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Date:

SUPERIOR COURT, RENE C. DAVIDSON COURTHOUSE
COUNTY OF ALAMEDA, STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA	
v.	No.
	Department
Defendant.	

BENCH MEMORANDUM RE: *BATSON-WHEELER* MOTIONS

I.
WHAT IS A *BATSON-WHEELER* MOTION?

"[T]he use of peremptory challenges to remove prospective jurors on the sole ground of group bias violates the right to trial by jury drawn from a representative cross-section of the community under article I, section 16, of the California Constitution." (***People* v. *Wheeler*** (1978) 22 Cal.3d 258, 276-277.)

"[T]he Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant." (***Batson* v. *Kentucky*** (1986) 476 U.S. 79, 89.)

A ***Batson-Wheeler*** motion is motion made by one of the parties claiming that the other party has exercised a challenge against a juror based on the juror's membership in a cognizable group (i.e., "an identifiable group distinguished on racial, religious, ethnic, or similar grounds[.]" (***People v. Wheeler*** (1978) 22 Cal.3d 258, 276.) It is an **extremely serious** allegation of egregious misconduct. Indeed, the allegation itself can cause irreparable harm to the reputation of the party against whom it is made. If true, such misconduct justifiably merits condemnation and sanction. On the other hand, if the motion is not made in good faith, but as a litigation tactic, such misuse of the motion merits equal condemnation.

II.
BATSON-WHEELER PROCEDURE IN A NUTSHELL

The three-step inquiry governing ***Batson-Wheeler*** claims is well established. "First, the trial court must determine whether the defendant has made a prima facie showing that the prosecutor exercised a peremptory challenge based on race. Second, if the showing is made, the burden shifts to the prosecutor to demonstrate that the challenges were exercised for a race-neutral reason. Third, the court determines whether the defendant has proven purposeful discrimination. The ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike." (***People* v. *Lomax*** (2010) 49 Cal.4th 530, 569; ***People v. Lenix*** (2008) 44 Cal.4th 602, 612-613.)

III.
DOES A TRIAL COURT HAVE ANY OBLIGATIONS IT MUST FULFILL IN ***ANTICIPATION*** OF A *BATSON-WHEELER* MOTION?

There are three primary obligations imposed on trial judges to help ensure that ***if*** a ***Batson-Wheeler*** motion is made, it may properly be addressed.

First, the trial court should make an order requiring that any ***Batson-Wheeler*** challenge be made outside the presence of the jury, i.e., by way of side bar conference. (**See *People* v. *Willis*** (2002) 27 Cal.4th 811, 822 [noting to ensure against undue prejudice to the party unsuccessfully making a peremptory challenge, courts may employ the procedure of using sidebar conferences followed by appropriate disclosure in open court as to successful challenges].)

Second, the trial court **must** pay close attention during jury selection so as to be able to verify or dispute representations made by counsel regarding their observations of the jurors' verbal responses, conduct (in and outside of the jury box), attitudes, body language, and other nonverbal behavior that may bear on the propriety of peremptory challenges. (**See *Thaler v. Haynes*** (2010) 130 S.Ct. 1171, 1174 ["where the explanation for a peremptory challenge is based on a prospective juror's demeanor, the judge should take into account, among other things, *any observations of the juror that the judge was able to make during the voir dire*"]; ***Snyder v. Louisiana*** (2008) 128 S.Ct. 1203, 1208 ["race neutral reasons for peremptory challenges often invoke a juror's demeanor (e.g., nervousness, inattention) making the trial court's first-hand observations of even greater importance"]; ***People v. Lenix*** (2008) 44 Cal.4th 602, 625 [citing to for the proposition that the "trial court bears a 'pivotal role in evaluating ***Batson*** claims,' for the *trial court must evaluate* the demeanor of the prosecutor in determining the credibility of proffered explanations, *and the demeanor of the panelist when that factor is a basis for the challenge"*], emphases added.)

Third, "trial courts must give advocates the opportunity to inquire of panelists and make their record. If the trial court truncates the time available or otherwise overly limits voir dire, unfair conclusions might be drawn based on the advocate's perceived failure to follow up or ask sufficient questions. Undue limitations on jury selection also can deprive advocates of the information they need to make informed decisions rather than rely on less demonstrable intuition." (***People v. Lenix*** (2008) 44 Cal.4th 602, 625.)

IV.
RELEVANT PRINCIPLES GOVERNING HOW A TRIAL COURT SHOULD PROCEED WHEN A *BATSON-WHEELER* MOTION HAS BEEN MADE?

As noted above, for both federal and state constitutional claims, there is a **three-step** inquiry whenever a ***Batson-Wheeler*** challenge is made. (***People* v. *Lenix*** (2008) 44 Cal.4th 602, 612-613.)

A. First Step (The Prima Facie Case)

In the first step, the party objecting to the challenge has the burden of making out a

prima facie case of discrimination. This is done "by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose." (***Johnson v. California*** (2005) 545 U.S. 162, 168.)

In determining whether this burden has been met, courts must keep in mind that "[s]ubject to rebuttal, a ***presumption exists that a peremptory challenge is properly exercised***, and the burden is upon the opposing party to demonstrate impermissible discrimination against a cognizable group." (***People* v. *Salcido*** (2008) 44 Cal.4th 93, 136; ***People* v. *Neuman*** (2009) 176 Cal.App.4th 571, 579, emphasis added.)

The California Supreme Court has identified what a trial court may consider in assessing whether a prima facie case has been made:

> Though proof of a prima facie case may be made from any information in the record available to the trial court, we have mentioned "certain types of evidence that will be relevant for this purpose. Thus the party may show that his opponent has struck most or all of the members of the identified group from the venire, or has used a disproportionate number of his peremptories against the group. He may also demonstrate that the jurors in question share only this one characteristic-their membership in the group-and that in all other respects they are as heterogeneous as the community as a whole. Next, the showing may be supplemented when appropriate by such circumstances as the failure of his opponent to engage these same jurors in more than desultory voir dire, or indeed to ask them any questions at all. Lastly, ... the defendant need not be a member of the excluded group in order to complain of a violation of the representative cross-section rule; yet if he is, and especially if in addition his alleged victim is a member of the group to which the majority of the remaining jurors belong, these facts may also be called to the court's attention." (***People* v. *Bell*** (2007) 40 Cal.4th 582, 597.)

In addition, a court may consider whether the prosecutor has passed on panel containing jurors who are members of the cognizable class at issue (see ***People* v. *Streeter*** (2012) 54 Cal.4th 205, 224; ***People* v. *Dement*** (2011) 53 Cal.4th 1, 20; ***People* v. *Clark*** (2012) 52 Cal.4th 856, 903-908; ***People* v. *Carasi*** (2008) 44 Cal.4th 1263, 1294-1295) and/ or fought to keep such jurors over a defense challenge for cause (**see *People* v. *Streeter*** (2012) 54 Cal.4th 205, 224;

People* v. *Jones (2011) 51 Cal.4th 346, 362). Whether there is evidence of the historical practice of the prosecutor or the prosecutor's office of discriminatory jury selection practice is also relevant in assessing whether an inference of discriminatory purpose can arise. (**See *Miller-El v. Dretke*** (2005) 545 U.S. 231, 253, 264-266.)

Finally, a court may consider whether its *own* observations of the jurors suggested neutral grounds for the challenges made by the prosecutor. (***People* v. *Neuman*** (2009) 176 Cal.App.4th 571, 580.)

Some common issues that arise at the first stage of the ***Batson-Wheeler*** motion are discussed below:

Can a challenge to a single member of a cognizable class establish a prima facie case?

Although the term "systematic exclusion" is sometimes used "to describe a discriminatory use of peremptory challenges, . . . [t]he term is not apposite in the ***Wheeler*** context, for a single discriminatory exclusion may violate a defendant's right to a representative jury." (***People* v. *Fuentes*** (1990) 54 Cal.3d 707, 716, fn. 4; **accord *People* v. *Taylor*** (2010) 48 Cal.4th 574, 642**; *People* v. *Montiel*** (1993) 5 Cal.4th 877, 909; **see also *People* v. *Reynoso*** (2003) 31 Cal.4th 903, 927, fn. 8 ["the unconstitutional exclusion of even a single juror on improper grounds of racial or group bias requires the commencement of jury selection anew"].)

It is **not** necessary that the party making a ***Batson-Wheeler*** challenge show a "pattern of systematic exclusion." Rather, one way of making a showing of a prima facie case is by showing a pattern of systematic exclusion. (**See *People* v. *Avila*** (2006) 38 Cal.4th 491, 549.) That being said, it important to understand why challenging one or two members of a cognizable group will rarely, if ever, ***by itself***, establish a prima facie case of purposeful discrimination ***in the absence of*** any additional evidence of purposeful discrimination.

This is because when the party making the ***Batson-Wheeler*** motion can point to no evidence ***other than*** the fact a party has challenged one or two members of cognizable group, the party is essentially asking the court to draw an inference of discrimination from the fact one party has excused 'most or all' members of the cognizable group," and thus is "necessarily relying on an apparent pattern in the party's challenges" (***People v. Bell*** (2007) 40 Cal.4th 582, 598, fn. 3.) In ***that*** situation, while it is possible to imagine circumstances "in which a

prima facie case could be shown on the basis of a single excusal, in the ordinary case . . . to make a prima face case after the excusal of only one or two members of a group is very difficult." (***Bell***, at p. 598, fn. 3; **accord** ***People* v. *Bonilla*** (2007) 41 Cal.4th 313, 343; ***People v. Hamilton*** (2009) 45 Cal.4th 863, 899 [agreeing with trial judge that the challenge of the only [African-American] subject to challenge was insufficient *in and of itself* to suggest a pattern].) Simply put, as a practical matter, "the challenge of one or two jurors can rarely suggest a pattern of impermissible exclusion." (***People* v. *Bell*** (2007) 40 Cal.4th 582, 598 [and noting that where there is a very small number of panelists falling into the cognizable class, it is impossible to draw an inference of discrimination from the fact that the prosecutor challenged a large percentage of the panelists falling into the class, i.e., two of a total of three]; **see also** ***People* v. *Garcia*** (2011) 52 Cal.4th 706, 744-750 [noting it is "'impossible,' as a practical matter, to draw the requisite inference where only a few members of a cognizable group have been excused and no indelible pattern of discrimination appears"]; ***People* v. *Christopher*** (1991) 1 C.A.4th 666, 672, 673 [challenge of one or two prospective jurors of same racial or ethnic group as defendant, even when panel contains no other members of group, does not establish prima facie case unless there is significant supporting evidence].)

Obviously, the greater the number of members of the cognizable group at issue challenged by the party accused of violating ***Batson-Wheeler***, the greater the likelihood an inference of impermissible exclusion will arise. (**See e.g., *Miller-El* v. *Dretke*** (2005) 545 U.S. 231, 240-241 [fact nine of ten African-Americans struck considered in finding discriminatory use].) However, in the absence of any evidence ***other than*** sheer numbers, courts routinely reject the argument that the burden of making a prima facie case has been met just because multiple members of a cognizable group have been challenged. (**See *People* v. *Taylor*** (2010) 48 Cal.4th 574, 643 [fact prosecutor exercised three of ten peremptory challenges to excuse two African-American prospective jurors and one Hispanic prospective juror "without more, is insufficient to create an inference of discrimination, especially where, as here, the number of peremptory challenges at issue is so small"]; ***People v. Hawthorne*** (2009) 46 Cal.4th 67, 79-80, [no prima facie showing where the defendant's motion was based solely on the assertion that the prosecutor used three of 11 peremptories to excuse African-American prospective jurors]; ***People* v. *Bonilla*** (2007) 41 Cal.4th 313, 343-344 [excusal of three out of four Hispanics, in a case where defendant was also Hispanic, did not create a prima facie case];

People v. Bell (2007) 40 Cal.4th 582, 598 [excusal of two out of three African-Americans did not create prima facie showing]; ***People v. Box*** (2000) 23 C.4th 1153, 1185 [no prima facie case where basis for claim was that two prospective jurors were both African-American and so was the defendant]; ***People* v. *Jones*** (1998) 17 C.4th 279, 293 [evidence supported ruling that there was no prima facie case of group bias in peremptory challenges of four African-Americans even though challenges left no African-American jurors on panel]; ***People* v. *Crittenden*** (1994) 9 C.4th 83, 119, 120, fn. 3 [excusal of all members of defendant's race does not automatically establish prima facie case; declining to follow contrary holdings of lower federal courts]; ***People v. Adanandus*** (2007) 157 Cal.App.4th 496, 503-504 [no prima facie case despite fact three African-American jurors challenged by prosecution where, inter alia, African-American juror remained on panel]; ***People* v. *Allen*** (1989) 212 Cal.App.3d 306, 312, 313 [exclusion of disproportionate number of minority jurors does not by itself establish prima facie case; ***Wheeler*** motion properly denied where record showed specific bias as ground for each of nine peremptory challenges against Blacks and Hispanics]; **cf**. ***Williams* v. *Runnels*** (9th Cir.2006) 432 F.3d 1102, 1103-1107 [use of three of first four peremptories against African-American jurors where only four of the first 49 prospective jurors were African-American was a statistical disparity that alone could create a prima facie showing albeit recognizing other facts could dispel the presumption].)1

Moreover, while a prosecutor's excusal of ***all*** members of a cognizable group may establish a prima facie case, this fact alone is not conclusive to such a showing. (***People* v. *Hoyos*** (2007) 41 Cal.4th 872, 901; ***People* v. *Neuman*** (2009) 176 Cal.App.4th 571, 575.)

Should the trial court engage in a "comparative analysis" at the prima facie level?

Comparative analysis refers to a mechanism that courts use to try to "flush out" the actual motivation of the party accused of using his or her peremptory challenges in a discriminatory fashion. In doing a comparative analysis, the court reviews the reasons given for the challenge as to the particular juror and then looks to see if those reasons would apply

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1. California cases finding no prima facie case prior to the holding in ***Johnson* v. *California*** (2005) 545 U.S. 162 are less persuasive insofar as what constitutes a prima facie showing than post-***Johnson*** cases in light of ***Johnson***'s holding that a prima facie case only requires a defendant challenging a peremptory excusal to show an "inference" the challenge was for an impermissible group bias, rather than the "more likely than not" standard used in California before ***Johnson***. (**Id**. at 168-173.)

equally to other jurors (not belonging to the same cognizable class as the challenged juror) who were not challenged. If there are two jurors who have given very similar responses, one of whom belongs to the cognizable class and one of whom does not, and the party has only challenged the juror in the cognizable class on the purported basis of a response given by both jurors, an inference can arise that the purported basis of the challenge is a pretext designed to conceal a discriminatory purpose. (**See *Miller El v. Dretke*** (2005) 545 U.S. 231, 241; ***Cook* v. *LaMarque*** (9th Cir. 2010) 593 F.3d 810, 815.)

If the trial court reserves ruling on the ***Batson-Wheeler*** motion until after the parties have completed their jury selection, then a properly conducted comparative analysis may be helpful in supporting or dispelling a claim an attorney is exercising a challenge for impermissible reasons.

However, if the trial court decides to rule upon a ***Batson-Wheeler*** motion before jury selection is completed, then comparative analysis is less helpful as a means of supporting an inference the challenges are being exercised for a permissible purpose. This is because the removed jurors may only be compared to other removed jurors. The removed jurors cannot be compared to jurors who have not been removed because it is unknown which jurors still sitting will not later be removed. (**See *People v. Riccardi*** (2012) 54 Cal.4th 758, 796 [declining to consider prospective jurors who were removed by defense peremptory challenges in conducting a comparative analysis because it was "impossible to conclude that the prosecutor had no concerns about [these jurors]" considering that the prosecutor, for tactical reasons, sometimes passed on jurors the prosecution would thereafter challenge"].)

Comparative analysis is generally useless for purposes of determining whether a first stage prima facie case has been established unless the prosecutor proffers reasons for challenging jurors. "Whatever use comparative juror analysis might have in a third-stage case for determining whether a prosecutor's proffered justifications for his [or her] strikes are pretextual, it has little or no use where the analysis does not hinge on the prosecution's actual proffered rationales." (***People* v. *Taylor*** (2010) 48 Cal.4th 574, 617.)

Comparative analysis may also be used to affirmatively support an inference that a prosecutor is not using his or her challenges in an impermissible manner (aka "reverse

comparative analysis"). If there are two jurors who have given very similar responses, one who belongs to the cognizable class and one who does not, and the party has challenged both jurors for the same reason, then an inference can arise that the purported basis of the challenge is not a pretext designed to conceal a discriminatory purpose. (**See *People v. Jackson*** (1996) 13 Cal.4th 1164, 1254.) This form of comparative analysis may potentially be conducted even at the prima facie level if some of the jurors who have been challenged are not from the same cognizable class as the juror who was purportedly improperly struck.

This bench memo discusses "comparative analysis" in greater detail under its discussion of the third stage of a ***Batson-Wheeler*** motion, at pp. 16-17.

Should a court allow the party to state reasons for use of the challenge if the court finds no prima case is made?

If the trial court does not find a prima facie of discrimination, it is not necessary to proceed to the second step; there is no obligation for the prosecutor to disclose any reasons for challenging the panelists; and a trial court is not required to evaluate them. (***People* v. *Carasi*** (2008) 44 Cal.4th 1263, 1292; ***People* v. *Zambrano*** (2007) 41 Cal.4th 1082, 1104-1105 & fn. 3; ***People* v. *Bell*** (2007) 40 Cal.4th 582, 596.)

However, the California Supreme Court has repeatedly ***recommended*** that the judge allow the prosecutor to place his reasons for excusing jurors belonging to the cognizable class on the record, notwithstanding the lack of any prima facie finding. (**See *People* v. *Taylor*** (2010) 48 Cal.4th 574, 616; ***People* v. *Bonilla*** (2007) 41 Cal.4th 313, 343, fn. 13; ***People* v. *Mayfield*** (1997) 14 Cal.4th 668, 723-724.) Indeed, it is recommended that this be done *even before* the trial judge makes its determination that a prima facie case has not been made out by the defense. (***People* v. *Bonilla*** (2007) 41 Cal.4th 313, 343, fn. 13; ***People* v. *Adanandus*** (2007) 157 Cal.App.4th 496, 500.) This is because doing so "may assist the trial court in evaluating the challenge and will certainly assist reviewing courts in fairly assessing whether any constitutional violation has been established." (***People* v. *Bonilla*** (2007) 41 Cal.4th 313, 343, fn. 13; ***People* v. *Adanandus*** (2007) 157 Cal.App.4th 496, 500.)

Second Step: Justifications for Challenge

The second step occurs after a finding that the totality of the relevant facts creates an

inference of discriminatory purpose. Once a prima facie case is made, the "'burden shifts to the [party who originally challenged the juror] to explain adequately the racial [or other cognizable class] exclusion' by offering permissible . . . neutral justifications for the strikes." (***Johnson* v. *California*** (2005) 545 U.S. 162, 168 [bracketed portions and other modifications added by author].) The burden in this second step is merely "the burden of production." (***Paulino* v. *Harrison*** (9th Cir. 2008) 542 F.3d 692, 699.)

The party who originally challenged the juror must then provide a "'clear and reasonably specific' explanation of his 'legitimate reasons' for exercising the challenges." (***People* v. *Lenix*** (2008) 44 Cal.4th 602, 613, citing to ***Batson* v. *Kentucky*** (1986) 476 U.S. 79, 98, fn. 20.)

"Certainly a challenge based on racial prejudice would not be supported by a legitimate reason." (***People* v. *Lenix*** (2008) 44 Cal.4th 602, 613.) On the other hand, a legitimate reason is simply "one that does not deny equal protection" and "a prosecutor may rely on any number of bases to select jurors[.]" (***People* v. *Lenix*** (2008) 44 Cal.4th 602, 613, citing to ***Purkett* v. *Elem*** (1995) 514 U.S. 765, 769.)

"The justification need not support a challenge for cause, and even a 'trivial' reason, if genuine and neutral, will suffice." (***People* v. *Lenix*** (2008) 44 Cal.4th 602, 613.) "A prospective juror may be excused based upon facial expressions, gestures, hunches, and even for arbitrary or idiosyncratic reasons." (**Ibid**; ***People* v. *Mills*** (2010) 48 Cal.4th 158, 176; **see also *Williams v. Rhoades*** (9th Cir. 2004) 354 F.3d 1101, 1109 [noting "demeanor, tone, and facial expressions" may lead to a "hunch" or "suspicion" that the juror might be biased.) The "'second step of this process does not demand an explanation that is persuasive, or even plausible'; so long as the reason is not inherently discriminatory, it suffices." (***Rice* v. *Collins*** (2006) 546 U.S. 333, 338.)

The types of neutral reasons for excusing a juror are too innumerable to list. However, some typical grounds include:

(i) a juror's relative youth and immaturity (s**ee *Rice* v. *Collins*** (2006) 546 U.S. 333, 341; ***People* v. *Salcido*** (2008) 44 Cal.4th 93, 140; ***People* v. *Cruz*** (2008) 44 Cal.4th 636, 657-659);

(ii) a juror's flippant or informal attitude is similarly a legitimate reason for excusing a

juror (**see *Thaler* v. *Haynes*** (2010) 130 S.Ct. 1171, 1172; ***People* v. *Howard*** (2008) 42 Cal.4th 1000, 1017, 1019);

(iii) a juror's reluctance to follow the law (**see *People* v. *Howard*** (2008) 42 Cal.4th 1000, 1017; ***People v. Watson*** (2008) 43 Cal.4th 652, 679-680; ***Gonzalez v. Brown*** (9th Cir. 2009) 585 F.3d 1202, 1205, 1209-1210);

(iv) the juror or close relative of the juror has a criminal background or has had a negative experience with the criminal justice system (s**ee *People* v. *Cruz*** (2008) 44 Cal.4th 636, 656, fn. 3; ***People* v. *Avila*** (2006) 38 Cal.4th 491, 554-555; ***People* v. *Farnam*** (2002) 28 Cal.4th 107, 138);

(v) the juror is skeptical about the fairness of the criminal justice (**see *People v. Elliott*** (2012) 53 Cal.4th 535, 569; ***People* v. *Clark*** (2012) 52 Cal.4th 856, 907; ***People v. Calvin*** (2008) 159 Cal.App.4th 1377, 1386);

(vi) the juror has life experiences that might make the juror overly sympathetic to, or biased towards, a person in the defendant's position (**see *People* v. *Watson*** (2008) 43 Cal.4th 652, 676; ***People* v. *Salcido*** (2008) 44 Cal.4th 93, 140);

(vii) the juror (or close relative of juror) is employed in a job or engages in activities that reflect an orientation toward rehabilitation and sympathy for defendants (**see *People v. Ervin*** (2000) 22 Cal.4th 48, 75; ***People* v. *Neuman*** (2009) 176 Cal.App.4th 571, 586; ***People* v. *Adanandus*** (2007) 157 Cal.App.4th 496, 507; ***People* v. *Barber*** (1988) 200 Cal.App.3d 378, 389-394.)

(viii) the juror is, or appears to be, lying or evasive, and/or gives less than forthright or unbelievable answers (see ***People v. Thomas*** (2011) 51 Cal.4th 449, 472, 475; ***People* v. *Booker*** (2011) 51 Cal.4th 141, 166-167; ***People v. Welch*** (1999) 20 Cal.4th 701, 746);

(ix) the juror has religious beliefs or biases that might affect his or her decision (**see *People* v. *Mills*** (2010) 48 Cal.4th 158, 184; ***People* v. *Richardson*** (2008) 43 Cal.4th 959, 985; ***People* v. *Martin*** (1998) 64 Cal.App.4th 378, 384);

(x) the "juror's attitude, attention, interest, body language, facial expression and eye contact" (***People* v. *Elliott*** (2012) 53 Cal.4th 535, 569; ***People* v. *Lenix*** (2008) 44 Cal.4th 602, 622-623);

(xi) the juror's appearance, including clothing, hairstyle, or other accoutrements (**see *People* v. *Elliott*** (2012) 53 Cal.4th 535, 568-570; ***People* v. *Wheeler*** (1978) 22 Cal.3d 258,

275; ***People* v. *Rushing*** (2011) 197 Cal.App.4th 801, 808.)

(xii) the juror lacks the mental or psychological ability to understand or focus on the issues at trial (**see *People* v. *Davis*** (2008) 164 Cal.App.4th 305, 312-313 ***People* v. *Gutierrez*** (2002) 28 Cal.4th 1083, 1124; ***People* v. *Welch*** (1999) 20 Cal.4th 701, 746);

(xii) the juror previously served on a deadlocked jury (**see *People* v. *Garcia*** (2011) 52 Cal.4th 706, 749; ***People* v. *Farnam*** (2002) 28 Cal.4th 107, 138; ***People* v. *Turner*** (1994) 7 Cal.4th 137, 170);

(xiii) the juror may experience hardship or difficulties in serving that may distract the juror from focusing (**see *People* v. *Clark*** (2012) 52 Cal.4th 856, 907; ***People* v. *Jenkins*** (2000) 22 Cal.4th 900, 994, 1044; ***People* v. *Neuman*** (2009) 176 Cal.App.4th 571, 585-586);

(xiv) the juror or a family member of the juror is unemployed or underemployed (***People v. Thomas*** (2011) 51 Cal.4th 449. 472-473, 475; ***People v. Jones*** (2011) 51 Cal.4th 346, 363 ; ***Stubbs v. Gomez*** (9th Cir.1999) 189 F.3d 1099, 1106).

Some common issues that arise at the second stage of the ***Batson-Wheeler*** motion are discussed below:

Should the court allow a prosecutor to explain his or her reasons for excluding a juror outside the presence of defense counsel?

In general, it is error for a trial court to allow a prosecutor to explain his or her reasons for excluding a particular juror outside the presence of defense counsel and defendant. (**See *People v. Ayala*** (2000) 24 Cal.4th 243, 259-269 [prosecutor's multiple ex parte hearings for justifications were error, albeit harmless] and dis. opn, J. George [hearings were prejudicial error]; ***Ayala v. Wong*** (9th Cir. 2012) 693 F.3d 945 [finding error in ***People* v. *Ayala*** (2000) 24 Cal.4th 243 was prejudicial]; ***United States* v. *Thompson*** (9th Cir. 1987) 827 F.2d 1254, 1260 [reversible error to hold ex parte hearing on prosecutor's explanations]; **but see *United States v. Alcantar*** (9th Cir. 1990) 897 F.2d 436, 438, fn. 2[recognizing a limited exception to this rule in "those instances in which disclosing the reasons for excluding jurors would reveal the prosecutor's case strategy"]; ***United States v. Thompson*** (9th Cir. 1987) 827 F.2d 1254, 125 [same].)

Can a prosecutor challenge a juror based on the prosecutor's own idiosyncratic personal biases against members of a particular profession?

A prosecutor may challenge a juror based on the prosecutor's personal bad luck with members of a particular profession. (**See *People* v. *Rushing*** (2011) 197 Cal.App.4th 801, 812 [citing with approval ***Johnson v. State*** (1996) 266 Ga. 775, 470 S.E.2d 637, 639, a case from Georgia that upheld the challenge to a juror who was a postal worker on the ground that "postal workers, in the prosecutor's experience, do not make good jurors"]; ***People v. Davis*** (2008) 164 Cal.App.4th 305, 313 [upholding prosecutor's challenging a juror who was a certified nursing assistant (CNA) because of the prosecutor's own personal bias against CNAs stemming from the bad experiences the prosecutor had outside of court with CNAs who were working in her father's nursing home, notwithstanding a lack of any assertion that CNAs lean toward the defense from an objective standpoint].)

Third Step: Assessment of Credibility

At the third step, if a "neutral explanation is tendered, the trial court must then decide . . . whether the opponent of the strike has proved purposeful racial discrimination." (***Johnson* v. *California*** (2005) 545 U.S. 162, 168.) The proper focus is on "the ***subjective genuineness*** of the race-neutral reasons given for the peremptory challenge, not on the objective reasonableness of those reasons." (***People* v. *Reynoso*** (2003) 31 Cal.4th 903, 924; ***People* v. *Adanandus*** (2007) 157 Cal.App.4th 496, 506, emphasis added.)

"[T]he issue comes down to whether the trial court finds the prosecutor's race-neutral explanations to be credible. Credibility can be measured by, among other factors, the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy." (***People* v. *Lenix*** (2008) 44 Cal.4th 602, 613, citing to ***Miller-El* v. *Cockrell*** (2003) 537 U.S. 322, 339; **see also *Lewis v. Lewis*** (9th Cir. 2003) 321 F.3d 824, 830 ["A finding of discriminatory intent turns largely on the court's evaluation of the prosecutor's credibility"].) The trial court has a duty to "assess the plausibility" of the prosecutor's proffered reasons for striking a potential juror, "in light of all evidence with a bearing on it." (***People* v. *Lenix*** (2008) 44 Cal.4th 602, 625.)

In assessing credibility, the court draws upon its contemporaneous observations of the

voir dire. It may also rely on the court's own experiences as a lawyer and bench officer in the community, and even the common practices of the advocate and the office who employs him or her." (***People* v. *Lenix*** (2008) 44 Cal.4th 602, 613, citing to ***People* v. *Wheeler*** (1978) 22 Cal.3d 258, 282.)2

Significantly, this case law makes it clear that when a court finds that a prosecutor has committed a ***Batson-Wheeler*** violation, notwithstanding the fact the prosecutor has presented race-neutral reasons for excusing a juror, the court is finding the prosecutor has lied to the court. The serious nature of this finding helps explain why "[a] presumption exists that a prosecutor has exercised his or her peremptory challenges in a constitutional manner." (***People* v. *Cleveland*** (2004) 32 Cal.4th 704, 732; ***People* v. *Crittenden*** (1994) 9 Cal.4th 83, 114.)

As noted before, "[t]he ultimate burden of persuasion regarding racial motivation rests with, ***and never shifts from, the opponent of the strike***." (***People* v. *Lenix*** (2008) 44 Cal.4th 602, citing to ***Rice* v. *Collins*** (2006) 546 U.S. 333, 338; **see also *Yee* v. *Duncan*** (9th Cir. 2006) 463 F.3d 893, 895, citing ***Purkett* v. *Elem*** (1995) 514 U.S. 765, 768, emphasis added.) This necessarily means that if a court is unsure whether a juror has been removed for discriminatory purposes, or if the reasons for believing a challenge was exercised in a discriminatory fashion do not outweigh the reasons for believing the challenge was made for a non-discriminatory purpose, no finding of a discriminatory purpose should be made.

In making the determination of whether the defendant has proven purposeful discrimination at the third step, the court may take into consideration all the factors it can take

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2. The training provided by Alameda County District Attorney's office on ***Batson-Wheeler*** issues over the past decade has **unequivocally** condemned the discriminatory use of peremptory challenges. New prosecutors are informed that using peremptory challenges in a discriminatory manner in selecting jurors is not only immoral and unethical; it is self-defeating to remove an otherwise favorable juror for the prosecution based on racial or ethnic stereotypes. On the other hand, prosecutors are also cautioned that if they are properly motivated, they must not be dissuaded from exercising a challenge out of fear that they will be subjected to a ***Batson-Wheeler*** challenge (and the attendant possibility that it will be erroneously granted). ***Batson-Wheeler*** motions may arise based on a genuine difference in perspective: a juror who appears to the prosecutor to obviously be a "bad juror" for the prosecution may appear to the defense counsel as a juror who the prosecutor should, but for the juror's membership in a cognizable group, want to keep on the jury and vice versa. However, occasionally attorneys use challenges improperly as a strategic weapon in order to distract the opposing attorney or render the opposing attorney "gun shy" in exercising peremptory challenges against jurors who are unfavorably disposed to the opposing attorney but belong to the cognizable class at issue.

into consideration at the prima facie level. (**See** this bench memo at p. 4; ***People* v. *Wheeler*** (1978) 22 Cal.3d 258, 282.)

"Both court and counsel bear responsibility for creating a record that allows for meaningful review." (***People* v. *Lenix*** (2008) 44 Cal.4th 602, 621.) "When the prosecutor's stated reasons are both inherently plausible and supported by the record, the trial court need not question the prosecutor or make detailed findings. But when the prosecutor's stated reasons are either unsupported by the record, inherently implausible, or both, more is required of the trial court than a global finding that the reasons appear sufficient." (***People* v. *Stevens*** (2007) 41 Cal.4th 182, 193; ***People* v. *Silva*** (2001) 25 Cal.4th 345, 386.)

Although a judge may not be able to observe every gesture, expression or interaction relied upon by the prosecutor (i.e., the judge has a different vantage point, and may have, for example, been looking at another panelist or making a note when the described behavior occurred), the trial "court must be satisfied that the specifics offered by the prosecutor are consistent with the answers it heard and the overall behavior of the panelist." (***People* v. *Lenix*** (2008) 44 Cal.4th 602, 625.)

"The record must reflect the trial court's determination on this point (see *Snyder*, *supra*, 128 S.Ct. at p. 1209), which may be encompassed within the court's general conclusion that it considered the reasons proffered by the prosecution and found them credible." (***People* v. *Lenix*** (2008) 44 Cal.4th 602, 625-626.)

In sum, if the court is going to deny the challenge, it "should be discernible from the record that "1) the trial court considered the prosecutor's reasons for the peremptory challenges at issue and found them to be race-neutral; 2) those reasons were consistent with the court's observations of what occurred, in terms of the panelist's statements as well as any pertinent nonverbal behavior; and 3) the court made a credibility finding that the prosecutor was truthful in giving race-neutral reasons for the peremptory challenges." (***People* v. *Lenix*** (2008) 44 Cal.4th 602, 621.)

Some common issues that arise at the third stage of the ***Batson-Wheeler*** motion are discussed below:

In stating grounds for removing a juror, is the court or the prosecutor required to assume the juror's responses are true?

The fact that a juror provides an answer that "contradicts" the basis for the prosecutor's challenge does not mean the prosecutor's reason will be held pretextual. "[T]he prosecution is not required to accept at face value a prospective juror's assurance that, despite an answer indicating the contrary, she would have no problem being neutral." (***People* v. *Rushing*** (2011) 197 Cal.App.4th 801, 812; **see also *Rice* v. *Collins*** (2006) 546 U.S. 333, 341 [notwithstanding young juror's oral response she could be impartial, prosecutor entitled to believe juror's youth and lack of ties to the community would make her a bad juror for the prosecution]; ***People* v. *Cardenas*** (2007) 155 Cal.App.4th 1468, 1477 [prosecutor had legitimate reasons for removing a bilingual juror on grounds the prosecutor believed the juror would refuse to accept an interpreter's translation over the juror's own translation even though juror ultimately agreed to abide by interpreter's translation]; ***People* v. *Gutierrez*** (2002) 28 Cal.4th 1083, 1124 [prosecutor justified in removing a juror on grounds the juror might harbor bad feelings toward the police despite the juror's claim otherwise; prosecutor was entitled to disregard a juror's claim that her emotional state and stressful circumstances would not interfere with her ability to consider the evidence where the juror repeatedly referred to her "nerves" and to being under considerable stress, cried twice during voir dire, and the unduly "emotional" state of the juror was confirmed by the judge].) Numerous cases, for example, have held that a prosecutor is entitled to dismiss a juror who has had negative contacts with law enforcement the criminal justice system or have close relatives who had such negative contacts, notwithstanding the juror's assurances that the prior experiences would not impact the juror. (**See e.g**., ***People* v. *McKinzie*** (2012) 54 Cal.4th 1302, 1321-1322; ***People* v. *Avila*** (2006) 38 Cal.4th 491, 554-555; ***People* v. *Farnam*** (2002) 28 Cal.4th 107, 138; ***People* v. *Adanandus*** (2007) 157 Cal.App.4th 496, 505.)

In conducting a comparative analysis (see this bench memo, at p. 7), how "similarly situated" do the jurors used for comparison purposes have to be?

At the third stage of a ***Batson-Wheeler*** motion a trial court may a conduct a comparative analysis in deciding whether purposeful discrimination has been shown. A comparative juror analysis involves comparing "panelists who were struck with those who were allowed to serve or were passed by the prosecution before being ultimately struck by the defense." (***People v. Lomax*** (2010) 49 Cal.4th 530, 572, fn. 14.) If the proffered reason for striking a member of the cognizable class at issue applies just as well to an otherwise-similar

juror who is not a member of the cognizable class and that only the latter is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at the third step. (**See *People v. Lomax*** (2010) 49 Cal.4th 530, 572.)

However, courts must avoid simplistic or superficial comparisons: "overlapping responses alone are not enough to demonstrate purposeful discrimination." (***People v. Calvin*** (2008) 159 Cal.App.4th 1377, 1389, citing to ***People v. Lewis and Oliver*** (2006) 39 Cal.4th 970, 1020.) "To prove such a claim, a defendant must engage in a careful side-by-side comparative analysis to demonstrate that the dismissed and retained jurors were "similarly situated." (***People* v. *Calvin*** (2008) 159 Cal.App.4th 1377, 1389, citing to ***People* v. *Lewis and Oliver*** (2006) 39 Cal.4th 970, 1016-1024; **see also *People* v. *Watson*** (2008) 43 Cal.4th 652, 672-682 [rejecting numerous claims jurors were similarly situated for comparative analysis purposes where jurors compared were similar in some aspects but different in others].)

Two jurors may give similar answers on a given point but whether they are, in fact, comparable in the eyes of the attorneys will depend on "other answers, behavior, attitudes or experiences" make each more or less desirable. (***People* v. *Lenix*** (2008) 44 Cal.4th 602, 624.) "'Myriad subtle nuances' not reflected on the record may shape an attorney's jury selection strategy, 'including attitude, attention, interest, body language, facial expression and eye contact.'" (***People* v. *Hartsch*** (2010) 49 Cal.4th 472 [110 Cal.Rptr.3d 673, 695, fn. 16].)

The manner of a juror is often "more indicative of the real character of his opinion that his words." (***People* v. *Lenix*** (2008) 44 Cal.4th 602, 622.) The differences in the manner in how a juror answers a question "may legitimately impact the prosecutor's decision to strike or retain the prospective juror." (**Id**. at p. 623.) Moreover, "[w]hile an advocate may be concerned about a particular answer, another answer may provide a reason to have greater confidence in the overall thinking and experience of the panelist. Advocates do not evaluate panelists based on a single answer." (**Id**. at p. 631.)

Finally, whether a juror is acceptable or not acceptable will change over the course of jury selection because a lawyer is not only seeking a particular kind of juror but a particular mix of jurors. "It may be acceptable, for example, to have one juror with a particular point of view but unacceptable to have more than one with that view. If the panel as seated appears to contain a sufficient number of jurors who appear strong-willed and favorable to a lawyer's position, the lawyer might be satisfied with a jury that includes one or more passive or timid

appearing jurors. However, if one or more of the supposed favorable or strong jurors is excused either for cause or [by] peremptory challenge and the replacement jurors appear to be passive or timid types, it would not be unusual or unreasonable for the lawyer to peremptorily challenge one of these apparently less favorable jurors even though other similar types remain. These same considerations apply when considering the age, education, training, employment, prior jury service, and experience of the prospective jurors." (**Id**. at p. 623.)

V.
REMEDY FOR A *BATSON-WHEELER* VIOALATION

The traditional remedy/sanction for a ***Batson-Wheeler*** violation was laid out in ***People v. Wheeler*** (1978) 22 Cal.3d 258: "when either party in a criminal case succeeds in showing that the opposing party has improperly exercised peremptory challenges to exclude members of a cognizable group, the court must dismiss all the jurors thus far selected, and quash the remaining venire." (**Id**. at p. 282; ***People* v. *Willis*** (2002) 27 Cal.4th 811, 813.) This remedy was also recognized as one means of responding to an attorney's discriminatory use of a peremptory challenge in ***Batson v. Kentucky*** (1986) 476 U.S. 79, although the High Court expressed "no view on whether it is more appropriate in a particular case, upon a finding of discrimination against black jurors, for the trial court to discharge the venire and select a new jury from a panel not previously associated with the case . . . or to disallow the discriminatory challenges and resume selection with the improperly challenged jurors reinstated on the venire[.]" (**Id**. at p. 99, fn. 24.)

In ***People v. Willis*** (2002) 27 Cal.4th 811, the California Supreme Court noted that the sanction of dismissal for a ***Batson-Wheeler*** violation was not mandated by the federal Constitution and expressly approved of the use of other remedies for a ***Batson-Wheeler*** violation than simply dismissing the panel and restarting jury selection: A trial court, acting ***with the consent of the aggrieved party***, "has discretion to consider and impose remedies or sanctions short of outright dismissal of the entire jury venire." (***Willis***, at pp. 814, 821, emphasis added.) Among the suggested alternative remedies: reseating of the juror, imposition of monetary sanction, and (in dicta) allowing the aggrieved party additional challenges. (**Id**. at p. 821 [albeit suggesting, at p. 824, that imposing monetary sanctions may not effectively vindicate the interests impacted by the improper use of jury challenges].)

However, the remedy of reseating should not be imposed if the challenged juror has already been discharged. (**See *People v. Willis*** (2002) 27 Cal.4th 811, 823; ***People v. Muhammed*** (2003) 108 Cal.App.4th 313, 323 [noting trial court could not use the sanction of reseating bumped jurors because the prospective jurors had already been excused].) This remedy should only be imposed with the consent or assent of the aggrieved party. (***Willis***, at p. 823.) Although the defense may be deemed to have implicitly, rather than expressly consented to the remedy of reseating a juror by submitting to the trial judge's announcement of that remedy (the defendant himself has no personal right to express waiver of dismissal of the jury panel), it is preferable for a trial judge to seek express consent of the aggrieved party. (***People* v. *Overby*** (2004) 124 Cal.App.4th 1237, 1245-1246.) "[I]f the complaining party does effectively waive its right to mistrial, preferring to take its chances with the remaining venire, ordinarily the court should honor that waiver rather than dismiss the venire and subject the parties to additional delay." (***Willis***, at p. 824.) The ***Willis*** court seemed to suggest that alternative sanctions are most appropriately imposed in situations "in which the remedy of mistrial and dismissal of the venire accomplish nothing more than to reward improper voir dire challenges and postpone trial." (**Id**. at pp. 821, 824.)

There is a concern that if a challenged juror is kept on the jury after the juror has become aware he or she has been challenged, the juror might hold it against the attorney who exercised the challeng – a concern magnified if the juror figures out the challenge was disallowed because the attorney purportedly challenged the juror for improper reasons.

Accordingly, the ***Willis*** court approved the use of having peremptory challenges made at sidebar outside the jury's presence, followed by appropriate disclosure in open court as to successful challenges, so that any successful ***Wheeler*** objection could be ruled on, and any improperly challenged jurors retained, without revealing to them which party had attempted their removal. (***Willis*** at pp. 819, 821.)

DATED:

Respectfully submitted,
NANCY E. O'MALLEY
DISTRICT ATTORNEY

By: _____

Deputy District Attorney
State Bar No.

POINTS AND AUTHORITIES

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Week Of	Topic	Guest	30 min
April. 22, 2019	Discovery of Juror Selection Notes: ***People v. Superior Court of San Diego County, Bryan Maurice Jones***	Abby Mulvihill	Bias

People v Superior Court of San Diego County, Bryan Maurice Jones (2019) __ Cal. 5th ___ 2019 WL 419062

The Court of Appeal holds that when a prosecutor's jury selection notes are referenced by a prosecutor during a *Batson/Wheeler* hearing when explaining his or her reasons for exercising a peremptory strike, those notes are discoverable by the defendant as part of a postconviction writ of habeas corpus discovery.

*** As this P&A discusses, prosecutors should expect that some defense counsel may argue this decision applies at trial as well.**

I. Factual and Procedural Background

1. Bryan Maurice Jones was convicted in San Diego County Superior Court of numerous crimes, including two first degree murders with special circumstances, two attempted murders, and sex offenses against one of the attempted murder victims. The jury sentenced Jones to death and the judgment was affirmed on appeal in the Supreme Court in *People v. Jones* (2013) 57 Cal.4th 899. (p.*1.)

2. During jury selection, the prosecution used peremptory challenges to excuse two African-American prospective jurors based on race, and defense counsel objected. Both were female, although the challenge was based only on race. After the trial court determined the defense attorney made a prima facie showing of racial bias, the prosecutor offered race-neutral explanations for excusing the jurors, citing in part a numerical score for each prospective juror that the prosecution team had devised. The trial court found the explanations proffered by the prosecutor credible and permitted the strikes. (p.*1, citing to the Supreme Court's opinion, *People v. Jones*, *supra,* 57 Cal.4th at pp. 916-918.)

3. The Supreme Court's opinion states the defendant renewed his *Batson/Wheeler* motion on the basis of race when another African American, who was a female, was excused by the prosecutor. However, the trial court declined to find that the defendant had demonstrated a prima facie showing of discrimination. Thus, no explanation was proffered by the prosecutor. The Supreme Court assessed the record independently and concluded there was ample evidence to support the trial court's ruling that no prima facie case had been established. (*People v. Jones, supra*, 57 Cal.4th at pp. 919-920.)

4. In a footnote, the Supreme Court opinion also states that the prosecutor excused an African-American man, but the defendant did not renew that claim in the Supreme Court.

5. Jones filed an amended petition for writ of habeas corpus, alleging ineffective assistance of counsel because his trial counsel failed to raise a *Batson/Wheeler* error for the prosecutor's exercise of peremptory challenges against women, noting 13 of the prosecution's 17 peremptory strikes were against prospective female jurors. Jones further alleged his trial counsel was ineffective for failing to raise a *Batson/Wheeler* error on the ground that four of those women were also African-American. (p.*2.)

6. After Jones's direct appeal, his habeas attorney sought postconviction discovery of the prosecutor's jury selection notes, pursuant to section Penal Code section 1054.9. The trial court granted the request in April 2018. In May, the district attorney filed a writ of mandate and/or prohibition seeking a stay and requesting the Court of Appeal vacate the trial court's order, which it denied. The district attorney appealed. The Supreme Court granted district attorney's petition for review and transferred the matter to the Court of Appeal. The Court of Appeal vacated its order denying the writ of mandate and/or prohibition and issued an order to show cause returnable why the petitioner (the People) is not entitled to the relief requested. Jones filed a formal return to the order to show cause. This Court of Appeal denied the district attorney's petition. The Court of Appeal's opinion is discussed below.

II. <u>The Issue and Applicable Legal Principles</u>

1. The Court of Appeal described the issue before it as follows: "The San Diego County District Attorney petitions for a writ of mandate and/or prohibition challenging the superior court's order directing the district attorney to turn over to defense habeas counsel the prosecution's jury selection notes, contending the materials are privileged work product not subject to discovery. We are called upon to determine whether these notes, when referenced during a *Batson/Wheeler* hearing by a prosecutor offering a neutral reason for exercising a peremptory strike, are discoverable by the defendant as part of postconviction writ of habeas corpus discovery." (p.*1.)

2. With regard to a defendant seeking post-conviction habeas discovery the Court of Appeal states: "A defendant is entitled to materials to which he would have been entitled at trial, whether or not he possessed those materials at the time of trial. (*In re Steele* (2004) 32 Cal.4th 682, 693, 695-696); Pen. Code § 1054.9, subd. (b).) This includes materials the prosecution did not provide at trial because there was no specific defense request but would have been obligated to provide had there been one.

[Citation]. The defendant bears the burden of demonstrating the materials requested are ones to which he would have been entitled to discovery at the time of trial. [Citation]." (p.*2.)

3 The Court of Appeal states: "In issuing the order to turn over the jury selection notes, the trial court necessarily concluded Jones met his burden of demonstrating he was entitled to them at the time of trial. Thus, to demonstrate an abuse of discretion in this case, the district attorney must demonstrate that at the time of trial, the defendant was not entitled to the jury selection notes." (p.*2.)

III. Work Product

1. The work product privilege is codified in the Code of Civil Procedure. It protects from discovery "writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories." (Code Civ. Proc., § 2018.030, subd. (a).) In the civil context, other work product is discoverable if the court determines its protection would unfairly prejudice the party seeking discovery. (Code Civ. Proc., § 2018.030, subd. (b).) (p.*3.)

2. However, in the criminal context, work product is more limited. As the California Supreme Court has stated, Penal Code section 1054.6 expressly limits the definition of "work product" in criminal cases to "core" work product," which is "any writing reflecting 'an attorney's impressions, conclusions, opinions, or legal research or theories.' " (*People v. Zamudio* (2008) 43 Cal.4th 327, 355) (p.*3.)

3. The work product doctrine " 'shelters the mental processes of the attorney, providing a privileged area in which he can analyze and prepare his client's case.' " (*People v. Collie* (1981) 30 Cal.3d 43, 59.) But the Court of Appeal here says it is "tasked with determining whether the work product privilege remains absolute when a court has an obligation to evaluate *the intent* of the prosecution, and the written mental impressions themselves may reveal an effort to unlawfully exclude prospective jurors based on race or gender." (p.*3, italics added.)

4. The Court of Appeal refers to the United States Supreme Court case of *Foster v. Chatman* (2016) __ U.S.__, 136 S.Ct. 1737, in which the Supreme Court considered a *Batson/Wheeler* challenge based on jury selection notes obtained by defense counsel through the Georgia Open Records Act. The prosecution's jury selection file was replete with documents referencing race. The Supreme Court concluded that "[t]he contents of the prosecution's file . . . plainly belie the State's claim that it exercised its strikes in a 'color-blind' manner." (*Foster*, at p. 1755.) (p.*3.)

5. The Court of Appeal states that although the Supreme Court in *Foster* did not address whether the jury selection notes were protected work privilege, "it makes clear the information contained within those notes is relevant to a determination of a prosecutor's credibility and genuineness." (p.*3, citing *Foster* at pp. 1743, 1755.)) Relying on *Foster*, the Court of Appeal here describes jury selection notes as "an example of the evidence of intent that a court should consider during the third stage of the *Batson/Wheeler* hearing." (p.*3.)

6. The Court of Appeal states that while the jury selection notes will likely contain the prosecution's impressions, conclusions, or opinions, there is a difference between a prosecutor's thoughts and opinions about the quality of the legal case or trial strategy and the thoughts and opinions about the adequacy of prospective jurors. The opinion emphasizes that the second step of the *Batson/Wheeler* hearing requires the prosecutor to disclose his or her thinking regarding the prospective jurors by offering a race- or gender-neutral justification for exercising the challenged peremptory strikes. "Moreover, the purpose of the third step is to evaluate the prosecutor's reasoning. This is inconsistent with the notion that circumstantial evidence of those thoughts is absolutely protected." (p.*4.)

7. The Court of Appeal states the significant civil cases on work product do not apply here because the situation before it "focuses on the conflict between protecting an attorney's mental impressions and ensuring the attorney's jury selection decisions are not based on discriminatory intent. Here, constitutional concerns are at odds with the alleged statutory protections of an attorney's work product; "[t]he 'Constitution forbids striking even a single prospective juror for a discriminatory purpose.' " (*Foster*, *supra*, 136 S.Ct. at p. 1747.) Thus, the Court of Appeal stated that given the importance of avoiding discrimination in jury selection, it could not conclude the trial court abused its discretion in ordering disclosure of the prosecutor's jury selection notes. (p.*4.)

IV. Waiver of Work Product

1. The Court of Appeal alternatively concludes that even assuming the jury selection notes are undiscoverable core work product, the prosecution's reference to their contents waived the protection. (p.*5.)

2. The only recognized exception to the absolute protection of core work product is the waiver doctrine. The Court of Appeal cites authority that the core work product privilege is waived when a witness testifies as to the work product's content. The Court of Appeal says additionally, Evidence Code section 771 requires the production of a writing used to refresh a witness's memory while testifying if requested by the adverse party. (Evid. Code, § 771, subd. (a).) The adverse party may cross-examine the witness concerning the writing and introduce portions of it that are pertinent to the testimony. (Evid. Code, § 771, subd. (b).) (p.*5.)

3. The district attorney urged the Court of Appeal to adopt for purpose of its analysis the definition of "witness" from the Code of Civil Procedure. The Code of Civil Procedure defines a "witness" as "a person whose declaration under oath is received as evidence for any purpose, whether such declaration be made on oral examination, or by deposition or affidavit." (Code Civ. Proc., § 1878.)

4. But the Court of Appeal responded that the issue before it is a discovery matter that regards *criminal* law. The Court of Appeal looked at the definition of "witness" in other statutes, including Evidence Code section 240 which treats the word "witness" as synonymous with "declarant." In turn, Evidence Code section 135 defines a "declarant" as a "person who makes a statement." The Court of Appeals stated, "These definitions are broader than the one offered by the district attorney and suggest more flexibility in who constitutes a witness in a criminal matter." (p.*5.)

5. The Court of Appeal states: "In a *Batson/Wheeler* hearing, resolution of the issues depends entirely on the reasons the prosecutor provides for exercising a peremptory challenge. Moreover, the prosecutor is the only source of information regarding his motivations, other than the jury selection notes. Thus, in this context, the prosecutor effectively serves as a witness as the term is used in Evidence Code section 771. Moreover, when the prosecutor references jury selection notes to refresh his recollection and offers details from those notes, he waives any work product protection. (See Evid. Code, § 771.)" (p.*5.)

6. As to the case before it, the Court of Appeal explained: "Here, the prosecutor referenced details from the jury selection notes throughout the *Batson/Wheeler* hearing. He explained the prosecution had numerically evaluated jurors based on their questionnaires, and he shared the specific numeric ratings with the court, in addition to other details and observations regarding the challenged prospective jurors. *These references to the jury selection notes waived any work product privilege*." (p.*6, italics added.)

7. The Court of Appeal additionally stated that it was not persuaded that "the prosecutor could not have waived the work product privilege because he was not under oath and therefore was not a witness. Although the prosecutor was not under oath, '[a]n attorney is an officer of the court, and in presenting matters to the court may employ only such means as are consistent with the truth[ ] and may not mislead the court in any fashion.' " (p.*6.) "This obligation requires an attorney to render a candid disclosure. In a *Batson/Wheeler* hearing, the prosecutor—whose credibility and genuineness will be assessed by the trial court—is expected to testify honestly regarding his rationale for exercising a peremptory challenge." (p.*6.)

8. The Court of Appeal concludes: "Thus, we conclude that when a prosecutor relies on jury selection notes to refresh his recollection and shares the details of jury selection notes with the court during a *Batson/Wheeler* hearing, upon request, the defense is entitled to review those notes. Accordingly, the court did not abuse its discretion in determining Jones was entitled to the jury selection notes pursuant to section 1054.9." (p.*6.)

V. <u>Observations</u>

1. At the outset, keep in mind the issue the Court of Appeal was addressing in this case: "We are called upon to determine whether [the prosecution's jury selection] notes, when referenced during a *Batson/Wheeler* hearing by a prosecutor offering a neutral reason for exercising a peremptory strike, ***are discoverable as part of postconviction writ of habeas corpus***."

2. Nevertheless, a defense counsel may attempt to rely on this case to argue that a defendant is entitled, under the same reasoning, to the prosecutor's jury selection notes at trial in the third stage of a *Baston/Wheeler* hearing, if the prosecutor relied on those notes in proffering his or her reasons for the peremptory challenge. The argument likely to be made by defense counsel is that if Penal Code section 1054.9, the statute governing discovery in the context of a postconviction writ of habeas corpus, provides that "discovery material means materials in the possession of the prosecution . . . to

which the same defendant would have been entitled at time of trial," then the defendant is necessarily entitled to the jury selection notes "at the time of trial." The Court of Appeal did not address this argument of course, because it was not asked to decide the question in that context. It was addressing only habeas corpus discovery.

3. The larger question, however, is whether the Court of Appeal is correct that 1) the prosecutor's jury selection notes are discoverable work product, and 2) even if notes are *not* discoverable work product, the prosecutor's reference to the notes in explaining his reasons for his peremptory challenge waived the work product protection.

It is anticipated that the San Diego District Attorney's Office will seek further relief in this case. This case was issued by the Fourth District Court of Appeal and certified for publication on April 9th. A California Court of Appeal case can be cited or relied upon as soon as it is certified for publication. (California Rules of Court, rule 8.1115(d.) After an opinion is issued, the appellate decision becomes final in 30 days unless one of the parties (in this case the San Diego District Attorney's Office) seeks review of the decision in the California Supreme Court. The party can also seek depublication of the Court of Appeal decision.

A petition for review in the Supreme Court has to be filed within 10 calendar days after the decision becomes final. If the Supreme Court grants review, the case stays on the books since it's already published, but it has no binding or precedential effect and may be cited for PERSUASIVE value only. Any citation to the Court of Appeal opinion must also note the grant of review and any subsequent action by the Supreme Court. (California Rules of Court, rule 8.115(e)). A request for depublication must be filed within 30 days after the decision is final in the Court of Appeal. (California Rule of Court, Rule 8.1125(a)(4).

4. In the meantime, should a prosecutor encounter a request by the defense attorney for the prosecutor's jury selection notes (which can occur only at the third stage of the *Batson/Wheeler* hearing, i.e., where the trial court must evaluate the credibility of the prosecutor's proffered reasons) the prosecutor may choose to object and distinguish the factual and procedural posture of this Court of Appeal case, *People v. Superior Court* (*Bryan Maurice Jones*). The Court of Appeal did not address application of its reasoning in the context of trial, nor has any other Court of Appeal decision held that jury selection notes, relied on by the prosecutor in stating his or her reasons for the peremptory challenge, must be turned over to the defense at trial upon request.

5. Nevertheless, until more is known as to whether the Supreme Court will act in this case, prosecutors should be prepared for the possibility that a trial court – in response to a request by defense counsel relying on this Court of Appeal case -- will require the prosecutor to turn over his or her jury selection notes to the defense, if the prosecutor referenced those notes in proffering reasons for the peremptory challenge.

6. At the outset, to state the obvious, as prosecutors we must act with the highest ethical obligation, thus it is expected that our jury selection notes will be free from any comments, notations,

etc. that reflect a discriminatory intent.

7. If jury selection notes include *trial strategy reasons* for striking the prospective juror, a prosecutor should be prepared to argue these particular notes are core work product that remain protected. The Court of Appeal here in this *Jones* case acknowledges that "there is a difference between a prosecutor's thoughts and opinions about the quality of . . . *trial strategy* and the thoughts an opinions about the adequacy of prospective jurors." (p.*4.)

8. Since the Court of Appeal states that the only discoverable notes are those used by the prosecutor "to refresh his recollection" in stating the reasons for the peremptory challenge, then it follows that *only* those notes used to refresh recollection should be turned over. If the prosecutor did not need to rely on notes to state some (or all) of his reasons, he did not refresh his recollection with those particular notes.

9. Should the prosecutor rely at all on jury selection notes in explaining his or her reasons for the peremptory challenge? Under the analysis of this Court of Appeal case, if the notes were not used to refresh recollection, they do not need to be turned over to the defense upon request. But in many cases, it might be impractical and counterproductive to refrain from relying on notes. Each situation will have to be evaluated individually. Here is a thoughtful comment from an attorney in the Alameda County District Attorney's Office: "Give all of your reasons for excusing a prospective juror, even if you have to refer to your notes. Making a good record that establishes a valid, non-discriminatory reason for excusing a prospective juror is more important to you personally and professionally and to the case itself, than any question about whether you have to turn over your stickie note to the court or defense counsel."

10. Also, if the defense raises a comparative juror analysis, the prosecutor must be prepared to give a thorough and careful explanation of why he or she exercised a peremptory challenge against one prospective juror and not another. Reliance on notes is imperative in this circumstance. [Read a Supreme Court cases that conducts a comparative jury analysis; it will convince you.]

11. Another suggestion offered by one of our prosecutors is to be certain to state all the reasons for your challenge, beyond what is stated in your written notes. Obviously, there is a transcript of the prosecutor's stated reasons for exercising a peremptory challenge, and these transcripts are part of the trial record that will be relied upon by a defendant in post-conviction habeas corpus. The trial court, in evaluating the credibility of the prosecutor's proffered reasons, is listening to the prosecutor's explanation in court. As another prosecutor in our office stated, prosecutors are not court reporters and cannot be expected to capture every word, thought or impression on paper as answers by the prospective juror are being given. Almost everything the prosecutor is writing down is necessarily summarized and incomplete. So all your reasons for striking a prospective juror should be stated and made part of the record, not just those reasons the prosecutor had time to write down on a piece of paper or stickie.

