Later, the prosecutor asked the entire venire: "Has anybody here had any contacts with law enforcement that were hostile, confrontational, adverse, however you want to describe it, that might carry over into what we're going to do here in this courtroom? Anybody at all? Traffic ticket you didn't feel you deserved?" The black female panelist was the sole juror to reply; she stated that she had gotten a traffic ticket. When asked whether the officer was impolite "or anything like that," the panelist answered, "No. Well, no one ever feels they deserve a ticket. That was all." The prosecutor asked, "You feel that maybe he was a little shading the truth a little bit in it?" The panelist answered, "Yeah." The prosecutor then asked, "Did you feel you deserved it?" The panelist replied, "I didn't know if I deserved it or not, so I just went along with it." (**Id.** at p. 609.)

Initially, the prosecutor accepted (i.e., passed on) the jury panel that included the black female panelist as well as a black male panelist. After the defense challenged the black male panelist, the prosecutor against accepted the panel. Following another defense peremptory challenge, the prosecutor challenged a Hispanic panelist. The defense then made a ***Batson-Wheeler*** motion, which the trial judge reserved until the completion of voir dire. Only after the defense exercised another peremptory challenge, did the prosecutor challenge the black female panelist. Ultimately, the panel was composed of six Caucasians, four Hispanics, and two Filipinos. (**Id.** at p. 610.)

When the ***Batson-Wheeler*** motion was eventually heard, the defense pointed out that prosecutor had excluded three Hispanics and one Black, and claimed the prosecutor "was excluding minorities from the jury, particularly Hispanics." As to the three Hispanics, the prosecutor provided reasons that were not subsequently challenged on appeal. (**Id.** at p. 60.)

Regarding the black female panelist, the prosecutor stated he was concerned about her statement regarding the traffic ticket, noting she was the only juror who raised her hand when the prosecutor asked about uncomfortable run-ins with the police and while the panelist (somewhat inconsistently) indicated the encounter wasn't adversarial, that she didn't know whether the officer was lying, and didn't fight the ticket, the prosecutor believed there was "probably a lot more to it than that[.]" The prosecutor also expressed concerned that the juror's brother (sic) was involved in a gang-related homicide because, in the prosecutor's experience, people who are victims of gangs quite often are themselves gang members and that could have negative repercussions on the prosecutor's case - a case involving a gang-related murder. (**Id.** at pp. 610-611.)

The trial judge held the prosecutor did not exercise his challenges for improper motives. The court of appeal agreed. Relying on ***People* v. *Johnson*** (2003) 30 Cal.4th 1302, the court of appeal declined a defense request to conduct a comparative juror analysis in evaluating the credibility of the prosecutor's expressed reasons for excusing minority prospective jurors on the ground that such analysis for the first time on appeal was not compelled. (**Id.** at p. 611.)

Holding

1. A reviewing court should "presume that a prosecutor uses peremptory challenges in a constitutional manner and give great deference to the trial court's ability to distinguish bona fide reasons from sham excuses." (**Id.** at p. 613.) The trial court's determination regarding the sufficiency of a prosecutor's justifications for exercising peremptory challenges is reviewed "with great restraint." (**Ibid.**) "So long as the trial court makes a sincere and reasoned effort to evaluate the nondiscriminatory justifications offered, its conclusions are entitled to deference on appeal." (**Id.** at p. 614, [and noting the United States Supreme Court has also held that it will defer to a trial court's finding of no discriminatory intent "in the absence of exceptional circumstances"].)

2. "If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson*'s third step." (**Id.** at p. 621.)

3. In reviewing the plausibility of a prosecutor's reasons for striking a juror, an appellate court can consider various kinds of evidence, including a comparison of panelists' responses. (**Id.** at p. 622.)

4. Failing to engage in comparative juror analysis for the first time on appeal unduly restricts review based on the entire record." (**Id.** at p. 622.)

5. "Thus, evidence of comparative juror analysis must be considered in the trial court and even for the first time on appeal if relied upon by defendant and the record is adequate to permit the urged comparisons." (**Id.** at p. 622.)

6. The court did not address whether appellate comparative juror analysis is required "when the objector has failed to make a prima facie showing of discrimination" but noted that the High Court precedents definitely do **not** mandate the use of comparative juror analysis in a first-stage *Wheeler-Batson* case, where neither the trial court nor the reviewing court has been presented with the prosecutor's reasons or have hypothesized any possible reasons. (**Id.** at p. 622, fn. 15 citing to ***People* v. *Bell*** (2007) 40 Cal.4th 582, 600-601 [which noted that where no reasons are provided at the first stage, comparative analysis would make little sense since there is nothing to compare]; ***People* v. *Howard*** (2008) 42 Cal.4th 1000, 1020; and ***People* v. *Bonilla*** (2007) 41 Cal.4th 313, 350.) **Editor's note**: **See also *People* v. *Carasi*** (2008) 44 Cal.4th 1263, 1295 [declining to engage in the use of comparative analysis when reviewing a trial court's finding no prima facie case was made].

7. Nevertheless, comparative juror analysis has **inherent limitations** on a cold record for a number of reasons:

(i) There is "more to human communication than mere linguistic content." (**Id.** at p. 622.)

The manner of a juror is often "more indicative of the real character of his opinion that his

words." (**Id.** at p. 622.) A reviewing court cannot pick up on the "myriad of subtle nuances" that may shape an answer, including the inflection of the juror's voice, or the juror's "attitude, attention, interest, body language, facial expression and eye contact." (at p. 622.)

Even when two jurors give ostensibly similar answers, the way in which the answer is given may reveal that one juror is giving a genuine response and the other is not. The differences in the manner in how a juror answers a question "may legitimately impact the prosecutor's decision to strike or retain the prospective juror." (**Id.** at p. 623.)

(ii) How a particular answer or constellation of answers is weighed by a prosecutor may be difficult to calculate.

"While an advocate may be concerned about a particular answer, another answer may provide a reason to have greater confidence in the overall thinking and experience of the panelist. Advocates do not evaluate panelists based on a single answer." (**Id.** at p. 631.) When a comparative juror analysis is undertaken for the first time on appeal, "the prosecutor is never given the opportunity to explain the differences he perceived in jurors who seemingly gave similar answers." (**Id.** at p. 623.)

(iii) The fluidity and myriad of factors that go into selecting a jury make it difficult to obtain a truly accurate comparison in general and this becomes even more difficult on appeal.

Whether a juror is acceptable or not acceptable will change over the course of jury selection because a lawyer is not only seeking a particular kind of juror but a particular mix of jurors. "It may be acceptable, for example, to have one juror with a particular point of view but unacceptable to have more than one with that view. If the panel as seated appears to contain a sufficient number of jurors who appear strong-willed and favorable to a lawyer's position, the lawyer might be satisfied with a jury that includes one or more passive or timid appearing jurors. However, if one or more of the supposed favorable or strong jurors is excused either for cause or [by] peremptory challenge and the replacement jurors appear to be passive or timid types, it would not be unusual or unreasonable for the lawyer to peremptorily challenge one of these apparently less favorable jurors even though other similar types remain. These same considerations apply when considering the age, education, training, employment, prior jury service, and experience of the prospective jurors." (**Id.** at p. 623.)

An "advocate is entitled to consider a panelist's willingness to consider competing views, openness to different opinions and experiences, and acceptance of responsibility for making weighty decisions." (**Id.** at p. 623.)

Two jurors may give similar answers on a given point but whether they are, in fact, comparable in the eyes of the attorneys will depend on "other answers, behavior, attitudes or experiences" make each more or less desirable. (**Id.** at p. 624.)

"These realities, and the complexity of human nature, make a formulaic comparison of isolated responses an exceptionally poor medium to overturn a trial court's factual finding." (**Id.** at p. 624.)

(iv) Unlike a reviewing court, "the trial judge's unique perspective of voir dire enables the judge to have first-hand knowledge and observation of critical events. [Citation.] The trial judge personally witnesses the totality of circumstances that comprises the 'factual inquiry,' including the jurors' demeanor and tone of voice as they answer questions and counsel's demeanor and tone of voice in posing the questions. [Citation.] The trial judge is able to observe a juror's attention span, alertness, and interest in the proceedings and thus will have a sense of whether the prosecutor's challenge can be readily explained by a legitimate reason...." (**Id.** at pp. 626-627.)

8. The court cautioned that there is a downside to advocates waiting until appeal to argue comparative juror analysis in light of the general rule that deference is given to the trial's court finding of no discriminatory intent. (**Id.** at p 624.)

9. On appeal, a reviewing court need not consider responses by stricken panelists or seated jurors other than those identified by the defendant in the claim of disparate treatment. (**Id.** at p. 624.)

10. The trial court's finding of no discriminatory intent is reviewed "on the record as it stands at the time the *Wheeler/Batson* ruling is made. If the defendant believes that subsequent events should be considered by the trial court, a renewed objection is required to permit appellate consideration of these subsequent developments." (**Id.** at p. 624)

11. The fact a trial or reviewing court can think up reasons for why the prosecutor may have wanted to challenge a juror, "will not satisfy the prosecutors' burden of stating a racially neutral explanation." (**Id.** at p. 625.)

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

The court recognized that, under Code of Civil Procedure section 223, a criminal trial court may limit counsel's questioning of prospective jurors and "may specify the maximum amount of time that counsel for each party may question an individual juror, or may specify an aggregate amount of time for each party, which can then be allocated among the prospective jurors by counsel." (at p. 625, fn. 16.) Moreover, the court recognized that "the exercise of discretion by trial judges in conducting voir dire is accorded considerable deference by appellate courts." (**Id.** at p. 625, fn. 16.) However, the ***Lenix*** court stated: "in exercising that discretion, trial courts should seek to

balance the need for effective trial management with the duty to create an adequate record and allow legitimate inquiry." (**Id.** at p. 625, fn. 16.)

13. The trial court has a duty to "assess the plausibility" of the prosecutor's proffered reasons for striking a potential juror, "in light of all evidence with a bearing on it." (**Id.** at p. 625.) Trial courts "must evaluate the demeanor of the prosecutor in determining the credibility of proffered explanations, and the demeanor of the panelist when that factor is a basis for the challenge." (**Id.** at p. 625.)

14. It should be discernible from the record that "1) the trial court considered the prosecutor's reasons for the peremptory challenges at issue and found them to be race-neutral; 2) those reasons were consistent with the court's observations of what occurred, in terms of the panelist's statements as well as any pertinent nonverbal behavior; and 3) the court made a credibility finding that the prosecutor was truthful in giving race-neutral reasons for the peremptory challenges. (**Id.** at pp. 625-626.)

15. "As to the second point, the court may not have observed every gesture, expression or interaction relied upon by the prosecutor. The judge has a different vantage point, and may have, for example, been looking at another panelist or making a note when the described behavior occurred. But the court must be satisfied that the specifics offered by the prosecutor are consistent with the answers it heard and the overall behavior of the panelist. The record must reflect the trial court's determination on this point (see *Snyder*, supra, 128 S.Ct. at p. 1209), which may be encompassed within the court's general conclusion that it considered the reasons proffered by the prosecution and found them credible." (**Id.** at pp. 625-626.)

16. The court observed that comparative juror analysis is a form of circumstantial evidence (**id.** at p. 622) and that a reviewing court must be careful not to accept one reasonable interpretation to the exclusion of other reasonable ones when reviewing the circumstantial evidence supporting the trial court's factual findings in a ***Wheeler/Batson*** holding. "If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also be reasonably reconciled with a contrary finding does not warrant a reversal of the judgment." (**Id.** at pp. 627-628.)

17. "[S]ubstantial evidence supports the trial court's finding that the prosecutor's proffered reasons were not pretextual." (**Id.** at p. 630 [and noting that using comparative juror analysis does not undermine this conclusion].)

18. The court **rejected** the notion that the removed panelist was similarly situated to another male juror who had a fairly hostile interaction with the police when they responded to a call from the juror's mother after the juror had taken away some keys from his mother to prevent her from driving while intoxicated. The juror stated the police threatened to mace his brother unless the keys were returned. The juror thought about sending a letter to the editor but chose not to because he "figured they're trying ... to handle that situation without getting hurt." (**Id.** at p.

630.) The court observed that the prosecutor's hesitation regarding the removed panelist was based on his sense of her possible lingering resentment, whereas the juror who was kept stated he realized that the police were acting out of concern for their safety and so he did not complain about their conduct. (**Ibid.**)

19. The court also **rejected** the defense argument that the removed panelist was similar to another juror who was kept. That other juror had a cousin who shot and killed someone when he was 16 years old. The cousin was convicted and sent to jail but was eventually released and was "doing great." The juror stated that his cousin was treated fairly by the police and courts, and "it was a bad situation, but it turned out to be a good situation for him." (**Id.** at p. 630.) That juror was a high school acquaintance of one of the police officers identified as a potential witness in defendant's case and the juror described the officer as "a really good guy." (**Ibid.**)

Although the defendant argued the prosecutor's concern about the gang affiliation of the brother of the removed panelist was pretextual because the prosecutor did not display similar concerns that the other juror's cousin might be a gang member (e.g., because he never asked about the gang status of the other juror's cousin), the court held, in light of the juror's comments about his cousin's past experience and present circumstances, the prosecutor could have found such question unnecessary. (**Id.** at pp. 630-631.) Moreover, the court stated the fact the juror held a high opinion of a prosecution witness " would likely have been significant in the prosecutor's decision to retain the juror and further distinguishes this juror from" the removed panelist. (**Id.** at p. 631.)

20. Finally, the court noted a lack of any additional evidence in the record that the prosecution's challenges were improperly based on race. For example, there was "no indication that the prosecutor or his office relied on racial factors" nor was there any "evidence of procedural manipulation, deceptive questioning, or any of the other signs of constitutional violation like those present in ***Miller-El II.***" (***Lenix***, at p. 631.)

D. *People* v. *Cruz* (2008) 44 Cal.4th 636

Facts:

In ***People*** v. ***Cruz*** (2008) 44 Cal.4th 636, the defendant claimed the prosecutor improperly exercised a peremptory challenge against a Hispanic juror on the sole basis of group bias. (**Id.** at p. 654.) Among the many reasons given by the prosecutor for excusing the juror: he was only 20 years old, and perhaps "one of the youngest, or the youngest" prospective jurors under consideration, and "may not be in the mainstream and that experienced in life"; he had "long hair," "Fu Manchu type" facial hair; he had come to court in a long, unbuttoned flannel shirt, and thereafter arrived at the peremptory challenge hearing in a plain white T-shirt; he appeared to be one of the "most poorly dressed" individuals in the courtroom; his stated goal in life (to open up a small "comic book store") arguably showed a lack of life experiences; he repeatedly stated a belief that the evidence would have to be "strong" for him to impose death; he stated that "at times the death penalty was used too much," and "indicated some hesitation" about imposing the

death penalty for a "cop killer"; he failed to answer questions Nos. 95 and 96 on the written jury questionnaire pertaining to his feelings about criminal defense attorneys, prosecutors, and police; in responding to question No. 99, which asked, "Do you feel that a police officer's testimony is more truthful/accurate that of a civilian?," he wrote, "police officers are human, and they can lie too"; he gave the impression he "had some sympathy toward those individuals who became intoxicated"; and the prosecutor felt he did not establish a very good "rapport" with the young prospective juror. The prosecutor also pointed out that the juror was one of very individuals who felt the "justice system was getting good or better" and attributed this "out of the mainstream" view to the fact the juror did not have a tremendous amount of experience and contact in society and with this criminal justice system." (**Id** at pp. 657-658, 659.)

