In such circumstances, the reviewing court will **not** be able to speculate on whether there existed "additional reasons" for challenging the juror that were not stated by the prosecution or relied upon by the court. (**See *People* v. *Thomas*** (2011) 51 Cal.4th 449, 474 ["the pertinent question is not whether, in the abstract, there were valid reasons the prosecutor might have relied upon in exercising the peremptory challenge, but whether the prosecutor actually relied upon a nondiscriminatory reason"]; ***People* v. *Jones*** (2011) 51 Cal.4th 346, 365 ["We agree with defendant that in judging why a prosecutor exercised a particular challenge, the trial court and reviewing court must examine only the reasons actually given"]; **see also *Miller El v. Dretke*** (2005) 545 U.S. 231, 252 ["If the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false"]; ***Gonzalez* v. *Brown*** (9th Cir. 2009) 585 F.3d 1202, 1207 [reviewing court will not speculate on reasons challenge may be justified]; ***Williams* v. *Runnels*** (9th Cir. 2006) 432 F.3d 1102, 1106-1110 [same, but in context of reviewing a trial judge's finding of no prima facie showing].)

However, if a prosecutor does not provide reasons (for purposes of doing a later comparative analysis) explaining why other jurors were kept or not kept, the appellate court may properly speculate regarding why a prosecutor may have kept one juror and not another. As pointed out in ***People* v. *Jones*** (2011) 51 Cal.4th 346, "no authority has imposed the additional burden of anticipating all possible unmade claims of comparative juror analysis and explaining why other jurors were not challenged. One of the problems of comparative juror analysis not raised at trial is that the prosecutor generally has not provided, and was not asked to provide, an explanation for nonchallenges. When asked to engage in comparative juror analysis for the first time on appeal, a reviewing court need not, indeed, must not turn a blind eye to reasons the record discloses for not challenging other jurors even if those other jurors are similar in some respects to excused jurors." (Id. at pp. 365-366.)

3. No prima facie case - prosecutor asked to place reasons on record "for review," but the trial court does not rely on those reasons

Sometimes a court will ask the prosecutor to put his or her reasons on the record simply for appellate purposes and not because the court is seeking to rely on those reasons in finding no prima facie case was made. (**See e.g., *People* v. *Clark*** (2012) 52 Cal.4th 856, 908, fn. 13; ***People* v. *Taylor*** (2010) 48 Cal.4th 574, 614; ***People* v. *Welch*** (1999) 20 Cal.4th 701, 746.) Where a "trial court states that it does not believe a prima facie case has been made, and then invites the prosecution to justify its challenges ***for purposes of completing the record on appeal***, the question whether a prima facie case has been made is ***not*** mooted, ***nor*** is a finding of a prima facie showing implied. (***People* v. *Welch*** (1999) 20 Cal.4th 701, 746, citing to ***People* v. *Turner*** (1994) 8 Cal.4th 137, 167, emphasis added.) In that scenario, the reviewing court ***will*** consider whether a prima facie case was made out. (**See *People* v. *Taylor*** (2010) 48 Cal.4th 574, 614; ***People* v. *Welch*** (1999) 20 Cal.4th 701, 746.)

"When the trial court under these circumstances rules that no prima facie case has been made, the reviewing court will consider the entire record of voir dire and uphold the trial court's ruling if the record "suggests grounds upon which the prosecutor might reasonably have challenged" the jurors in question. (***People*** **v.** ***Welch*** (1999) 20 Cal.4th 701, 746, citing to ***People*** **v.** ***Davenport*** (1995) 11 Cal.4th 1171, 1200.) Moreover, in that circumstance, that the trial court is not required to make a "sincere and reasoned effort to evaluate" the genuineness of the prosecutor's explanations for his peremptory challenges. (***People*** **v.** ***Clark*** (2012) 52 Cal.4th 856, 908, fn. 13.)

B. Can Comparative Analysis Be Done for the First Time on Appeal?

Appellate courts are now required to conduct a comparative analysis in evaluating ***Batson-Wheeler*** claims that ***went through the three-step process*** even though the attorney challenging the removal of a juror did not rely on a comparative to argue the removal was improper in the trial court. (**See** ***People*** **v.** ***Lenix*** (2008) 44 Cal.4th 602, 622.)

However, while a reviewing court may consider "the comparisons of prospective jurors challenged and unchallenged" even though few if any of these comparisons are made in the trial court, the reviewing court must remain "mindful that comparative juror analysis on a cold appellate record has inherent limitations." (***People*** **v.** ***Booker*** (2011) 51 Cal.4th 141, 165-166; ***People*** **v.** ***Taylor*** (2009) 47 Cal.4th 850, 886.) 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..." (***People*** **v.** ***Lenix*** (2008) 44 Cal.4th 602, 626-627.)

In addition to recognizing the "difficulty of assessing tone, expression and gesture from the written transcript of voir dire," a reviewing court must "attempt to keep in mind the fluid character of the jury selection process and the complexity of the balance involved. 'Two panelists might give a similar answer on a given point. Yet the risk posed by one panelist might be offset by other answers, behavior, attitudes or experiences that make one juror, on balance, more or less desirable. 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.'" (***People*** **v.** ***Booker*** (2011) 51 Cal.4th 141, 165-166; ***People*** **v.** ***Taylor*** (2009) 47 Cal.4th 850, 886; ***People*** **v.** ***Lenix*** (2008) 44 Cal.4th 602, 624.)

Even though a comparative analysis can be done for the first time 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. (***People*** **v.** ***Lenix*** (2008) 44 Cal.4th 602, 624.) Moreover, 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." (***Lenix*** at p. 624)

Comparative juror analysis is a form of circumstantial evidence. (**Id.** at p. 622.) 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." (***People*** **v.** ***Lenix*** (2008) 44 Cal.4th 602, 627-628.)

Moreover, it should be kept in mind that while the High Court relied on comparative juror analysis as part of its reasons for not deferring to the lower courts in both ***Snyder*** **v.** ***Louisiana*** (2008) 552 U.S. 472S and ***Miller El*** **v.** ***Dretke*** (2005) 545 U.S. 231, "in neither case was that analysis the sole reason for its conclusion that the challenges in question were racially motivated. The comparative juror analysis in both cases merely supplemented other strong evidence that the challenges were improper." (***People*** **v.** ***Jones*** (2011) 51 Cal.4th 346, 364, fn. 2.)

A <u>different rule exists</u> when it comes to assessing whether a trial judge properly declined to find a prima facie case. The California Supreme Court has repeatedly rejected the use of comparative analysis for the first time on appeal when deciding whether a trial judge properly declined to find a prima facie case (**See** ***People*** **v.** ***Clark*** (2012) 52 Cal.4th 856, 903-908; ***People*** **v.** ***Taylor*** (2010) 48 Cal.4th 574, 644, fn. 20.) The United States Supreme Court has never approved use of comparative analysis in that situation, albeit the Ninth Circuit has

California courts have, however, conducted the *affirmative* form of comparative analysis for the first time on appeal in deciding to uphold a trial court's decision that no prima facie case was met, i.e., by comparing removed jurors of different cognizable classes against each other to see if they shared neutral characteristics that would render them unfavorable jurors for the prosecution.

C. Great Deference to, But Not Abdication of, Responsibility to Review, Trial Court's Findings

On appeal, when it comes to whether a prosecutor exercised his or her peremptory challenge in a discriminatory manner, determinations of credibility and demeanor lie "peculiarly within a trial judge's province", and "in the absence of exceptional circumstances," the trial court's determination is entitled to deference. (***Snyder*** **v.** ***Louisiana*** (2008) 552 U.S. 472, 477; **see also** ***Felkner*** **v.** ***Jackson*** (2011) 131 S.Ct.

1305, 1307,366 ["[t]he trial court's determination is entitled to 'great deference,' ibid., and 'must be sustained unless it is clearly erroneous[.]'"] This deference stems from the fact that "the trial judge is in the best position to evaluate the credibility of the prosecutor's proffered justifications[.]" (***Jamerson*** **v.** ***Runnels*** (9th Cir. 2013) 713 F.3d 1218, 1224; ***Briggs*** **v.** ***Grounds*** (9th Cir. 2011) 682 F.3d 1165. 1171.)

A reviewing court only looks at whether substantial evidence supports the trial court's denial of a ***Batson/Wheeler*** motion. (***People v. Mills*** (2010) 48 Cal.4th 158, 176, ***People*** **v.** ***Lenix*** (2008) 44 Cal.4th 602, 613.)

It is presumed that a prosecutor used the peremptory challenges in a constitutional manner and "great deference" is given to the trial court's ability to distinguish bona fide reasons from sham excuses." (***People*** **v.** ***Booker*** (2011) 51 Cal.4th 141, 165; ***People*** **v.** ***Taylor*** (2009) 47 Cal.4th 850, 886; ***People v. Lenix*** (2008) 44 Cal.4th 602, 613.) The trial court's determination regarding the sufficiency of a prosecutor's justifications for exercising peremptory challenges is reviewed "with great restraint." (**Ibid.**) "

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.)

And when a prosecutor provides two reasons, one demeanor and one nondemeanor, but the reviewing court determines the nondemeanor reason (i.e., the only reason a reviewing court can evaluate) is pretextual, a reviewing court should not uphold the challenge solely because the prosecutor also gave a demeanor reason, at least not when the trial court does not specifically cite that demeanor in its ruling. (**See** ***People*** **v.** ***Jones*** (2011) 51 Cal.4th 346, 363 [discussing ***Snyder*** **v.** ***Louisiana*** (2008) 552 U.S. 472].)