12. **Excerpt from June 13, 2016 P&A on *Foster v. Chatman*, with Jeff Rubin as guest, *applicable to this current P&A*:**

"As a result of the *Foster* decision, should prosecutors refrain from taking notes on the race or ethnicity of jurors?

As Jeff explains, such a conclusion would be an erroneous take-away from *Foster*. The *Foster* court did *not* dispute that identifying jurors by race would be proper if done for the purpose of responding to a *Batson-Wheeler* motion, either at the time the challenge is made, or years later at a *Batson-Wheeler* remand hearing. The Supreme Court in *Foster* rejected the State's belated argument that the prosecutors' notes were made for such a legitimate purpose. It did not find credible this claim, which had never before been asserted. The Supreme Court instead concluded that the notes reflected a concerted effort to keep blacks off the jury.

In *People v. Lenix* (2008) 44 Cal.4th 602, the California Supreme Court emphasized that "post-*Batson*, recording the race of each juror is an important tool to be used by the court and counsel in mounting, refuting or analyzing a *Batson* challenge." (*Id*. at p. 617, fn. 2.)

Indeed, it is impossible to make a comparative juror analysis without a full record of the race, gender, ethnicity of each juror.

A suggestion from Jeff: As to the identification of the juror's race, gender or ethnicity, the prosecutor can make a notation in his or her file that such identifying factors were recorded solely for the purpose of responding to a *Batson-Wheeler* motion, or put that information on the record if necessary.

Additionally, make notes of the reasons for choosing or not choosing each juror, including the juror's demeanor, attitude, and other intangibles - not just those who seem like they might be adverse to the prosecution. This is especially important when the judge allows limited or no voir dire and the notes will help the judge see beneath superficial similarities between jurors who were kept and those whom the prosecutor challenged. As mentioned in *Gonzalez v. Brown* (9th Cir. 2009) 585 F.3d 1202, "[i]t is obviously a desirable and correct practice for a prosecutor to have notes of reasons for a peremptory strike if a challenge is raised requiring a race-neutral explanation at step two of *Batson*." (*Brown* at p. 1209, fn. 5.) Keep such notes as they may save a prosecution down the road if a prosecutor needs to refresh his or her recollection if the prosecutor at a post-conviction proceeding. (See *Shirley v. Yates* (9th Cir. 2015) 807 F.3d 1090, 1105, fn. 16.)"

13. There is likely more to come on this Court of Appeal opinion, and if so, P&A will follow it.

Suggestions for future shows, ideas on how to improve P&A, and other comments or criticisms should be directed to P&A author Mary Pat Dooley at (510) 272-6249, marypat.dooley@acgov.org. Technical questions should be addressed to Gilbert Leung 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.

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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	Topics	Guests	30 min
April 25, 2016	(Batson/Wheeler reversal (*People v. Arellano*)		Elim. of Bias

This P&A discusses a recent *Batson/Wheeler* case, *People v. Arellano* (2016) 235 Cal.App.4th 1139, in which the Court of Appeal concluded that particular stated reasons given by the prosecutor for challenging an African-American juror were not supported by the record and were contrary to the evidence presented at voir dire.

After a mistrial was declared as to certain counts, the defendant was convicted of the remaining charges. Those counts were reversed for the *Batson/Wheeler* error.

This P&A handout contains three sections:

1. General Principles of *Batson/Wheeler*

2. A discussion of the *Arellano* opinion

3. Suggestions for making the prosecution's statement of "permissible, nondiscriminatory justifications" for excusing a juror

I. *General Principles of Batson/Wheeler*

A. The Three Stage Process

1. "First, the defendant must make a prima facie showing that the prosecution exercised a challenge based on impermissible criteria.

2. Second, if the trial court finds a prima facie case, then the prosecution must offer nondiscriminatory reasons for the challenge. Second, if the prima facie case has been made, the

burden shifts to the proponent of the strike to explain adequately the basis for excusing the juror by offering permissible, nondiscriminatory justifications.

3. Third, the trial court must determine whether the prosecution's offered justification is credible and whether, in light of all relevant circumstances, the defendant has shown purposeful race discrimination." *(People v. Manibusan* (2013) 58 Cal.4th 40, 75.)

B. The First and Second Stages: The Prima Facie Showing, and the Prosecutor's Response

1. A prima facie showing of racial discrimination in the use of peremptory challenges is established if the totality of relevant facts gives rise to an inference of discriminatory purpose. (*Johnson v. California* (2005) 545 U.S. 162, 168.)

2. Although at the prima facie stage the court the considers the entire record, particularly relevant considerations are that a party has struck most or all of the members of the identified group from the venire, that a party has used a disproportionate number of strikes against the group, that the party has failed to engage these jurors in more than desultory voir dire, that the defendant is a member of the identified group, and that the victim is a member of the group to which the majority of the remaining jurors belong. (*People v. Scott* (2015) 61 Cal.4th 363, 384.) (Scott)

3. The totality of the relevant facts must be considered. (*Id*. at p. 385.)

4. Keep in mind the procedure strongly urged by the Supreme Court in *Scott*:

a. A party exercising a strike has no obligation to articulate a reason until an inference of discrimination has been raised;

b. <u>*However*</u>, "we have nonetheless repeatedly encouraged trial courts to offer prosecutors the opportunity to state their reasons so as to enable creation of an adequate record for an appellate court, should it disagree with the first-stage ruling, to determine whether any constitutional violation has been established." (*Scott*, *supra*, 61 Cal.4th at p. 388.)

c. Otherwise, "a remand will thus be needed to create that record, years after the trial, whenever an appellate court disagrees with the trial court's first-stage ruling," (i.e. the appellate court, contrary to the trial court, concludes a prima facie case was made by the defendant.) (*Id*. at p. 389.)

d. So as a practical matter, even if the trial court does not find a prima facie case, the prosecution should request (if not invited to do so by the trial court) to state its reasons for exercising the strike.

e. The Supreme Court in *Scott* explained the effect of doing so: "[W]here (1) the trial court has determined that no prima facie case of discrimination exists, (2) the trial court allows or invites the prosecutor to state his or her reasons for excusing the juror for the record, (3) the prosecutor provides nondiscriminatory reasons, and (4) the trial court determines that the prosecutor's nondiscriminatory reasons are genuine, an appellate court should begin its analysis of the trial court's denial of the *Batson/Wheeler* motion with a review of the first-stage ruling." (*Scott*, at p.

391.)

f. " If the appellate court agrees with the trial court's first-stage ruling, the claim is resolved. If the appellate court disagrees, it can proceed directly to review of the third-stage ruling, aided by a full record of reasons and the trial court's evaluation of their plausibility." (*Scott*, at p. 391.)

g. "In the circumstance where (1) the trial court has determined that no prima facie case of discrimination exists, (2) the trial court allows or invites the prosecutor to state his or her reasons for excusing the juror on the record, (3) the prosecutor provides a reason that is discriminatory on its face, and (4) the trial court nonetheless finds no purposeful discrimination, the appellate court should likewise begin its analysis of the trial court's denial of the *Batson/Wheeler* motion with a review of the first-stage ruling. In that (likely rare) situation, though, the relevant circumstances, including the facially discriminatory justification advanced by the prosecutor, would almost certainly raise an inference of discrimination and therefore trigger review of the next step of the *Batson/Wheeler* analysis" (Id. at pp. 391-392.) .

C. The Third Stage of *Batson/Wheeler*

1 At the third stage, the proper focus of a *Batson/Wheeler* inquiry is on the subjective genuineness of the race-neutral reasons given for the peremptory challenge. The prosecutor's reason for exercising the peremptory challenge must be sincere and legitimate, legitimate in the sense of being nondiscriminatory. (*People v. Reynoso* (2003) 31 Cal.4th 903, 924.)

2. The prosecutor's " 'justification need not support a challenge for cause, and even a "trivial" reason, if genuine and neutral, will suffice.' [Citation.] A prospective juror may be excused based upon facial expressions, gestures, hunches, and even for arbitrary or idiosyncratic reasons." (*People v. Lenix* (2008) 44 Cal.4th 602, 613.)

3. However, "implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination". (*Purkett v. Elem* (1995) 514 U.S. 765, 786.)

4. Comparative juror analysis, on a claim of race based peremptory challenges, compares the voir dire responses of the challenged prospective jurors with those of similar jurors who were not members of the challenged jurors' racial group, whom the prosecutor did not challenge. (*Miller–El v. Dretke* (2005) 545 U.S. 231, 241.) ["If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at Batson 's third step."]. "[C]omparative juror analysis is but one form of circumstantial evidence that is relevant, but not necessarily dispositive, on the issue of intentional discrimination." (*People v. Lenix*, *supra*, 44 Cal.4th at p. 622.)

5. Regarding *Batson/Wheeler*'s third-stage, appellate review of a trial court's denial of a *Batson/Wheeler* motion is deferential, and appellate courts examine only whether substantial evidence supports the trial court's conclusions." (*Lenix*, *supra*, 44 Cal.4th at p. 613.)

6. However, such deference is inapplicable when of one of the prosecutor's stated reasons considered by the trial court to be a legitimate basis for excusing a prospective juror is contradicted by the record. (*People v. Long* (2010) 189 Cal.App.4th 826, 847.)

II. People v. Arellano (2016) 245 Cal.App.4th 1139: A Batson/Wheeler Reversal

A. General Background

1. The defendant was charged with first degree premeditated murder and felon in possession of a firearm, and other felony offenses. After a lengthy trial, the jury was unable to reach a verdict on those charges and mistrial was declared. The jury convicted defendant of the other charged offenses: possession of an assault weapon and active participation in a criminal street gang.

2. The trial court conducted "lengthy voir dire proceedings" over five days. The Court of Appeal's opinion does not indicate whether questionnaires were used.

3. The trial court found the defendant made a prima facie case of discrimination as to three peremptory challenges used by the prosecutor to remove three African-American women, identified as V.B., V.L., and W.W.

4. The Court of Appeal concluded the trial court properly denied defendant's *Batson/Wheeler* motions to as V.B. and V.K., but should have granted the motion as to W.W.

B. Prospective Juror V.B.

1. During hardship excusals, V.B. requested a medical hardship because she was diabetic, she had to regularly eat, and had to frequently use the restroom. She also said her "kids were accused of being in gangs" in Kern County. Her son had been convicted of robbery, and another son was involved with a cousin who was a gang member. She said her family situation and health concerns would prevent her from giving her undivided attention to the case.

2. The prosecutor stipulated to V.B.'s hardship excuse. Defense counsel declined to stipulate. In response to questions by defense counsel, V.B. said she could sit through the trial, and did not know how her son's situation would affect how she listened to the facts. She presumed defendant was innocent and understood the People's burden of proof. Defense counsel declined to stipulate to V.B.'s hardship excuse.

3. In response to a question by the prosecutor, V.B. said both her sons went to prison. She did not feel the system treated them fairly. She said, " '[B]efore my son went up, one person went up. They were both similar.' " But the other man was white and got probation, and she believed the difference in treatment was racial. However, she said this was "all in the past" because it happened

10-15 years ago and she would not hold it against the District Attorney's Office. V.B. remained on the panel through hardships.

C. Prospective Juror V.K.

1. Juror V.K. was one of the first 12 people seated in the jury box. In response to the court's voir dire, she said she is a special needs social worker at Kern Regional Center. Her husband was a "[s]enior pastor." She did not further define his position or where he was a pastor.

2. Prospective Juror V.K. said she did not have any religious or philosophical beliefs that would prevent her from serving as a juror. She did not have any problem with judging the facts and evidence to determine if the accused committed a crime. She had never served on a jury before. There was nothing about the nature of the case that would affect her ability to be impartial. She never had a less-than-pleasurable experience with law enforcement, she had never been a crime victim, and she did not have any friends or family who had been charged with or convicted of a crime. She did not know of any reason why she could not give both sides a fair trial.

3. Defense counsel asked Juror V.K. if there was anything about defendant that made her already judge him as guilty. She replied: "No. I don't know him. He just looks like a young man, well-groomed, in a nice suit."

4. Both sides passed for cause. The prosecutor exercised his first peremptory challenge against V.K. and the defense did not object.

D. *Batson/Wheeler* Motion as to Jurors V.B. and V.K.

1. After several rounds of peremptory challenges exercised by both the defense counsel and the prosecutor, the prosecutor excused V.B. Defense counsel made a *Batson/Wheeler* motion as to both V.K. and V.B. Defense counsel conceded there might be reasons to excuse V.B., " 'but when you put her in combination with [V.K], which there was nothing whatsoever showing a bias one way, that's the reason why I'm doing this motion."

2. The trial court noted that there were three African-American jurors still in the box, including W.W. The court said it was "pretty sure" W.W. was African-American and defense counsel agreed.

3. The trial court did not see anything about V.K. that supported a peremptory challenge and found a prima facie case and possible discriminatory purpose. The trial court asked the prosecutor to explain any permissible, race-neutral justifications to excuse V.B. and V.K.[1]

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[1] The trial court never stated expressly that it found a prima facie case as to V.B. The Court of Appeal's analysis proceeds on the basis that a prima facie case was found as to both V.K. and V.B. If the trial court does not state expressly that it has found a prima facie case, but nevertheless asks for race-neutral justifications, the better practice is to clarify the trial court's position, as this will be important on appeal. In *People v. Scott*, the trial court did not say it found a prima facie case, but nevertheless asked for the prosecutor's reasons. The prosecutor clarified with the trial court that it had not found a prima facie case but was that it soliciting the prosecutor's reasons for the record. (*Scott*, *supra*, 61 Cal.4th at p. 382.) The prosecutor then provided his

4. As to V.K., the prosecutor stated, "[H]er spouse is a senior pastor, and I'm always concerned with people from the clergy coming in because they have a lot of dealings and sympathy and that type of outreach." [¶] "And when [defense counsel] was questioning her and he was asking about what she thinks, she said . . . the defendant looks like a young man, groomed, in a nice suit, accurate observations, but it was the way she said it, and coming with the fact that her husband's a senior pastor, which to me means the head of a church, causes me great concern that she will increase my burden of proof and hold me to a higher standard of feel [*sic*] sympathy for the defendant. Even if she thinks she can do it—even if she thinks she can be fair, based on her answers, I don't think she can be."

5. As to V.B., the prosecutor mentioned the health issues, her children being accused of being in gangs, their conviction for crimes, and her belief in a son's unfair treatment.

6. The trial court found that the prosecutors had offered "race-neutral justifications" for striking both jurors.

E. Court of Appeal Analysis as to V.B.

1. The Court of Appeal concluded there was substantial evidence to support the prosecutor's stated justifications for excusing V.B. and the trial court's findings.

2. The Court of Appeal said the use of peremptory challenges to exclude potential jurors who have had negative experiences with the criminal justice system, or have relatives and/or family members in prison, is not unconstitutional. The Court of Appeal cited *People v. Roldan* (2005) 35 Cal.4th 646, 703, fn. 22; *People v. Morris* (2003) 107 Cal.App.4th 402, 409.

3. The Court of Appeal also cited *People v. Turner* (2001) 90 Cal.App.4th 413, 419: "[T]he arrest or conviction of a juror's relative provides a legitimate, group-neutral basis for excluding a juror."

F. Court of Appeal's Analysis as to V.K.

1. The Court of Appeal concluded there was substantial evidence to support the prosecutor's stated justifications for excusing V.K.

2. The occupation of a prospective juror's spouse may be a legitimate nondiscriminatory reason for a peremptory challenge. The court cited *People v. Rushing* (2011) 197 Cal.App.4th 801, 811–

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reasons. As the Supreme Court pointed out in *Scott*, if the trial court does not find a prima facie case, the trial court should offer prosecutors an opportunity to state their reasons in order to create an adequate record for appeal. "If the appellate court agrees with the trial court's first stage ruling, the claim is resolved." (*Id*. at p. 391.) On the other hand, if the appellate court concludes the defendant made a prima facie showing, the appellate court has a full record of reasons from which to make the third stage ruling. (*Ibid*.)

812.

3. As to the prosecutor's concerns that V.K. might feel sympathy for the defendant, the Court of Appeal noted that for purposes of *Batson/Wheeler*, "a 'legitimate reason' is not a reason that makes sense, but a reason that does not deny equal protection." (*Purkett v. Elem*, *supra*, 514 U.S. at pp. 768–769.) The court said, "[F]or example, a peremptory challenge based on a prospective juror's experience in counseling or social services, and the prosecutor's concern that such a person might be too sympathetic to the defense, have been held as proper race-neutral reasons for excusal." The court cited *People v. Clark* (2011) 52 Cal.4th 856, 907–908; *People v. Trevino* (1997) 55 Cal.App.4th 396, 411–412; *People v. Landry* (1996) 49 Cal.App.4th 785, 790–791; *People v. Watson* (2008) 43 Cal.4th 652, 677; *People v. Perez* (1996) 48 Cal.App.4th 1310, 131.

As to social workers specifically, the Court of Appeal said in *People v. Mai* (2013) 57 Cal.4th 986, the court held that a prosecutor's "expressed reservation about having social workers on the jury was race neutral. It also had ' " 'some basis in accepted trial strategy' " ' [citation] insofar as it stemmed from a concern about the general attitudes and philosophies persons in that profession might harbor." (*Id*. at p. 1053.)

G. Juror W.W. – Voir Dire

1. The trial court's voir dire with prospective juror W.W. began as follows:

"Q. [Y]our occupation.
"A. I'm a field representative for the Department of Commerce
"Q. All right. What do you do in that important capacity?
"A. *I collect information for Congress and President and different organizations that distribute information back down to the cities and counties about work, the state of the nation, how people are doing health-wise* --
"Q. How are you doing on Obama Care? [¶] That's a two-way street, isn't it, for you? Pretty busy right—or do you handle that?
"A. I don't." (Italics added in original.)

2. W.W. said she had two accounting degrees, and had worked for the Department of Commerce in Kern County for 22 years in the same capacity. Her spouse worked for the City of Bakersfield. He was not in law enforcement, although she did not specify his job.

3. W.W. had served on four juries, all civil. When asked by the court what those cases were about, she said that one involved a fight "between some people at a school and police were fighting." Someone who got involved in the fight filed charges for police brutality, and the trial court confirmed that it was a lawsuit for "interference with one's civil rights." The plaintiff sought reimbursement for medical expenses.

4. When asked whether she ever had any "less than pleasurable experience with law enforcement," W.W. said yes. She said she was attacked on the street "when she was working at the assessor's office" by a woman claiming that W.W. was "messing with her husband," but W.W. was not. A bystander broke up the incident. Someone called the police. W.W. said she asked if the police would give her a ride home, but "they took off." W.W. said she was injured "a little bit," but the police did not offer to get her any medical care. W.W. said the incident would not affect her ability to be fair and impartial in this case. W.W. clarified that the police agency in that incident was not the same agency involved in this case.

5. W.W. had no family or close friends who had been victims of a crime, or charged with committing a crime.

H. Juror W.W. – *Batson/Wheeler* Motion

1. When the prosecutor excused W.W., the defense immediately made another *Batson/Wheeler* motion. The trial court excused the panel and asked the court reporter to read back W.W.'s responses to clarify its notes.

2. The Court of Appeal opinion stated that the prosecutor "again refused to concede that W.W. was African–American. Defense counsel replied that the prosecutor was being 'disingenuous to the Court' to say that she was not African–American. The court again said it appeared she was African–American."

3. The court stated that since W.W. was the third African–American female excused, there was an inference "though very slight, of discriminatory purpose," and asked the prosecutor "to offer permissible race-neutral justifications for the strike."

4. The following exchange occurred:

"[THE PROSECUTOR]: . . . Having found a prima facie case, [W.W.] is a—*she works for a liberal political organization where she provides information to the Democratic Party or Congress*—

"THE COURT: [*referring to the court reporter's readback*] *Did you hear 'commerce' and 'Congress' at different times?*

"[THE PROSECUTOR]: I just heard 'Congress.'

"[DEFENSE COUNSEL]: I only heard that of 'commerce.'

"THE COURT: Did you hear 'commerce' too?

"[DEFENSE COUNSEL]: I heard 'commerce.' I never heard—

"THE COURT: Several times. [¶] And I think the second thing [the reporter] had read did say 'Congress,' and I thought I heard her say 'Congress' too, but then she goes back to 'commerce.' [¶] Didn't mean to interrupt you.

"[THE PROSECUTOR]: *But she deals with these liberal organizations for what I heard was Congress and collects—she did say she collects information for the government and I don't know—I mean, she could have political motives or anything like that. I just don't know. And I don't have all day to go into that.*

[PROSECUTOR CONTINUED]: "*Then second, she did have a problem with the police. She didn't like the way things were handled. And you think about what she wasn't happy with, she was unhappy that they didn't give her a ride home. Police aren't required to give her a ride home. So she's kind of holding them to a higher standard than they have.* [¶] And before that, when talking about her jury service, the first case she mentions is the police brutality suit. So I think even if she doesn't know it, she's got a little bit of a bias there. When talking about her prior jury service, the first thing that comes to mind is a police brutality case and then later on she talks about a problem with police. [¶] So I think she's got a bias against police and potentially some sort of political motives. Those are my justifications, your Honor."

(*Italics were added by the Court of Appeal in original*.)

5. The trial court denied the *Batson/Wheeler* motion, saying that "based on the totality of the facts surrounding W.W.'s questioning," the prosecutor had offered a race-neutral explanation and the defense had not proved any purposeful racial discrimination.

6. The Court of Appeal stated that the record implies that the final composition of the jury included two African-American men.

I. Court of Appeal's Analysis as to W.W.

1. The Court of Appeal began its analysis by stating: "The People assert that the prosecutor stated a valid race-neutral reason to excuse W.W. because she was not satisfied with how the police treated her when she was assaulted, and the prosecutor was concerned that she had been on a jury which heard a civil suit for 'police brutality.' "

2. But the Court of Appeal emphasized that "the entirety of the prosecutor's statements about W.W. raise serious questions about the credibility of any purported race-neutral reasons."

3. The Court of Appeal noted that a prospective juror's occupation may be a permissible, nondiscriminatory reason for exercising a peremptory challenge, "and a prosecutor is entitled to believe that people involved in particular professions or with particular philosophical leanings are ill-suited to serve as jurors because they are not sympathetic to the prosecutor." For authority, it cited

People v. Chism (2014) 58 Cal.4th 1266, 1316; *People v. Reynoso*, *supra*, 31 Cal.4th at pp. 924–925; People v. Landry (1996) 49 Cal.App.4th 785, 790–791; *People v. Adanandus* (2007) 157 Cal.App.4th 496, 507–508;

The Court of Appeal also gave these examples:

People v. Barber (1988) 200 Cal.App.3d 378, 394, [court noted peremptory challenges are often exercised against teachers by prosecutors on the belief they are deemed to be rather liberal];

People v. Perez (1996) 48 Cal.App.4th 1310, 1315, same; social services or caregiving fields];

People v. Trevino (1997) 55 Cal.App.4th 396. 411, [same; prospective jurors or their spouses in health care or social services fields];

People v. Granillo (1987) 197 Cal.App.3d 110, 120–121, fn. 2 [many prosecutors believe various professional people are too demanding or require certainty].)

4. But the Court of Appeal said in this case, "the factual premise for the prosecutor's reason for excusing W.W. from the jury is unsubstantiated in the record. Indeed, there is no evidentiary basis for the prosecutor's declaration that W.W. worked for 'a liberal political organization' and could have 'political motives.' W.W. stated she had worked as a field representative for the Department of Commerce and collected information about the county residents which was reported to the President and Congress. She had the same job for 22 years, which meant she worked throughout presidential administrations and congressional majorities from both political parties. She never said she was affiliated with a particular political party."

5. The Court of Appeal said it was only after the prosecutor stated his reasons about W.W.'s "alleged political motives" and "the court and defense counsel made halting attempts to point out his error, that he mentioned her prior experience with the police and jury service on a 'police brutality case.'"

6. The Court of Appeal noted that generally reviewing courts accord great deference to the trial court's ruling that a particular reason in genuine. However, the Court of Appeal quoted *People v. Silva* (2001) 25 Cal.4th 769, 385-386, "But when the prosecutor's stated reasons are either unsupported by the record, inherently implausible, or both, more is required of the trial court than a global finding that the reasons appear sufficient."

7. The Court of Appeal emphasized that the trial court has a duty to determine the credibility of the prosecutor's proffered explanations and should be suspicious when presented with reasons that are unsupported. The Court of Appeal again quoted *Silva*: "Although an isolated mistake or misstatement that the trial court recognizes as such is generally insufficient to demonstrate discriminatory intent, it is another matter altogether when . . . the record of voir dire provides no support for the prosecutor's stated reasons for exercising a peremptory challenge and the trial court has failed to probe the issue." (*Silva*, *supra*, 25 Cal.4th at p. 385.)

8. The Court of Appeal was critical of both the prosecutor and the trial court, stating: "The prosecutor misstated the record when he asserted W.W. worked for a 'liberal political organization connected to the 'Democratic Party or Congress.' Upon hearing this reason, both the court and defense counsel initially tried to clarify whether W.W. said 'Commerce' or 'Congress.' However, the court did not attempt to pursue the matter. The prosecutor again asserted W.W. worked for and collected information for 'these liberal organizations' and 'she could have political motives.' The court summarily denied the motion without pursuing the prosecutor's obvious inaccuracy about W.W.'s employment and the inference which he made from those erroneous assertions."

9. Finally, as to the prosecutor's misrepresentations of the record, the Court of Appeal stated: "Even given deferential review, there is no evidence to support the prosecutor's reason for removing W.W. The prosecutor's reason was inconsistent with and unsupported by the record. While the court initially questioned the prosecutor's account of the record, it quickly apologized for interrupting him. There is simply an absence of factual support for the prosecution's explanation, and the court failed to adequately determine the credibility of the proffered justification."

10. Although the prosecutor accepted the panel containing some African-American jurors, the Court of Appeal noted that exclusion by peremptory challenge of a single juror on the basis of race is an error of constitutional magnitude requiring reversal. (*People v. Chism*, *supra*, 58 Cal.4th at p. 1316.)

11. The Court of Appeal then addressed the prosecutor's "two race-neutral concerns" about W.W. based on her prior experience with police and service on a civil suit involving police brutality. (In a footnote, the Court of Appeal said it was not persuaded by the prosecutor's suggestion that W.W.'s referencing a police brutality case first in order among several cases on which she previously served as a juror necessarily suggests bias.)

12. The Court of Appeal said: "[T]he prosecutor only stated these reasons after he refused to concede W.W. was African-American, expounded on her alleged employment by a 'liberal political organization,' and the court and defense counsel attempted to tell him that his version of W.W.'s voir dire response was erroneous." The Court of Appeal relied for support on *Miller-El*, *supra*, 545 U.S. 231, where the prosecutor's reason for striking a prospective African-American juror on the basis that the juror's brother had suffered a prior conviction was characterized by the Supreme Court as an afterthought, provided only after defense counsel had characterized an earlier-stated reason as patently false.

13. The Court also stated: "We are also concerned about the prosecutor's expression of doubt that W.W. was African–American, which he initially raised when he excused V.B. and V.K. It is understandable that a prosecutor would not want to be accused of systematically removing minorities from a jury panel. I n this case, however, the prosecutor's repeated assertions W.W. may not be African–American undermine his subsequent claim that he excused her because of the race-neutral reason of her prior interaction with the police."

14. The California Court of Appeal concluded: " 'Where the facts in the record are objectively contrary to the prosecutor's statements, serious questions about the legitimacy of a prosecutor's reasons for exercising peremptory challenges are raised.' " The Court of Appeal reversed the convictions.

III. For Prosecutors: Making the Statement of Race-Neutral Justifications

Most of the suggestions below are taken from the conversation with Assistant DA John Brouhard in the July 6, 2015 P&A on *People v. Scott.* The full list of John's suggestions is contained in the handout from that P&A. The excerpts below are supplemented in view of the focus in *People v. Arellano* on misrepresenting the record.

1. As *People v. Scott* makes clear (see Section I above) the prosecutor should state his race-neutral justifications for his peremptory challenges, even if the trial court does not find a prima facie case of discrimination. (But the prosecutor should get an express ruling from the trial court that it does *not* find that defendant has made the prima facie showing.)

2. Even if the trial court rules that no prima facie case has been shown, the prosecutor needs to state the reasons for the strike as thoroughly and seriously as if the trial court did find a prima facie case. As John stated in the July 6, 2015 P&A, this is not the time to be cursory or abbreviated There's much at stake ultimately if the appellate court finds a *Batson/Wheeler* violation, including the integrity of the conviction, and -- for the prosecutor personally -- reputation and status in the state bar.

3. Along these lines, be conscious that you are creating a record that will be read by the Court of Appeal, and possibly the California Supreme Court and possibly the federal district court and the Ninth Circuit. Once the trial is over, your case lives on paper only. Reviewing courts are reading words in a transcript. These reviewing justices will likely not know you or your reputation. But the words you chose to describe the reasons for your strike and the thoroughness and accuracy of your response will convey much about your professionalism, integrity, and the seriousness with which you approached the *Batson/Wheeler* motion.

4. Take the time necessary to appropriately and professionally respond. A natural reaction at the time of *Batson/Wheeler* motion is to feel personally attacked, resulting in an emotional reaction. But the prosecutor needs to be able to respond professionally and thoroughly, which means getting control of the emotions.

5. Words of advice from a former judge: In essence prosecutors should say with their attitude, "We have the opportunity to show the system is fair. So without apology, I'll explain my reasons." The onus is on the prosecutor to be prepared and to make his or her best case.

6. Often *Batson/Wheeler* motions will be made at the end of a long and tiring jury selection. The

trial judge's plan may have been to timely move forward to opening statements. But there's too much at stake for the prosecution to be rushed. This is not a process that anyone – the court, prosecution or defense – should take lightly. When the motion is brought, the prosecutor needs to review his or her notes and organize materials before responding. Ask the court for time to do so. For example, ask the court to address the motion after lunch or allow you a break to prepare your response. Alert the court that you want to be clear and thorough in order to assist the court with its ruling (which may include comparative analysis.) Make sure you have the citation to *Scott* with you, just in case the trial court is resistant to allowing you the time needed to prepare. *Scott* refers to the prosecutor making a "full record of reasons" for the strikes. (*People v. Scott*, *supra*, 61 Cal.4th at p. 391.)

7. In its statement of reasons, the prosecution will need to make a record of "statistical" information. This information is critical to the reviewing court, which is relying on a cold record. The appellate court has no means of knowing the racial/gender/ etc. composition of the jury unless it is described for the record. So when the *Batson/Wheeler* motion is made, describe what has occurred in jury selection to that point. Put on the record, for example, the composition of the jury in the box, whether members of the identified class remain in the box, a description of the challenges that have been exercised by both sides (e.g. race/gender or whatever is the identified class.) You need to do this statistical "portrait" separately for each juror who has been challenged in the *Batson/Wheeler* motion.

8. Prosecutors need to give a full explanation of the reasons for their challenges. This explanation cannot be abbreviated. One of the reasons for this thoroughness is comparative juror analysis. On appeal of the trial court's ruling on *Batson/Wheeler*, the defense may challenge the prosecutor's justifications by showing there were other jurors, not members of the identified class, who were similarly situated but not struck by the prosecutor, and therefore the prosecutor's reasons are pretextual. So at the trial level, the prosecutor needs to be thinking about members of the jury that he or she did not strike, and if these jurors bear similarities to those who are the subject of the *Batson/Wheeler* motion, and address this disparity.

9. Intangible reasons for challenging a juror, such as saying the juror gave you a "bad vibe," is of no assistance on appeal. The reason is too vague to assess. Challenge yourself to articulate what you are relying on. Make as good a record as you can. For example, did you see a physical reaction that concerned you? Was there lack of eye contact? Was there something about the manner in which the juror was dressed? If possible, get the trial court to confirm that you are accurately stating what occurred.

10. The takeaway from the *Arellano* opinion to always keep in mind: The prosecutor must accurately represent what occurred during voir dire. This means taking good notes, or asking the court reporter to read back the portion of the prospective juror's answer on which you are relying when, as in *Arellano*, there is disagreement at to your accuracy. As *Arellano* emphasizes, when a prosecutor states reasons that are objectively contrary to the facts in the record, this discrepancy raises serious doubts about the genuineness of the prosecutor's reasons. In these instances, the justifications may be found (as in *Arellano*) to be a pretext for purposeful discrimination. John's

Brouhard's next suggestion is another way to help ensure the accuracy of the prosecutor's representations.

11. Once the prosecutor has made a complete record, a good practice is to ask the defense to respond to the prosecutor's justifications. Get permission from the judge of course. For example, "Your Honor, I would invite defense counsel to comment on what I've just said and point out any area where he disagrees. And if defense counsel believes there's a comparative analysis of a juror whom I did not strike, but who counsel believes is similarly situated, I will be happy to respond to that as well." John's suggestion of inviting response is applicable to any reason offered by the prosecutor.

12. Along those same lines, the prosecutor should encourage the trial judge to ask questions and make comments. Should the appellate court need to make a third stage *Batson/Wheeler* ruling, this kind of exchange between the prosecutor and the court will demonstrate that the court was attentive and evaluated the prosecutor's reasons.

13. Finally, after all the above has occurred, the prosecutor must get a ruling from the trial court that the prosecutor's reasons were genuine. Pay close attention to the language of the court. If the court states that the prosecutor provided race-neutral reasons for the strikes, this is <u>not</u> the standard of review at the *Batson/Wheeler* third stage. The trial court must say it has evaluated the prosecutor's reasons and found them genuine. A prosecutor wants to avoid a situation where the California appellate court or the Ninth Circuit determines the trial court failed to evaluate the prosecutor's reasons under the proper standard and therefore the reviewing court must engage in its own independent analysis. As the United States Supreme Court stated recently in *Davis v.* Ayala (2015) 135 S.Ct. 2187, "A trial judge [not an appellate justice] is best situated to evaluate both the words and the demeanor of jurors who are peremptorily challenged, as well as the credibility of the prosecutor who exercised those strikes."

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Week Of	Topic	Guest	30 min
June 13, 2015	*Foster v. Chatman*: U.S. Supreme Court issues a decision on *Batson* claims	Santa Clara County Deputy DA Jeff Rubin	Bias

This week's P&A discusses the United States Supreme Court decision in *Foster v. Chatman* (May 23, 2016) __ S.Ct. __ [2016 WL 2945233].

The defendant's 1987 trial, in which he was convicted and sentenced to death, was held four months after *Batson v. Kentucky* (1986) 476 U.S. 79 was decided. The prosecution used four of its nine peremptory challenges to strike all four black potential jurors. The Supreme Court concluded the prosecutors were motivated in part by race when they struck two of those potential jurors. "Two peremptory strikes on the basis of race are two more than the Constitution allows." (*Foster*, *supra*, at p.*18.)

At the conclusion of this P&A handout, we discuss the takeaways of the *Foster* decision, with guest Jeff Rubin offering his responses on two concerns that have been raised by this decision: a) Should prosecutors refrain from taking any notes on the race or ethnicity of jurors, and b) Can the defense demand to see prosecutors' jury selection notes.

I. General Background

a. The 79-year-old victim had been beaten, sexually assaulted, and strangled to death. Her home had been burglarized. The defendant Foster subsequently confessed to killing the victim, and the victim's possessions were recovered from Foster's home and his sister's home. (*Foster*, *supra*, at p.*4.)

b. The United States Supreme Court explained the jury selection process in this case: "In the first phase, each prospective juror completed a detailed questionnaire, which the prosecution and defense

reviewed. The trial court then conducted a juror-by-juror voir dire of approximately 90 prospective jurors. Throughout this process, both parties had the opportunity to question the prospective jurors and lodge challenges for cause. This first phase whittled the list down to 42 'qualified' prospective jurors. Five were black." (p.*4.)

c. In the second phase, known as the "striking of the jury," both parties had the opportunity to exercise peremptory strikes against the array of qualified jurors. Pursuant to Georgia law, the prosecution had ten such strikes; Foster twenty. In a procedure quite different from the California system, the process worked as follows: "The clerk of the court called the qualified prospective jurors one by one, and the State had the option to exercise one of its peremptory strikes. If the State declined to strike a particular prospective juror, Foster then had the opportunity to do so. If neither party exercised a peremptory strike, the prospective juror was selected for service. This second phase continued until 12 jurors had been accepted." (p.*4.)

d. On the morning when the second phase began, one of the five qualified black prospective jurors alerted the court that she had just learned that a close friend was related to Foster, and this juror was removed for cause. Four black prospective jurors were left. The prosecutors removed all four black prospective jurors. Foster's *Batson* challenge was denied. (p.*4.)

e. The jury convicted Foster. Following sentencing, Foster renewed his *Batson* claim in a motion for a new trial. After an evidentiary hearing, the motion was denied. The Georgia Supreme Court affirmed the conviction and the United States Supreme Court denied cert. Foster then sought a writ of habeas corpus in the superior court, again pressing his *Batson* claim. After considering the evidence, the state habeas court denied relief. The Georgia Supreme Court declined to issue the certificate of probable cause necessary under Georgia law for Foster to pursue an appeal, determining that Foster's claim had no arguable merit. The United States Supreme Court granted review, reversed the order of the Georgia Supreme Court and remanded for further proceedings. (pp.*3, 4.)

II. Information Obtained by the Defense for its *Batson* challenge

a. While the state habeas proceeding was pending, Foster filed a series of requests under the Georgia Open Records Act, seeking access to the prosecution's file from the 1987 trial. In response, the prosecution disclosed documents related to the jury selection at the trial. Over the prosecution's objections, the state habeas court admitted those documents into evidence. (p. *5.)

b. The United States Supreme Court described the documents obtained by Foster from the prosecution as follows:

(i) Four copies of the jury venire list: On each copy, the names of the black prospective jurors were highlighted in bright green. A legend in the upper right corner of the lists indicated that the green highlighting "represents Blacks." The letter "B" also appeared next to each black prospective juror's name. According to the testimony of Clayton Lundy, an investigator who assisted the prosecution

during jury selection, these highlighted venire lists were circulated in the district attorney's office during jury selection. That allowed "everybody in the office" -- approximately "10 to 12 people," including secretaries, investigators, and prosecutors -- to look at them, share information, and contribute thoughts on whether the prosecution should strike a particular juror. Lundy testified that the documents were returned to District Attorney Lanier before jury selection. (p.*5.) [Jeff Rubin points out in his P&A presentation that the case was tried in Floyd County, Georgia. Its largest city, Rome, had only 35,000 people as of the 2015 census, and the population was likely far smaller in 1987 when the case was tried. As Jeff explains, it was likely not unusual for people in the DA's Office to have personal knowledge about many of the jurors.]

(ii) A draft of an affidavit that had been prepared by Investigator Lundy "at [District Attorney] Lanier's request" for submission to the state trial court in response to Foster's motion for a new trial: The typed draft detailed Lundy's views on ten black prospective jurors. Under the name of one of those jurors, Lundy had written: "If it comes down to having to pick one of the black jurors, [this one] might be okay. This is solely my opinion. . . . Upon picking of the jury after listening to all of the jurors we had to pick, if we had to pick a black juror I recommend that [this juror] be one of the jurors." Lundy's text had been crossed out by hand; the version of the affidavit filed with the trial court did not contain the crossed-out language. Lundy testified that he "guessed" the redactions had been done by District Attorney Lanier. (p.*5.)

(ii) Three handwritten notes on three black prospective juror: The three jurors were identified as "B # 1," "B# 2," and "B# 3." Lundy testified that these were examples of the type of "notes that the team -- the State would take down during voir dire to help select the jury in Mr. Foster's case." (p.*6.)

(iv) A typed list of the qualified jurors remaining after voir dire: The list included "Ns" next to ten jurors' names, which Lundy told the state habeas court "signified the ten jurors that the State had strikes for during jury selection." Such an "N" appeared alongside the names of all five qualified black prospective jurors. The file also included a handwritten version of the same list, with the same markings. Lundy testified that he was unsure who had prepared or marked the two lists. (p.*6.)

(v) A handwritten document titled "definite NO's," listing six names: The first five names were those of the five qualified black prospective jurors. The prosecution conceded that either District Attorney Lanier or Assistant District Attorney Pullen compiled the list, which Lundy testified was "used for preparation in jury selection." (p.*6.)

(vi) A handwritten document titled "Church of Christ": A notation on the document read: "NO. No Black Church." (p.*6.)

(vii) The questionnaires that had been completed by several of the black prospective jurors: On each one, the juror's response indicating his or her race had been circled. (p.*6.)

c. District Attorney Lanier and Deputy District Attorney Pullman submitted affidavits stating that neither of them made the highlighted marks on the jury venire list. Neither prosecutor testified at the habeas proceeding. (p.*6.)

d. The United States Supreme Court had this to say about its review of the contents of the prosecution's file obtained by Foster under the Georgia Open Records Act: "The State concedes that the prosecutors themselves authored some documents (admitting that one of the two prosecutors must have written the list titled 'definite NO's), and Lundy's testimony strongly suggests that the prosecutors viewed others, (noting that the highlighted jury venire lists were returned to Lanier prior to jury selection). There are, however, genuine questions that remain about the provenance of other documents. Nothing in the record, for example, identifies the author of the notes that listed three black prospective jurors as 'B# 1,' 'B# 2,' and 'B# 3.' Such notes, then, are not necessarily attributable directly to the prosecutors themselves. The state habeas court was cognizant of those limitations, but nevertheless admitted the file into evidence, reserving 'a determination as to what weight the Court is going to put on any of them' in light of the objections urged by the State." (p.*9, internal record citations omitted.)

The Supreme Court stated further, "We agree with that approach. Despite questions about the background of particular notes, we cannot accept the State's invitation to blind ourselves to their existence. We have 'made it clear that in considering a *Batson* objection, or in reviewing a ruling claimed to be *Batson* error, all of the circumstances that bear upon the issue of racial animosity must be consulted.' (citation omitted.) As we have said in a related context, '[d]etermining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial . . . evidence of intent as may be available.' (citation omitted.) At a minimum, we are comfortable that all documents in the file were authored by someone in the district attorney's office. Any uncertainties concerning the documents are pertinent only as potential limits on their probative value." (p.*10.)

III. Foster's Challenge

The Supreme Court pointed out that Foster centered his claim on the strikes of two black prospective jurors. Jeff Rubin provided the following written summary of how the prosecutor's stated reasons for challenging these jurors were contradicted by the various prosecutorial notes obtained by the defense:[1]

"For example, the prosecutor in *Foster* told the trial court that one of the black jurors challenged was only struck when a peremptory challenge opened up due to an unexpected event resulting in the excusal of another juror for cause. The prosecutor explained that the juror was listed in his notes as "questionable" along with another white juror and then provided reasons why the "questionable" white juror was just a better fit in comparison. (*Id*. at p. *11.) However, the High Court found, based on the prosecution notes, that "the predicate for the State's account—that [the juror] was "listed" by the prosecution as "questionable," making that strike a last-minute race-neutral decision—was false." (*Id*. at p. *12.) Rather, the juror in question was one of ten listed jurors (the first five of whom listed were black) that the prosecutor intended to strike in advance who were definite "NO's." (*Ibid*.) "Only in the number six position did a white prospective juror appear, and she had informed the court during

[1] This summary is contained in Jeff Rubin's *Inquisitive Prosecutor's Guide* (IPG), June 10, 2016, "*Batson-Wheeler* Outline." Much thanks to Jeff for allowing us to include it.

voir dire that she could not "say positively" that she could impose the death penalty even if the evidence warranted it." (*Ibid*.) The court rejected the prosecution argument that this contradiction was explainable as the prosecutor misspeaking, noting that the statement regarding the questionability of the jurors were "not some off-the-cuff remark; it was an intricate story expounded by the prosecution in writing, laid out over three single-spaced pages in a brief filed with the trial court." (*Ibid*.) The court observed that several of prosecutor's reasons for why he chose to strike the black juror over the other questionable white juror were also contradicted by the record: although the prosecutor said he struck the black juror because "the defense did not ask her questions about" three different trial issues, the transcripts revealed that the defense asked her several questions on all three topics. (*Ibid*.) Moreover, other explanations given (such as the fact that the black juror was divorced, young, and arguably lied about not being familiar with the neighborhood because she went to high school near the neighborhood of the crime) while not explicitly contradicted by the record, are difficult to credit because the State accepted 3 of 4 white jurors who were divorced, accepted eight white jurors who were under 36 (the black juror was 34 years old), and a white juror who lived and worked near the neighborhood of the crime. (*Id*. at pp. *12,13.) The High Court highlighted that it was "not faced with a single isolated misrepresentation." (*Id.* at p. *13.)

Another reason the Supreme Court disbelieved the prosecutor's reasons were genuine was the fact the prosecutor's statement of the primary reasons for challenging the second black juror shifted over time. At the pre-trial *Batson* motion, the prosecutor initially provided eight reasons for challenging the juror but strongly indicated he was only concerned about was the fact the juror had an 18 years old son, which is about the same age as the defendant. But at the subsequent motion for a new trial, the prosecutor told that trial court his paramount concern was the second black juror's membership in the Church of Christ. The prosecutor claimed the "bottom line" was the juror's affiliation with the Church of Christ, a church which does not take a formal stand against the death penalty but whose members "are very, very reluctant to vote for the death penalty." (*Id*. at p.*14.)

The High Court recognized that the prosecutor may have simply misspoke in one of these two proceedings. However, the Court then noted that if that were the case, at least one of the two purportedly principal justifications for the strike would withstand closer scrutiny - and neither did. As to the claim of a concern about the age of the juror's son, the prosecutor did not accept the second black juror who stated the defendant's age would not be a factor in sentencing "whatsoever," but accepted white jurors with sons close in age to the defendant, including a juror who stated the defendant's age would "probably" be a factor in sentencing. (*Id*. at p. *14.) The prosecution sought to explain this away by noting that, unlike the white jurors, the son of the second black juror had been convicted of "basically the same thing that this defendant is charged with." (*Id*. at p. *15.) The High Court said equating the crime committed by the son of the second black juror (stealing hubcaps from a car in a mall parking lot five years earlier for which the son received a 12 month suspended sentence) with defendant's crime (a capital murder of a 79–year–old widow after a brutal sexual assault) was "nonsense" and so implausible that it actually supported the conclusion that the focus on the second juror's son was pretextual. (*Id*. at p. *15.) As to the claim the second black juror was struck because of his affiliation with the Church of Christ, the juror asserted no fewer than four times during voir dire that he could impose the death penalty and while the prosecution argued it challenged several white jurors on the same basis (i.e., for belonging to that same denomination), the record showed these

other jurors were actually challenged for cause for different reasons. In addition, the handwritten notes from the prosecution's file stated that the Church of Christ did not take a stand on the death penalty, leaving it to individual members but the notes then stated: "NO. NO Black Church." (*Id*. at p. *16.)

Many of the other justifications provided for challenging this second black juror "similarly come undone when subjected to scrutiny. The prosecution stated this juror "appeared to be confused and slow in responding to questions concerning his views on the death penalty" but the juror unequivocally voiced his willingness to impose the death penalty, the way the question was asked was confusing in general (according to the trial court) and a white juror who showed similar confusion served on the jury. (*Id*. at pp. *16-17.) The prosecution stated it struck the second black juror because his wife worked at a hospital that dealt a lot with mentally disturbed and mentally ill people but expressed no such concerns about white juror who had worked at the same hospital. (*Id*. at p. *17.) And the prosecution stated the second black juror was struck because the defense didn't ask the juror questions about the age of the defendant, his feelings about criminal responsibility involved in "insanity" or "publicity"; but such questions were asked by the defense. (*Ibid*.)

In sum, the difference in treatment of the black jurors and white jurors with similar characteristics, coupled with "the shifting explanations, the misrepresentations of the record, and the persistent focus on race in the prosecution's file" left the Foster Court "with the firm conviction that the strikes . . . were 'motivated in substantial part by discriminatory intent.'" (*Id*. at p. *18.)" [Inquisitive Prosecutor's Guide, pp. 94-96.]

IV. The Supreme Court's Conclusion

a. The Supreme Court sternly rebuked the prosecution in this *Foster* case. It noted that throughout all stages of the litigation, the State had strenuously objected that race was not a factor in its jury selection strategy. "Indeed, at times the State has been downright indignant." (p.*17.) But the Supreme Court stated that the contents of the prosecution's file "plainly belied" the State's claim that it exercised its strikes in a color-blind manner. (p.*18.)

b. The Supreme Court said the "sheer number of references to race" in the prosecutor's file was "arresting." Nevertheless, the State contended that its focus on black jurors did not indicate an attempt to exclude them from jury. The State claimed, instead, that since *Batson* had just come down only months before Foster's trial, the State was unsure of what sort of showing might be required of them and wanted to be prepared. Therefore, in the State's words, the State wanted to be " 'thoughtful and non-discriminatory in [its] consideration of black prospective jurors [and] to develop and maintain detailed information on those prospective jurors in order to properly defend against any suggestion that decisions regarding [its] selections were pretextual.' " (p.*18.)

c. The Supreme Court said the State's argument " 'reeks of afterthought,' " noting that this argument had "never before been made in the nearly 30–year history of this litigation: not in the trial court, not in the state habeas court, and not even in the State's brief in opposition to Foster's petition for certiorari." (p.*18.)

d. The Supreme Court, summarizing the focus on race in the prosecution's file, said this focus demonstrated a concerted effort to keep blacks off the jury. The information contained in the prosecution's file undercut the prosecution's claim that it was actively seeking a black juror.

V. Takeaways

1. As a result of the *Foster* decision, should prosecutors refrain from taking notes on the race or ethnicity of jurors?

As Jeff explains, such a conclusion would be an erroneous take-away from *Foster*. The *Foster* court did *not* dispute that identifying jurors by race would be proper if done for the purpose of responding to a *Batson-Wheeler* motion, either at the time the challenge is made, or years later at a *Batson-Wheeler* remand hearing. As explained above, the Supreme Court in *Foster* rejected the State's belated argument that the prosecutors' notes were made for such a legitimate purpose. It did not find credible this claim, which had never before been asserted. The Supreme Court instead concluded that the notes reflected a concerted effort to keep blacks off the jury.

In *People v. Lenix* (2008) 44 Cal.4th 602, the California Supreme Court emphasized that "post-*Batson*, recording the race of each juror is an important tool to be used by the court and counsel in mounting, refuting or analyzing a *Batson* challenge." (*Id*. at p. 617, fn. 2.)

Indeed, it is impossible to make a comparative juror analysis without a full record of the race, gender, ethnicity of each juror.

A suggestion from Jeff: As to the identification of the juror's race, gender or ethnicity, the prosecutor can make a notation in his or her file that such identifying factors were recorded solely for the purpose of responding to a *Batson-Wheeler* motion, or put that information on the record if necessary.

Additionally, the following comments are taken from Jeff's IPG:

Make notes of the reasons for choosing or not choosing each juror, including the juror's demeanor, attitude, and other intangibles - not just those who seem like they might be adverse to the prosecution. This is especially important when the judge allows limited or no voir dire and the notes will help the judge see beneath superficial similarities between jurors who were kept and those whom the prosecutor challenged. As mentioned in *Gonzalez v. Brown* (9th Cir. 2009) 585 F.3d 1202, "[i]t is obviously a desirable and correct practice for a prosecutor to have notes of reasons for a peremptory strike if a challenge is raised requiring a race-neutral explanation at step two of *Batson*." (*Brown* at p. 1209, fn. 5.) Keep such notes as they may save a prosecution down the road if a prosecutor needs to refresh his or her recollection if the prosecutor at a post-conviction proceeding. (See *Shirley v. Yates* (9th Cir. 2015) 807 F.3d 1090, 1105, fn. 16.) [IPG, p. 15.]

2. Does the *Foster* decision signal that the defense can demand to see the prosecution's jury selection notes?

Jeff advises that this concern is probably overblown. In California, the government is entitled to assert the work-product privilege to prevent the disclosure of these types of notes from public records request. Whether such an objection to the request was made in *Foster* and/or whether a court ruled that the privilege was overcome by the need for the notes is not discussed in the *Foster* opinion. But, in California, if the defense makes a public record request for such notes, the privilege should be asserted. California Government Code Section 6254, subdivision (k) exempts from release records the disclosure of which is prohibited by provisions of the Evidence Code relating to privilege.

Also, an argument should be raised that if it such records somehow constitute "discovery," the request is barred by Penal Code section 1054. However, hopefully, in most cases, the information in the notes will be beneficial to the prosecution – in other words – we would not want to assert the privilege and if we did assert the privilege, unless there was evidence supporting a claim of discriminatory prosecution, a court reviewing the documents in camera should not release the notes to the defense.

3. When a prosecutor mischaracterizes what the juror has said or proffers a reason for excusing a juror that is contradicted by the record or lacks support in the record, will these mistakes be used in assessing discriminatory intent?

As *Foster* demonstrates, reasons given by the prosecutor that are not borne out by the record or that are contradicted by the record can be viewed as evidence of pretext. On the other hand, just because a mistake has been made in recollecting what a juror said does not mean the attorney is being pretextual or acting with discriminatory purpose. See the Inquisitive Prosecutor Guide discussion at pages 91-100, for a fuller discussion of this issue, and citations to cases therein.

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Week Of	Topic	Guest	30 min
May 1, 2017	**Peremptory Challenges Against Gay Jurors/ Mixed-Motive Analysis**	**Danielle Hilton**	Ethics

People v. Douglas **(April 11, 2017) __ Cal.App.5th __ [2017 WL 1325849]**

Holding: The prosecutor's exercise of peremptory challenges against two "openly gay" prospective jurors violated *Batson/Wheeler*.

The Court of Appeal holds that when both discriminatory and nondiscriminatory reasons are given for exercising a peremptory strike, the trial court should engage in a "mixed-motive" analysis in which the challenged party must establish that the strike would have exercised on the basis of the neutral reason, even without considering the discriminatory basis.

I. Events in the Trial Court

A. Factual Background and Convictions

1. The defendant, Clifton Sharpe, and the defendant's former boyfriend, Martin Andrade, lived together. Andrade was working as a male escort or prostitute. Andrade arranged for Jeffrey B. to come to the house, where they engaged in sex. Although the defendant and Sharpe were home at the time, Jeffrey did not see them.

2. After Jeffrey left, Andrade told the defendant that Jeffrey had not paid the amount agreed upon for Andrade's services. Defendant and Sharpe left the house to find Jeffrey. Sharpe drove and the defendant sat in the front passenger seat. They caught up with Jeffrey, pulled alongside his car and the defendant yelled at Jeffrey, "Where's your money at?"

3. Jeffery drove off, with the defendant and Sharpe following. Jeffrey became concerned and ran several stoplights to get away. He got on the freeway, but the defendant Sharpe followed, and a high speed chase ensued. According to Jeffrey, the defendant pointed a gun at him through the passenger

window. Jeffrey, fearing for his safety, swerved his car into the defendant's car. Sharpe lost control and his car spun out. The defendant shot several times at Jeffrey and one bullet hit Jeffrey's car. Jeffrey's car was damaged, but he drove a short distance and then ran for help. Meanwhile, the defendant's car, now disabled on the freeway, was hit by two passing motorists.

4. When law enforcement arrived, the defendant was untruthful about the events, initially claiming that Jeffrey's car sideswiped his car for no reason. Police eventually recovered a semiautomatic handgun in the spare tire compartment of the defendant's car, and two spent casings were found on the freeway shoulder that matched the ammunition in the gun.

5. The jury convicted the defendant of various offenses, including attempted second-degree robbery, assault with a firearm and shooting at an occupied motor vehicle, and the jury found true various enhancements.

B. The Issue on Appeal

The defendant argued that the trial court erred in denying his *Batson/Wheeler* motion after the prosecutor peremptorily excused "two openly gay prospective jurors." (p.*1)

C. Jury Selection: The Two Prospective Jurors

1. During the voir dire, both the prosecutor and defense counsel asked questions about the panel's feelings or perceptions of homosexuality and sexual orientation since the defendant and several witnesses were gay. No one on the panel responded that they would have a problem deciding the case based on the facts and not on the ground of sexual orientation.

2. Based on answers given during voir dire, it became known that two men in the jury venire were openly gay. The opinion states that in discussing their general biographical information, prospective jurors D.J. and S.L. both explained that they lived with their male partners. (p.*2.)

3. D.J. had a doctorate degree from U.C. Berkeley in molecular biology, and was the director of a company specializing in growing microorganisms to prevent crop damage. He knew a public defender in Yolo County where the case was being tried. They were friends and he knew her "fairly well." In fact, he had lunch with her the day before this voir dire, and had recently attended her baby shower. He estimated he saw her about once a week, and that she had visited his home. The public defender had discussed her work with D.J., although she did not discuss specific details. She had told D.J. about different attorneys in the Public Defender's Office as well as the District Attorney's Office. She had never mentioned the prosecutor assigned to this case, however. (p.*2.)

4. D.J.'s public defender friend told him that "she would never go to the dark side," which D.J. explained meant that she would never work as a prosecutor. Following up on this statement, the prosecutor asked, since he was from the "dark side," whether D.J. believed the charges were somehow

contrived or that his ability to listen to the evidence and apply the law would be affected. D.J. responded that the term "dark side" was his friend's term, not his, and that he could make a decision based on the facts of the case.

5. D.J. said he disliked guns and strongly believed the Second Amendment should be revoked, but he could follow the judge's instructions. He said his only bias was against guns.

6. A short time later, the prosecutor exercised a peremptory challenge excusing D.J.

7. Following the questioning of other prospective jurors and more peremptory challenges from both the prosecution and the defense, S. L. was called into the jury box. S.L. graduated from high school and owned a travel agency. He had no prior jury experience and told the court there was "absolutely no reason why he could not be fair."

8. Defense counsel asked the new panel members generally whether anyone wanted to respond to one of his questions. No one answered, and defendant's counsel said he had no further questions for the group. Sharpe's counsel likewise had no questions.

9. The prosecutor asked S.L. whether he could listen to testimony from a witness who had visited a male prostitute and judge the witness's credibility fairly. S.L. responded that he "definitely" could listen to that testimony without prejudging the witness. S.L. also responded "no" when asked by the prosecutor whether he believed that persons engaged in illegal activities deserve what they get for engaging in such activities. He said "yes" when asked whether, if selected, he could share his opinion about the facts of the case, work with others in applying those facts to the law, and use his common sense.

10. A short time later, the prosecutor peremptorily excused S.L.

D. The *Batson/Wheeler* Motion

1. Following S.L.'s excusal, Sharpe's counsel made a *Batons/Wheeler* motion, arguing the prosecutor had systematically used his peremptory challenges to excuse the only two openly gay men in the jury venire. The defendant's counsel joined in the motion. While Sharpe's counsel acknowledged D.J.'s friendship with the attorney in the Yolo County Public Defender's Office, he argued there was no other reason why D.J. or S.L. were excused except for t being openly gay men.

2. Although the court was not sure whether sexuality was a proper subject for a *Wheeler* motion, it allowed the motion "out of an abundance of caution."

3. The prosecutor then gave his reasons for striking both jurors. He excused D.J. based on his close relationship with the Yolo County public defender, noting that D.J. gone to her baby shower recently and that she had discussed the personality traits of several members of the prosecutor's office with him. He also cited D.J.'s statement that the public defender considered district attorneys as "the dark

side." The prosecutor stated that he did not believe the People could get a "fair shake in the case" from D.J.

As to S.L., the prosecutor said he excused him based on his demeanor. The prosecutor said that when the defendant's counsel got up, the prosecutor saw that S.L. changed his body posture, leaned forward, and seemed to be more attentive. In contrast, the prosecutor said that when he spoke to S.L., S.L. seemed to be leaning back more and that his answers were very short and not descriptive. Neither the defendant's counsel nor Sharpe's counsel contradicted the prosecutor's description of S.L.'s demeanor.