Holding:

1. After reiterating some of the principles of comparative analysis, the court engaged in a comparative analysis and found no discriminatory intent. (**Id.** at pp. 658-659.)

2. After observing that 8 or 9 other jurors had given similar responses to the challenged juror when it came to the justice system (and thus the juror's view in this regard was not outside the mainstream), the court found the prosecutor's view of the juror's response was not made in isolation but was made "while mindful of the prosecutive juror's very young age in relation to all the other prospective jurors on the panel." (**Id.** at p. 660.)

   The court stated the critical determination was not whether the prosecutor was entirely accurate that the juror's view was "outside the mainstream," but whether his given reasons were credible and sincere as opposed to a sham intended to mask his true intent to discriminate[.]" (**Id.** at p. 660.)

3. The court held that a juror (as the juror in the instant case) who fails to answer some of the question is differently situated than jurors who answer "no opinion" or "Don't know." (**Id.** at p. 660.)

4. The court held that an affirmative response such as the juror in the instant case gave (i.e., "police officers are human they can lie to (sic)") to the question of whether police officer testimony is more truthful/accurate than that of a civilian" is a qualitatively different response than simply responding "no" or "not necessarily." (**Id.** at pp. 660-661.)

5. In sum, the court approved a more nuanced approach to comparing answers that takes into account the whole picture and recognizes that subtle differences may be significant. (**Id.** at p. 661.)

IV. The Use of Disproportionality Analysis

Another mechanism that courts sometimes use to determine whether there has been a prima

facie showing of discriminatory use of peremptory challenges is to look to see whether the prosecutor has a used a "disproportionate number of peremptories" against jurors in the cognizable class. Thus, for example, if the prosecutor has used a high percentage of his challenges against members of the cognizable class, this can be viewed as evidence of a discriminatory purpose. (**See *People* v. *Hall*** (1989) 208 Cal.App.3d 34, 45 [citing cases using a disproportionality analysis to assess whether prima face case was made].)

"A more complete analysis of disproportionality compares the proportion of a party's peremptory challenges used against a group to the group's proportion in the pool of jurors subject to peremptory challenge." (***People* v. *Bell*** (2007) 40 Cal.4th 582, 598, fn. 3.)

However, where there is a small sample size, disparities carry "relatively little information." Thus, for example, in ***Bell***, the fact that the prosecutor had used two of his 16 peremptory challenges (12.5%) against members of the cognizable class in issue when only three of the 47 prospective jurors (6.4%) belonged to that class was of little use in establishing an inference of discrimination, notwithstanding the former figure was almost twice the latter figure. (***People* v. *Bell*** (2007) 40 Cal.4th 582, 598, fn. 3; **see also *Wade* v. *Terhune*** (9th Cir. 2000) 202 F.3d 1190, 1198 [significance "limited" where corresponding ratios were "four of sixty-four (or 6%)" (proportion of group in pool) and "one of three (or 33%)" (proportion of challenges exercised against group)].)

V. Other Procedural Issues

A. Timeliness of Motion

A ***Batson-Wheeler*** motion "is timely if made before jury impanelment is completed because 'the impanelment of the jury is not deemed complete until the alternates are selected and sworn.'" (***People* v. *McDermott*** (2002) 28 Cal.4th 946, 970; ***People* v. *Adanandus*** (2007) 157 Cal.App.4th 496, 500.)

VI. Appellate Review Rules

A. Deference to, But Not Abdication of, Responsibility to Review, Trial Court's Finding

As long as the court makes "a sincere and reasoned effort to evaluate the nondiscriminatory

justifications offered, its conclusions are entitled to deference on appeal." (***People* v. *Zambrano*** (2007) 41 Cal.4th 1082, 1104; ***People* v. *Lewis* and *Oliver*** (2006) 39 Cal.4th 970, 1009.)

"But deference is not abdication." (***People* v. *Gonzales*** (2008) 165 Cal.App.4th 620, 628.) "When the prosecutor's stated reasons are both inherently plausible and supported by the record, the trial court need not question the prosecutor or make detailed findings. But when the prosecutor's stated reasons are either unsupported by the record, inherently implausible, or both, more is required of the trial court than a global finding that the reasons appear sufficient." (***People* v. *Stevens*** (2007) 41 Cal.4th 182, 193; ***People* v. *Silva*** (2001) 25 Cal.4th 345, 386.)

B. Review Where No Prima Facie Finding

If a trial court denies a ***Batson-Wheeler*** motion without finding a prima facie case of group bias, the reviewing court considers the entire record of voir dire. (***People* v. *Adanandus*** (2007) 157 Cal.App.4th 496, 501.) This probably means that questioning of panelists who do not make it on the jury may be considered to determine if there was "disparate questioning."

However, the finding is still entitled to "considerable deference on appeal" and if the record "suggests grounds upon which the prosecutor might reasonably have challenged" the panelists in question, the conviction will be affirmed. (***People* v. *Crittenden*** (1994) 9 Cal.4th 83, 116-117; ***People* v. *Adanandus*** (2007) 157 Cal.App.4th 496, 501.) The only time deference will not be given is where the trial court may have applied the incorrect unnecessarily high standard of "more likely than not" instead of the mere "reasonable inference of discrimination" standard in assessing whether a prima facie case has been made out. (**See *Johnson* v. *California*** (2005) 545 U.S. 162.) In that situation, the record is reviewed independently to "apply the high court's standard and resolve the legal question whether the record supports an inference that the prosecutor excused a juror" on a prohibited discriminatory basis. (***People* v. *Adanandus*** (2007) 157 Cal.App.4th 496, 502 [and cases cited therein].

VII. *Batson-Wheeler* Remand Hearings

Sometimes an appellate court will find that the trial judge erred in determining that no prima facie case had been established. In such circumstances, appellate courts will often remand the case to the trial court with orders to conduct a ***Batson-Wheeler*** hearing as if the prima facie case had been made, i.e., the trial court is ordered to go through steps two and three. This allows the prosecutor to provide neutral reasons for excusing the jurors who the defense claimed were removed for discriminatory reasons and allows the trial court to decide whether those neutral reasons are credible. (**See e.g., *People* v. *Kelly*** (2008) 162 Cal.App.4th 797; ***Paulino* v. *Harrison*** (9th Cir. 2008) 542 F.3d 692; ***Yee* v. *Duncan*** (9th Cir. 2006) 441 F.3d 851.)

A. Some General Principles

In ***People*** **v.** ***Kelly*** (2008) 162 Cal.App.4th 797, the court laid out several principles as to how those hearings may be conducted: (i) it is not necessary that the defendant have his original voir dire attorney at the remand hearing; (ii) the prosecutor does not have to be under oath when stating the reasons he or she challenged the juror; (iii) the prosecutor does not have turn over his or her original voir dire notes; and (iv) the defense does not get to cross-examine the prosecutor regarding his or her stated reasons. (**Id.** at pp. 802-805.)

B. Inability to Recall Reason for Exclusion Not Dispositive

In ***Yee*** **v.** ***Duncan*** (9th Cir. 2006) 441 F.3d 851, the defendant was a male dental assistant who had been convicted of sexual battery and lewd acts upon female juvenile patients under anesthesia. The prosecutor excused eight men from the jury, albeit leaving four men on the jury. When the time came for the prosecutor to explain the challenges, she offered gender-neutral reasons for seven of the eight men. However, the prosecutor "could not recall" the reason she excluded the eighth male juror. (**Id.** at pp. 895-896.) The trial judge nonetheless found held there had been "no systematic exclusion of the male gender" and said that it believed the prosecutor's representations to the court and found them unobjectionable. (**Id.** at p. 896.)

The Ninth Circuit upheld the conviction, noting that while failure to provide a reason for bumping a juror at the second step "becomes evidence that is added to the inference of discrimination raised by the prima facie showing," it is not an automatic violation of equal protection. (**Id.** at pp. 899, 900.) To the contrary, the ***Yee*** court held a trial court must still proceed to step three before it can determine that purposeful discrimination has occurred. At that point, the trial court "considers all the evidence to determine whether the ***actual*** reason for the strike violated the defendant's equal protection rights." (**Ibid**, emphasis added by P&A.) The court pointed out that if the rule were otherwise, the "prosecution would then bear the ultimate burden even though only an inference of discrimination had been made" and this would be contrary to the purpose of ***Batson***: namely, getting at "the real reason" why the jurors were stricken. (***Yee***, at p. 899.) "[I]nferences are simply not enough." (**Ibid.**)

Applying the proper standard, the Ninth Circuit found the California appellate court that affirmed the conviction did not act unreasonably since (i) the voir dire testimony suggested a gender-neutral reason why the prosecutor might have wanted to challenge the juror - the juror had served as a juror on a medical malpractice case and such service could well have brought the juror too close to the malpractice issues presented in the defendant's case which arose from acts committed in defendant's dental office; (ii) "the prosecutor twice accepted the jury; and (iii) the prosecutor had non-discriminatory, objectively verifiable reasons for excluding all of the other removed venire members. (**Id.** at p. 901.)

C. Speculation as to Reasons for Bumping a Juror May Be Insufficient

The holding in ***Yee*** should be contrasted to the very recent case of ***Paulino*** **v.** ***Harrison*** (9th Cir.

2008) 542 F.3d 692. In ***Paulino***, the prosecutor used challenges against five of six African-Americans; one African-American remained on the jury. After the prosecutor challenged the fifth African-American venire-member, defense counsel made a ***Wheeler*** objection. The parties conferred with the judge who, after speculating as to why the prosecutor removed the juror, declined to find any prima facie case had been made. The judge pontificated that while "the statistical improbability of five out of six is such [as] to give rise to an inference that these peremptory challenges were in part based upon race[,]" the judge could "see why[the prosecutor] would be uncomfortable with each one of them[.]" (**Id.** at p. 695.)

Defendant challenged this ruling in state courts to no avail and then filed a habeas petition in federal court. After the federal district court also denied the claim, the Ninth Circuit ordered the district court to conduct an evidentiary hearing to give the state an "opportunity to present evidence as to the prosecutor's race-neutral reasons for the apparently-biased pattern of peremptories[.]" (**Id.** at pp. 695-696.)

"**Editor's note**: When the case was first remanded to the district court, it did not require the prosecutor to state any reasons but simply relied on its own speculation as to the reasons for bumping the jurors. (**Id.** at p. 696.)

At the hearing, the prosecutor testified that she had absolutely no memory of jury selection, nor of her actual reasons for striking any of the venire-members in question; she could not find the notes she had taken during jury selection and reading the voir dire transcript did not refresh her recollection. Moreover, there was nothing in the state court record that reflected her contemporaneous thoughts on why she struck the African-American jurors because the trial court never required her to explain the reasons for the five strikes. Thus, "instead of explaining her actual non-discriminatory reasons for exercising her peremptory challenges, the prosecutor offered hypothetical race-neutral reasons for striking each potential African-American juror in question." (**Id.** at p. 696 [and noting the prosecutor acknowledged that the reasons she articulated were mere speculation drawn from her reading of the voir dire transcript].) The district court found that the prosecution failed to meet its "burden of production" at the second step. (**Id.** at p. 699.)

When the case got back to the Ninth Circuit, the State argued that the prosecutor's testimony, taken as a whole, constituted persuasive circumstantial evidence of her actual non-discriminatory reasons for striking the five African-American venire-members. (**Id.** at p. 699.) However, the Ninth Circuit disagreed. The Ninth Circuit recognized that "[e]vidence of a prosecutor's actual reasons may be direct or circumstantial," (**id.** at p. 700) but held that pure speculation does not qualify "as circumstantial evidence of the prosecutor's actual reasons, simply because it was the prosecutor herself who offered the speculation during the course of an evidentiary hearing." (**Id.** at pp. 701 [and rejecting the idea that it should put any stock in testimony from the prosecutor regarding her "general principles" of jury selection since prosecutor was not sure which principles she considered in selecting jury].)

The *Paulino* court agreed with ***Yee*** that even where the prosecutor does not produce neutral reasons for challenging a juror at the second step, the trial court must proceed to the third step. (*Paulino* at p. 702.) However, the court held that, at step three, "the prima facie showing plus the evidence of discrimination drawn from the state's failure to produce a reason-- will establish purposeful discrimination by a preponderance of the evidence in ***most*** cases." (**Id.** at p. 703, emphasis added by P&A.)

Ultimately, the *Paulino* court concluded that the defense had met its burden of showing impermissible use of peremptory strikes based on (i) the "stark" statistical disparities, i.e., the removal of 83% of the potential African-American jurors; (ii) the pattern in which the prosecutor exercised her peremptory challenges, i.e., the prosecutor never accepted the jury with a black juror other than one seated juror # 2 and " after using two of her first three peremptory challenges against the other two blacks in the jury box at the time, the prosecutor immediately excused each of the three subsequent black jurors called into the jury box;" and (iii) the lack of any evidence of race-neutral reasons to explain the prosecutor's pattern of strikes or the resulting statistical disparities. (**Id.** at p. 703.)

NEXT WEEK: NEW CASES ON

WHETHER A SUSPECT WHO IS ARRESTED AND TAKEN TO JAIL WITH A WEAPON ON HIS PERSON CAN BE CHARGED WITH "VOLUNTARILY" BRINGING THAT WEAPON INTO JAIL?

WHETHER A USE OF A FIREARM CLAUSE CAN BE FOUND WHERE THE FIREARM IS NEVER RECOVERED AND THE WITNESSES CAN'T SAY WHETHER THE FIREARM WAS A TOY?

WHETHER THE PROSECUTION CAN *ALWAYS* ADD AN OFFENSE PROVEN AT THE PX?

WHETHER PARTIES CAN AGREE TO TREAT A COMPLAINT AS AN INFORMATION?

AND WHETHER IT IS ERROR TO PERMIT THE PROSECUTION TO ARGUE A THEORY OF GUILT AT TRIAL BASED ON EVIDENCE NO PRESENTED AT THE PX?

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Week Of	Topic	Guest	Elim. Of Bias
July 19 2010	Our Sort of Annual *Batson-Wheeler* Update: Some of the Most Significant Cases Issued January 2009 - July 2010 With Recommendations and Additional Commentary By Jerry Coleman (Part I of II)	Jerry Coleman Assistant District Attorney San Francisco County	30 min

Batson Does Not Require That a Judge Reject an Attorney's Claim That a Peremptory Challenge Was Made on the Basis of the Juror's Demeanor, Rather Than for a Discriminatory Purpose, Unless the Judge Personally Observed the Demeanor in Question

Thaler v. *Haynes* (2010) 130 S.Ct. 1171

Facts: During jury selection in a death penalty case, two judges presided at different stages. The first judge presided when the attorneys questioned the prospective jurors individually. The second judge took over when peremptory challenges were exercised. After the prosecutor struck an African-American juror, the defense raised a ***Batson*** objection. The second judge found a prima facie case under ***Batson*** and the prosecutor was then required to justify use of the peremptory challenge. The prosecutor offered a race-neutral explanation that was based on the juror's demeanor during individual questioning. Specifically, the prosecutor asserted that the juror's demeanor had been "somewhat humorous" and not "serious" and that her "body language" had belied her "true feeling." (at p 1172.)