For example, in ***Snyder*** **v.** ***Louisiana*** (2008) 552 U.S. 472, a case in which the prosecutor challenged five out of five African-American jurors, the trial court denied a challenge that the prosecutor was acting in a discriminatory manner where the prosecutor gave two purportedly neutral reasons for challenging one of the jurors: (i) that the juror appeared nervous during voir dire questioning and (ii) out of a concern that the panelist might have been motivated to find the defendant guilty of a lesser included offense, thus obviating the need for a penalty phase proceeding, based on the juror stating that he was a student teacher and would miss class if he served on the jury. Without explanation, the trial court said it was going to allow the

challenge of the juror. The trial and penalty phases concluded two days after the panelist was struck. (**Id.** at pp. 478-479.) The United States Supreme Court, while recognizing that "deference is especially appropriate where a trial judge has made a finding that an attorney credibly relied on demeanor in exercising a strike," court found no such deference was due. As to the first reason (i.e., the prosecutor's explanation of nervousness), the court refused to give deference to the determination because the trial court simply allowed the challenge without explanation. As to the second reason (the fact the juror had a student-teaching obligation, the court rejected any deference because (i) the juror told the court that he got clearance to miss a week of work and the trial and penalty phase only lasted a few days, and (ii) the prosecutor accepted white jurors who disclosed conflicting obligations that appear to have been at least as serious and each juror's concern about serving on the jury due to conflicting obligations, was *thoroughly explored* by the trial court when the relevant jurors asked to be excused for cause. (**Id.** at pp. 480-485 [albeit recognizing that, in general, "a retrospective comparison of jurors based on a cold appellate record may be very misleading when alleged similarities were not raised at trial].)

D. *Alleged Batson-Wheeler* Violations Involving Prospective Alternate Jurors Who Do Not Sit on the Final Jury

A defendant cannot complain on appeal of a ***Batson/Wheeler*** violation as to alternate jurors who never serve on the final jury. (***People v. Roldan*** (2005) 35 Cal.4th 646, 703 [and noting any violation could not possibly have prejudiced the defendant].)

XII. Federal Habeas Review

As pointed out by the United States Supreme Court in ***Felkner*** v. ***Jackson*** (2011) 131 S.Ct. 1305: "On federal habeas review AEDPA imposes a highly deferential standard for evaluating state-court rulings and demands that state-court decisions be given the benefit of the doubt." (**Id.** at p. 1307, citing to ***Renico*** v. ***Lett*** (2010) 130 S.Ct. 1855, 1862.) A federal habeas court can only grant a habeas petition based on a third-stage ***Batson*** claim, "if it was unreasonable to credit the prosecutor's race-neutral explanations for the ***Batson*** challenge. State-court factual findings, moreover, are presumed correct; the petitioner has the burden of rebutting the presumption by 'clear and convincing evidence.'" (***Rice*** **v.** ***Collins*** (2006) 546 U.S. 333, 338-339 quoting ***Miller-El*** **v.** ***Dretke*** (2005) 545 U.S. 231, 240.) "When it comes to a federal habeas petition based on a claim that the prosecutor exercised his peremptory challenges in a discriminatory manner, even greater deference is due." (***Briggs*** **v.** ***Grounds*** (9th Cir. 2011) 682 F.3d 1165, 1171; **see also** ***Aleman v. Uribe*** (9th Cir. 2013) 2013 WL 3619980, *3-*4 ["double deferential" standard of review is applied to the question of whether a state court "violates a defendant's constitutional rights by denying a ***Batson*** motion" because a "level of deference arises from the broad power of a trial court to assess credibility of the prosecutor's statements that were made in open court"; and because when a federal court reviews a state court decision by way of a

habeas writ under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) it must defer to state court decisions that are not objectively unreasonable].)

Where the state court conducted comparative analysis and determined that the prosecutor did not exercise her peremptory challenges in a discriminatory manner, AEDPA deference applies and a federal court need not undertake comparative analysis de novo. (***Briggs*** **v.** ***Grounds*** (9th Cir. 2011) 682 F.3d 1165, 1171, fn. 6 [and applying this rule where the state court did not give detailed reasons, but did give some specific reasons why the comparative analysis failed to show purposeful discrimination at step three].)

Application of this standard was well-illustrated in ***Felkner*** **v.** ***Jackson*** (2011) 131 S.Ct. 1305. In ***Felkner***, the prosecutor excused two African-American jurors: one was excused based on the juror's belief that he was frequently stopped by police from the ages of 16 to 30 years old based on his race and age; the other was excused because she had master's degree in social work, and had interned at the county jail, probably in the psych unit as a sociologist of some sort. (**Id.** at p. 1306.) The trial court found these reasons were race-neutral, rejecting the defense argument that other non-African-American jurors who were not challenged were similarly situated (**see** this outline, section at p. VII-H-3-b, at p. 95. The appellate court reviewed the record at length and upheld the conviction. The Ninth Circuit Court of Appeals offered the following one sentence explanation for granting the defendant's habeas petition: "The prosecutor's proffered race-neutral bases for peremptorily striking the two African-American jurors were not sufficient to counter the evidence of purposeful discrimination in light of the fact that two out of three prospective African-American jurors were stricken, and the record reflected different treatment of comparably situated jurors." (**Id.** at p. 1307.) In reversing the Ninth Circuit, the High Court characterized the Ninth Circuit decision "as inexplicable as it is unexplained" and stated: "The state appellate court's decision was plainly not unreasonable. There was simply no basis for the Ninth Circuit to reach the opposite conclusion, particularly in such a dismissive manner." (**Id.** at p. 1307.)

A timely objection to the prosecutor's use of peremptory challenges is a prerequisite to a ***Batson*** challenge on a habeas petition under the AEDPA. (***Haney*** **v.** ***Adams*** (9th Cir. 2011) 641 F.3d 1168, 1173.)

If, on review, the state appellate record does not disclose the race or ethnicity of the jurors and the federal court is doing a comparative analysis for the first time, the federal court may consider "enlarged driver's license photographs" of the jurors that the defendant submitted to show the race of each venire member. (***Jamerson*** **v.** ***Runnels*** (9th Cir. 2013) 713 F.3d 1218, 1227.)

XIII. *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, often where the state court used the improper standard for finding a prima facie case. 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. (**See e.g.**, ***Johnson v. Finn*** (9th Cir. 2012) 665 F.3d 1063, 1068.) 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) 463 F.3d 893.)

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) 463 F.3d 893, 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 author.) 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 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 author.)

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.)

D. Federal Magistrate's Finding on Credibility of Prosecutor May Not Be Reversed by Federal District Court Without Holding Evidentiary Hearing in District Court Where Prosecutor Testifies

In ***Johnson*** v. ***Finn*** (9th Cir. 2012) 665 F.3d 1063, the Ninth Circuit held that where a magistrate judge is evaluating the prosecutor's credibility as to reasons for challenging a juror at a remand hearing, the district judge is required to hold a new evidentiary hearing in order to reject the credibility determination of the magistrate judge. (**Id.** at p. 1075.)

NOTE: THIS OUTLINE OWES ITS GENESIS TO, AND DERIVED MUCH OF ITS MATERIAL FROM, ADA JERRY COLEMAN'S "MR. WHEELER GOES TO WASHINGTON: THE FULL FEDERALIZATION OF JURY CHALLENGE PRACTICE IN CALIFORNIA [CDAA'S PROSECUTOR'S NOTEBOOK VOL. XXXIII]. IF THERE ARE ANY MISTAKES, IT'S THEORETICALLY POSSIBLE COLEMAN IS RESPONSIBLE, BUT IT'S ABOUT TEN TIMES MORE LIKELY THAT RUBIN IS TO BLAME.

-END-

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	Guests (Dooley)	Elim. of Bias
April 27 2015	Three cases on *Wheeler/Batson*: 1) Peo. v. Cisneros; 2) Castellanos v. Small; 3) People v. Singh	Jerry Coleman	30 min

This week's P&A covers three recent cases on *Wheeler- Batson.*[1]

I. *People v. Cisneros* (2015) 234 Cal.App.4th 111

Can you justify your peremptory challenge by stating only that you prefer the next prospective juror? No. You must *also* articulate reasons why you excused the challenged juror.

A. Facts of Case

1. The defendant was charged two counts of making a criminal threat; failure to register as a sex offender; and one count of sexual intercourse with a minor. As to one threat counts, it was alleged that he personally used a deadly or dangerous weapon. (*Cisneros*, *supra*, 234 Cal.App.4th at p. 114.)

2. Pitts met defendant when she was 17 years old and he was 36 years old. They had sex four days after they met. In an incident occurring in May 2011, defendant and Pitts were living together with their infant son. Pitts and the defendant were in the midst of an argument when her sister phoned. When Pitts told her sister about the argument, the defendant became enraged, took out a butcher knife and told Pitts he was going to kill her. He was standing about six feet away and made thrusting movements with the knife toward her stomach. When the defendant turned his back, Pitts took the infant, ran from the house, and called 911. Two officers met with her in a parking lot. She was crying and told them what had happened. Defendant was arrested. However, Pitts did not return telephone calls from law enforcement. When the detective assigned to the case and the prosecutor were finally able to reach Pitts by phone, she told them her initial report had been fabricated, and the district attorney's office did not file charges. (*Id.* at pp. 114-115.)