4. The prosecutor then added another reason as to both D.J. and S.L. The prosecutor said that in a case like this, where the victim was "not out of the closet and actually was untruthful with the police about the extent of his relationship with a male prostitute," the prosecutor believed an openly gay person might hold a biased view of the testimony of such a witness because the witness was willing to lie about or not be open regarding his sexuality. Sharpe's counsel responded that the prosecutor's reasoning would allow him to "kick" any openly gay person.

5. The trial court denied the motion. As the opinion explains: "Citing D.J.'s close personal relationship with the public defender, his conversations with her about members of the District Attorneys' office as well as the Public Defender's office, and the 'dark side' comment, the court found the prosecutor was amply justified in excusing D.J. for nondiscriminatory reasons. The court also accepted the prosecutor's demeanor-based observations regarding S.L., stating: 'With regard to [S.L.], the observations of body posturing, his answers being short and not descriptive, I don't find that that would signify a wholesale basis on the prosecution's part of excluding those who are openly or even gay." (p.*4.) [*Notably, the trial court did not mention the prosecutor's reason listed in #4 above*.]

II. The Court of Appeal Analysis

A. Is Sexual Orientation a Group Classification for *Batson/Wheeler*?

1. The Court of Appeal said although the United States Supreme Court has yet to address whether *Batson* extends to sexual orientation, the Ninth Circuit held in *SmithKline Beecham Corp. v. Abbott Labs*. (9th Cir. 2014) 740 F.3d 471, that equal protection prohibits peremptory strikes based on sexual orientation under *Batson*. In doing so, the court relied heavily on the Supreme Court's decision in *United States v. Windsor* (2013) --U.S.-- [186 L.Ed.2d 808], which held that the Defense of Marriage Act's definition of marriage as excluding same sex partners violated equal protection and due process.

The Court of Appeal said that the Fourth District Court of Appeal, in *People v. Garcia* (2000) 77 Cal.App.4th 1269, 1275, 1280-1281, also found that excluding gay men and lesbians on the basis of group bias violates the California Constitution. The Court of Appeal stated: "Like *Garcia* and *SmithKline*, we, too, find that excluding prospective jurors solely on the basis of sexual orientation runs afoul of the constitutional principles espoused in *Batson/Wheeler*." (p.*5.)

B. Application of the *Batson/Wheeler* Analysis

1. Because the prosecutor gave reasons for his peremptory challenges, the Court of Appeal proceeded directly to the second and third steps of the *Batson/Wheeler* analysis to determine whether the trial court erred in concluding that the proffered reasons were nondiscriminatory.

2. The Court of Appeal stated: "We review a trial court's determination regarding the sufficiency of a prosecutor's justifications for exercising peremptory challenges with great restraint. (*People v. Thomas* (2011) 51 Cal.4th 449, 474.) The trial court's determination is a factual one, and as long as the trial court makes a sincere and reasoned effort to evaluate the nondiscriminatory justifications offered, its conclusions are entitled to deference on appeal when they are supported by substantial evidence. ([*People v*.] *Hamilton,* [2009] 45 Cal.4th [863], 900-901; *Thomas*, at p. 474.)" (p.*6.)

3. The Court of Appeal noted that the first two reasons given by the prosecutor – "that D.J. had a close personal relationship with a public defender that may have made him less sympathetic to the prosecution and that S.L. had an unfavorable demeanor -- are clearly permissible because they do not facially invoke group bias."

4. However, the Court of Appeal also said this: "The third reason--the assumption that openly gay men may harbor a bias or hostility towards a witness who was not openly gay--is troubling, however." (p.*6.)

5. In the Court of Appeal, the defendant argued that the prosecutor's "third reason" is "outrightly discriminatory against openly gay persons, and thus does not constitute a neutral explanation for excusing these two jurors." (p.*6.) However, the Court of Appeal said it was not entirely persuaded "that defendant has fully characterized the nature of the prosecutor's challenge. The record, we believe, can also be read to indicate a concern not about sexual orientation, but rather a concern about an underlying attitude or belief regarding truthfulness. The reason for the challenge, then, is arguably more nuanced than defendant contends." (*Ibid*.)

6. The Court of Appeal noted a distinction between a challenge based solely on a prospective juror's membership in a particular group and a challenge to the juror's attitude about the justice system and society which may be group r*elated*. The Court of Appeal gave examples. In *People v. Hamilton* (2009) 45 Cal.4th 863, the California Supreme Court upheld a peremptory challenge where the prosecutor said one of the reasons he struck the prospective Black juror was because the juror said he had considerable sympathy for Black people on trial and thought the justice system was unfair to Blacks. In finding substantial evidence supported the challenge, the court implicitly rejected the defendant's argument that the prosecutor's reason was based on race itself. (*Id*. at pp. 901-902.) The court found the juror's responses to several questions on the juror questionnaire form indicated that the prospective juror harbored a skepticism regarding the fair treatment of Blacks within the criminal justice system, thus supporting the prosecutor's concerns. (*Id.* at p. 902.) In other words, the juror's skepticism was race-related, but the prosecutor was not striking the jury because of his race.

The Court of Appeal also pointed to *People v. Martin* (1998) 64 Cal.App.4th 378, 385, in which the

prosecutor exercised a peremptory challenge against a juror who was a Jehovah's Witness. The court found the strike was based on the juror's relevant personal values and thus not improper, even though those views are founded in religious beliefs. The prosecutor struck the juror because, in his experience, members of that religion had a hard time with criminal trials as " 'they couldn't judge anybody at all.' " (*Id*. at p. 381.) The court in *Martin* found that "[t]he prosecutor's perception that the juror's religious views might render her uncomfortable with sitting in judgment of a fellow human being was a specific bias related to the individual juror's suitability for jury service" sufficient to support the strike. (*Id*. at p. 384.)

The third case cited by the Court of Appeal here is *Hernandez v. New York* (1991) 500 U.S. 352, 372, where the United States Supreme Court affirmed the trial court's factual finding that the prosecutor's reason for striking two Latino jurors was race-neutral and genuine. The prosecutor said he excused the jurors because their demeanor and specific responses caused him to doubt their ability to defer to the official translation of the Spanish-language testimony anticipated from various trial witnesses. (*Id.* at pp. 356-357. The Supreme Court in *Hernandez* said the fact that the prosecutor's reasoning might disproportionately affect prospective Latino jurors did not render the reason nonneutral. (*Id*. at pp. 361-362.)

7. The Court of Appeal here highlighted remarks made by Justice O'Connor in her concurring opinion in *Hernandez*. Justice O'Connor stated: "No matter how closely tied or significantly correlated to race the explanation for a peremptory strike may be, the strike does not implicate the Equal Protection Clause unless it is based on race. (*Hernandez,* at p. 375.) She also noted that *Batson* "does not require that the [prosecutor's] justification be unrelated to race. *Batson* requires only that the prosecutor's reason for striking a juror not *be* the juror's race." (*Ibid*.) (p.*8.)

8. The Court of Appeal here returned to its concern that the record could be read to indicate a concern not about sexual orientation, but rather a concern about an underlying attitude or belief regarding truthfulness. It noted the prosecutor was clearly concerned about how potential jurors would relate to or judge the credibility of someone who had lied about certain aspects of his life, as the prosecution's main witness had done. Defense counsel asked similar questions regarding lying and the different motivations for lying, showing that the topic of truthfulness was important to both sides. The Court of Appeal said, "The prosecutor could have genuinely been concerned with potential jurors' beliefs regarding a witness's purported truthfulness or, more appropriately, lack of truthfulness that was related to the facts presented by this specific case." (p.*7.)

The Court of Appeal also noted that the prosecutor asked prospective jurors whether "anybody [had] an automatic reaction where they would vote guilty or not guilty because some of the people involved in this case, either witnesses or people who are accused are homosexual." The Court of Appeal said, "One inference from this line of questioning is that the prosecutor sought to ferret out any biases *for or against* gay persons, and not that he was trying to oust all gay people from serving on the jury." (p.*7, italics in original.) The Court said this interpretation is especially likely since *all* the main witnesses in the case – prosecution and defense – were gay.

Finally, the Court of Appeal noted that the prosecutor asked the venire whether they believed a

person might be motivated to lie if he was not necessarily open about his sexuality. "This question probed whether jurors could understand the motivation to lie under such circumstances and thus was an attempt to discern whether they would be empathetic to Jeffrey, the prosecution's primary witness." (p.*8.)

C. Court of Appeal's Conclusion on *Batson/Wheeler*

1. Nevertheless, after this review, the Court of Appeal said, "As far as we can tell from the voir dire transcript, however, the trial court never actually considered the prosecutor's sexual orientation-related ground." (p.*8.) The Court of Appeal noted that although reviewing courts generally defer to a trial court's factual findings under *Batson/Wheeler*, because the trial court here did not address the reason, it could not simply presume the court found the reason to be neutral and nondiscriminatory.

2. Thus, the Court of Appeal said this: "Given the evidence in the record, and in light of the important constitutional rights at stake . . . , we err on the side of constitutional caution by finding that the prosecutor's third reason was sexual orientation-based as defendant argues." (p.*8.) In other words, the prosecutor's statement -- that he believed openly gay men might be biased against the victim in this case who had lied to the police about his visit to the gay prostitute and who was not living an openly gay lifestyle -- was a discriminatory based on sexual orientation, and thus a constitutionally impermissible reason for striking D.J. and S.L.

III. Evaluation of *Batson/Wheeler* Challenge Based on Permissible and Impermissible Reasons

1. However, the Court of Appeal said its conclusion as to the impermissible nature of the prosecutor's proffered reason on sexual orientation did not end its inquiry. "Instead it compels us to examine how to evaluate a *Batson/Wheeler* challenge when a party gives both permissible and impermissible reasons for exercising a strike." The Court of Appeal noted that although other jurisdictions have considered the issue, it was not aware of any published United States Supreme Court or California appellate court case deciding the matter. (p.*8.)

2. The defendant urged the adoption of the "per se" rule of unconstitutionality. As recounted in the opinion, the defendant explained this approach as "when a party offers multiple rationales for a peremptory strike, some of which are permissible and one of which is not, the taint from the impermissible reason mandates reversal and essentially moots any other neutral reason given." Under this approach, a discriminatory peremptory challenge cannot be saved because the proponent of the challenge puts forth a nondiscriminatory reason. (p.*9.)

3. Other jurisdictions, primarily federal, have adopted a "mixed-motive" or "dual motivation" analysis. As explained, " 'after the defendant makes a prima facie showing of discrimination, the state may raise the affirmative defense that the strike would have been exercised on the basis of the neutral reasons and in the absence of the discriminatory motive. If the state makes such a showing, the peremptory challenge survives constitutional scrutiny.' " (p.*9, quoting *Gattis v. Snyder* (3d. Del. (2002)

278 F.3d 222, 223.)

3. The Ninth Circuit has adopted a third approach known as the "substantial motivating factor" approach, i.e. "whether the prosecutor was 'motivated in substantial part by discriminatory intent.' " (p.*9, *quoting Cook v. LaMarque* (9th Cir.2010) 593 F.3d 810, 814-815.) The Ninth Circuit in *Cook* said to make this determination of whether race was a substantial motivating factor, the trier of fact must evaluate the "persuasiveness of the justifications offered by the prosecutor." *(Ibid*.)

4. The Court of Appeal here, relying on United States Supreme Court precedent as well as California case law in other contexts, concluded that a court should use the mixed-motive approach to determine the constitutionality of a peremptory strike whenever a party gives both neutral and nonneutral reasons for the strike. (p.*9.)

5. However, in an effort to apply the mixed-motive analysis here, the Court of Appeal said it was not apparent from the transcript whether the trial court ever considered the prosecutor's sexual orientation-based reason, "let alone concluded that it was a motivating but not determinative factor in the decision to strike D.J. and S.L." (p.*11.) Therefore, the Court of Appeal remanded the case for further proceedings so the trial court can apply a mixed-motive analysis to the peremptory challenges. (*Ibid*.)

6. The Court of Appeal stated on remand, "the prosecutor shall have the opportunity to show that he would have stricken both jurors even without considering their sexual orientation. [Citations.] If the prosecutor makes the necessary showing, the challenges stand. If not, the judgment must be reversed." (p.*11.)

7. Therefore the Court of Appeal conditionally reversed the judgment.

A Takeway: It is likely there will be further proceedings on this opinion. But in the meantime, prosecutors should make certain that the trial court rules on *all* the reasons the prosecutor gives for his or her peremptory challenges.

Suggestions for future shows, ideas on how to improve P&A, and other comments or criticisms should be directed to Mary Pat Dooley at (510) 272-6249, marypat.dooley@acgov.org. Technical questions should be addressed to Gilbert Leung 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.

POINTS AND AUTHORITIES

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Week Of	Topic	Guest	30 min
June 19, 2017	*People v. Gutierrez*: Supreme Court Reversal for *Batson/Wheeler* Error	Ben Beltramo	Bias

People v. Gutierrez (June 1, 2017) __ Cal 5th __ 2017 WL 2375542

In this three co-defendant trial, the prosecutor had used 10 of his 16 peremptory challenges against Hispanics when the defense made a *Batson/Wheeler* motion. The trial court denied the motion, and the Court of Appeal affirmed the convictions in all respects. The Supreme Court concluded the record did not support the trial court's denial of the *Batson/Wheeler* motion as to one prospective juror. Also, the Court of Appeal erred in refusing to conduct comparative juror analysis. Defendants' convictions were reversed.

This decision represents the first time in 16 years and the second time in over 25 years that the Supreme Court has found a *Batson/Wheeler* violation. This opinion is a unanimous decision written by Justice Cuellar, with a concurrence by Justice Liu. The opinion states: "This case offers us an opportunity to clarify the constitutionally required duties of California lawyers, trial judges, and appellate judges when a party has raised a claim of discriminatory bias in jury selection."

I. Background

A. Factual and Procedural Background

1. The three defendants (Gutierrez, Enriquez and Ramos) were all members of subsets of the Sureno gang, and the shooting was gang related. The victim got into an altercation with defendant Ramos and left. The other two defendants got into a vehicle and searched for the victim. When they saw him, Gutierrez got out and shot the victim multiple times. Also in the vehicle at the time of shooting was Gabriel Trevino, a member of the Sureno gang subset based in the city of Wasco. Trevino testified for the prosecution under a grant of immunity. (p.*1.)

2. Gutierrez and Enriquez were convicted of multiple offenses, including attempted premeditated murder. Ramos was convicted of active participation in a criminal street gang. (p.*2.)

3. The Court of Appeal affirmed the judgments in all respects.

B. The *Batson/Wheeler* Motion

1. All three defendants are Hispanic, and they joined in a *Batson/ Wheeler* motion toward the end of voir dire proceedings. The motion was brought on the basis of asserted discriminatory exclusion of Hispanic individuals. At the time the motion was made, the prosecution had exercised 16 peremptory strikes – 10 of them against individuals identified as Hispanic, either based on appearance or surname. The trial court observed that four of the prosecutor's challenges against Hispanics were consecutive. There were two Hispanic prospective jurors seated on the panel at the time of the motion. (p.*2.)

3. After finding that defendants had established a prima facie case under *Batson/Wheeler,* the court asked the prosecutor to explain the reasons for his challenges. The prosecutor did so for each removed Hispanic panelist. The court individually reviewed eight out of 10 proffered justifications. The court did not individually review the strikes of two challenged panelists. The court then made a "global finding" that the prosecutor's strikes were neutral and nonpretextual. The trial court denied defendants' motion. (p.*3.)

4. The prosecutor then struck three more panelists. Defendants individually exercised further peremptory challenges, with counsel for Gutierrez removing one prospective juror previously identified as Hispanic. The final jury included one Hispanic individual. (p.*3.)

C. *Batson/Wheeler* Standard

1. The exercise of even a single peremptory challenge solely on the basis of race or ethnicity offends the guarantee of equal protection of the laws under the Fourteenth Amendment to the federal Constitution. (*Batson v. Kentucky* (1986) 476 U.S. 79.) Such conduct also violates a defendant's right to trial by a jury drawn from a representative cross-section of the community under the California Constitution. (*People v. Wheeler* (1978) 22 Cal.3d 258, 276–277.) (p.*3.)

2. When a party raises a claim that an opponent has improperly discriminated in the exercise of peremptory challenges, the court and counsel must follow a three-step process. First, the party bringing the *Batson/Wheeler* motion must demonstrate a prima facie case by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose.

3. Second, if the court finds the moving party has established a prima facie case, the burden shifts to the opponent of the motion to give an adequate nondiscriminatory explanation for the challenges. The opponent of the motion must provide a "clear and reasonably specific explanation" of his "legitimate reasons" for exercising the challenges. (*Batson*, *supra*, 476 U.S. at p. 98, fn. 20.) In other words, the opponent must offer a neutral basis for the challenge, one not based on race, ethnicity, or similar grounds. The United States Supreme Court has said that unless "a discriminatory intent is

inherent in the prosecutor's explanation,' " the reason will be deemed neutral." (*Purkett v. Elem* (1995) 514 U.S. 765, 768.) (p.*4.)

4. Third, if the opponent provides the neutral explanation, the trial court must decide whether the moving party has proven purposeful discrimination. The moving party must show that it was " ' "more likely than not that the challenge was improperly motivated." ' " (p. *4.) This portion of the *Batson/Wheeler* analysis focuses on the subjective genuineness of the reason, not the objective reasonableness. (p.*4.)

4. To assess credibility at this third step, the court may consider among other factors, the prosecutor's demeanor, how reasonable or how improbable the explanations are, and whether the proffered rationale has some basis in accepted trial strategy. (*People v. Lenix* (2008) 44 Cal.4th 602, 613.) (p.*4.)

5. At this third stage, the presiding judge must make " 'a sincere and reasoned attempt' " to evaluate the prosecutor's justification, with consideration of the circumstances of the case known at that time, the judge's knowledge of trial techniques, and his or her observations of the prosecutor's examination of panelists and exercise of for-cause and peremptory challenges. Justifications that are " 'implausible or fantastic' " will probably be found to be pretexts for purposeful discrimination. The Supreme Court here notes that trial courts enjoy a relative advantage vis-à-vis reviewing courts because they can draw on their contemporaneous observations when assessing a prosecutor's credibility. (p.*4.)

6. On review, a trial court's conclusions are entitled to deference only when the trial court made a " 'sincere and reasoned effort to evaluate the nondiscriminatory justifications offered.' " (p.*4.)

II. Justification for the Strikes

A. Overall

1. The prosecutor provided justifications for his strikes of the 10 Hispanic individuals. As to four of these prospective jurors, the prosecutor cited as at least one reason the fact that they were each either previously affiliated with gangs or had family members who were at some point involved in gang activity.

2. The prosecutor struck two other prospective jurors because they described negative experiences with law enforcement.

3. The other prospective juror was removed because she testified about " 'living in an area with a lot of gang activity," which she had not specifically seen,' " and her brother had been accused of a crime, and she previously served as a juror in a criminal case that resulted in a hung jury. (p.*5.)

B. Three Prospective Jurors

1. The Supreme Court here identified errors by the trial court in evaluating the prosecutor's strikes of the three remaining Hispanic prospective jurors. However, it relied for its reversal on the explanations offered by the prosecutor as to only one of these three prospective jurors, Number 2723471 [discussed below]. The Court's conclusion made it unnecessary to determine whether the trial court erred in denying the *Batson/Wheeler* motion as to those other two Hispanic panelists. As the Supreme Court stated here, "Exclusion of even one prospective juror for reasons impermissible under *Batson* and *Wheeler* constitutes structural error, requiring reversal." (*Id*. at p.*3.)

2. Justice Liu in his concurring opinion would have held that all three strikes provided a basis for reversal. (p.*16.)

C. Prospective Juror No. 2723471

1. The following information was established through the trial court's voir dire. Prospective Juror No. 2723471 (hereafter Juror 2723471) was a teacher from the City of Wasco. She was divorced and had no children. Her former husband was a correctional officer. She had other relatives in law enforcement positions, including an uncle who worked for California Highway Patrol. Neither she nor anyone close to her had any connections to gangs. (*Id*. at p.*5.)

2. The Supreme Court's opinion includes the "entirety" of the prosecutor's colloquy with Juror 2723471:

> "[The prosecutor]: And starting with Ms. 2723471, are you [aware of] gangs that are active in the Wasco area?
>
> "[Juror 2723471]: No.
>
> "[The prosecutor]: Do you live in the Wasco area?
>
> "[Juror 2723471]: Yes.
>
> "[The prosecutor]: In Wasco itself?
>
> "[Juror 2723471]: Yes, I live in Wasco." (*Id*. at p.*5.)

3. As described in the Supreme Court's opinion, the prosecutor said that his decision to challenge Juror 2723471 was " 'a tough one.' " The prosecutor stated his reason for the strike: " 'She's from Wasco and she said that she's not aware of any gang activity going on in Wasco, and I was unsatisfied by some of her other answers as to how she would respond when she hears that Gabriel Trevino is from a criminal street gang, a subset of the Surenos out of Wasco.' " However, the prosecutor did not specify which of her "other answers" caused him dissatisfaction. Nor did the People on appeal identify any of her other responses that bore on her possible reaction to Trevino's testimony. The Supreme

Court stated, "We have found no other answers in the record to support the People's position on this point." (*Id*. at p.*5.)

4. In denying the *Batson/Wheeler* challenge as to Juror 2723471, the trial court said she was excused "as a result of the Wasco issue and also lack of life experience." However, the trial court was partially mistaken: the prosecutor had not given "lack of life experience" as a reason for striking Juror 723471. [Nor did the prosecutor correct the trial court's error.] As the Supreme Court concludes, "Accordingly, the sole basis relied upon by the prosecutor for striking this particular panelist was the 'Wasco issue.' " (*Id*. at p.*6.)

III. The Supreme Court's Analysis re Claim of *Batson/Wheeler* Error

1. The Supreme Court found the reason offered for the challenge to Juror 2723471 -- her unawareness of gang activity in Wasco -- to be a facially neutral explanation, and therefore proceeded to the third step of the *Batson/Wheeler* framework, the credibility of the explanations offered.

2. The Supreme Court emphasized that "credibility may be gauged by examining factors including but not limited to ' "the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy." ' " (*Id*. at p. *10.)

3. The trial court expressly acknowledged that the prosecutor's justification for striking Juror 2723471 was "the Wasco" issue. The trial court made a global finding that " 'in looking at the totality of the circumstances and judging the reasons given by [the prosecutor], I don't find his reasons to be a pretext in this particular case, and [the prosecutor] does appear consistent.' " (*Id*. at p.*10.) However, the Supreme Court observed that as to the "Wasco issue," it was relied on by the prosecutor for the only two panelists who lived in Wasco, and both were Hispanic. As to that other panelist, however, additional reasons existed for the prosecutor's challenge, including that she had an uncle who was a gang member. The Supreme Court noted there no comparison between Hispanic and non-Hispanic panelists regarding the prosecutor's questioning about Wasco, so being "consistent" in questioning the two Hispanic panelists has little probative value on whether the Wasco explanation was credible. (p.*10.)

4. The Supreme Court then turned to the nature of the explanation itself. As the Supreme Court stated: "The prosecutor's articulated basis for striking Juror 2723471 was derived solely from three responses to yes/no questions, which established that this panelist lived in Wasco and was not aware of gangs active in the Wasco area. The prosecutor may have conveyed the gist of his concern—that he was uncertain how a prospective juror's unawareness of Wasco gang activity might bear on her response to Trevino—but his explanation left some lucidity to be desired." (*Id.* at p. 10.)

5. The Supreme Court then turned to the explanation offered by the People on appeal: The People argued that Trevino was an " 'important witness' " for the prosecution and thus the prosecutor could

have reasonably anticipated that Trevino would testify regarding his own gang affiliation and criminal activity in Wasco. The People argued, as a result, " 'The fact that a potential juror is unaware of the activity of gangs in Wasco could cause that juror to be biased against Trevino who would testify to the contrary.' " But the Supreme Court said that given the record of questioning of Juror 2723471, "such a deduction is tenuous." The Supreme Court said it was not evident why a panelist's unawareness of gang activity in Wasco would indicate a bias against a member of a gang based in Wasco. The Court said it's possible that a juror unaware of gang activity in Wasco would be uncomfortable with, and skeptical of, a witness who claimed to be a member of a gang based in her neighborhood, "but such a conclusion does not strike us an obvious or natural inference drawn from this panelist's responses." (*Id.* at p.*10.)

6. The Supreme Court went on to say: "It is conceivable--even though the People do not present this argument--that the prosecutor genuinely believed gang activity to be so rampant in Wasco that this panelist must have been either untruthful or uninformed in denying her awareness of Wasco gang activity. If this had been the case, such reasoning should have been articulated by the prosecutor. '[A] prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives. A *Batso*n challenge does not call for a mere exercise in thinking up any rational basis.' (See *Miller-El-Dretke* (2005) 545 U.S. 231, 252.)" (Id. at p.*11.)

7. The Supreme Court described the shortcomings in the prosecutor's questioning of this panelist, and how they impacted on the credibility of his explanation: "The questioning of Juror 2723471 provides little aid in elucidating the reasoning for this strike. The prosecutor asked no follow-up questions to this prospective juror, certainly none about how she would react if she heard that a member of a Wasco gang would testify in this case. No further support for the People's argument is found in this panelist's dialogue with either the court or any of the defense attorneys. The prosecutor's swift termination of individual voir dire of this panelist—even though her responses did not evince a manifest predisposition to disbelieve or dislike Trevino—at least raises a question as to how interested he was in meaningfully examining whether her unawareness of gang activity in Wasco might cause her to be biased against the witness for the People's case." (*Id*. at p. *11.)

8. Another factor weighing against the credibility of the prosecutor's explanation was considered by the Court: "In the course of responding to voir dire questioning by the court, Juror 2723471 disclosed that she had relatives in corrections and law enforcement positions. Her former husband was a correctional officer, and she had other relatives in law enforcement positions, including an uncle who worked for the California Highway Patrol. The record demonstrates that this prosecutor viewed familial relationships with law enforcement members as a generally desirable characteristic. The prosecutor explained that he considered his strikes of [two other Hispanic panelists] to be a "tough call" because of their relatives in law enforcement. The prosecutor's statements, considered in context, reveal that he viewed familial ties to law enforcement as an offsetting force against characteristics he perceived as negative. The fact that the prosecutor struck Juror 2723471 despite her law enforcement ties—though he expressed his tendency to favor this characteristic with regard to other panelists—is a relevant circumstance in assessing the credibility of the prosecutor's reasoning." (*Id*. at p. *11.)

9. However, the Supreme Court did note a fact weighing against a finding of discriminatory intent: the prosecutor passed on challenges five times while Juror 2723471 remained on the panel. It noted that she lasted through one full panel round and was the first person struck during the next panel round. "These passes may tend to indicate the prosecutors good faith. [Citation.] Indeed, we have found that passes while a specific panelist remains on the panel strongly suggest that race was not a motive in challenged strikes. [Citation] We bear in mind this circumstance, which the trial court recognized. But neither that acknowledgement nor the prosecutor's passes themselves wholly preclude a finding that a panelist is struck on account of bias against an identifiable group, when such a strike occurs *eventually* instead of *immediately.* (*Id*. at p. *12, italics added.)

10. The Supreme Court next moved to the critical point it makes in this opinion, that unless the reason for the challenge is "self-evident," the prosecutor must explain how the answers of the panelist support the prosecutor's challenge. The Supreme Court here states: "Some neutral reasons for a challenge are sufficiently self-evident, if honestly held, such that they require little additional explication. One example: excusing a panelist because she has previously been victim to the same crime at issue in the case to be tried. Moreover, a peremptory challenge may be based on a broad range of factors indicative of juror partiality, even those which are 'apparently trivial' or 'highly speculative.' [Citation]. Yet when it is not self-evident why an advocate would harbor a concern, the question of whether a neutral explanation is genuine and made in good faith becomes more pressing. That is particularly so when, as here, an advocate uses a considerable number of challenges to exclude a large proportion of members of a cognizable group. Out of 16 strikes exercised by the prosecution up to that point, 10 were used to remove jurors who shared the same ethnicity as defendants. Four of these challenges against Hispanics were consecutive. And when the motion was made, 10 out of 12 Hispanic panelists (83 percent) who had entered the jury box were peremptorily struck by the prosecution." (*Id*. at p.*12.)

11. The Supreme Court emphasizes that advocates "have a role to play in building a record worthy of deference." As to advocates, the Supreme Court states: "Advocates should bear in mind the record created by their own questioning—where the court and opposing counsel have failed to elicit panelist responses in a certain area of interest—as well as their explanations for peremptory challenges. In this instance, it is difficult to lend credence to the prosecutor's expressed concern about 'how [Juror 2723471] would respond when she hears that Gabriel Trevino is from a criminal street gang' when his brief questioning of this panelist failed to shed light on the nature of his apprehension or otherwise indicate his interest in meaningfully examining the topic, and the matter was far from self-evident." (*Id*. at p.*12.)

12. As to courts, the Supreme Court said, "The court, too, has its own obligations under the progeny of *Batson* and *Wheeler*. '[W]hen the prosecutor's stated reasons are either unsupported by the record, inherently implausible, or both, more is required of the trial court than a global finding that the reasons appear sufficient.' " (*Id*. at p. *12.)

13. The Supreme Court found the trial court's ruling to be inadequate: "The court here acknowledged the 'Wasco issue' justification and deemed it neutral and nonpretextual by blanket

statements. It never clarified why it accepted the Wasco reason as an honest one. Another tendered basis for this strike, the reference to the prospective juror's 'other answers' as they related to an expectation of her reaction to Trevino, was not borne out by the record—but the court did not reject this reason or ask the prosecutor to explain further. In addition, the court improperly cited a justification not offered by the prosecutor: a lack of life experience. On this record, we are unable to conclude that the trial court made 'a sincere and reasoned attempt to evaluate the prosecutor's explanation" regarding the strike of Juror 2723471. The court may have made a *sincere* attempt to assess the Wasco rationale, but it never explained why it decided this justification was not a pretext for a discriminatory purpose. Because the prosecutor's reason for this strike was not self-evident and the record is void of any explication from the court, we cannot find under these circumstances that the court made a *reasoned* attempt to determine whether the justification was a credible one." (*Id*. at p. *12, italics in original.)

14. The Supreme Court was also critical of mistakes made both by the trial court and the prosecutor in describing events during voir dire and recounting statements of panelists. The Supreme Court noted that as to one prospective Hispanic juror, the prosecutor, when called upon at the time of the *Batson/Wheeler* motion to explain his challenge, could not initially recall why he struck this panelist. "Later, consulting a single note," he offered an explanation to the trial court. (*Id*. at p.*6.) [Note: the Supreme Court at another point in the opinion states that voir dire lasted "from Monday May 7 through part of Wednesday May 16," and involved questioning by three defense attorneys, the prosecutor, and the court.) (p.*13.)

15. The Supreme Court makes this statement: "[W]e can only perform a meaningful review when the record contains evidence of solid value. Providing an adequate record may prove onerous, particularly when jury selection extends over several days and involves a significant number of potential jurors. It can be difficult to keep all the panelists and their responses straight. Nevertheless, the obligation to avoid discrimination in jury selection is a pivotal one. It is the duty of courts and counsel to ensure the record is both accurate and adequately developed." (*Id*. at p.*13.)

IV. The Court of Appeal

1. The Court of Appeal also ran afoul of the Supreme Court. On direct appeal, the defendants urged the Court of Appeal to engage in comparative juror analysis, but it declined. (*Id*. at p.*14.)

2. The Supreme Court stated: "Defendants argue that the Court of Appeal erred in refusing to undertake comparative juror analysis. We agree. By avoiding comparative juror analysis in this context, the Court of Appeal went against the grain of established holdings from both our court and the high court, which recognize comparisons between panelists who are challenged and those who are not to be valuable tools in determining the credibility of explanations." (*Id*. at p.* 14.)

V. The Supreme Court's Final Words: To the Courts

Although the Supreme Court is critical of prosecutors who fail to make an adequate record during voir dire, the Supreme Court reserves its strongest words for the trial and appellate courts: "Counsel have a role to play in ensuring that the record of proceedings sufficiently supports neutral, credible justifications for strikes of prospective jurors. But the ultimate responsibility of safeguarding the integrity of jury selection and our justice system rests with courts. [Citation.] For at least one excluded panelist in this case, the record does not permit us to find that the trial court met its obligations to make ' "a sincere and reasoned attempt to evaluate the prosecutor's explanation" ' and 'clearly express its findings.' [Citation.] In light of the voir dire record, we conclude that the trial court erred in denying defendants' *Batson/Wheeler* motion. In addition, the Court of Appeal erred in refusing to conduct comparative juror analysis. We reverse the judgment of the Court of Appeal and remand for further proceedings consistent with this opinion." (p.*15.)

VI. Takeaways

Deputy District Attorney Ben Beltramo offers some takeaway points based on the analysis by the Supreme Court in this opinion.

A. Make a Thorough and Complete Record

1. Two quotes from this *Gutierrez* decision are particularly important on this point:

a. "When they assess the viability of neutral reasons advanced to justify a peremptory challenge**,** both a trial court and reviewing court must examine *only those reasons actually expressed*." (*Gutierrez*, italics added.)

b. " 'A prosecutor has to state his reasons as best he can *and stand or fall on the plausibility of the reasons he gives*.' " (*Gutierrez*, quoting *Miller El v. Dtretke* (2005) 545 U.S. 231, 252.)

2. There is no going back

a. The prosecutor's credibility rises and falls on the explanation given for the peremptory challenges.

b. Prosecutors need to develop a thorough, detailed and complete record as to why the peremptory challenge is being exercised.

c. Prosecutors cannot go back and supplement the record once the trial court's ruling is made. The prosecutor is left with the record he or she developed, both in terms of the voir dire questioning and the explanations the prosecutor gave at the hearing on the *Batson/Wheeler* motion.

d. The trial court cannot go back and fill in the gaps of the prosecutor's logic or reasons, nor can the judge (as the judge did here) offer reasons that the prosecutor did not proffer.

B. How to Make a Thorough and Complete Record

There are two important components to making the record: taking notes and thorough questioning

1. Take detailed and extensive notes

a. Voir dire is an exhausting process. It's the first time in front of the panel, and so it's the first impression the prosecutor creates at trial. The prosecutor is asking questions, listening, evaluating answers and paying attention to the panelist's demeanor. But also the prosecutor has to be conscious of the court, which sometimes wants to hurry the process along, and has to be conscious of the panel that has heard the same questions being asked over and over and may be getting impatient with the process. All of this is occurring at the same time that the prosecutor has to be aware of the record he or she is creating.

b. Although all of this is taxing, note-taking as to what the jurors are saying is imperative.

2. Notes Should Include:

a. Answers that concern you – when you're on your feet asking questions, listen carefully to the answer, stop and write verbatim the answer that concerns you. A *Batson/Wheeler* motion could be made occur hours or days after the questioning so it is important to capture the panelist's words as soon as possible

b. Demeanor that concerns you – how the panelist is responding physically to you, how open the panelist is to you, such things as facial expressions, eye contact, body language, tone of voice

c. Your thoughts as to *why* these things concern you

C. Responding to the *Baston/Wheeler* Challenge

1. Take a deep breath

2. Ask the court for a break

a. You are going to be asked to explain reasons based on answers given by the panelist earlier in the day or perhaps days before.

b. You may have a lot to organize. You will want to review your notes, review the questionnaire, organize your thoughts, look at the composition of the jury that exists for comparative analysis purposes.

c. The court might want you to state your reasons immediately, but it is a fair to advise the court that you intend to make a thorough and detailed record of all your reasons for excusing the challenged panelists. Because this will take time, ask the court's permission for time to organize your notes and your thoughts so that you can present your reasons for the challenges in a concise manner.

3. The prosecutor must provide legitimate and genuine reasons for the challenge. Answer the question that is posed by the motion: why did you strike this panelist? No discussion of the good v. bad points of the panelist is demanded. The focus is on the reasons for the challenge. Explain in direct fashion the concerns you had and why you had them.

4. Explain the reason! In *Gutierrez*, the prosecutor's three questions to Juror 2723471 established that the panelist lived in Wasco and was not aware of gang activity in the Wasco area. The Supreme Court said "the prosecutor may have conveyed the gist of his concern – that he was uncertain how a prospective juror's unawareness of Wasco gang activity might bear on her response to Trevino." But the prosecutor never explained *how* he thought it might bear on her response. The prosecutor did not offer any explanation that supported a reason to challenge the juror. Explain *why* the answer of the panelist concerns you.

5. An example of when this explanation is necessary often occurs with regard to the occupation of the panelist. If the particular occupation concerns you and is a basis for your challenge, explain to the court the reason for your concern.

6. There may be specific facts about your case that support a reason for striking a panelist, perhaps the particular witnesses who are going to testify or the nature of the evidence. You must be able to articulate this concern to the trial judge.

7. The panelist's demeanor can support a challenge. You should describe thoroughly those aspects of the demeanor. Invite the court to corroborate your observations based on the court's own awareness of what you described.

8. Look at your panel that is seated and discuss any comparisons that exist. Look for any prospective juror outside the protected group who a reviewing court could say was similarly situated, but whom you did not challenge. Be able to explain why you chose to keep that panelist and how he or she is different from the panelist you did challenge.

9. Much of our evaluation of prospective jurors is based on a "total package." It's not just about what the person says, but how the person says it, the manner in which the person says it, how the person responds to you. Can you talk to this person and will he or she be receptive to your point of view?

D. <u>Assisting the Trial Court in Making the Record</u>

1. As the Supreme Court makes clear in *Gutierrez*, the trial court must meet its obligation to make a

sincere and reasoned review of the prosecutor's explanations. Any flaws in the trial court's assessment will weigh against a "reasoned' review and may result in a reversal.

2. Be certain that the trial court addresses each of the panelists in the protected group whom you challenged. In *Gutierrez*, the trial court failed to address two of the prosecutor's challenges and made a "global" finding of nondiscrimination. As the Supreme Court concluded, this assessment was insufficient. If such a situation occurs, the prosecutor must ask the court to address all the challenges that you exercised.

3. When the trial court is making the record by assessing the reasons you gave for your challenges, make sure the court addresses only the reasons you actually gave. In *Gutierrez*, the court attributed to the prosecutor a reason that prosecutor never offered. Yet the trial court's determination that the prosecutor's explanations were credible (and thus satisfying the third stage of *Batson/Wheeler*) was based in a part on this reason. Thus, it is incumbent on the prosecutor to correct any mistakes made by the court.

A Final Thought from the P&A author: the Advocate's View

As advocates, we are mindful of the trial court's desire to avoid belabored voir dire and to move the trial forward. But the California Supreme Court states expressly in *Gutierrez* that advocates *must* develop an adequate record containing evidence of solid value. As *Gutierrez* illustrates, doing so often necessitates follow-up questions in order to understand a juror's response or to assess the impact of that response on the anticipated evidence. Particularly when juror questionnaires are not used, advocates (including those in misdemeanor cases) need a reasonable opportunity to conduct this kind of voir dire in order to meet their obligation under *Gutierrez*.

The Supreme Court here emphasizes that an advocate's questioning of the challenged panelist must "aid in elucidating the reasoning for the strike." Since a trial court is required to make a sincere and reasoned attempt to evaluate the advocate's explanation, the trial court should allow the advocate to ask fully those questions on which that explanation will be based. Justice Liu quotes the United States Supreme Court that " 'a *Batson* claim is, at bottom, a credibility determination.' " In view of such a significant determination, much is at stake for the advocate.

Suggestions for future shows, ideas on how to improve P&A, and other comments or criticisms should be directed to P&A author Mary Pat Dooley at (510) 272-6249, marypat.dooley@acgov.org. Technical questions should be addressed to Gilbert Leung 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.

If you would like to be removed from our email list, contact Mishel Jackson at Mishel.Jackson@acgov.org

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	General
June 20, 2016	Can Defense Get DA Jury Selection Notes; Two Proposition 47 Cases	Micheal O'Connor	30 min

● **This week's P&A expands on a topic that arose in last week's P&A discussion of the United States Supreme Court decision in *Foster v. Chatman* (May 23, 2016) __ S.Ct. __ [2016 WL 2945233], in which the defense obtained the prosecution's jury selection notes pursuant to a Georgia Public Records Act request. Question: Can the defense obtain the prosecution's jury selection notes in California?**

Assistant District Attorney Micheal O'Connor, who is the custodian of records for the Alameda County District Attorney's Office, discusses the manner in which our notes can be *requested* (not necessarily obtained), i.e., by a California Public Records Act request and by civil subpoenas in state and federal district court.

The handout includes comments made by Mike in the video as to both methods, and includes an outline prepared by Mike entitled "Requests for Government Documents Pursuant to Civil Discovery and the California Public Records Act."

● **This week's P&A also includes a discussion of two recent published Proposition 47 cases, *People v. Hall*, concerning a denial of resentencing where it would pose an unreasonable risk of danger to public safety, and *People v. Montgomery*, interpreting the timing of a "prior conviction" prohibiting redesignation of a felony to a misdemeanor.**

I. Disclosure of DA's Notes

Mike O'Connor's discussion of the means by which prosecution notes can be requested:

A. California Public Records Act, Government Code section 6250

1. Any document in possession of a public agency is ordinarily a public record and can be obtained by a public records request.

2. There are exemptions, however. The most important for prosecutors is Government Code section 6254(f), the investigative exemption. Under this exemption, documents found in the prosecution's criminal investigatory files are exempt from disclosure, and thus the public cannot receive these documents with a Public Records Act request.

3. The other exemption under the Public Records Act is Government Code section 6254(k) which prevents the disclosure of privileged documents. [The concept of "privilege" is explained below in the section on subpoenas.]

4. So ordinarily, under the Public Records Act, if a member of the public (for example, a defense attorney or defendant or journalist) makes a request to the prosecution for criminal records including jury selection notes or other notes in prosecution files, the request is declined because those records are exempted from disclosure. That is usually the end of the story.

5. But keep in mind that certain things can occur that will change the outcome: These requests can be handled by city attorneys, county counsel, or the custodian of records within the prosecution office. The ordinary response to a request for these documents is to be conservative and give over as much as possible because the requesting party can sue if it is does not receive the records. Even if the prosecution acts in good faith in refusing to give over the records, the risk is that a reviewing court may disagree that the documents are exempt. If this occurs, "[t]he court shall award costs and reasonable attorneys fees to the plaintiff. . . ." (Govt. Code, § 6259.) These fees can be considerable. Therefore, the people reviewing these documents are often inclined to turn them over to avoid a lawsuit.

B. Subpoenas

1. Subpoenas can be for state or federal court and can be civil or criminal. The discussion here is limited to civil subpoenas.

2. Civil subpoenas can come up in two ways:
   a.) civil rights actions against the District Attorney or police;
   b.) a federal or state habeas corpus action which may involve the issuance of subpoenas for prosecution documents.

3. For subpoenas, unlike the Public Records Act, there is no exemption for investigations, so prosecutors cannot assert that the documents are precluded from disclosure because they are part of the prosecution's investigative files.

4. In order to object to the disclosure of these documents pursuant to subpoena, there must be a privilege. If the documents are not privileged, the subpoenaed documents must be given over.

5. Per case law, the government has only one privilege: Evidence Code section 1040. Section 1040 states in part that a public entity has a privilege to refuse to disclose official information.

6. But Evidence Code section 1040 does not operate by itself; it operates in conjunction with other privileges that the government may hold. So the prosecution must assert both section 1040 and the underlying privileges which the prosecution is asking to be considered.

7. In the context of jury investigative notes and jury selection notes, these underlying privileges are most often work product privilege and the deliberative process privilege.

8. Work product privilege protects the impressions, conclusions, and opinions of the attorney reflecting tactical and strategic thinking. Usually, work product does not have to be turned over.

9. The deliberative process privilege protects the processes by which a given decision was reached, for example, the thought process in deciding how to charge a case.

10. Private litigants might have an absolute privilege, e.g. the attorney-client privilege is an absolute privilege that a defendant can assert. By contrast, the government does not have an absolute privilege. Because the government's privilege arises under Evidence Code section 1040, it is always subject to the weighing process.

11. Evidence Code section 1040 provides that documents can be withheld following an in-camera review by a court, where the court concludes that the public interest in preserving the confidentiality of the documents outweighs the necessity for disclosure. Thus, any time the prosecution asserts a privilege when documents are being sought by subpoena, the assertion of privilege is subject to judicial review.

12. Mike makes this observation: As to jury selection notes, if the court looks at the documents and determines that those documents might reflect an improper motive in jury selection, it his highly likely the court will conclude that such documents must be disclosed because the policy in favor of jury selection outweighs the prosecution's interest in protecting its strategic thought process.

13: Mike's conclusion: By asserting the privilege, the prosecution can make its notes disclosure-resistant, but cannot make them disclosure-proof.

C. Some Suggestions from Mike on DA Notes

1. After the prosecutor finishes his or her case and is packing up the file, determine which case notes in the file are important and need to be kept. The prosecution has two interests: a) the possibility of a retrial after reversal, and b) protecting the case from reversal during appellate or habeas review.

2. So take a look at the notes in your file: do the notes serve either of the above interests? If the notes are unimportant, they do not need to be preserved.

3. Regarding important notes: Jury selection notes can be very important, so they should be saved. Keep in mind that jury selection challenges may come up years later after the trial is over, even when the issue was not raised in the trial court perhaps because of incompetence of counsel. The trial prosecutor, or another prosecutor in the office, may be called upon years later to explain and defend why the particular juror was dismissed.

4. Knowing that these notes are being kept, the trial prosecutor should make them readily understandable. If the trial prosecutor uses a shorthand method to identify jurors or the reasons for their dismissal, he or she should provide a key or explanation for the shorthand before closing up the file. As Mike cautions, a judge looking at these notes years later may not understand the shorthand, and thus may improperly impute a biased motive for the dismissal.

5. Make your notes in a professional manner. Per Mike, when you're writing down your notes, imagine you have a federal judge looking over your shoulder. A federal judge may in fact be looking at them at some future point.

Requests for Government Documents Pursuant to
Civil Discovery and the California Public Records Act[1]

I. INTRODUCTION

A. Basic Types of Public Information Requests.

1. The California Public Records Act
2. Civil Subpoenas in State Court
3. Civil Subpoena in Federal Court
4. Requests from Other Government Agencies.
5. Criminal Discovery Requests.
    a. This presentation does NOT deal with standard criminal discovery requests.

II. CALIFORNIA PUBLIC RECORDS ACT (GOVERNMENT CODE 6250)

A. Public access for public business.

"The people have the right of access to information concerning the conduct of the people's business, and, therefore, ... the writings of public officials and agencies shall be open to public scrutiny." (Cal. Const., art. I, § 3, subd. (b)(1).)

"With the passage of Proposition 59 effective November 3, 2004, the people's right of access to information in public settings now has state constitutional stature ... ." (***Sutter's Place v. Superior Court*** (2008) 161 Cal.App.4th 1370, 1379.)

B. Requesters.

1. Every Person.

"[E]very person has a right to inspect any public record ... ." (Gov't Code § 6253(a).

2. Out-of-state residents may request California Records. (***Connell v. Superior Court*** (1997) 56 Cal.App.4th 601, 611-612.)

3. Corporations are "persons" under CPRA. (Gov't Code § 6252(c); ***Connell v. Superior Court*** (1997) 56 Cal.App.4th 601, 611.)

4. Government Agencies.

Although not statutorily defined as "persons", government agencies and their officers are persons entitled to request records under the act. (***Los Angeles Unified School Dist. v. Superior Court*** (2007) 151 Cal.App.4th 759, 769-70.)

a. Before providing otherwise exempt records to another governmental agency, the furnishing agency may require the exempting agency to execute a confidentiality agreement under which the requesting agency would be required to assert the exemption and agree not to furnish the document pursuant to CPRA. "Government Code section 6254.5, subdivision (e), provides that [an agency] may disclose an otherwise exempt document to another governmental agency if the agency agrees to treat the document as confidential. The section provides a means for governmental agencies to share privileged materials without waiving the privilege." (***County of Los Angeles v. Superior Court*** (2005) 130 Cal.App.4th 1099, 1107.)

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[1] This document has been prepared by Micheal O'Connor, Assistant District Attorney, Alameda County District Attorney's Office

b. District Attorney in particular has right of access to public records held by other agencies. (Gov't Code § 6263.)

i. District Attorney may petition the court for access to otherwise exempt records of other agencies. (Gov't Code §6264).

ii. Other statutes may combine with CPRA to give D.A.s access to exempt records without the need for a court order. (*See, e.g.,* Gov't Code § 26509, which gives the D.A. the right to inspect records of complaint to consumer protection agencies.)

5. Motive

The motive of the requester is irrelevant; the question is whether disclosure serves the public interest. (Gov't Code § 6257.5; ***County of Santa Clara v. Superior Court*** (2009) 170 Cal.App.4th 1301, 1324.)

C. Requests.

1. Right to inspect original record.

Requester may ask to inspect any "reasonably identifiable" record. Record must be made available for inspection on the agency's premises during business hours. (Gov't Code § 6253(a).)

2. Copies.

Requester may ask for copies, but agency may charge statutory fees or direct costs before providing records. (Gov't Code § 6253(b).)

3. No requirement that request be in writing.

4. Agency required to assist. (Gov't Code §6253.1)

a. If requester's request for a record is unfocused or ineffective, the public agency must:

(1) Assist the requester to identify records responsive to the request;

(2) Describe the information technology and physical location in which the records exist.

(3) Provide suggestions for overcoming any practical basis for denying access to the records or information sought.

D. Agency's response.

1. Time to respond. (Gov't Code § 6253(c).)

Response to a CPRA request is time-sensitive. The agency must:

a. Promptly provide the records (within 10 days; sooner if feasible) OR

b. Send a written determination within ten days of the request describing whether or not there are identifiable, disclosable records OR

c. Send a written response within 10 days that extends the deadline to respond by no more than 14 days if:

i. the letter is signed by the agency head or her designee; AND

ii. there are unusual circumstances (the records are off-site, or they are in the control of another agency, or a large number of items must be examined or a computer program must be written to extract the data).

6. Time to furnish the records.

The agency must indicate in its initial response when the records will be available to the requester. Although the statute sets no specific deadlines for actually providing the records (as opposed to the time for actually providing the written determination) the general tenor of CPRA is that the records must be provided as quickly as feasible.

4. Fees.

Under Gov't Code § 6253(b), the agency may collect fees:

a. Statutory fees: in general, fee schedule for civil discovery is governed by Evidence Code section 1563. Basic fee is ten cents per standard page, actual cost of production for nonstandard pages.

b. Agency may recover actual costs of writing a program to extract information sought.

c. Indirect costs, such as attorney review of requests and time locating or redacting a document, are generally not reimbursable. (*See* ***Los Angeles Unified School Dist. v. Superior Court*** (2007) 151 Cal.App.4th 759, 770.)

E. Items governed by the CPRA.

1. "Public Record" broadly defined.

   "[A]ny writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics."
   (Government Code § 6250(e).)

2. "Writing"

   "[A]ny handwriting, typewriting, printing, photostating, photographing, photocopying, transmitting by electronic mail or facsimile, and every other means of recording upon any tangible thing any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof, and any record thereby created, regardless of the manner in which the record has been stored." (§ 6252, subd. (g).)

3. Which records:

   "All public records are subject to disclosure unless the Public Records Act expressly provides otherwise." (***American Civil Liberties Union of Northern Cal. v. Superior Court*** (2011) 202 Cal.App.4th 55, 66-67.)

4. Identifiable

   Records must be described clearly enough to permit the agency to determine whether the writings sought are under its control. (***California First Amendment Coalition v. Superior Court*** (1998) 67 Cal.App.4th 159, 165.)

5. Responsive

   An agency is only required to disclose information responsive to a request. (***American Civil Liberties Union of Northern Cal. v. Superior Court*** (2011) 202 Cal.App.4th 55, 82.)

6. Unreasonably burdensome requests.

   "A clearly framed request [that] requires an agency to search an enormous volume of data for a 'needle in the haystack' or, conversely, a request [that] compels the production of a huge volume of material may be objectionable as unduly burdensome. [Citation.] Records requests, however, inevitably impose some burden on government agencies. An agency is obliged to comply so long as the record can be located with reasonable effort." (***California First Amendment Coalition v. Superior Court*** (1998) 67 Cal.App.4th159, 166; ***BUT SEE Weaver v. Superior Court*** (2014) 224 Cal.App.4th 746, 752 (request of death penalty inmate for death penalty cases charged not unduly burdensome though it would take one employee 40 hours and cost the agency $3400.)

7. Matters not covered by CPRA.

   a. CPRA covers only records, that is material that has been recorded in some form or another. This would not cover, for example, unrecorded conversations.

b. CPRA does not cover non-existent documents. Thus agencies are not required to create a non-existent document to satisfy a request.

c. CPRA does not require us to answer general questions. It does require us to assist the requester in phrasing questions that would lead to the production of documents responsive to the request.

d. Mere possession of a record does not make it a government document. (***Coronado Police Officers Ass'n v. Carroll*** (2003) 106 Cal.App.4th 1001, 1006.)

F. Local/federal law and CPRA

1. Federal law.

The Freedom of Information Act (FOIA). FOIA applies only to federal agencies, and therefore does not cover state or local agencies. Federal law construing FOIA is likewise not binding us, though there are many parallels between the two schemes, and so comparison to federal law may be helpful. (***Williams v. Superior Court*** (1993) 5 Cal.4th 337.)

2. Local laws

County and municipal ordinances may permit greater disclosure than that required by CPRA, but ONLY as to those agencies falling under their jurisdiction. (Gov't Code § 6253.1; *See* ***Rivero v. Superior Court*** (1997) 54 Cal.App.4th 1048, 1059.)

G. Exemptions from CPRA.

Requesters may sometimes ask for records which do exist, which are identifiable and which are responsive to the request. These items may nevertheless be withheld if they are exempted from the CPRA. The majority of these exemptions are found in Government Code section 6254 *et seq*.

HOWEVER: The courts favor disclosure, and will narrowly construe exemptions. "The agency opposing disclosure bears the burden of proving that an exemption applies." (***Weaver v. Superior Court*** (2014) 224 Cal.App.4th 746, 750)

1. Law enforcement investigations (Gov't Code § 6254(f))

By far the exemption most widely applicable to law enforcement agencies. This section exempts from disclosure "[r]ecords of complaints to, or investigations conducted by, or records of intelligence information or security procedures of ... any state or local police agency, or any investigatory or ... any other state or local agency for correctional, law enforcement, or licensing purposes."

a. Exception: Except for information that would compromise the investigation, (such as the names of confidential informants), the arresting agency must disclose:

i) Arrestees: the full name and occupation of every individual arrested by the agency, the individual's physical description including date of birth, color of eyes and hair, sex, height and weight, the time and date of arrest, the time and date of booking, the location of the arrest, the factual circumstances surrounding the arrest, the amount of bail set, the time and manner of release or the location where the individual is currently being held, and all charges the individual is being held upon, including any outstanding warrants ... and parole or probation holds.

ii. Requests for assistance: "the time, substance, and location of all complaints or requests for assistance received by the agency and the time and nature of the response thereto, including, to the extent the information regarding crimes alleged or committed or any other incident investigated is recorded, the time, date, and location of occurrence, the time and date of the report, the name and age of the victim, the factual circumstances surrounding the crime or incident, and a general

description of any injuries, property, or weapons involved ... .” Need not disclose name of sexual assault victims, however.

iii.) CPRA request from crime victim: must disclose to the victim or an authorized representative “the names and addresses of persons involved in, or witnesses ... to the incident, the description of any property involved, the date, time, and location of the incident, all diagrams, statements of the parties involved in the incident, the statements of all witnesses.”

b. Loss of exemption: Once an otherwise exempt document is filed in court, it becomes a public document, and the investigative exemption no longer applies. (***Weaver v. Superior Court*** (2014) 224 Cal.App.4th 746, 751.)

c. Duration: Indefinite. The disclosure exemption extends indefinitely, even after an investigation is closed. (***Rivero v. Superior Court*** (1997) 54 Cal.App.4th 1048, 1052.) While passage of time may reduce the interest against disclosure of older, closed files, no court has yet defined the outside time limit. (***Id.*** at 1059.)

d. Conflicting county or municipal ordinances cannot supersede 6254(f): “Investigation and prosecution of state criminal law are statewide concerns, not municipal affairs. [Citation] Conflicting local ordinances ... must yield.” (***Rivero v. Superior Court*** (1997) 54 Cal.App.4th 1048, 1059.)

2. Items related to personal privacy. Gov’t Code section 6254(c) protects against “Personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy.” Disclosure of public records involve "two fundamental yet competing interests: (1) prevention of secrecy in government; and (2) protection of individual privacy." (***Gilbert v. City of San Jose*** (2003) 114 Cal.App.4th 606, 610.)

a. Public employee personnel files that contain confidential information are probably covered.

b. Salaries of public employees are not confidential and must be disclosed upon request. (***International Federation of Professional and Technical Engineers, Local 21, AFL-CIO v. Superior Court*** (2007) 42 Cal.4th 319.)

c. Names of employees of private businesses that happen to be on documents in agency’s possession: these requests involve the disclosure of the identity and employment status of the employees in question. For public employees, there is very little privacy interest. For private individuals, however, there is at least a modicum of protection. California law treats employment information as personal. (See Penal Code section 530.55, which defines "place of employment" as "personal identifying information", and Government Code, section 11015.5 which discusses government possession of personal information about private individuals.) "When it comes to disclosing a person's identity under CPRA, the public interest which must be weighed is the interest in whether such disclosure ‘would contribute significantly to public understanding of government activities' and serve the legislative purpose of ‘shedding light on an agency's performance of its statutory duties.'" (***Los Angeles Unified School District v. Superior Court*** (2014) 228 Cal.App.4th 222, 241.)

3. Notes. a) Preliminary drafts, notes, or memoranda that are not retained by the agency in the ordinary course of business absent a compelling public interest. (Gov’t Code §6254(a).)

4. Pending litigation. Records that pertain to claims or lawsuits involving a public agency remain exempt until after the litigation has resolved. (Gov’t Code § 6254(b).)

5. Privileged documents. Records protected by statute or by privilege are exempt from disclosure. (Gov't Code § 6254(k).) Any item that would be privileged would also be exempt from discovery by subpoena. See below for a more detailed discussion.
6. Critical security information. Records relating to vulnerability to terrorist attack or to critical infrastructure of an agency are exempt. (Gov't Code § 6254(aa) and (ab).)
7. Miscellaneous. Numerous other exemptions apply that relate to specific agencies or practices that do not involve the ordinary course of business for law enforcement agencies. (E.g. Governor's calendar; strategic contract negotiations, licensing information, private trade secrets under government review etc.)
8. Catchall. "Under [Gov't Code] section 6255, the catchall exception" [citation] an agency may withhold public records even if no express exemption is applicable, if it can demonstrate 'that on the facts of the particular case the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record.'" (***Versaci v. Superior Court*** (2005) 127 Cal.App.4th 805, 813-814.) This is essentially the same standard as under Evidence Code section 1040. (See below.)
9. Partially exempt records. If only part of a record is exempt, the agency is required to produce the remainder, if segregable. (§ 6253(a); ***County of Santa Clara v. Superior Court*** (2009) 170 Cal.App.4th 1301, 1322.)
10. **Waiver**. An agency may waive an exemption in its discretion and decide to provide an otherwise exempt document in response to a request. However, once discretion is exercised in favor of producing a record, the item loses its exempt status and must be furnished to any subsequent requesters of the same document. (§ 6254.5; ***County of Santa Clara v. Superior Court*** (2009) 170 Cal.App.4th 1301, 1321-22.)
11. Court filings. Once a document is filed in court, it loses any previous exemption. (***Weaver v. Superior Court*** (2014) 224 Cal.App.4th 746, 751.)

