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 p. 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 & 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*** 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 p. 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 p. 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 p. 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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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 was 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 p. 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 bring 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 judgement 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 impanelment 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 ***Batson/ Wheeler*** 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 undermines 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.

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
Nov. 3 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~~) PART 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 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. <u>**What is a legitimate reason?**</u> 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. <u>**Reliance on Intangibles**</u>: "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: *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 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 compiy 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.)

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	Ethics
August 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 redecides 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 nonblack juror" who was allowed to serve. If the reasons given 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." (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 nonblack 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 nonblack jurors similarly situated to juror Fields, "the differences seem far from significant," particularly when read in light of Fields's 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 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 nonblacks 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 was 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.

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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 judgements (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 & Defendants Cannot Complain About *Batson/Wheeler* 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, 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 *Wheeler/Batson* 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 p. 1242-1243.)

Later in the day, the prosecutor asked the trial judge to reconsider both ***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 p. 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 co-defendant 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 p. 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 ***Muhammed*** 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	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 PART I

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 who 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 co-defendant where counsel for one of the co-defendants 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.

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