3. In October 2011, Pitts went to the police station carrying the child and crying hysterically. She told the officer at the front desk that she just received a telephone call from the defendant in which

[1] This P&A provides 30 minutes of MCLE credit for Elimination of Bias

he threatened to kill her. The detective who had investigated the May incident interviewed Pitts. Pitts told him that that her earlier report of the May incident was correct, but she had recanted because she was afraid. (*Id.* at p. 115-116.)

4. At trial, Pitts was unavailable to testify and the court permitted her testimony to be read to the jury. The prosecution introduced evidence of prior acts of domestic violence against a woman with whom the defendant lived between 1999 and 2004. (*Id.* at pp. 113, 116.)

5. The defendant testified, stating Pitts was 18-years old when they first had sex, and giving contrary accounts of the incidents. He denied threatening her with a knife in May, and threatening her in October. (*Id.* at p. 116-117.)

6. The jury found the defendant guilty of the two counts of making criminal threats and found true the use of a dangerous weapon enhancement. It was unable to reach a verdict on the remaining counts. (*Id.* at p. 117.)

B. Voir Dire

- ***The First Wheeler/Batson motion***

1. After jurors were excused for cause, twelve jurors were placed in the jury box, four of whom were male. The prosecutor twice accepted this panel, comprised of eight women and four men. (*Id.* at p. 117.)

2. The defense then excused a female prospective juror, who was replaced with a prospective male juror, after which both the prosecutor and defense counsel exercised challenges. The prosecutor used her next four peremptory challenges against prospective male jurors. (*Id.* at pp. 117-118.)

3. Defense counsel made a *Wheeler/Batson* motion at this point. The trial court found a prima facie case and the prosecutor explained her reason for excusing each of the four prospective jurors: Juror 7 had been arrested a few times, had been in a bar fights, and was a "rough around the edges"; Juror 13 was an engineer, and engineers can be "over-analytical" and "extremely nit-picky"; Juror 19's responses were limited to yes or no and he seemed robotic; and the prosecutor expressed the same reasons as to Juror 24. (*Id.* at p. 118.)

4. The trial court denied the motion, finding that the prosecutor's reasons were independent of gender bias. (*Ibid.*)

- ***The Second Wheeler/Batson Motion***

1. After the prosecutor used her fifth peremptory challenge to excuse another male juror, defense counsel renewed his *Wheeler/Batson* motion. (*Id.* at p. 118.)

2. The court found a prima facie case of discrimination, and the prosecutor gave her reason for excusing this male juror, stating: ""I'm kicking Juror No. 6 because I believe the [next] person . . . that is

slated in his position, in my view, is a better fit for what I like. . . ." (*Id.* at p. 118.) *As will be discussed below, this explanation becomes an issue for the Court of Appeal.*[2]

3. After the trial court expressed doubt as to whether this was a legitimate reason, the prosecutor argued, "I'm replacing him with a male. And I think he's a better fit." (*Ibid*

4. The prosecutor also stated that as to Juror 6, "we didn't get a whole lot of information from him other than . . . his area of residence and his occupation." (*Ibid.*) In a footnote, however, the Court of Appeal noted that Juror 6 said he was married with two children, and that his wife stayed at home with the children. (*Ibid.*, fn. 5.)

5. The trial court denied the *Wheeler/Batson* motion, finding the prosecutor's reason for excusing Juror 6 was not gender related. (*Ibid.*)

- ***The Third Wheeler/Batson Motion***

1. The third *Wheeler/Batson* motion was made after the prosecutor excused a male juror when she exercised her eighth peremptory challenge. This male juror was one of three men in the jury box at that time. The trial court did not find a prima facie case of discrimination although it allowed the prosecutor to explain her reasons for excusing this juror. (*Id.* at p. 118.) The Court of Appeal devotes no discussion to this particular challenge.

- ***The Fourth Wheeler/Batson Motion***

1. The male juror who precipitated the third Wheeler/Batson challenge was replaced by another male juror. The prosecutor used her ninth peremptory challenge to excuse him, resulting in defense counsel's fourth *Wheeler/Batson* challenge. (*Id.* at pp. 118-119.)

2. The trial court found a prima facie case of discrimination. (*Id.* at p. 119.)

3. The prosecutor explained her decision in part: "I'm kicking this juror not for a gender based reason, but because I believe the next juror in line, Juror No. 34, is a better fit. Juror No. 34 was very involved in the voir dire process. He's the country club manager. He is very conservative in his appearance and very conservative in his answers that he shared." (*Ibid.*) *As will be discussed below, this explanation becomes an issue for the Court of Appeal.* The Court of Appeal noted that Juror 34 also said one of his staff members was a retired deputy sheriff. (*Ibid.*, fn. 6.)

4. The trial court denied the *Wheeler/Batson* motion, explaining that replacing one potential male juror with another male juror who appeared more favorable toward the prosecution was a genuine, gender-neutral reason that did not deny equal protection. (*Ibid.*)

5. The panel that was finally accepted was comprised of 10 women and two men. (*Ibid.*)

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[2] The prosecutor knew who the identities of upcoming jurors because jurors were questioned 20 at a time, with 12 going into the jury box in order.

C. Court of Appeal's Analysis

• *Principles Applicable to this Challenge*

1. First, the Court of Appeal pointed out that the *Wheeler/Batson* analysis applies to improper peremptory challenges on the basis of gender. (*Cisneros* at p. 119, fn. 8, citing *People v. Avila* (2006) 38 Cal.4th 491, 541.)

2. The Court of Appeal said this case concerns the second step in a reviewing court's *Wheeler/Batson* analysis: whether the prosecutor offered a race-neutral basis for striking the challenged juror. (*Id.* at p. 120.)

3. At the second step, the issue is the facial validity of the prosecutor's explanation. The prosecutor must offer a gender-neutral explanation. (*Ibid.*)

4. A neutral explanation is one based on something other than the gender of the juror. The reason need not make sense; it must be one that does not deny equal protection. (*Ibid.*)

5. A prospective juror may be excused based upon facial expressions, gestures, hunches, and even arbitrary and idiosyncratic reasons as long as the reason does not deny equal protection. (*Ibid.*)

6. Purposeful discrimination in the exercise of peremptory challenges is reversible per se. (*Ibid.*)

8. Even "the exclusion by peremptory challenge of a single juror on the basis of race or ethnicity is an error of constitutional magnitude requiring reversal." (*Ibid.*, *quoting People v. Silva* (2001) 25 Cal.4th 345, 386.)

• *The Court of Appeal's Application of these Principles*

1. As to the second *Wheeler/Batson* motion, The prosecutor explained that she excused Juror 6 because she preferred the next prospective juror. (*Cisneros*, at p. 120.)

2. As to the fourth *Wheeler/Batson* motion, the prosecutor explained she excused Juror 32 for the same reason. (*Id.* at p. 120.)

3. The Court of Appeal had this to say: "Although the prosecutor provided some information about why the next jurors were desirable, she failed to identify any characteristics whatsoever about Jurors 6 and 32 or articulate personal observations about their demeanor or even a hunch about them that animated the decision to excuse them. She thus failed to carry her step two burden to proffer a gender-neutral explanation for dismissing them." (*Id.* at p. 120.)

4. The Court cited case authority stating it is the prosecutor's burden to offer a race or gender-neutral explanation for striking the juror, once the defendant has made a prima facie showing that the

peremptory challenge was based race or gender. (*Id.* at p. 121, citing *Miller-El v. Cockrell* (2003) 537 U.S. 322, 328; *People v. Hamilton* (2009) 45 Cal.4th 863, 898.) (*Cisneros*, at p. 120.)

5. The Court of Appeal said it did not question the trial court's acceptance of the genuineness of the prosecutor's stated reason. (*Id.* at p. 121.)

6. But the Court of Appeal said the prosecution's explanation that she preferred the next prospective juror coming into the box is not an adequate, nondiscriminatory explanation. (*Id.* at p. 121.)

7. The Court of Appeal stated: "[W]henever counsel exercises a peremptory challenge, it necessarily means that he or she prefers the next prospective juror to the one being challenged (whether the individual qualities of the next person are known or unknown). It is, in effect, no reason at all." (*Id.* at p. 121.)

8. General assertions are inadequate. The prosecutor must articulate a neutral explanation related to the particular case to be tried. (*Id.*, *citing Batson*, *supra*, 476 U.S. at pp. 97-98.)

9. The bar is not a high one. The explanation does not even have to be persuasive or even plausible, just adequate enough for the court to ensure it was not inherently discriminatory. (*Id.*, citing *Rice v. Collins* (2006) 546 U.S. 333, 338.)

10. The Court of Appeal noted that the prosecutor was willing to accept some men on the panel; she twice accepted the panel when it had four men on it. (*Id.* at p. 122.)

11. But the question is not whether some members of the protected classification were acceptable. It is whether *any* juror, when excused, was dismissed because of group bias. (*Id.* at p. 122.)

12. "Moreover, the prosecutor's failure to articulate anything about Jurors 6 and 32 as the basis for striking them after the trial court had found a prima facie case did nothing to dispel the reasonable inference the prosecutor preferred women to men and was exercising her peremptory challenges to effect that preference." (*Ibid.)*

D. Take Aways from Guest Jerry Coleman

- When you're giving your reasons for excusing the juror, base those reasons on the record. You can't be mistaken about the reasons [*case in point – see Castellanos v. Small below*] or forget the reasons. Write them down, state them correctly. They have to be right. So take good notes.