H. Costs.

1. Copying Costs.
Agency may recover direct costs of duplication or statutory fees. (Gov't Code 6253(c).)
2. Retrieval Costs.
Ordinarily, on-site retrieval costs are not recoverable.
3. Production Costs.
Agency may recover production costs, (computer services, or programming costs) to extract data from electronic records such as a database. (Gov't Code 6253.9(b).)
4. Statutory Costs.
Evidence Code section 1563 may provide a basis for a statutory cost:
"'Reasonable cost,' as used in this section, shall include ... : ten cents ($0.10) per page for standard reproduction of documents of a size 8 ½ by 14 inches or less; twenty cents ($0.20) per page for copying of documents from microfilm; actual costs for the reproduction of oversize documents or ... documents requiring special processing which are made in response to a subpoena; actual postage charges; and the actual cost, if any, charged to the witness ...for the retrieval and return of records held offsite..."
5. Requests by government agencies.
Government Code § 6103 states that "[n]either the state nor any county, city, district, or other political subdivision, nor any public officer ... shall pay ... any fee for the ... the performance of any official service ...."

I. Enforcement by requestor.

1. Documenting a refusal.

If the agency refuses to disclose a request, it must do so by way of a written determination stating the reasons for its refusal. (Gov't Code § 6255(b).)

2. Review by requester.

The requester may seek review of the agency's refusal by going to court to seek a declaratory judgment. (Gov't Code §6258.) If the verified petition appears to demonstrate that records are being improperly withheld, the court will order the agency to release the records or to show cause. (Gov't Code § 6259.)

3. Expedited judicial review.

CPRA litigation and review must be expedited. (Gov't Code §§ 6258, 6259(c). ***San Lorenzo Valley Community Advocates for Responsible Educ. v. San Lorenzo Valley Unified School Dist.*** (2006) 139 Cal.App.4th 1356.)

4. In camera review.

The court would normally review the items in camera to see whether or not the agency was justified in withholding the documents. The agency has the burden of demonstrating non-disclosure. (Gov't Code §6255.) Since the act favors disclosure, exemptions are narrowly construed. (***County of Santa Clara v. Superior Court*** (2009) 170 Cal.App.4th 1301, 1321-22.) Essentially, the court engages in "a case-by-case balancing process, with the burden of proof on the proponent of nondisclosure to demonstrate a clear overbalance on the side of confidentiality. " (***Michaelis, Montanari & Johnson v. Superior Court*** (2006) 38 Cal.4th 1065, 1071.)

5. Court orders.

If the court upholds the exemption, the records remain undisclosed. If the court finds that the public interest in favor of disclosure outweigh the public interest against, the court will order the agency to furnish the records. (Gov't Code §6255(b).)

6. Failure to comply with deadlines in responding will not result in disclosure if the agency is justified in withholding them. (***Michaelis, Montanari & Johnson v. Superior Court*** (2006) 38 Cal.4th 1065, 1072.)

7. Appeal.

The parties cannot appeal, but can seek an extraordinary writ. The petition for writ must be filed within 20 days, though the appellate court has discretion to allow a slightly longer time to file. (6259(c).)

8. Costs of litigation.

The court can order attorney's fees and costs.

a. To the requestor:

"The court shall award court costs and reasonable attorney fees to the plaintiff should the plaintiff prevail ... ." (Gov't Code § 6259(d).)

i. The plaintiff prevails if

-The court orders records disclosed; or

-The agency provides the records without a court order but the decision to disclose was motivated by the lawsuit. (***Rogers v. Superior Court*** (1993) 19 Cal.App.4th 469, 482.) "[I]f a public record is disclosed only because a plaintiff filed a suit to obtain it, the plaintiff has prevailed. (***Los Angeles Times v. Alameda Corridor Transp. Authority*** (2001) 88 Cal.App.4th 1381, 1391.)

ii. Costs and attorneys fees are paid by the agency, not the public employee. (Gov't Code § 6259(d).)

b. To the agency:

Costs are awarded to the agency, but only if the requestor's suit is clearly frivolous. (Gov't Code § 6259(d).)

c. Determining attorney fees:

Reasonable attorney fees are the number of hours reasonably expended times the reasonable hourly rate (the "lodestar" method). The reasonable hourly rate is the "hourly rate prevailing in the community for similar work." (***Wilson v. Superior Court*** (1996) 51 Cal.App.4th 1136, 1141.)

III. THINGS TO KEEP IN MIND ABOUT CIVIL SUBPOENAS

"The process by which the attendance of a witness is required is the subpoena. It is a writ or order directed to a person and requiring the person's attendance at a particular time and place to testify as a witness [or] .... to bring [or produce] any books, documents, or other things under the witness's control ... ." (CCP § 1985(a).)

This presentation deals with civil, not criminal, subpoenas to which the agency is not a party. In the case of criminal subpoenas, the criminal trial attorney should usually handle the subpoenas. If the agency is a party, the attorney representing the agency will handle the subpoenas.

A. Types of State Court Subpoenas in Civil Cases

1. Subpoena Duces Tecum

An SDT is a subpoena which requires the production of records or documents. These are often addressed to the custodian of the record for an agency.

a. These record requests are often satisfied by production of the records and an accompanying affidavit of the producing witness. (CCP § 2002)

2. Deposition Subpoena. A deposition is a written or oral declaration, under oath, made upon notice to the adverse party, for the purpose of enabling him to attend and cross-examine. the named witness (CCP § 2004.)

a. Generally, the deposition is held in a noncourt setting, often the law offices of the subpoena-issuing party. There will be a court reporter, but no judge, clerk or bailiff. The attorneys for all parties generally appear; occasionally the parties themselves may be present. The oath is administered by the court reporter to the subpoenaed witness. Both sides may question the witness. Through their attorneys, the parties may state objections, but unless there is a privilege asserted, the witness must answer. The court will rule on objections at a later time. Failure to assert a privilege is a waiver of the privilege. (CCP § 2025.460.)

b. A deposition subpoena may compel a witness to bring evidence as well as testify. (CCP § 2025.510.)

c. The witness to be deposed must be given at least ten days notice. (CCP § 2025.270.)

3. Subpoena for testimony at civil tribunal.

a. Most often this is at civil trial. (CCP 1985.2)

b. May also include administrative hearings, arbitrations etc.

B. Witness Fees.

1. *State Court*: Document production. Recovery of production costs for documents and records produced in response to a civil subpoena are governed by Evidence Code section 1563.

a. Reasonable costs include, but are not limited to:

i) ten cents ($0.10) per page for standard copies

ii) twenty cents ($0.20) per page for microfilm;

iii) actual costs for oversize documents

iv) actual costs for special processing

v) actual cost of retrieval fees from third party

vi) clerical costs of $24 per hour for locating and making the records available.

vii) postage

2. *State Court*: Fees to witnesses. Government agency must reimburse agency employees for expenses of responding to subpoena; requestor must reimburse the agency.

a. Public agency must pay all expenses of its employees who actually testify at civil proceedings relating to the agency.

b. Qualified expenses include actual salary while away from the office; and incidental expenses necessary to attendance at the subpoena, including: transportation; meals; lodging, etc.

c. Applies to peace officers (Gov't Code § 68097.1(a)); state (Gov't Code § 68097.1(b)) and local agency employees (Gov't Code § 68096.1(a)).

d. Local agency should require $275 deposit in advance; may then refund or bill the requester after actual cost is determined.

e. It is a misdemeanor for a requesting party to pay money directly to a peace officer for testimony, and a misdemeanor for a peace officer to accept money for testimony. (Gov't Code § 68097.7.)

3. *Federal Court*: Document Production.

a. No fees are required unless production would be unduly burdensome.

4. *Federal Court*: Witness fees:

a. Witness must be paid $40 per day for time testifying and traveling.

b. Witness must be reimbursed for travel expenses. (28 U.S.C.A. § 1821).

C. Official Privileges.

Under California Law, a government agency has only one privilege: the official information privilege under Evidence Code section 1040. That privilege can be either absolute or conditional. A privilege is absolute if disclosure of information is prohibited by statute. A privilege is conditional if the public interest against disclosure outweighs the public interest in favor of disclosure. (***Shepherd v. Superior Court*** (1976) 17 Cal.3d 107, 123.)

1. Absolute privileges under section 1040. As ***Shepherd*** notes, Evidence Code section 1040(b)(1) states that a public entity has a privilege to refuse to disclose official information if the privilege is claimed by a person authorized to do so and disclosure is forbidden by an act of Congress or by a California statute. Some statutes that prohibit disclosure of information:

a. Criminal records. Disclosure of criminal history information is prohibited by Penal Code sections 11076; 11105; 11140; 13300 through 13305. (*See*

Westbrook v. County of Los Angeles (1994) 27 Cal.App.4th 157, 162-63; 89 Ops. Cal. Atty. Gen. 204.)

b. A criminal defendant's offer to plead guilty, or withdrawn plea of guilty is inadmissible in any proceeding. (Evidence Code § 1153.)

c. Probation reports. Penal Code section 1203.05 limits the production of probation reports:

(1) Specified persons-- the defendant, the district attorney, and any person authorized by law--have unfettered access to reports at any time;

(2) unspecified persons and the general public have unfettered access to reports for only 60 days;

(3) after that time, they have access only by court order.

People v. Connor (2004) 115 Cal.App.4th 669, 678-79.)

2. Conditional Privilege under section 1040(b)(2).

a. A public agency has the privilege to withhold documents if "disclosure of the information is against the public interest because there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interest of justice". (Evid. Code § 1040(b)(2).)

b. Waiver.

Section 1040(b)(2) provides that: "no privilege may be claimed under [1040] if any person authorized to do so has consented that the information be disclosed ... ."

c. Balancing Test.

Faced with a claim of privilege, a court must hold an in camera review of items claimed to be privileged. The court should weigh the needs of the requester against the public's interest in preventing disclosure. The court should evaluate the importance of the material sought to the requester, and should consider whether other materials might be available that would serve the same purpose. After the in camera review, the court should hold an adversarial hearing exploring the information's relevance and importance, and the interests of both sides before granting or denying the petition to disclose the records. (***Michael P. v. Superior Cour***t (2001) 92 Cal.App.4th 1036.)

d. Examples of conditionally privileged information.

i. Deliberative process privilege

"The deliberative process privilege protects materials reflecting deliberative or decision-making processes. It "mental processes by which a given decision was reached and the substance of conversations, discussions, debates, deliberations and like materials reflecting advice, opinions, and recommendations by which government policy is processed and formulated. (***Regents of University of California v. Superior Court*** (1999) 20 Cal.4th 509, 540.) ... The key question in every case is whether the disclosure of materials would expose an agency's decision-making process in such a way as to discourage candid discussions within the agency and thereby undermine the agency's ability to perform its functions." ***American Civil Liberties Union of Northern Cal. v. Superior Court*** (2011) 202 Cal.App.4th 55, 75 (*Internal quotation marks omitted*.)

In ***People v. Keenan*** (1988) 46 Cal.3d 478,the California Supreme Court upheld a refusal to grant the defendant discovery about the San Francisco District Attorney's capital charging policies and practices without

specifically relying on the deliberative process privilege, but using similar reasoning.

ii. Ongoing criminal investigation.

In ***County of Orange v. Superior Court (Wu)*** (2000) 79 Cal.App.4th 759 the plaintiffs filed a defamation action against the Orange County Sheriff's Department after being publicly named suspects in their child's unsolved murder and subpoenaed the records of the investigation. The court of appeal upheld the Sheriff's privilege claim. "We conclude on the record before us that the public interest in solving [the child's] homicide and bringing the perpetrator(s) to justice out-weighed the [plaintiff's] interest in obtaining the discovery sought." (***Id.*** at 767.) The court noted that this would not be an indefinite privilege.

iii. Investigative techniques (***People v. Montgomery*** (1988) 205 Cal.App.3d 1011 (surveillance location).)

iv. Confidential Informants. (Evidence Code §1041.)

v. Attorney work product privilege (Code of Civ. Proc. §2018.030.)

The attorney work product privilege protects "an attorney's impressions, conclusions, opinions, or legal research or theories." (***Ibid.***) This doctrine applies in criminal cases, and will protect the attorney work product of a public prosecutor as long as the criminal case is pending. (***Shepherd v. Superior Court*** (1976) 17 Cal.3d 107, 121.) The extent to which a public prosecutor may claim the privilege as to a closed criminal case is unclear. In ***Shepherd v. Superior Court*** the District Attorney and the Grand Jury investigated a crime. The D.A. ultimately decided not to charge the case and the matter was closed. A civil suit was filed against the target of the investigation, and the plaintiff sought to obtain the D.A.'s files. The D.A. objected in part based on the attorney work product privilege as to the D.A.'s research, memos, impressions etc. The California Supreme Court held that the work product privilege did not apply. The court noted that, unlike a private attorney, a public prosecutor has no client, and therefore has no client's interest to protect when a case is closed. The court held that if the records are to be withheld, they must be upheld under a different theory pursuant to section 1040.

Shepherd dealt with a closed case that was never charged. It seems likely that we could assert the privilege as to charged case even after these cases are closed if there is a significant possibility of retrial due to a retrial or appeal. ***Shepherd v. Superior Court*** 17 Cal.3d 107, 121.)

Two Proposition 47 Cases

I. *People v. Hall* (June 6, 2016, A145088) __ Cal.App.4th __ [2016 WL 3155980]- (Alameda County Case)

- ***Court Examines: Unreasonable Risk of Danger to Public Safety***

A. Factual and Procedural Background

1. In May 2013, the defendant followed a woman as she walking down the street in Oakland. He repeatedly called out to her, and then came up in front of her and demanded her purse. When she did not respond, he pushed her into a parked car and told her to let go of her purse. The victim felt a knife in her abdomen. The defendant said he would stab her if she did not give him her purse. Eventually the defendant ripped the purse from the victim's shoulder and ran away. The defendant was apprehended by police as he was running with the victims' purse.

2. The defendant was charged with second degree robbery with an enhancement for personal use of a deadly weapon. It was alleged that he suffered 10 prior felony convictions and served five prior prison terms. Two of the prior convictions were for serious and violent felonies.

3. In exchange for the dismissal of the robbery count and other special allegations, the defendant pleaded no contest to grand theft from the person (Pen. Code §, 487) and admitted two prior prison terms. He was sentenced to five years in prison.

4. After enactment of Proposition 47, the defendant filed a petition to reduce his felony conviction to a misdemeanor. Among arguments made by the prosecution in opposition to the petition was that Hall would present an unreasonable risk of danger to public safety. (Pen. Code, § 1170.18, subds. (b)-(c).)

5. At the hearing on defendant's petition, the prosecutor referred to the defendant's lengthy criminal record, as well as records from the California Department of Corrections and Rehabilitation (CDCR). In particular, the prosecutor highlighted the violence involved in the instant offense, "as well as the fact that he was on probation for a [robbery] where he assaulted a homeless woman and threatened to kill her if she didn't give over her property. . . ." The CDCR records showed the defendant had no disciplinary issues in prison but apparently referred to a 1996 arrest for sexual assault, as well as "another statement about an incident that . . . was sexual in nature." Although counsel for the defendant argued that the arrest records should not be considered, he raised no other objection to the CDCR records and the trial court indicated

they would become "part of the record." At the hearing's conclusion, the trial court denied the defendant's petition on the ground he presented an unreasonable risk of danger to public safety. (p.*2.)

B. Court of Appeal's Analysis

1. At the outset, the Court of Appeal noted the Attorney General's argument that the defendant had failed to prove his eligibility for Proposition 47 resentencing because he failed to prove the value of the property taken was less than $950.

2. The Court of Appeal agreed that it is the person petitioning for resentencing who has this initial burden of proving the value of the property did not exceed $950. The Court of Appeal said: "Evidence to support such a finding may come from within or outside the record of conviction, or from undisputed facts acknowledged by the parties. In some cases, the record of a petitioner's conviction may suffice to establish a prima facie case for resentencing. But in others it may not, particularly where there was no reason for either party to fix the value of the property stolen when the plea was taken." (p.*4.)

3. Here, nothing in the accusatory pleading, preliminary hearing transcript or plea said anything about the value of the property taken from the victim, and section 487, subdivision (c) does not include a threshold value required for a felony conviction. Nor did the defendant submit any additional evidence on the issue with his petition for resentencing. However, the Court of Appeal noted that the defendant had submitted an earlier petition for rehearing that was not heard, and the record provided no information as to whether he had provided such evidence of value in his earlier petition. In any event, because the prosecution did not press the issue, the Court of Appeal declined to address it. (p.*4.)

4. The Court of Appeal moved to the second stage of the resentencing analysis, which refers to the court's discretion to determine that resentencing a petitioner would pose an unreasonable risk of danger to public safety. (Pen. Code, § 1170.18, subd. (b).) On appeal, the burden is on the defendant to establish that the trial court's exercise of discretion was irrational or arbitrary. (p.*4.)

5. "Unreasonable risk of danger to public safety means an unreasonable risk that the petitioner will commit a new violent felony within the meaning of section 667, subdivision (e)(2)(C)(iv)]." (§ 1170.18, subd. (c).) [See next paragraph]

6. Section 667, subdivision (e)(2)(C)(iv) provides a list of felony offenses commonly known as "super strikes." These offenses include "(I) A 'sexually violent offense' as defined in subdivision

(b) of Section 6600 of the Welfare and Institutions Code. [¶] (II) Oral copulation with a child who is under 14 years of age, and who is more than 10 years younger than he or she as defined by Section 288a, sodomy with another person who is under 14 years of age and more than 10 years younger than he or she as defined by Section 286, or sexual penetration with another person who is under 14 years of age, and who is more than 10 years younger than he or she, as defined by Section 289. [¶] (III) A lewd or lascivious act involving a child under 14 years of age, in violation of Section 288. [¶] (IV) Any homicide offense, including any attempted homicide offense, defined in Sections 187 to 191.5, inclusive. [¶] (V) Solicitation to commit murder as defined in Section 653f. [¶] (VI) Assault with a machine gun on a peace officer or firefighter, as defined in paragraph (3) of subdivision (d) of Section 245. [¶] (VII) Possession of a weapon of mass destruction, as defined in paragraph (1) of subdivision (a) of Section 11418. [¶] (VIII) Any serious and/or violent felony offense punishable in California by life imprisonment or death." (§ 667, subd. (e)(2)(C)(iv).)

7. "In exercising its discretion, the court may consider all of the following: [¶] (1) The petitioner's criminal conviction history, including the type of crimes committed, the extent of injury to victims, the length of prior prison commitments, and the remoteness of the crimes. [¶] (2) The petitioner's disciplinary record and record of rehabilitation while incarcerated. [¶] (3) Any other evidence the court, within its discretion, determines to be relevant in deciding whether a new sentence would result in an unreasonable risk of danger to public safety." (§ 1170.18, subd. (b).)

8. The trial court did not abuse its discretion. In making its finding that resentencing the defendant would pose an unreasonable risk to public safety, the trial court noted the defendant's "continual and consistent escalation of the types of crimes" and the "seriousness of the crimes." The trial court noted that in the 2012 case, the defendant told the victim that he would kill her if she did not stop following him, and in the most recent case he told the victim he would stab her if she did not let go of her purse. The trial court also considered how close in time these offense s were to the defendant's resentencing petition. The trial court stated that "a reasonable inference can be drawn that the defendant is in fact ready, willing and able to commit one of those strikes if one of his victims doesn't comply with his unreasonable and unlawful demands." (p.*5.)

9. The Court of Appeal concluded the trial court applied the appropriate standard for determining whether the defendant posed an unreasonable risk of danger to public safety. It noted that the trial court clearly considered whether the defendant presented an unreasonable risk of committing a "super strike" if resentenced. The Court of Appeal also concluded that the trial court expressly considered each enumerated factor in exercising its discretion. The Court of Appeal stated: "The trial court could reasonably infer from Hall's recent criminal behavior and repeated failure to rehabilitate that he presents an elevated—and escalating—risk of not only threatening violence, but also using deadly force. (See § 667, subd. (e)(2)(C)(iv)(IV).)" (p.*6.)

II. *People v. Montgomery* (June 8, 2016, G051812) __ Cal.App.4th __ [2016 WL 3185233]

● *Court Examines Meaning of "Prior Conviction" for Ineligibility for Prop 47 Redesignation*

A. Factual and Procedural Background

1. The defendant petitioned to have his conviction for cocaine possession redesignated from a felony to a misdemeanor.

2. The defendant pleaded guilty to the drug charge in 1989; at the same time, he was convicted on a separate charge in another case of attempted murder. As part of his plea bargain in the attempted murder case, the defendant pleaded guilty to the earlier cocaine possession charge and was sentenced to a two-year term of imprisonment, to run concurrent to his sentence for the attempted murder.

3. Penal Code section 1170.18, subdivision (f) provides that a person who has completed his sentence for a conviction for a felony, who would have been guilty of a misdemeanor had Proposition 47 been in effect at the time of the offense, may file an application in the trial court to have the felony designated as a misdemeanor.

4. However, this provision shall not apply to a person who has one or more prior super strike convictions. (Pen. Code, § 1170.18, subd.(i).) Attempted murder is a super strike conviction making an applicant ineligible for redesignation.

B. Court of Appeal's Analysis

1. Since defendant's prior conviction for attempted murder could be disqualifying, the question for the Court of Appeal was, "Prior to what?" Is it prior to the offense that is the subject of the redesignation application (i.e. prior to drug conviction) or prior to asking for redesignation under section 1170.18, subd. (f)? (p.*2.)

2. The defendant argued that his attempted murder conviction did not predate the conviction for cocaine possession; it was contemporaneous. But the Attorney General argued that "prior" conviction means prior to the redesignation application, so the contemporaneous nature is irrelevant. (p.*2.)

3. The Court of Appeal said the term "prior conviction" is ambiguous. Thus it looked to the official ballot materials and analysis of the Legislative Analyst to assist in interpretation. It noted that Proposition 47 material focused mainly on people who were currently incarcerated. "The portion of the proposition allowing completed sentences to be redesignated received little attention in the voter pamphlet. (p.*3.)

4. After examining the Proposition 47 voter information guide and the findings and declaration portion of the proposed law, the Court of Appeal concluded that "prior conviction" for purposes of section 1170.18, subd. (i) means a conviction that occurred *any* time before the filing of the redesignation application. (pp. *3-4.)

5. The Court of Appeal stated: "Both the Legislative Analyst and the proposition's proponents promised the electorate that violent criminals would not get a break under the new law. It seems their intent was to assure that "dangerous" criminals could not be released, and we cannot see that it would have made a difference to the voters when that dangerousness became apparent. The term is ambiguous, and we conclude that this interpretation is more in keeping with the intent of the voters who passed Proposition 47." (p.*4.) The Court of Appeal also stated, as to the framers of the propostion: "Their intent could not have been to mete out leniency based upon whether one attempts murder and then possesses cocaine or possesses cocaine and then attempts murder." (p.*4.)

POINTS AND AUTHORITIES

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Week Of	Topic	Guest Speaker	Ethics
Aug. 8, 2005	The Latest Cases on Batson/Wheeler Challenges (Part II of II)	Jerry Coleman San Francisco ADA	30

Evidence of Juror's Demeanor May Be Grounds for Removing Juror and Distinguishing Juror From Others of Similar Stated Views (Jury Selection Post-Johnson & Miller-El).

People v. Ward (2005) 36 Cal.4th 186 [30 Cal.Rptr.3d 464, 474-479] [Cites are to Cal.Rptr]

Facts: The prosecution exercised peremptory challenges against seven African-American jurors (including two challenges made during the selection of alternate jurors). The defense made several Batson/Wheeler motions. (At p. 474.) It wasn't clear whether the trial court found a prima facie showing of discriminatory purpose had been made to all the challenged jurors but the prosecution was, nevertheless permitted to give an explanation for the challenges. (At p. 475.) The trial judge denied the motions, noting among other things, the prosecution properly removed jurors based on the juror's demeanor or attitude in answering questions. (At pp. 474-479.)

1. A "trial court is not required to make specific or detailed comments for the record to justify every instance in which a prosecutor's [nondiscriminatory] reason for exercising a peremptory challenge is being accepted by the court as genuine. This is particularly true where the prosecutor's [nondiscriminatory] reason for exercising a peremptory challenge is based on the prospective juror's demeanor, or similar intangible factors, while in the courtroom." (At p. 475.)

2. The court found the prosecutor's explanations for booting five of the jurors based on their hesitancy to imposing death as expressed during voir dire was proper. (At p. 476.) The court noted that "[a] prosecutor legitimately may exercise a peremptory challenge against a juror who is skeptical about imposing the death penalty." (At p. 476.)

3. Without specifically describing the "demeanor" or "manner" of one of the jurors, the court found the prosecutor's explanation that the juror's demeanor suggested she was a "death skeptic" was valid in light of the trial judge's confirmation of that observation. (At p. 476.)

4. The court also found the prosecutor's explanation that one of the booted jurors expressed hostility toward the prosecution in response to questioning about his knowledge of gangs (a hostility confirmed by the trial judge) provided a neutral reason for challenging the juror. (At pp. 476-477.)

5. The court also upheld the removal of another juror (Rose B.) based on (1) the responses she gave in her juror questionnaire (i.e., that the death penalty is a "horrible thing"); (2) her unconventional appearance—i.e., wearing 30 silver chains around her neck and rings on every one of her fingers—which suggested that she might not fit in with the other jurors; and (3) her "body language" during questioning suggesting that she was "uptight with" the prosecutor. (At p. 477.)

The court held the first cited reason alone supported the denial of defendant's motion. (At p. 477.)

6. The court also found that the fact that five of the twelve sitting jurors were African-American, while not conclusive, was "an indication of good faith in exercising peremptories, and an appropriate factor for the trial judge to consider in ruling on a Wheeler motion. (At p. 477.)

Comparative Analysis

7. The court assumed that it could do a comparative analysis even though it had not been done in the trial court but found that two jurors who were permitted to remain were not similarly situated to the jurors who were booted. (At p. 477.)

8. One of the jurors booted worked in the probation department and was a group supervisor for 40-50 juvenile delinquents. This did not make this juror comparable to one of the jurors who remained on the jury who had a son who was arrested for drug possession and was involved in a fight in which he was stabbed. (At pp. 477-478.)

   The fact only the booted juror was asked about his experience with gangs did not cast the prosecutor's reasons in an "implausible light." (At p. 478.) Given the booted juror's background, it was reasonable to ask the juror about his experience with gangs, while there was nothing in the seated juror's answers which suggested she would have had such experience. (At p. 478.)

9. The fact that the other seated juror served on a prior jury which did not reach a verdict did not render this juror similarly situated to Rose B. (the juror booted because the prosecutor felt she would not fit in due to her excessive use of jewelry). There was nothing to indicate the seated juror had an unconventional appearance or even that she had hung up the previous jury. (At p. 478.)

   Moreover, the fact this seated juror stated she believed that LWOP was a more severe punishment than the death penalty did not establish that the prosecutor's reasons for striking other jurors were implausible, in light of the fact that, unlike Rose B. (the booted juror who described the death penalty as horrible), the seated juror did not indicate any reluctance to impose the death penalty. (At p. 478.)

10. The court also found that this seated juror was not similarly situated to Rose B. or other jurors struck by the prosecution because the juror expressed ***no*** reluctance to imposing the death penalty during questioning and exhibited less of a personal distaste or visceral reaction to the death penalty. (At p. 479.)

11. The fact the seated juror stated in her questionnaire that she thought her son had been treated unfairly by the criminal justice system did not show the prosecutor's reasons for removing the booted jurors were pretextual since the prosecutor struck no jurors based on their experiences with the criminal justice system and, in any event, the seated juror said she felt her son was treated unfairly because of the victim's links to law enforcement - a fact which made it unlike the circumstances in the case being tried. (At p. 479.)

Simply Claiming a Juror's Demeanor is Unacceptable May Be Insufficient to Establish Neutral Reason for Challenging Juror Where No Further Explanation Given.

People v. Allen (2004) 115 Cal.App.4th 542

Facts: The prosecutor excused two African-American jurors. The first juror was a

benefit authorizer with the Social Security Administration whose home had been burglarized. The second juror was a program analyst for Kaiser and said she had two cousins in law enforcement. The second juror did not answer a question posed on the juror questionnaire regarding whether she had any moral or religious principles that would make it difficult to determine guilt, but, on voir dire, explained that she did not answer the question because she did not understand what was being asked and confirmed she would base her decision on the law and evidence and common sense. (At pp. 545-546.)

The defense made a Batson/Wheeler motion and the trial judge found a prima facie case had been made. The prosecutor explained that he bumped the first juror in the following manner: "The first woman, her very response to your answers, and her demeanor, and not only dress but how she took her seat. I don't know if anyone else noticed anything but it's my experience, given the number of trials I've done, that that type of juror, whether it's a personality conflict with me or what have you, but they tend to, in my opinion, disregard their duty as a juror and kind of have more of an independent thinking." (At p. 546.)

As to the second juror, the prosecutor stated that the juror had questions as to what religious or moral convictions meant and that concerned her and that it gave the prosecutor concern that she "would question things that may be evident on their face and may not make the sort of juror that I would like for that reason." (At p. 546.)

The trial court then denied the defendant's motion without asking the prosecutor further questions or making any findings with respect to the prosecutor's explanations. (At p. 546.)

On appeal, the defendant claimed the reasons provided by the prosecutor were not sufficiently specific to adequately explain any possible race-neutral reasons for dismissing the jurors and that the trial court failed to make a sincere, serious and reasoned inquiry into the explanations provided. (At p. 547.)

1. A prospective juror may be excused based upon bare looks and gestures, hunches, and even arbitrary reasons. For example, courts have upheld peremptory challenges "where the juror's body language seemed angry and hostile" or of "jurors who looked nervous, who looked tired, who looked weird, who seemed unable to relate to the prosecutor, who had a very defensive body position, who were overweight and poorly groomed and seemed not to trust the prosecutor." (At p. 547.)

2. "[E]ven less tangible evidence of potential bias may bring forth a peremptory challenge: either party may feel a mistrust of a juror's objectivity on no more than the 'sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another' [citation]—upon entering the box the juror may have smiled at the defendant, for instance, or glared at him." (At p. 547, citing to People v. Wheeler (1978) 22 Cal.3d 258, 275.)

3. Moreover, "[w]hen the prosecutor's stated reasons are both inherently plausible and supported by the record, the trial court need not question the prosecutor or make detailed findings." (At p. 548.)

4. However, "when the prosecutor's stated reasons are either unsupported by the record, inherently implausible, or both, more is required of the trial court than a global finding that the reasons appear sufficient." (At p. 548.)

5. When the reasons provided for removing the juror involve subjective judgments (e.g., whether or not the juror is attentive), there is a potential for abuse, and such reasons deserve careful scrutiny by the trial judge. (At pp. 548-549.)

6. In the instant case, the court found the explanation proffered by the prosecutor

for booting the second juror misstated the record and that it would have been helpful for the trial court to have further probed the prosecutor's reasons. However, the court assumed the prosecutor's explanation was justified. (At p. 550.)

7. The court found the trial judge erred in accepting the prosecutor's explanations as to the first juror since there was nothing in the record to give them content.

"[S]imply saying that a peremptory challenge is based on "her demeanor" without a fuller description of what the prospective juror was or was not doing provides no indication of what the prosecutor observed, and no basis for the court to evaluate the genuineness of the purported non-discriminatory reason for the challenge." (At p. 551.)

The prosecutor's explanations that the juror was removed because of "her dress" and "how she took her seat" without additional elaboration as to what it was about the juror's dress or how she took her seat which made her unacceptable do not provide for meaningful review." (At p. 551.) The prosecutor's reasons were simply too general or too vague to evaluate and do not demonstrate the challenge was based on legitimate grounds. (At p. 551.)

8. The prosecutor may not rebut the defendant's prima facie case merely by denying that he had a discriminatory motive or affirming his good faith in making individual selections. (At p. 552.)

9. The court noted that, as an alternative to asking more probing questions, the trial judge could have "placed his own observations on the record, [and] that may well have provided a sufficient basis for understanding the basis on which the peremptory challenge was made, at least if the prosecutor acquiesced in the court's recitation." (At p. 553, fn. 8.)

Removal of All Members of a Cognizable Group Does Not, By Itself, Establish a Prima Facie Case of Discriminatory Use of Challenges.

People v. Young (2005) 34 Cal.4th 1149, 1170-1174

Facts: The prosecution struck three African-American female jurors. Two African-American male jurors remained on the panel. (At p. 1171.)

1. The removal of all members of a cognizable group, standing alone, is not dispositive of whether defendant has established a prima facie case of discrimination. (At p. 1173, fn. 6.)

2. **Pertinent Expertise**: There were neutral reasons for striking a juror who worked as a therapist and testified for the prosecution as an expert in a sexual assault case because it was reasonable to believe the juror would have had difficulty setting aside her expertise in evaluating the evidence in the case. (At p. 1174.) The court also noted the prosecution could justifiably fear (despite the juror's statements to the contrary) that the juror might be biased against the prosecution for vigorously cross-examining defense witnesses who were psychologists or psychiatrists. (At p. 1174.)

3. **Negative View of Government**: In addition to the reasons stated above, the prosecutor could permissibly have stricken the juror for her stated belief that crime had increased, in part, because of an increase in the double standard of our government[] system" - an apparently negative view of the government. (At p. 1174.)

4. **Connections With Attorneys**: The prosecutor could also have properly challenged a juror who stated she was a insurance claims specialist who assisted defense attorneys in preparation for litigation and arbitration - albeit it appeared the defense attorneys were civil defense attorneys who represented insurance companies - on the ground the juror might be overly defense oriented in evaluating and deliberating the charges against the defendant. (At p. 1174.)

Slight Delay in Making Batson/Wheeler Motion Does Not Render It Untimely and Defendants Cannot Complain About Batson/Wheeler *r* Violations Involving Alternate Jurors Who Do Not End Up Serving on the Jury.

People v. Roldan (2005) 35 Cal.4th 646, 699-703 [only]

Facts: The prosecution removed two African-American jurors. One had a general view against the death penalty and had a son in prison. The other stated had been detained for smoking marijuana and gave somewhat conflicting testimony regarding his status as a "peace officer," initially claiming he was a county probation peace officer, and then "clarifying" he was a group supervisor for the probation department and not a sworn peace officer. (At p. 700.)

The defense attorney did not make a Batson/Wheeler motion immediately after the second African-American juror was challenged; instead, he waited until after he, himself, excused another juror. (At p. 700.) The defense pointed out that two of the prosecutor's eight challenges had been made against African-American men. The court denied the motion on grounds no prima facie case had been made out and because the motion was untimely. (At p. 700.)

The defense made another Batson/Wheeler motion after the prosecution peremptorily challenged two more jurors during the selection of the alternate jurors. The motion was denied and neither juror ended up serving on the jury. (At p. 701.)

1. A Batson/Wheeler motion is untimely if first made after the jury has been sworn and the venire dismissed. (At p. 701.)

2. As a general matter, Batson/Wheeler must be timely made but it is not required "that such motions be made, on pain of waiver, immediately upon the exercise of the offending peremptory challenge and before any other challenges have been made." (At p. 702.) The motion, in the instant case, was made within a minute after the targeted juror was dismissed, and the defense had a reasonable explanation for its tardiness; the motion was timely. (At p. 703.)

3. Nevertheless, and assuming the low "reasonable inference" standard, the motion was properly denied because no prima facie showing had been made: the only showing in support of the motion was that two challenged jurors were African-American and that 2 of 8 peremptories had been used against African-American jurors. (At p. 702.)

4. There were neutral reasons for excusing the first African-American juror. The juror had a son in prison and expressed unfavorable views on the death penalty. (At p. 703.)

"[T]he use of peremptory challenges to exclude prospective jurors whose relatives and/or family members have had negative experiences with the criminal justice system is not unconstitutional." (At p. 703.)

It is proper to remove a juror who has "unfavorable" views regarding the death penalty. (At p. 703.)

5. There were neutral reasons for excusing the second African-American juror. The

contact with the criminal justice system and the juror's lack of candor. (At p. 703.)

6. The defendant cannot complain about any Batson/Wheeler violation regarding the removal of alternate jurors because no alternate jurors ended up serving on the jury. Moreover, any error in this circumstance could not possibly prejudice a defendant. (At p. 703.)

Attorney (Rather Than Defendant) May Impliedly Consent to Remedying Batson/Wheeler Violation By Methods Short of Dismissal of Entire Venire.

People v. Overby (2004) 124 Cal.App.4th 1237

Facts: During jury selection, after the prosecution bumped a black juror, the defense attorney asked the court to order the juror to remain in the courtroom and then made a Batson/Wheeler objection. The defense attorney did not request any specific remedy. The trial judge granted the motion and stated, as a remedy, that he was going to reseat the improperly challenged juror. When the trial judge asked if the attorneys wished to be heard on the court's decision, the defense attorney stated, "submit." The juror was then seated over the prosecutor's objection and voir dire resumed. The prosecutor then made her own Batson/Wheeler objection, which was denied. (At pp. 1242-1243.)

Later in the day, the prosecutor asked the trial judge to reconsider Batson/Wheeler motions and argued the jury venire should be dismissed. The motion for reconsideration was denied. At no time, during the motion, did defense counsel state she agreed the venire should be dismissed or indicate any dissatisfaction with the remedy chosen by the court. (At p. 1243.)

On appeal, the defendant argued that, the court's remedy could not be imposed absent his personal consent or waiver of his right to the dismissal of the panel (as a remedy for a Batson/Wheeler violation). (At p. 1243.)

1. In People v. Willis (2002) 27 Cal.4th 811, the California Supreme Court approved remedies short of dismissing the entire venire for a Batson/Wheeler violation, provided the alternate relief was acceptable to the complaining party: In "situations...in which the remedy of mistrial and dismissal of the venire accomplish nothing more than to reward improper voir dire challenges and postpone trial...with the *assent of the complaining party*, the trial court should have the discretion to issue appropriate orders short of outright dismissal of the remaining jury, including assessment of sanctions against counsel whose challenges exhibit group bias and reseating any improperly discharged jurors if they are available to serve." (At p. 1242.)

2. The consent required by Willis need not be personally given by the defendant and may be granted by counsel. "The right to request a mistrial or to elect to continue with a particular jury is not one of the constitutional rights deemed to be so personal and fundamental that it may only be personally waived by the defendant." (At p. 1243.)

3. Defense counsel's conduct (e.g., asking that the challenged juror remain, declining to object to remedy proposed by the judge by saying "submit," and declining to indicate any dissatisfaction with the reseating remedy after having time and opportunity to reconsider it further) showed defense counsel implicitly consented to the remedy imposed by the trial court. (At pp. 1244-1245.)

4. The court noted, however, in future cases, "it would be preferable and advisable for the trial court to ensure that the record reflects the express consent of the prevailing party whenever an alternate remedy authorized by Willis...is employed."

(At p. 1245.)

Trial Judge Has Authority to Inform Counsel Not to Violate *Batson-Wheeler* Even Before Any Challenge to a Juror is Made.

People v. Bouldon (2005) 126 Cal.App.4th 1305

Facts: In a three codefendant case, during a discussion between counsel and the trial judge prior to the start of jury selection, the judge ordered each counsel "not to violate Wheeler." (At p. 1311.)

On appeal, the defendants argued that the trial court's order not to violate **Wheeler** contained an implicit threat to impose monetary sanctions of up to $1,500 if counsel wrongly challenged venire members, and that this created a conflict of interest between defendants and defense counsel and chilled counsel's ability to zealously represent the defendants in exercising peremptory challenges due to a fear of incurring the wrath of the court. (At p. 1314.)

1. The court noted that the trial judge may have decided to issue the order based on the case of People v. Muhammad (2003) 108 Cal.App.4th 313, which held that a trial court does not have the power to imposed a monetary sanction (under Code of Civil Procedure Section 177.5) for a Wheeler violation unless preceded by a order not to engage in discriminatory use of jury challenges. (At pp. 1312-1313.)

2. The possibility that counsel will incur a financial sanction for violating Wheeler does not represent a serious impediment to a defendant's right to zealous representation by counsel. The court's order did no more than tell counsel they had to obey the law - something counsel is already required to do. (At p. 1314.)

3. Although the decisions in Willis and Muhammad anticipated that the order containing the threat of sanctions would issue after problematic conduct on the part of counsel became evident during voir dire, the judge's pre-emptive prophylactic order is authorized by a trial judge's "statutory and the inherent power to exercise reasonable control over all proceedings connected with the litigation before him," and to "take whatever steps [are] necessary to see that no conduct on the part of any person obstructs the administration of justice." (At p. 1314.)

NEXT WEEK: NEW CASES ON

ONE JUDGE RECONSIDERING THE DECISION OF ANOTHER JUDGE TO RELEASE A DEFENDANT ON HIS OWN RECOGNIZANCE

DEPRESSION AS A DEFENSE TO A CHARGE OF FAILURE TO UPDATE SEX REGISTRATION

WHETHER A DEFENDANT CAN BE CONVICTED OF AIDING AND ABETTING A CRIME WHEN

THE PRINCIPAL HAS NOT COMMITTED THE CRIME AND WHAT NEEDS TO BE PROVED TO ESTABLISH A VIOLATION OF HEALTH AND SAFETY CODE SECTION 11383, THE STATUTE PROHIBITING POSSESSION OF PRECURSORS.

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Week Of	Topic	Guest Speaker	Ethics
Aug. 1, 2005	THE NEW RULES ON ASSESSING WHETHER JURY CHALLENGES ARE BEING EXERCISED IN A DISCRIMINATORY FASHION FROM THE U.S. SUPREME COURT: HIGHLIGHTING JOHNSON & MILLER-EL	Jerry Coleman, San Francisco DA's Office	30

Defense Only Has to Raise a Reasonable Inference (Not a "Strong Likelihood" of Discriminatory Purpose) in Order to Make Out a Prima Facie Case of Purposeful Discrimination Under Batson.

Johnson v. California (2005) 125 S.Ct. 2410

Facts:

During jury selection, after challenges for cause were completed, the prosecutor used three of his 12 peremptory challenges to remove all the black jurors remaining in the venire. After the second black juror was challenged, and again, after the third black juror was challenged, the defense objected that the prosecutor's challenges were unconstitutionally based on race under both the California and United States Constitutions. (At p. 2414)

Even though the trial judge warned the prosecutor "we are very close," the judge did not ask the prosecutor to explain his dismissal of the second black juror. The judge found no explanation was necessary as the defendant had failed to establish a prima face case under People v. Wheeler (1978) 22 Cal.3d 258, which requires that there be a "strong likelihood" that the exercise of the peremptory challenges were based upon a group rather than an individual basis. (At p. 2414.)

The trial judge also did not ask the prosecutor for an explanation after the prosecutor challenged the third black juror. Instead, the judge stated that his own examination of the record convinced him that the strikes could be justified by race-neutral reasons, specifically, the judge opined that the black jurors had offered equivocal or confused answers in their written questionnaires. (At p. 2414.)

Procedural History:

The case eventually ended up before the California Supreme Court on the issue of whether the trial judge erred in requiring the defense to make a showing of a "strong likelihood" that the peremptory strikes had been based on race, instead of just a showing of an "inference" of discrimination, when establishing a prima face case. The California Supreme Court noted that in Batson v. Kentucky (1986) 476 U.S. 79, the United States Supreme Court used the latter terminology. However, the California Supreme Court concluded that, despite the difference in language, the standard for making out a prima facie case was really the same under the state and the federal standard. (At p. 2415.) The case went up to the United States Supreme Court on the same issue.

1. Under Batson v. Kentucky (1986) 476 U.S. 79, there is a three-step process for deciding whether peremptory strikes are being used in an unconstitutionally

discriminatory manner.

"First, the defendant must make out a prima facie case 'by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose.'" (At p. 2416.)

"Second, once the defendant has made out a prima facie case, the 'burden shifts to the State to explain adequately the racial exclusion' by offering permissible race-neutral justifications for the strikes." (At p. 2416.)

"Third, '[i]f a race-neutral explanation is tendered, the trial court must then decide...whether the opponent of the strike has proved purposeful racial discrimination.'" (At p. 2416.)

2. California's standard, which requires that the person objecting to the challenge show "that it is more likely than not the other party's peremptory challenge, if unexplained, [was] based on impermissible group bias," is an "inappropriate yardstick by which to measure the sufficiency of a prima facie case." (At p 2416.) Rather, "a defendant satisfies the requirements of Batson's first step by producing evidence sufficient to permit the trial judge to draw an **inference that discrimination has occurred**." (At p. 2417.)

3. The High Court reiterated that the person challenging the strikes has the "burden of persuasion" to "prove the existence of purposeful discrimination" and this burden "rests with, and never shifts from, the opponent of the strike." (At p. 2417.)

4. Thus, even if the State produces only a frivolous or utterly nonsensical justification for its strike, the case does not end—it merely proceeds to step three." (At p. 2417.)

5. "The first two Batson steps govern the production of evidence that allows the trial court to determine the persuasiveness of the defendant's constitutional claim. 'It is not until the third step that the persuasiveness of the justification becomes relevant—the step in which the trial court determines whether the opponent of the strike has carried his burden of proving purposeful discrimination.'" (At p. 2418.)

6. "In the unlikely hypothetical in which the prosecutor declines to respond to a trial judge's inquiry regarding his justification for making a strike, the evidence before the judge would consist not only of the original facts from which the prima facie case was established, but also the prosecutor's refusal to justify his strike in light of the court's request. Such a refusal would provide additional support for the inference of discrimination raised by a defendant's prima facie case." (At p. 2418, fn. 6.)

Editor's Note regarding whether to state reasons where the judge finds no prima facie case: Under the new Johnson standard, an appellate court is even more likely to find a prima facie case has been met - even if the trial judge found it was not. Thus, to avoid having the case remanded in that circumstance, it still makes sense to state the reasons for exercising the challenges even if the trial judge finds no prima facie case.

Coleman's suggestion as to cases involving Wheeler/Batson issues that are on appeal or pending sentencing: If a case is on appeal and has been sent back down in light of the decision in Johnson, our response should be two-fold. First, make sure the trial judge initially re-decides whether a prima facie showing has been met under the new Johnson standard. The judge may still find no prima facie case has been shown. Second, assuming the trial judge finds a prima facie case has been met, make sure to provide justifications of your challenges; if you persuade the trial court that your challenges are for neutral motives, the conviction

should stand on appeal.

Once a Prima Facie Case of Discriminatory Use of Juror Challenges is Found, Courts Should Consider Various Factors in Determining Whether That Showing Has Been Rebutted, Including Looking at the Type of Questions Asked of Each Juror and Comparing Jurors Who Were Bumped to Those Who Remained.

Miller-El v. Dretke (2005) 125 S.Ct. 2317

Facts: In 1986, Dallas prosecutors used peremptory strikes to exclude 10 of 11 African-American jurors eligible to serve on the jury. Evidentiary hearings were held bearing on the questions of whether the prosecutor's office engaged in a pattern of discriminatory use of jury challenges and whether the individual prosecutor had engaged in discriminatory use of jury challenges. The facts elicited at those hearings will be discussed below as relevant. (At p. 2322.)

Procedural stance: After his conviction, defendant filed several unsuccessful appeals and petitions for a writ of habeas corpus based on the claim that prosecutors used their challenges in violation of the Equal Protection Clause. The state courts denied relief, the federal district court denied relief on defendant's federal habeas corpus petition, and the federal appellate court denied a certificate of appealability, which, under federal law, prevented the defendant from appealing the matter. Ultimately, the case ended up in the United States Supreme Court on the question of what the defendant needed to show in order to obtain a certificate of appealability. The first time the case came before the Supreme Court, the court found a sufficient showing had been made to permit a review in the Fifth Circuit Court of Appeals and sent the case back down to the Fifth Circuit for a determination of the appeal on the merits. The Fifth Circuit rejected defendant's claim on the merits, and the case made its way back up to the United States Supreme Court. (At pp. 2322-2323.)

1. Under Batson v. Kentucky (1986) 476 U.S. 79, a defendant may rely on the "totality of the relevant facts" about a prosecutor's conduct in attempting to make out a prima facie case of discriminatory jury selection (i.e., raise of inference of purposeful discrimination). (At pp. 2324-2335.)

2. Once the defendant makes a prima facie showing, the burden shifts to the State to come forward with a neutral explanation for challenging jurors within an arguably targeted class. (At p. 2324.)

3. Although there may be any number of bases on which a prosecutor reasonably might believe that it is desirable to strike a juror who is not excusable for cause, the prosecutor must give a clear and reasonably specific explanation of his legitimate reasons for exercising the challenge. (At p. 2324.)

4. The court recognized that "peremptories are often the subjects of instinct," and that "it can sometimes be hard to say what the reason is." (At p. 2332.) But went on to say when "illegitimate grounds like race are in issue, a prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives." (At p. 2332.)

5. "The trial court then will have the duty to determine if the defendant has established purposeful discrimination." (At p. 2325.)

6. The Miller-El court discussed several factors that should be considered in making the determination of whether the defendant has established purposeful discrimination. (At pp. 2325-2340.)

7. **Statistically Significant Numerical Disparity:** A court may consider the total number of members of a protected class who are in the jury panel in comparison to the number of members of the class who actually sit on the jury. A large disparity supports a finding of discriminatory use. (At p. 2325.)

☐ The court noted that out of 20 black members of a 108 person venire panel, only one served on the jury. (At p. 2325.)

☐ The court recognized that 9 black members were excused for cause or by agreement although this fact did not appear to be something the court placed any emphasis upon. (At p. 2325.)

☐ However, the court pointed out that "prosecutors used their peremptory strikes to exclude 91% of the eligible African-American venire members" and that happenstance was "unlikely to produce this disparity." (At p. 2325.)

8. **Comparison of the Jurors Who Were Struck With Those Were Kept:** The court looked at the reasons given for striking a black juror and compared them to the reasons given for striking an "otherwise similar non-black juror" who was allowed to serve. If the reasons given "for striking a black panelist applies just as well to an otherwise-similar non-black who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at Batson's third step." (At p. 2325.)

☐ The court considered this factor a "more powerful" indication of purposeful discrimination than the statistical disparity. (At p. 2325.)

☐ The court **rejected** the dissent's argument that, in order for two jurors to be deemed "similarly situated" for comparison purposes, the individuals must have given similar responses in all relevant areas. Rather, the court stated: "None of our cases announces a rule that no comparison is probative unless the situation of the individuals compared is identical in all respects, and there is no reason to accept one." (At p. 2329, fn. 6.)

9. **Examples of How Court Conducted Comparative Analysis:**

Juror Fields

The court looked at the whether the reasons provided by the prosecutor for bumping a black juror named Fields, who had expressed "unwavering support for the death penalty," were credible.

At one point in the questioning, the juror indicated that the possibility of rehabilitation might be relevant to the likelihood that a defendant would commit future acts of violence, but, upon follow-up questioning, stated that while he believed anyone could be rehabilitated, this belief would not stand in the way of a decision to impose the death penalty. The juror was also questioned about his brother, whom the juror had noted in his questionnaire had a criminal history. In response to those questions, the juror stated his brother had been arrested and convicted on a number of occasions for possession of a controlled substance but he didn't really know too much about it and that it would not interfere with his service on the jury. (At pp. 2326-2327.)

When asked to provide race neutral reasons, the prosecutor claimed the juror had stated he "could only give death if he thought the a person could not be rehabilitated and he later made a comment that any person could be rehabilitated if they find God or are introduced to God and the fact that we have a concern that his religious feelings may affect his jury service in this case." (At p. 2327.)

When defense counsel pointed out that the prosecutor had mischaracterized the

juror's position on rehabilitation, the prosecutor neither defended what he said or withdrew the strike, but "suddenly" came up with the fact the juror's brother had a prior conviction." (At p. 2327.)

The court dinged the prosecutor for the mischaracterization of testimony. The court refused to credit the idea the prosecutor was simply mistaken since, in light of the juror's unequivocal support for the death penalty, unless the prosecutor had a racially-motivated reason for bumping the juror, the prosecutor would have cleared up any misunderstanding by asking further questions before striking the juror. (At p. 2327.)

The court then noted that two other white jurors and a Hispanic juror were not challenged even though they expressed similar thoughts on rehabilitation to those the prosecutor assumed juror Fields had expressed. The court observed that the prosecutor asked no further follow-up questions of these jurors about their views on rehabilitation despite the fact their remarks on rehabilitation could well have signaled a limit on their willingness to impose a death sentence. (At pp. 2327-2328.)

Editor's Note: The fact the prosecution struck other non-black jurors who expressed views similar to juror Fields was noted but considered of no import. (At p. 2328.)

The court discredited the prosecutor's second ground for dismissing the juror (e.g., that the juror had a brother with a criminal history), stating it "reeked of afterthought." The court found the explanation pretextual based not only on when it was raised but on other reasons, rendering it implausible; specifically, the juror's testimony indicated he was not close to his brother and the prosecution did not inquire further about the influence the brother's history might have had on the juror. (At p. 2328.)

Editor's Note: The court did not discount this factor as a ground for bumping a juror but its assumption that a lack of further questioning on the topic reflected a lack of concern is disturbing since there may be lots of reasons not to delve into the subject further, especially, if doing so might tend to alienate the juror or bring out information that could taint the other jurors. Moreover, as pointed out by the dissent, the prosecutor did engage in fairly significant questioning in this area: the prosecutor asked about where the offenses occurred, whether the brother had been tried or convicted, and whether it would affect the juror's ability to serve. (Dis. opn. at pp. 2356-2357.)

Editor's Note: When asked to state neutral reasons for striking a juror, be sure to state **all** the reasons you have decided to exercise your challenge. Reasons that are left unstated (i.e., because the prosecutor simply forgot to mention them at the earliest opportunity) may be viewed as prextual post hoc explanation.

The court ultimately concluded that while there was both similarities and some differences between the non-black jurors similarly situated to juror Fields, "the differences seem far from significant," particularly when read in light of Fields' voir dire testimony in its entirety. Upon that reading, Fields should have been an ideal juror in the eyes of a prosecutor seeking a death sentence, and the prosecutors' explanations for the strike cannot reasonably be accepted." (At p. 2329.)

Juror Warren

The court also did a side-by-side comparison of the answers provided by another black juror named Warren regarding his views on the death penalty (i.e., that death might be too lenient of a punishment in comparison to life imprisonment) against the answers provided by jurors who were kept on the jury. The court found

other "similarly situated" jurors gave similar answers and were kept. (At p. 2329.)

The court discounted the prosecutor's explanation that jurors with similar views were kept but juror Warren was booted because at the time juror Warren was struck, the prosecution had 10 peremptory challenges left and could afford to be liberal in using them. The court discounted this explanation because one of the jurors with similar views was kept even though that juror was passed on before juror Warren was booted. (At p. 2330.)

Moreover, the court noted that the prosecutor had asked follow-up questions of juror Warren in which he repeatedly stated he could impose death despite his views, whereas the juror who came up earlier and was kept was never even asked similar follow-up questions. (At p. 2330.)

The court also placed little emphasis on the fact that juror Warren had a brother-in-law convicted of a crime having to do with food stamps as a legitimate ground for striking juror Warren because the prosecutor never questioned juror Warren about his errant relative at all, and his "failure to ask undermines the persuasiveness of the claimed concern." Moreover, the court noted juror Warren's brother's criminal history was comparable to those of relatives of other panel members not struck by prosecutors. (At p. 2330, fn. 8.)

10. **Disparate Questioning -Use of Different "Set" of Questions Depending on Race of Juror:** If the prosecution uses a different "type" of questioning when questioning jurors of the group allegedly being discriminated against than when questioning other jurors, this can be evidence of a discriminatory state of mind.

☐ The court noted that the prosecutors' statements preceding questions about a juror's thoughts on capital punishment fell into two categories. One set of prefatory statements was cast in general terms; the other set went into more graphic detail about how the punishment would be carried out. (At p. 2334.)

☐ The defendant contended that the latter statement was given to "prompt some expression of hesitation to consider the death penalty and thus to elicit plausibly neutral grounds for a peremptory strike of a potential juror subjected to it, if not a strike for cause." The defendant argued that the more graphic prefatory statement was given to a higher proportion of blacks than whites and, thus, it provided evidence that prosecutors more often wanted blacks off the jury absent some neutral and extenuating explanation. (At p. 2334.)

☐ The court accepted the basic premise of the defendant's argument and found prosecutors disproportionately used the bland prefatory statement when questioning white jurors: 94% of the white venire panel members, but only 47% of the black venire panel members, were given the bland set. (At p. 2334.)

☐ The court rejected the State's argument that the giving of the different prefatory statements depended on whether the jurors expressed an ambivalence about the death penalty in their answers on the juror questionnaire. (At p. 2335.) The court observed that the State's explanation did not hold up because that explanation did not account for the discrepancy as accurately as the explanation that the questioning differed based on race. (At p. 2336.)

Editor's Note: The dissenting opinion does a pretty good job of skewering the majority analysis and showing the prosecution's expressed grounds did, in fact, show the jurors were questioned for the purported, rather than for a racially discriminatory, reason. (At pp. 2356-2360.)

☐ Another gambit that the court stated showed the prosecution was using its challenges improperly involved the prosecution asking members of the panel how low

a sentence they would consider imposing for murder. "Most potential jurors were first told that Texas law provided for a minimum term of five years, but some members of the panel were not, and if a panel member then insisted on a minimum above five years, the prosecutor would suppress his normal preference for tough jurors and claim cause to strike." (At p. 2337.) "Ninety-four percent of whites were informed of the statutory minimum sentence, compared [with] only twelve and a half percent of African-Americans. No explanation is proffered for the statistical disparity." (At p. 2337.) The court discounted the state's alternative explanation for why some jurors were asked the question and others were not (e.g., based on the stated opposition to the death penalty, or ambivalence about it on the questionnaires or during voir dire) because "only 27% of non-blacks questioned on the subject who expressed these views were subjected to the trick question, as against 100% of black members." (At p. 2338.)

11. **Use of Process to Attempt to Avoid Selection of Members of Group:** In Texas there is a procedure called "jury shuffling" which permits parties to rearrange the order in which members of the jury panel are examined so as to increase the likelihood that visually preferable panel members will be moved forward and empaneled. The court found "the prosecution's decision to seek a jury shuffle when a predominant number of African-Americans were seated in the front of the panel, along with its decision to delay a formal objection to the defense's shuffle until after the new racial composition was revealed, raise a suspicion that the State sought to exclude African-Americans from the jury." (At p. 2333.)

Some Rules to Assist the Courts in Assessing Whether Challenge Was Used in a Discriminatory Manner.

12. **Failure to Inquire About Particular Subject of Alleged Concern:** "[T]he State's failure to engage in any meaningful voir dire examination on a subject the State alleges it is concerned about is evidence suggesting that the explanation is a sham and a pretext for discrimination." (At p. 2329.)

13. **Logic of the Reasons Given in Light of Accepted Trial Strategy:** "[T]he credibility of reasons given can be measured by 'how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy." (At p. 2329.)

14. **Selection of a Member of Group Allegedly Being Discriminated Against:** The court noted the prosecution had left an African-American juror on the panel. However, the court found the weight of this factor was diminished in light of the prosecution's statement that jurors who might have been unacceptable early on in jury selection would be left on when fewer challenges were available to the prosecution; when the juror was selected, 11 of the prosecution's 15 peremptories were gone and three of the persons yet to be questioned were opposed to capital punishment. (At p. 2330.)

Editor's Note: In a concurring opinion, Justice Breyer recommended reviewing the whole question of whether peremptory challenges themselves should be eliminated in order to end racial discrimination in the jury selection process. (At p. 2344.)

NEXT WEEK: JERRY COLEMAN RETURNS TO DISCUSS THE CALIFORNIA SUPREME COURT'S FIRST POST-JOHNSON/MILLER-EL DECISION AS WELL AS OTHER CASES INVOLVING BATSON/WHEELER CHALLENGES, INCLUDING THE LATEST CASES ON ALTERNATIVE REMEDIES TO DISMISSING THE PANEL WHEN SUCH VIOLATIONS ARE FOUND.

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.