The prosecutor also said that, based on his observations of the juror during questioning by the defense, he believed that she "had a predisposition" and would not look at the possibility of imposing a death sentence "in a neutral fashion." The defense attorney did not dispute the prosecutor's characterization of the juror's demeanor, but he asserted that her answers on the jury questionnaire "show[ed] that she was a juror who [was] leaning towards the State's case." After considering the prosecutor's explanation and the arguments of defense counsel, the second judge stated that the prosecutor's reason for the strike was "race-neutral" and denied the ***Batson*** objection without further explanation. (at p. 1172.)

After the defendant was convicted, he appealed, arguing that "a trial judge who did not witness the actual voir dire cannot, as a matter of law, fairly evaluate a ***Batson*** challenge[.]" (at p. 1172.) The court of appeal rejected the argument, pointing out that are many factors which a trial judge - even one who did not preside

over the voir dire examinations - can consider in determining whether the opponent of the peremptory strikes has met his burden, including the nature and strength of the parties' arguments during the ***Batson*** hearing, the attorneys' demeanor and credibility, and the record of the earlier voir dire (which in the instant case reflected that the juror was congenial and easygoing during voir dire and that her attitude was less formal than that of other veniremembers). (at p. 1173.)

However, when the case made its way up to the federal Fifth Circuit Court of Appeals, that court held that under ***Batson*** (and the more recent United States Supreme Court decision in ***Snyder*** **v.** ***Louisiana*** (2008) 552 U.S. 472), it was "clearly established" that a judge must reject a demeanor-based explanation for a peremptory challenge unless the judge personally observed and recalls the aspect of the prospective juror's demeanor on which the explanation is based. Since the second judge did not do so, the Fifth Circuit reversed the conviction and granted a new trial. (at pp. 1173-1174.) The State then petitioned the High Court and review was granted.

1. The ***Haynes*** court recognized that, in general, a judge ruling on an objection to a peremptory challenge is required to undertake "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available" and "where the explanation for a peremptory challenge is based on a prospective juror's demeanor, the judge should take into account, among other things, any observations of the juror that the judge was able to make during the voir dire." (at p. 1174.)

2. Moreover, the ***Haynes*** court reiterated the observation in ***Snyder*** that when the explanation for a peremptory challenge "invoke[s] a juror's demeanor," the trial judge's "first hand observations" are of great importance. (at p. 1175.)

3. However, the ***Haynes*** court held neither ***Batson*** nor ***Snyder*** stand for the proposition that a demeanor-based explanation for a peremptory challenge must be rejected unless the judge personally observed and recalls the relevant aspect of the prospective juror's demeanor. (at p. 1174.)

4. The ***Haynes*** court indicated the observation in ***Snyder*** "that the best evidence of the intent of the attorney exercising a strike is often that *attorney's* demeanor" undermined the claim a judge need personally have observed the juror's demeanor in order to accept the attorney's explanation that the juror's demeanor was the race-neutral basis for the challenge. (at p. 1175.)

5. The High Court reversed the Fifth Circuit Court of Appeals and upheld the conviction.*

*Editor's note: Although **strongly** suggesting that it is entirely proper for a trial judge to consider an attorney's demeanor-based challenge without having observed the demeanor in question, the actual issue before the High Court was only whether the rule a judge could not do so was "clearly established." In any event, the case reiterates the desirability of judges making close observations of the jurors' demeanor during the voir dire process.

"People of Color" are Not a Cognizable Group for *Batson-Wheeler* Purposes
People v. *Neuman* (2009) 176 Cal.App.4th 571

Facts: The prosecutor exercised his first peremptory challenge against a Hispanic prospective juror, his second against an African-American prospective juror, and his third against a prospective juror who defense counsel initially claimed was Hispanic based on counsel's belief the juror had a Latino accent (albeit the juror did not have a Hispanic last name, did not appear to have an identifiable ethnicity, and counsel later appeared to agree with the judge the accent was "Southern" not Latino). The prosecution's fourth peremptory was exercised against a person who the trial court guessed, based on her name only, was southeast Asian (albeit defense counsel identified her as Middle-Eastern). (at p. 573.)*

Editor's note: The confusion over which cognizable class some of the jurors belonged to in the ***Neuman*** case highlights the increasing difficulty in our multiracial society with attempting to pigeonhole jurors into discrete cognizable classes. A prosecutor may argue, *in good faith*, that she did not know the challenged juror was even a member of the cognizable group at issue and this cuts against a finding of impermissible bias. (**See *People v. Barber*** (1988) 200 Cal.App.3d 378, 394 ["a bona fide showing by the prosecutor, reasonably accepted by the trial court, that he or she did not believe or recognize a prospective juror as being a member of a particular cognizable class . . . effectively resolves the issue in favor of the prosecution"].)

Defense counsel challenged the prosecutor's use of peremptories under ***Wheeler/Batson***, claiming all four had been used against "people of color" and argued none of the prospective jurors said anything "that would indicate that they couldn't be fair to the People." (at p. 573.) The trial judge found no prima facie case and declined to even allow the prosecutor to state any reasons for the challenge. After the case proceeded to trial and defendant was convicted, the defense filed a new trial motion claiming prosecution improperly challenged three jurors (one Hispanic-American, one African-American, and one Asian-American). The judge denied the motion, explaining that he did not believe "people of color" were a cognizable group and noting the difficulty in making out a prima face case of discriminatory purpose based on a single challenge to a member of cognizable group. (at p. 574.)

On appeal, the defendant reiterated the arguments made in the trial court.

1. Relying on the California Supreme Court decision in ***People*** **v.** ***Davis*** (2009) 46 Cal.4th 539, 583 the court held that "people of color" is not a cognizable group. (at pp. 578-579.)

2. The court rejected defendant's attempt to distinguish ***Davis*** on the ground that the ***Davis*** court was only discussing a ***Wheeler*** challenge and not a ***Batson*** challenge. (at p. 578.)

3. The court noted that only one of the cases cited by the defense in support of its premise that a court can combine challenges to members of multiple cognizable groups actually stood for the proposition that "minority" groups can be combined into a larger supergroup for ***Batson-Wheeler*** purposes: ***Green*** **v.** ***Travis*** (2nd Cir. 2005) 414 F.3d 288).

Editor's note: The *Neuman* court pointed out that in portions of California, "combining all members of minority groups may obliterate their status as members of a group that is in the minority." (at p. 580, fn. 14.) This may be true, but it is not really legally significant since ***Batson-Wheeler*** challenges are not dependent on the cognizable group being in the minority. (**See** ***People*** **v.** ***Willis*** (2002) 27 Cal.4th 811, 813-814 [stating excluding white males from the jury was a clear violation of the People's right to an impartial jury]; ***Roman*** **v.** ***Abrams*** (2nd Cir. 1987) 822 F.2d 214, 227-228 [Caucasians are a cognizable group]; ***State*** **v.** ***Chambers*** (Mo.App. E.D. 2007) 234 S.W.3d 501, 514 [same]; ***State v. Daniels*** (Haw. 2005) 122 P.3d 796, 802, fn. 11 [Caucasian males are a cognizable class].) Indeed, the absurdity of the defense position is highlighted when you consider that ***every*** juror belongs to *at least* two cognizable groups (male or female, plus an ethnic or racial group). Under the defense logic, you could have a cognizable "supergroup" that encompasses 100% of the jurors! However, there are some federal cases cited by the defense (***Fernandez*** **v.** ***Roe*** (9th Cir. 2002) 286 F.3d 1073 and ***United States*** **v.** ***Stephens*** (7th Cir. 2005) 421 F.3d 503) that *do* indicate that a prosecutor's use of challenges against members of a second minority group are part of the "relevant circumstances" the trial court can consider in assessing whether to find a prima facie showing of discrimination against members of a first minority group has been shown. (***Neuman*** at pp. 575-579.)

Even Assuming Jurors of Different Classes Could Be Lumped Together to Form a Super Cognizable Class:

4. The court then went on to hold that even if the jurors could all be lumped together, the defendant still failed to show the trial judge erred in finding the defendant had not made out a prima facie case. Among the facts cited by the court in support of upholding the trial judge's finding:

(i) the defendant was of a different racial group than the persons allegedly impermissibly challenged;

(ii) the prosecutor did not engage in desultory voir dire of these prospective jurors;

(iii) the bumped jurors did not share only the characteristic of being a member of a cognizable group (they all were young college students, relatively inexperienced in life) and were otherwise as heterogeneous as the community as a whole. (at p. 581.)

5. The court also noted that the existence of potential race-neutral reasons for excusing a juror may be considered by the trial court (and appellate court) in dispelling any inference necessary to establish a prima facie case and such reasons existed in the instant case. (at p. 583 [albeit recognizing, at p. 589, that, in reviewing the denial of a *third*-step denial of a ***Batson-Wheeler*** motion, courts should not conjure up reasons not supported by the record or the law in an attempt to uphold the denial of the motion].)

6. Among the grounds the appellate court identified as providing a neutral basis for the prosecutor to want to challenge each of the jurors:

(i) the youth and limited life experience of each of the jurors (at pp. 586-587)

(ii) the fact the jurors were still students (at pp. 586-587)

(iii) the difficulties (e.g., due to lengthy commutes) the juror would have in serving as a juror (at pp. 585-586)

(iv) the fact one of the mother of the one of the challenged jurors "had been involved for more than all her life as a counselor and probation officer (at p. 586)

(v) the fact one of the jurors gave somewhat conflicting answers regarding her ability to put aside the fact she had been a victim of molestation (i.e., by initially claiming she gave the issue much thought but then later becoming much more unequivocal and boasting of an "incredible ability of being impartial with everything that happened to me[.]). (at p. 586.)

(vi) the fact that one of the jurors gave a "strange" response to a defense counsel question about whether, when reading about someone being arrested or charged with a crime in the paper, the juror thought "where there's smoke, there's fire" or "that people are presumed innocent and the paper may omit certain crucial facts" (i.e., the juror said the latter as she was recently a victim of media manipulation where she was quoted out of context, but then offered no explanation as to how she came to be in that situation) (at pp. 586-587.)

7. The court stated that even assuming there was a statistical disparity created by the prosecution exercising the first three of four challenges against "people of color," the fact that such a disparity existed did not compel a finding of a prima facie case. (at pp. 584-585 citing ***People v. Bonilla*** (2007) 41 Cal.4th 313, 343-

344 [excusal of three out of four Hispanics, in a case where the defendant was also Hispanic, did not necessarily create a prima facie case]; ***People v. Bell*** (2007) 40 Cal.4th 582, 598 [excusal of two out of three African-Americans did not create prima facie showing where small absolute size of sample made drawing an inference of discrimination from this fact alone impossible].) Nor would the fact that the prosecution challenged most or all the members of a group necessarily establish an inference of discrimination. (at p. 584 citing to ***People*** **v.** ***Hamilton*** (2009) 45 Cal.4th 863, 899 [fact only African-American subject to challenge was challenged insufficient *in and of itself* to raise an inference of discrimination].)

8. The court **rejected** the argument that if the trial court erred in failing to find a prima facie case based on statistical and/or pattern analysis, or erred in requiring a pattern to be established, it must "reverse regardless of the presence of race-neutral reasons for excusing these prospective jurors[.]" (at p. 580, fn. 13.)

The court recognized that Ninth Circuit in ***Williams*** **v.** ***Runnels*** (9th Cir.2006) 432 F.3d 1102 held that the inference of discrimination raised by a statistical disparity cannot be rebutted by race-neutral reasons appearing on the record. However, the ***Neuman*** court **rejected** this principle: "Whether the Ninth Circuit meant that a trial court may not rely on race-neutral reasons in the record to dispel an inference of discrimination created by a statistical disparity, or an appellate court may not use such reasons to uphold a trial court's finding that no prima facie case has been made, both positions are contrary to holdings by the California Supreme Court, which bind us." (at p. 583.) **Editor's note: See also *Gonzalez* v. *Brown*** (9th Cir. 2009) 585 F.3d 1202 [discussed in this P&A memo, at p. 7].)

9. When the ***only*** question before the reviewing court is whether a prima facie case has been made out, only the facts existing at the time the ***Batson-Wheeler*** motion was made may be considered. (at pp. 581-585.)

10. The court took the defense to task for attempting to use a "statistical comparison" in a case where an adequate record was not provided of how many members of a cognizable group were prospective jurors at the time of the challenge, how many ended up serving on the jury, or how many additional peremptories were exercised by the prosecutor against such members. (at pp. 581-583 [and noting that minority jurors remained on the venire at the time the challenge was made].)

11. The court also took the defense to task for attempting to do a comparative analysis based on comparisons

between the jurors who were removed from the jury and those who were left on the jury in a case only addressing the propriety of the trial court's first step decision not to find a prima facie case, as opposed to when a court engages in the complete three-step Batson-Wheeler procedure. (at pp. 587-589.)

Editor's note: The California Supreme Court has repeatedly recommended that the judge allow the prosecutor to place his reasons for excusing jurors belonging to the cognizable class on the record, notwithstanding the lack of any prima facie finding. (**See *People* v. *Taylor*** (2010) 48 Cal.4th 574, 616; ***People* v. *Bonilla*** (2007) 41 Cal.4th 313, 343, fn. 13; ***People* v. *Mayfield*** (1997) 14 Cal.4th 668, 723-724.) The court in ***Neuman*** helped make it clear **why**, even if a court makes a determination that no prima facie case has been made, it is **important for the prosecutor to put reasons on the record**. As pointed out in ***Neuman***, a reviewing court may affirm the finding by examining the record for race-neutral grounds upon which the prosecutor might have challenged the prospective jurors in question. (at p. 580 citing to ***People* v. *Davis*** (2009) 46 Cal.4th 539; ***People* v. *Carasi*** (2008) 44 Cal.4th 1263, 1295, fn. 17 (conc. & dis.opn. of Kennard, J.); ***People* v. *Hoyos*** (2007) 41 Cal.4th 872, 900-901, fn. 15; ***People* v. *Lancaster*** (2007) 41 Cal.4th 50, 76; ***People* v. *Avila*** (2006) 38 Cal.4th 491, 554; and ***People* v. *Bonilla*** (2007) 41 Cal.4th 313, 343-359.) A prosecutor may have many neutral reasons for challenging a juror that are not obvious or reflected in the record. A reviewing court cannot consider reasons based on facts not reflected in the record and may overlook less-obvious reasons based on facts reflected in the record unless the prosecutor states the reasons.

Failure of the Prosecutor to Recall a Specific Reason for Challenging a Juror is Not a Good Thing, But It Does Not Preclude a Trial Judge From Finding the Challenge Was Made for a Permissible Purpose Based on Other Circumstances

Gonzalez* v. *Brown (9th Cir. 2009) 585 F.3d 1202

Facts: During jury selection, the prosecution used its first peremptory strike against an African-American juror, then passed on the panel after the defense exercised its first peremptory strike. The defense exercised a second peremptory strike, the prosecution struck a Caucasian juror but then passed on the panel again after the defense exercised a third strike, and the prosecution again accepted the panel. The trial court recessed for the day. The next morning, the jury box contained seven additional prospective jurors. The prosecution exercised its third peremptory strike to excuse an African-American juror. The defense accepted the panel. The prosecution then exercised its fourth peremptory strike to excuse another African-American juror, and the defense made a ***Wheeler*** motion. The judge agreed with the defense that the strikes created a "classical" inference of racial bias, and asked that the prosecution explain its reasoning. (at p. 1205.)