- It's not enough to tell the trial court why the "next juror up" is better; you must articulate why the one being excused is poorer by comparison. You should explain why the replacement is better, but also give the reasons why the juror you are striking is worse.

- Give as much information as you can to justify your decision. Keep in mind such factors as distrust of law enforcement, demeanor, unconventional clothing, limited life experience, prior jury

service resulting in a hung jury, etc. These are all valid reasons, but they must be grounded in appropriate trial strategy.

- Continue to make the record of how many members of the protected class are still on the panel, the number of times you passed on the panel when there were more members of the protected class seated.

- Since your own discrimination or lack of discrimination is "on trial," you should justify your own attitude, but remember that your focus ultimately must be on who you excused, and that there was a race-neutral or gender-neutral reason for doing so.

II. *Castellanos v. Small* (2014) 766 F.3d 1137

Prosecutor's stated reasons for peremptory challenge of juror were factually inaccurate. Did prosecutor mistakenly rely on notes regarding wrong juror? Doesn't matter -- review of federal habeas court is limited to the evidence presented in state court. Habeas relief granted.

A. Facts of the Case

1. The defendant was 17-years-old at the time of the incident. He was at his apartment with neighbors, 12 year old Nicky and 11-year-old Joey. The defendant was trying to recruit Nicky to join his gang but Nicky had previously refused. (*Castellanos*, *supra*, 766 F.3d at p. 1140.)

2. The defendant pulled a gun from his waist and pointed it at both boys. Joey ducked, and the defendant turned and pointed the gun directly at Nicky, asking "What do you think about this?" He fired, shooting Nicky in the head. (*Id.* at pp. 1140-141.))

3. Among other charges, the defendant was convicted of second degree murder and assault with a deadly weapon. (*Id.* at p. 1140.)

B. General Background

1. At the outset of voir dire, at least five of the twelve prospective jurors seated in the jury box were Hispanic. (*Id.* at p. 1142.)

2. During the jury selection, defense counsel made a *Wheeler/Batson* motion, telling the court that "the prosecutor is exercising his challenges to exclude mainly Hispanics." At the time the time defense counsel made his Wheeler/Batson motion, the prosecutor hade used six peremptory strikes, four of which were used against Hispanics. (*Ibid.*)

3. Although the habeas petition addressed the four Hispanic jurors, the Ninth Circuit said it was beginning and ending its analysis by considering only one particular juror whom the Ninth Circuit described as "Venirewoman 4968."

4. The Ninth Circuit said that elimination of even a single juror based on race demands a retrial. (*Id.* at p. 1148, fn. 8.)

C. Voir Dire Analysis – California Court of Appeal

1. The prosecutor had begun the questioning of the panel by asking them to answer the questions on the board. The only question related to children was: "Do you have adult children; is so, how many?" (*Id.* at p. 1140.)

2. Juror 4968 was a Hispanic female. She worked for a bread company. At the time of trial, she was divorced and had two adult children. Her ex-husband worked for Boeing, and she had never before served on a jury.

3. There was some ambiguity in the transcript as to whether Juror 4968 had two children (both adult) or four children (two adult and two "kids"). Juror 4968 initially stated, "I have two girls, kids." The prosecutor responded by asking, "And what are the occupations of your adult children, your adult children?" Juror 4968 answered, "My daughter, she doesn't work. And my son works . . . for the [export magazines]." (*Id.* at p. 1142, fn. 2.)

4. When the trial court asked the prosecutor to address Juror 4968, the prosecutor stated: "4968 -- I thought the person was white, but regardless, the person, she didn't have any children. The victim in here is going to be a child testifying, so I want jurors to understand children, so I've kicked a lot of jurors who don't have children, and she had no children." (*Id.* at p. 1143.)

5. The Court of Appeal in a footnote opined that "[i]t appears the prosecutor may have confused his notes regarding Juror no. 4968 with those for Juror No. 3938"

6. The Court of Appeal, which considered all four Hispanic jurors that had been excused by the prosecution, concluded: "The trial court's determination is entitled to considerable deference because of the court's knowledge of local conditions and local prosecutors, powers of observations, understanding of trial techniques and judicial experience."

D. Voir Dire Analysis – the Federal Magistrate Judge [2012 WL 1424990]

1. A magistrate judge was appointed to conduct an evidentiary hearing on the claims raised in the defendant's petition for writ of habeas corpus, including his claim of *Wheeler/Batson* error. Ultimately the hearing was vacated and the magistrate reached his decision on pleadings and other material.

2. The magistrate noted that as to Juror 4968, the prosecutor's reason for excusing her (she has no children) was contradicted by the record, which indicated she had at least two and possibly four children. The magistrate judge said, "As such, the record indicates the prosecutor's stated reason was factually erroneous and, therefore, can be construed as pretextual."

3. Nevertheless, the magistrate judge observed, "[I]it appears that the California Court of Appeal's explanation that the prosecutor confused his notes may be accurate" because the prosecutor also had excused at that point a Caucasian female (Juror 3938) who did not have children. Juror 4968 was the prosecutor's first peremptory challenge, and Juror 3938 was the prosecutor's second peremptory challenge.

4. Quoting *Rice v. Collins* (2006) 546 U.S. 333, the magistrate stated, " 'Seizing on what can plausibly be viewed as an innocent transposition makes little headway toward the conclusion that the prosecutor's explanation was clearly not credible."

5. The magistrate judge allowed the State to augment the record by providing the prosecutor's actual reasons for excusing Juror 4968. The trial prosecutor submitted a declaration stating that he excused the prospective juror because she appeared to be "unable to follow directions," as she did not initially respond when she was called into the jury box, and it was his general practice to excuse jurors who appeared to have difficulty following directions."

6. The magistrate judge recommended that the district court deny the defendant's habeas petition.

D. Voir Dire Analysis – The Federal District Court [2012 WL 1432198]

1. The district court accepted the conclusions and recommendation of the magistrate judge and denied the defendant's application for relief, but certified a grant of appealability on the *Wheeler/Batson* claim.

E. Voir Dire Analysis – The Ninth Circuit

1. The Ninth Circuit reversed the district court and granted the defendant's application for habeas relief. (766 F.3d at p. 1151.)

2. It said the California Court of Appeal decision serves as the basis for its review. (*Id.* at p. 1145.)

3. The Ninth Circuit said the California Court of Appeal's decision was not contrary to clearly established federal law, but under the governing federal statute, it was still required to look at the reasonableness of the state court's factual determinations. (*Id.* at p. 1147.)

4. Because the California Court of Appeal did not undertake a comparative juror analysis, the Ninth Circuit said "we must do so on collateral review" because side-by-side comparisons of the venirepersons who were struck and those who were empanelled may serve as evidence showing purposeful discrimination. (*Id.* at p. 1148.)

5. The Court said because "our inquiry under the federal statute is limited to the 'evidence presented in the State court proceedings, ' " it would not consider the "post-hoc justifications offered by the deputy district attorney who tried the case. (*Id.* at p. 1148.) Therefore, the Ninth Circuit did not entertain the possibility that the prosecutor had confused his notes and his declaration explaining the reason he excused Juror 4968.

7. Thus considering only the prosecutor's proffered explanation at trial for excusing Juror 4968, the Ninth Circuit said that the reason given by the prosecutor was "belied by the record." The only question asked by the prosecutor regarding children was whether the juror had adult children, and she said she did. "Thus, unless the totality of other relevant circumstances in this case suggests a contrary conclusion, *the prosecutor's factually erroneous reason can be construed as pretextual.*" (*Id.* at pp. 1148-1149.)

8. "A side-by-side comparison of Venirewoman 4968 to members of the empaneled jury suggests that the prosecutor's race-neutral justification for removing Venirewoman 4968 was pretextual. Three other venirepersons who also had no adult children -- Jurors 7707, 7107, and 8243 -- were ultimately permitted to serve on the jury. Moreover, one of the empaneled jurors, Juror 0373, didn't even answer the question about whether he had adult children, and the prosecutor never followed up to clarify." (*Id.* at p. 1149.)

9. "But even if the prosecutor's credibility weren't further undermined by that side-by-side comparison, the prosecutor's question -- whether the venirepersons had 'adult children' -- itself lends little support for his proffered justification. The question whether the venireperson had 'adult children' seems a rather odd way of getting at what the prosecutor purportedly sought to identify: whether the venireperson had experience with young children like the child witness who planned to testify. If the prosecutor's purpose truly was to determine which venirepersons could 'understand children,' a broader initial question -- for example, 'Do you have any children? -- would have better served that purpose. . . As the Supreme Court has stated, 'The State's failure to engage in any meaningful voir dire examination on a subject the State alleges it is concerned about is evidence suggesting that the explanation is a sham and a pretext for discrimination.' (*Miller–El v. Dretke* (2005) 545 U.S. 231, 241.)" (*Id.* at p. 1149.)

10. The Ninth Circuit noted the final jury included seven Hispanics. It also noted that the prosecutor had used only 12 of his 20 total peremptory, meaning that he declined to use additional peremptory challenges to excuse Hispanics. But the Ninth Circuit stated: "But just as is the case with the composition of the empaneled jury, the number of peremptory strikes the prosecutor fails to use after a *Batson* motion has been made cannot alone undermine a showing of purposeful discrimination. And, even when the remaining strikes are considered together with the composition of the empaneled jury, the two facts do not overcome a petitioner's already established showing of purposeful discrimination." (*Id.* at pp 1149-1150.)