Week Of	Topic	Guest Speaker	Elim of Bias
Nov. 10 2008	**RESPONDING TO *BATSON-WHEELER* CHALLENGES (PART II OF III: MAKING A GOOD RECORD)**	**Jerry Coleman San Francisco Asst District Atty**	**30 min**

This week's P&A video is a continuation of last week's 11/03/08 P&A video. Accordingly, pagination and titles pick up from where last week's memo ended.

III. Responding to an Unjustified *Batson-Wheeler* Claim in the Trial Court

It goes without saying that, for legal, ethical, and tactical reasons, no prosecutor should exercise a peremptory challenge against a juror based solely on that juror's gender, sexual orientation, or membership in a racial, ethnic, or religious group. Prosecutors who engage in discriminatory jury selection will receive condemnation, not support, from fellow prosecutors. On the other hand, a prosecutor should not refrain from challenging a juror for *permissible* reasons out of a concern that the defense will raise a disingenuous or frivolous ***Batson-Wheeler*** claim.

Note: While this P&A is geared to how a prosecutor should respond to a ***Batson-Wheeler*** claim, the principles, procedures and obligations imposed by the federal and state constitution when it comes to juror challenges "apply equally to all advocates." (***People* v. *Lenix*** (2008) 44 Cal.4th 602, 612.)

If an unjustified ***Batson-Wheeler*** challenge is raised by the defense, we respectfully recommend the following response.

A. Step One: The Prima Facie Case

1. Holding the Defense to Its Burden, Light Though It Be

There is somewhat of a disconnect between the different principles that govern what constitutes a prima facie case, i.e., an inference of discriminatory purpose in use of peremptory challenges.

On the one hand, it has often been stated that simply pointing out that the prosecutor has challenged one or more members of a particular cognizable class is insufficient to show a prima facie case of discrimination. (**See *People* v. *Box*** (2000) 23 Cal.4th 1153, 1188-1189 [insufficient showing where the "only basis for establishing a prima facie case cited by defense counsel was that the [three] prospective jurors-like defendant-were" of the same cognizable class]; ***People* v. *Farnam*** (2002) 28 Cal.4th 107, 136 -137[insufficient showing where defendant's only "stated bases for establishing a prima facie case were that (1) four of the first five peremptory challenges exercised by the prosecution were" [members of the same cognizable class], and (2) a very small minority of jurors on the panel were [members of that class]"].) This is especially true where the prosecutor has passed on a panel containing one or more members of the cognizable class in issue. (**See *People* v. *Adanandus*** (2007) 157 Cal.App.4th 496, 503; ***People* v. *Cornwell*** (2005) 37 Cal.4th 50, 69-70.)

On the other hand, as pointed out in last week's P&A memo, "the unconstitutional exclusion of even a single juror on improper grounds of racial or group bias requires the commencement of jury selection anew[.]" (***People* v. *Reynoso*** (2003) 31 Cal.4th 903, 927, fn. 8.) And, to be sure, the ultimate issue to be addressed on a ***Wheeler-Batson*** motion "is not whether there is a pattern of systematic exclusion; rather, the issue is whether a particular prospective juror has been challenged because of group bias." (***People* v. *Bell*** (2007) 40 Cal.4th 582, 598, fn. 3; ***People* v. *Avila*** (2006) 38 Cal.4th 491, 549.)

Language from the California Supreme Court in ***People* v. *Bell*** (2007) 40 Cal.4th 582, however, provides a basis for explaining these two somewhat inconsistent perspectives. The general rule is that if the defense can show a prosecutor has challenged a single juror for a discriminatory purpose, there has been a ***Batson-Wheeler*** violation. However, if the court is being asked to "draw an inference of discrimination from the fact one party has excused 'most or all' members of the cognizable group," and that is the ***sole basis*** provided for the inference to be drawn, the court is "necessarily relying on an apparent pattern in the party's challenges" (***Bell***, at p. 598, fn. 3.) In ***that*** situation, while it is possible to imagine circumstances "in which a prima facie case could be shown on the basis of a single excusal, in the ordinary case . . . to make a prima face case after the excusal of only one or two members of a group is very difficult." (***Bell***, at p. 598, fn. 3; **accord *Wade* v. *Terhune*** (9th Cir. 2000) 202 F.3d 1190, 1198.) This is because, as a practical matter, "the challenge of one or two jurors can rarely suggest a *pattern* of impermissible exclusion." (***People* v. *Bell*** (2007) 40 Cal.4th 582, 598 [and noting that where there is a very small number of panelists falling into the cognizable class, it is impossible to draw an inference of discrimination from the fact that the prosecutor challenged a large percentage of the panelists falling into the class, i.e., two of a total of three].)

With those principles in mind, the burden on the defense of making out a prima facie case is relatively light. ADA Coleman believes that prosecutors can expect a trial court to find a prima facie case when two panelists of a cognizable class are challenged or even when only a single panelist of a cognizable class has been challenged but there has been no voir dire of that panelist or the panelist is the only member of the cognizable class at issue in the jury venire.

This does not mean, however, the prosecutor should simply concede the issue of whether a prima facie case has been made out. To the contrary, "[w]hen a ***Wheeler*** motion is made, the party opposing the motion should be given an opportunity to respond to the motion, i.e., to argue that no prima facie case has been made." (***People* v. *Fuentes*** (1990) 54 Cal.3d 707, 716, fn. 5.)

Thus, it is appropriate to hold the defense to its burden at this first step, especially in light of the presumption that a prosecutor exercising a peremptory challenge is doing so on a constitutionally permissible ground. (***People v. Cleveland*** (2004) 32 Cal.4th 704, 732; ***People* v. *Farnam*** (2002) 28 Cal.4th 107, 134.)

This burden, as identified in ***People* v. *Wheeler*** (1978) 22 Cal.3d 258 is the following:

"First, as in the case at bar, he 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 [reasonable inference] that such persons are being challenged because of their group association rather than because of any specific bias." (***Wheeler***, at p. 280 [with bracketed modification by P&A to reflect the holding in ***Johnson* v. *California*** (2005) 545 U.S. 162].)

Per ***Wheeler***, certain types of evidence are relevant to this showing:

(i) the prosecutor "has struck most or all of the members of the identified group from the venire" (***Wheeler***, at p. 280; ***People* v. *Bell*** (2007) 40 Cal.4th 582, 597);

(ii) the prosecutor "has used a disproportionate number of his peremptories against the group" (***Wheeler***, at p. 280;

People v. *Bell* (2007) 40 Cal.4th 582, 597-598 [and noting that a "more complete analysis of disproportionality compares the proportion of a party's peremptory challenges used against a group to the group's proportion in the pool of jurors subject to peremptory challenge" while noting that a small absolute sample size can render such an analysis uninformative];

(iii) "the jurors in question share only this one characteristic - their membership in the group - and that in all other respects they are as heterogeneous as the community as a whole" (*Wheeler*, at p. 280; *People* v. *Bell* (2007) 40 Cal.4th 582, 597 **see also** *People* **v.** *Yeoman* (2003) 31 Cal.4th 93, 115 [finding no prima facie showing because, inter alia, defense counsel made no effort to discuss prospective juror's individual characteristics]);

(iv) the prosecutor failed "to engage these same jurors in more than desultory voir dire, or indeed to ask them any questions at all" (*Wheeler*, at p. 281; *People* v. *Bell* (2007) 40 Cal.4th 582, 597 **see also** *People* **v.** *Yeoman* (2003) 31 Cal.4th 93, 115 [finding no prima facie showing because, inter alia, defense counsel made no effort to discuss nature of prosecutors' voir dire or juror's answers]); and

(v) the defendant is a member of the excluded group and "especially if in addition his alleged victim is a member of the group to which the majority of the remaining jurors belong" - although the court made it clear this is just a relevant factor and not a prerequisite to making the showing. (*Wheeler*, at p. 281; *People* v. *Bell* (2007) 40 Cal.4th 582, 597 [and, indicating at p. 599, that the fact the victim is in the same cognizable class as the challenged juror tends to rebut an inference of discrimination].)

Other circumstances that should be placed on the record:

(i) the number of members of the identified group in the jury box and panel (**see** *Miller-El* **v.** *Dretke* (2005) 545 U.S. 231, 240-241 [court may consider the total number of members of a protected class who are in the jury panel in comparison to the number of members of the class who actually sit on the jury; a large disparity supports a finding of discriminatory use];

(ii) whether the challenged juror shares characteristics of one or more unchallenged panelists belonging to groups other than the cognizable group at issue (**see** *Miller-El* **v.** *Dretke* (2005) 545 U.S. 231, 244 and next week's 11/17/08 P&A memo discussing comparative analysis);

(iii) whether there has been disparate questioning of jurors, i.e., whether panelists belonging to the cognizable group were questioned in a different manner than panelists not belonging to the cognizable group (**see** *Miller-El* **v.** *Dretke* (2005) 545 U.S. 231, 255-257)

(iv) any evidence of the historical practice of the prosecutor or the prosecutor's office of discriminatory jury selection practice (*Miller-El* **v.** *Dretke* (2005) 545 U.S. 231, 253, 264-266)

2. What should a prosecutor do if it is not clear that the challenged juror is actually a member of the cognizable class to which the defense claims the juror belongs?

Courts have long recognized the dilemma of trying to figure out whether a juror fits into a particular cognizable class. As pointed out in *Wheeler* itself, this dilemma arises because "veniremen are not required to announce their race, religion, or ethnic origin when they enter the box, and these matters are not ordinarily explored on voir dire. The reason, of course, is that the courts of California are or should be blind to all such distinctions among our citizens." (**Id**. at p. 263; **accord** *People* **v.** *Trevino* (1985) 39 Cal.3d 667, 687; *People* **v.** *Motton* (1985) 39 Cal.3d 596, 603.) Asking jurors to identify their race or ethnicity can be awkward or offensive. (**See** *People* **v.** *Trevino* (1985) 39 Cal.3d 667, 687 [noting counsel's decision to make the *Wheeler* motion on the basis of easily identifiable surnames, rather than risk juror animosity in quizzing selected individuals as to whether or not they are Mexican-American, was proper]; *People* **v.** *Motton* (1985) 39 Cal.3d 596, 603 [noting while "direct questions on racial identity would help to make a clear and undisputable record" such questions are not required because, inter alia," such questions may be offensive to some jurors and thus are not ordinarily asked on voir dire"].)

This dilemma arises not just in assessing whether the challenged juror belongs to a particular class but in assessing the cognizable class of **all** the other panelists and jurors. The latter assessment is necessary, of course, in order to effectively utilize the mechanisms for determining whether discriminatory challenges are being made, i.e., disparate questioning analysis, comparative analysis, disproportionality analysis, etc.

Moreover, the dilemma of trying to figure out whether a juror fits into a particular cognizable class is only going to become more frequent as the various ethnic and racial groups that populate California intermarry. Indeed, it is questionable whether the current framework for analyzing ***Batson-Wheeler*** challenges can even rationally be applied when it comes to multiracial or multiethnic jurors.

Nevertheless, if the prosecutor has doubts about whether the challenged juror or other members of the panel belong to the cognizable class identified by the defense, the issue should be raised.
The burden is clearly on the party making the ***Batson-Wheeler*** motion to establish the juror is a member of cognizable class at issue. (***Wheeler***, at p. 280.) And if the class membership of the other members of the venire is going to be relied on by the party making the motion to support a claim the other party is using challenges in a discriminatory fashion, the burden would remain on the party making to the motion to establish that class membership. (**See *People* v. *Bell*** (2007) 40 Cal.4th 582, 600.) Conversely, if the party who initially challenged the juror wants to rely on the class membership of the other members of the venire to defeat a ***Batson-Wheeler*** claim, then it would be incumbent on that party to establish the class membership of the jurors in the venire or on the eventual jury.
Sometimes, this burden can be met because, notwithstanding the implication in ***Wheeler*** that such questions might be inappropriate, the juror questionnaires ask individuals to identify their racial, ethnic, or religious background. Moreover, sometimes is unnecessary, at least in the context of alleged racial discrimination, to "establish the true racial identity of the challenged jurors" since discrimination is more often based on appearances than verified racial descent, and a showing that the party challenging the jurors was systematically excusing persons based on "appearances" could still establish a prima facie case. (***People* v. *Bell*** (2007) 40 Cal.4th 582, 599; ***People* v. *Motton*** (1985) 39 Cal.3d 596, 604.)

However, membership in some cognizable classes is difficult to ascertain. For example, in ***People* v. *Bell*** (2007) 40 Cal.4th 582, a case where the defense attempted to claim the prosecution was discriminating against lesbians, the court pointed out that "sexual orientation is usually not so easily discerned from appearance. Without any definite indication that the challenged prospective jurors either were lesbians or that the prosecutor believed them to be such, no prima facie case of discrimination against lesbians as a group can be made." (**Id**. at p. 599.) Similarly, in ***In re Freeman*** (2006) 38 Cal.4th 630, a case where the defense tried to claim the prosecution was discriminating against Jews, the ***Batson-Wheeler*** claim failed because there was an insufficient showing that challenged prospective jurors either were Jewish or were thought to be so by the prosecutor. (**Id**. at pp. 644-645.)

Unfortunately, the courts do not provide much guidance in how to ascertain membership in a cognizable class short of directly asking the juror. (**See** ***People* v. *Wheeler*** (1978) 22 Cal.3d 258, 263.) If such a question needs to be asked, it may be better to have the court make the inquiry.

3. Should the prosecutor make sure that the record includes facts that would undermine an inference of discrimination?

A prosecutor should point out the **absence** of evidence permitting an inference of discrimination if the trial court fails to note such an absence for the record.

a. Defendant Not a Member of the Cognizable Class

If the defendant is not a member of the cognizable class at issue, this fact should be reflected in the record. (**See *People* v. *Bell*** (2007) 40 Cal.4th 582, 599 [considering fact defendant was ***not*** a member of any of the cognizable classes at issue in finding the prosecutor's challenges created no inference of discrimination].
If the defense is claiming that the prosecutor has excluded members of a sub-group of a cognizable class (i.e., African-American women) but the prosecutor has not excluded members of the parallel sub-group (i.e., African-American men), this fact should be pointed out. (**See *People* v. *Bell*** (2007) 40 Cal.4th 582, 599 [considering fact prosecutor did not exercise peremptory challenges against most or all members of "parallel" group (African-American men) of the cognizable class at issue (African-American women) in finding the prosecutor's challenges created no inference of discrimination].)

b. Victim is a Member of the Cognizable Class

If the victim was a member of cognizable class at issue, this fact should be reflected in the record. (**See *People* v. *Bell*** (2007) 40 Cal.4th 582, 599 [considering fact victim was a member of the cognizable class at issue in finding the prosecutor's challenges created no inference of discrimination].)

c. Challenges Have Not Be Made in a Disproportionate Manner

The fact that a prosecutor has **not** used a disproportionate number of his or her challenges against members of the cognizable class is a factor that weighs against finding an inference of discrimination. (**See *People* v. *Bell*** (2007) 40 Cal.4th 582, 598 [considering fact prosecutor used only two of 16 peremptory challenges against members of the cognizable class at issue in finding the prosecutor's challenges created no inference of discrimination].)

d. No Desultory Questioning

The fact a prosecutor has not engaged in "desultory questioning" of members of the cognizable class at issue is a factor that weighs against finding an inference of discrimination. (**See *People* v. *Bell*** (2007) 40 Cal.4th 582, 598 [considering fact prosecutor did not engage members of the cognizable class at issue in "desultory" questioning in finding no inference of discrimination].)

e. The Challenged Jurors Shared Not Only Membership in the Cognizable Class But Other Characteristics
A prosecutor should point out that the jurors who were removed shared more in common (when it came to characteristics relevant to the prosecutor's concerns about their "favorability" as jurors) than just membership in the cognizable class. (**See *People* v. *Bell*** (2007) 40 Cal.4th 582, 599 [considering fact that defense failed to show that in respects other than their ethnic background or national origin the challenged members of the cognizable class were especially heterogeneous in finding no inference of discrimination].)

f. The Prosecution Has Passed on a Panel That Includes Members of the Cognizable Class

If a prosecutor has passed on a panel that includes members of the cognizable class, this fact should be mentioned as it undercuts an inference of discrimination. (**See *People* v. *Carasi*** (2008) 44 Cal.4th 1263, 1294-1295 [no prima facie case of discrimination against females shown because, inter alia, the prosecutor repeatedly passed on panels containing numerous women].)

4. Should the prosecutor state his or her reasons for challenging a juror if the trial court finds the defense has failed to make a prima facie showing?

Unless the court finds there has been a prima facie case made out at the first step, there is no obligation for the prosecutor to disclose any reasons for challenging the panelists, and a trial court is not required to evaluate them. (***People* v. *Carasi*** (2008) 44 Cal.4th 1263, 1292; ***People* v. *Zambrano*** (2007) 41 Cal.4th 1082, 1104-1105 & fn. 3; ***People* v. *Bell*** (2007) 40 Cal.4th 582, 596.)

It is, however, not only permissible, but recommended for a prosecutor to put neutral reasons on the record *even before* the trial judge makes its determination that a prima facie case has not been made out by the defense. (***People* v. *Bonilla*** (2007) 41 Cal.4th 313, 343, fn. 13; ***People* v. *Adanandus*** (2007) 157 Cal.App.4th 496, 500.)

Indeed, even if a court makes a determination that no prima facie case has been made, it is still important for the prosecutor to put reasons on the record. (**See e.g.**, ***People* v. *Farnam*** (2002) 28 Cal.4th 107, 135.) This is because it is possible that reviewing courts will find that the court erred in concluding no prima facie case was met (especially since the United States Supreme Court recently found that the standard California courts were using the wrong standard for prima face case -**see *Johnson* v. *California*** (2005) 545 U.S. 162), and the failure to put any reasons on the record ensures that the case will have to be sent back for a remand. On the other hand, if reasons were placed on the record, the appellate court may be able to consider them in finding the failure to find a prima facie showing was harmless error.

Moreover, putting the reasons on the records avoids the problem of having to remember what the reasons were for excusing a juror years later. (**See *Paulino* v. *Harrison*** (9th Cir. 2008) 542 F.3d 692, 700; ***Yee* v. *Duncan*** (9th Cir. 2006) 441 F.3d 851.)

B. Step Two: Stating the Grounds for the Challenges

1. Should the prosecutor ask to proffer his or her reasons for excluding a juror outside the presence of the defendant and defense counsel?

Prosecutors often are concerned that in responding to a ***Batson- Wheeler*** challenge, they will be forced to reveal jury-picking and/or trial strategies. Thus, there is an instinctual desire to want to explain the choices in an ex parte in camera proceeding.

In general, however, it is error for a trial court to allow a prosecutor to explain his or her reasons for excluding a particular juror outside the presence of defense counsel and defendant. (**See *People* v. *Ayala*** (2000) 24 Cal.4th 243, 259-269 [prosecutor's multiple ex parte hearings for justifications were error, albeit harmless] and dis. opn, J. George [hearings were prejudicial error]; ***United States* v. *Thompson*** (9th Cir. 1987) 827 F.2d 1254, 1260 [reversible error to hold ex parte hearing on prosecutor's explanations].)

The Ninth Circuit does recognize a limited exception to this rule in "those instances in which disclosing the reasons for excluding jurors would reveal the prosecutor's case strategy[.]" (***United States* v. *Alcantar*** (9th Cir. 1990) 897 F.2d 436, 438, fn. 2; ***United States* v. *Thompson*** (9th Cir. 1987) 827 F.2d 1254, 1259.)

And the California Supreme Court appears to recognize this very limited exception as well. In ***People* v. *Ayala*** (2000) 24 Cal.4th 243, for example, the court cited to ***Georgia* v. *McCollum*** (1992) 505 U.S. 42, 58 for the proposition that "[i]n the rare case in which the explanation for a challenge would entail confidential communications or reveal trial strategy, an in camera discussion can be arranged." (***Ayala*** at p. 262.) The ***Ayala*** court held, however, that the exception did not apply when all that was revealed, as in the case before it, were jury selection strategies. (**Ibid.**)

2. State <u>all</u> grounds for the challenge

While peremptory challenges are often based on instinct and it can sometimes be hard to articulate the reason for removing a juror, "a prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives." (***People* v. *Lenix*** (2008) 44 Cal.4th 602, 624.)
Prosecutors should "provide as complete an explanation for their peremptory challenges as possible." (***People* v. *Lenix*** (2008) 44 Cal.4th 602, 624.)

The fact a trial or reviewing court can think up reasons for why the prosecutor may have wanted to challenge a juror, "will not satisfy the prosecutors' burden of stating a racially neutral explanation." (***People* v. *Lenix*** (2008) 44 Cal.4th 602, 625.)

3. Should a prosecutor asked the trial court to confirm the prosecutor's observations regarding a juror's demeanor?

Although it may be awkward, if a prosecutor is basing a challenge to a juror on the basis of the juror's demeanor, it is important to ask whether the judge made the same observations as the prosecutor. As pointed out in Justice Moreno's concurring opinion in ***People* v. *Lenix*** (2008) 44 Cal.4th 602, "[w]hen a trial judge validates a prosecutor's challenge based on the prospective juror's demeanor, and makes clear that such demeanor is the primary reason for validating the challenge, then it is difficult to imagine any circumstance under which an appellate court would second-guess that judgment." (***Lenix***, at p. 634, conc. opn., J. Moreno.) Conversely, if the trial judge is not asked to validate the observation, an appellate court will not presume that the trial judge credited the prosecutor's explanation. (**See *Snyder***

v. *Louisiana* (2008) 128 S.Ct. 1203, 1209; ***People* v. *Lenix*** (2008) 44 Cal.4th 602, 619; **cf.**, ***People* v. *Adanandus*** (2007) 157 Cal.App.4th 496, 510 [where neither trial court nor defense counsel contradicted prosecutor's account of challenged jurors' demeanor or manner of responding to his questions, this suggests the prosecutor's description is accurate].)

4. Should the prosecutor place on the record why he or she kept jurors who were, at least, superficially similarly situated to the challenged panelist?

If the defense has relied on a comparative analysis in attempting to establish a prima facie case, it will be necessary to explain why a juror who the defense is claiming is similarly situated is not similarly situated.

If the defense has not relied on comparative analysis but there is a concern that the judge may do so, it may be wise to anticipate this analysis and short circuit it by explaining the reasons why jurors who might appear to be similarly situated are not, in fact, similarly situated.

Conversely, a prosecutor may wish to point out the fact that other panelists, *regardless of* whether or not they were members of the cognizable class at issue, were *also* challenged on the same ground or grounds as the panelist whom the defense is claiming was improperly excused. (**See *People* v. *Watson*** (2008) 43 Cal.4th 652, 680 [noting prosecutor challenged both jurors who were similarly situated regarding their exposure to gangs].)

5. Should the prosecutor point out that the victims or prosecution witnesses are members of the cognizable class the defense is claiming is being discriminated against?

In ***People* v. *Bell*** (2007) 40 Cal.4th 582, the court held the fact the victims in a criminal case are members of the same cognizable class as the challenged juror can help show that defendant did not meet his burden of raising an inference of discrimination. However, the court also said it discussed this circumstance not because it affirmatively showed the absence of discrimination but only as an indication of why defendant did not make a prima facie showing at step on. (**Id**. at p. 600.)

Nevertheless, there is no harm in pointing out the fact the victims or witnesses are of the same cognizable class as the challenged juror as it provides some evidence that would tend to substantiate a lack of motive on the part of the prosecutor to exclude members of the cognizable class at issue.

6. Should the prosecutor point out the defendant is not a member of the cognizable class the defense is claiming is being discriminated against?

Although a defendant may properly bring a ***Batson- Wheeler*** motion based on a prosecutor's removal of members of a cognizable class to which the defendant does not belong, the fact the defendant is not a member of the cognizable class at issue "remains a subject of proper consideration by the court."

(***People* v. *Farnam*** (2002) 28 Cal.4th 107, 135.)

7. Should the prosecutor point out he or she is a member of the cognizable class the defense is claiming is being discriminated against?

The fact a prosecutor is a member of the same cognizable class as the challenged juror does not insulate a prosecutor from being found to have exercised his or her challenges in a discriminatory fashion. Although as a practical matter, a defense attorney is less likely to use a ***Batson- Wheeler*** challenge in an attempt to surreptitiously prejudice the jury against the prosecutor when the juror being challenged and the prosecutor are of the same cognizable class, P&A has found no case indicating that the fact the prosecutor is of the same or different cognizable class as the challenged juror is relevant. All prosecutors (regardless of the cognizable class to which they belong) are entitled to the presumption that they are exercising their challenges in a constitutional manner.

8. Should the prosecutor point out that he or she passed on the panel while it contained members of the cognizable class at issue?

If a prosecutor has passed on a panel that includes members of the cognizable class at issue, this should be pointed out. (**See *People* v. *Carasi*** (2008) 44 Cal.4th 1263, 1294-1295.). The fact a prosecutor has passed on a juror who is a member of the cognizable class in issue, while not conclusive on the issue of good faith, is "an indication of good faith in exercising peremptories, and an appropriate factor for the trial judge to consider in ruling on a ***Wheeler*** objection"].) (***People* v. *Turner*** (1994) 8 Cal.4th 13, 168; ***People* v. *Adanandus*** (2007) 157 Cal.App.4th 496, 511; ***People* v. *Irvin*** (1996) 46 Cal.App.4th 1340, 1355.)

If a prosecutor has passed on a panel that includes members of a different sub-group of the same cognizable class, this should be pointed out as well. For example, in ***People* v. *Bell*** (2007) 40 Cal.4th 582, the court noted that the fact the prosecutor did not exercise peremptory challenges against African-American males tended to undermine a prima facie showing that the prosecutor was exercising challenges against African-American females with a discriminatory purpose. (**Id**. at p. 599.)

9. What other factors should prosecutors consider putting before the court?

a. Prior Nondiscriminatory History: If the prosecutor has a prior history of accepting jurors belonging to the cognizable class at issue, this should be brought to the attention of the court.

b. Prior Office Training: If the prosecutor has evidence that his office had condemned use of discriminatory challenges, this should be brought to the attention of the court. (**Cf**., ***Miller-El* v. *Dretke*** (2005) 545 U.S. 231, 253, 264-266 [considering existence of office training *approving* use of discriminatory challenges].)

C. Step Three: Responding to the Judge's Concerns

1. Respond to any issues raised by the judge

If the defense has not supported a ***Batson- Wheeler*** claim with one or more of the relevant factors but the judge asks about the factors, the prosecutor should address those concerns.

2. Make sure the record reflects the necessary findings by the trial judge

The prosecutor should make sure the following is discernable from the record:

"1) the trial court considered the prosecutor's reasons for the peremptory challenges at issue and found them to be race-neutral; 2) those reasons were consistent with the court's observations of what occurred, in terms of the panelist's statements as well as any pertinent nonverbal behavior; and 3) the court made a credibility finding that the prosecutor was truthful in giving race-neutral reasons for the peremptory challenges." (***People* v. *Lenix*** (2008) 44 Cal.4th 602, 621.)

3. Should a prosecutor ask the trial judge to take note of the final composition of the jury?

As pointed out in ***People* v. *Lenix*** (2008) 44 Cal.4th 602, "[w]hen a ***Wheeler/Batson*** motion has been made, it is helpful for the record to reflect the ultimate composition of the jury." (**Id**. at p. 610., fn. 6.)

If the prosecutor passed on a final jury panel that includes a member of the cognizable class allegedly being improperly excluded, this "strongly suggests" that the prosecutor was not motivated in exercising challenges by the panelist's membership in the class. (***People* v. *Lenix*** (2008) 44 Cal.4th 602, 629; ***People* v. *Kelly*** (2007) 42 Cal.4th 763, 780; ***People* v. *Cornwell*** (2005) 37 Cal.4th 50, 69-70; ***People* v. *Reynoso*** (2003) 31 Cal.4th 903, 926; **but see *People* v. *Snow*** (1987) 44 Cal.3d 216, 226 ["although the passing of certain jurors may be an indication of the prosecutor's good faith in exercising his peremptories, and may be an appropriate factor for the trial judge to consider in ruling on a Wheeler objection, it is not a conclusive factor"]; ***Brinson* v. *Vaughn*** (3d Cir.2005) 398 F.3d 225, 233 ["a prosecutor may violate ***Batson*** even if the prosecutor passes up the opportunity to strike some African American jurors" and "a prosecutor's decision to refrain from discriminating against some African American jurors does not cure discrimination against others"].)

NEXT WEEK: THE FINAL PART OF OUR SERIES ON RESPONDING TO *BATSON-WHEELER* CHALLENGES WHEREIN ADA JERRY COLEMAN FOCUSES ON RECENT DEVELOPMENTS IN THE SUBSTANTIVE CASE LAW SURROUNDING SUCH CHALLENGES.

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.

STRATEGIES
The Prosecutors' Newsletter on Violence Against Women
ÆQUITAS
Issue # 2 ♦ July 2010

Educating Juries in Sexual Assault Cases

Part I: Using Voir Dire to Eliminate Jury Bias

By Christopher Mallios, JD and Toolsi Meisner, JD[1]

Crimes of sexual violence continue to be misunderstood even though there has been significant research surrounding the dynamics of sexual assault and its impact on victims during the last three decades.[2] We now understand much more about these crimes, the people who commit them, and the way victims respond to trauma. Unfortunately, we cannot assume that the results of this research have infiltrated the minds of the average layperson, juror, or judge.

Too many people still believe the outdated and disproved mythology that surrounds sexual violence.[3] Rape myths shift the blame for the crime from the rapist to the victim.[4] When a fact-finder in a sexual assault case accepts a rape myth as true, the prosecutor faces tremendous barriers to achieving justice for victims and holding offenders accountable for their crimes.

This article is the first in a series that will explain strategies to educate juries about sexual violence facts and overcome common misconceptions. In addition to providing data-driven information about sexual assault based on research, journal articles, and authoritative publications, this article will suggests ideas to improve jury selection techniques. Future articles in this series will provide additional material to provide prosecutors with information and strategies to educate, dispel common misconceptions, and convey the truth to fact finders through other aspects of trial practice, including opening statements, direct examination, calling expert witnesses, and closing arguments.[5]

To be effective in prosecuting crimes of sexual violence, prosecutors must understand the research and statistics about sexual assault in order to educate judges and juries about sexual assault dynamics and common victim responses. Although much of the data in this area is not generally admissible in a criminal case, prosecutors can benefit from a thorough understanding of the dynamics of sexual assault because it will aid them when devising trial strategies, anticipating defenses, preparing victims, and developing effective cross-examinations and arguments.

Further, prosecutors who truly understand sexual violence can better identify jurors who might harbor mistaken beliefs and accept false mythology about sexual assault and poison the rest of the jury with misinformation. When the prosecution selects jurors who have a more realistic understanding of the dynamics of sexual assault, they are more likely to be fair and perhaps even help educate other jurors during deliberation.

Voir Dire Practice and Legal Authority

Voir dire practice can differ depending on what state, county, and judge has jurisdiction over the case. Most jurisdictions have appellate case law addressing the defendant's right to conduct voir dire of jurors regarding their ability to be fair and follow the law. Appellate courts, however, have few opportunities to address the prosecutor's right to question jurors about the mistaken beliefs about rape they possess that would interfere with their ability to follow the law.[6] Prosecutors can make a persuasive argument that jurors with firmly held but mistaken beliefs about rape are unlikely to be able to follow the court's instructions in the law[7] and that specific questioning in this area is the only way to determine the prevalence of rape myths in the jury panel.[8] "Despite considerable research and publications in professional and popular journals concerning rape, [rape] myths continue to persist in common law reasoning."[9]

Traditional voir dire questions regarding jurors' abilities to follow the law, assess witness credibility, understand the burden of proof, and other common areas of inquiry might not sufficiently address potential jurors' emotional reactions to sexual assault cases. An increasing number of jurisdictions are curtailing the ability of prosecutors and defense attorneys to conduct meaningful voir dire of jurors in the name of "judicial economy." The prevalence of rape myths, however, weighs in favor of judges creating exceptions to the general rule of strictly limiting juror voir dire in sexual assault cases.[10]

Goals of Voir Dire in Sexual Assault Cases

In the general sense, the goal of voir dire is to select a jury that can be fair to both sides and render a verdict based on an application of the facts as the jury finds them and the law as the judge instructs them. Through a process where each side questions potential jurors and strikes jurors that appear to be biased against them, a fair jury emerges. In sexual assault cases, however, there are additional goals. For example, jurors do not harbor "robbery myths" that stand in the way of justice for robbery victims. In a sexual assault case, another goal of jury selection is to delve into juror rape myth acceptance and begin to redefine these problematic beliefs into juror competence. Jury selection should also begin to prepare the jury for the evidence, touch on difficult facts, and prepare the jury for the use of graphic terminology and evidence. Another goal, when possible, is to use a jurors' life experiences to educate the other jurors about friends or family members who have been victims of sexual assault and discuss their reactions to being victimized. This can set the stage for later evidence and arguments about victim behavior.

Suggestions for Voir Dire in Sexual Assault Cases

A victim is more likely to be sexually assaulted by someone s/he knows – friend, date, intimate partner, classmate, neighbor, or relative – than by a stranger.[11] Sexual violence can occur at any time and there is no way to adequately predict who might be a perpetrator. Unfortunately, non-strangers and familiar places are often the most dangerous to victims. According to a large study of women who were raped or sexually assaulted during 2002, sixty-seven percent identified the perpetrator as a non-stranger.[12] Another study found that 8 out of 10 victims know the people who raped them.[13] Another study found that nearly 6 out of 10 sexual assault incidents occurred in the victim's home or at the home of a friend, relative, or neighbor.[14] These studies, which are all based on statistics compiled by the U.S. Department of Justice, conclusively support the fact that most rapists are non-strangers.

There is no racial, socio-economic, professional, or other demographic profile that typifies a rapist. This type of criminal is not physically identifiable and often appears friendly and non-threatening.[15] Researchers and sexual violence experts spend considerable time attempting to educate the public about the danger of stereotyping rapists, but their messages are often undermined by the images perpetuated by popular media coverage of sexual assault cases. It is understandable, therefore, that jurors are commonly reluctant to convict attractive and sociable sexual assault defendants who are known to their victims.

Sexual assault defendants commonly appear in court well groomed and well dressed. They might also be married and have children. Jurors confronted with this image may be reluctant to convict without a constant reminder that the defendant is purposeful and dangerous. When the defendant is also a friend or family member of the victim and uses that relationship to gain, and then betray the victim's trust, jurors may need to be informed in order to recognize and understand the defendant's predatory behavior.[16]

In jurisdictions where prosecutors are permitted to ask questions of potential jurors during voir dire, it might be appropriate to ask whether a potential juror would be less likely to convict a defendant of rape if that defendant were a partner, friend, or acquaintance of the victim. The answer to this question provides insight into whether the juror knows that the majority of rapists are non-strangers and whether they view non-stranger rapes as seriously as those committed by strangers. A juror who understands the prevalence of non-stranger sexual assaults can also educate ill-informed jurors on the panel.

Another question to pose to jurors deals with their abilities to follow the judge's instructions regarding the definition of rape regardless of their personal beliefs. If the victim and defendant were in a relationship prior to or during the rape, tell prospective jurors that they will hear evidence about that relationship and ask whether the existence of a prior relationship would concern them when deciding the case. As always, follow-up questions regarding whether the juror expects rapists to be strangers and whether they can follow the law in this area would be useful to probe the beliefs behind the jurors' answers.

Sexual violence is never the victim's fault. No other crime victim is looked upon with the degree of blameworthiness, suspicion, and doubt as a rape victim. Victim blaming is unfortunately common and is one of the most significant barriers to justice and offender accountability.

Victim blaming can be expressed in several themes: victim masochism (e.g., she enjoyed it or wanted it), victim precipitation (e.g., she asked for it or brought it on herself), or victim fabrication (e.g., she lied or exaggerated).[17] In a criminal trial, the defense might appeal to some or all of these common victim-blaming biases to help the defendant avoid accountability. Further, it can translate into jurors blaming victims for their choices in an attempt to distance themselves from the victim and the crime thereby preserving the perception that they are safe if they do not make the same choices as the victim.

When allowed, prosecutors may consider asking questions to determine whether potential jurors understand the importance of holding the offender and not the victim accountable for crimes of sexual violence. For example, prosecutors could ask jurors whether they believe that a victim can be raped even if that victim consented to some other measure of intimate contact before the rape occurred.

In some cases it may be important to gauge whether jurors will still follow the law when the facts do not present the most sympathetic victim. Prosecutors may need to ask questions to determine whether jurors believe that a defendant can commit the crime of rape even if the victim was drinking, using drugs, dressed in a way that the jurors perceive as provocative, being prostituted, or engaged in any other behavior that may inappropriately cause victim blaming. Prosecutors should directly address victim behavior that jurors might consider problematic by preparing them for such behavior during the voir dire process. Through certain voir dire questions, prosecutors can also inform jurors that they will hear evidence regarding the victim's behavior before or after the assault that might cause jurors concern. For example, prosecutors may consider asking whether certain behaviors would cause the jurors unease and interfere with their ability to follow the court's instructions and render a fair verdict.

Prosecutors can counter victim-blaming myths throughout the trial by stressing that without consent, "No" means "No," no matter what the situation or circumstances. It doesn't matter if the victim was drinking or using drugs, out at night alone, gay or lesbian, sexually exploited, on a date with the perpetrator, or if the jurors believe the victim was dressed seductively. No one asks to be raped. The responsibility and blame lie with the perpetrator who took advantage of a vulnerable victim or violated the victim's trust to commit a crime of sexual violence.

Rape is an act of violence and aggression in which the perpetrator uses sex as a weapon to gain power and control over the victim. It is a common defense tactic in rape trials to redefine the rape as sex and try to capitalize on the mistaken belief that rape is an act of passion that is primarily sexually motivated. It is important to draw the

legal and common sense distinction between rape and sex.

There is no situation in which an individual cannot control his sexual urges.[18] Sexual excitement does not justify forced sex and a victim who engages in kissing, hugging, or other sexual touching maintains the right to refuse sexual intercourse. Rapists do not rape because they want to have sex and many rapists also may have partners with whom they engage in consensual sex. Sexual deviance and character traits form the motives for rapists' behaviors.[19] Their sexual deviance may cause them to be aroused by exploiting the physical and/or psychological vulnerabilities in their victims, whether they result from intoxication or physical or mental disabilities. Rapists are also motivated by character traits common to many criminals.

> When an offender has a criminal, narcissistic, or otherwise interpersonally and socially compromised personality, he can be motivated to offend for a variety of reasons. He may lack the internal barriers that prevent offending, like guilt, remorse, empathy, or compassion. He may maintain a belief system, which devalues the rights of others and overvalues his rights. He may be indifferent to, or aroused by, the pain, suffering, injury, or humiliation of others. The offender also may feel that the rules of society do not apply to him.[20]

When conducting voir dire, prosecutors should look out for any answers that indicate that a potential juror might confuse sex with sexual violence and aggression. If a juror harbors attitudes that excuse sexual violence as something that men "simply can't control", they will not be able to deliberate fairly.

There is no "typical" sexual assault victim. Sexual violence can happen to anyone, regardless of sex, race, age, sexual orientation, socio-economic status, ability, or religion. Prosecutors might come across jurors who think that "real" sexual assault victims are attractive, young or sexually inexperienced. This particular stereotype of sexual assault victims is often related to the mistaken belief that rape is about sex, rather than violence, and that the attractiveness of the victim is one of the "causes" of the assault.

Although there is no typical sexual assault victim, studies indicate that certain groups are victimized at higher rates than others. One study found that people with disabilities have an age-adjusted rate of rape or sexual assault that was more than twice the rate for people without disabilities.[21] For individuals with psychiatric disabilities, the rate of violent criminal victimization including sexual assault was two times greater than in the general population.[22] American Indian and Alaska Native women and girls are victims of rape or sexual assault at a rate that is double that of other racial groups.[23]

The elderly, boys and men, sexually exploited women, or persons with disabilities challenge many jurors' beliefs about rape. Questioning potential jurors about their expectations of rape victims and whether they would be able follow the law and render a verdict of guilty, even if the victim does not fit their idea of what a "typical" rape victim should be, will help identify misinformed jurors who may need to be eliminated or educated.

Most victims do not incur physical injuries from sexual assaults. Many of the unwanted and forced acts that take place during a sexual assault do not result in visible non-genital injuries. Most adult rape victims do not have any non-genital injuries from sexual assaults. According to a study examining the prevalence of injuries from rape, only 5 percent of forcible rape victims had serious physical injuries and only 33 percent had minor injuries.[24] This study also showed that most victims of rape, attempted rape, and sexual assault do not receive medical treatment for their injuries. Furthermore, the presence or absence of genital injuries following a rape is not necessarily significant when evaluating a case. Early studies of rape examinations found that most rape victims did not have any genital injuries.[25] Those initial studies, which relied on direct visualization without any magnification or staining techniques, found genital injury rates between 5 and 40 percent.[26] In jurisdictions where forensic sexual assault examiners use only direct visualization techniques without magnification or staining, injury rates would be expected to fall within the range of those studies.

Using the latest examination techniques, including direct visualization, colposcopy, staining techniques, and digital imaging, studies indicate the occurrence of genital injury after rape to be between 50 and 90 percent.[27] These newer examination techniques allow examiners to document

many more minor injuries; however, more research is necessary to determine the prevalence of genital injuries after consensual sexual activity and the relevance, if any, of injury patterns in sexual assault examinations.

Jurors must understand that rape is a life-threatening event and victims make split-second decisions about how to react to sexual violence in order to survive. Some victims respond to the severe trauma of sexual violence through the psychological phenomenon of dissociation, which is sometimes described as "leaving one's body," while some others describe a state of "frozen fright," in which they become powerless and completely passive. Physical resistance is unlikely in victims who experience dissociation or frozen fright or among victims who were drinking or using drugs before being assaulted.[28] To a rape victim, a threat of violence or death is immediate regardless of whether the rapist uses a deadly weapon. The absence of injuries might suggest to some jurors that the victim failed to resist and, therefore, must have consented. The fact that a victim ceased resistance to the assault for fear of greater harm or chose not to resist at all does not mean that the victim gave consent. Each rape victim does whatever is necessary to do at the time in order to survive. The victim's decisions about whether to resist during a sexual assault can lead to jurors victim-blaming or perceiving the victim as less credible and must therefore be directly addressed by prosecutors.

In conducting voir dire, prosecutors may be able to ask questions to probe potential jurors' expectations that sexual assault victims must have suffered serious injuries. In cases involving a victim who has minor or no injuries, prosecutors may consider asking potential jurors whether they would not believe that a victim had been raped if the rapist did not use a deadly weapon or inflict serious injuries. To gain additional insights into the beliefs of potential jurors in this area, prosecutors may even consider asking whether jurors believe that a certain level of resistance is necessary for the crime of rape to occur. Furthermore, if the prosecution intends to call an expert to explain the lack of injuries, it may be important to ask whether potential jurors might be inherently distrustful of expert testimony.

A related issue pertains to jurors' unrealistic expectations and demands for other types of forensic evidence such as fingerprints and scientific testing such as criminalistics and DNA tests. Many prosecutors believe based on first-hand experience that the "CSI Effect" is one of the most significant barriers to justice in sexual assault cases.[29] In cases in which jurors might have heightened expectations regarding the availability of scientific evidence, it might be appropriate during voir dire to inquire into those expectations and begin to educate the jurors about why such evidence might not be available or probative based on the facts of the case.

Most rape victims delay reporting their victimization to law enforcement or never report at all. Victims of sexual assaults respond in various ways, including the manner in which they report incidents, if at all. Many victims choose not to report their victimization because they believe that it is a private or personal matter, fear the defendant, or believe the police are biased against them.[30] Some victims may be embarrassed or distrust law enforcement or the court process. The same reasons cause many victims who do file police reports to do so after some time has passed.

Studies show that sexual assault is one of the most underreported crimes, with 60 percent still being unreported.[31] The closer the relationship between the victim and the perpetrator, the less likely the victim was to report the crime to the police.[32] When the perpetrator is a current or former husband or boyfriend, that rate of reporting drops to approximately 25 percent.[33] Males are the least likely to report a sexual assault, though males make up approximately 10 percent of all victims.[34]

Victims may exhibit a range of emotional responses to assault: calm, hysteria, laughter, anger, apathy, or shock. Each victim copes with the trauma of the assault in a different way. Victims of sexual assault are three times more likely than the rest of the population to suffer from depression, six times more likely to suffer from post-traumatic stress disorder, thirteen times more likely to abuse alcohol, twenty-six times more likely to abuse drugs, and four times more likely to contemplate suicide.[35]

Depending on the facts of the case and how the victim acted after the assault, prosecutors may need to question jurors to ascertain whether specific victim behaviors would concern them and cause them to make adverse prejudgments about victim credibility. Additional questions about whether jurors could fairly consider expert testimony regarding victim behavior might be appropriate in cases in which the prosecution will introduce expert testimony.

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Victim credibility is often the primary issue in sexual assault prosecutions and this is especially so in non-stranger cases. Some people are so skeptical of sexual assault allegations that they assume that most victims are lying when they report their victimization to law enforcement. The mistaken belief that most sexual assault allegations are false is unfortunately common. Significantly, methodologically reliable research indicates that only 2 to 8 percent of sexual assault cases involve false reporting.[36] This research conclusively disproves a common myth that most rape victims lie about being raped; nevertheless, defense attorneys may design a defense strategy to appeal to jurors who believe the oft-repeated myth that most rape victims lie. Expert testimony about the credibility of a witness is inadmissible and prosecutors will unlikely be allowed to ask potential jurors about their pre-conceived ideas about the credibility of a witness. Nevertheless, to the extent that the court will permit the prosecution to explore whether potential jurors harbor a general belief that most rape allegations are false, some questioning in this area could reveal anti-victim biases that could interfere with the juror's ability to be fair. Questions about whether a juror will wait until hearing all of the evidence – including expert testimony regarding common victim reactions to sexual assault – to decide the credibility of a witness can help reveal biased potential jurors and identify those who may be able to educate other members of the jury.

Conclusion

The jury selection process is the first opportunity for a prosecutor to begin educating jurors in a sexual violence case and allows prosecutors to identify and strike jurors whose biases will interfere with their ability to follow the law and render a fair verdict. Using deliberate and thoughtful language when explaining the facts of the case, providing context for victim behavior, and inquiring about jurors' life experiences can help prosecutors dispel myths and counter the defense strategies that seek to exploit them.

Successful juror education begins with voir dire, continues throughout the entire trial, and culminates with a strong closing argument. An appreciation of the facts about sexual violence is key to that success. A skillful jury selection is only the initial step in an effective prosecution strategy that will yield the best possible result in prosecuting these difficult cases. An effective strategy in these cases must continue with the collection and presentation of all corroborating evidence, application of solid trial advocacy skills, and the use of expert witnesses, when appropriate, to maximize offender accountability, and achieve justice.

Forthcoming articles in this series will further discuss the topic of juror education. In the meantime, please visit www.aequitasresource.org for additional information and resources related to the prosecution of sexual assault and other violence against women related cases.

Upcoming Training Events

National Institute on the Prosecution of Sexual Violence II
November 16-19, 2010
in Washington, DC

This Institute is presented in partnership with the Pennsylvania Coalition Against Rape and the U.S. Department of Justice, Office on Violence Against Women. Seating is limited, so please apply early.This course is open to all prosecutors and attendance is free of charge; however, priority will be given to OVW grantees who have previously attended NIPSVI. There is no limit to the number of attendees from any jurisdiction.

National Institute on the Prosecution of Sexual Violence I
January 11-14, 2011
in Washington, DC

This Institute is presented in partnership with the Pennsylvania Coalition Against Rape and the U.S. Department of Justice, Office on Violence Against Women. Seating is limited, so please apply early. This course is open to all prosecutors and attendance is free of charge; however, priority will be given to OVW grantees. There is no limit to the number of attendees from any jurisdiction.

For additional information please visit:
http://www.aequitasresource.org/training.cfm

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(Endnotes)

1 Christopher Mallios and Toolsi Meisner are Attorney Advisors at AEquitas: The Prosecutors' Resource on Violence Against Women.

2 *See e.g.* William L. *Assessment, Treatment, and Theorizing about Sex Offenders: Developments during the Last Twenty Years and Future Directions*, 23 CRIM. JUST. & BEHAV. 162 (1999); EDNA B. FOA & BARBARA OLASOV ROTHBAUM, TREATING THE TRAUMA OF RAPE: COGNITIVE BEHAVIORAL THERAPY (The Guilford Press 1998); SUSAN ESTRICH, REAL RAPE (Harvard University Press 1987).

3 See generally, Sarah Ben-David & Ofra Schneider, *Rape Perceptions, Gender Role Attitudes, and Victim-Perpetrator Acquaintance*, 53 SEX ROLES 385, (2005).

4 *See generally* Kimberly A. Lonsway & Louise F. Fitzgerald, *Rape Myths in Review* 18 PSYCHOL. OF WOMEN Q. 133 (1994).

5 More information and resources are available at www.AEquitasResource.org, and at http://www.pcar.org/aboust_sa/faq_sa.html.a (Pennsylvania Coalition Against Rape).

6 Following a conviction, the defendant in a criminal case can raise numerous claims, including legal challenges to the manner in which the trial court conducted jury selection; however, the Double Jeopardy Clause of the United States Constitution prevents the prosecution from filing an appeal after an acquittal in a case in which the trial court permitted biased jurors to be seated.

7 "Many jurors bring to the courtroom the myths about rape which had long influenced [the] courts as they applied 'special' rules of evidence only to rape cases." Commonwealth v. Gallagher, 547 A.2d 355, 360 (Pa. 1988) (Larsen, J., dissenting).

8 "[R]ape mythology persists, and recent studies reveal that rape myths insidiously infect the minds of jurors, judges, and others who deal with rape and its victims." State v. Robinson, 431 N.W.2d 165, 173 (Wis. 1988) (quoting Toni M. Massaro, *Experts, Psychology, Credibility, and Rape: The Rape Trauma Syndrome Issue and Its Implications for Expert Psychological Testimony,* 69 MINN. L. REV. 395, 402-10 (1985)).

9 Sarah Ben-David & Ofra Schneider, *Rape Perceptions, Gender Role Attitudes, and Victim-Perpetrator Acquaintance*, 53 SEX ROLES 385 (2005).

10 More information and resources are available at http://www.pcar.org (Pennsylvania Coalition Against Rape), and http://www.nsvrc.org (National Sexual Violence Resource Center).

11 *See generally* Kimberly A. Lonsway & Louise F. Fitzgerald, *Rape Myths in Review* 18 PSYCHOL. OF WOMEN Q. 133 (1994).

12 Callie Rennison, *National Crime Victimization Survey: Criminal Victimization 2000, Changes 1999-2000 with Trends 1993-2000*, BUREAU OF JUST. STAT., U.S. DEPT. OF JUST.

13 Patricia Tjaden & Nancy Thoennes, *Full Report of the Prevalence, Incidence, and Consequences of Intimate Partner Violence Against Women: Findings from the National Violence Against Women Survey*, NAT'L INST. OF JUST., U.S. DEPT. OF JUST. (2000), *available at* http://www.ncjrs.gov/pdffiles1/nij/183781.pdf (last visited June 28, 2010).

14 Lawrence Greenfeld, *Sex Offenses and Offenders*, BUREAU OF JUST. STAT., U.S. DEPT. OF JUST. (1997).

15 *See* Veronique N. Valliere, *Understanding the Non-Stranger Rapist*, 1 THE VOICE, NAT'L DISTRICT ATTORNEYS ASS'N NEWSLETTER, 4 (2007), *available at* http://www.ndaa.org/publications/newsletters/the_voice_vol_1_no_11_2007.pdf (last visited June 28, 2010) ("Another powerful tool [sex] offenders use to groom and manipulate their audience is to be nice. A 'nice' offender does not fit society's image of a rapist…Most non-stranger rapists use their social skills to gain control of and cooperation from the victim with little effort.").

16 *Id.* ("Nice comes through to juries and judges, as well as to the victim. Offenders often produce character witnesses to testify that they are good citizens/fathers/workers/church members. The defendant is counting on society to perpetrate the belief that niceness cannot coexist with violence, evil or deviance; consequently, the 'nice' guy must not be guilty of the alleged offense.").

17 *See* Sarah Ben-David & Ofra Schneider, *Rape Perceptions, Gender Role Attitudes, and Victim-Perpetrator Acquaintance*, 53 SEX ROLES 385, 386 (2005).

18 *See* Barbara E. Johnson, Douglas L. Kuch & Patricia R. Schander, *Rape Myth Acceptance and Sociodemographic Characteristics: A Multidimensional Analysis*, 36 SEX ROLES 693, 696 (1997).

19 Veronique N. Valliere, *Understanding the Non-Stranger Rapist*, 1 THE VOICE, NAT'L DISTRICT ATTORNEYS ASS'N NEWSLETTER, 2 (2007), *available at* http://www.ndaa.org/publications/newsletters/the_voice_vol_1_no_11_2007.pdf (last visited June 28, 2010).

20 *Id.*

21 Michael Rand and Erika Harrell, National Crime Victimization Survey, Crime Against People with Disabilities, BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUSTICE (2007), *available at http://www.nsvrc.org/sites/default/files/Crimes-against-people-with-disabilities-2007.txt*

22 Virginia Aldigé Hiday, et al., *Criminal Victimization of Persons with Severe Mental Illness*, 50 PSYCHIATRIC SERVICES 62 (1999).

23 Steven W. Perry, *American Indians and Crime: A BJS Statistical Profile, 1992-2002*, BUREAU OF JUST. STAT., U.S. DEPT. OF JUST. (2004), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/aic02.pdf (last visited June 28, 2010).

24 Callie Rennison, *Rape and Sexual Assault: Reporting to Police and Medical Attention, 1992-2000*, BUREAU OF JUST. STAT., U.S. DEPT. OF JUST. (2002) (assuming that every rape victim suffers injury from the commission of the rape and referring to victims who suffered additional injuries in addition to the rape itself).

25 Marilyn Sawyer Sommers, *Defining Patterns of Genital Injury from Sexual Assault: A Review*, 8 TRAUMA, VIOLENCE & ABUSE 270, 271 (2007).

26 *Id.*

27 *Id.*

28 Kimberly Lonsway, Joanne Archmbault & David Lisak, *False Reports: Moving Beyond the Issue to Successfully Investigate and Prosecute Non-Stranger Sexual Assault*, 3 THE VOICE, NAT'L DISTRICT ATTORNEYS ASS'N NEWSLETTER, 8 (2009) *available at* http://www.ndaa.org/publications/newsletters/the_voice_vol_3_no_1_2009.pdf (last visited June 28, 2010).

29 See generally, Donald Shelton, *The "CSI Effect:" Does it really exist?*, 259 NAT'L INST. OF JUST. 1, (2008), *available at* http://www.ncjrs.gov/pdffiles1/nij/221500.pdf (last visited June 28, 2010).

30 Callie Rennison, *Rape and Sexual Assault: Reporting to Police and Medical Attention, 1992-2000*, BUREAU OF JUST. STAT., U.S. DEPT. OF JUST. (2002).

31 Michael Rand & Shannan Catalano, *Criminal Victimization, 2006*, BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUSTICE (2007), *available at* http://www.rainn.org/pdf-files-and-other-documents/News-Room/press-releases/2006-ncvs-results/NCVS%202006-1.pdf (last visited June 28, 2010).

32 Callie Rennison, *Rape and Sexual Assault: Reporting to Police and Medical Attention, 1992-2000*, BUREAU OF JUST. STAT., U.S. DEPT. OF JUST. (2002).

33 *Id.*

34 *Id.*

35 *Rape-Related Posttraumatic Stress Disorder*, National Center for Victims of Crime (2009), *available at* www.ncvc.org/ncvc/main.aspx?dbName=DocumentViewer&DocumentID=32366 (last visited June 28, 2010).

36 Kimberly Lonsway, Joanne Archmbault & David Lisak, *False Reports: Moving Beyond the Issue to Successfully Investigate and Prosecute Non-Stranger Sexual Assault*, 3 THE VOICE, NAT'L DISTRICT ATTORNEYS ASS'N NEWSLETTER, 2 (2009) *available at* http://www.ndaa.org/publications/newsletters/the_voice_vol_3_no_1_2009.pdf (last visited June 28, 2010).

This project was supported by Grant No. 2009-TA-AX-K024 awarded by the U.S. Department of Justice, Office on Violence Against Women (OVW). The opinions, findings, conclusions, and recommendations expressed in this publication are those of the author(s) and do not necessarily reflect the views of OVW.

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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 Speaker	Elim. of Bias	Ethics
Nov. 3 2003	Our Annual "Wheeler" Update: The Latest Cases on Jury Selection Inimitably Discussed By California's Leading Expert in the Field (Part III of III)	Jerry Coleman (SF ADA)	10	20

Trial Court's Conclusion that Prosecutor's Exercise of Peremptory Challenges Were Not Based on Group Bias Entitled to Great Deference on Appeal & Court Need Not "Verify" on the Record Every Single Observation Cited By Party Justifying Use of Challenge.

People v. Reynoso (2003) 31 Cal.4th 903 [3 Cal.Rptr.3d 769] [pin cites are to Cal.Rptr]

Facts: The defendants were jointly tried and convicted of first degree murder. The victim was Hispanic; as were the defendants. During jury selection, the prosecution exercised four peremptory challenges. Two challenges were used against Hispanic jurors, although the prosecution had passed on the jury four times before kicking the first Hispanic juror and 14 times before kicking the second Hispanic juror. The court found a prima facie case of exclusion for group bias. The prosecutor justified his exclusion of the first juror on grounds she was a counselor for "at-risk youth" and would have undue sympathy for the defendants (who could be categorized as "at-risk youth"). The prosecutor justified his exclusion of the second juror on grounds she was a customer service representative (and thus lacked educational experience), that she did not seem to be paying attention to the proceedings, and because she was not involved in the process. The trial court accepted the reasons as race-neutral. At that juncture, defense counsel piped up and argued that there was nothing in the second juror's background that would make her sympathetic to the defense and she had relatives in law enforcement; ergo, she was excused for racial reasons. The trial judge noted that another Hispanic female juror who likewise had law enforcement contacts had not been peremptorily challenged by the prosecutor but by the defense. No Hispanic jurors were ultimately empaneled. (At pp. 775-776, 789.)

The **court of appeal** concluded that in light of the California Supreme Court decision of People v. Silva (2001) 25 Cal.4th 345 [see 5/20/03 P&A memo], it had to reverse the conviction on grounds the trial judge failed to adequately satisfied its obligation to evaluate the prosecutor's reasons for booting the second juror. First, the court of appeal believed that the initial reason given by the prosecution - that the juror was a customer service representative with a lack of educational experience - was not supported by the record and lacked any content related to the case being tried. Second, the court of appeal believed that failure of the trial court to expressly comment upon the prosecutor's claim (disputed by the defense) that the juror was not paying attention undermined the

prosecutor's claim. The court of appeal also criticized the trial court for considering a challenge exercised by the defense in its analysis. (At p. 777)

1. There is a general presumption "that a party exercising a peremptory challenge is doing so on a constitutionally permissible ground." (At p. 773 [albeit noting this presumption can be rebutted upon a proper showing - **see** last week's P&A memo at pp. 1-3.]

2. It is important to distinguish between the second step of Wheeler/Batson inquiry (i.e., whether a race-neutral explanation is tendered) from the third step of the inquiry (i.e., whether there has nevertheless been a showing of purposeful discrimination).

   - "The second step of this process does not demand an explanation that is persuasive, or even plausible. 'At this [second] step of the inquiry, the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral.'" (At p. 779, citing to Purkett v. Elem (1995) 514 U.S. 765, 767.)

   - "It is not until the *third* step that the persuasiveness of the justification becomes relevant - the step in which the trial court determines whether the opponent of the strike has carried his burden of proving purposeful discrimination." (At p. 779, citing to Purkett v. Elem (1995) 514 U.S. 765, 768.)

   - "To say that a trial judge may choose to disbelieve a silly or superstitious reason at step three is quite different from saying that a trial judge must terminate the inquiry at step two when the race-neutral reason is silly or superstitious. The latter violates the principle that the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike." (At p. 779, citing to Purkett v. Elem (1995) 514 U.S. 765, 768.)