The prosecutor justified excusing the second African-American juror on the grounds that "yesterday[the juror] had been very evasive when [the trial court] asked her specifically about the suspension, the license suspension." The prosecutor observed that the juror had been accepted as part of the panel several times on

Thursday, but that the composition of the jury had changed overnight. The prosecutor justified excusing the third African-American juror on the grounds that "[the trial court] asked [the juror] several times [on Friday] about would [he] require the People to prove it beyond all doubt? And even though [the trial court] kept explaining it to [the juror], he kept answering he expects the People to prove it beyond all doubt, was his repetitive answer." (at p. 1205.) However, the prosecution could not recall its reason for excusing the *first* African-American juror. (at p. 1205.)

Although the defense objected to the failure of the prosecutor to recall the reason for excusing the first juror, the trial court held that "in light of the prosecution's explanation for excusing two of the jurors on Friday and the fact that the prosecution accepted the panel twice on Thursday, the court was satisfied that no racial prejudice was involved." The judge also noted that two African-American jurors were currently sitting on the panel, a third was a prospective panelist, and there were "at least three or four Hispanic jurors in the panel[.]" (at p. 1205.)

The state Court of Appeal concluded the defendant had not met his ultimate burden of persuasion to prove purposeful discrimination with respect to the first juror. That court hypothesized that the prosecution may have struck the first juror because she stated she was "a strong believer in forgiving and-I am a strong believer that what applies to one person should apply to another. And if I make a moral judgment toward one person, I should be in a position to be judged the same way regardless of my position in the case." (at pp. 1205-1206.) (**Editor's note: See** point #6, in this P&A memo, at p. 9.) The case eventually came before the Ninth Circuit.

1. The Ninth Circuit acknowledged that a prosecutor's refusal to justify his strike will provide "additional support for the inference of discrimination raised by a defendant's prima facie case." (at p. 1208, fn. 14.)

2. Moreover, the Ninth Circuit was troubled by the prosecution's total inability to explain a peremptory strike "because note taking during jury selection would have provided an easy remedy and avoided assessment of the issue placed before us" and because "[i]t is obviously a desirable and correct practice for a prosecutor to have notes of reasons for a peremptory strike if a challenge is raised requiring a race-neutral explanation at step two of ***Batson***." (at p. 1209, fn. 5.)

3. Nevertheless, the court held failure to state a valid reason at step two of the ***Batson*** evaluation is not a per se violation of ***Batson***; a court may consider the totality of circumstances to decide if the prosecutor's

peremptory strike was purposefully discriminatory. (at pp. 1208-1209.)

4. In the instant case, it was not an unreasonable application of ***Batson*** for the state court to find the prosecutor properly exercised her challenge of an African-American juror in view of:

(i) the relatively low number of peremptory challenges that the prosecutor exercised against African-American jurors (at p. 1204)

(ii) the fact the prosecutor accepted one of the African-American jurors twice before she exercised a peremptory strike to remove that juror - which "suggests that her motives for exercising the strike were not racial but, as she stated, had to do with the jury composition" especially considering the prosecutor had plenty of challenges left when she passed the second time (i.e., the prosecutor did not accept that juror twice simply because her peremptory strikes were running low) (at p. 1210);

(iii) the fact three African-American jurors remained on the venire and two in the jury box at the time of the challenge and the prosecutor did not use any of her remaining challenges to strike an African-American juror (at p. 1210 [and noting the fact that African-American jurors remained on the panel "may be considered indicative of a nondiscriminatory motive"].)

(iv) the fact prosecutor could articulate coherent reasons for her Friday strikes - which makes her explanation that she simply could not remember why she had excused the first juror on Thursday more believable (at p. 1210 [and noting, at p. 1209 that the defendant could point to no other factors than the first juror's race which suggested she was excused on a racial basis alone].)

5. The court declined to say whether it would have reached the same conclusion if the case was before them on direct appeal in a federal prosecution or by way of a habeas petition. (at p. 1209, fn. 5.)

6. In light of the circumstantial evidence supporting the trial court's decision, the Ninth Circuit declined to decide whether the California Court of Appeal was entitled to "offer a hypothetical justification for the prosecution's first peremptory strike consistent with the requirements of ***Batson***[.]" (at p. 1209, fn. 6.) However, the Ninth stated that the language of the Supreme Court in ***Miller El v. Dretke*** (2005) 545 U.S. 231 was "suggestively to the contrary." (at p. 1209, fn. 6.)

Editor's note: Earlier in the opinion, the Ninth Circuit also cited to ***Miller El*** for the proposition that a

reviewing court "will not supply a reason for the prosecutor to have exercised her strike because we cannot know what were her true motives." (at p. 1207.) **Contrast *People* v. *Neuman*** (2009) 176 Cal.App.4th 571 [discussed in this P&A memo, at p. 6].

IN MEMORIAM

ART GARRETT

1951-2010

NEXT WEEK: THE SECOND HALF OF OUR *BATSON-WHEELER* UPDATE WITH SAN FRANCISCO ASSISTANT DISTRICT ATTORNEY JERRY COLEMAN.

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 Vicki Long at (510) 272-6326. Participatory students: MCLE Evaluation sheets are available on location and certificates of attendance are constructively maintained in your possession in the Ala. Co. Dist.Atty computer banks.

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

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

BENCH MEMORANDUM RE: *BATSON-WHEELER* MOTIONS

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

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

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

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

II.
BATSON-WHEELER PROCEDURE IN A NUTSHELL

The three-step inquiry governing ***Batson-Wheeler*** claims is well established. "First, the trial court must determine whether the defendant has made a prima facie showing that the prosecutor exercised a peremptory challenge based on race. Second, if the showing is made, the burden shifts to the prosecutor to demonstrate that the challenges were exercised for a race-neutral reason. Third, the court determines whether the defendant has proven purposeful discrimination. The ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike." (***People* v. *Lomax*** 2010 WL 2606825, *25; ***People v. Lenix*** (2008) 44 Cal.4th 602, 612-613.)

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

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

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

Second, the trial court **must** pay close attention during jury selection so as to be able to verify or dispute representations made by counsel regarding their observations of the jurors' verbal

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

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

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

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

A. FIRST STEP

In the first step, the party objecting to the challenge has the burden of making out a prima facie case of discrimination. This is done "by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose." (***Johnson v. California*** (2005) 545 U.S. 162, 168.)

In determining whether this burden has been meet, courts must keep in mind that "[s]ubject

to rebuttal, a ***presumption exists that a peremptory challenge is properly exercised***, and the burden is upon the opposing party to demonstrate impermissible discrimination against a cognizable group." (***People* v. *Salcido*** (2008) 44 Cal.4th 93, 136; ***People* v. *Neuman*** (2009) 176 Cal.App.4th 571, 579, emphasis added.)

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

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

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

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

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

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

This is because when the party making the ***Batson-Wheeler*** motion can point to no evidence ***other than*** the fact a party has challenged one or two members of cognizable group, the party is essentially asking the court to draw an inference of discrimination from the fact one party has excused 'most or all' members of the cognizable group," and thus is "necessarily relying on an apparent pattern in the party's challenges" (***People v. Bell*** (2007) 40 Cal.4th 582, 598, fn. 3.) In ***that*** situation, while it is possible to imagine circumstances "in which a prima facie case could be shown on the basis of a single excusal, in the ordinary case . . . to make a prima face case after the excusal of only one or two members of a group is very difficult." (***Bell***, at p. 598, fn. 3; **see also *People v. Hamilton*** (2009) 45 Cal.4th 863, 899 [agreeing with trial judge that the challenge of the only [African-American] subject to challenge was insufficient *in and of itself* to suggest a pattern]; **accord *Wade v. Terhune*** (9th Cir. 2000) 202 F.3d 1190, 1198.) Simply put, as a practical matter, "the challenge of one or two jurors can rarely suggest a pattern of impermissible exclusion." (***People* v. *Bell*** (2007) 40 Cal.4th 582, 598 [and noting that where there is a very small number of panelists falling into the cognizable class, it is impossible to draw an inference of discrimination from the fact that the prosecutor challenged a large percentage of the panelists falling into the class, i.e., two of a total of three]; ***People* v. *Christopher*** (1991) 1 C.A.4th 666, 672, 673 [challenge of one or two prospective jurors of same racial or ethnic group as defendant, even when panel contains no other members of group, does not establish prima facie case unless there is significant supporting evidence].)

Obviously, the greater the number of members of the cognizable group at issue challenged by the party accused of violating ***Batson-Wheeler***, the greater the likelihood an inference of impermissible exclusion will arise. (**See e.g., *Miller-El* v. *Dretke*** (2005) 545 U.S. 231, 240-241 [fact nine of ten African-Americans struck considered in finding discriminatory use].) However, in the absence of any evidence ***other than*** sheer numbers, courts routinely reject the argument that

the burden of making a prima facie case has been met just because multiple members of a cognizable group have been challenged. (**See *People* v. *Taylor*** (2010) 48 Cal.4th 574, 643 [fact prosecutor exercised three of ten peremptory challenges to excuse two African-American prospective jurors and one Hispanic prospective juror "without more, is insufficient to create an inference of discrimination, especially where, as here, the number of peremptory challenges at issue is so small"]; ***People v. Hawthorne*** (2009) 46 Cal.4th 67, 79-80 [no prima facie showing where the defendant's motion was based solely on the assertion that the prosecutor used three of 11 peremptories to excuse African-American prospective jurors]; ***People* v. *Bonilla*** (2007) 41 Cal.4th 313, 343-344 [excusal of three out of four Hispanics, in a case where defendant was also Hispanic, did not create a prima facie case]; ***People v. Bell*** (2007) 40 Cal.4th 582, 598 [excusal of two out of three African-Americans did not create prima facie showing]; ***People v. Box*** (2000) 23 C.4th 1153, 1185 [no prima facie case where basis for claim was that two prospective jurors were both African-American and so was the defendant]; ***People* v. *Jones*** (1998) 17 Cal.4th 279, 293 [evidence supported ruling that there was no prima facie case of group bias in peremptory challenges of four African-Americans even though challenges left no African-American jurors on panel]; ***People* v. *Crittenden*** (1994) 9 C.4th 83, 119, 120, fn. 3 [excusal of all members of defendant's race does not automatically establish prima facie case; declining to follow contrary holdings of lower federal courts]; ***People v. Adanandus*** (2007) 157 Cal.App.4th 496, 503-504 [no prima facie case despite fact three African-American jurors challenged by prosecution where, inter alia, African-American juror remained on panel]; ***People* v. *Allen*** (1989) 212 Cal.App.3d 306, 312, 313 [exclusion of disproportionate number of minority jurors does not by itself establish prima facie case; ***Wheeler*** motion properly denied where record showed specific bias as ground for each of nine peremptory challenges against Blacks and Hispanics]; **cf. *Williams* v. *Runnels*** (9th Cir.2006) 432 F.3d 1102, 1103-1107 [use of three of first four peremptories against African-American jurors where only four of the first 49 prospective jurors were African-American was a statistical disparity that alone could create a prima facie showing albeit recognizing other facts could dispel the presumption].)1

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

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

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

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

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

Second Step

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

The party who originally challenged the juror must then provide a "'clear and reasonably

specific' explanation of his 'legitimate reasons' for exercising the challenges." (***People* v. *Lenix*** (2008) 44 Cal.4th 602, 613, citing to ***Batson* v. *Kentucky*** (1986) 476 U.S. 79, 98, fn. 20.) "Certainly a challenge based on racial prejudice would not be supported by a legitimate reason." (***People* v. *Lenix*** (2008) 44 Cal.4th 602, 613.) On the other hand, a legitimate reason is simply "one that does not deny equal protection" and "a prosecutor may rely on any number of bases to select jurors[.]" (***People* v. *Lenix*** (2008) 44 Cal.4th 602, 613, citing to ***Purkett* v. *Elem*** (1995) 514 U.S. 765, 769.)

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

The types of neutral reasons for excusing a juror are too innumerable to list. However, some typical grounds include: (i) a juror's relative youth and immaturity (**see *Rice* v. *Collins*** (2006) 546 U.S. 333, 341; ***People* v. *Salcido*** (2008) 44 Cal.4th 93, 140; ***People* v. *Cruz*** (2008) 44 Cal.4th 636, 657-659; (ii) a juror's flippant or informal attitude (**see *Thaler* v. *Haynes*** (2010) 130 S.Ct. 1171, 1172; ***People* v. *Howard*** (2008) 42 Cal.4th 1000, 1017, 1019); (iii) a juror's reluctance to follow the law (**see *People* v. *Howard*** (2008) 42 Cal.4th 1000, 1017; ***People v. Watson*** (2008) 43 Cal.4th 652, 679-680; ***Gonzalez v. Brown*** (9th Cir. 2009) 585 F.3d 1202, 1205, 1209-1210); (iv) the fact a juror or close relative of the juror has a criminal background or has had a negative experience with the criminal justice system (**see *People* v. *Cruz*** (2008) 44 Cal.4th 636, 656, fn. 3; ***People* v. *Avila*** (2006) 38 Cal.4th 491, 554-555; ***People* v. *Farnam*** (2002) 28 Cal.4th 107, 138); (v) the fact the juror has life experiences that might make the juror overly sympathetic to, or biased towards, a person in the defendant's position (**see *People* v. *Watson*** (2008) 43 Cal.4th 652, 676; ***People* v. *Salcido*** (2008) 44 Cal.4th 93, 140); or (vi) the fact the juror (or close relative of juror) is employed in a job or engages in activities that reflect an orientation toward rehabilitation and sympathy for defendants (**see *People v. Ervin*** (2000) 22 Cal.4th 48, 75; ***People* v. *Neuman*** (2009) 176 Cal.App.4th 571, 586; ***People* v. *Adanandus*** (2007) 157 Cal.App.4th 496, 507; ***People* v.**

Barber (1988) 200 Cal.App.3d 378, 389-394.)

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

The fact that a juror provides an answer that "contradicts" the basis for the prosecutor's challenge does not mean the prosecutor's reason will be held pretextual. (**See e.g., *Rice* v. *Collins*** (2006) 546 U.S. 333, 341 [notwithstanding young juror's oral response she could be impartial, prosecutor entitled to believe juror's youth and lack of ties to the community would make her a bad juror for the prosecution]; ***People* v. *Cardenas*** (2007) 155 Cal.App.4th 1468, 1477 [prosecutor had legitimate reasons for removing a bilingual juror on grounds the prosecutor believed the juror would refuse to accept an interpreter's translation over the juror's own translation even though juror ultimately agreed to abide by interpreter's translation]; ***People* v. *Gutierrez*** (2002) 28 Cal.4th 1083, 1124 [prosecutor justified in removing a juror on grounds the juror might harbor bad feelings toward the police despite the juror's claim otherwise; prosecutor was entitled to disregard a juror's claim that her emotional state and stressful circumstances would not interfere with her ability to consider the evidence where the juror repeatedly referred to her "nerves" and to being under considerable stress, cried twice during voir dire, and the unduly "emotional" state of the juror was confirmed by the judge].) Numerous cases, for example, have held that a prosecutor is entitled to dismiss a juror who has had negative contacts with law enforcement the criminal justice system or has close relatives who have had such negative contacts, notwithstanding the juror's assurances that the prior experiences would not impact the juror. (***People* v. *Avila*** (2006) 38 Cal.4th 491, 554-555; ***People* v. *Farnam*** (2002) 28 Cal.4th 107, 138; ***People* v. *Adanandus*** (2007) 157 Cal.App.4th 496, 505.)