11. The Ninth Circuit did not go further and consider the prosecutor's reasons for excusing the other Hispanic jurors that were at issue, because " 'just one racial strike retrial calls for a retrial.' " (*Id.* at p. 1150.)

12. However, the Ninth Circuit noted that the prosecutor's reason for striking one of the other Hispanic jurors at issue in the habeas petition – that this prospective juror "had trouble following directions in the beginning" – lacked any support in the record. (*Ibid.)*

Take Away:

Did the prosecutor make a mistake and confuse Juror 4968 with a different prospective juror when he was asked to explain his reason for excusing Juror 4968?

If so, this harsh decision teaches a tough lesson.

The Ninth Circuit says it will look only at the record of the state proceedings, so a prosecutor's belated efforts to explain his mistake and offer his actual reasons for excusing the prospective juror will not be considered.

As a result, the Ninth Circuit concluded the prosecutor provided factually erroneous reasons to support his strike, which can be construed as pretextual discrimination. The court said the actual evidence undermined the prosecutor's credibility.

If the prosecutor did in fact "confuse his notes "on this one witness, he set in motion a chain of events that eventually led to this petition for habeas relief being granted and – nine years after conviction – a new trial for this defendant

So the obvious and significant takeaway point here: Keep accurate and complete notes on prospective jurors during the voir dire. Have a system of tracking each prospective juror that is well organized and allows you to access the information quickly and easily in the event you are called upon to justify your peremptory challenges. If you need to do so, take time to review your notes before providing your explanation for your challenge to the court. As this case demonstrates, your words in the trial court will bind you in federal court.

III. *People v. Charandeep Singh* (2015) 234 Cal.App.4th 1319

Issue: Did the trial court err in granting the *prosecution*'s Wheeler/Batson motion?

A. Trial Court's Ruling

1. The defense counsel used seven consecutive peremptory challenges to excuse Caucasians. When he used his eighth peremptory challenge to excuse another Caucasian juror, Juror No. 416024,

the prosecutor made a *Wheeler/Batson* motion and the trial court found the prosecutor had made a prima facie case.

2. The trial court asked t Juror No. 416204 to return the next day when the trial court would hear argument on the motion.

3. The next day, after hearing defense counsel's proffered justifications, the trial court granted the prosecutor's *Wheeler-Batson* motion and asked the prosecution for its preferred remedy, since the prosecutor wanted to complete the trial promptly because a witness was leaving the area.

4. The prosecutor did not want juror 416204 reseated because the prosecutor was concerned the juror would hold it against him, and asked that the trial court simply continue with voir dire and impose sanctions if any further impermissible challenges occur.

5. The trial court reseated Juror No. 416024, but otherwise accepted the suggestion of the prosecutor. However, the trial court assured defense counsel that he should not hesitate to use his remaining two peremptories if he believed he had a proper basis for doing so.

6. After trial commenced, defense counsel noted for the record that he would have excused Juror No. 416204 and Juror No. 439656, but declined to do so, out of concern that the court would not sustain the challenges and he might incur sanctions. (*Id.* at p 1326.)

B. Court of Appeal Analysis

1. On appeal, the defendant challenged the finding that defense counsel committed a *Wheeler/Batson violation,* asserting that the trial court's rulings on his peremptory challenges were erroneous.

2. The defendant disputed whether Caucasians are a cognizable group for purpose of equal protection, and argued that the trial court should have "abdicated any further effort to gauge the sincerity of his race-neutral justifications" for his peremptories because defendant had articulated a subjective basis that the trial court could not second-guess. (*Id.* at p. 1329.)

3. Although the Court of Appeal said both arguments above were "doubtful propositions," it was not necessary to address them because the defendant had not established any resulting prejudice. (*Id.* & fn. 8.)

4. Any error in overruling a peremptory does not result in any fundamental unfairness and thus is not structural error. A defendant must affirmatively demonstrate prejudice. (*Id.* at p. 1331.)

5. The defendant's only claim of prejudice was this: "defendant asserts the erroneous overruling of his peremptory and the threat of sanctions chilled any further exercise of defense peremptories, resulting in the seating of objectionable Jurors Nos. 416024 and 439656." (*Id.* at p. 1332.)

5. But the Court of Appeal said this claim does meet the standard for prejudice. The Court of Appeal discussed *People v. Black* (2014) 58 Cal.4th 912, in which the trial court erroneously denied the defendant's challenges for cause as to two jurors, forcing him to use peremptory challenges. Eventually, the defense counsel in *Black* defendant exhausted his remaining challenges and was unable to remove Juror No. 8, whom he agreed was not objectionable for cause, but who was objectionable for other reasons.

6. The Supreme Court in *Black* said that a defendant must show the error affected his right to a fair trial and impartial jury, and "[a] defendant's right to an impartial jury is affected only when he exhausts his peremptory challenges and an incompetent juror, meaning a juror who should have been removed for cause, sits on the jury that decides the case." (*People v. Black*, *supra*, 58 Cal.4th at p. 920.).

7. The Court of Appeal here in *Singh* said: "The present context is analogous to *Black*. Instead of complaining that the trial court forced him to exhaust the defense peremptories erroneously, defendant asserts the erroneous overruling of his peremptory and the threat of sanctions chilled any further exercise of defense peremptories, resulting in the seating of objectionable Juror Nos. 416024 and 439656. This is the *only* claimed prejudice. However, under *Black*, defendant must demonstrate either bias or other grounds for a challenge for cause on the part of either juror in order to establish the necessary prejudice for reversal. . . . As defendant has thus failed to provide a demonstration of the necessary prejudice, we do not need to resolve whether the trial court's actions were indeed erroneous." (*Singh*, *supra*, 234 Cal.App.4th 1319.)

8. In other words, the defense can't demonstrate that his conviction should be reversed just because the trial court's erroneous denial of the defendant's peremptory challenge left him with an objectionable juror.

NEXT WEEK: THE CALIFORNIA SUPREME COURT ADDRESSES "SECOND-STRIKE" SENTENCING AND THE PRIOR FELONY ENHANCEMENT

Suggestions for future shows, ideas on how to improve P&A, and other comments or criticisms should be directed to Mary Pat Dooley at (510) 272-6249. Technical questions should be addressed to Gilbert Leung at (510) 272-6327. Participatory students: MCLE Evaluation sheets are available on location and certificates of attendance are constructively maintained in your possession in the Ala. Co. Dist.Atty computer banks.

POINTS AND AUTHORITIES

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	Guests (Dooley)	Elim. of Bias
April 27 2015	Three cases on *Wheeler/Batson*: 1) Peo. v. Cisneros; 2) Castellanos v. Small; 3) People v. Singh	Jerry Coleman	30 min

This week's P&A covers three recent cases on *Wheeler- Batson.*[1]

I. *People v. Cisneros* (2015) 234 Cal.App.4th 111

Can you justify your peremptory challenge by stating only that you prefer the next prospective juror? No. You must *also* articulate reasons why you excused the challenged juror.

A. Facts of Case

1. The defendant was charged two counts of making a criminal threat; failure to register as a sex offender; and one count of sexual intercourse with a minor. As to one threat counts, it was alleged that he personally used a deadly or dangerous weapon. (*Cisneros*, *supra*, 234 Cal.App.4th at p. 114.)

2. Pitts met defendant when she was 17 years old and he was 36 years old. They had sex four days after they met. In an incident occurring in May 2011, defendant and Pitts were living together with their infant son. Pitts and the defendant were in the midst of an argument when her sister phoned. When Pitts told her sister about the argument, the defendant became enraged, took out a butcher knife and told Pitts he was going to kill her. He was standing about six feet away and made thrusting movements with the knife toward her stomach. When the defendant turned his back, Pitts took the infant, ran from the house, and called 911. Two officers met with her in a parking lot. She was crying and told them what had happened. Defendant was arrested. However, Pitts did not return telephone calls from law enforcement. When the detective assigned to the case and the prosecutor were finally able to reach Pitts by phone, she told them her initial report had been fabricated, and the district attorney's office did not file charges. (*Id.* at pp. 114-115.)

3. In October 2011, Pitts went to the police station carrying the child and crying hysterically. She told the officer at the front desk that she just received a telephone call from the defendant in which

[1] This P&A provides 30 minutes of MCLE credit for Elimination of Bias

he threatened to kill her. The detective who had investigated the May incident interviewed Pitts. Pitts told him that that her earlier report of the May incident was correct, but she had recanted because she was afraid. (*Id.* at p. 115-116.)

4. At trial, Pitts was unavailable to testify and the court permitted her testimony to be read to the jury. The prosecution introduced evidence of prior acts of domestic violence against a woman with whom the defendant lived between 1999 and 2004. (*Id.* at pp. 113, 116.)

5. The defendant testified, stating Pitts was 18-years old when they first had sex, and giving contrary accounts of the incidents. He denied threatening her with a knife in May, and threatening her in October. (*Id.* at p. 116-117.)

6. The jury found the defendant guilty of the two counts of making criminal threats and found true the use of a dangerous weapon enhancement. It was unable to reach a verdict on the remaining counts. (*Id.* at p. 117.)