3. **What is a legitimate reason?** A prosecutor must give "legitimate reasons" for exercising his challenges and the reasons "must be related to the particular case to be tried." However, this just means that the prosecution cannot "satisfy his burden of production by merely denying that he had a discriminatory motive or by merely affirming his good faith." (At p. 780, citing to Purkett v. Elem (1995) 514 U.S. 765, 768-769.)

4. A "'legitimate reason' is not a reason that makes sense, but a reason that does not deny equal protection." For example, the prosecutor's reasons for bumping a juror in Purkett (i.e., that the juror had long, unkempt hair, a mustache, and a beard) "was deemed by the high court to be an entirely valid, race-neutral reason that satisfied the prosecutor's burden under step two of articulating a nondiscriminatory reason for the peremptory challenge under scrutiny." (At p. 780.)

   The Purkett court noted: "It matters not that another prosecutor would have chosen to leave the prospective juror on the jury. Nor does it matter that the prosecutor, by peremptorily excusing men with long unkempt hair and facial hair on the basis that they are specifically biased against him or against the People's case or witnesses, may be passing over any number of conscientious and fully-qualified potential jurors." (At p. 786.)

5. The proper focus of a Batson/Wheeler inquiry, of course, is on the subjective genuineness of the race-neutral reasons given for the peremptory challenge, not on the objective reasonableness of those reasons. (At p. 786, citing to Purkett v. Elem (1995) 514 U.S. 765, 769.)

6. **Reliance on Intangibles**: "Peremptory challenges based on counsel's personal observations are not improper." (At p. 780.)

7. "Indeed, even less tangible evidence of potential bias may bring forth a peremptory challenge: either party may feel a mistrust of a juror's objectivity on no more than the 'sudden impressions and unaccountable prejudices we are apt to conceive upon the **bare looks and gestures of another**' (citation omitted)—upon entering the box the juror may have smiled at the defendant, for instance, or glared at him." (At p. 780.)

8. "[N]othing in Wheeler disallows reliance on the prospective jurors' **body language or manner of answering questions** as a basis for rebutting a prima facie case" of exclusion for group bias." (At p. 780.) For example, an observation that the juror was "**laughing at an inappropriate point** during voir dire" has been upheld as a valid ground for bumping a juror even though the appellate court could not verify the conduct occurred based on the record. (At p. 780.)

9. "If a prosecutor can lawfully peremptorily excuse a potential juror based on a hunch or suspicion, or because he does not like the **potential juror's hairstyle**, or because he observed the potential juror glare at him, or smile at the defendant or defense counsel, then surely he can challenge a potential juror whose **occupation**, in the prosecutor's subjective estimation, would not render him or her the best type of juror to sit on the case for which the jury is being selected." (At p. 786; see also People v. Robinson (2003) 110 Cal.App.4th 1196, 1206 - discussed in this P&A memo, below, at p. 10 - ["Exclusion based on hunches and other arbitrary reasons are permissible as long as the reasons are not based on improper group bias"].)

   Moreover, a attorney may legitimately peremptorily excuse a potential juror because he or she feels the potential juror's occupation reflects **too much education**, and that a juror with that particularly high a level of education would likely be specifically biased against their witnesses, or their client's position in the case. (At p. 787, fn. 6.)

10. "Nowhere does Wheeler or Batson say that trivial reasons are invalid. What is required are reasonably specific and neutral explanations that are related to the particular case being tried." (At p. 780.)

11. **Reasons May Change Depending on Mix of Jurors & Number of Challenges Left**: "[I]t is a combination of factors rather than any single one which often leads to the exercise of a peremptory challenge. In addition, the particular combination or mix of jurors which a lawyer seeks may, and often does, change as certain jurors are removed or seated in the jury box." (At p. 781.)

   - "It may be acceptable, for example, to have one juror with a particular point of view but unacceptable to have more than one with that

view." (At p. 781.)

- "If the panel as seated appears to contain a sufficient number of jurors who appear strong-willed and favorable to a lawyer's position, the lawyer might be satisfied with a jury that includes one or more passive or timid appearing jurors. However, if one or more of the supposed favorable or strong jurors is excused either for cause or peremptory challenge and the replacement jurors appear to be passive or timid types, it would not be unusual or unreasonable for the lawyer to peremptorily challenge one of these apparently less favorable jurors even though other similar types remain. These same considerations apply when considering the age, education, training, employment, prior jury service, and experience of the prospective jurors. (At p. 781.)

- "[T]he 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 and the number of challenges remaining with the other side. Near the end of the voir dire process a lawyer will naturally be more cautious about 'spending' his increasingly precious peremptory challenges. Thus at the beginning of voir dire the lawyer may exercise his challenges freely against a person who has had a minor adverse police contact and later be more hesitant with his challenges on that ground for fear that if he exhausts them too soon, he may be forced to go to trial with a juror who exhibits an even stronger bias." (At p. 781.)

- "Moreover, as the number of challenges decreases, a lawyer necessarily evaluates whether the prospective jurors remaining in the courtroom appear to be better or worse than those who are seated. If they appear better, he may elect to excuse a previously passed juror hoping to draw an even better juror from the remaining panel." (At pp. 781-782.)

12. **Passing on the Jury With the Juror Eventually Booted Still Present**: "Although not a conclusive factor, "the passing of certain jurors may be an indication of the prosecutor's good faith in exercising his peremptories, and may be an appropriate factor for the trial judge to consider in ruling on a Wheeler objection." (At p. 788; accord, People v. Gutierrez (2002) 28 Cal.4th 1083, 1122 [discussed in this P&A memo, below at p. 7].)

Moreover, passing on a jury with a juror of the same class as the jurors who have allegedly been bumped for a discriminatory reason lends itself to an inference of non-discriminatory purpose -even when the juror is later bumped by the opposing party. The court **rejected** the argument that passing on a jury in which a member of the allegedly targeted class remains cannot be considered on appeal where the juror is ultimately bumped by the opposing party because it cannot be known with certainty whether the prosecutor would in fact not have peremptorily challenged the juror, had the defense not itself first peremptorily excused her. (At p. 790, fn. 9.)

Editor's Note: In Hayes v. Woodford (9th Cir. 2002) 301 F.3d 1054 (see this P&A memo, below at p. 9), the court noted that while "a trial court cannot rely exclusively on the racial makeup of the jury to determine that there has been no discrimination," the fact an attorney has accepted a jury containing members of the allegedly discriminated against class is "a permissible, relevant factor in assessing the genuineness of the prosecutor's race-neutral reasons." (Id., at p. 1081, 1083 [and noting the

number of jurors belonging to the class allegedly discriminated against who were seated proportionately far exceeded the number who might be expected to be seated given the small percentage of the class in the relevant jurisdiction]; see also Lewis v. Lewis (9th Cir. 2003) 321 F.3d 824, 834, fn. 39 (see this P&A memo, below, at p. 7) [while fact juror of targeted class not struck relevant in deciding whether prima facie case made out and is a sign of good faith on the part of the prosecutor, "it does not alone support an affirmative credibility finding"].)

Trial Judge Not Obligated to Verify On the Record Every Race-Neutral Reason Given for Bumping Jurors.

13. Where "the trial court is fully apprised of the nature of the defense challenge to the prosecutor's exercise of a particular peremptory challenge, where the prosecutor's reasons for excusing the juror are neither contradicted by the record nor inherently implausible (citation omitted) and where nothing in the record is in conflict with the usual presumptions to be drawn, i.e., that all peremptory challenges have been exercised in a constitutional manner, and that the trial court has properly made a sincere and reasoned evaluation of the prosecutor's reasons for exercising his peremptory challenges, then those presumptions may be relied upon, and a Batson/Wheeler motion denied, notwithstanding that the record does not does contain detailed findings regarding the reasons for the exercise of each such peremptory challenge." (At p. 790.)

14. The trial court "must make 'a sincere and reasoned attempt to evaluate the prosecutor's explanation in light of the circumstances of the case as then known, his knowledge of trial techniques, and his observations of the manner in which the prosecutor has examined members of the venire and has exercised challenges for cause or peremptorily." (At p. 782.)

15. "But in fulfilling that obligation, the trial court is not required to make specific or detailed comments for the record to justify every instance in which a prosecutor's race-neutral reason for exercising a peremptory challenge is being accepted by the court as genuine. This is particularly true where the prosecutor's race-neutral reason for exercising a peremptory challenge is based on the prospective juror's demeanor, or similar intangible factors, while in the courtroom." (At p. 782.) "The impracticality of requiring a trial judge to take note for the record of each prospective juror's demeanor with respect to his or her ongoing contacts with the prosecutor during voir dire is self-evident." (At p. 790.)

16. "[W]hen the prosecutor's stated reasons are either unsupported by the record, inherently implausible, or both, more is required of the trial court than a global finding that the reasons appear sufficient." (At p. 785.)

17. "When the prosecutor's stated reasons are both inherently plausible and supported by the record, the trial court need not question the prosecutor or make detailed findings." (At p. 785.) Specific inquiry by the trial court is not required to show compliance with its obligation under Wheeler. (At p. 782.)

18. Thus, in the instant case, **it was wrong** for the appellate court to find that the record on appeal did not support the prosecutor's stated reasons

for exercising a peremptory challenge against the second Hispanic juror and did not support the trial court's express determination that those reasons were sincere and genuine. (At p. 785.)

- **Was the prosecutor so wrong about customer service reps?**

The question for the trial court was not whether the notion that all persons employed as customer service representatives would have insufficient 'educational experience' to effectively serve on juries was objectively valid. Nor was it whether, subjectively speaking, the specific juror (who was employed as a customer service representative) herself had insufficient "educational experience" to sit on the jury. (At pp. 786-787.) Rather, the pertinent question is whether the reason given was legitimate or was a disingenuous reason given to cover a challenge made for a discriminatory purpose. (At p. 787.)

Similarly, the proper function of the reviewing court was not to objectively validate or invalidate the broadly stated premise about customer representatives. (At p. 786.) Rather, a reviewing court (in a deferential manner) simply assesses whether the prosecutor's ***subjective*** race-neutral reasons for exercising the peremptory challenges at issue were sincere and whether the defense met their burden of showing a strong likelihood the challenge was exercised for an improper purpose. (At p. 786.)

Here, the juror's occupation was confirmed by her answers to the general questions, as were the additional circumstances that she had no prior jury experience or past contact with the criminal justice system in any capacity. It was legitimate (especially when coupled with the juror's inattentiveness) for the prosecutor to believe that such a juror would not be the best person to decide a multi-defendant murder case. (At pp. 786-787.)

Note: The fact that one of the other Hispanic jurors was a counsel for at-risk youth was deemed a reasonable ground for bumping the juror in the instant case. (At p. 785, fn. 5; but see United States v. Murillo (9th Cir. 2002) 288 F.3d 1126, 1135-1137 [claim juror was bumped because juror worked for a casino was not given much credence where a large part of the county's citizens also worked in casinos].)

- **What about the prosecutor's observation the juror was not paying attention and was not sufficiently involved in the jury selection?**

There was nothing inherently implausible about this reason, nor was it contradicted by the record, especially in light of her lack of prior jury service and lack of any contact with the criminal justice system. (At p. 787.)

Implied Finding: It was not necessary for the trial judge to specifically clarify or probe the prosecutor's claim regarding the juror's demeanor. When the trial judge expressly accepted this race-neutral reason as sincere and genuine, this was tantamount to an implied acceptance of the reason as real. (At p. 788.)

- **Other reasons for upholding the trial court's determination?**

Passing: If the prosecutor's "reasons for excusing the second Hispanic juror] were indeed pretextual, and he was in actuality bent on removing her from the jury because of her Hispanic ancestry, his acceptance of the jury 14 times with [her] seated in the jury box, on four such occasions with [another] Hispanic prospective juror also seated on the jury, was hardly the most failsafe or effective way to effectuate that unconstitutional discriminatory intent." (At p. 788.)

Victim & Defendant Both of Same Class: "[B]oth the defendants and the murder victim were of Hispanic ancestry, a circumstance that might be viewed as neutralizing any suspected untoward belief on the prosecutor's part that Hispanic jurors would tend to be biased in favor of, and thereby be more inclined to vote to acquit, the Hispanic defendants. (At p. 788, fn. 7.)

Propriety of Considering Defense Counsel's Challenges in Assessing Prosecutor's Alleged Discriminatory Intent.

18. It is settled that "the propriety of the prosecutor's peremptory challenges must be determined without regard to the validity of defendant's own challenges." (At p. 788.)

19. The court noted that the trial judge's mention of the fact that defense counsel had booted a Hispanic juror not bumped by the prosecution was simply made to point out that, contrary to defense counsel's claim, the prosecution did attempt to keep law enforcement jurors despite their Hispanic ancestry and therefore it was reasonable to believe that the Hispanic juror challenged by the prosecution was booted for other reasons than her ancestry. (At p. 789.)

20. Bottom line: Great deference must be given to the trial court's determination that the use of peremptory challenges was not for an improper purpose or class bias purpose. (At pp. 790-791.)

Folks With Hispanic Surnames Only Through Marriage are Not Hispanic For Wheeler/Batson Purposes.

People v. Gutierrez (2002) 28 Cal.4th 1083

1. Where a court declines to find a prima facie case but allows the prosecutor to state his reasons for the peremptory challenge, this does ***not*** constitute an implied finding of a prima facie case. (At p. 1122.)

2. However, where a court makes no express finding that a prima facie case had not been demonstrated but instead immediately asks the prosecutor to justify the questioned challenges, this suggests an implied finding of a prima facie case. (At pp. 1122-1123; see also People v. Cash (2002) 28 Cal.4th 703, 723 (discussed in this P&A memo, below at p. 9; People v. Muhammad (2003) 108 Cal.App.4th 313, 317 (discussed in this P&A memo, below at p. 11).)

3. "Spanish surnamed" sufficiently describes the cognizable class under Wheeler. However, this is a sufficient definition "only where no one knows at the time of the challenge whether the Spanish-surnamed juror is Hispanic." (At p. 1123.)

Where, as in the instant case, a juror is not of Hispanic origin, but only acquires her Hispanic surname through marriage, and indicates on her juror questionnaire and in court that she is not Hispanic, the juror is not Hispanic for Wheeler/Batson purposes. (At p. 1123.)

4. In discussing whether the asserted reasons given by the prosecutor for bumping Hispanic jurors, the court had occasion to condone the following reasons as race-neutral grounds that would properly merit booting a juror:

Jurors View About Applying Death Penalty in Death Penalty Case
A juror who had serious reservations about death penalty stated he could not face defendant after voting to put him to death, indicated death penalty frightened him, claimed if he voted for death he would have to "pay for it in the end" and said he would rather have someone else make the decision was properly bumped on these grounds. (At p. 1123.)

A juror who felt death penalty was unfair would vote to abolish it and would automatically vote for life imprisonment on questionnaire (but who seemed to say otherwise during voir dire) was properly bumped. (At p. 1126.)

See also People v. McDermott (2002) 28 Cal.4th 946, 970-979 (see last week's 10/27/03 P&A memo, below, at p. 6 [discussing the booting of numerous jurors because of views on death penalty].)

Relatives Involved in Crime
A juror whose father had been imprisoned for drug crimes properly booted on this ground alone. (At pp. 1123.)

Prior Bad Experience With Police
A juror who said CHP had stopped him for traffic offense and had tried to "rough him up and harass" him could be booted on this ground alone - even though juror claimed to have no hard feelings about incident. (At p. 1124.)

A juror who gave a lengthy and detailed account of her son's arrest for drunk driving and claimed he had been harassed and falsely accused of using drugs and who felt she herself had been unfairly given a parking ticket (which she successfully fought) was properly bumped on these grounds. (At p. 1125.)

Tendency to Rely Too Heavily on Expert Opinion
Where a juror said he could not vote for the death penalty if a psychologist concluded defendant had a mental problem that affected his conduct (thus indicating he might rely too heavily on the expert opinion testimony of psychologists), this provided non-racial reason for bumping juror in case involving psychological defense. (At p. 1124.)

Where a juror who was teacher said he never disagreed with psychologist's evaluation of a student and expressed hesitancy in disagreeing with an expert, this was a non-discriminatory reason for bumping the juror in a case involving expert witnesses. (At pp. 1124-1125.)

Factors Indicating Difficulty or Inability to Concentrate or Undue

Emotionality
A juror who appeared extremely emotional (she cried twice during voir dire) and overwhelmed by outside stresses was properly bumped because factors indicating a difficulty or inability to focus on the evidence may serve to justify a peremptory challenge. (At p. 1124.)

Appearance of Favoring Defense
Where a juror seemed to keep agreeing with the defense and stated that in a previous jury experience he believed the other jurors had made up their minds before the defense presented their case, this would indicate the juror might be skeptical of the People's evidence and, alone, could justify a challenge. (At p. 1125.)

Hostile Looks
Hostile looks from a prospective juror can themselves support a peremptory challenge. (At p. 1125.)

Bias Against Group to Which Victim Belongs
Where juror stated that he felt "transsexuals were sick" and victim was a transsexual, prosecutor could properly be concerned the juror might be biased against victim and bump the juror. (At p. 1125.)

Close-Mindedness to Other's Opinions
Where juror said he would not be influenced by anyone's opinion but his own, this provided valid grounds for bumping the juror because prosecutor could be concerned juror would not listen to the opinions of other jurors. (At p. 1125.)

Other Juror Characteristics Which Were Deemed to Be Legitimate Grounds for Bumping Jurors Identified in Recent Decisions:

Expressed opinions about the judicial system: A juror's expressed opinion about the judicial system, including the ***belief that racial discrimination may taint the criminal justice system***, is a race-neutral reason for using a peremptory challenge. (See United States v. Steele (9th Cir. 2002) 298 F.3d 906, 913-914 [and noting line of questioning gave rise to eliciting this information proper where prospective juror raises the issue first].)

Juror's reading and television preferences: The fact a juror claimed that she ***never read a book*** and her statement that ***"Judge Judy" was her favorite TV show*** were legitimate grounds for bumping a juror. (See United States v. Murillo (9th Cir. 2002) 288 F.3d 1126, 1135-1137.)

Trouble communicating: Juror's apparent ***trouble communicating*** was a proper ground for a peremptory challenge. (See United States v. Murillo (9th Cir. 2002) 288 F.3d 1126, 1135-1137.)

Juror's possible resentment against law enforcement: The fact a juror had been ***refused full-time employment with a police department*** (so he might have some resentment about being turned down) was a legitimate reason for bumping juror. Similarly, fact a ***juror was going through a divorce with a police officer*** and had a ***warrant out for her arrest*** was also a race-neutral ground for challenging a juror. (See Hayes v. Woodford (9th Cir. 2002) 301 F.3d 1054, 1082-1083.)

Juror Prone to Exaggerate or Lie: The fact a juror claimed he had been accepted for employment with a police department (when that would have been impossible because of the department's age requirement) and appeared prone to exaggeration (i.e., juror made a comment he had a "photostatic" mind) provided legitimate grounds for booting the juror. (See Hayes v. Woodford (9th Cir. 2002) 301 F.3d 1054, 1082-1083.)

Juror Connection to Case: A prosecutor's challenge to a juror was upheld as race-neutral where a person's wallet had been found at a crime scene pertinent to this case, and the juror's daughter employed the wallet's owner. (See Hayes v. Woodford (9th Cir. 2002) 301 F.3d 1054, 1082-1083.)

Excluding Jurors Who Have a Religious Bent or Bias Making It Difficult For Them to Impose the Death Penalty is Proper Nondiscriminatory Ground for a Peremptory Challenge.

People v. Cash (2002) 28 Cal.4th 703, 723-726 [only]

Facts: One of the several African-American jurors in a capital case was bumped by the prosecutor. The prosecutor gave different reasons for bumping the juror. Among the reasons: the juror was raised as a Jehovah's Witness and members of that religion are "taught not to pass judgment" and so would be unwilling to vote for death; the juror gave abrupt answers suggesting he resented being questioned; and the juror appeared reluctant to serve - he was sitting on the edge of his seat holding his backpack as if he was ready to leave. (At pp. 723-724.)

1. The vice that Wheeler seeks to address is the exclusion of any juror based on the "presumption that certain jurors are biased merely because they are members of an identifiable group distinguished on racial, religious, ethnic, or similar grounds." (At p. 724.)

2. Although the United States Supreme Court has only applied Batson to forbid group exclusion based on race or gender, the California Supreme Court has described the protections against group exclusion as including religious affiliation. (At p. 724.)

3. Nevertheless, "[e]xcusing prospective jurors who have a religious bent or bias that would make it difficult for them to impose the death penalty is a proper, nondiscriminatory ground for a peremptory challenge." (At p. 725.)

4. None of the prosecutor's reasons were inherently implausible and all found support in the record. (At p. 725.)

Once a Trial Court Has Found a Prima Facie Case of Discriminatory Use of Challenges, It Must Consider Every Challenged Juror.

People v. Robinson (2003) 110 Cal.App.4th 1196 **[NOT SPECIFICALLY DISCUSSED IN P&A VIDEO]**

Facts: The defense made a Wheeler motion based on the prosecution using three of seven challenges to bump African-American jurors. In response to the Wheeler motion, the trial judge stated he could understand the prosecutor's reasons for excusing two of three African-American jurors but found a prima facie case as to one of them. Counsel then argued the merits of the

prosecution's challenge to the juror against whom a prima facie case had been found but never addressed the challenge to the other two African-American jurors. (At pp. 1204-1205.)

Subsequently, the prosecution bumped an African-American juror who was a chaplain in a jail and an investigator with the L.A. Sheriff's Department. After another Wheeler motion based on this challenge, the prosecutor explained that he typically did not leave people that work in the religious professions on his jury because they are too sympathetic to the defendants. He bumped the juror in question because she was a chaplain in a men's jail, which, in the prosecutor's mind, outweighed the fact the juror worked for the sheriff's department. (At p. 1205.)

Challenge Based on Religious Activity

1. While exclusion on the basis of religion alone would be improper, membership in a religious group can be used to strike a prospective juror, as long as the prosecution explains how religion would affect the juror's duty to deliberate. That is, if it can be shown the juror has a specific, rather than a group, bias the challenge will be upheld. (At p. 1207.)

   - For example, in People v. Martin (1998) 64 Cal.App.4th 378, the prosecution bumped a Jehovah's witness in a theft case where the juror had stated her beliefs would not cause a problem unless she were sitting in a capital case, because she was opposed to the death penalty. The prosecutor's explanation that, based on his experience, Jehovah's Witnesses had a hard time with criminal trials because they couldn't judge anybody at all, was held a legitimate justification. (At p. 1206.)

   - For example, in People v. Allen (1989) 212 Cal.App.3d 306, a pastor was held to have been properly booted when she conceded her religious views might interfere with her ability to deliberate. (At p. 1206.)

2. In the instant case, it was reasonable to believe a chaplain who ministered to gang members in jail might be improperly influenced, i.e., possess a specific and legitimate, as opposed to group, bias. (At p. 1207.)

Short-Circuiting Wheeler Requirement

3. "A Wheeler motion challenges the selection of a jury, not the rejection of an individual juror; the issue is whether a pattern of systematic exclusion exists." (At p. 1208; accord, People v. McGee (2002) 104 Cal.App.4th 559, 570 [see this P&A memo, below at p. 13.)

4. "Accordingly, once the trial court has found a prima facie case of improper use of peremptory challenges to exclude jurors based on perceived group bias, the burden shifts to the prosecutor to provide race-neutral explanations for **all** challenges involved and for the court to evaluate the prosecutor's explanation in light of the circumstances of the case as then known." (At p. 1208, emphasis added; accord, People v. McGee (2002) 104 Cal.App.4th 559, 570 [see this P&A memo, below at p. 13.)

5. Here, the trial court short-circuited the process by not requiring the prosecutor to justify why he bumped some of the African-American jurors who were alleged to have bumped for improper reasons. (At p. 1208.)

6. Wheeler error is reversible per se. (At p. 1206.)

7. The court remanded the case to the trial judge "for a hearing to have the prosecutor explain race neutral reasons for each of his challenges." (At p 1208.) The court ordered that, after hearing those reasons, the judge must then determine the validity of those challenges based upon the entire record. (At p. 1208.) If the judge determines that the reasons given by the prosecutor for the first Wheeler motion are valid, then it must reconsider the second Wheeler motion taking into account all of the evidence it has heard in the first Wheeler motion in order to determine if there has been a pattern of systematic exclusion. (At pp. 1208-1209.)

8. The court then ordered that if the judge determines it is impossible for the prosecutor to remember why certain challenges were made or for the judge to adequately evaluate those reasons, the judgment must be reversed and a new trial granted. (At p. 1209.)

All Peremptory Challenges Should Be Considered Even Though No Prima Facie Case as to Those Challenges Had Been Made Earlier.

People v. McGee (2002) 104 Cal.App.4th 559 [**NOT SPECIFICALLY DISCUSSED IN P&A VIDEO**]

Facts: Defendant (an African-American) made a Wheeler/Batson motion after the People used five of six peremptory challenges to remove African-American jurors. The trial court denied this motion, finding no prima facie case had been made. When the prosecutor excused another African-American juror, the defense made a second Wheeler/Batson motion and the trial court found a prima facie case as to that juror. Although defense counsel asked that the court review the prosecutor's reasons for striking all the African-American jurors, the trial court declined. The prosecutor explained his reason for kicking the last African-American juror and this was accepted as a legitimate challenge by the trial court. The defense made two more Wheeler/Batson motions after the prosecutor, respectively, struck two more African-American jurors before the jury was sworn and two more African-American jurors during voir dire of the alternate jurors. In each case, the trial court found no prima facie showing. (At pp. 565-568.)

1. After the trial court found a prima facie case in response to the second Wheeler/Batson motion, it was error for the trial court to limit its finding of a prima facie case (and the concomitant requirement the prosecutor provide race-neutral explanations) to the most recent African-American juror who had been excused at that point. (At p. 570.)

   Editor's Note: See also People v. Gore (1993) 18 Cal.App.4th 692 [even if Wheeler/Batson motion made during selection of alternate jurors, court should consider jurors in targeted group who defense retroactively claims were erroneously bumped during the initial phase of jury selection].

2. With each successive Wheeler/Batson motion, "the objecting party retains the initial burden to establish a prima facie case—that is, to raise a reasonable inference that the opposing party has challenged jurors because of their race or other group association." (At p. 572.)

3. "[O]nce a prima facie showing has been refuted, it is incumbent on the moving party to make a new prima facie showing with regard to any

subsequent Wheeler motion pertaining to different jurors of the identified group from the venire." (At p. 572.)

4. "Subsequent Wheeler motions, however, may be based on evidence presented in prior Wheeler motions, to the extent necessary to establish a discriminatory pattern of peremptory challenges." (At p. 572.)

5. Thus, because the defendant was unable to support his third and fourth motions with evidence that ***should*** have been in the record had the second motion been properly done, the case has to be remanded for rehearing on all three motions. (At pp. 572-573.)

Trial Court Does Not Have Power to Impose Monetary Sanction for Wheeler Violation Unless Preceded By Court Order Not to Engage in Discriminatory Use of Jury Challenges.

People v. Muhammad (2003) 108 Cal.App.4th 313

Facts: After the prosecutor had exercised nine challenges (a white male, two Asians, three African-Americans, one Hispanic, one white Caucasian, and one person of unknown ethnicity), defense counsel made a Wheeler motion based on the "systematic exclusion of minorities." (At p. 317.) The trial judge then effectively found a prima facie showing by requiring the prosecutor to explain her reasons. The trial judge accepted the reasoning for some of the jurors. However, it found the other reasons provided were pretextual. (At p. 317.)

Specifically, the reasons the trial judge deemed illegitimate were the following: "For several of the other ethnic minority prospective jurors, the explanation was that the trial would involve technical evidence, especially from the coroner, and, based on their occupations, the prosecutor did not believe the prospective jurors were up to understanding the case. One was "a janitor or a tailor," two others were "janitors" and one a custodian, which was the reason for excusing her. Another prospective juror, an Hispanic female, was a clerk with a public health agency, and the prosecutor could "only assume as a county employee she's much like our clerks, she's basically a filing individual. Based on that, again, I didn't believe she could comprehend the testimony." Still another dismissed prospective juror, a female African-American, was a customer service representative, "they're the individuals that you call when you want your phone company service...based on technical, but a background in whether or not they could comprehend the testimony, I just base it—based on a calculated assumption or guess as to what their level of comprehension's going to be." [sic] (At p. 317.)

The trial judge was very upset with the prosecutor, claiming that what she did was not only illegal, but immoral and unethical. The judge then imposed monetary sanctions in the amount of $1,500 pursuant to Code of Civil Procedure Section 177.5. The court also threatened to prevent the prosecutor from using any more peremptory challenges but never made good on this threat. (At p. 318.) The defendant ultimately pled guilty but the People appealed the imposition of the sanctions.

1. The People's appeal was authorized under Code of Civil Procedure Section 904.1(b), which permits an appeal after final judgment from a sanction order where the amount is less than $5,000. (At p. 319.)

The trial court properly found a Wheeler/Batson violation.

2. "As a general proposition, an honestly held belief that a prospective juror will be unable to understand the case is a legitimate basis for a peremptory challenge." (At p. 322.)

3. Nevertheless, a "trial court's judgment is entitled to considerable deference. This is especially true when the bench officer is an experienced trial judge." (At p. 322.) Where a trial judge finds the prosecutor's explanation was a pretext, no less deference is due to that determination than if it had been the reverse. (At p. 323.)

4. Hence, the trial court properly declared a mistrial and dismiss the remaining venire.*****

*****The alternative sanction of reseating the bumped jurors (see People v. Willis (2002) 27 Cal.4th 811, 823) was not an option because the prospective jurors had already been excused. (At p. 323.)

The court was incorrect in imposing a monetary sanction.

5. Aside from a contempt proceeding, a monetary sanction can only be imposed against an attorney when authorized by a statute. (At p. 323.)

6. Under Section 177.5, a monetary sanction can be imposed "for any violation of a lawful court order by a person, done without good cause or substantial justification." (At p. 324.)

7. Section 177.5 applies to criminal and civil cases and does not require the offending act be "willful," only that it be committed without good cause or substantial justification. (At p. 324.)

8. Absent an order, Section 177.5 has no application. (At p. 325.)

9. In the instant case, no order was made before the judge imposed the monetary sanction. Accordingly, the monetary sanction must be lifted. (At pp. 325-326.)

10. If the court wants to impose a monetary sanction for a Wheeler/Batson violation, it must first order the counsel not to violate the Equal Protection Clause in selecting jurors. However, it seems "degrading to the judicial process and to the attorneys who practice before our courts for a court to have to warn counsel that, on penalty of a monetary sanction, they must not violate the Constitution." (At pp. 325-326.)

11. The court anticipates that monetary sanctions will only be imposed after a second Wheeler motion - the first Wheeler motion providing the opportunity for an admonition/order from the court. (At p. 326.)
If a court "admonishes counsel that a repetition of specific conduct will result in a monetary sanction, that statement is tantamount to an order not to repeat the conduct, and should suffice under section 177.5. (At p. 325.)

12. A monetary sanction may be imposed **in addition to** the granting of the mistrial. (At pp. 324-325.) Indeed, where the alternative sanction of

reseating a challenged juror is not available, there is a stronger reason to impose a monetary sanction. (At p. 325.)

13. Note: The court's order imposing a monetary sanction was also deficient because it did not comply with Section 177.5(b)'s requirement that it "be in writing and shall recite in detail the conduct or circumstances justifying the order." (At p. 324.)

Defendant Cannot Assert Wheeler Error on Appeal When Error is Based on Defendant's Own Improper Exercise of Juror Challenges [**NOT SPECIFICALLY DISCUSSED IN P&A VIDEO**].

People v. Morris (2003) 107 Cal.App.4th 402

Note: Some of the facts relating to a different Wheeler issue were discussed in last week's 10/27/03 P&A memo at p. 5.

Facts: After a defendant made a Wheeler motion, the prosecutor also made a Wheeler motion based upon defendant's exercise of challenges against white males. The trial judge denied the motion, but after defendant used four more challenges against white males, the prosecutor made a second Wheeler motion. The trial judge found a prima facie case and then determined that the defendant had exercised his challenges in a discriminatory fashion. The prosecutor argued that having found such discrimination, the court must grant the People's Wheeler motion and excuse the panel. The court declined to do in the interest of proceeding with the trial. (At p. 409.)

On appeal, the defendant contended that, once the trial court found that jurors were excused on the basis of group bias, the court was required to grant the People's motion and to dismiss the entire jury panel and venire and start voir dire with a new venire. Failure to do so, defendant claimed was error requiring reversal. (At p. 410.)

1. Although a trial judge has the discretion to impose an alternative remedy or sanction to dismissing the venire when a Wheeler motion is granted, "trial courts lack discretion to impose alternative procedures in the absence of consent or waiver by the complaining party." (At pp. 410-411.)

2. Since the prosecutor did not consent to the trial court's alternative procedure of admonishing defense counsel and proceeding with the trial, it was error for the trial court to do so. (At p. 411.)

3. Nevertheless, a defendant does not have standing on appeal to take advantage of the trial court's error since the error was based on counsel's own improper exercise of peremptory challenges to exclude a legally cognizable group. (At p. 413.)

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Week Of	Topic	Guest Speaker	Elim of Bias
Nov. 3, 2008	BATSON-WHEELER CHALLENGES: PREPARING FOR AND PRE-EMPTING A BATSON-WHEELER MOTION	Jerry Coleman San Francisco Asst District Atty	30 Minutes

I. BATSON-WHEELER Basics

A. Constitutional Basis

"[T]he use of peremptory challenges to remove prospective jurors on the sole ground of group bias violates the right to trial by jury drawn from a representative cross-section of the community under article I, section 16, of the California Constitution." (People v. Wheeler (1978) 22 Cal.3d 258, 276-277.)

"[T]he Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant." (Batson v. Kentucky (1986) 476 U.S. 79, 89.)

B. Basic Procedure When a Claim is Made That an Attorney is Exercising His or Her Challenges in an Unconstitutionally Discriminatory Manner

For both federal and state constitutional claims, there is a three-step inquiry whenever a Batson-Wheeler challenge is made. (People v. Lenix (2008) 44 Cal.4th 602, 612-613.)

1. First Step

a. The party objecting to the challenge must make out a prima facie case "by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose." (Johnson v. California (2005) 545 U.S. 162, 168.)

b. Although the term "systematic exclusion" is sometimes used "to describe a discriminatory use of peremptory challenges,...[t]he term is not apposite in the Wheeler context, for a single discriminatory exclusion may violate a defendant's right to a representative jury." (People v. Fuentes (1990) 54 Cal.3d 707, 716, fn. 4; accord, People v. Montiel (1993) 5 Cal.4th 877, 909; see also People v. Reynoso (2003) 31 Cal.4th 903, 927, fn. 8 ["the unconstitutional exclusion of even a single juror on improper grounds of racial or group bias requires the commencement of jury selection anew"]; but see the 11/17/08 P&A memo [discussing how relying on a single challenge to a member of the cognizable group will rarely be sufficient, by itself, to create an inference of discrimination].)

c. When a Batson-Wheeler motion is made, "the party opposing the motion should be

given an opportunity to respond to the motion, i.e., to argue that no prima facie case has been made." (People v. Fuentes (1990) 54 Cal.3d 707, 716, fn. 5.)

d. "The three-step Batson analysis, however, is not so mechanistic that the trial court must proceed through each discrete step in ritual fashion." (People v. Adanandus (2007) 157 Cal.App.4th 496, 500.)

e. A trial court may invite the prosecutor to state neutral reasons for the challenged strikes before announcing its finding on whether a defendant met the first step of the Batson test by making out a prima facie case of discrimination. (People v. Bonilla (2007) 41 Cal.4th 313, 343, fn. 13; People v. Adanandus (2007) 157 Cal.App.4th 496, 500.) Indeed, the California Supreme Court has stated "it is the ***better*** practice for the trial court to have the prosecution put on the record its race-neutral explanation for any contested peremptory challenge, even when the trial court may ultimately conclude no prima facie case has been made out. This may assist the trial court in evaluating the challenge and will certainly assist reviewing courts in fairly assessing whether any constitutional violation has been established." (People v. Bonilla (2007) 41 Cal.4th 313, 343, fn. 13; People v. Adanandus (2007) 157 Cal.App.4th 496, 500.) (Emphasis added by P&A.)

2. Second Step

Once a prima facie case is made, the "'burden shifts to the [party who originally challenged the juror] to explain adequately the racial [or other cognizable class] exclusion' by offering permissible...neutral justifications for the strikes." (Johnson v. California (2005) 545 U.S. 162, 168 [bracketed portions and other modifications added by P&A].)

The party who originally challenged the juror must then provide a "'clear and reasonably specific' explanation of his 'legitimate reasons' for exercising the challenges." (People v. Lenix (2008) 44 Cal.4th 602, 613, citing to Batson v. Kentucky (1986) 476 U.S. 79, 98, fn. 20.) "Certainly a challenge based on racial prejudice would not be supported by a legitimate reason." (People v. Lenix (2008) 44 Cal.4th 602, 613.)

On the other hand, a legitimate reason is simply "one that does not deny equal protection" and "a prosecutor may rely on any number of bases to select jurors[.]" (People v. Lenix (2008) 44 Cal.4th 602, 613, citing to Purkett v. Elem (1995) 514 U.S. 765, 769.)

Thus, "[t]he justification need not support a challenge for cause, and even a 'trivial' reason, if genuine and neutral, will suffice." (People v. Lenix (2008) 44 Cal.4th 602, 613.) "A prospective juror may be excused based upon facial expressions, gestures, hunches, and even for arbitrary or idiosyncratic reasons." (Ibid; accord, People v. Adanandus (2007) 157 Cal.App.4th 496, 506.) The "'second step of this process does not demand an explanation that is persuasive, or even plausible'; so long as the reason is not inherently discriminatory, it suffices." (Rice v. Collins (2006) 546 U.S. 333, 338.)

Burden of Production: The burden in this second step is merely "the burden of production." (Paulino v. Harrison (9th Cir. 2008) 542 F.3d 692, 699.) **Editor's Note**: For a more thorough discussion of what reasons are, or are not, legitimate, see the 11/17/08 P&A memo.

3. Third Step

If a "neutral explanation is tendered, the trial court must then

decide...whether the opponent of the strike has proved purposeful racial [or other cognizable group] discrimination." (Johnson v. California (2005) 545 U.S. 162, 168 [bracketed portion added by P&A].) The proper focus is on "the subjective genuineness of the race-neutral reasons given for the peremptory challenge, not on the objective reasonableness of those reasons." (People v. Reynoso (2003) 31 Cal.4th 903, 924; People v. Adanandus (2007) 157 Cal.App.4th 496, 506.)

At the third step, "the issue comes down to whether the trial court finds the prosecutor's race-neutral explanations to be credible. Credibility can be measured by, among other factors, the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy." (People v. Lenix (2008) 44 Cal.4th 602, 613, citing to Miller-El v. Cockrell (2003) 537 U.S. 322, 339 [discussed in depth in 8/01/05 P&A memo].) The trial court has a duty to "assess the plausibility" of the prosecutor's proffered reasons for striking a potential juror, "in light of all evidence with a bearing on it." (People v. Lenix (2008) 44 Cal.4th 602 at p. 625.)

In assessing credibility, the court draws upon its contemporaneous observations of the voir dire. It may also rely on the court's own experiences as a lawyer and bench officer in the community, and even the common practices of the advocate and the office who employs him or her." (People v. Lenix (2008) 44 Cal.4th 602, 613, citing to People v. Wheeler (1978) 22 Cal.3d 258, 282.)

"In addition, race-neutral reasons for peremptory challenges often invoke a juror's demeanor (e.g., nervousness, inattention), making the trial court's first-hand observations of even greater importance. In this situation, the trial court must evaluate not only whether the prosecutor's demeanor belies a discriminatory intent, but also whether the juror's demeanor can credibly be said to have exhibited the basis for the strike attributed to the juror by the prosecutor." (Snyder v. Louisiana (2008) 128 S.Ct. 1203, 1208; People v. Lenix (2008) 44 Cal.4th 602, 613.)

Although a judge may not be able to observe every gesture, expression, or interaction relied upon by the prosecutor (i.e., the judge has a different vantage point and may have, for example, been looking at another panelist or making a note when the described behavior occurred), the trial "court must be satisfied that the specifics offered by the prosecutor are consistent with the answers it heard and the overall behavior of the panelist." (People v. Lenix (2008) 44 Cal.4th 602, 625.) "The record must reflect the trial court's determination on this point (see Snyder, supra, 128 S.Ct. at p. 1209), which may be encompassed within the court's general conclusion that it considered the reasons proffered by the prosecution and found them credible." (People v. Lenix (2008) 44 Cal.4th 602, 625-626.)

"Both court and counsel bear responsibility for creating a record that allows for meaningful review." (People v. Lenix (2008) 44 Cal.4th 602, 621.)

"When the prosecutor's stated reasons are both inherently plausible and supported by the record, the trial court need not question the prosecutor or make detailed findings. But when the prosecutor's stated reasons are either unsupported by the record, inherently implausible, or both, more is required of the trial court than a global finding that the reasons appear sufficient." (People v. Stevens (2007) 41 Cal.4th 182, 193; People v. Silva (2001) 25 Cal.4th 345, 386.)

If the court is going to deny the challenge, it "should be discernable from the record that "1) the trial court considered the prosecutor's reasons for the

peremptory challenges at issue and found them to be race-neutral; 2) those reasons were consistent with the court's observations of what occurred, in terms of the panelist's statements as well as any pertinent nonverbal behavior; and 3) the court made a credibility finding that the prosecutor was truthful in giving race-neutral reasons for the peremptory challenges." (People v. Lenix (2008) 44 Cal.4th 602, 621.)

"The ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike." (People v. Lenix (2008) 44 Cal.4th 602, citing to Rice v. Collins (2006) 546 U.S. 333, 338; see also Yee v. Duncan (9th Cir. 2006) 463 F.3d 893, 895, citing Purkett v. Elem (1995) 514 U.S. 765, 768.)

II. Anticipating the Batson-Wheeler Challenge

A. Request Batson-Wheeler Claims Be Made Outside Jury's Presence

It is a commonly held belief among prosecutors that some defense attorneys do not act in good faith when making a claim the prosecutor is exercising his or her peremptory challenges in a discriminatory fashion. Prosecutors often assume, especially when neutral reasons for removing a particular juror are obvious, that the defense attorney is actually making the Batson-Wheeler claim not because of an honest belief the prosecutor has improperly exercised a peremptory challenge but as a tactic to render the prosecutor "gun shy" in exercising peremptory challenges against members of a cognizable class. The tactic is premised on the idea that the fear of being subjected to a Batson-Wheeler challenge (and the attendant possibility that it will be erroneously granted) will dissuade the prosecutor from exercising a challenge against any other panelist belonging to the same cognizable class even though those other panelists might be unfavorably disposed toward the prosecution. An even more nefarious reason that is sometimes given to explain why the defense is making an apparently disingenuous Batson-Wheeler claim is that it is done in an attempt to prejudice the jury against the prosecutor by implying the prosecutor is a bigot or racist. Finally, it is sometimes speculated that the disingenuous Batson-Wheeler claim is made in order to discover the prosecutor's strategy in selecting jurors and, indirectly, the prosecutor's trial strategy.

Certainly, the belief that defense attorneys sometimes use Batson-Wheeler claims for tactical purposes may arise simply from a difference in perspective. A juror who appears to the prosecutor to be a "bad juror" may appear to the defense counsel as a juror whom the prosecutor should, but for the juror's membership in a cognizable group, want to keep on the jury (although from a purely tactical standpoint, if, in fact the prosecutor is removing jurors who would be predisposed to the prosecution for reasons of irrational prejudice, the defense should want to encourage such challenges). On the other hand, some defense attorneys appear to be much more prone than others to making Batson-Wheeler challenges, either in general or at least when appearing in front of a judge who has a reputation for giving such challenges a generous reception.

If a prosecutor is aware that a particular defense attorney has a history of making apparently tactical Batson-Wheeler challenges and/or making the challenges before the jury in a manner calculated to prejudice the jury against the prosecution, is there anything a prosecutor can do?

As a matter of course (not just when there is a belief the defense attorney may attempt to use Batson-Wheeler challenges in an improper fashion), the prosecutor should ask that any Batson-Wheeler claim made by either party be done at sidebar or otherwise outside the presence of the jury. (See, e.g., People v. Willis

(2002) 27 Cal.4th 811, 822 [noting the ABA recommends that "[a]ll challenges, whether for cause or peremptory, should be addressed to the court outside the presence of the jury, in a manner so that the jury panel is not aware of the nature of the challenge, the party making the challenge, or the basis of the court's ruling on the challenge," but recognizing that this procedure may be cumbersome and alternative procedures may be used to help avoid any prejudice to counsel making the challenge].) Requiring that Batson-Wheeler motions be made at sidebar helps ensure that (i) the jury in general will not be "poisoned" against the attorney accused of improperly exercising a juror challenge; and (ii) helps keep viable the option of reseating a juror by minimizing the possibility the reseated juror will hold his or her initial removal against the attorney who asked that the juror be removed. (See People v. Willis (2002) 27 Cal.4th 811, 822.)

If the defense attorney has a particularly egregious habit of abusing Batson-Wheeler, a prosecutor may want to be ready with evidence (i.e., transcripts) of such past abuse to bring to the attention of the court in support of a request that Batson-Wheeler motions be made outside the presence of the jury.

B. Ask Court to Use Juror Questionnaires

For entirely plausible reasons, prosecutors do not typically ask the exact same questions of every single juror. Because of time constraints, a prosecutor has to pick and choose which questions will be most likely to elicit information from a particular juror or address the prosecutor's concerns raised by the court's questioning of the juror. A prosecutor may choose not to waste time asking questions of jurors the prosecutor knows he or she will definitely keep or bump. A prosecutor may not want to ask questions of a juror the prosecutor likes for fear that too much questioning might elicit answers highlighting the juror's pro-prosecution bent to the defense. A prosecutor may want to ask additional questions of a juror who is difficult to read or who gives answers that demand follow-up questions.

That being said, trial courts are empowered to consider disparate questioning (i.e., asking different types of questions of the jurors depending on whether they fall into the cognizable class at issue) or perfunctory questioning (i.e., asking fewer or no questions of jurors in the cognizable class) in assessing a prosecutor's motive when a Batson-Wheeler motion is made. With that in mind, prosecutors should consider asking for the use of juror questionnaires that ask identical questions of each juror. Questionnaires also can provide support to help show that a panelist was removed because the remainder of the pool of panelists looked better or because the next juror in the box was a significantly better juror for the prosecution. Finally, questionnaires can help avoid a claim that questioning was perfunctory. (See People v. Bell (2007) 40 Cal.4th 582, 598, fn. 5 [quoting the trial court for the proposition that when an extensive questionnaire is used with every juror, "it can never be a perfunctory examination"].)

If a trial court is not inclined to use questionnaires, be cognizant that disparate questioning of jurors (especially in the absence of any explanation for disparate questioning) may be seized upon, fairly or unfairly, by the trial court or the reviewing court as evidence of a discriminatory purpose. "The State's failure to engage in any meaningful voir dire examination on a subject the State alleges it is concerned about is evidence suggesting that the explanation is a sham and a pretext for discrimination." (Green v. LaMarque (9th Cir. 2008) 532 F.3d 1028, 1033, citing Miller-El v. Dretke (2005) 545 U.S. 231, 246.)

C. Ask the Court for Sufficient Time to Conduct Voir Dire - Have Lenix at Hand

The less opportunity the attorneys have to question the juror, the more difficult it will be for the judge to assess the real reason a juror has been challenged. A prosecutor might want to have a bench memorandum ready with the following information derived from People v. Lenix (2008) 44 Cal.4th 602, when appearing in front of judges who are reluctant to allow a significant amount of time on voir dire:

> "Trial courts ***must*** give advocates the opportunity to inquire of panelists and make their record. If the trial court truncates the time available or otherwise overly limits voir dire, unfair conclusions might be drawn based on the advocate's perceived failure to follow up or ask sufficient questions. Undue limitations on jury selection also can deprive advocates of the information they need to make informed decisions rather than rely on less demonstrable intuition." (People v. Lenix (2008) 44 Cal.4th 602, 625, emphasis added.)
>
> In Lenix, the California Supreme Court recognized that, under Code of Civil Procedure section 223, a criminal trial court may limit counsel's questioning of prospective jurors and "may specify the maximum amount of time that counsel for each party may question an individual juror, or may specify an aggregate amount of time for each party, which can then be allocated among the prospective jurors by counsel." (Id., at p. 625, fn. 16.) Moreover, the Lenix court recognized that "the exercise of discretion by trial judges in conducting voir dire is accorded considerable deference by appellate courts." (Id., at p. 625, fn. 16.) However, the Lenix court stated: "in exercising that discretion, trial courts should seek to balance the need for effective trial management with the duty to create an adequate record and allow legitimate inquiry." (Id., at p. 625, fn. 16.)

Editor's Note: Providing the court with a copy of Lenix may be even more beneficial since not only does the decision provide authority for allowing adequate voir dire time, it provides an excellent guideline for how courts and attorneys should handle a Batson-Wheeler challenge. Indeed, in this regard, Lenix is one of the most valuable and insightful opinions ever written on the subject.

D. Think About and Be Prepared to Explain the Reasons for Challenging a Juror

Gut instinct may be the best indicator of whether a panelist will make a good juror and that is a genuinely neutral reason for removing a juror. Be aware, however, that the less concrete the grounds provided for removing a juror, the more likely it is that those grounds will be scrutinized with a skeptical eye by a judge or reviewing court.

Make notes of the demeanor, attitude, and other intangibles of all jurors, not just those who seem like they might be adverse to the prosecution. This is especially important when the judge allows limited or no voir dire and will help the judge see beneath superficial similarities between jurors who were kept and those whom the prosecutor challenged.

E. Notes on the Race, Ethnicity, or Gender of the Jurors

In the case of Miller-El v. Dretke (2005) 545 U.S. 231, the fact a prosecutor had taken notes regarding the juror's race was used as evidence of a racially motivated intent. (Id., at p. 266.) And in Green v. LaMarque (9th Cir. 2008) 532 F.3d 1028, the Ninth Circuit, citing to Miller-El, held that the fact the prosecutor had noted the race of each venire member next to the member's name provided additional evidence of racial discrimination.

However, the Green court completely missed the significance of the note-taking regarding the juror's race in Miller-El. In Miller-El, the prosecutor's own notes identifying every potential juror by race were used to show the prosecutor was following an office policy of emphasis on race. The notes were significant because, at the time of the trial in Miller-El, there was no reason to note the juror's race; Batson was only decided after the defendant in Miller-El was tried. (Miller-El, at p. 264, fn. 38.) In Green, of course, the Batson-Wheeler principles were well-established and there was every reason to note a juror's membership in a cognizable class.

As pointed out in People v. Lenix (2008) 44 Cal.4th 602, a case where the court *did* understand the significance of the race-identifying notes in Miller-El, the court emphasized that "post-Batson, recording the race of each juror is an important tool to be used by the court and counsel in mounting, refuting or analyzing a Batson challenge." (Lenix, at p. 617, fn. 12.)

Although prosecutors should strive for a color-blind approach to jury selection, in light of the fact a prosecutor's jury selection decisions may be reviewed years later, purposefully omitting to note the membership of a juror in a cognizable class because of the analysis in Green is like teaching a child to smoke based on claims made in a 1950's cigarette ad. (See United States v. Philip Morris USA, Inc. (D.D.C. 2006) 449 F.Supp.2d 1, 154 [in 1953, L&M cigarettes were advertised as "just what the doctor ordered"].)

Jerry Coleman noted that the Los Angeles District Attorney's Office provides a form to prosecutors for writing down observations of panelists during jury selection that has a pre-printed notation on it essentially stating that the identification the juror's race, gender, or ethnicity is done solely for the purpose of responding to a Batson-Wheeler motion. In the absence of such a form, prosecutors can convey the same intent by simply making a notation in the file of the purpose for identifying the cognizable class to which a panelist belongs or putting the reason for such notation on the record.

F. Have Ready Access to Notes From Other Trials and/or Office Manuals

In People v. Lenix (2008) 44 Cal.4th 602, the court stated that in assessing credibility of the prosecutor, a trial court may "rely on the court's own experiences as a lawyer and bench officer in the community, and ***even the common practices of the advocate and the office who employs him or her***." (Lenix, at p. 613, citing to People v. Wheeler (1978) 22 Cal.3d 258, 282; cf., Miller-El v. Dretke (2005) 545 U.S. 231, 253 [appearance of discriminatory intent supported by "widely known evidence of the general policy of the Dallas County District Attorney's Office to exclude black venire members from juries at the time Miller-El's jury was selected"].)

A prosecutor's past history of non-discriminatory practices should be compelling evidence of continuing non-discriminatory practices. It may be useful for a

prosecutor to keep records of the composition of previous juries so that they are available to show the prosecutor has previously accepted jurors of the same cognizable class as the jurors the prosecutor is presently being accused of having improperly excluded.

It may also be worthwhile to keep notes of any office training class or copies of training publications (i.e., this very memo) establishing the office unequivocally condemns the exercise of peremptory challenges for discriminatory purposes.

UPDATE ON CASES PREVIOUSLY REPORTED UPON

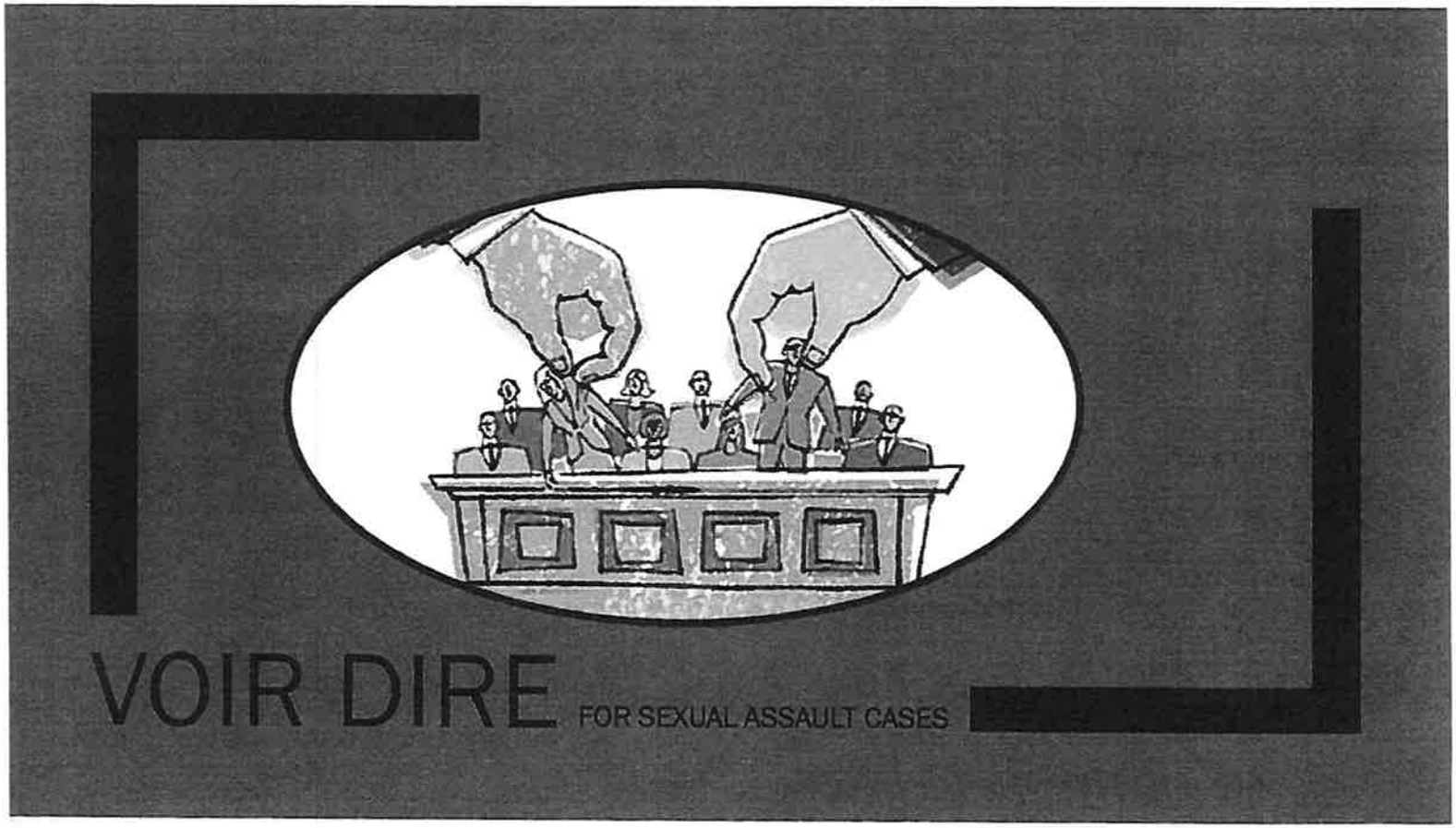
The California Supreme Court has taken up the following recently reported upon cases for review:

People v. Sutton (2008) 165 Cal.App.4th 646 [finding good cause existed to continue a case involving codefendant where counsel for one of the codefendants was engaged in another trial and the continuance was relatively brief] - reported on in the 9/1/08 P&A memo.

People v. Diaz (2008) 81 Cal.Rptr.3d 215 [finding a search of a cell phone seized from the defendant an hour after the suspect was arrested and transported to the station was permissible as a search incident to arrest] - reported on in the 8/18/08 P&A memo.

NEXT WEEK: OUR SERIES ON BATSON-WHEELER DEVELOPMENTS CONTINUES WITH JERRY COLEMAN EXPLAINING THE PROPER METHOD OF RESPONDING TO BATSON-WHEELER MOTIONS IN LIGHT OF THE RECENT CASE LAW.

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.



VOIR DIRE

FOR SEXUAL ASSAULT CASES

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INTRODUCTION

Criminal justice depends on a fair jury. A fair jury is one that will base its decision on facts and law not biases. To diffuse biases that will interfere with a jury's ability to be fair, we must be able to draw those biases out of potential jurors. Effective Voir Dire taps into not only potential jurors' conscious decision-making processes but also biases of which the jurors themselves may be unaware that they have. Thus, effective Voir Dire is essential to obtaining a fair jury.

This handout contains sample Voir Dire questions for sexual assault cases. These Voir Dire questions address juror biases that are created by myths and stereotypes about sexual assault victims, sexual assault defendants, and sexual assaults themselves.

Consent

- I'm making a cup of tea. I asked if Sam if he wants a cup of tea and he said "yes." Has Sam consented to a cup of tea?
- What if Sam says "no, thank you," has Sam consented to a cup of tea?
- What if Sam says that he is not sure and I make the tea, can I force Sam to drink the tea? Why not?
- What if Sam said yes but fell asleep while I was making the tea, is it ok for me to pour the tea down Sam's throat while he is sleeping? Why?
- What if Sam said "yes," started drinking the tea, but fell asleep before finishing the tea, is it ok for me to pour the remainder of the tea down Sam's throat as he sleeps? Why?

Consent.... con't

- What if Sam said "yes" to tea on Sunday, Monday, and Tuesday when I asked if he wanted tea on those days, is it ok to force tea on Sam on Wednesday without asking if he wants tea on Wednesday first?
- What if Sam said "yes" but in the time that it took me to make the tea, Sam changed his mind and said "no, thank you"...can I force Sam to drink the tea? But, why can't I when I went through the trouble of making the tea because he said "yes" initially?
- What if Sam is my husband, can I force him to drink tea?