Should the court ask the prosecutor to list all the reasons for challenging the juror?

While peremptory challenges are often based on instinct and it can sometimes be hard to articulate the reason for removing a juror, "a prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives." (***People* v. *Lenix*** (2008) 44 Cal.4th 602, 624.) Prosecutors should "provide as complete an explanation for their peremptory challenges as possible." (***People* v. *Lenix*** (2008) 44 Cal.4th 602, 624.)

Attempting to comply with this direction sometimes results in a mixture of strong and weak

reasons. As noted in ***People* v. *Taylor*** (2009) 47 Cal.4th 850, the fact that some reasons are not well supported by the record does not mean a challenge to the juror was motivated by race. (**Id.** at p. 896.) "While an attorney who offers unsupported explanations for excusing a prospective juror may be trying to cover for the fact his or her real motivation is discriminatory, alternatively this may reflect nothing more than a misguided sense that more reasons must be better than fewer or simply a failure of accurate recollection." (**Ibid; see also *Gonzalez v. Brown*** (9th Cir. 2009) 585 F.3d 1202, 1208-1210.)

Third Step

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

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

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

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2. The training provided by Alameda County District Attorney's office on ***Batson-Wheeler*** issues over the past decade has **unequivocally** condemned the discriminatory use of peremptory challenges. New

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

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

In making the determination of whether the defendant has proven purposeful discrimination at the third step, the court may take into consideration all the factors it can take into consideration at the prima facie level. (**See** this bench memo at p. 4; ***People* v. *Wheeler*** (1978) 22 Cal.3d 258, 282.)

A trial court may also conduct a comparative analysis in deciding whether purposeful discrimination has been shown. A comparative juror analysis involves comparing "panelists who were struck with those who were allowed to serve or were passed by the prosecution before being ultimately struck by the defense." (***People v. Lomax*** 2010 WL 2606825, *26, fn. 14.) If the proffered reason for striking a member of the cognizable class at issue applies just as well to an

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

otherwise-similar juror who is not a member of the cognizable class but only the latter is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at the third step. (**See *People v. Lomax*** 2010 WL 2606825, *26.)

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

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

The manner of a juror is often "more indicative of the real character of his opinion that his words." (***People* v. *Lenix*** (2008) 44 Cal.4th 602, 622.) The differences in the manner in how a juror answers a question "may legitimately impact the prosecutor's decision to strike or retain the prospective juror." (**Id.** at p. 623.) Moreover, "[w]hile an advocate may be concerned about a particular answer, another answer may provide a reason to have greater confidence in the overall thinking and experience of the panelist. Advocates do not evaluate panelists based on a single answer." (**Id.** at p. 631.) Finally, whether a juror is acceptable or not acceptable will change over the course of jury selection because a lawyer is not only seeking a particular kind of juror but a particular mix of jurors. "It may be acceptable, for example, to have one juror with a particular point of view but unacceptable to have more than one with that view. If the panel as seated appears to contain a sufficient number of jurors who appear strong-willed and favorable to a lawyer's position, the lawyer might be satisfied with a jury that includes one or more passive or timid appearing jurors. However, if one or more of the supposed favorable or strong jurors is

excused either for cause or [by] peremptory challenge and the replacement jurors appear to be passive or timid types, it would not be unusual or unreasonable for the lawyer to peremptorily challenge one of these apparently less favorable jurors even though other similar types remain. These same considerations apply when considering the age, education, training, employment, prior jury service, and experience of the prospective jurors." (**Id.** at p. 623.)3

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

Although a judge may not be able to observe every gesture, expression or interaction relied upon by the prosecutor (i.e., the judge has a different vantage point, and may have, for example, been looking at another panelist or making a note when the described behavior occurred), the trial "court must be satisfied that the specifics offered by the prosecutor are consistent with the answers it heard and the overall behavior of the panelist." (***People* v. *Lenix*** (2008) 44 Cal.4th 602, 625.) "The record must reflect the trial court's determination on this point (see *Snyder*, *supra*, 128 S.Ct. at p. 1209), which may be encompassed within the court's general conclusion that it considered the reasons proffered by the prosecution and found them credible." (***People* v. *Lenix*** (2008) 44 Cal.4th 602, 625-626.)

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;

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

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.)

DATED:

Respectfully submitted,
NANCY E. O'MALLEY
DISTRICT ATTORNEY

By: _____
Deputy District Attorney
State Bar No.

POINTS AND AUTHORITIES

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Week Of	Topic	Guest	Elim. of Bias
July 26 2010	Our Sort of Annual *Batson-Wheeler* Update: The Most Significant Cases Issued January 2009 - July 2010 (Part II of II) With Recommendations and Additional Commentary By Jerry Coleman (Part II of II)	Jerry Coleman Assistant District Attorney San Francisco County	30 min

Prosecutor's Reasons for Challenging Multiple African-American Jurors Were Not Discriminatory Where Jurors Were Challenged Primarily Because of Their "Neutral Stance" on the Death Penalty

People v. *Lomax* 2010 WL 2606825

Facts: The prosecutor challenged one African-American Juror, struck three non-African American jurors, passed on the panel five times before excusing a second African-American juror. Later, the prosecutor used his tenth peremptory challenge to excuse the remaining African-American from the original panel. As the parties exercised their challenges, six additional African-Americans were seated in the jury box. Of these six, the prosecutor struck three. After the fifth African-American juror was challenged, the defendant made a ***Wheeler*** motion. (at pp. *25-*26.)

The trial judge found a prima facie case "based on the numbers." The prosecutor then gave his reasons for excusing each prospective juror. One of the common reasons provided for removing most of the jurors at issue was that the juror had expressed a neutral philosophical position toward the death penalty and the prosecutor, in general, was seeking the strongest possible jurors for the penalty phase. (at p. *27.) The judge found no systematic exclusion based on race. (at p. *26.) This ruling was challenged post-conviction when the case came before the California Supreme Court. (at p. *26.)

1. At the third stage of the ***Wheeler/Batson*** inquiry, "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." (at p. *26, citing to ***Miller-El v. Cockrell*** (2003) 537 U.S. 322, 339.)

"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 that employs him or her." (at p. *26.)

2. "So long as the trial court makes a sincere and reasoned effort to evaluate the nondiscriminatory justifications offered, its conclusions are entitled to deference on appeal." (at p. *26 citing to ***People*** **v.** ***Burgener*** (2003) 29 Cal.4th 833, 864.)

3. The court applied a comparative analysis in deciding whether to uphold the trial court's determination. In general, a comparative juror analysis "compares panelists who were struck with those who were allowed to serve or were passed by the prosecution before being ultimately struck by the defense." (at p. *26, fn. 14.) "If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at ***Batson***'s third step." (at p. *26.)

"[C]omparative juror analysis is but one form of circumstantial evidence that is relevant, but not necessarily dispositive, on the issue of intentional discrimination." (at p. *26.)

4. *On review*, the court's focus is limited to the responses of stricken panelists and seated jurors that have been identified by defendant in his claim of disparate treatment." (at p. *26.)

5. The court rejected the defendant's argument that a prosecution's rejection of a juror based on the juror's expressed "neutrality is tantamount to finding a juror unacceptable because he or she is unbiased." (at p. *27.)

The court pointed out this is a flawed comparison because a juror's decision whether to impose the death penalty has moral and normative underpinnings and a juror's "philosophical position on capital punishment is directly relevant and may factor into penalty phase decisionmaking" whereas the same cannot be said of bias. (at p. *27.)

Moreover, even when jurors have expressed neutrality on the death penalty, "neither the prosecutor nor the trial court [i]s required to take the jurors' answers at face value." If other statements or attitudes of the juror suggest that the juror has "reservations or scruples" about imposing the death penalty, this demonstrated reluctance is a race-neutral reason that can justify a peremptory challenge, even if it would not be sufficient to support a challenge for cause. (at p. *27.)

6. The court rejected the defense argument that the prosecutor's retention of two non-African-American panelists who also checked the questionnaire response stating that they were philosophically neutral on the death penalty showed the prosecution's challenge to the African-American jurors was pretextual. This was because both of these jurors expressed more favorable views toward capital punishment when asked to describe their opinion. Moreover, the jurors could also be considered prosecution oriented for other reasons, i.e., one worked as a fingerprint analyst for the sheriff's department and was married to a police officer and the other was the type of "mature, stable" juror the prosecutor said he was seeking, i.e., the juror was 41 years old, had been married for 22 years, and been very active in community organizations in his hometown. (at p. *27.)

7. The court also rejected the argument that because, during voir dire, the prosecutor asked only one of the excused panelists about his views on the death penalty, the prosecutor was not really concerned about whether the panelists were neutral on the death penalty. (at p. *28.)

The court recognized that "[a] failure to engage in meaningful voir dire on a subject of purported concern can, in some circumstances, be circumstantial evidence suggesting the stated concern is pretextual." (at p. *28.) However, this principle was somewhat inapplicable in the instant case "because the attorneys were not permitted to question prospective jurors directly, but instead had to ask the trial court to inquire into areas of special concern." (at p. *28.)

8. The court also pointed out there were other neutral reasons for excusing the challenged jurors.

9. The evidence showed the prosecutor did not excuse the first African-American juror for impermissible reasons. In addition to expressing neutrality on the death penalty, this juror disclosed that two years ago her nephew was convicted of murder; the juror said she did not know if her nephew had been treated fairly by the police and the court system. (at p. *28 [and noting the arrest of a juror or a close relative is an accepted race-neutral reason for exclusion].)

The court **rejected** the claim two non-African American jurors who also had relatives involved in the criminal justice system (one whose son was a gang member and had been convicted of burglary, a second whose cousin had been convicted of aggravated assault) were similarly situated to this African-American juror because neither burglary nor aggravated assault is as serious as murder, the offense committed by the African-American juror's nephew and charged against defendant, and "[m]ore importantly, despite the criminal convictions of their relatives, these seated jurors expressed strongly prosecution-oriented views." (at p.

*28.)

The juror whose son had been convicted of burglary, expressed contempt for violence and gangs and described negative encounters with gang members and strongly favored the death penalty. The juror whose cousin had been convicted of aggravated assault expressed strong support for the death penalty, had taken courses at the police reserve academy, had applied to work with various law enforcement agencies, planned to pursue a bachelor's degree in criminal justice, had several friends and relatives who worked in law enforcement and wanted to become a police officer herself. (at p. *29.)

The prosecutor had another legitimate reason for excusing this African-American juror. She was dissatisfied with the outcome of two criminal cases in which her family members were murdered as no one had been charged in either case. (at p. *29 [and noting that a "juror's negative experience with the criminal justice system has long been considered a valid basis for exercising a peremptory challenge].) This reason remained valid even though the juror disavowed the response in oral questioning. (at p. *29.)

10. The evidence shows the prosecutor did not excuse the second African-American juror for impermissible reasons. The juror (a paralegal whose father had recently been convicted of driving under the influence of alcohol and had past encounters with the police stemming from domestic violence against the juror's mother), in addition to expressing neutrality on the death penalty, gave several curious questionnaire responses that revealed possible misunderstandings of the law. The juror was very young (24 years old) and "came into court wearing a T-shirt and somewhat sloppily attired," characteristics that were inconsistent with the prosecutor's general preference for having "older, more conservative people" on the jury. (at p. *29 [and noting "a potential juror's youth and apparent immaturity are race-neutral reasons that can support a peremptory challenge].)

Citing to ***Rice*** v. ***Collins*** (2006) 546 U.S. 333, 341, the ***Lomax*** court stated "it is not unreasonable for a prosecutor to believe a young person with few ties to the community might be less willing than an older, more permanent resident to impose a substantial penalty." (at p. *29.)

Citing to ***People*** v. ***Hamilton*** (2009) 45 Cal.4th 863, 904-905, the ***Lomax*** court observed that "a slovenly appearance can reveal characteristics that are legitimately undesirable to the prosecution. (at p. *29.) ,

The court rejected defendant's argument that the prosecutor's reasons were pretext because another juror who was 28 was not challenged. This juror (described above in this P&A memo at point 9) was not similarly situated since she came from a family of law enforcement officers, aspired to become a police officer

herself, and strongly favored the death penalty. (at p. *29.)

11. The evidence shows the prosecutor did not excuse the third African-American juror for impermissible reasons This juror (in addition to expressing neutrality on the death penalty) had been convicted for receiving stolen property. (at p. *30 [and noting a criminal conviction is a valid, race-neutral reason for the prosecutor to dismiss him from the jury].) Moreover, this juror described several other encounters with crime and law enforcement that made him an undesirable juror from the prosecution's perspective: he had "a lot of friends" who had been arrested and convicted of crimes; had witnessed many crimes, including robberies, drug offenses, thefts and assaults; and was robbed but did not report the crime. (at p. *30.)

12. The evidence shows the prosecutor did not excuse the fourth African-American juror for impermissible reasons. First, the prosecutor passed on a panel containing this juror five times and acceptance of a panel containing African-American prospective jurors "strongly suggests that race was not a motive" in the challenge of an African-American panelist. (at p. *30.) Second, the juror testified as an alibi witness for his brother in a criminal trial for assault. The juror initially claimed not to know the result of the trial but later disclosed that his brother had been convicted and jailed for the offense. Moreover, the juror had testified that his brother was not at the scene of the crime when it was committed and the prosecutor feared the juror may have perjured himself. Finally, this juror's veracity was also called into question by the disclosure that he had been court-martialed and discharged from the Navy for falsifying a reading on his watch station. (at p. *30.)

13. The evidence shows the prosecutor did not excuse the fifth African-American juror for impermissible reasons. First, the juror was neutral on the death penalty. Second, the prosecutor passed with the juror on the panel one time. Third, one of the reasons given by the prosecutor for the challenging the juror was that the persons down the road would be better jurors and this was borne out by the prosecutor's responses to panelists later called. (at p. *31 [and noting "the selection of a jury is a fluid process, with challenges for cause and peremptory strikes continually changing the composition of the jury before it is finally empanelled" and that while a "prosecutor might have initially been willing to accept some panelists with neutral opinions on capital punishment, the changing mix of prospective jurors could legitimately motivate him to strike these neutral panelists in hopes of obtaining upcoming jurors with more favorable death penalty views"].)

14. The evidence shows the prosecutor did not excuse the sixth African-American juror for impermissible reasons.

Although the juror initially expressed neutrality on the death penalty in her questionnaire she later stated she did not understand why people could receive different sentences for the same crime. This comment suggested to the prosecutor that the juror have "some deeper philosophical reservations about the death penalty" than she had revealed in court. Moreover, the juror's ex-boyfriend had been prosecuted for purse snatching, she and others in her home owned guns "for protection," and she had fired a gun or been present when guns were fired as part of a "New Year's tradition." (at p. *31.)

15. The court rejected defendant's request that an analysis be done comparing the challenged African-American panelists with panelists of other races *who were also challenged* by the prosecutor. The court held the relevance of this comparison was questionable. Because the prosecutor used his peremptory challenges to excuse these prospective jurors, in many cases before he used a peremptory to excuse an African-American panelist, such a comparison does not provide evidence that the challenges to African-Americans were motivated by race. "That some panelists of other races may have been even more worthy of a peremptory challenge does not mean that the excused African-American panelists were improperly discharged. The more telling comparison is between 'black venire panelists who were struck and white panelists allowed to serve.'" (at p. *26.)