B. Voir Dire

- ***The First Wheeler/Batson motion***

1. After jurors were excused for cause, twelve jurors were placed in the jury box, four of whom were male. The prosecutor twice accepted this panel, comprised of eight women and four men. (*Id.* at p. 117.)

2. The defense then excused a female prospective juror, who was replaced with a prospective male juror, after which both the prosecutor and defense counsel exercised challenges. The prosecutor used her next four peremptory challenges against prospective male jurors. (*Id.* at pp. 117-118.)

3. Defense counsel made a *Wheeler/Batson* motion at this point. The trial court found a prima facie case and the prosecutor explained her reason for excusing each of the four prospective jurors: Juror 7 had been arrested a few times, had been in a bar fights, and was a "rough around the edges"; Juror 13 was an engineer, and engineers can be "over-analytical" and "extremely nit-picky"; Juror 19's responses were limited to yes or no and he seemed robotic; and the prosecutor expressed the same reasons as to Juror 24. (*Id.* at p. 118.)

4. The trial court denied the motion, finding that the prosecutor's reasons were independent of gender bias. (*Ibid.*)

- ***The Second Wheeler/Batson Motion***

1. After the prosecutor used her fifth peremptory challenge to excuse another male juror, defense counsel renewed his *Wheeler/Batson* motion. (*Id.* at p. 118.)

2. The court found a prima facie case of discrimination, and the prosecutor gave her reason for excusing this male juror, stating: ""I'm kicking Juror No. 6 because I believe the [next] person . . . that is

slated in his position, in my view, is a better fit for what I like. . . ." (*Id.* at p. 118.) *As will be discussed below, this explanation becomes an issue for the Court of Appeal.*[2]

3. After the trial court expressed doubt as to whether this was a legitimate reason, the prosecutor argued, "I'm replacing him with a male. And I think he's a better fit." (*Ibid*

4. The prosecutor also stated that as to Juror 6, "we didn't get a whole lot of information from him other than . . . his area of residence and his occupation." (*Ibid.*) In a footnote, however, the Court of Appeal noted that Juror 6 said he was married with two children, and that his wife stayed at home with the children. (*Ibid.*, fn. 5.)

5. The trial court denied the *Wheeler/Batson* motion, finding the prosecutor's reason for excusing Juror 6 was not gender related. (*Ibid.*)

- ***The Third Wheeler/Batson Motion***

1. The third *Wheeler/Batson* motion was made after the prosecutor excused a male juror when she exercised her eighth peremptory challenge. This male juror was one of three men in the jury box at that time. The trial court did not find a prima facie case of discrimination although it allowed the prosecutor to explain her reasons for excusing this juror. (*Id.* at p. 118.) The Court of Appeal devotes no discussion to this particular challenge.

- ***The Fourth Wheeler/Batson Motion***

1. The male juror who precipitated the third Wheeler/Batson challenge was replaced by another male juror. The prosecutor used her ninth peremptory challenge to excuse him, resulting in defense counsel's fourth *Wheeler/Batson* challenge. (*Id.* at pp. 118-119.)

2. The trial court found a prima facie case of discrimination. (*Id.* at p. 119.)

3. The prosecutor explained her decision in part: "I'm kicking this juror not for a gender based reason, but because I believe the next juror in line, Juror No. 34, is a better fit. Juror No. 34 was very involved in the voir dire process. He's the country club manager. He is very conservative in his appearance and very conservative in his answers that he shared." (*Ibid.*) *As will be discussed below, this explanation becomes an issue for the Court of Appeal.* The Court of Appeal noted that Juror 34 also said one of his staff members was a retired deputy sheriff. (*Ibid.*, fn. 6.)

4. The trial court denied the *Wheeler/Batson* motion, explaining that replacing one potential male juror with another male juror who appeared more favorable toward the prosecution was a genuine, gender-neutral reason that did not deny equal protection. (*Ibid.*)

5. The panel that was finally accepted was comprised of 10 women and two men. (*Ibid.*)

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[2] The prosecutor knew who the identities of upcoming jurors because jurors were questioned 20 at a time, with 12 going into the jury box in order.

C. Court of Appeal's Analysis

• *Principles Applicable to this Challenge*

1. First, the Court of Appeal pointed out that the *Wheeler/Batson* analysis applies to improper peremptory challenges on the basis of gender. (*Cisneros* at p. 119, fn. 8, citing *People v. Avila* (2006) 38 Cal.4th 491, 541.)

2. The Court of Appeal said this case concerns the second step in a reviewing court's *Wheeler/Batson* analysis: whether the prosecutor offered a race-neutral basis for striking the challenged juror. (*Id.* at p. 120.)

3. At the second step, the issue is the facial validity of the prosecutor's explanation. The prosecutor must offer a gender-neutral explanation. (*Ibid.*)

4. A neutral explanation is one based on something other than the gender of the juror. The reason need not make sense; it must be one that does not deny equal protection. (*Ibid.*)

5. A prospective juror may be excused based upon facial expressions, gestures, hunches, and even arbitrary and idiosyncratic reasons as long as the reason does not deny equal protection. (*Ibid.*)

6. Purposeful discrimination in the exercise of peremptory challenges is reversible per se. (*Ibid.*)

8. Even "the exclusion by peremptory challenge of a single juror on the basis of race or ethnicity is an error of constitutional magnitude requiring reversal." (*Ibid., quoting People v. Silva* (2001) 25 Cal.4th 345, 386.)

• *The Court of Appeal's Application of these Principles*

1. As to the second *Wheeler/Batson* motion, The prosecutor explained that she excused Juror 6 because she preferred the next prospective juror. (*Cisneros*, at p. 120.)

2. As to the fourth *Wheeler/Batson* motion, the prosecutor explained she excused Juror 32 for the same reason. (*Id.* at p. 120.)

3. The Court of Appeal had this to say: "Although the prosecutor provided some information about why the next jurors were desirable, she failed to identify any characteristics whatsoever about Jurors 6 and 32 or articulate personal observations about their demeanor or even a hunch about them that animated the decision to excuse them. She thus failed to carry her step two burden to proffer a gender-neutral explanation for dismissing them." (*Id.* at p. 120.)

4. The Court cited case authority stating it is the prosecutor's burden to offer a race or gender-neutral explanation for striking the juror, once the defendant has made a prima facie showing that the

peremptory challenge was based race or gender. (*Id.* at p. 121, citing *Miller-El v. Cockrell* (2003) 537 U.S. 322, 328; *People v. Hamilton* (2009) 45 Cal.4th 863, 898.) (*Cisneros*, at p. 120.)

5. The Court of Appeal said it did not question the trial court's acceptance of the genuineness of the prosecutor's stated reason. (*Id.* at p. 121.)

6. But the Court of Appeal said the prosecution's explanation that she preferred the next prospective juror coming into the box is not an adequate, nondiscriminatory explanation. (*Id.* at p. 121.)

7. The Court of Appeal stated: "[W]henever counsel exercises a peremptory challenge, it necessarily means that he or she prefers the next prospective juror to the one being challenged (whether the individual qualities of the next person are known or unknown). It is, in effect, no reason at all." (*Id.* at p. 121.)

8. General assertions are inadequate. The prosecutor must articulate a neutral explanation related to the particular case to be tried. (*Id.*, *citing Batson*, *supra*, 476 U.S. at pp. 97-98.)

9. The bar is not a high one. The explanation does not even have to be persuasive or even plausible, just adequate enough for the court to ensure it was not inherently discriminatory. (*Id.*, citing *Rice v. Collins* (2006) 546 U.S. 333, 338.)

10. The Court of Appeal noted that the prosecutor was willing to accept some men on the panel; she twice accepted the panel when it had four men on it. (*Id.* at p. 122.)

11. But the question is not whether some members of the protected classification were acceptable. It is whether *any* juror, when excused, was dismissed because of group bias. (*Id.* at p. 122.)

12. "Moreover, the prosecutor's failure to articulate anything about Jurors 6 and 32 as the basis for striking them after the trial court had found a prima facie case did nothing to dispel the reasonable inference the prosecutor preferred women to men and was exercising her peremptory challenges to effect that preference." (*Ibid.)*

D. Take Aways from Guest Jerry Coleman

- When you're giving your reasons for excusing the juror, base those reasons on the record. You can't be mistaken about the reasons [*case in point – see Castellanos v. Small below*] or forget the reasons. Write them down, state them correctly. They have to be right. So take good notes.

- It's not enough to tell the trial court why the "next juror up" is better; you must articulate why the one being excused is poorer by comparison. You should explain why the replacement is better, but also give the reasons why the juror you are striking is worse.

- Give as much information as you can to justify your decision. Keep in mind such factors as distrust of law enforcement, demeanor, unconventional clothing, limited life experience, prior jury

service resulting in a hung jury, etc. These are all valid reasons, but they must be grounded in appropriate trial strategy.

- Continue to make the record of how many members of the protected class are still on the panel, the number of times you passed on the panel when there were more members of the protected class seated.

- Since your own discrimination or lack of discrimination is "on trial," you should justify your own attitude, but remember that your focus ultimately must be on who you excused, and that there was a race-neutral or gender-neutral reason for doing so.

II. *Castellanos v. Small* (2014) 766 F.3d 1137

Prosecutor's stated reasons for peremptory challenge of juror were factually inaccurate. Did prosecutor mistakenly rely on notes regarding wrong juror? Doesn't matter -- review of federal habeas court is limited to the evidence presented in state court. Habeas relief granted.