Lying vs. Victim Report Inconsistencies

- Has anyone here ever seen a parade?
- Let's say you went to the rose parade. You were so excited because you won VIP tickets and have never won anything before so it was an especially memorable event. The parade had 20 floats, 10 marching bands, and 5 people on horseback. You are alert and sober. Later that evening, you tell your friend about the parade that you saw. Do you think you would mention all 20 floats, 10 bands, and 5 horses? Would you remember all the details of all the floats? The colors of the band uniforms? The colors of the horses and the order in which they appeared?
- One week later you run into another friend and tell her about the parade. Would you tell her the exact things that you told your other friend. Would you tell her that you had told the other friend about having seen the parade? If you told your first friend about one of the ladies on horseback wearing a hat but not mentioned the hat to the other, were you lying about seeing a parade? If when you talked to the second friend you had forgotten that the third band had baton twirlers, were you lying about seeing a parade?

Lying vs. Victim Report Inconsistencies...con't

- Six months later, the subject of the parade comes up at your workplace and you mention that you saw the parade. Do you believe that the details you provide will vary from the original version that you spoke of with your first friend? Why?
- Do you agree that it is human and even expected that as we reiterate an event there are variations in telling of that event?
- Your first friend talked to yet another friend about what you had seen. Their version of what you said was different. Is it fair to conclude that you were lying when you said that you saw the parade? Why?

Minimal Resistance

- If you only had the victim's word and no other evidence how would that impact the way you view the case?
- Do you believe a person must show a certain level of resistance to sexual assault? What is that level?
- Do you expect more resistance when the victim is a male?
- Does sexual assault have to involve deadly force or serious injury? Why?
- Does sexual assault have to result in any injury? Why?
- Could a rapist use something besides physical force to cause a victim to submit? What are some examples?
- What might cause a victim of sexual assault to not resist or stop resisting?
- Does a victim of sexual assault have to scream?

Late Reporting

- During childhood, did anyone experience being bullied at school? Did you immediately report it? Why?
- Have you ever had to tell other people about a traumatic or humiliating experience that happened to you? How did you feel when telling?
- Has anyone had an embarrassing secret that they did not want anyone to know that they told to someone years later? Does fact that you kept that secret all those years make it less true when you finally divulged it?
- What are some of the reasons a victim might not report a sexual assault immediately to the police? (threats, guilt, fear, embarrassment, etc.)
- What are some of the reasons that a victim might report a sexual assault later?

Late Reporting...con't

- Could discussing the intimate details of a humiliating act with total stranger be more than a traumatized sexual assault victim is capable of handling immediately after the assault?
- Juror X, how would you feel if I asked you to tell us about the last sexual experience that you had with your significant other? Is it difficult to talk about an event involving sexual activity to a group of strangers in a public courtroom even when the act may have been performed with consent and love? Can you understand how difficult it is to talk about nonconsensual sexual acts with a total stranger much more in a public courtroom?

Trauma Response

- Is there anyone here who has ever been through a traumatic event such as a car accident, physical injury, or mugging? How did you respond right after it occurred? (ask more than one juror to get varying answers)
- Juror X you described a response to your situation which was different from juror Y's response. Do you think that different people react in different ways to stress?
- After the traumatic event were you able to think clearly? After it was over did you come up with things you wish you would have done differently? Did you react the way you had thought that you would?
- Do you think that sexual assault victims might respond in a variety of ways to trauma as well? In what ways might they react? (laugh, shock, calm, hysteria, cry, anger, disassociation, fear, etc.)
- Do all victim of sexual assault cope with trauma in the same way? Please explain.

Expectations of Victims

- Can you be a victim of sexual assault if your dress or conduct "invites" advances? Why?
- If the victim is wearing provocative clothing or accepts an expensive dinner does that change your opinion? Why?
- How would you feel if I told you that the victim was dressed in a very short skirt and not wearing panties? Does that impact how you view the case? How?
- How would you feel if you were told the victim was an alcoholic?
- What does a sexual assault victim look like? Are they a specific age, sexual orientation, race, or socio-economic status? Are they all attractive?
- Have you or someone you know been a victim of sexual assault, reported or not? How do you know them? Did they report? What happened to the assailant? Did you feel that the outcome of the situation was fair?

Expectations of Victims...con't

- Has anyone ever had a victim of sexual assault disclose the assault to you? Did that person provide proof to you? Did you believe him or her? Why?
- Why would someone rob a drunk person? (easy target)
- Is it any less of a crime if a rapist chooses an easy target?
- Is it any less of a crime if the victim's actions made them more vulnerable to being sexually assaulted? (going on a date, walking down a dark alley, accepting a ride)
- Do you believe a person can be raped even if they consented to some other sexual contact at some point before the rape occurred?
- Can prostitutes be victims of sexual assault? Why?
- Can a victim of statutory rape be a victim even if they don't see themselves as one? Why?

Staying with the Assailant

- Has anyone ever stayed at a job with a boss that was mean or mistreating you? Why did you stay at that job?
- Why might a victim stay with their assailant? (children, money, fear, etc.)

Gender Bias

- Do you have any friends that are part of the LGBTQ (Lesbian, Gay, Bisexual, Transgender, Questioning)community?
- What are your feelings on "Don't ask Don't tell" policies in the military?
- What are your feelings on gay marriage?
- Do you have any religious beliefs or other strong personal convictions which would make it uncomfortable or impossible for you to fairly and impartially consider a case involving a victim, witness, or defendant that is (homosexual, identifies with a gender to which they were not born, cross dresses, or is transitioning from one gender to another)? If yes, please explain.
- Do you have strong feelings or opinions about homosexuality or gender identity issues?

Gender Bias...con't

- Do you believe that hate crimes law should apply to issues regarding sexuality and/or gender identity?
- If I held up a picture of two men or two women kissing would it make you uncomfortable? If so, can you gauge your level of discomfort for me?
- This case is an accusation of a male on male (woman on woman) sexual assault. Is there anything about that type of accusation that would make you feel uncomfortable sitting as a juror?
- Politically, are you liberal, middle of the road, or conservative?
- Would anyone be bothered if someone from the LGBTQ community moved in next door to you?
- Do you think employers should be able to refuse to hire someone because of his or her sexual orientation or gender identity?

Gender Bias...con't

- Would you feel bothered if you had to work closely with someone who was lesbian, gay, bisexual, or transgender?
- Can a man be a victim of a sexual assault? Why? Are male victims less likely to report? Why?
- Can a heterosexual man be sexually assaulted by another heterosexual man? Why?
- Can a member of the LBGTQ community be sexually assaulted by a heterosexual man or woman? Why?
- Can a (describe your victim: heterosexual woman/man, homosexual woman/man, transitioning man/woman, transgender, or asexual) be sexually assaulted by a (describe your suspect: heterosexual woman/man, homosexual man/woman, transitioning man/woman, transgender, or asexual)? Why?

Expectations of Assailants

- When I say the word "rapist" what images come to mind?
- How would you expect a rapist to act?
- How would you expect a rapist to look like?
- What would you expect a rapist's life to be like? (a poor sex crazed stranger with a knife or gun)
- Ted Bundy, famous serial rapist, was handsome, had a girlfriend and job, and was a quiet neighbor. How does that affect you opinion?
- Do you think you can tell by looking at someone whether that person committed a sexual assault?
- Does a sexual assault assailant have a specific sexual orientation?
- Does a sexual assault assailant have a specific socioeconomic status?

Expectations of Assailants...con't

- The defendant is an attractive person, when you look at the defendant do you feel any sympathy for him/her?
- Looking at the defendant, do you have any opinion of the case before hearing any evidence?
- Have you or anyone close to you ever been accused of sexual assault?
- Can it be rape if the two people are married or know each other?
- Can nonconsensual sex exist in a relationship where there is or has been consensual sex? Please explain.
- Who believes that sexual assault is due to an uncontrollable sexual urge? Who doesn't? Why?

POINTS AND AUTHORITIES

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Week Of	Topic	Guest	Elim. of Bias
Nov. 17 2008	RESPONDING TO *BATSON-WHEELER* CHALLENGES (PART III OF III: AN OVERVIEW THE RULES IN LIGHT OF RECENT CASE LAW DEVELOPMENTS: 2005-2008	Jerry Coleman San Francisco Asst District Atty	30 min

Significant Developments in *Batson- Wheeler* Case Law: 2005-2008

The flow of this P&A memo *roughly* follows the order of topic discussion in the CDAA Prosecutor's Notebook Vol. XXXIII "Mr. Wheeler Goes to Washington (The Full Federalization of Jury Challenge Practice in California) written by San Francisco County Assistant District Attorney Jerry P. Coleman. The P&A memo also reflects the incipient development of a P&A outline. Pagination picks up where the 11/10/08 P&A memo left off.

I. The Basics

A. Who Can Make a *Batson-Wheeler* Motion?

A ***Batson-Wheeler*** objection may be raised by the defense or the prosecution. (***People* v. *Wheeler*** (1978) 22 Cal.3d 258, 280, 283, fn. 29; ***People* v. *Williams*** (1994) 26 Cal.App.4th Supp. 1, 9; ***Georgia* v. *McCollum*** (1992) 505 U.S. 42.)

The defendant need not be a member of the cognizable class the defendant is claiming has been discriminated against in order "to complain of a violation of the representative cross-section rule." (***People* v. *Wheeler*** (1978) 22 Cal.3d 258, 281; **see also *Powers* v. *Ohio*** (1991) 499 U.S. 400.)

B. What Groups are Cognizable Classes for Purposes of *Batson-Wheeler* Challenges?

1. In General

When a party claims a panelist has been struck based on the panelist's membership in a particular group, the key initial issue is whether the group identified is a cognizable class, i.e., does the group represent "an identifiable group distinguished on racial, religious, ethnic, or similar grounds[.]" (***People* v. *Wheeler*** (1978) 22 Cal.3d 258, 276.)

2. Sub-Groups Can Be Cognizable Classes

A cognizable class may contain sub-groups that might qualify as a cognizable class. (**See *People* v. *Bell*** (2007) 40 Cal.4th 582, 597-598 [African-American women constitute a cognizable class]; ***People* v. *Motton*** (1985) 39 Cal.3d 596, 605-606 [same]; ***People* v. *Gonzalez*** (2008) 165 Cal.App.4th 620, 631 [indicating Spanish-speaking/unassimilated Hispanics may constitute a cognizable class].)

3. What "Racial" or "Ethnic" Groups Have Been Identified as Cognizable Classes?

a. <u>Asian-Americans</u>

Asian-Americans have been identified as a cognizable class. (**See *Frazier* v. *New York*** (S.D.N.Y. 2002) 187 F.Supp.2d 102, 114-116; ***Rieber* v. *State*** (1994) 663 So.2d 985, 991.) **But see *People* v. *Johnson*** (1989) 47 Cal.3d 1194, the court proceeded to analyze a defense claim the prosecution improperly excluded "Asian" jurors as if Asians were a cognizable class but observing in a footnote that is at least questionable whether "the generic description Asian" could constitute a "cognizable group." (**Id.** at p. 1217 and fn. 3.)

b. <u>African-Americans</u>

African-Americans have been identified as a cognizable class. (**See e.g.**, ***People* v. *Wheeler*** (1978) 22 Cal.3d 258.)

c. Chinese-Americans

In ***People* v. *Lopez*** (1991) 3 Cal.App.4th Supp. 11, the court treated two Chinese-Americans as belonging to a cognizable group. It is not clear whether the court distinguished between Chinese-Americans and Asian-Americans. **(Id.** at pp. 14-18.)

d. Filipino-Americans

Filipino-Americans may be a separate cognizable class that is distinct from Asian-Americans. (**See *People* v. *Bell*** (2007) 40 Cal.4th 582, 599 [assuming, but not deciding, whether Filipino-Americans are a distinct group from Asian-Americans]; **cf.**, ***United States* v. *Canoy*** (7th Cir. 1994) 38 F.3d 893, 897 [characterizing Filipino-American as belonging to group of persons of "Asian descent"])

e. Hispanic-Americans

Hispanics have been identified as a cognizable class. (**See e.g. *People* v. *Perez*** (1996) 48 Cal.App.4th 1310, 1315.)

(i) **Can a Spanish-surname suffice to identify a juror as a Hispanic for *Batson-Wheeler* purposes?**

In ***People* v. *Gutierrez*** (2002) 28 Cal.4th 1083, the court held that "Spanish surnamed" jurors can essentially be deemed a surrogate stand-in for the cognizable class of Hispanics. However, this principle only applies "where no one knows at the time of the challenge whether the Spanish-surnamed juror is Hispanic." (**Id.** at p. 1123.) If a juror is not of Hispanic origin, but only acquires her Hispanic surname through marriage, and indicates on her juror questionnaire and in court that she is not Hispanic, the juror is not Hispanic for ***Batson-Wheeler*** purposes. (at p. 1123.)

In ***People* v. *Cruz*** (2008) 44 Cal.4th 636, the California Supreme Court declined to address whether the defense had made a prima facie showing of use of discriminatory challenges against Hispanics based on the prosecution's bumping of a juror with a Spanish surname because the juror identified as "white" and only had obtained a Hispanic surname through marriage. (**Id.** at pp. 656-657.)

The ***Cruz*** court acknowledged that that "Spanish surnamed" sufficiently describes a cognizable class "Hispanic" under ***Wheeler***. However, the court stated that is only true "where no one knows at the time of the challenge whether the Spanish-surnamed prospective juror is Hispanic." (**Cruz**, at pp 656-657.) Since, in ***Cruz***, the record reflected the challenged juror was "white" and not of Hispanic origin, it was not proper to even address whether the juror was bumped because she was Hispanic. (***Ibid.***)

(ii) **Are Spanish-speaking Hispanics a separately-recognized cognizable class sub-group?**

In ***People* v. *Gonzalez*** (2008) 165 Cal.App.4th 620, the prosecutor used his first four challenges to excuse Hispanic jurors, one of whom was identified as JC and the other as FR.* The prosecutor did not ask any question of JC, and no answers on the jury questionnaire stood out. When the prosecutor asked the panel if anyone who spoke Spanish would be able to accept the interpreter's translation, JC did not raise his hand. After a ***Batson-Wheeler*** challenge was brought, the prosecutor stated he excluded JC based on his youth, his lack of significant family ties, and the fact JC was Spanish-speaking, which, the prosecutor said might be a problem when listening to witnesses who were testifying through a Spanish-interpreter. The defense argued that "Spanish-speaking" (as opposed to Hispanic) jurors were a cognizable class and the prosecutor was improperly excluding them. (**Id.** at pp. 624-625.) ***Editor's note**: The court found it unnecessary to discuss the challenge to FR.

The ***Gonzalez*** court recognized that in ***Hernandez* v. *New York*** (1991) 500 U.S. 352, the court held that the fact a bilingual juror might have difficulty in accepting the translator's rendition was a neutral reason for excluding a juror. (***Gonzalez***, at pp. 628-629 [and noting that this ground was held to be a valid reason for removing two jurors who expressed hesitancy in their ability to follow the interpreter's translation in ***People* v. *Cardenas*** (2007) 155 Cal.App.4th 1468].)

However, the ***Gonzalez*** court held that the prosecutor was not actually concerned with the ability of the jurors to follow the rule about ignoring their own interpretation of what a Spanish speaker would say. Rather, the court concluded that the prosecutor had simply provided this reason (as well as the other reasons) to conceal an intent to essentially exclude unassimilated Hispanics (i.e., "those persons who may be perceived as more closely identifying with their national origin and or their Hispanic ethnicity"). (**Id.** at p. 631.) The court disregarded the fact there remained other Hispanics on the

panel whom the court assumed were non-Spanish speakers "given the prosecutor's systematic elimination of all Hispanic Spanish speakers. (**Ibid.**)

The ***Gonzalez*** court came to this conclusion because only two panelists raised any question about the requirement of having to adopt the official translation of the testimony. One of them the prosecutor never challenged. That juror was Spanish-speaking but did not have a Hispanic surname (albeit she may have been Hispanic). The other *was* Hispanic and *was* challenged but the prosecutor did not justify his peremptory challenge on the ground the juror would have difficulty adopting the official translation. (**Id.** at p. 630.) Moreover, the court found the other grounds asserted by the prosecutor for excluding JC (i.e., his youth and lack of mature family ties) were pretextual. (**Id.** at pp .631-632.)

f. Native-Americans

Native-Americans have been identified as a cognizable class. (**See *Kesser* v. *Cambra*** (9 th Cir. 2006) 465 F.3d 351, 357-358, 360.)

4. What "Religious" Groups Have Been Identified as Cognizable Classes?

The California Supreme Court has held that "religious membership constitutes an identifiable group under ***Wheeler***." (***People* v. *Richardson*** (2008) 43 Cal.4th 959, 984; ***In re Freeman*** (2006) 38 Cal.4th 630, 643.) "Such a practice [religious-based excusals] also violates the defendant's right to equal protection under the Fourteenth Amendment to the United States Constitution." (***People* v. *Richardson*** (2008) 43 Cal.4th 959, 984.) The United States Supreme Court has not yet applied ***Batson*** to forbid group exclusion based on religion, although a number of state and federal courts have done so. (***In re Freeman*** (2006) 38 Cal.4th 630, 643.)

Generally, courts have recognized that while excluding a juror on the basis of belonging to a particular religious group would be impermissible, it is proper to exclude jurors whose religious beliefs would interfere with the duties of a juror. (**See *People* v. *Martin*** (1998) 64 Cal.App.4th 378, 384-385 [challenge of juror who was Jehovah's Witness was upheld based on juror's answer regarding religious principles making it difficult to judge others]; ***People* v. *Richardson*** (2008) 43 Cal.4th 959, 985 [excusing prospective jurors who have a religious bent or bias that would make it difficult for them to impose the death penalty is a proper, nondiscriminatory ground for a peremptory challenge] ***People* v. *Watson*** (2008) 43 Cal.4th 652, 679 [same]; ***People* v. *Cash*** (2002) 28 Cal.4th 703, 725 [same]; **accord *People* v. *Catlin*** (2001) 26 Cal.4th 81, 118-119; ***People* v. *Ervin*** (2000) 22 Cal.4th 48, 76.)

a. Jewish

In ***People* v. *Johnson*** (1989) 47 Cal.3d 1194, the court proceeded to analyze a defense claim the prosecution improperly excluded Jewish jurors as if Jews were a cognizable class, albeit observing in a footnote that is at least questionable whether a religious group can constitute a "cognizable group." (**Id.** at p. 1217 and fn. 3.)

5. Are Persons Sharing a Sexual Orientation a Cognizable Class?

In ***People* v. *Garcia*** (2001) 77 Cal.App.4th 1269, the court held that "gays and lesbians" are a cognizable class. (**Id.** at p. 1281.) The court lumped both gays and lesbians together into a single cognizable class without specifically stating whether each might be its own cognizable class. (**See also** Code of Civil Procedure section 231.5 [forbidding peremptory challenges based on sexual orientation].)

6. Are Males or Females a Cognizable Class?

In ***J.E.B.* v. *Alabama ex rel. T. B.*** (1994) 511 U.S. 127, the court held that equal protection prohibited the exclusion of women from juries on the basis of their gender. (**Id.** at p. 129; **see also *People* v. *Bonilla*** (2007) 41 Cal.4th 313, 343 [treating women as a cognizable class].)

II. What Will or Will Not Be Considered Adequate Justification for Exercising a Peremptory Challenge Against a Juror

A. In General

1. An Attorney Does Not Violate Equal Protection So Long as He or She Has a Genuine Non-Discriminatory Reason for Challenging a Juror - Even if the Reason "Makes No Sense."

In ***People* v. *Cruz*** (2008) 44 Cal.4th 636, the California Supreme Court reiterated some principles it had espoused in ***People* v. *Guerra*** (2006) 37 Cal.4th 1067, 1100 and ***People* v. *Reynoso*** (2003) 31 Cal.4th 903, 919 regarding what constitutes legitimate grounds for a prosecutor to peremptorily challenge a juror: "'All that matters is that the prosecutor's reason for exercising the peremptory challenge is sincere and legitimate, legitimate in the sense of being nondiscriminatory.' [Citation omitted by P&A].) A reason that makes no sense is nonetheless 'sincere and legitimate' as long as it does not deny equal protection." (***Cruz*** at p. 987.)

B. Categories of Reasons for Valid Peremptory Challenges

1. Negative Experiences Jurors or Relatives of Jurors Have Had With Law Enforcement or Hostile Attitude Toward Law Enforcement

There are many cases holding that prior negative contacts or experiences between a juror or a close relative of the juror and law enforcement or the criminal justice system is a neutral reason for a prosecutor to challenge a juror. This can include the juror or the juror's close relative being arrested, prosecuted, and/or convicted of a crime. (**See *People* v. *Cruz*** (2008) 44 Cal.4th 636, 656, fn. 3 [juror's son]; ***People* v. *Watson*** (2008) 43 Cal.4th 652, 677 [same]; ***People* v. *Davis*** (2008) 164 Cal.App.4th 305, 313 [same]; ***People* v. *Avila*** (2006) 38 Cal.4th 491, 554-555 [juror's brother]; ***People* v. *Adanandus*** (2007) 157 Cal.App.4th 496, 504, 509 [juror's brother; juror's son]; ***People* v. *Farnam*** (2002) 28 Cal.4th 107, 138 [juror's nephew]; ***People* v. *Morris*** (2003) 107 Cal.App.4th 402, 409 [same]; ***People* v. *Watson*** (2008) 43 Cal.4th 652, 678 [juror's ex-husband]; ***People* v. *Salcido*** (2008) 44 Cal.4th 93, 140 [juror's boyfriend]; **see also *People* v. *Watson*** (2008) 43 Cal.4th 652, 675 [juror was witness to fatal shooting but was never contacted by police who she felt did not take crime seriously].) "Prosecutors are understandably concerned about retaining such persons on criminal juries." (***People* v. *Calvin*** (2008) 159 Cal.App.4th 1377, 1386.) This reasons remains a neutral ground notwithstanding the juror's assurances that the prior experiences would not impact the juror. (***People* v. *Avila*** (2006) 38 Cal.4th 491, 554-555; ***People* v. *Farnam*** (2002) 28 Cal.4th 107, 138; ***People* v. *Adanandus*** (2007) 157 Cal.App.4th 496, 505.)

2. Juror Holds Belief That the Justice System is Unfair or Expressions of Hostility Toward the Criminal Justice System

a. Belief criminal justice system in general is not fair

"[S]kepticism about the fairness of the criminal justice system is a valid ground for excusing jurors." (***People* v. *Calvin*** (2008) 159 Cal.App.4th 1377, 1386.) In ***People* v. *Cruz*** (2008) 44 Cal.4th 636, the California Supreme Court described the following as two of the "ample nondiscriminatory bases on which to peremptorily excuse" a juror: the juror's feeling that sometimes that system is not fair; the juror's sense that the police were from time to time opinionated about situations and were not willing to consider other possibilities and listen to explanations. (**Id.** at p. 656, fn. 3.)

b. Belief criminal justice system is not fair to certain groups

Sometimes a juror will express a belief that the justice system treats a particular cognizable class unfairly. The belief that the system is biased against members of a certain cognizable class, especially when the defendant is a member of that same class and the juror indicates this belief might bias him or her, constitutes a legitimate reason for challenging that juror. (**See *People* v. *Calvin*** (2008) 159 Cal.App.4th 1377, 1381 [fact juror indicated that the criminal justice system was not fair for Black people, that if you can't pay for a good attorney, the criminal justice system is not fair, and that Blacks are accused wrongfully, get convicted because they don't know their rights or the system or have the means to hire an attorney" and he had concerns about being fair and impartial" provided neutral grounds for challenging the juror]; ***People* v. *Adanandus*** (2007) 157 Cal.App.4th 496, 504, 507 [fact juror expressed the opinion there was "inherent bias in the criminal justice system against young African-American men" and that it would be difficult for her to "impartial" in the kind of case pending for trial provided neutral reason for challenging juror].)

In ***People* v. *Calvin*** (2008) 159 Cal.App.4th 1377, the court rejected the argument that skepticism toward the criminal justice system is so prevalent among African-Americans that it should be considered a proxy for race and that, as a result, peremptory challenges based on such an attitude should be deemed discriminatory. (**Id.** at p. 1379.) Ironically, if the prosecutor had challenged the juror based solely on the assumption that the defense adopted in ***Calvin***, it would probably **not** be considered a neutral reason. In other words, "[i]f the prosecutor . . . had dismissed the African-American jurors based on his ***assumptions*** about their attitudes, he would have demonstrated the type of group-based discrimination outlawed by both the equal protection clause and the California Constitution's guarantee of a trial by a jury drawn from a representative cross-section of the community." (***People* v. *Calvin*** (2008) 159 Cal.App.4th 1377, 1387.)

However, as long as the challenge is not made based on assumptions that members of the class would hold skeptical views towards the criminal justice system, but rather on actual views expressed by the challenged jurors, it is permissible to challenge the jurors on that basis. (***People* v. *Calvin*** (2008) 159 Cal.App.4th 1377, 1388.) The fact that similar attitudes are held by many other members of the class to which the juror belonged "does not convert the prosecutor's challenge into intentional race-based discrimination." (**Ibid**; **see also *People* v. *Avila*** (2006) 38 Cal.4th 491, 545 [prosecutor's challenge to juror proper where it was based on juror's *personal* experience that police officers lied, "not on a theoretical perception that she, a member of a minority group, might view the police with distrust"].)

3. Juror is Young, Immature, and/or Lacks Life Experience

Relative youth and immaturity are neutral grounds for excusing a juror. (**See *People* v. *Salcido*** (2008) 44 Cal.4th 93, 140 [19-year old juror].)

In ***People* v. *Cruz*** (2008) 44 Cal.4th 636, the court held that the fact the juror was only 20 years old and "one of youngest, or the youngest" prospective juror" was one of several reasons that did not reflect a "discriminatory intent. (**Id**. at pp. 657-659.)

In ***People* v. *Watson*** (2008) 43 Cal.4th 652, the court held that it was proper for a prosecutor to challenge a juror who, inter alia, was young, inexperienced, and who believed the reason for why the crime rates were increasing was because "Republicans [were] in the presidency" - a reason the prosecutor characterized as "immature." (**Id**. at p. 679.)

In ***People* v. *Salcido*** (2008) 44 Cal.4th 93, the court that it was proper for a prosecutor to challenge a juror who was "immature" as reflected by her "focus on the attention she had received at work because of the possibility she would be selected as a juror in this case, and on the useful experience she might acquire as a result" and answers she gave indicating she did not appreciate the gravity of the responsibility in a death case. (**Id**. at p. 140; **see also *People* v. *Sims*** (1993) 5 Cal.4th 405, 429-430 [upholding peremptory challenge based upon juror's immaturity].)

Compare ***People* v. *Gonzalez*** (2008) 165 Cal.App.4th 620, a case where the appellate court *disbelieved* a prosecutor's claim a juror was excused for immaturity where the exact age of the juror was not disclosed by the record, the prosecutor claimed the occupation of the juror (clearing utility lines) indicated the juror was lacking maturity but the job could have been a "responsible, permanent, possibly career position", and the prosecutor asserted the juror was single and childless but this was not supported by the record as a fact. (**Id**. at pp. 631-632.)

4. Juror Holds Out of the Mainstream Views Regarding Criminal Laws

In ***People* v. *Adanandus*** (2007) 157 Cal.App.4th 496, the court held it was a legitimate ground to excuse a juror who stated that drugs, including crack cocaine, should be legalized, who was ambivalent about whether he would be able to hold defendant accountable if the offense stemmed from drug dealing, and who was equivocal about the effect his views on the drug laws might have if he was called on as a juror to decide the case. (**Id**. at pp. 505, 510.)

5. Juror is Soft of Crime or Likely Harbors Pro-Defense Bias

If the juror harbors a "generally prodefense partiality or bias," this, by itself, provides a legitimate ground to challenge a juror. (***People* v. *Adanandus*** (2007) 157 Cal.App.4th 496, 507, citing to ***People* v. *Farnam*** (2002) 28 Cal.4th 107, 138; **see also *People* v. *Semien*** (2008) 162 Cal.App.4th 701, 708 [noting prosecutor could rightly be concerned with juror who worked with the "underprivileged" where the term could encompass persons who are "on the defense side of a government prosecution"].)

6. Juror Appears Less Than Forthright or Unbelievable

If a juror gives answers that appear to be inconsistent, less than forthcoming, or provides some other reason for the prosecutor to distrust the juror or believe the juror's responses are not credible, this provides a legitimate ground to challenge a juror. (**See *People* v. *Adanandus*** (2007) 157 Cal.App.4th 496, 500; ***People* v. *Cardenas*** (2007) 155 Cal.App.4th 1468, 1475; **see also *People* v. *Salcido*** (2008) 44 Cal.4th 93, 140 [fact juror less than direct in answering questions relating to his views on the death penalty provided neutral grounds for excusing juror]; ***People* v. *Davis*** (2008) 164 Cal.App.4th 305, 313 [fact juror initially *mistakenly or intentionally* characterized her son as a victim of a DUI driver but later revealed her son had actually been arrested for DUI was, inter alia, a proper basis for challenging the juror].)

7. Juror Gives Answers Indicating Juror Would Have Sympathy for Persons in Defendant's Situation

If a juror expresses attitudes reflecting a belief that a defendant's social environment or history might excuse or mitigate his or her criminal behavior, this can provide neutral grounds for challenging a juror. (**See *People* v. *Watson*** (2008) 43 Cal.4th 652, 673-675 [proper to excuse juror who said her childhood friend had committed murders but did not deserve the death penalty because of the neighborhood he grew up in and fact friend came from single parent home].)

8. Juror Has Life Experiences That Might Make the Juror Overly Sympathetic to, or Biased Towards, a Person in the Defendant's Position

If a juror has had experiences that might cause her to sympathize or empathize with the criminal defendant on trial, this can provide neutral grounds for excusing the juror. (**See *People* v. *Watson*** (2008) 43 Cal.4th 652, 676 [proper to challenge juror who, inter alia, had brother who worked in CYA and sometimes would tell her "a sad story from an inmate's point of view"]; ***People* v. *Salcido*** (2008) 44 Cal.4th 93, 140 [juror's own history of alcoholism resulting in a court martial and abusive behavior toward his family was proper ground for excusing juror because it could predispose him to bias in favor of a defendant who might use alcoholism as mitigation in a death penalty case].)

People* v. *Watson (2008) 43 Cal.4th 652, 673-674, 680 [fact juror has had substantial exposure to gang members such that it might make it more difficult for her to impose the death penalty in a gang-related drive-by shooting case was neutral reason to exercise a challenge against the juror].)

9. Juror Has Life Experiences That Might Cause the Juror to Question Some Aspect of the Prosecution Case

If a juror expresses sentiments or has prior experiences that might bear on how the prosecution's case is viewed (i.e., doubts about the validity of certain types of evidence or certain types of witnesses), this can provide neutral grounds for challenging the juror. (**See *People* v. *Watson*** (2008) 43 Cal.4th 652, 676 [fact juror had trouble describing her own assailant when she was a victim of purse snatching, inter alia, provided neutral grounds for challenging a juror in a case dependent on identification testimony].)

10. Juror Has Religious Beliefs That Might Affect His or Her Decision

If a person's religious beliefs would make it difficult for the juror to convict or impose a penalty, this can provide neutral grounds for challenging a juror. (**See** this P&A memo, I-B-4, at p. 24.)

11. Juror Expresses an Unwillingness or Reluctance to Follow the Law

a. Reluctance to Follow Law in General

In ***People* v. *Howard*** (2008) 42 Cal.4th 1000, the court held that it was proper to challenge a juror who indicated that he would "negotiate" with the judge if there was a law or instruction that differed from the juror's own opinion or belief. (**Id.** at p. 1017.)

b. Holding People to Higher Burden of Proof

In ***People* v. *Watson*** (2008) 43 Cal.4th 652, the court held the fact the juror indicated he might hold the prosecution to a higher burden of proof than beyond a reasonable doubt was a neutral reason for challenging a juror. (**Id.** at pp. 679-680.)

c. Accepting Interpreter's Translation Despite Coming to a Different Translation

The failure of a bilingual juror to accept a translator's rendition of what a witness has testified to, regardless of the juror's own interpretation is a neutral reason for challenging a juror. (**See *Hernandez* v. *New York*** (1991) 500 U.S. 353, 361; ***People* v. *Cardenas*** (2007) 155 Cal.App.4th 1468, 1476-1477.)

12. Juror's Attitude and Behavior During Court Proceedings

a. Late to Court

In ***People* v. *Watson*** (2008) 43 Cal.4th 652, the court held the fact a juror was twice late to court provided grounds for the prosecutor to believe the juror was irresponsible and that this was, inter alia, a legitimate ground for challenging the juror. (**Id.** at pp. 679-680.) Similarly, in ***People* v. *Davis*** (2008) 164 Cal.App.4th 305, the court found, inter alia, the fact the juror was not punctual provided neutral grounds for challenging the juror. (**Id.** at pp. 312-313.)

b. Inattention

In ***People* v. *Davis*** (2008) 164 Cal.App.4th 305, the court found, inter alia, the fact the juror was inattentive provided neutral grounds for challenging the juror. (**Id.** at pp. 315.)

c. Arrogant or Flippant Attitude

In ***People* v. *Howard*** (2008) 42 Cal.4th 1000, the court cited to a trial judge's observation that the juror was "arrogant, flippant" in finding the prosecutor was justified in challenging one juror and observed that another juror was properly challenged because, inter alia, the juror's responses revealed a flippant attitude toward the proceeding and suggested he was trying to avoid jury service. (**Id.** at pp. 1017, 1019 [and noting the latter juror had written prosecutors "are trickly (sic) people," and that defense attorneys "will say anything"].)

d. Attempt to Avoid Jury Service

In ***People* v. *Howard*** (2008) 42 Cal.4th 1000, the court cited to a trial judge's observation that the juror was "trying to get off the panel" in upholding the trial court's finding the prosecutor had properly challenged the juror. (**Id.** at p. 1019.)

e. Reluctance to Answer Questions

In ***People* v. *Howard*** (2008) 42 Cal.4th 1000, the court stated "[a]n advocate may legitimately be concerned about a prospective juror who will not answer questions." (**Id.** at p. 1019 [and pointing out that there was no prima facie showing a juror was discriminated against where, inter alia, one of the challenged jurors declined to fill out substantial portions of the jury questionnaire, marking "confidential" on "almost all of his answers"].)

13. Juror Lacks Mental Ability to Understand the Issues or Proceedings

In ***People* v. *Watson*** (2008) 43 Cal.4th 652, the court held the fact a juror, inter alia, exhibited significant confusion about the death penalty determination provided a neutral ground for removing the juror. (**Id.** at p. 682.) In ***People* v. *Davis*** (2008) 164 Cal.App.4th 305, the court found that, inter alia, the fact a juror seemed very confused, sat in the wrong chair, did not seem to be able to follow the court's instructions, and appeared dazed and somewhat unresponsive provided neutral grounds for challenging the juror. (**Id.** at pp. 312-313.)

14. Juror Lacks Psychological Ability to Focus on the Trial

In ***People* v. *Gutierrez*** (2002) 28 Cal.4th 1083, the court held that "[f]actors indicating a difficulty or inability to focus on the evidence may serve to justify a peremptory challenge." (**Id.** at p. 1124; **see also *Mitchell* v. *Superior Court*** (1984) 155 Cal.App.3d 624, 628.)
In ***People* v. *Gutierrez*** (2002) 28 Cal.4th 1083, the court held prosecutor was justified in challenging a juror on grounds her ability concentrate or fairly deliberate on the evidence would be compromised where the juror appeared extremely emotional and overwhelmed by outside stresses, repeatedly referred to her "nerves" and to being under considerable stress, and cried twice during voir dire. (**Id.** at p. 1124.)

15. Juror Has Difficulty Making a Decision

In ***People* v. *Fiu*** (2008) 165 Cal.App.4th 360, the juror repeatedly expressed a concern that it might be difficult for her to make a decision regarding guilt if the defendant was present in the courtroom. This was found to be a neutral reason for removing the juror. (**Id.** at p. 395.)

16. Juror Has Previous Served on a Hung Jury

The fact a panelist has previously served on a jury that was unable to reach a verdict "constitutes a legitimate concern for the prosecution, which seeks a jury that can reach a unanimous verdict[.]" (***People* v. *Farnam*** (2002) 28 Cal.4th 107, 138; ***People* v. *Turner*** (1994) 7 Cal.4th 137, 170.)

17. Juror Directly or Indirectly Expresses Reluctance to Impose the Death Penalty in a Death Penalty Case

Statements or attitudes of a juror that reflect a reluctance to impose the death penalty provide neutral reasons for excusing the juror. (**See *People* v. *Watson*** (2008) 43 Cal.4th 652, 673-675, 679-681 [juror did not believe friend deserved death penalty despite friend committing multiple murders; juror said she would vote against death penalty if

on the ballot and her death penalty determination might be swayed by her religious views; juror was uncertain whether could impose death penalty; juror indicated he would not vote for the death penalty if it was on the ballot due to his religious beliefs].)

"A prosecutor may exercise peremptory challenges against prospective jurors who are not so intractably opposed to the death penalty that they are subject to challenge for cause under the ***Witt-Wainwright*** standard, but who nonetheless are substantially opposed to the death penalty." ***People*** **v.** ***Salcido*** (2008) 44 Cal.4th 93, 139-140; **see also** ***People*** **v.** ***Zambrano*** (2007) 41 Cal.4th 1082, 1104-1107; ***People*** **v.** ***Jurado*** (2006) 38 Cal.4th 72, 106.)

18. Juror (or Spouse of Juror) is Employed in a Job or Engages in Activities That Reflect an Orientation Toward Rehabilitation and Sympathy for Defendants

a. Counselors

In ***People*** **v.** ***Adanandus*** (2007) 157 Cal.App.4th 496, the court found a prosecutor could properly excuse a juror because, inter alia, the juror worked as a school counselor in the Americorps program (a program that focused primarily on rehabilitation) and this "might maker her more partial to the defense[.]" (**Id.** at p. 507.)
In ***People*** **v.** ***Ervin*** (2000) 22 Cal.4th 507, the court held it was proper to excuse a juvenile counselor who believed in rehabilitation on grounds this might cause her to reject the death penalty. (**Id.** at p. 75; **see also** ***People*** **v.** ***Adanandus*** (2007) 157 Cal.App.4th 496, 507.)

b. Attorneys and Employees of Attorneys and Their Spouses

In ***People*** **v.** ***Barber*** (1988) 200 Cal.App.3d 378, the court held it was proper to excuse a juror whose *spouse* worked for a "liberal attorney." (**Id.** at pp. 389-394; **see also** ***People*** **v.** ***Adanandus*** (2007) 157 Cal.App.4th 496, 507.)

c. Drug Treatment Affiliation

In ***People*** **v.** ***Landry*** (1996) 49 Cal.App.4th 785, the court held it was proper to excuse a juror who, inter alia, was on the board of a drug treatment program. (**Id.** at pp. 789-790; **see also** ***People*** **v.** ***Adanandus*** (2007) 157 Cal.App.4th 496, 508.)

d. Nursing Assistants

In ***People*** **v.** ***Davis*** (2008) 164 Cal.App.4th 305, the court held it was proper for a prosecutor to excuse a juror who was a certified nursing assistant based on the prosecutor's *own personal bad experiences , outside of court*, with nursing assistants. (**Id.** at p. 313.)

e. Psychologists/Psychiatrists

In ***People*** **v.** ***Landry*** (1996) 49 Cal.App.4th 785, the court held it was proper to excuse a juror who, inter alia, had a background in psychiatry or psychology. (**Id.** at pp. 789-790; **see also** ***People*** **v.** ***Adanandus*** (2007) 157 Cal.App.4th 496, 508.)

f. Religious Leaders

In ***People*** **v.** ***Semien*** (2008) 162 Cal.App.4th 701, the court held a prosecutor had legitimate grounds for challenging a pastor who dealt with homeless people since the pastor was "in the business of forgiveness," and the prosecutor was not required to accept the pastors' assurance that he could find someone guilty." (**Id.** at p. 708.)

g. Teachers

In ***People*** **v.** ***Landry*** (1996) 49 Cal.App.4th 785, the court held it was proper to excuse a juror who, inter alia, was a teacher. (**Id.** at pp. 789-790; **see also** ***People*** **v.** ***Adanandus*** (2007) 157 Cal.App.4th 496, 507.) In ***People*** **v.** ***Barber*** (1988) 200 Cal.App.3d 378, the court held it was proper to excuse a juror because the juror was a teacher and prosecutor believed teachers tended to be liberal and "less prosecution oriented." (**Id.** at pp. 389-394; **see also** ***People*** **v.** ***Adanandus*** (2007) 157 Cal.App.4th 496, 507.)

h. Social Service Type Work

If a juror has a background in, or is employed in, social service type work, this can provide neutral grounds for

challenging the juror. (**See *People* v. *Watson*** (2008) 43 Cal.4th 652, 677 [proper to excuse a juror who, inter alia, was a social worker]; ***People* v. *Landry*** (1996) 49 Cal.App.4th 785, 789-790 [proper to excuse a juror who, inter alia, had worked in a youth services agency]; **accord *People* v. *Adanandus*** (2007) 157 Cal.App.4th 496, 508; ***People* v. *Turner*** (1994) 8 Cal.4th 137, 170[proper to excuse a juror who had trained with the Department of Social Services].) Indeed, even if someone close to the juror has a background or job in social work, this can provide neutral grounds for challenging the juror. (**See *People* v. *Semien*** (2008) 162 Cal.App.4th 701, 707-708 [proper to excuse a juror who, inter alia, had a wife working in the county welfare department].)

C. Can a prosecutor challenge a juror based on the prosecutor's own personal biases against members of a profession?

Although it is fairly well-established that a prosecutor can rely on stereotypical assumptions about persons involved in certain occupations tilting toward the defense (**see** this P&A memo, above, at pp. 31-33), can a prosecutor's idiosyncratic hostility towards members of a particular profession provide neutral grounds for challenging a juror?

In ***People* v. *Davis*** (2008) 164 Cal.App.4th 305, the prosecutor challenged a juror who was a certified nursing assistant (CNA) because of the prosecutor's own personal bias against CNAs stemming from the bad experiences the prosecutor had outside of court with CNAs who were working in her father's nursing home. This was found to be a neutral reason for challenging the juror, notwithstanding a lack of any assertion that CNAs lean toward the defense from an objective standpoint. (**Id.** at p. 313.)

D. Is a prosecutor required to assume a juror's responses are true?

The fact that a juror provides an answer that "contradicts" the basis for the prosecutor's challenge does not mean the prosecutor's reason will be held pretextual. (**See e.g.,*Rice* v. *Collins*** (2006) 546 U.S. 333, 341 [notwithstanding young juror's oral response she could be impartial, prosecutor entitled to believe juror's youth and lack of ties to the community would make her a bad juror for the prosecution]; ***People* v. *Cardenas*** (2007) 155 Cal.App.4th 1468, 1477 [prosecutor had legitimate reasons for removing a bilingual juror on grounds the prosecutor believed the juror would refuse to accept an interpreter's translation over the juror's own translation even though juror ultimately agreed to abide by interpreter's translation]; ***People* v. *Gutierrez*** (2002) 28 Cal.4th 1083, 1124 [prosecutor justified in removing a juror on grounds the juror might harbor bad feelings toward the police despite the juror's claim otherwise; prosecutor was entitled to disregard a juror's claim that her emotional state and stressful circumstances would not interfere with her ability to consider the evidence where the juror repeatedly referred to her "nerves" and to being under considerable stress, cried twice during voir dire, and the unduly "emotional" state of the juror was confirmed by the judge].)
Numerous cases have held that a prosecutor is entitled to dismiss a juror who has had negative contacts with law enforcement the criminal justice system or have close relatives who had such negative contacts, notwithstanding the juror's assurances that the prior experiences would not impact the juror. (***People* v. *Avila*** (2006) 38 Cal.4th 491, 554-555; ***People* v. *Farnam*** (2002) 28 Cal.4th 107, 138; ***People* v. *Adanandus*** (2007) 157 Cal.App.4th 496, 505.)

III. The Use of Comparative Analysis to Assess the Existence of a Discriminatory Motive

Comparative analysis refers to a mechanism that courts use to try to "flush out" the actual motivation of the party accused of using his or her peremptory challenges in a discriminatory fashion. In doing a comparative analysis, the court reviews the reasons given for the challenge as to the particular juror and then looks to see if those reasons would apply equally to other jurors (not belonging to the same cognizable class as the challenged juror) who were not challenged. If there are two jurors who have given very similar responses, one of whom belongs to the cognizable class and one of whom does not, and the party has only challenged the juror in the cognizable class on the purported basis of a response given by *both* jurors, an inference can arise that the purported basis of the challenge is a pretext designed to conceal a discriminatory purpose.

Although courts applying comparative analysis sometimes engage in a very simplistic or superficial comparison, "overlapping responses alone are not enough to demonstrate purposeful discrimination." (***People* v. *Calvin*** (2008) 159 Cal.App.4th 1377, 1389, citing to ***People* v. *Lewis and Oliver*** (2006) 39 Cal.4th 970, 1020.) "To prove such a claim, a defendant must engage in a careful side-by-side comparative analysis to demonstrate that the dismissed and retained jurors were "similarly situated." (***People* v. *Calvin*** (2008) 159 Cal.App.4th 1377, 1389, citing to ***People* v. *Lewis and Oliver*** (2006) 39 Cal.4th 970, 1016-1024; **see also *People* v. *Watson*** (2008) 43 Cal.4th 652, 672-682 [rejecting numerous claims that jurors were similarly situated for comparative analysis purposes where both booted and seated jurors were similar in some aspects but different in others].)

There were several significant decisions that came out of the United States Supreme Court and California Supreme Court in the past couple of years regarding the use of comparative analysis by both trial courts and appellate courts in order to assess the existence of a discriminatory motive. These cases are discussed in depth, below, to highlight "comparative analysis" in action.

A. *Snyder* v. *Louisiana* (2008) 128 S.Ct. 1203

Facts

In ***Snyder***, the prosecutor exercised peremptory challenges against all five black panelists. (**Id**. at p. 1207.) However the Supreme Court focused on the prosecutor's reasons for challenging just one of those panelists. In the first phase of jury selection, the court inquired of panelists whether jury service would result in extreme hardship. The panelist explained that he was a college senior who needed to complete his student-teaching requirement to graduate and expressed concern that jury service would cause him to miss classes. The trial court contacted the university dean, who gave assurances that he would work with the panelist to make up classes. After receiving this information, the panelist expressed no further concern and the prosecutor did not question him further on the issue. (**Id**. at pp. 1209-1210.)

In explaining this peremptory challenge, the prosecutor offered two race-neutral reasons. First, he stated the panelist appeared nervous throughout the voir dire questioning. Second, the prosecutor claimed to be apprehensive that, in order to minimize the student-teaching hours missed during jury service, the panelist might have been motivated to find the defendant guilty of a lesser included offense, thus obviating the need for a penalty phase proceeding. (**Id**. at p. 1210.) Although defense counsel disputed both explanations, the trial court said it was "going to allow the challenge." The trial and penalty phases concluded two days after the panelist was struck. (**Id**. at p. 1210.)

Held:

1. While recognizing that deference to the trial judge "is especially appropriate where a trial judge has made a finding that an attorney credibly relied on demeanor in exercising a strike[,]" the court found no such deference was due in the instant case (i.e., the court would not presume that the trial judge credited the prosecutor's explanation of nervousness) because the trial court "responded to the prosecutor's two proffered reasons by simply allowing the challenge without explanation." (**Id**. at p. 1209.)

2. The court characterized the prosecutor's explanation that the juror might be motivated to convict of something less than a first degree murder in order to save time in the penalty phase as "highly speculative" and pointed out that the fact the actual trial and penalty phase only lasted two days indicated that serving on a jury would not have seriously interfered with panelist's ability to complete his required student teaching. (**Id**. at p. 1210.)

3. The court also found that the implausibility of the prosecutor's explanation was reinforced by the prosecutor's acceptance of white jurors who disclosed conflicting obligations that appear to have been at least as serious as that of the bumped panelist. The court observed, for example, the prosecutor did not express a similar concern about one white juror who offered substantially more pressing work and family reasons as to why jury service would cause him hardship or about another white juror who claimed that in order to serve he would have to cancel an urgent appointment at which his presence was essential. (**Id**. at pp. 1211-1212.)

4 The court recognized that "a retrospective comparison of jurors based on a cold appellate record may be very misleading when alleged similarities were not raised at trial. In that situation, an appellate court must be mindful that an exploration of the alleged similarities at the time of trial might have shown that the jurors in question were not really comparable." (**Id.** at p. 1211.)

Nevertheless, the court held, it was proper to do a comparative analysis in the instant case since "the shared characteristic, i.e., concern about serving on the jury due to conflicting obligations, was thoroughly explored by the trial court when the relevant jurors asked to be excused for cause." (**Id**. at p. 1211.)

B. *Rice* v. *Collins* (2006) 546 U.S. 333

Facts

In ***Rice***, the issue before the court was whether the prosecutor had improperly challenged a young female African-American juror (identified as juror 16). The prosecutor provided the following explanations for striking Juror 16: she had rolled her eyes in response to a question from the court; she was young and might be too tolerant of a drug crime; she

was single; and she lacked ties to the community. (**Id**. at pp. 336-337.) The prosecutor also referred to the fact the juror was female but the trial court did not rely on the last ground. The trial court also stated it did not observe the demeanor of the juror the prosecutor complained about. Nonetheless, the trial court noted the prosecutor's rationale for removing the juror because she was youthful was supported by the prosecutor's challenge of other youthful jurors outside the cognizable class at issue. (**Id**. at p. 337.)

When the case got to the Ninth Circuit by way of habeas, the Ninth Circuit found that there was "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding" regarding the trial court's finding that the prosecutor's reason for removing the juror (i.e. her youth) was credible. The Ninth Circuit gave three reasons for finding the trial court's determination (and a subsequent state court of appeal's upholding of the determination) to be unreasonable. First, the prosecutor erroneously referred to another prospective African-American juror's age as being young when that other juror was a grandmother. Second, the prosecutor improperly attempted to use gender as a basis for exclusion. Third, the prosecutor's explanation that she struck the juror in part because of her youth and lack of ties to the community was belied by the fact the juror replied affirmatively when asked if she believed the crime with which defendant was charged should be illegal and disclaimed any other reason she could not be impartial. The Ninth Circuit believed the "eye rolling" claim was not credible in light of the aforementioned factors. (**Id**. at p. 349-341.)

Held

1. The ***Collins*** court overruled the Ninth Circuit, noting that the trial court "had the benefit of observing the prosecutor firsthand over the course of the proceedings," and took the Ninth Circuit to task for attempting "to use a set of debatable inferences to set aside the conclusion reached by the state court[.]" (**Id**. at p. 342.) In support of its finding that the Ninth Circuit should not have granted the defendant's writ of habeas corpus, the ***Collins*** court addressed each of the Ninth Circuit's reasons for finding the prosecutor's explanation for removing the juror was a pretext.

2. First, in response to the Ninth Circuit's claim the prosecutor could not be believed because she characterized one juror who was a grandmother as young, the ***Collins*** court stated that "it is quite plausible that the prosecutor simply misspoke with respect to a juror's numerical designation, an error defense counsel may also have committed. It is a tenuous inference to say that an accidental reference with respect to one juror, Juror 19, undermines the prosecutor's credibility with respect to Juror 16. Seizing on what can plausibly be viewed as an innocent transposition makes little headway toward the conclusion that the prosecutor's explanation was clearly not credible." (**Id**. at p. 340.)
3. Second, in response to the Ninth Circuit's claim the trial court should have questioned the prosecutor's credibility because of her "attempt to use gender as a race-neutral basis for excluding Jurors 016 and 019," the ***Collins*** court said the Ninth Circuit "assigned the gender justification more weight than it can bear. The prosecutor provided a number of other permissible and plausible race-neutral reasons, and [defendant] provides no argument why this portion of the colloquy demonstrates that a reasonable factfinder must conclude the prosecutor lied about the eye rolling and struck Juror 16 based on her race." (**Id**. at p. 340.)

4. Third, as to the Ninth Circuit's skepticism (in light of the juror's oral response she thought the crime should be illegal and she could be impartial) regarding the prosecutor's stated concern regarding Juror 16's youth and lack of ties to the community, the ***Collins*** court stated: notwithstanding these oral averments of the juror, it was "not unreasonable to believe the prosecutor remained worried that a young person with few ties to the community might be less willing than an older, more permanent resident to impose a lengthy sentence for possessing a small amount of a controlled substance. [Citation omitted by P&A]. Even if the prosecutor was overly cautious in this regard, her wariness of the young and the rootless could be seen as race neutral, for she used a peremptory strike on a white male juror, Juror 6, with the same characteristics." (**Id**. at p. 341.)

C. *People* v. *Lenix* (2008) 44 Cal.4th 602

Facts:

In ***Lenix***, the defense claimed that the prosecution improperly exercised a peremptory challenge against a black female panelist (i.e., a member of the venire). During the course of questioning, the panelist stated that "murder aspect" of the case concerned her. When the prosecutor followed up by asking if there was something beyond what might trouble anybody about murder charges, the panelist said, "The fact someone lost a life." (**Id**. at p. 609.) The prosecutor asked if anyone close to the panelist had been involved in something like that. The panelist answered that her sister's husband, to whom she was close, had been murdered 10 or 11 years ago. When asked if the murder was gang related, the panelist said it was. The prosecutor asked which gang committed the offense and the

panelist replied no one had ever been arrested. In response to further questions from the prosecutor, the panelist said she did not have any trouble with law enforcement for failing to make an arrest and would not hold the experience against the defendant. The panelist said there was nothing else the parties needed to know about the murder or any "similar situations." (**Id**. at p. 609.)

Later, the prosecutor asked the entire venire: "Has anybody here had any contacts with law enforcement that were hostile, confrontational, adverse, however you want to describe it, that might carry over into what we're going to do here in this courtroom? Anybody at all? Traffic ticket you didn't feel you deserved?" The black female panelist was the sole juror to reply; she stated that she had gotten a traffic ticket. When asked whether the officer was impolite "or anything like that," the panelist answered, "No. Well, no one ever feels they deserve a ticket. That was all." The prosecutor asked, "You feel that maybe he was a little shading the truth a little bit in it?" The panelist answered, "Yeah." The prosecutor then asked, "Did you feel you deserved it?" The panelist replied, "I didn't know if I deserved it or not, so I just went along with it." (**Id**. at p. 609.)

Initially, the prosecutor accepted (i.e., passed on) the jury panel that included the black female panelist as well as a black male panelist. After the defense challenged the black male panelist, the prosecutor against accepted the panel. Following another defense peremptory challenge, the prosecutor challenged a Hispanic panelist. The defense then made a ***Batson-Wheeler*** motion, which the trial judge reserved until the completion of voir dire. Only after the defense exercised another peremptory challenge, did the prosecutor challenge the black female panelist. Ultimately, the panel was composed of six Caucasians, four Hispanics, and two Filipinos. (**Id**. at p. 610.)

When the ***Batson- Wheeler*** motion was eventually heard, the defense pointed out that prosecutor had excluded three Hispanics and one Black, and claimed the prosecutor "was excluding minorities from the jury, particularly Hispanics." As to the three Hispanics, the prosecutor provided reasons that were not subsequently challenged on appeal. (**Id**. at p. 60.)

Regarding the black female panelist, the prosecutor stated he was concerned about her statement regarding the traffic ticket, noting she was the only juror who raised her hand when the prosecutor asked about uncomfortable run-ins with the police and while the panelist (somewhat inconsistently) indicated the encounter wasn't adversarial, that she didn't know whether the officer was lying, and didn't fight the ticket, the prosecutor believed there was "probably a lot more to it than that[.]" The prosecutor also expressed concerned that the juror's brother (sic) was involved in a gang-related homicide because, in the prosecutor's experience, people who are victims of gangs quite often are themselves gang members and that could have negative repercussions on the prosecutor's case - a case involving a gang-related murder. (**Id**. at pp. 610-611.)

The trial judge held the prosecutor did not exercise his challenges for improper motives. The court of appeal agreed. Relying on ***People*** **v.** ***Johnson*** (2003) 30 Cal.4th 1302, the court of appeal declined a defense request to conduct a comparative juror analysis in evaluating the credibility of the prosecutor's expressed reasons for excusing minority prospective jurors on the ground that such analysis for the first time on appeal was not compelled. (**Id**. at p. 611.)

<u>Holding</u>

1. A reviewing court should "presume that a prosecutor uses peremptory challenges in a constitutional manner and give great deference to the trial court's ability to distinguish bona fide reasons from sham excuses." (**Id**. at p. 613.) The trial court's determination regarding the sufficiency of a prosecutor's justifications for exercising peremptory challenges is reviewed "with great restraint." (**Ibid**.) "So long as the trial court makes a sincere and reasoned effort to evaluate the nondiscriminatory justifications offered, its conclusions are entitled to deference on appeal." (**Id**. at p. 614, [and noting the United States Supreme Court has also held that it will defer to a trial court's finding of no discriminatory intent "in the absence of exceptional circumstances"].)

2. "If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at ***Batson***'s third step." (**Id**. at p. 621.)

3. In reviewing the plausibility of a prosecutor's reasons for striking a juror, an appellate court can consider various kinds of evidence, including a comparison of panelists' responses. (**Id**. at p. 622.)

4. Failing to engage in comparative juror analysis for the first time on appeal unduly restricts review based on the entire record." (**Id**. at p. 622.)

5. "Thus, evidence of comparative juror analysis must be considered in the trial court and even for the first time on appeal if relied upon by defendant and the record is adequate to permit the urged comparisons." (**Id**. at p. 622.)

6. The court did not address whether appellate comparative juror analysis is required "when the objector has failed to make a prima facie showing of discrimination" but noted that the High Court precedents definitely do **not** mandate the use of comparative juror analysis in a first-stage *Wheeler-Batson* case, where neither the trial court nor the reviewing court has been presented with the prosecutor's reasons or have hypothesized any possible reasons. (**Id**. at p. 622, fn. 15 citing to ***People* v. *Bell*** (2007) 40 Cal.4th 582, 600-601 [which noted that where no reasons are provided at the first stage, comparative analysis would make little sense since there is nothing to compare]; ***People* v. *Howard*** (2008) 42 Cal.4th 1000, 1020; and ***People* v. *Bonilla*** (2007) 41 Cal.4th 313, 350.) **Editor's note: See also *People* v. *Carasi*** (2008) 44 Cal.4th 1263, 1295 [declining to engage in the use of comparative analysis when reviewing a trial court's finding no prima facie case was made].

7. Nevertheless, comparative juror analysis has **inherent limitations** on a cold record for a number of reasons:

(i) There is "more to human communication than mere linguistic content." (**Id**. at p. 622.)

The manner of a juror is often "more indicative of the real character of his opinion that his words." (**Id**. at p. 622.) A reviewing court cannot pick up on the "myriad of subtle nuances" that may shape an answer, including the inflection of the juror's voice, or the juror's "attitude, attention, interest, body language, facial expression and eye contact." (at p. 622.)

Even when two jurors give ostensibly similar answers, the way in which the answer is given may reveal that one juror is giving a genuine response and the other is not. The differences in the manner in how a juror answers a question "may legitimately impact the prosecutor's decision to strike or retain the prospective juror." (**Id**. at p. 623.)

(ii) How a particular answer or constellation of answers is weighed by a prosecutor may be difficult to calculate.

"While an advocate may be concerned about a particular answer, another answer may provide a reason to have greater confidence in the overall thinking and experience of the panelist. Advocates do not evaluate panelists based on a single answer." (**Id**. at p. 631.) When a comparative juror analysis is undertaken for the first time on appeal, "the prosecutor is never given the opportunity to explain the differences he perceived in jurors who seemingly gave similar answers." (**Id**. at p. 623.)

(iii) The fluidity and myriad of factors that go into selecting a jury make it difficult to obtain a truly accurate comparison in general and this becomes even more difficult on appeal.