Prosecutor's Reasons for Striking One of Two African-American Jurors Held Pretextual in Light of, Among Other Things, Prosecutor's Mischaracterization of Juror's Responses, Failure to Strike Non-African-American Jurors Providing Similar Responses, and Giving Some Dubious Reasons for Striking the Other African-American Juror

Ali v. *Hickman* (9th Cir. 2009) 584 F.3d 1174

Facts: During jury selection, the prosecutor peremptorily struck the only two African-American members of the jury pool. The defense counsel made a ***Batson-Wheeler*** objections after each juror was struck but the trial court did not require a hearing on the objection until after the second objection. (at pp. 1176-1177.)

The prosecutor provided three reasons for striking the first African-American juror. First, the prosecutor expressed a concern that the juror had some involvement in the criminal justice system as a result of the molestation of one child by another child. The prosecutor acknowledged the juror stated that would not affect her judgment but then pointed out, "Her words were that she doesn't think it will affect her judgment in this case. She did not say it won't. She said she doesn't think on that. It did involve family

members within the system." (at p. 1177.) Second, the prosecutor was worried about the juror being very emphatic about how she expected attorneys to conduct themselves in the courtroom, i.e., the juror said "that if it was anything less than professional and respectfully done that that would affect her." The prosecutor indicated that at times the attorneys may have to take an aggressive approach at time and the juror's demeanor and response concerned him. (at p. 1177.) Third, the prosecutor said the juror hesitated in responding to the question regarding "what she felt in terms of sitting in judgment of others and then said, "yes, that could be a problem for her, sitting in judgment of others, because she was thinking of her Christian faith." The prosecutor said that after further exploratory questioning by the defense, the juror said she thought she could judge facts and that type of matter without crossing her religious tenets. However, the prosecutor remained concerned over her hesitancy. (at pp. 1177-1178.)

The prosecutor also provided several reasons for challenging the second African-American juror. First, the prosecutor said he had some concern about the juror's responses to a line of questioning pursued by defense counsel indicating the juror would change his mind and make decisions as he went along. The prosecutor said he was concerned that the juror would over-intellectualize the case. (at p. 1178.) Second, the prosecutor said he was offended by a "smartass answer" provided by the juror when the prosecutor asked "Is there anything else that you could think of that would cause you not to be fair and impartial? The juror answered, "I haven't done anything yet," a comment immediately provoking a barrel of laughter throughout the courtroom. (at p. 1178.) Third, the prosecutor did not appreciate that when the juror spoke with the judge about a hardship request, he engaged in lighthearted banter that the prosecutor thought reflected a casualness atypical of jurors. (at pp. 1178-1179.)

The trial judge then denied the ***Batson-Wheeler*** challenge without engaging in any comparative analysis. (at p. 1179.) After the defendant was convicted, a claim was raised in the state appellate court the denial of the challenge was erroneous. This claim was denied (albeit the appellate court did not engage in comparative analysis). The California Supreme Court denied review and a later state habeas petition. The defendant then filed a habeas petition in federal district court. After engaging in a comparative analysis, the district court denied the petition finding that while the analysis revealed "some minor faults in the prosecutor's reasoning," the faults did not demonstrate racial bias or pretext and that the "prosecution's race-neutral justifications were sufficiently credible, clear, and reasonably specific." (at p. 1180.) Nevertheless, with unbridled enthusiasm for uncovering the hidden discriminatory motives (that somehow slipped past all the previous courts) lurking behind the apparently nondiscriminatory reasons provided by the prosecutor, a panel of the

Ninth Circuit granted review of the district court's denial of the federal habeas petition. (at p. 1180.)

1. The Ninth Circuit held that each of the prosecutor's justifications for striking the first juror was "logically implausible, undermined by a comparative juror analysis, and otherwise unsupported by the record." (at p. 1182.)

2. The court found the prosecutor's assertion that he excused the first juror because she initially hesitated when responding to the court's inquiry about the effect of the molestation incident on her ability to judge defendant's case was a "makeweight" for several reasons.

First, any bias arising from the incident would logically tend to favor the prosecution, not the defense since the victim was like the juror's daughter, a young woman and the victim of a domestic assault. **(Editor's note**: The juror's daughter was a 14 and the victim of an attempted child molestation by a step-child of the juror. Defendant's victim was a 20-year old murdered by her boyfriend.) The juror's answers reflected a focused "entirely on the effect that the incident had on her daughter" and a distancing of herself from the perpetrator - whom she never described as her son or her step-son. The juror lived with her daughter and had only a few months contact with the perpetrator. The Ninth Circuit angrily rejected the state's argument that the prosecutor could believe the juror would feel sympathetic toward the defendant. The state argued that this sympathy was reflected in the juror's belief that the light sentence the juror's step-son received for molestation seemed fair to the juror and the fact the juror "minimized" the molestation by referring to it as an attempted molestation. The Ninth Circuit never addressed the first aspect of the state's argument but held no minimization occurred since attempted molestation **is** a serious crime and there was no evidence an actual molestation had taken place. The Ninth Circuit also took the state to task for suggesting that the prosecutor's concern that the juror might feel sympathy for the defendant because of the molestation incident was shown by the prosecutor asking whether the juror would feel any sympathy for the defendant because she had a son the same age as the defendant. The Ninth Circuit pointed out this question was in reference to the juror's *other* biological son. (at p. 1182-1185.)

Second, the prosecutor actually *favored* jurors who had been the victims of domestic abuse or who had friends who had been victims of such abuse, even if the juror indicated that his or her experiences might affect his or her objectivity. The Ninth Circuit pointed to two jurors who were retained by the prosecution notwithstanding being involved in incidents of domestic violence. One of these jurors described an incident where she was shoved into a stove while trying to prevent her drunk husband from physically abusing their

15-year old son. The Ninth Circuit characterized this juror as being herself a direct victim of domestic violence but also as someone who indicated the behavior could be partially excused due to her husband being under the influence of alcohol or drugs. The Ninth Circuit believed this significant because evidence at trial showed that defendant was a chronic drug user and had been using drugs and alcohol on the days preceding his murder of the victim. The Ninth Circuit also believed this juror's answer and the answer provided by the first African-American juror were comparable when it came to how they would be affected by the incident, but the prosecutor kept the former and challenged the latter. The Ninth Circuit also held that the fact that prosecutor allowed another juror to remain on the jury whose answers suggested she might be affected by domestic violence undermined the prosecutor's claim he was concerned with leaving on juror's with past experiences with domestic violence.

Editor's note: This juror was not a direct victim of domestic violence but said "her ***friend's*** experiences with sexual abuse by men will make me biased against any man who may have assaulted or murdered a woman" and gave equivocal answers that suggested she would be biased ***against*** the defendant. (at pp. 1185-1187.)

The Ninth Circuit **rejected** the argument that, because the prosecutor also challenged a juror who described an incident involving the molestation by the juror's eight-year old son of his two-year old daughter, the prosecutor was consistent in challenging jurors in a similar situation to the first African-American juror. The Ninth Circuit observed the removal of this juror "only confirms that the prosecutor was concerned with the *direction* of a juror's bias, not with objectivity" since this juror's response showed he was focused on his son rather than his daughter - who the juror suggested would not be affected by the incident. Moreover, the Ninth Circuit suggested there was evidence this juror would be biased in favor of the defense because when asked if he could give the prosecution a fair shake, he said he *thought* he could but when asked the same question regarding the defense, he said he was *certain* he could. (at pp. 1187.)

Third, the Ninth Circuit held the fact the prosecutor failed to ask follow-up questions in order to clear up any lingering doubt about the first African-American's objectivity also shows this justification was a makeweight, especially considering the prosecutor *did* ask a follow-up question on potential bias during the voir dire of the other juror discussed a molestation incident involving family members. (at pp. 1187-1188.)

Fourth, although the first African-American juror was equivocal hesitated in her initial response to a very general question about the effect the molestation incident might have on her judgment as a juror, she later unequivocally stated it would not have an effect, yet other jurors were retained who remained somewhat equivocal when asked if they could remain "objective." (at p. 1189.)

3. The Ninth Circuit found that the second reason provided by the prosecutor (i.e., that the juror was excused because she indicated that "anything less than professional and respectful[ ]" conduct on the part of the attorneys might affect her view of the case and because the prosecutor was concerned that she would react negatively to aggressive cross-examination) for excusing the first African-American juror was not genuine and that the California courts unreasonably accepted it as non-racially motivated. The Ninth Circuit provided several grounds for its conclusion. (at p. 1191.)

First, the juror simply expressed reasonable expectations concerning attorney behavior. She did not say, as the prosecutor claimed, that unprofessional conduct or aggressive cross-examination would "affect her judgment." Rather, she said the opposite-that she would not penalize the attorneys for aggressively advocating on behalf of their clients. (at p. 1190 [and stating that the prosecutor's mischaracterization of the testimony is evidence of discriminatory pretext].) Second, the prosecutor did not challenge a juror who also stated that he expected professional behavior from the attorneys. Moreover, the jurors' expectations were reasonable and "were fully consistent with the prosecutor's own views about the level of professionalism that the lawyers would maintain during the trial. (at p. 1191.)

Editor's note: The *Hickman* court took the prosecutor's inaccurate characterization of what a juror said as evidence of pretext. However, as noted in ***People* v. *Taylor*** (2009) 47 Cal.4th 850, the fact that some reasons are not well supported by the record does not mean a challenge to the juror was motivated by race. (**Id.** at p. 896.) "While an attorney who offers unsupported explanations for excusing a prospective juror may be trying to cover for the fact his or her real motivation is discriminatory, alternatively this may reflect nothing more than a misguided sense that more reasons must be better than fewer or simply a failure of accurate recollection." (**Ibid.**) Nevertheless, considering that reviewing courts (or at least the Ninth Circuit) may interpret a misrecollection of what was said by a juror as evidence supporting a claim the prosecutor had an improper motive (**see e.g., *Cook* v. *LaMarque*** (9th Cir. 2010) 593 F.3d 810, 818), it is **recommended** that if a prosecutor does not have a very accurate recollection of juror responses to questions that are being used to justify a challenge, the prosecutor ask for readback or, better yet, that a transcript be provided of, at least, the answers given by the challenged juror, if not all the jurors whose responses would be useful in conducting a comparative analysis. (**See *Lewis* v. *Lewis*** (9th Cir. 2003) 321 F.3d 824 [suggesting that counsel can be particularly helpful in assisting the court at the third step of *Batson* "when afforded the opportunity to review a transcript of the jury selection proceedings"].)

5. The Ninth Circuit found the third reason for striking the first African-American juror (i.e., that she might have trouble "sitting in judgment of others" due to "her Christian faith") was also pretextual. The Ninth Circuit provided several grounds for its conclusion.

First, the prosecutor mischaracterized what the juror said. (at p. 1192.) When the asked by defense counsel if there was "[a]nything about your spiritual training or spiritual practice that will prevent you from judging other people if you're chosen to be a juror," the juror actually said, "No." When the defense counsel followed up with a question asking why the juror had to think about her answer for a second, she replied that "judging" someone as far as her Christian faith was concerned would be making a decision based on no information or just arbitrarily. The juror distinguished that from the kind of judging she would be asked to do in the criminal case which would require her to make a decision based on the evidence that has been presented. and taking that into consideration. (at pp. 1191.)

Second, the Ninth Circuit pointed to the fact that the other two reasons provided were pretextual and that "raises an inference that this final rationale is also a make-weight." (at p. 1192.)* When the prosecutor questioned the first African-American juror, "he did not ask a single question about her religious views or the implications of those views. This failure to inquire makes the mischaracterization of [the juror's] "Christian faith" response all the more indicative of pretext." (at p. 1192.)

*Editor's note: The Ninth Circuit cited to language in ***Snyder*** v. ***Louisiana*** (2008) 552 U.S. 472 [128 S.Ct. 1203, 1212] in support of this proposition but this, ironically, is a misrepresentation of the import of that language.

Third, the Ninth Circuit **rejected** the argument that because the prosecutor also struck a non-African-American juror based on a concern with the juror's religious beliefs, this supported the prosecutor's reason for striking the first African-American juror was genuine. The Ninth Circuit distinguished this other juror on the ground she actually indicated that her religious beliefs would affect her ability to sit as a juror under certain circumstances-i.e., in capital cases. And even though the murder was not a capital trial, "the prosecutor could reasonably have had qualms about a potential juror who admitted that she could not vote in favor of the prosecution in certain circumstances for religious reasons." (at p. 1193.) The Ninth Circuit also observed that the prosecutor asked follow-up questions regarding this juror's religious beliefs, which helped show the prosecutor was not really concerned with the religious beliefs of the first African-American juror since it showed that when the prosecutor was truly concerned with a juror's religious he asked follow-up questions and he did not ask follow-up questions of the first African-American juror. The court noted this conclusion was further supported by the fact that another juror (a Jehovah's Witness) gave, arguably, an even more equivocal answer than the first African-American juror about being able to perform his duties as a juror, was kept on the panel without further follow-up questions being asked. (at pp. 1193.)

6. The Ninth Circuit then went on to evaluate the reasons provided for striking the second African-American juror - not to determine the question of whether this juror was properly challenged, but because "because the weakness of at least two of the prosecutors justifications for challenging [this juror] lends further support to our conclusion that [the first African-American juror's] strike was racially motivated." (at p. 1193, bracketed language added.)

7. The court found the first reason provided (i.e., that the prosecutor feared the juror would "over-intellectualize" the decision-making process) was highly questionable since it was based essentially on the juror's responses to questions that simply reflected the juror would keep an open mind by continuously evaluating the evidence presented. The Ninth Circuit found that this is how jurors are supposed to approach their task, i.e., with open- mindedness, not close-mindedness, and that the prosecutor's characterization of the juror's response as indicative of an unwillingness to have an open mind was dubious.* (at pp. 1193-1194.)

*Editor's note: What is dubious is the Ninth Circuit's claiming the prosecutor was concerned that juror would not have an open mind. The prosecutor gave no such indication - what concerned the prosecutor was that the juror's mind would be so open it could not come to a decision.

8. The court also found the third reason provided (i.e., that the juror exhibited a casual attitude) was "weak." The Ninth Circuit claimed this rationale was so "underdeveloped" that it likely fell short of the "clear and reasonably specific" explanation of legitimate reasons as mandated by ***Batson***. (at pp. 1194.)

The Ninth Circuit recognized that the juror joked with the court on a couple of occasions but said "his lengthy voir dire indicates that he was a thoughtful individual who would have taken the trial seriously" and that any "light-hearted banter" between the juror and the judge was done with the acknowledged encouragement of the trial court. (at pp. 1194-1195.) The Ninth Circuit also observed the prosecutor failed to explain why a casual or lighthearted demeanor would render the juror unfit for jury service and that this concern with lightheartedness seemed to contradict the prosecutor's alleged concern that the juror would "over-intellectualize" the decision-making process. (at p. 1195.)

Editor's note: The Ninth Circuit failed to explain why being lighthearted is inconsistent with "overintellectualizing" and overlooked the fact that the a concern with lightheartedness was consistent with the undisputed reason given by the prosecutor, i.e., that the juror twice responded to questions from the prosecutor with answers that the prosecutor credibly could have viewed as smart ass answers.

9. The fact that the prosecutor peremptorily struck the only other African-American juror in the jury pool and provided at least two implausible reasons for that challenge reinforces the conclusion the first African-

American juror was improperly challenged. (at p. 1196.)