A. Facts of the Case

1. The defendant was 17-years-old at the time of the incident. He was at his apartment with neighbors, 12 year old Nicky and 11-year-old Joey. The defendant was trying to recruit Nicky to join his gang but Nicky had previously refused. (*Castellanos*, *supra*, 766 F.3d at p. 1140.)

2. The defendant pulled a gun from his waist and pointed it at both boys. Joey ducked, and the defendant turned and pointed the gun directly at Nicky, asking "What do you think about this?" He fired, shooting Nicky in the head. (*Id.* at pp. 1140-141.))

3. Among other charges, the defendant was convicted of second degree murder and assault with a deadly weapon. (*Id.* at p. 1140.)

B. General Background

1. At the outset of voir dire, at least five of the twelve prospective jurors seated in the jury box were Hispanic. (*Id.* at p. 1142.)

2. During the jury selection, defense counsel made a *Wheeler/Batson* motion, telling the court that "the prosecutor is exercising his challenges to exclude mainly Hispanics." At the time the time defense counsel made his Wheeler/Batson motion, the prosecutor hade used six peremptory strikes, four of which were used against Hispanics. (*Ibid.*)

3. Although the habeas petition addressed the four Hispanic jurors, the Ninth Circuit said it was beginning and ending its analysis by considering only one particular juror whom the Ninth Circuit described as "Venirewoman 4968."

4. The Ninth Circuit said that elimination of even a single juror based on race demands a retrial. (*Id.* at p. 1148, fn. 8.)

C. Voir Dire Analysis – California Court of Appeal

1. The prosecutor had begun the questioning of the panel by asking them to answer the questions on the board. The only question related to children was: "Do you have adult children; is so, how many?" (*Id.* at p. 1140.)

2. Juror 4968 was a Hispanic female. She worked for a bread company. At the time of trial, she was divorced and had two adult children. Her ex-husband worked for Boeing, and she had never before served on a jury.

3. There was some ambiguity in the transcript as to whether Juror 4968 had two children (both adult) or four children (two adult and two "kids"). Juror 4968 initially stated, "I have two girls, kids." The prosecutor responded by asking, "And what are the occupations of your adult children, your adult children?" Juror 4968 answered, "My daughter, she doesn't work. And my son works . . . for the [export magazines]." (*Id.* at p. 1142, fn. 2.)

4. When the trial court asked the prosecutor to address Juror 4968, the prosecutor stated: "4968 -- I thought the person was white, but regardless, the person, she didn't have any children. The victim in here is going to be a child testifying, so I want jurors to understand children, so I've kicked a lot of jurors who don't have children, and she had no children." (*Id.* at p. 1143.)

5. The Court of Appeal in a footnote opined that "[i]t appears the prosecutor may have confused his notes regarding Juror no. 4968 with those for Juror No. 3938"

6. The Court of Appeal, which considered all four Hispanic jurors that had been excused by the prosecution, concluded: "The trial court's determination is entitled to considerable deference because of the court's knowledge of local conditions and local prosecutors, powers of observations, understanding of trial techniques and judicial experience."

D. Voir Dire Analysis – the Federal Magistrate Judge [2012 WL 1424990]

1. A magistrate judge was appointed to conduct an evidentiary hearing on the claims raised in the defendant's petition for writ of habeas corpus, including his claim of *Wheeler/Batson* error. Ultimately the hearing was vacated and the magistrate reached his decision on pleadings and other material.

2. The magistrate noted that as to Juror 4968, the prosecutor's reason for excusing her (she has no children) was contradicted by the record, which indicated she had at least two and possibly four children. The magistrate judge said, "As such, the record indicates the prosecutor's stated reason was factually erroneous and, therefore, can be construed as pretextual."

3. Nevertheless, the magistrate judge observed, "[I]it appears that the California Court of Appeal's explanation that the prosecutor confused his notes may be accurate" because the prosecutor also had excused at that point a Caucasian female (Juror 3938) who did not have children. Juror 4968 was the prosecutor's first peremptory challenge, and Juror 3938 was the prosecutor's second peremptory challenge.

4. Quoting *Rice v. Collins* (2006) 546 U.S. 333, the magistrate stated, " 'Seizing on what can plausibly be viewed as an innocent transposition makes little headway toward the conclusion that the prosecutor's explanation was clearly not credible."

5. The magistrate judge allowed the State to augment the record by providing the prosecutor's actual reasons for excusing Juror 4968. The trial prosecutor submitted a declaration stating that he excused the prospective juror because she appeared to be "unable to follow directions," as she did not initially respond when she was called into the jury box, and it was his general practice to excuse jurors who appeared to have difficulty following directions."

6. The magistrate judge recommended that the district court deny the defendant's habeas petition.

D. Voir Dire Analysis – The Federal District Court [2012 WL 1432198]

1. The district court accepted the conclusions and recommendation of the magistrate judge and denied the defendant's application for relief, but certified a grant of appealability on the *Wheeler/Batson* claim.

E. Voir Dire Analysis – The Ninth Circuit

1. The Ninth Circuit reversed the district court and granted the defendant's application for habeas relief. (766 F.3d at p. 1151.)

2. It said the California Court of Appeal decision serves as the basis for its review. (*Id.* at p. 1145.)

3. The Ninth Circuit said the California Court of Appeal's decision was not contrary to clearly established federal law, but under the governing federal statute, it was still required to look at the reasonableness of the state court's factual determinations. (*Id.* at p. 1147.)

4. Because the California Court of Appeal did not undertake a comparative juror analysis, the Ninth Circuit said "we must do so on collateral review" because side-by-side comparisons of the venirepersons who were struck and those who were empanelled may serve as evidence showing purposeful discrimination. (*Id.* at p. 1148.)

5. The Court said because "our inquiry under the federal statute is limited to the 'evidence presented in the State court proceedings, ' " it would not consider the "post-hoc justifications offered by the deputy district attorney who tried the case. (*Id.* at p. 1148.) Therefore, the Ninth Circuit did not entertain the possibility that the prosecutor had confused his notes and his declaration explaining the reason he excused Juror 4968.

7. Thus considering only the prosecutor's proffered explanation at trial for excusing Juror 4968, the Ninth Circuit said that the reason given by the prosecutor was "belied by the record." The only question asked by the prosecutor regarding children was whether the juror had adult children, and she said she did. "Thus, unless the totality of other relevant circumstances in this case suggests a contrary conclusion, *the prosecutor's factually erroneous reason can be construed as pretextual.*" (*Id.* at pp. 1148-1149.)

8. "A side-by-side comparison of Venirewoman 4968 to members of the empaneled jury suggests that the prosecutor's race-neutral justification for removing Venirewoman 4968 was pretextual. Three other venirepersons who also had no adult children -- Jurors 7707, 7107, and 8243 -- were ultimately permitted to serve on the jury. Moreover, one of the empaneled jurors, Juror 0373, didn't even answer the question about whether he had adult children, and the prosecutor never followed up to clarify." (*Id.* at p. 1149.)

9. "But even if the prosecutor's credibility weren't further undermined by that side-by-side comparison, the prosecutor's question -- whether the venirepersons had 'adult children' -- itself lends little support for his proffered justification. The question whether the venireperson had 'adult children' seems a rather odd way of getting at what the prosecutor purportedly sought to identify: whether the venireperson had experience with young children like the child witness who planned to testify. If the prosecutor's purpose truly was to determine which venirepersons could 'understand children,' a broader initial question -- for example, 'Do you have any children? -- would have better served that purpose. . . As the Supreme Court has stated, 'The State's failure to engage in any meaningful voir dire examination on a subject the State alleges it is concerned about is evidence suggesting that the explanation is a sham and a pretext for discrimination.' (*Miller–El v. Dretke* (2005) 545 U.S. 231, 241.)" (*Id.* at p. 1149.)

10. The Ninth Circuit noted the final jury included seven Hispanics. It also noted that the prosecutor had used only 12 of his 20 total peremptory, meaning that he declined to use additional peremptory challenges to excuse Hispanics. But the Ninth Circuit stated: "But just as is the case with the composition of the empaneled jury, the number of peremptory strikes the prosecutor fails to use after a *Batson* motion has been made cannot alone undermine a showing of purposeful discrimination. And, even when the remaining strikes are considered together with the composition of the empaneled jury, the two facts do not overcome a petitioner's already established showing of purposeful discrimination." (*Id.* at pp 1149-1150.)

11. The Ninth Circuit did not go further and consider the prosecutor's reasons for excusing the other Hispanic jurors that were at issue, because " 'just one racial strike retrial calls for a retrial.' " (*Id.* at p. 1150.)

12. However, the Ninth Circuit noted that the prosecutor's reason for striking one of the other Hispanic jurors at issue in the habeas petition – that this prospective juror "had trouble following directions in the beginning" – lacked any support in the record. (*Ibid.)*

Take Away:

Did the prosecutor make a mistake and confuse Juror 4968 with a different prospective juror when he was asked to explain his reason for excusing Juror 4968?

If so, this harsh decision teaches a tough lesson.

The Ninth Circuit says it will look only at the record of the state proceedings, so a prosecutor's belated efforts to explain his mistake and offer his actual reasons for excusing the prospective juror will not be considered.

As a result, the Ninth Circuit concluded the prosecutor provided factually erroneous reasons to support his strike, which can be construed as pretextual discrimination. The court said the actual evidence undermined the prosecutor's credibility.