Whether a juror is acceptable or not acceptable will change over the course of jury selection because a lawyer is not only seeking a particular kind of juror but a particular mix of jurors. "It may be acceptable, for example, to have one juror with a particular point of view but unacceptable to have more than one with that view. If the panel as seated appears to contain a sufficient number of jurors who appear strong-willed and favorable to a lawyer's position, the lawyer might be satisfied with a jury that includes one or more passive or timid appearing jurors. However, if one or more of the supposed favorable or strong jurors is excused either for cause or [by] peremptory challenge and the replacement jurors appear to be passive or timid types, it would not be unusual or unreasonable for the lawyer to peremptorily challenge one of these apparently less favorable jurors even though other similar types remain. These same considerations apply when considering the age, education, training, employment, prior jury service, and experience of the prospective jurors." (**Id**. at p. 623.)

An "advocate is entitled to consider a panelist's willingness to consider competing views, openness to different opinions and experiences, and acceptance of responsibility for making weighty decisions." (**Id**. at p. 623.)

Two jurors may give similar answers on a given point but whether they are, in fact, comparable in the eyes of the attorneys will depend on "other answers, behavior, attitudes or experiences" make each more or less desirable. (**Id**. at p. 624.)

"These realities, and the complexity of human nature, make a formulaic comparison of isolated responses an exceptionally poor medium to overturn a trial court's factual finding." (**Id**. at p. 624.)

(iv) Unlike a reviewing court, "the trial judge's unique perspective of voir dire enables the judge to have first-hand knowledge and observation of critical events. [Citation.] The trial judge personally witnesses the totality of circumstances that comprises the 'factual inquiry,' including the jurors' demeanor and tone of voice as they answer questions and counsel's demeanor and tone of voice in posing the questions. [Citation.] The trial judge is able to observe

a juror's attention span, alertness, and interest in the proceedings and thus will have a sense of whether the prosecutor's challenge can be readily explained by a legitimate reason...." (**Id**. at pp. 626-627.)

8. The court cautioned that there is a downside to advocates waiting until appeal to argue comparative juror analysis in light of the general rule that deference is given to the trial's court finding of no discriminatory intent. (**Id**. at p 624.)

9. On appeal, a reviewing court need not consider responses by stricken panelists or seated jurors other than those identified by the defendant in the claim of disparate treatment. (**Id**. at p. 624.)

10. The trial court's finding of no discriminatory intent is reviewed "on the record as it stands at the time the *Wheeler/ Batson* ruling is made. If the defendant believes that subsequent events should be considered by the trial court, a renewed objection is required to permit appellate consideration of these subsequent developments." (**Id**. at p. 624)

11. The fact a trial or reviewing court can think up reasons for why the prosecutor may have wanted to challenge a juror, "will not satisfy the prosecutors' burden of stating a racially neutral explanation." (**Id**. at p. 625.)

12. "Trial courts must give advocates the opportunity to inquire of panelists and make their record. If the trial court truncates the time available or otherwise overly limits voir dire, unfair conclusions might be drawn based on the advocate's perceived failure to follow up or ask sufficient questions. Undue limitations on jury selection also can deprive advocates of the information they need to make informed decisions rather than rely on less demonstrable intuition." (**Id**. at p. 625.)

    The court recognized that, under Code of Civil Procedure section 223, a criminal trial court may limit counsel's questioning of prospective jurors and "may specify the maximum amount of time that counsel for each party may question an individual juror, or may specify an aggregate amount of time for each party, which can then be allocated among the prospective jurors by counsel." (at p. 625, fn. 16.) Moreover, the court recognized that "the exercise of discretion by trial judges in conducting voir dire is accorded considerable deference by appellate courts." (**Id**. at p. 625, fn. 16.) However, the ***Lenix*** court stated: "in exercising that discretion, trial courts should seek to balance the need for effective trial management with the duty to create an adequate record and allow legitimate inquiry." (**Id**. at p. 625, fn. 16.)

13. The trial court has a duty to "assess the plausibility" of the prosecutor's proffered reasons for striking a potential juror, "in light of all evidence with a bearing on it." (**Id**. at p. 625.) Trial courts "must evaluate the demeanor of the prosecutor in determining the credibility of proffered explanations, and the demeanor of the panelist when that factor is a basis for the challenge." (**Id**. at p. 625.)

14. It should be discernible from the record that "1) the trial court considered the prosecutor's reasons for the peremptory challenges at issue and found them to be race-neutral; 2) those reasons were consistent with the court's observations of what occurred, in terms of the panelist's statements as well as any pertinent nonverbal behavior; and 3) the court made a credibility finding that the prosecutor was truthful in giving race-neutral reasons for the peremptory challenges. (**Id**. at pp. 625-626.)

15. "As to the second point, the court may not have observed every gesture, expression or interaction relied upon by the prosecutor. The judge has a different vantage point, and may have, for example, been looking at another panelist or making a note when the described behavior occurred. But the court must be satisfied that the specifics offered by the prosecutor are consistent with the answers it heard and the overall behavior of the panelist. The record must reflect the trial court's determination on this point (see *Snyder*, supra, 128 S.Ct. at p. 1209), which may be encompassed within the court's general conclusion that it considered the reasons proffered by the prosecution and found them credible." (**Id**. at pp. 625-626.)

16. The court observed that comparative juror analysis is a form of circumstantial evidence (**id**. at p. 622) and that a reviewing court must be careful not to accept one reasonable interpretation to the exclusion of other reasonable ones when reviewing the circumstantial evidence supporting the trial court's factual findings in a ***Wheeler/Batson*** holding. "If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also be reasonably reconciled with a contrary finding does not warrant a reversal of the judgment." (**Id**. at pp. 625-626.) at p. 627-628.)

17. "[S]ubstantial evidence supports the trial court's finding that the prosecutor's proffered reasons were not pretextual." (**Id**. at p. 630 [and noting that using comparative juror analysis does not undermine this conclusion].)

18. The court **rejected** the notion that the removed panelist was similarly situated to another male juror who had a fairly hostile interaction with the police when they responded to a call from the juror's mother after the juror had taken away

some keys from his mother to prevent her from driving while intoxicated. The juror stated the police threatened to mace his brother unless the keys were returned. The juror thought about sending a letter to the editor but chose not to because he "figured they're trying ... to handle that situation without getting hurt." (**Id**. at p. 630.) The court observed that the prosecutor's hesitation regarding the removed panelist was based on his sense of her possible lingering resentment, whereas the juror who was kept stated he realized that the police were acting out of concern for their safety and so he did not complain about their conduct. (**Ibid**.)

19. The court also **rejected** the defense argument that the removed panelist was similar to another juror who was kept. That other juror had a cousin who shot and killed someone when he was 16 years old. The cousin was convicted and sent to jail but was eventually released and was "doing great." The juror stated that his cousin was treated fairly by the police and courts, and "it was a bad situation, but it turned out to be a good situation for him." (**Id**. at p. 630.) That juror was a high school acquaintance of one of the police officers identified as a potential witness in defendant's case and the juror described the officer as "a really good guy." (**Ibid**.)

Although the defendant argued the prosecutor's concern about the gang affiliation of the brother of the removed panelist was pretextual because the prosecutor did not display similar concerns that the other juror's cousin might be a gang member (e.g., because he never asked about the gang status of the other juror's cousin), the court held, in light of the juror's comments about his cousin's past experience and present circumstances, the prosecutor could have found such question unnecessary. (**Id**. at pp. 630-631.) Moreover, the court stated the fact the juror held a high opinion of a prosecution witness " would likely have been significant in the prosecutor's decision to retain the juror and further distinguishes this juror from" the removed panelist. (**Id**. at p. 631.)

20. Finally, the court noted a lack of any additional evidence in the record that the prosecution's challenges were improperly based on race. For example, there was "no indication that the prosecutor or his office relied on racial factors" nor was there any "evidence of procedural manipulation, deceptive questioning, or any of the other signs of constitutional violation like those present in ***Miller-El II."*** (***Lenix***, at p. 631.)

D. ***People*** v. ***Cruz*** (2008) 44 Cal.4th 636

Facts:

In ***People*** **v.** ***Cruz*** (2008) 44 Cal.4th 636, the defendant claimed the prosecutor improperly exercised a peremptory challenge against a Hispanic juror on the sole basis of group bias. (**Id**. at p. 654.) Among the many reasons given by the prosecutor for excusing the juror: he was only 20 years old, and perhaps "one of the youngest, or the youngest" prospective jurors under consideration, and "may not be in the mainstream and that experienced in life"; he had "long hair," "Fu Manchu type" facial hair; he had come to court in a long, unbuttoned flannel shirt, and thereafter arrived at the peremptory challenge hearing in a plain white T-shirt; he appeared to be one of the "most poorly dressed" individuals in the courtroom; his stated goal in life (to open up a small "comic book store") arguably showed a lack of life experiences; he repeatedly stated a belief that the evidence would have to be "strong" for him to impose death; he stated that "at times the death penalty was used too much," and "indicated some hesitation" about imposing the death penalty for a "cop killer"; he failed to answer questions Nos. 95 and 96 on the written jury questionnaire pertaining to his feelings about criminal defense attorneys, prosecutors, and police; in responding to question No. 99, which asked, "Do you feel that a police officer's testimony is more truthful/accurate that of a civilian?," he wrote, "police officers are human, and they can lie too"; he gave the impression he "had some sympathy toward those individuals who became intoxicated"; and the prosecutor felt he did not establish a very good "rapport" with the young prospective juror. The prosecutor also pointed out that the juror was one of very individuals who felt the "justice system was getting good or better" and attributed this "out of the mainstream" view to the fact the juror did not have a tremendous amount of experience and contact in society and with this criminal justice system." (**Id** at pp. 657-658, 659.)

Holding:

1. After reiterating some of the principles of comparative analysis, the court engaged in a comparative analysis and found no discriminatory intent. (**Id**. at pp. 658-659.)

2. After observing that 8 or 9 other jurors had given similar responses to the challenged juror when it came to the justice system (and thus the juror's view in this regard was not outside the mainstream), the court found the prosecutor's view of the juror's response was not made in isolation but was made "while mindful of the prospective juror's very young age in relation to all the other prospective jurors on the panel." (**Id**. at p. 660.)

The court stated the critical determination was not whether the prosecutor was entirely accurate that the juror's view was "outside the mainstream," but whether his given reasons were credible and sincere as opposed to a sham intended to mask his true intent to discriminate[.]" (**Id**. at p. 660.)

3. The court held that a juror (as the juror in the instant case) who fails to answer some of the question is differently situated than jurors who answer "no opinion" or "Don't know." (**Id**. at p. 660.)

4. The court held that an affirmative response such as the juror in the instant case gave (i.e., "police officers are human they can lie to (sic)") to the question of whether police officer testimony is more truthful/accurate than that of a civilian" is a qualitatively different response than simply responding "no" or "not necessarily." (**Id**. at pp. 660-661.)

5. In sum, the court approved a more nuanced approach to comparing answers that takes into account the whole picture and recognizes that subtle differences may be significant. (**Id**. at p. 661.)

IV. The Use of Disproportionality Analysis

Another mechanism that courts sometimes use to determine whether there has been a prima facie showing of discriminatory use of peremptory challenges is to look to see whether the prosecutor has a used a "disproportionate number of peremptories" against jurors in the cognizable class. Thus, for example, if the prosecutor has used a high percentage of his challenges against members of the cognizable class, this can be viewed as evidence of a discriminatory purpose. (**See *People* v. *Hall*** (1989) 208 Cal.App.3d 34, 45 [citing cases using a disproportionality analysis to assess whether prima face case was made].)

"A more complete analysis of disproportionality compares the proportion of a party's peremptory challenges used against a group to the group's proportion in the pool of jurors subject to peremptory challenge." (***People* v. *Bell*** (2007) 40 Cal.4th 582, 598, fn. 3.)

However, where there is a small sample size, disparities carry "relatively little information." Thus, for example, in ***Bell***, the fact that the prosecutor had used two of his 16 peremptory challenges (12.5%) against members of the cognizable class in issue when only three of the 47 prospective jurors (6.4%) belonged to that class was of little use in establishing an inference of discrimination, notwithstanding the former figure was almost twice the latter figure. (***People* v. *Bell*** (2007) 40 Cal.4th 582, 598, fn. 3; **see also *Wade* v. *Terhune*** (9th Cir. 2000) 202 F.3d 1190, 1198 [significance "limited" where corresponding ratios were "four of sixty-four (or 6%)" (proportion of group in pool) and "one of three (or 33%)" (proportion of challenges exercised against group)].)

V. Other Procedural Issues

A. Timeliness of Motion

A ***Batson-Wheeler*** motion "is timely if made before jury impanelment is completed because 'the impanelment of the jury is not deemed complete until the alternates are selected and sworn.'" (***People* v. *McDermott*** (2002) 28 Cal.4th 946, 970; ***People* v. *Adanandus*** (2007) 157 Cal.App.4th 496, 500.)

VI. Appellate Review Rules

A. Deference to, But Not Abdication of, Responsibility to Review, Trial Court's Finding

As long as the court makes "a sincere and reasoned effort to evaluate the nondiscriminatory justifications offered, its conclusions are entitled to deference on appeal." (***People* v. *Zambrano*** (2007) 41 Cal.4th 1082, 1104; ***People* v. *Lewis* and *Oliver*** (2006) 39 Cal.4th 970, 1009.)

"But deference is not abdication." (***People* v. *Gonzales*** (2008 165 Cal.App.4th 620, 628.) "When the prosecutor's stated reasons are both inherently plausible and supported by the record, the trial court need not question the prosecutor or make detailed findings. But when the prosecutor's stated reasons are either unsupported by the record, inherently implausible, or both, more is required of the trial court than a global finding that the reasons appear sufficient." (***People* v. *Stevens*** (2007) 41 Cal.4th 182, 193; ***People* v. *Silva*** (2001) 25 Cal.4th 345, 386.)

B. Review Where No Prima Facie Finding

If a trial court denies a ***Batson-Wheeler*** motion without finding a prima facie case of group bias, the reviewing court considers the entire record of voir dire. (***People*** **v.** ***Adanandus*** (2007) 157 Cal.App.4th 496, 501.) This probably means that questioning of panelists who do not make it on the jury may be considered to determine if there was "disparate questioning."

However, the finding is still entitled to "considerable deference on appeal" and if the record "suggests grounds upon which the prosecutor might reasonably have challenged" the panelists in question, the conviction will be affirmed. (***People*** **v.** ***Crittenden*** (1994) 9 Cal.4th 83, 116-117; ***People*** **v.** ***Adanandus*** (2007) 157 Cal.App.4th 496, 501.) The only time deference will not be given is where the trial court may have applied the incorrect unnecessarily high standard of "more likely than not" instead of the mere "reasonable inference of discrimination" standard in assessing whether a prima facie case has been made out. (**See** ***Johnson*** **v.** ***California*** (2005) 545 U.S. 162.) In that situation, the record is reviewed independently to "apply the high court's standard and resolve the legal question whether the record supports an inference that the prosecutor excused a juror" on a prohibited discriminatory basis. (***People*** **v.** ***Adanandus*** (2007) 157 Cal.App.4th 496, 502 [and cases cited therein].

VII. *Batson-Wheeler* Remand Hearings

Sometimes an appellate court will find that the trial judge erred in determining that no prima facie case had been established. In such circumstances, appellate courts will often remand the case to the trial court with orders to conduct a ***Batson-Wheeler*** hearing as if the prima facie case had been made, i.e., the trial court is ordered to go through steps two and three. This allows the prosecutor to provide neutral reasons for excusing the jurors who the defense claimed were removed for discriminatory reasons and allows the trial court to decide whether those neutral reasons are credible. (**See e.g.**, ***People*** **v.** ***Kelly*** (2008) 162 Cal.App.4th 797; ***Paulino*** **v.** ***Harrison*** (9th Cir. 2008) 542 F.3d 692; ***Yee*** **v.** ***Duncan*** (9th Cir. 2006) 441 F.3d 851.)

A. Some General Principles

In ***People*** **v.** ***Kelly*** (2008) 162 Cal.App.4th 797, the court laid out several principles as to how those hearings may be conducted: (i) it is not necessary that the defendant have his original voir dire attorney at the remand hearing; (ii) the prosecutor does not have to be under oath when stating the reasons he or she challenged the juror; (iii) the prosecutor does not have turn over his or her original voir dire notes; and (iv) the defense does not get to cross-examine the prosecutor regarding his or her stated reasons. (**Id**. at pp. 802-805.)

B. Inability to Recall Reason for Exclusion Not Dispositive

In ***Yee*** **v.** ***Duncan*** (9th Cir. 2006) 441 F.3d 851, the defendant was a male dental assistant who had been convicted of sexual battery and lewd acts upon female juvenile patients under anesthesia. The prosecutor excused eight men from the jury, albeit leaving four men on the jury. When the time came for the prosecutor to explain the challenges, she offered gender-neutral reasons for seven of the eight men. However, the prosecutor "could not recall" the reason she excluded the eighth male juror. (**Id.** at pp. 895-896.) The trial judge nonetheless found held there had been "no systematic exclusion of the male gender" and said that it believed the prosecutor's representations to the court and found them unobjectionable. (**Id**. at p. 896.)

The Ninth Circuit upheld the conviction, noting that while failure to provide a reason for bumping a juror at the second step "becomes evidence that is added to the inference of discrimination raised by the prima facie showing," it is not an automatic violation of equal protection. (**Id**. at pp. 899, 900.) To the contrary, the ***Yee*** court held a trial court must still proceed to step three before it can determine that purposeful discrimination has occurred. At that point, the trial court "considers all the evidence to determine whether the ***actual*** reason for the strike violated the defendant's equal protection rights." (**Ibid**, emphasis added by P&A.) The court pointed out that if the rule were otherwise, the "prosecution would then bear the ultimate burden even though only an inference of discrimination had been made" and this would be contrary to the purpose of ***Batson***; namely, getting at "the real reason" why the jurors were stricken. (***Yee***, at p. 899.) "[I]nferences are simply not enough." (**Ibid**.)

Applying the proper standard, the Ninth Circuit found the California appellate court that affirmed the conviction did not act unreasonably since (i) the voir dire testimony suggested a gender-neutral reason why the prosecutor might have wanted to challenge the juror - the juror had served as a juror on a medical malpractice case and such service could well have brought the juror too close to the malpractice issues presented in the defendant's case which arose from acts committed in defendant's dental office; (ii) "the prosecutor twice accepted the jury; and (iii) the prosecutor had non-discriminatory, objectively verifiable reasons for excluding all of the other removed venire members. (**Id.** at p. 901.)

C. Speculation as to Reasons for Bumping a Juror May Be Insufficient

The holding in ***Yee*** should be contrasted to the very recent case of ***Paulino* v. *Harrison*** (9th Cir. 2008) 542 F.3d 692. In ***Paulino***, the prosecutor used challenges against five of six African-Americans; one African-American remained on the jury. After the prosecutor challenged the fifth African-American venire-member, defense counsel made a ***Wheeler*** objection. The parties conferred with the judge who, after speculating as to why the prosecutor removed the juror, declined to find any prima facie case had been made. The judge pontificated that while "the statistical improbability of five out of six is such [as] to give rise to an inference that these peremptory challenges were in part based upon race[,]" the judge could "see why[the prosecutor] would be uncomfortable with each one of them[.]" (**Id**. at p. 695.)

Defendant challenged this ruling in state courts to no avail and then filed a habeas petition in federal court. After the federal district court also denied the claim, the Ninth Circuit ordered the district court to conduct an evidentiary hearing to give the state an "opportunity to present evidence as to the prosecutor's race-neutral reasons for the apparently-biased pattern of peremptories[.]" (**Id**. at pp. 695-696.)

***Editor's note**: When the case was first remanded to the district court, it did not require the prosecutor to state any reasons but simply relied on its own speculation as to the reasons for bumping the jurors. (**Id**. at p. 696.)

At the hearing, the prosecutor testified that she had absolutely no memory of jury selection, nor of her actual reasons for striking any of the venire-members in question; she could not find the notes she had taken during jury selection and reading the voir dire transcript did not refresh her recollection. Moreover, there was nothing in the state court record that reflected her contemporaneous thoughts on why she struck the African-American jurors because the trial court never required her to explain the reasons for the five strikes. Thus, "instead of explaining her actual non-discriminatory reasons for exercising her peremptory challenges, the prosecutor offered hypothetical race-neutral reasons for striking each potential African-American juror in question." (**Id**. at p. 696 [and noting the prosecutor acknowledged that the reasons she articulated were mere speculation drawn from her reading of the voir dire transcript].) The district court found that the prosecution failed to meet its "burden of production" at the second step. (**Id**. at p. 699.)

When the case got back to the Ninth Circuit, the State argued that the prosecutor's testimony, taken as a whole, constituted persuasive circumstantial evidence of her actual non-discriminatory reasons for striking the five African-American venire-members. (**Id**. at p. 699.) However, the Ninth Circuit disagreed. The Ninth Circuit recognized that "[e]vidence of a prosecutor's actual reasons may be direct or circumstantial," (**id**. at p. 700) but held that pure speculation does not qualify "as circumstantial evidence of the prosecutor's actual reasons, simply because it was the prosecutor herself who offered the speculation during the course of an evidentiary hearing." (**Id**. at pp. 701 [and rejecting the idea that it should put any stock in testimony from the prosecutor regarding her "general principles" of jury selection since prosecutor was not sure which principles she considered in selecting jury].)
The ***Paulino*** court agreed with ***Yee*** that even where the prosecutor does not produce neutral reasons for challenging a juror at the second step, the trial court must proceed to the third step. (***Paulino*** at p. 702.) However, the court held that, at step three, "the prima facie showing plus the evidence of discrimination drawn from the state's failure to produce a reason-- will establish purposeful discrimination by a preponderance of the evidence in ***most*** cases." (**Id**. at p. 703, emphasis added by P&A.)

Ultimately, the ***Paulino*** court concluded that the defense had met its burden of showing impermissible use of peremptory strikes based on (i) the "stark" statistical disparities, i.e., the removal of 83% of the potential African-American jurors; (ii) the pattern in which the prosecutor exercised her peremptory challenges, i.e., the prosecutor never accepted the jury with a black juror other than one seated juror # 2 and " after using two of her first three peremptory challenges against the other two blacks in the jury box at the time, the prosecutor immediately excused each of the three subsequent black jurors called into the jury box;" and (iii) the lack of any evidence of race-neutral reasons to explain the prosecutor's pattern of strikes or the resulting statistical disparities. (**Id**. at p. 703.)

NEXT WEEK: NEW CASES ON

WHETHER A SUSPECT WHO IS ARRESTED AND TAKEN TO JAIL WITH A WEAPON ON HIS PERSON CAN BE CHARGED WITH "VOLUNTARILY" BRINGING THAT WEAPON INTO JAIL?

WHETHER A USE OF A FIREARM CLAUSE CAN BE FOUND WHERE THE FIREARM IS NEVER RECOVERED AND THE WITNESSES CAN'T SAY WHETHER THE FIREARM WAS A TOY?

WHETHER THE PROSECUTION CAN *ALWAYS* ADD AN OFFENSE PROVEN AT THE PX?

WHETHER PARTIES CAN AGREE TO TREAT A COMPLAINT AS AN INFORMATION?

AND WHETHER IT IS ERROR TO PERMIT THE PROSECUTION TO ARGUE A THEORY OF GUILT AT TRIAL BASED ON EVIDENCE NO PRESENTED AT THE PX?

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.

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 Speaker	Elim. of Bias	Ethics
Oct. 20 2003	Our Annual "Wheeler" Update: The Latest Cases on Jury Selection Inimitably Discussed By California's Leading Expert in the Field (Part I of III)	Jerry Coleman (SF ADA)	10	20

Batson (Federal) and Wheeler (State) Standards for Determining Whether Prima Facie Case of Discriminatory Use of Jury Challenges are Consistent & Use of Comparative Analysis for First Time on Appeal is Unreliable and Should Not Be Done

People v. Johnson (2003) 30 Cal.4th 1302

Facts: A prosecutor used three of his twelve peremptory challenges to exclude all the African-American jurors on the jury panel. After the second challenge to an African-American juror, defense counsel argued the prosecutor had no apparent reason to challenge the second juror other than her racial identity. The judge stated there was no "strong likelihood" that the challenge was done for a group rather than individual basis. After the third challenge to an African-American juror, the trial court again denied the defense claim that there had been a prima facie case made out. The trial court noted that the juror had a sister with drug charges and that the jury questionnaire indicated the juror would have difficulty understanding things. The trial court also noted that the second African-American juror challenged had neglected to mention in her questionnaire that her parent had a robbery or arrest, that the juror stated she didn't know if she could be fair, and that the juror's answers indicated she might decide the case on emotions rather than facts. (At pp. 1307-1308.)

1. Using peremptory challenges to remove prospective jurors solely because of group bias, for example, on racial grounds, violates both the California Constitution (People v. Wheeler (1978) 22 Cal.3d 258) and the United States Constitution (Batson v. Kentucky (1986) 476 U.S. 79). (At pp. 1305-1306.)

2. Both Wheeler and Batson require the person objecting to the other party's use of a peremptory challenge to first establish a "prima facie case" of discriminatory use of a peremptory challenge before the challenged party must provide non-discriminatory reasons for the challenge(s). (At p. 1306.)

Establishing the Prima Facie Case Under *Wheeler* and *Batson*.

3. In Wheeler, the court specifically laid out how this prima facie case must be established: "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. First,...he 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*** that such persons are being challenged because of their group association rather than because of any specific bias." (At p. 1309, emphasis added.)

4. In Batson, the court specifically laid out how this prima facie case must be established: "To establish such a case, the defendant first must show that he is a member of a cognizable racial group..., and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact,...that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.'...Finally, the defendant must show that these facts and any other relevant circumstances ***raise an inference*** that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race."***** (At pp. 1311-1312, emphasis added.)

*****Subsequent cases have made clear that defendant need not be a member of the group excluded. (See Powers v. Ohio (1991) 499 U.S. 400 at p. 1311, fn. 1.)

5. In Wheeler, the court also identified **the types of evidence the objector may present to make the prima face case** (emphasis added to highlight the gist of the principle):

- "[T]he party may show that his opponent has ***struck most or all of the members*** of the identified group from the venire, or has ***used a disproportionate number of his peremptories*** against the group." (At p. 1309.)

- "He may also demonstrate that the ***jurors in question share only this one characteristic***—their membership in the group—and that in all other respects they are as heterogeneous as the community as a whole." (At p. 1309.)

- "Next, the showing may be supplemented when appropriate by such circumstances as the ***failure of his opponent to engage these same jurors in more than desultory voir dire***, or indeed to ask them any questions at all." (At p. 1309.)

- "Lastly,...the defendant need not be a ***member of the excluded group*** in order to complain of a violation of the representative cross-section rule; yet, if he is, and especially if in addition his ***alleged victim is a member of the group to which the majority of the remaining jurors belong***, these facts may also be called to the court's attention."

6. In Batson, the court also identified some of **the types of evidence the objector may present to make the prima face case**:

- If there is a "pattern of strikes against [an identified group of] jurors included in the particular venire, [this] might give rise to an inference of discrimination." (At p. 1312.)

- "Similarly, the prosecutor's questions and statements during voir dire examination and in exercising his challenges may support or refute an inference of discriminatory purpose." (At p. 1312.)

7. **Deference given to trial judge under both *Wheeler* and *Batson* in determining discriminatory purpose**:

- In Wheeler, the California Supreme Court noted trial judges are deemed "to be a good position to make such determinations...on the basis of their knowledge of local conditions and of local prosecutors.'...They are also well situated to bring to bear on this question their powers of observation, their understanding of trial techniques, and their broad judicial experience. We are confident of their ability to distinguish a true case of group discrimination by peremptory challenges from a spurious claim interposed simply for purposes of harassment or delay. (At p. 1310.)

- In Batson, the United States Supreme Court noted that "trial judges, experienced in supervising voir dire, will be able to decide if the circumstances concerning the prosecutor's use of peremptory challenges creates a prima facie case of discrimination against black jurors." (At p. 1312.)

8. "Wheeler's standard for establishing a prima facie case of discriminatory use of peremptory challenges is, and always has been, compatible with Batson. It merely means that to state a prima facie case, the objector must show that **it is more likely than not** the other party's peremptory challenges, if unexplained, were based on impermissible group bias" (At p. 1318.)

   The ***standard for making out a prima facie case is the same*** under both cases despite the fact that in Batson, the High Court discussed the prima facie showing as being one in which the objecting party has shown "an inference of discriminatory purpose," while the Wheeler, the court discussed the prima facie showing as there being a "strong likelihood" or "reasonable inference" of discriminatory use of the challenges. (At p. 1306.)

9. The California Supreme Court observed that despite its repeated statements that its standard for determining whether a prima facie case has been made is the same standard as the federal standard, the Ninth Circuit has been kind of dense about recognizing that this is so. (At pp. 1313-1314, 1317.)

   Instead, the Ninth Circuit essentially insists that if the state court (trial or appellate) uses the term "strong likelihood" to describe the standard for determining whether a prima facie case has been established, then the state court has applied an impermissibly lower standard of scrutiny than required by the federal Constitution. (At p. 1313.)

   Editor's Note re: Consideration of Previous Findings of Improper Use of Peremptory Challenges:

   The fact a trial judge is expected to take into consideration the judge's knowledge of local prosecutors does not mean that prior findings that the prosecutor has used peremptory challenges in a discriminatory manner will be held against the prosecutor. In Williams v. Woodford (9th Cir. 2002) 306 F.3d 665 (discussed in next week's 10/27/03 P&A memo), the court ***rejected*** defendant's argument that an inference of discrimination in making a prima facie case could arise where there were "(1) two, unrelated California Supreme Court decisions that found the prosecutor of Williams's case to have used peremptory challenges in a racially discriminatory manner in those cases, and (2) the prosecutor's closing argument at trial, in which Williams argues that the prosecutor made a racist analogy, a claim that the district court rejected and Williams does not appeal." (At p. 682.) The Williams court held "these circumstances irrelevant because they are not "the circumstances concerning the prosecutor's use of peremptory challenges" at Williams's trial." (At p. 682.) Moreover, the Williams court stated: "Even if we assumed some relevance, the cited circumstances are not sufficient to raise an inference that the prosecutor exercised peremptory challenges in a racially discriminatory manner in Williams's case. (At p. 682.)

What Happens Once the Prima Facie Case is Made Out

10. Under Wheeler, "[i]f the court finds that a prima facie case has been made, the burden shifts to the other party to show if he can that the peremptory challenges in question were not predicated on group bias alone. The showing need not rise to the level of a challenge for cause. But to sustain his burden of justification, the allegedly offending party must satisfy the court that he exercised such peremptories on grounds that were reasonably relevant to the particular case on trial or its parties or witnesses—i.e., for reasons of specific bias as defined herein." (At p. 1310.)

The allegedly offending party may "support his showing by reference to the totality of the circumstances: for example, it will be relevant if he can demonstrate that in the course of this same voir dire he also challenged similarly situated members of the majority group on identical or comparable grounds." (At p. 1310.)

"If the court finds that the burden of justification is not sustained as to any of the questioned peremptory challenges, the presumption of their validity is rebutted." (At p. 1310.)

11. Similarly, under Batson, "[o]nce the defendant makes a prima facie showing, the burden shifts to the State to come forward with a neutral explanation for challenging black jurors.*****...The prosecutor...must articulate a neutral explanation related to the particular case to be tried. The trial court then will have the duty to determine if the defendant has established purposeful discrimination." (At p. 1312.)

*****Editor's Note: The language quoted reflects the group that was challenged was black jurors; Batson, of course, applies to challenges made against all racial or ethnic groups.

Use of Comparative Analysis

Editor's Note: Essentially, comparative juror analysis is a method of attempting to "go behind" a party's asserted non-discriminatory reasons for booting a juror belonging to a particular class by looking at whether jurors belonging to other classes were booted for similar reasons.

12. Appellate courts should not engage in "comparative juror analysis" for the ***first time*** on appeal since it "is unreliable and inconsistent with the deference reviewing courts necessarily give to trial courts." (At p. 1318.) Neither Miller-El (see next week's 10/27/03 P&A memo) nor Batson require otherwise. (At pp. 1306, 1318, 1322, 1325.)

"If the trial court makes a '***sincere and reasoned effort***' to evaluate the nondiscriminatory justifications offered, its conclusions are entitled to deference on appeal. In such circumstances, an appellate court will not reassess good faith by conducting its own comparative juror analysis. Such an approach would undermine the trial court's credibility determinations and would discount '"the variety of [subjective] factors and considerations,"' including 'prospective jurors' body language or manner of answering questions,' which legitimately inform a trial lawyer's decision to exercise peremptory challenges." (At p. 1320 [and noting this principle applies both when the appellate court is evaluating whether a prima facie case has been made and when it is evaluating whether the reasons provided by party for booting the juror are valid]. (Emphasis added.)

The court **stopped short of prohibiting the practice** of doing comparative analysis on appeal **outright** but noted "we are hard pressed to envision a scenario where comparative juror analysis for the first time on appeal would be fruitful or appropriate." (At p. 1325.)

13. A trial court is not obligated, sua sponte, to do its own comparative analysis of jurors in assessing whether a party has been exercising his or her challenges in a discriminatory manner. (At p. 1319.) A trial judge need not consider arguments not made and evidence not presented. (At p. 1322.)

14. Moreover, even at the trial level, "comparative juror analysis is 'largely beside the point' because of the legitimate subjective concerns that go into selecting a jury." (At p. 1319.) By itself, it proves little. (At p. 1319.) "[U]se of a comparison analysis to evaluate the bona fides of the prosecutor's stated reasons for peremptory challenges does not properly take into account the variety of factors and considerations that go into a lawyer's decision to select certain

jurors while challenging others that appear to be similar. Trial lawyers recognize that it is a combination of factors rather than any single one which often leads to the exercise of a peremptory challenge. In addition, the particular combination or mix of jurors which a lawyer seeks may, and often does, change as certain jurors are removed or seated in the jury box." (At p. 1319.)

15. This does not mean, however, that a ***trial*** judge is prevented from engaging in comparative analysis in making its determination of whether a party is using peremptory challenges in a discriminatory manner. (At p. 1322.) Similarly, the party objecting to juror being booted may rely on such analysis in making a prima facie case. (At p. 1318.) Comparative juror analysis is not irrelevant. Properly presented to the trial court, it can be among the relevant circumstances the trial court must consider in making its determination. (At p. 1323.)

16. Moreover, a trial court should consider obvious matters even when not brought to the court's attention by either party. For example, a trial court can take note that the defendant is of the same class as the challenged jurors even though not mentioned by the challenging party. (At p. 1323.)

17. Note: The **Ninth Circuit permits the use of comparative analysis for the first time on appeal**. (At p. 1320.) (See also United States v. Alanis (9th Cir. 2003) 335 F.3d 965 [this P&A memo, below at p. 6].) Although, even the Ninth Circuit gives some deference to the trial judge when it comes to whether a prima facie case was made out. As noted in Tolbert v. Page (9th Cir. 1999) 182 F.3d 677, 683-684: "The trial judge is able to observe a juror's attention span, alertness, and interest in the proceedings and thus will have a sense of whether the prosecutor's challenge can be readily explained by a legitimate reason.... In addition, the trial court is 'experienced in supervising voir dire.' [Citations.] The appellate court, on the other hand, must judge the existence of a prima facie case from a cold record. An appellate court can read a transcript of the voir dire, but it is not privy to the unspoken atmosphere of the trial court—the nuance, demeanor, body language, expression and gestures of the various players. [Citation.]...[T]he prima facie inquiry is so fact-intensive and so dependent on first-hand observations made in open court that the trial court is better positioned to decide the issue...." (At pp. 1320-1321.)

No Prima Facie Case Made Out in the Instant Case

18. The court noted the trial judge did not discuss the reasons for booting the first African-American juror. However, the court went on to point out that defense counsel had never put forth arguments as to why no reasons existed for challenging the juror. Moreover, the following race-neutral reasons provided grounds for challenging the first African-American juror: "(1) she was **childless** (this case involved the death and alleged abuse of a minor), (2) the **police had made no arrest after the robbery of her home** five or six years ago, and (3) she **omitted to answer the two questions** in the questionnaire dealing with her opinions of prosecuting and defending attorneys." (At p. 1327.)

The court observed that "lack of family may have appeared relevant to the prosecutor in a case involving child abuse and reasonably could be deemed to constitute a non-discriminatory basis for striking the venireman." (At p. 1327.)

19. The court upheld the trial court's determination that the reasons given for booting the second juror (she **neglected to mention in her questionnaire that her parent had a robbery or arrest**; she **didn't know if she could be fair**, her answers indicated she **might decide the case on emotions** rather than facts) were legitimate. (At pp. 1307-1308, 1325.)

20. The court upheld the trial court's determination that the reasons given for booting the third juror (that the **juror had a sister with drug charges** and that the jury questionnaire indicated **the juror would have difficulty understanding**

things) were legitimate. (At pp. 1307-1308, 1325.)

21. The fact all three African-American jurors were challenged in a case in which an African-American defendant was charged with killing his white girlfriend's child was highly relevant to whether a prima facie case had been made out, but it was not dispositive in making out a prima facie case. (At p. 1326.)

22. The fact that the district attorney did not ask any questions of the African-American jurors could, in theory, be a relevant circumstance in deciding whether a prima facie case of discriminatory purpose has been shown. (At p. 1328.) However, since the trial was conducted at a time when the trial court had primary responsibility for jury voir dire and the prosecutor did not ask questions of any juror, it was not a significant factor in the case at bar. (At p. 1328.)

Not Enough for Judge to Simply Note Attorney Has Provided Plausible Reasons for Striking Men—There Must Be a Determination of Whether There Was Purposeful Discrimination

United States v. Alanis (9th Cir. 2003) 335 F.3d 965

Facts: The defendant was tried for abusive sexual conduct. The prosecutor used all six of her challenges against men. The trial judge found a prima facie case. The prosecutor "then offered a gender-neutral explanation for striking each man. One man was struck because he was from Glasgow, Montana, and so might disbelieve the government's Native American witnesses. Another was struck because he was old and might have trouble hearing or staying alert. Two were struck because they were young and because they had no children. And two more were struck because they had no children." The trial court then stated: "It appears to the court that the government has offered a plausible explanation based upon each of the challenges discussed that is grounded other than in the fact of gender of the person struck. The Batson challenge is denied." Trial proceeded. (At pp. 966-967.)

1. "A defendant's original objection to a prosecutor's allegedly discriminatory peremptory strikes, even after it is met with a prosecutor's gender-neutral explanation, imposes on the trial court an obligation to complete all steps of the Batson process without further request, encouragement, or objection from counsel." (At p. 968.)

2. "[U]nder Batson, it is not sufficient for equal protection purposes that a trial court deem a prosecutor's gender-neutral explanations facially plausible. Rather, in determining whether the challenger has met his or her burden of showing intentional discrimination, the district court must conduct a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." (At p. 969, fn. 3.)

3. The court recognized that "[o]rdinarily, it is for the trial court, rather than for the appeals court, to perform the third step of the Batson process in the first instance." Nevertheless, it went on to hold that "even on the cold record," the prosecutor's stated reasons for striking prospective male jurors was a pretext for purposeful discrimination. (At p. 969, fn. 5.)

4. Despite the fact that no comparative juror analysis had taken place at the trial level, the court found that had the trial judge properly proceed to step three, he would have concluded that the prosecutor's gender-neutral explanations were pretexts for purposeful discrimination: "The record shows that the prosecutor did not strike four female jurors who possessed the same objective characteristics the prosecutor claimed she found objectionable in the men she struck from the jury. Peremptory challenges cannot be lawfully exercised against potential jurors of one gender unless potential jurors of another gender with comparable characteristics are also challenged." (At p. 969.)

Editor's Note: The court seems to have warped evidence of purposeful discrimination into purposeful discrimination itself.

5. The court did observe that the Ninth Circuit has held "that there may be no Batson violation, even though prospective jurors of different races or genders provided similar responses and one was excused while the other was not, so long as the prosecutor struck jurors based on subjective grounds that were not "objectively verifiable." (At p. 969, fn. 4.)

NEXT WEEK: JERRY COLEMAN RETURNS FOR THE SECOND PART OF OUR WHEELER/BATSON UPDATE. WE FOCUS ON THE LATEST PRONOUNCEMENT FROM THE UNITED STATES SUPREME COURT AND PROVIDE YOU WITH MORE ELUSIVE ETHICS AND ELIMINATION OF BIAS MCLE CREDITS.

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POINTS AND AUTHORITIES

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Week Of	Topic	Guest Speaker	Elim. of Bias	Ethics
Oct. 27 2003	Our Annual "Wheeler" Update: The Latest Cases on Jury Selection Inimitably Discussed By California's Leading Expert in the Field (Part II of III)	Jerry Coleman (SF ADA)	10	20

Factors Which Courts Can Consider in Evaluating Claims of Discriminatory Jury Selection.

Miller-El v. Cockrell (2003) 123 S.Ct. 1029 [537 U.S. 322]

Facts: In 1986, Dallas prosecutors used peremptory strikes to exclude 10 of 11 African-American jurors eligible to serve on the jury. Evidentiary hearings were held bearing on the questions of whether the prosecutor's office engaged in a pattern of discriminatory use of jury challenges and whether the individual prosecutor had engaged in discriminatory use of jury challenges. The facts elicited at those hearings will be discussed below as relevant. (At pp. 1035-1036.)

Procedural Stance: After his conviction, defendant filed several unsuccessful appeals and petitions for a writ of habeas corpus based on the claim that prosecutors used their challenges in violation of the Equal Protection Clause. The state courts denied relief, the federal district court denied relief on defendant's federal habeas corpus petition, and the federal appellate court denied a certificate of appealability which, under federal law, prevented the defendant from appealing the matter. Ultimately, the case ended up in the U.S. Supreme Court on the question of what the defendant needed to show in order to obtain a certificate of appealability. (At pp. 1035-1036, 1039.)

1. It was not contested that the defendant had made a prima facie showing that peremptory challenges had been exercised on the basis of race. Nor was it contested that the prosecutor had offered race-neutral explanations for striking the jurors. What was at issue was whether the defendant had shown purposeful discrimination. (At p. 1040.)

2. The Supreme Court discussed several principles for assessing whether there has been a showing of purposeful discrimination at the final stage (where the court evaluates the prosecutor's justifications).

3. "The critical question in determining whether a prisoner has proved purposeful discrimination at step three is the persuasiveness of the prosecutor's justification for his peremptory strike." (At p. 1040.)

4. In the third stage, "the issue comes down to whether the trial court finds the prosecutor's race-neutral explanations to be credible." (At p. 1040.)

5. "Credibility can be measured by, among other factors, the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy." (At p. 1040.)

6. "[I]mplausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination." (At p. 1040.)

7. In deciding whether the superficially neutral explanations provided were, in fact, race-based, the court can consider "the facts and circumstances that were adduced in support of the prima facie case." (At p. 1041.)

8. **Statistical Evidence**: The Court noted that the statistical evidence alone raised "some debate" as to whether the prosecution acted with a race-based reason when striking prospective jurors. The court pointed out that prosecutors used their peremptory strikes to exclude 91% of the eligible African-American venire members, and only one served on the jury. In total, 10 of the prosecutors' 14 peremptory strikes were used against African-Americans. (At p. 1042.)

   Editor's Note: In People v. Johnson (2003) 30 Cal.4th 1302, the Court noted that the statistical evidence in Miller-El was **not** cited "to show that it alone necessarily established a prima facie case." (Id., at p. 1328.) In the recent Ninth Circuit case of Williams v. Woodford (9th Cir. 2002) 306 F.3d 665, 681-682, the court noted that "[s]tatistical facts like a high proportion of African-Americans struck and a disproportionate rate of strikes against African-Americans can establish a pattern of exclusion on the basis of race that gives rise to a prima facie Batson violation. The Williams court then cited two federal decisions illustrating this principle: Fernandez v. Roe (9th Cir. 2002) 286 F.3d 1073, 1078 [prima facie case when the prosecutor struck four out of seven (57%) Hispanics, and 21% (four out of nineteen) of the prospective juror challenges were made against Hispanics who constituted only about 12% of the venire]; and Turner v. Marshall (9th Cir. 1995) 63 F.3d 807, 813 [five of nine (56%) African-Americans struck, and 56% (five out of nine) of the challenges were made against African-Americans who constituted only about 30% of the venire].

9. **Comparative Analysis**: The Court noted that some of the rationales provided by prosecutors for striking African-American jurors pertained equally to white jurors who were not challenged. For example, some of the proffered reasons for kicking some of the African-American jurors were because of their ambivalence about the death penalty, hesitancy to vote to execute defendants capable of being rehabilitated, or the juror's family history of criminality. Yet, several white jurors with such characteristics (albeit not all of the characteristics) were not bumped. (At p. 1043 [**but see** dissenting opinion of Justice Thomas, at p. 1053, noting that similarly situated does not refer to jurors who match in some characteristics but in **all** relevant characteristics])

10. **Disparate Questioning**: The Court noted that different types of questions were asked of African-American jurors than of the white jurors. The different type of questioning could be viewed as an attempt by the prosecution to elicit responses from African-American jurors which were bound to reflect greater opposition to the death penalty than from white jurors who were not asked similarly skewed questions, thus providing

justification for removal of the African-American jurors. That is, disparate questioning can be a tool for obscuring the real reason for booting jurors and is some evidence of purposeful discrimination. (At p. 1043.)

The State sought to explain the different types of questioning by asserting that the additional questions asked were not the result of the juror's race but the result of how the jurors answered the questionnaires. Those jurors expressing doubts about the death penalty were questioned more extensively. The Court did not challenge the notion that disparate questioning could be the result of factors that were not race-related, but found factual support for such an interpretation lacking: 20 jurors expressed some hesitation about the death penalty (10 whites and 10 African-Americans) but 7/10 African-American juror were questioned in "disparate" fashion and only 2/10 white jurors were questioned in "disparate" fashion. (At p. 1043.)

11. **Jury Shuffling**: In Texas there is a procedure called "jury shuffling," which permits parties to rearrange the order in which members of the jury panel are examined so as to increase the likelihood that visually preferable panel members will be moved forward and empaneled. (Kind of like an open-card poker game in which players can request the dealer take back the cards dealt - but only the cards dealt - and then re-shuffle, and re-deal.) Shuffling can affect jury composition because jurors not questioned during voir dire are dismissed at the end of the week and a new panel is called; jurors shuffled to the back are less likely to serve. The Court found that the prosecution's decision to seek a jury shuffle when a predominate number of African-Americans were seated in the front of the panel and its decision to delay a formal objection to the defense's shuffle until after the new racial composition was revealed raised a suspicion of discrimination. (At p. 1044.)

12. **Historical Evidence of Discriminatory Use of Challenges**: The Court also accorded some weight to historical evidence of racial discrimination by the District Attorney's Office. Although most, if not all, of the more concrete evidence of any office policy to exclude African-Americans pre-dated the jury selection in the instant case, the Court found it relevant to the extent it cast doubt on the motives of the prosecutors in the instant case. The court noted that even presuming the prosecutors were not part of a past culture of discrimination, they were not likely ignorant of the culture since they joined the office when prosecutors were still being trained to exclude minorities from juries. (At pp. 1044-1045.)

The Court also noted that the supposition that race was a factor in jury selection was reinforced by the fact the prosecutors marked the race of each prospective juror on their juror cards. (At p. 1045.)

13. Ultimately, the Court found it was a debatable issue whether there had been purposeful discrimination and remanded the case for further determination. (At p. 1045.)

Note: It must be kept in mind that the Supreme Court was not making a finding the prosecutor used his challenges in a racially discriminatory manner; that issue was reserved for the court hearing the habeas petition. Rather, the High Court simply held that there was enough evidence presented to allow the habeas petition to go forward (i.e., that there was a "substantial showing of the denial of a constitutional right"). That is,

"reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" (At pp. 1041-1042.)

Loss of Juror Questionnaires Doesn't Necessarily Require Reversal When *Wheeler/Batson* Claim Made in Death Case.

People v. Heard (2003) 31 Cal.4th 946 [969-971 only]

Facts: In a capital case, the defendant claimed the prosecutor was using his peremptory challenges in a discriminatory manner. In responding to the trial court's finding of a prima facie case, the prosecutor referred in part to answers contained in juror questionnaires as the basis for booting jurors. On appeal, it became clear all juror questionnaires were lost except those for the jurors who were actually empaneled. It was not possible to reconstruct the information on the questionnaires. (At p. 969.)

1. The court noted that, in view of California Rule of Court 39.51, in capital cases, all juror questionnaires must be scrupulously maintained. (At p. 969.)

2. The loss of jury questionnaires does not require automatic reversal. The defendant must show the loss is prejudicial to the defendant's ability to prosecute his appeal. (At p. 970.)

3. The court rejected all three grounds asserted by the defendant in support of his claim that the loss of the questionnaires prejudiced his ability to obtain meaningful appellate review of the trial court's rulings relating to the Wheeler/Batson claim (even though he proffered no substantive objection to the trial court's rejection of the Wheeler/Batson claim):

   - Defendant's first ground was that it was impossible to know the race of the excluded jurors because that information was in the missing questionnaires. However, from the transcript of the arguments on the Wheeler/Batson motion the race of the excluded jurors was made clear. (At p. 970.)

   - Defendant's second ground - that he could not challenge the justifications proffered by the prosecutor deriving from the questionnaires - was also lacking in merit because there was no indication that the prosecutor's recounting of the information in the questionnaires was wrong. The court noted that defense counsel had an obligation at trial to being to the trial court's attention any disagreement with the prosecutor's representations as to the questionnaires content. (At pp. 970-971.)

   - Defendant's third ground was that without the missing questionnaires, he could not do a comparative analysis of the excused jurors versus the seated jurors. However, the court reiterated its holding in Johnson that absent any attempt to engage in comparative juror analysis at the trial level, it should not be done on appeal. (At p. 971.)

No Prima Facie Case Made Out By Defense Counsel Where Counsel Simply Made Cursory Reference to Jurors By Name, Number, Occupation, and Race.

People v. Yeoman (2003) 31 Cal.4th 93, 115-118 [only]

Facts: After 12 jurors were selected but not yet sworn, defense counsel made a motion claiming the prosecution had peremptorily challenged four African-American jurors on account of race. Defendant's entire presentation consisted of naming the four jurors in question, noting their numbers, occupation, and race and citing to Wheeler. The court found no prima facie case had been made out as to three of the four jurors and accepted the prosecutor's reasons for bumping the fourth juror as not being based on group bias. (At p. 115.)

1. Defendant's motion should more properly have been brought as a motion to dismiss the venire than as a motion for mistrial, but it was still considered by the court on review. (At p. 115.)

2. Counsel seeking to make out a prima facie case of unconstitutional use of peremptory challenges must make "as complete a record as feasible of the relevant circumstances, establishing that the excluded persons belong to a cognizable group, and showing that the other party has more likely than not exercised its peremptory challenges because of group association rather than any specific bias." (At p. 115.)

3. A cursory reference to prospective jurors by name, number, occupation and race without making "any effort to set out the other relevant circumstances, such as the prospective jurors' individual characteristics, the nature of the prosecutor's voir dire, or the prospective jurors' answers to questions" will be deemed insufficient. (At p. 115.)

4. Thus, the defendant in the instant case failed to make out a prima facie case. (At p. 115.)

5. On appeal, when a trial court denies a motion under Wheeler, after finding no prima facie case of group bias, the entire record of voir dire is considered for evidence to support the trial court's ruling. If the record suggests grounds upon which the prosecutor might reasonably have challenged the prospective jurors in question, the judgment is affirmed. (At p. 116.)

6. Here, the jurors gave answers to questions that might reasonably have caused the prosecutor to challenge each of the three jurors against whom no prima facie case was made, namely:

   - The first juror indicated she "would not like to sit as a juror," "cannot judge another," and felt "frustrated" that the Supreme Court is far to the right." (At p. 116.)

   - The second juror indicated she had not favored the initiative reinstating the death penalty and that the causes of and solution to "crime problems," were respectively "haves and have nots" and the "possibility of socialism." (At p. 116.)

   - The third juror left blank several questions intended to explore her attitudes toward crime and capital punishment. (At p. 116.)

7. The court rejected defendant's attempt to show the booted jurors' response were comparable to the responses of jurors who were not bumped but, per Johnson (see last week's P&A memo), the court declined to do any comparative juror analysis on appeal for the first time. (At p. 116.)

8. As to the juror against whom a prima facie case was made out, the court upheld the trial court's determination the juror was not bumped for a discriminatory purpose: Although the juror worked as a correctional officer, the **other jurors kept had stronger death penalty views** - the juror had not answered questions intended to explore his view on the death penalty and said he had not given the subject much thought. (At p. 117.)

9. The court reiterated that the inquiry required by the trial court into possibly discriminatory use of peremptory challenges is identical under Batson and Wheeler. (At pp. 117-118.)

People v. Morris (2003) 107 Cal.App.4th 402 [also discussed in next week's P&A memo]

1. Where defendant made a Wheeler motion but only noted that three of the six jurors excused by the prosecution were Black or Hispanic and did not identify which the six jurors were Black or Hispanic, the defendant did not comply with the requirement that the moving party make a complete as record as is feasible. (At pp. 407-409.)

2. The court **rejected** defendant's argument that the record is sufficient to demonstrate error - even though it did not identify which of the prosecutor's six challenges were at issue in the defendant's Wheeler motion nor the race of any of the jurors - because there could be no race-neutral rationale for any of the prosecutor's peremptory challenges except for one. (At p. 408.)

3. The argument was rejected because there were race-neutral grounds: "The brother of one of the challenged jurors was a public defender, and the prosecutor might reasonably believe that he would be biased in favor of defendant or against the prosecution. The nephew of another challenged juror was incarcerated, and the prosecutor might reasonably be concerned that this would make her sympathetic towards defendant. A third challenged juror stated that her close friend was "murdered" by a prison guard, which suggests that she might be biased against peace officers (all of the prosecution witnesses were peace officers)." (At p. 409.)

4. "Because there were race-neutral grounds for challenging some of the jurors, defendant can demonstrate error only if he shows that those jurors were not the Black or Hispanic jurors who were the subject of his Wheeler motion. But defendant did not do that." (At p. 409.)

Williams v. Woodford (9th Cir. 2002) 306 F.3d 665, 681-682 [only] **[not discussed on video]**

1. No prima facie case was made out where prosecutor used 2 of 19 challenges to remove the only African-American females and 1 of 3 challenges to remove an African-American male during the selection of alternates but defendant "failed to allege, and the record does not disclose, facts like how many African-Americans (apparently men, if any) sat on the jury, how many African-Americans were in the venire, and how large the venire was," making it impossible to say whether any statistical disparity existed that might support an inference of discrimination. (At pp. 681-682.)

Coleman Recommendation: Take a look at People v. Walker (1998) 64

Cal.App.4th 1062, which lays out what is a good prima facie case versus what is a bad prima facie case.

Coleman Recommendation: Even if a court denies a prima facie case, the prosecution should provide reasons for the challenges. This is because doing so will assist the appellate court in finding reasons to uphold the denial of the prima facie case.

Wheeler/Batson Timely If Made Before Jury Impaneled.

People v. McDermott (2002) 28 Cal.4th 946 [969-981 only]

1. A Wheeler/Batson motion is timely if made before jury empanelment is completed (i.e., before the alternates are sworn and before any remaining unselected prospective jurors are dismissed). (At p. 969.)

2. Such a motion is timely not only as to the prospective jurors challenged during the selection of the alternate jurors, but also to those dismissed during selection of the twelve jurors already sworn. (At p. 969.)

3. It is not required that the prosecutor give separate reasons for challenging each of the jurors who the prosecutor allegedly booted for discriminatory reasons nor is it required that the court make separate findings as to each challenged juror.

   However, it is generally preferable to have individual reasons and individual findings for each challenged juror. (At p. 980.)

4. When the prosecutor claims he challenged certain jurors because he believed the pool of jurors coming up were more in favor of the death penalty, it is not required that the trial court undertake a comparison between the jurors not as yet selected and those bumped. (At pp. 980-981.)

If Some Reasons for Bumping Jurors are Legitimate But Others Are Not, Wheeler/Batson Violation Still May Be Found.

Lewis v. Lewis (9th Cir. 2003) 321 F.3d 824

Facts: The prosecutor struck one of two African-American jurors in the jury pool during the selection of alternate jurors. One African-American juror was impaneled. When asked about law enforcement connections, the juror was who struck said he had a niece who was a "nurse officer" and a nephew who was a jailer. The juror indicated that she did not talk with her niece or nephew about law enforcement and implied if she did not do so because it would not be an interesting conversation. (At p. 827.)

The trial judge found a prima facie case and the prosecutor was asked to provide reasons. The reasons provided were as follows: (1) there was no systematic exclusion because another African-American juror was left on the panel; (2) the juror's responses when asked about her niece and nephew indicated she had a disinterest in law enforcement issues; (3) the juror would potentially have information about jail and this association with jail might cause issues because the prosecutor was having protective orders on various witnesses; (4) the juror was watched closely because she was an African-American who the prosecutor thought might be associated with the defendants and during this observation, it appeared she did not relate well

and interact with other potential juror; (5) the prosecutor had concerns about how the juror described her occupation - it wasn't clear what she did; (6) the defense counsel - in a Freudian slip betraying his apparent affinity with the juror - referred to the defendant by the juror's last name. (At pp. 827-828.)

After listening to the prosecutor, the trial judge stated: "The arguments - some of the arguments are not convincing. But the argument with respect to the jail, that's probably a reasonable kind of - even though you don't know which one of the two, both of them would obviously work in the jail, either the nurse or the nephew who's a correctional officer. We don't know which one. But both of them - they would be working any place but the jail." (sic) (At p. 828.)

When defense counsel tried to interject and describe weaknesses in the record with respect to the reason the court had cited, the court ended the inquiry and denied the Wheeler/Batson motion. (At p. 828.)

The state appellate court upheld the conviction, noting that the prosecutor's concern that the juror would not be able to relate to the other jurors was by itself a legitimate reason to bump the juror. (At p. 828.)

1. The Ninth Circuit reversed, finding the trial judge had failed to perform its duty to determine whether purposeful discrimination had occurred and gave five reasons in support of its finding:

- First, contrary to the prosecutor's statement, only a possibility existed that one of the juror's relatives worked in the jail. The prosecutor never asked whether the juror's relatives worked in the jail. Moreover, the juror said she did not discuss her relatives' work with them, making the possibility that she would receive information about the witnesses held in the jail even more remote. Thus, the only reason actually verified as non-racial was based on a false assumption. (At p. 832.)

- Second, two jurors with even closer potential connections to the jail were not struck. Thus, a comparative analysis of the challenged juror with the empaneled jurors reveals that a finding of pretext was warranted. (At pp. 832-833.)

- Third, the trial court **rejected** at least two or three of the prosecutor's proffered reasons. Since the judge determined that several reasons offered by the prosecutor did not hold up under scrutiny and cited only one that was "probably reasonable," this undermined the prosecutor's credibility such that the trial court's finding one reason was legitimate was unwarranted. (At p. 833.)

- Fourth, while the fact a juror has a "loner" personality has been upheld as legitimate grounds for challenging a juror, an appellate court should not rely on this fact in the instant case. The trial court did not specify which reasons it rejected. Since it may have rejected this reason as being legitimate, an appellate court cannot assume that it accepted this reason as legitimate. Moreover, the prosecutor's self-proclaimed method of gathering the information about the juror was not race-neutral (i.e., he focused on her because she was an African-American). Finally, the reason given depends entirely on the prosecutor's credibility; the judge did not

confirm this observation and the judge's statements undermine the prosecutor's credibility. (At pp. 833-834.)

2. The court also noted that requiring a court to allow defense counsel to argue whether the prosecutor's reasons are legitimate is not clearly established law, "it seems wise for courts to allow counsel to argue, if only to remove some of the burden of record evaluation from the court." (At p. 831, fn. 27.)

NEXT WEEK: SAN FRANCISCO ADA JERRY COLEMAN RETURNS FOR A FINAL GO-ROUND ON SOME RECENT AND IMPORTANT CASES IN THE WHEELER/BATSON AREA.

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