10. The Ninth Circuit did not dispute the genuineness of the second reason or the fourth reason (i.e., that the juror had discussed criminal cases with his brother, whom the prosecutor reasonably but mistakenly believed to be a criminal defense attorney). (at p. 1195 [and noting both were supported by the record].)

NOTE

A copy of a sample bench memo re: ***Batson-Wheeler*** motions is attached. A copy of that memo (entitled: BATSON-WHEELER JUDICIAL OBLIGATIONS BENCH MEMO.07-10) is on the shared drive in the Points and Authorities Directory. Important aspects of the cases discussed in this week's and last week's P&A memo, along with tidbits from other recent case law in the ***Batson-Wheeler*** area will be incorporated into the BATSON-WHEELER OUTLINE also on the shared drive in the Points and Authorities Directory.

NEXT WEEK: WE COVER A PAIR OF CASES FROM THE CALIFORNIA SUPREME COURT ADDRESSING WHETHER A DEFENDANT WHO IS ARRESTED AND INVOLUNTARILY BROUGHT TO JAIL WHILE POSSESSING DRUGS IS EXEMPT FROM THE STATUTE PROHIBITING THE BRINGING OF DRUGS INTO JAIL. PLUS, AN APPELLATE CASE PROVIDING AN EXCELLENT REVIEW OF WHAT INFORMATION IN A PROBATION REPORT (AND WHEN HEARSAY IN GENERAL) WILL BE ADMISSIBLE IN A PROBATION REVOCATION HEARING.

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 --
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Week Of	Topic	Guest	Elim. of Bias
July 26 2010	Our Sort of Annual *Batson-Wheeler* Update: The Most Significant Cases Issued January 2009 - July 2010 (Part II of II) With Recommendations and Additional Commentary By Jerry Coleman (Part II of II)	Jerry Coleman Assistant District Attorney San Francisco County	30 min

Prosecutor's Reasons for Challenging Multiple African-American Jurors Were Not Discriminatory Where Jurors Were Challenged Primarily Because of Their "Neutral Stance" on the Death Penalty

People v. *Lomax* 2010 WL 2606825

Facts: The prosecutor challenged one African-American juror, struck three non-African American jurors, passed on the panel five times before excusing a second African-American juror. Later, the prosecutor used his tenth peremptory challenge to excuse the remaining African-American from the original panel. As the parties exercised their challenges, six additional African-Americans were seated in the jury box. Of these six, the prosecutor struck three. After the fifth African-American juror was challenged, the defendant made a *Wheeler* motion. (at pp. *25-*26.)

The trial judge found a prima facie case "based on the numbers." The prosecutor then gave his reasons for excusing each prospective juror. One of the common reasons provided for removing most of the jurors at issue was that the juror had expressed a neutral philosophical position toward the death penalty and the prosecutor, in general, was seeking the strongest possible jurors for the penalty phase. (at p. *27.) The judge found no systematic exclusion based on race. (at p. *26.) This ruling was challenged post-conviction when the case came before the California Supreme Court. (at p. *26.)

1. At the third stage of the ***Wheeler/Batson*** inquiry, "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." (at p. *26, citing to ***Miller-El v. Cockrell*** (2003) 537 U.S. 322, 339.)

"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 that employs him or her." (at p. *26.)

2. "So long as the trial court makes a sincere and reasoned effort to evaluate the nondiscriminatory justifications offered, its conclusions are entitled to deference on appeal." (at p. *26 citing to ***People* v. *Burgener*** (2003) 29 Cal.4th 833, 864.)

3. The court applied a comparative analysis in deciding whether to uphold the trial court's determination. In general, a comparative juror analysis "compares panelists who were struck with those who were allowed to serve or were passed by the prosecution before being ultimately struck by the defense." (at p. *26, fn. 14.) "If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at ***Batson***'s third step." (at p. *26.)

"[C]omparative juror analysis is but one form of circumstantial evidence that is relevant, but not necessarily dispositive, on the issue of intentional discrimination." (at p. *26.)

4. *On review*, the court's focus is limited to the responses of stricken panelists and seated jurors that have been identified by defendant in his claim of disparate treatment." (at p. *26.)

5. The court rejected the defendant's argument that a prosecution's rejection of a juror based on the juror's expressed "neutrality is tantamount to finding a juror unacceptable because he or she is unbiased." (at p. *27.)

The court pointed out this is a flawed comparison because a juror's decision whether to impose the death penalty has moral and normative underpinnings and a juror's "philosophical position on capital punishment is directly relevant and may factor into penalty phase decisionmaking" whereas the same cannot be said of bias. (at p. *27.)

Moreover, even when jurors have expressed neutrality on the death penalty, "neither the prosecutor nor the trial court [i]s required to take the jurors' answers at face value." If other statements or attitudes of the juror suggest that the juror has "reservations or scruples" about imposing the death penalty, this demonstrated reluctance is a race-neutral reason that can justify a peremptory challenge, even if it would not be sufficient to support a challenge for cause. (at p. *27.)

6. The court rejected the defense argument that the prosecutor's retention of two non-African-American panelists who also checked the questionnaire response stating that they were philosophically neutral on the death penalty showed the prosecution's challenge to the African-American jurors was pretextual. This was because both of these jurors expressed more favorable views toward capital punishment when asked to describe their opinion. Moreover, the jurors could also be considered prosecution oriented for other reasons, i.e., one worked as a fingerprint analyst for the sheriff's department and was married to a police officer and the other was the type of "mature, stable" juror the prosecutor said he was seeking, i.e., the juror was 41 years old, had been married for 22 years, and been very active in community organizations in his hometown. (at p. *27.)

7. The court also rejected the argument that because, during voir dire, the prosecutor asked only one of the excused panelists about his views on the death penalty, the prosecutor was not really concerned about whether the panelists were neutral on the death penalty. (at p. *28.)

The court recognized that "[a] failure to engage in meaningful voir dire on a subject of purported concern can, in some circumstances, be circumstantial evidence suggesting the stated concern is pretextual." (at p. *28.) However, this principle was somewhat inapplicable in the instant case "because the attorneys were not permitted to question prospective jurors directly, but instead had to ask the trial court to inquire into areas of special concern." (at p. *28.)

8. The court also pointed out there were other neutral reasons for excusing the challenged jurors.

9. The evidence showed the prosecutor did not excuse the first African-American juror for impermissible reasons. In addition to expressing neutrality on the death penalty, this juror disclosed that two years ago her nephew was convicted of murder; the juror said she did not know if her nephew had been treated fairly by the police and the court system. (at p. *28 [and noting the arrest of a juror or a close relative is an accepted race-neutral reason for exclusion].)

The court **rejected** the claim two non-African American jurors who also had relatives involved in the criminal justice system (one whose son was a gang member and had been convicted of burglary, a second whose cousin had been convicted of aggravated assault) were similarly situated to this African-American juror because neither burglary nor aggravated assault is as serious as murder, the offense committed by the African-American juror's nephew and charged against defendant, and "[m]ore importantly, despite the criminal convictions of their relatives, these seated jurors expressed strongly prosecution-oriented views." (at p.

*28.)

The juror whose son had been convicted of burglary, expressed contempt for violence and gangs and described negative encounters with gang members and strongly favored the death penalty. The juror whose cousin had been convicted of aggravated assault expressed strong support for the death penalty, had taken courses at the police reserve academy, had applied to work with various law enforcement agencies, planned to pursue a bachelor's degree in criminal justice, had several friends and relatives who worked in law enforcement and wanted to become a police officer herself. (at p. *29.)

The prosecutor had another legitimate reason for excusing this African-American juror. She was dissatisfied with the outcome of two criminal cases in which her family members were murdered as no one had been charged in either case. (at p. *29 [and noting that a "juror's negative experience with the criminal justice system has long been considered a valid basis for exercising a peremptory challenge].) This reason remained valid even though the juror disavowed the response in oral questioning. (at p. *29.)

10. The evidence shows the prosecutor did not excuse the second African-American juror for impermissible reasons. The juror (a paralegal whose father had recently been convicted of driving under the influence of alcohol and had past encounters with the police stemming from domestic violence against the juror's mother), in addition to expressing neutrality on the death penalty, gave several curious questionnaire responses that revealed possible misunderstandings of the law. The juror was very young (24 years old) and "came into court wearing a T-shirt and somewhat sloppily attired," characteristics that were inconsistent with the prosecutor's general preference for having "older, more conservative people" on the jury. (at p. *29 [and noting "a potential juror's youth and apparent immaturity are race-neutral reasons that can support a peremptory challenge].)

Citing to ***Rice*** **v.** ***Collins*** (2006) 546 U.S. 333, 341, the ***Lomax*** court stated "it is not unreasonable for a prosecutor to believe a young person with few ties to the community might be less willing than an older, more permanent resident to impose a substantial penalty." (at p. *29.)

Citing to ***People*** **v.** ***Hamilton*** (2009) 45 Cal.4th 863, 904-905, the ***Lomax*** court observed that "a slovenly appearance can reveal characteristics that are legitimately undesirable to the prosecution. (at p. *29.) ,

The court rejected defendant's argument that the prosecutor's reasons were pretext because another juror who was 28 was not challenged. This juror (described above in this P&A memo at point 9) was not similarly situated since she came from a family of law enforcement officers, aspired to become a police officer

herself, and strongly favored the death penalty. (at p. *29.)

11. The evidence shows the prosecutor did not excuse the third African-American juror for impermissible reasons This juror (in addition to expressing neutrality on the death penalty) had been convicted for receiving stolen property. (at p. *30 [and noting a criminal conviction is a valid, race-neutral reason for the prosecutor to dismiss him from the jury].) Moreover, this juror described several other encounters with crime and law enforcement that made him an undesirable juror from the prosecution's perspective: he had "a lot of friends" who had been arrested and convicted of crimes; had witnessed many crimes, including robberies, drug offenses, thefts and assaults; and was robbed but did not report the crime. (at p. *30.)

12. The evidence shows the prosecutor did not excuse the fourth African-American juror for impermissible reasons. First, the prosecutor passed on a panel containing this juror five times and acceptance of a panel containing African-American prospective jurors "strongly suggests that race was not a motive" in the challenge of an African-American panelist. (at p. *30.) Second, the juror testified as an alibi witness for his brother in a criminal trial for assault. The juror initially claimed not to know the result of the trial but later disclosed that his brother had been convicted and jailed for the offense. Moreover, the juror had testified that his brother was not at the scene of the crime when it was committed and the prosecutor feared the juror may have perjured himself. Finally, this juror's veracity was also called into question by the disclosure that he had been court-martialed and discharged from the Navy for falsifying a reading on his watch station. (at p. *30.)

13. The evidence shows the prosecutor did not excuse the fifth African-American juror for impermissible reasons. First, the juror was neutral on the death penalty. Second, the prosecutor passed with the juror on the panel one time. Third, one of the reasons given by the prosecutor for the challenging the juror was that the persons down the road would be better jurors and this was borne out by the prosecutor's responses to panelists later called. (at p. *31 [and noting "the selection of a jury is a fluid process, with challenges for cause and peremptory strikes continually changing the composition of the jury before it is finally empanelled" and that while a "prosecutor might have initially been willing to accept some panelists with neutral opinions on capital punishment, the changing mix of prospective jurors could legitimately motivate him to strike these neutral panelists in hopes of obtaining upcoming jurors with more favorable death penalty views"].)

14. The evidence shows the prosecutor did not excuse the sixth African-American juror for impermissible reasons.

Although the juror initially expressed neutrality on the death penalty in her questionnaire she later stated she did not understand why people could receive different sentences for the same crime. This comment suggested to the prosecutor that the juror have "some deeper philosophical reservations about the death penalty" than she had revealed in court. Moreover, the juror's ex-boyfriend had been prosecuted for purse snatching, she and others in her home owned guns "for protection," and she had fired a gun or been present when guns were fired as part of a "New Year's tradition." (at p. *31.)

15. The court rejected defendant's request that an analysis be done comparing the challenged African-American panelists with panelists of other races *who were also challenged* by the prosecutor. The court held the relevance of this comparison was questionable. Because the prosecutor used his peremptory challenges to excuse these prospective jurors, in many cases before he used a peremptory to excuse an African-American panelist, such a comparison does not provide evidence that the challenges to African-Americans were motivated by race. "That some panelists of other races may have been even more worthy of a peremptory challenge does not mean that the excused African-American panelists were improperly discharged. The more telling comparison is between 'black venire panelists who were struck and white panelists allowed to serve.'" (at p. *26.)

Prosecutor's Reasons for Striking One of Two African-American Jurors Held Pretextual in Light of, Among Other Things, Prosecutor's Mischaracterization of Juror's Responses, Failure to Strike Non-African-American Jurors Providing Similar Responses, and Giving Some Dubious Reasons for Striking the Other African-American Juror

Ali v. *Hickman* (9th Cir. 2009) 584 F.3d 1174

Facts: During jury selection, the prosecutor peremptorily struck the only two African-American members of the jury pool. The defense counsel made a ***Batson-Wheeler*** objections after each juror was struck but the trial court did not require a hearing on the objection until after the second objection. (at pp. 1176-1177.)

The prosecutor provided three reasons for striking the first African-American juror. First, the prosecutor expressed a concern that the juror had some involvement in the criminal justice system as a result of the molestation of one child by another child. The prosecutor acknowledged the juror stated that would not affect her judgment but then pointed out, "Her words were that she doesn't think it will affect her judgment in this case. She did not say it won't. She said she doesn't think on that. It did involve family

members within the system." (at p. 1177.) Second, the prosecutor was worried about the juror being very emphatic about how she expected attorneys to conduct themselves in the courtroom, i.e., the juror said "that if it was anything less than professional and respectfully done that that would affect her." The prosecutor indicated that at times the attorneys may have to take an aggressive approach at time and the juror's demeanor and response concerned him. (at p. 1177.) Third, the prosecutor said the juror hesitated in responding to the question regarding "what she felt in terms of sitting in judgment of others and then said, "yes, that could be a problem for her, sitting in judgment of others, because she was thinking of her Christian faith." The prosecutor said that after further exploratory questioning by the defense, the juror said she thought she could judge facts and that type of matter without crossing her religious tenets. However, the prosecutor remained concerned over her hesitancy. (at pp. 1177-1178.)

The prosecutor also provided several reasons for challenging the second African-American juror. First, the prosecutor said he had some concern about the juror's responses to a line of questioning pursued by defense counsel indicating the juror would change his mind and make decisions as he went along. The prosecutor said he was concerned that the juror would over-intellectualize the case. (at p. 1178.) Second, the prosecutor said he was offended by a "smartass answer" provided by the juror when the prosecutor asked "Is there anything else that you could think of that would cause you not to be fair and impartial? The juror answered, "I haven't done anything yet," a comment immediately provoking a barrel of laughter throughout the courtroom. (at p. 1178.) Third, the prosecutor did not appreciate that when the juror spoke with the judge about a hardship request, he engaged in lighthearted banter that the prosecutor thought reflected a casualness atypical of jurors. (at pp. 1178-1179.)

The trial judge then denied the ***Batson-Wheeler*** challenge without engaging in any comparative analysis. (at p. 1179.) After the defendant was convicted, a claim was raised in the state appellate court the denial of the challenge was erroneous. This claim was denied (albeit the appellate court did not engage in comparative analysis). The California Supreme Court denied review and a later state habeas petition. The defendant then filed a habeas petition in federal district court. After engaging in a comparative analysis, the district court denied the petition finding that while the analysis revealed "some minor faults in the prosecutor's reasoning," the faults did not demonstrate racial bias or pretext and that the "prosecution's race-neutral justifications were sufficiently credible, clear, and reasonably specific." (at p. 1180.) Nevertheless, with unbridled enthusiasm for uncovering the hidden discriminatory motives (that somehow slipped past all the previous courts) lurking behind the apparently nondiscriminatory reasons provided by the prosecutor, a panel of the

Ninth Circuit granted review of the district court's denial of the federal habeas petition. (at p. 1180.)

1. The Ninth Circuit held that each of the prosecutor's justifications for striking the first juror was "logically implausible, undermined by a comparative juror analysis, and otherwise unsupported by the record." (at p. 1182.)

2. The court found the prosecutor's assertion that he excused the first juror because she initially hesitated when responding to the court's inquiry about the effect of the molestation incident on her ability to judge defendant's case was a "makeweight" for several reasons.

First, any bias arising from the incident would logically tend to favor the prosecution, not the defense since the victim was like the juror's daughter, a young woman and the victim of a domestic assault. **(Editor's note**: The juror's daughter was a 14 and the victim of an attempted child molestation by a step-child of the juror. Defendant's victim was a 20-year old murdered by her boyfriend.) The juror's answers reflected a focused "entirely on the effect that the incident had on her daughter" and a distancing of herself from the perpetrator - whom she never described as her son or her step-son. The juror lived with her daughter and had only a few months contact with the perpetrator. The Ninth Circuit angrily rejected the state's argument that the prosecutor could believe the juror would feel sympathetic toward the defendant. The state argued that this sympathy was reflected in the juror's belief that the light sentence the juror's step-son received for molestation seemed fair to the juror and the fact the juror "minimized" the molestation by referring to it as an attempted molestation. The Ninth Circuit never addressed the first aspect of the state's argument but held no minimization occurred since attempted molestation is a serious crime and there was no evidence an actual molestation had taken place. The Ninth Circuit also took the state to task for suggesting that the prosecutor's concern that the juror might feel sympathy for the defendant because of the molestation incident was shown by the prosecutor asking whether the juror would feel any sympathy for the defendant because she had a son the same age as the defendant. The Ninth Circuit pointed out this question was in reference to the juror's *other* biological son. (at p. 1182-1185.)

Second, the prosecutor actually *favored* jurors who had been the victims of domestic abuse or who had friends who had been victims of such abuse, even if the juror indicated that his or her experiences might affect his or her objectivity. The Ninth Circuit pointed to two jurors who were retained by the prosecution notwithstanding being involved in incidents of domestic violence. One of these jurors described an incident where she was shoved into a stove while trying to prevent her drunk husband from physically abusing their

15-year old son. The Ninth Circuit characterized this juror as being herself a direct victim of domestic violence but also as someone who indicated the behavior could be partially excused due to her husband being under the influence of alcohol or drugs. The Ninth Circuit believed this significant because evidence at trial showed that defendant was a chronic drug user and had been using drugs and alcohol on the days preceding his murder of the victim. The Ninth Circuit also believed this juror's answer and the answer provided by the first African-American juror were comparable when it came to how they would be affected by the incident, but the prosecutor kept the former and challenged the latter. The Ninth Circuit also held that the fact that prosecutor allowed another juror to remain on the jury whose answers suggested she might be affected by domestic violence undermined the prosecutor's claim he was concerned with leaving on juror's with past experiences with domestic violence.

Editor's note. This juror was not a direct victim of domestic violence but said "her ***friend***'s experiences with sexual abuse by men will make me biased against any man who may have assaulted or murdered a woman" and gave equivocal answers that suggested she would be biased ***against*** the defendant. (at pp. 1185-1187.)

The Ninth Circuit **rejected** the argument that, because the prosecutor also challenged a juror who described an incident involving the molestation by the juror's eight-year old son of his two-year old daughter, the prosecutor was consistent in challenging jurors in a similar situation to the first African-American juror. The Ninth Circuit observed the removal of this juror "only confirms that the prosecutor was concerned with the *direction* of a juror's bias, not with objectivity" since this juror's response showed he was focused on his son rather than his daughter - who the juror suggested would not be affected by the incident. Moreover, the Ninth Circuit suggested there was evidence this juror would be biased in favor of the defense because when asked if he could give the prosecution a fair shake, he said he *thought* he could but when asked the same question regarding the defense, he said he was *certain* he could. (at pp. 1187.)

Third, the Ninth Circuit held the fact the prosecutor failed to ask follow-up questions in order to clear up any lingering doubt about the first African-American's objectivity also shows this justification was a makeweight, especially considering the prosecutor *did* ask a follow-up question on potential bias during the voir dire of the other juror discussed a molestation incident involving family members. (at pp. 1187-1188.)

Fourth, although the first African-American juror was equivocal hesitated in her initial response to a very general question about the effect the molestation incident might have on her judgment as a juror, she later unequivocally stated it would not have an effect, yet other jurors were retained who remained somewhat equivocal when asked if they could remain "objective." (at p. 1189.)

3. The Ninth Circuit found that the second reason provided by the prosecutor (i.e., that the juror was excused because she indicated that "anything less than professional and respectful[ ]" conduct on the part of the attorneys might affect her view of the case and because the prosecutor was concerned that she would react negatively to aggressive cross-examination) for excusing the first African-American juror was not genuine and that the California courts unreasonably accepted it as non-racially motivated. The Ninth Circuit provided several grounds for its conclusion. (at p. 1191.)

First, the juror simply expressed reasonable expectations concerning attorney behavior. She did not say, as the prosecutor claimed, that unprofessional conduct or aggressive cross-examination would "affect her judgment." Rather, she said the opposite-that she would not penalize the attorneys for aggressively advocating on behalf of their clients (at p. 1190 [and stating that the prosecutor's mischaracterization of the testimony is evidence of discriminatory pretext].) Second, the prosecutor did not challenge a juror who also stated that he expected professional behavior from the attorneys. Moreover, the jurors' expectations were reasonable and "were fully consistent with the prosecutor's own views about the level of professionalism that the lawyers would maintain during the trial. (at p. 1191.)

Editor's note: The *Hickman* court took the prosecutor's inaccurate characterization of what a juror said as evidence of pretext. However, as noted in ***People*** **v.** ***Taylor*** (2009) 47 Cal.4th 850, the fact that some reasons are not well supported by the record does not mean a challenge to the juror was motivated by race. (**Id.** at p. 896.) "While an attorney who offers unsupported explanations for excusing a prospective juror may be trying to cover for the fact his or her real motivation is discriminatory, alternatively this may reflect nothing more than a misguided sense that more reasons must be better than fewer or simply a failure of accurate recollection." (**Ibid.**) Nevertheless, considering that reviewing courts (or at least the Ninth Circuit) may interpret a misrecollection of what was said by a juror as evidence supporting a claim the prosecutor had an improper motive (**see e.g.,** ***Cook*** **v.** ***LaMarque*** (9th Cir. 2010) 593 F.3d 810, 818), it is **recommended** that if a prosecutor does not have a very accurate recollection of juror responses to questions that are being used to justify a challenge, the prosecutor ask for readback or, better yet, that a transcript be provided of, at least, the answers given by the challenged juror, if not all the jurors whose responses would be useful in conducting a comparative analysis. (**See** ***Lewis v. Lewis*** (9th Cir. 2003) 321 F.3d 824 [suggesting that counsel can be particularly helpful in assisting the court at the third step of *Batson* "when afforded the opportunity to review a transcript of the jury selection proceedings"].)

5. The Ninth Circuit found the third reason for striking the first African-American juror (i.e., that she might have trouble "sitting in judgment of others" due to "her Christian faith") was also pretextual. The Ninth Circuit provided several grounds for its conclusion.

First, the prosecutor mischaracterized what the juror said. (at p. 1192.) When the asked by defense counsel if there was "[a]nything about your spiritual training or spiritual practice that will prevent you from judging other people if you're chosen to be a juror," the juror actually said, "No." When the defense counsel followed up with a question asking why the juror had to think about her answer for a second, she replied that "judging" someone as far as her Christian faith was concerned would be making a decision based on no information or just arbitrarily. The juror distinguished that from the kind of judging she would be asked to do in the criminal case which would require her to make a decision based on the evidence that has been presented, and taking that into consideration. (at pp. 1191.)

Second, the Ninth Circuit pointed to the fact that the other two reasons provided were pretextual and that "raises an inference that this final rationale is also a make-weight." (at p. 1192.)* When the prosecutor questioned the first African-American juror, "he did not ask a single question about her religious views or the implications of those views. This failure to inquire makes the mischaracterization of [the juror's] 'Christian faith' response all the more indicative of pretext." (at p. 1192.)

*Editor's note: The Ninth Circuit cited to language in ***Snyder*** **v.** ***Louisiana*** (2008) 552 U.S. 472 [128 S.Ct. 1203, 1212] in support of this proposition but this, ironically, is a misrepresentation of the import of that language.

Third, the Ninth Circuit **rejected** the argument that because the prosecutor also struck a non-African-American juror based on a concern with the juror's religious beliefs, this supported the prosecutor's reason for striking the first African-American juror was genuine. The Ninth Circuit distinguished this other juror on the ground she actually indicated that her religious beliefs would affect her ability to sit as a juror under certain circumstances-i.e., in capital cases. And even though the murder was not a capital trial, "the prosecutor could reasonably have had qualms about a potential juror who admitted that she could not vote in favor of the prosecution in certain circumstances for religious reasons." (at p. 1193.) The Ninth Circuit also observed that the prosecutor asked follow-up questions regarding this juror's religious beliefs, which helped show the prosecutor was not really concerned with the religious beliefs of the first African-American juror since it showed that when the prosecutor was truly concerned with a juror's religious he asked follow-up questions and he did not ask follow-up questions of the first African-American juror. The court noted this conclusion was further supported by the fact that another juror (a Jehovah's Witness) gave, arguably, an even more equivocal answer than the first African-American juror about being able to perform his duties as a juror, was kept on the panel without further follow-up questions being asked. (at pp. 1193.)

6. The Ninth Circuit then went on to evaluate the reasons provided for striking the second African-American juror - not to determine the question of whether this juror was properly challenged, but because "because the weakness of at least two of the prosecutors justifications for challenging [this juror] lends further support to our conclusion that [the first African-American juror's] strike was racially motivated." (at p. 1193, bracketed language added.)

7. The court found the first reason provided (i.e., that the prosecutor feared the juror would "over-intellectualize" the decision-making process) was highly questionable since it was based essentially on the juror's responses to questions that simply reflected the juror would keep an open mind by continuously evaluating the evidence presented. The Ninth Circuit found that this is how jurors are supposed to approach their task, i.e., with open- mindedness, not close-mindedness, and that the prosecutor's characterization of the juror's response as indicative of an unwillingness to have an open mind was dubious.* (at pp. 1193-1194.)

*Editor's note: What is dubious is the Ninth Circuit's claiming the prosecutor was concerned that juror would not have an open mind. The prosecutor gave no such indication - what concerned the prosecutor was that the juror's mind would be so open it could not come to a decision.

8. The court also found the third reason provided (i.e., that the juror exhibited a casual attitude) was "weak." The Ninth Circuit claimed this rationale was so "underdeveloped" that it likely fell short of the "clear and reasonably specific" explanation of legitimate reasons as mandated by ***Batson***. (at pp. 1194.)

The Ninth Circuit recognized that the juror joked with the court on a couple of occasions but said "his lengthy voir dire indicates that he was a thoughtful individual who would have taken the trial seriously" and that any "light-hearted banter" between the juror and the judge was done with the acknowledged encouragement of the trial court. (at pp. 1194-1195.) The Ninth Circuit also observed the prosecutor failed to explain why a casual or lighthearted demeanor would render the juror unfit for jury service and that this concern with lightheartedness seemed to contradict the prosecutor's alleged concern that the juror would "over-intellectualize" the decision-making process. (at p. 1195.)

Editor's note: The Ninth Circuit failed to explain why being lighthearted is inconsistent with "overintellectualizing" and overlooked the fact that the a concern with lightheartedness was consistent with the undisputed reason given by the prosecutor, i.e., that the juror twice responded to questions from the prosecutor with answers that the prosecutor credibly could have viewed as smart ass answers.

9. The fact that the prosecutor peremptorily struck the only other African-American juror in the jury pool and provided at least two implausible reasons for that challenge reinforces the conclusion the first African-

American juror was improperly challenged. (at p. 1196.)

10. The Ninth Circuit did not dispute the genuineness of the second reason or the fourth reason (i.e., that the juror had discussed criminal cases with his brother, whom the prosecutor reasonably but mistakenly believed to be a criminal defense attorney). (at p. 1195 [and noting both were supported by the record].)

NOTE

A copy of a sample bench memo re: ***Batson-Wheeler*** motions is attached. A copy of that memo (entitled: BATSON-WHEELER JUDICIAL OBLIGATIONS BENCH MEMO.07-10) is on the shared drive in the Points and Authorities Directory. Important aspects of the cases discussed in this week's and last week's P&A memo, along with tidbits from other recent case law in the ***Batson-Wheeler*** area will be incorporated into the BATSON-WHEELER OUTLINE also on the shared drive in the Points and Authorities Directory.

NEXT WEEK: WE COVER A PAIR OF CASES FROM THE CALIFORNIA SUPREME COURT ADDRESSING WHETHER A DEFENDANT WHO IS ARRESTED AND INVOLUNTARILY BROUGHT TO JAIL WHILE POSSESSING DRUGS IS EXEMPT FROM THE STATUTE PROHIBITING THE BRINGING OF DRUGS INTO JAIL. PLUS, AN APPELLATE CASE PROVIDING AN EXCELLENT REVIEW OF WHAT INFORMATION IN A PROBATION REPORT (AND WHEN HEARSAY IN GENERAL) WILL BE ADMISSIBLE IN A PROBATION REVOCATION HEARING.

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	Elim. of Bias
Jan. 7 2013	*Batson-Wheeler* Update - Part I of II: Handling Motions Alleging Discriminatory Use of Peremptory Challenges	Jerry Coleman, ADA San Francisco District Attorney's Office	30 min

This week's P&A video is the first part of a two-part series on new ***Batson-Wheeler*** cases, albeit with some review of the general principles so that the new cases may be placed in context.

Accompanying this week's video is a copy of a bench memo, incorporating many of the new cases, that may be filed with the court pre-trial or be used as a quick guide to the area.

Next week, the memo will be a lengthy full-blown outline that covers all aspects of handling motions alleging discriminatory use of peremptory challenges and incorporates all of the new case law that issued since P&A last covered the topic in 2010.

NEXT WEEK: PART TWO OF OUR UPDATE ON *BATSON-WHEELER* ISSUES.

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 Gilbert Leung at (510) 272-6327. Participatory students: MCLE Evaluation sheets are available on location and certificates of attendance are constructively maintained in your possession in the Ala. Co. Dist.Atty computer banks.

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Date:

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

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

BENCH MEMORANDUM RE: *BATSON-WHEELER* MOTIONS

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

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

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

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

II.
BATSON-WHEELER PROCEDURE IN A NUTSHELL

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

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

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

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

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

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

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

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

A. First Step (The Prima Facie Case)

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