If the prosecutor did in fact "confuse his notes "on this one witness, he set in motion a chain of events that eventually led to this petition for habeas relief being granted and – nine years after conviction – a new trial for this defendant

So the obvious and significant takeaway point here: Keep accurate and complete notes on prospective jurors during the voir dire. Have a system of tracking each prospective juror that is well organized and allows you to access the information quickly and easily in the event you are called upon to justify your peremptory challenges. If you need to do so, take time to review your notes before providing your explanation for your challenge to the court. As this case demonstrates, your words in the trial court will bind you in federal court.

III. *People v. Charandeep Singh* (2015) 234 Cal.App.4th 1319

Issue: Did the trial court err in granting the *prosecution*'s Wheeler/Batson motion?

A. Trial Court's Ruling

1. The defense counsel used seven consecutive peremptory challenges to excuse Caucasians. When he used his eighth peremptory challenge to excuse another Caucasian juror, Juror No. 416024,

the prosecutor made a *Wheeler/Batson* motion and the trial court found the prosecutor had made a prima facie case.

2. The trial court asked t Juror No. 416204 to return the next day when the trial court would hear argument on the motion.

3. The next day, after hearing defense counsel's proffered justifications, the trial court granted the prosecutor's *Wheeler-Batson* motion and asked the prosecution for its preferred remedy, since the prosecutor wanted to complete the trial promptly because a witness was leaving the area.

4. The prosecutor did not want juror 416204 reseated because the prosecutor was concerned the juror would hold it against him, and asked that the trial court simply continue with voir dire and impose sanctions if any further impermissible challenges occur.

5. The trial court reseated Juror No. 416024, but otherwise accepted the suggestion of the prosecutor. However, the trial court assured defense counsel that he should not hesitate to use his remaining two peremptories if he believed he had a proper basis for doing so.

6. After trial commenced, defense counsel noted for the record that he would have excused Juror No. 416204 and Juror No. 439656, but declined to do so, out of concern that the court would not sustain the challenges and he might incur sanctions. (*Id.* at p 1326.)

B. Court of Appeal Analysis

1. On appeal, the defendant challenged the finding that defense counsel committed a *Wheeler/Batson violation,* asserting that the trial court's rulings on his peremptory challenges were erroneous.

2. The defendant disputed whether Caucasians are a cognizable group for purpose of equal protection, and argued that the trial court should have "abdicated any further effort to gauge the sincerity of his race-neutral justifications" for his peremptories because defendant had articulated a subjective basis that the trial court could not second-guess. (*Id.* at p. 1329.)

3. Although the Court of Appeal said both arguments above were "doubtful propositions," it was not necessary to address them because the defendant had not established any resulting prejudice. (*Id.* & fn. 8.)

4. Any error in overruling a peremptory does not result in any fundamental unfairness and thus is not structural error. A defendant must affirmatively demonstrate prejudice. (*Id.* at p. 1331.)

5. The defendant's only claim of prejudice was this: "defendant asserts the erroneous overruling of his peremptory and the threat of sanctions chilled any further exercise of defense peremptories, resulting in the seating of objectionable Jurors Nos. 416024 and 439656." (*Id.* at p. 1332.)

5. But the Court of Appeal said this claim does meet the standard for prejudice. The Court of Appeal discussed *People v. Black* (2014) 58 Cal.4th 912, in which the trial court erroneously denied the defendant's challenges for cause as to two jurors, forcing him to use peremptory challenges. Eventually, the defense counsel in *Black* defendant exhausted his remaining challenges and was unable to remove Juror No. 8, whom he agreed was not objectionable for cause, but who was objectionable for other reasons.

6. The Supreme Court in *Black* said that a defendant must show the error affected his right to a fair trial and impartial jury, and "[a] defendant's right to an impartial jury is affected only when he exhausts his peremptory challenges and an incompetent juror, meaning a juror who should have been removed for cause, sits on the jury that decides the case." (*People v. Black*, *supra*, 58 Cal.4th at p. 920.).

7. The Court of Appeal here in *Singh* said: "The present context is analogous to *Black*. Instead of complaining that the trial court forced him to exhaust the defense peremptories erroneously, defendant asserts the erroneous overruling of his peremptory and the threat of sanctions chilled any further exercise of defense peremptories, resulting in the seating of objectionable Juror Nos. 416024 and 439656. This is the *only* claimed prejudice. However, under *Black*, defendant must demonstrate either bias or other grounds for a challenge for cause on the part of either juror in order to establish the necessary prejudice for reversal. . . . As defendant has thus failed to provide a demonstration of the necessary prejudice, we do not need to resolve whether the trial court's actions were indeed erroneous." (*Singh*, *supra*, 234 Cal.App.4th 1319.)

8. In other words, the defense can't demonstrate that his conviction should be reversed just because the trial court's erroneous denial of the defendant's peremptory challenge left him with an objectionable juror.

NEXT WEEK: THE CALIFORNIA SUPREME COURT ADDRESSES "SECOND-STRIKE" SENTENCING AND THE PRIOR FELONY ENHANCEMENT

Suggestions for future shows, ideas on how to improve P&A, and other comments or criticisms should be directed to Mary Pat Dooley at (510) 272-6249. Technical questions should be addressed to Gilbert Leung at (510) 272-6327. Participatory students: MCLE Evaluation sheets are available on location and certificates of attendance are constructively maintained in your possession in the Ala. Co. Dist.Atty computer banks.

POINTS AND AUTHORITIES

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	
June 29 2015	CA Supreme Court clarifies its *Batson/Wheeler* practice (*Peo. v. Scott*) – Part I; and U.S. Supreme Court reverses Ninth Circuit on *Batson/Wheeler* (*Davis v.Ayala*)	John Brouhard	Elim. of Bias 30 min

I. *People v. Scott* (2015) 61 Cal.4th 691

The California Supreme Court clarifies the *Batson/Wheeler* procedure on appellate review: a) when trial court finds no prima facie case of discrimination, b) after which prosecution offers or is asked to state its reasons for the strikes, c) and the trial court rules on those reasons, appellate courts must begin their analysis of the trial court's denial of the *Batson/Wheeler* motion at the first step (finding of no prima facie case.).

A. Introduction

The defendant was convicted of first degree murder with felony murder special circumstances, and was sentenced to death. The majority opinion is a per curiam opinion, signed by five justices, meaning it is a decision rendered by the majority of the court acting collectively, without identifying any particular judge as the author of the opinion. The majority affirmed the judgment in its entirety, including rejecting the defendant's claim of a *Batson/Wheeler* violation. Justice Liu, joined by Justice Krueger, wrote separately, concurring in the result on the merits and agreeing that no *Batson/Wheeler* error occurred. But Justice Liu disagreed with the majority's recommended procedure for appellate review of *Batson/Wheeler* claims when the trial court finds no prima facie case of discrimination, after which the trial court invites or receives the prosecutor's reasons for striking the challenged jurors and rules on reasons.

B. Factual Background of *Batson/Wheeler* Motion

1. The defendant, who is African American, based his *Batson/Wheeler* claim on the prosecutor's peremptory challenges of two African American prospective jurors, identified in the opinion as "R.C." and "H.R."

2. R.C. stated in her questionnaire that the deputy district attorney assigned to *this* case had also prosecuted her son. R.C. visited her son in prison as often as possible, and believed that her son had not been treated fairly by law enforcement or the district attorney's office. Before voir dire, the defense stipulated to R. C.'s excusal, but the trial court did not accept the stipulation, believing it was to inquire into R.C.'s ability to be fair.

3. When asked in voir dire whether there was anything that would affect her ability to be fair to both sides in this case, R.C. reiterated that the assigned deputy district attorney had successfully prosecuted her son and sent him to prison a year or two earlier, and reiterated her belief that her son was not treated fairly by the district attorney's office. Additionally, the same police department and the same lead investigator from her son's case were involved in this case. Although R.C. admitted having been very upset at the time of her son's trial, she said could be fair in this case, but said she did not know whether the district attorney would want someone like her on the jury.

4. Prospective juror H.R. stated in his questionnaire that he would consider all the aggravating and mitigating evidence presented before deciding the question of penalty and could vote for death in an appropriate case. However, in response to question 75, which asked jurors to read five options that described views about imposing the death penalty and to "check the one that best describes" their views, H.R. put a checkmark next to three different boxes: group five, which stated, "I oppose the death penalty. I will never vote for the death of another person"; group four, which stated, "I have doubts about the death penalty, but I would not vote against it in every case,"; and group three, which stated, "I neither favor nor oppose the death penalty."

5. During questioning by the trial court, H.R. said he could return a death verdict, but when asked by the court which of the three groups he checked off in the questionnaire best represented his view about imposing a death sentence, H.R. said he had to think about it. He finally replied that "I think group four would be more the way I feel." Under questioning by the prosecutor, H.R. e said made a mistake when looking at question 75, and was leaning toward group 4. When asked if he could imagine a crime warranting the death penalty, H.C. said, "I guess that's possible," "I guess I could," and "I think I can."

C. The Motion to Dismiss the Panel

1. After the jurors were sworn, but before the alternate jurors were selected, the defendant moved to dismiss the panel, claiming the prosecutor's decisions to strike R.C. and H.R. were racially motivated. Defense counsel relied in particular on R.C.'s statements that she could put aside the "situation" with her son and decide the case solely on the evidence, and on H.R.'s statements that he could be a fair and impartial juror and would be able to vote for death in an appropriate case.

2. The trial court ruled that the defendant's motion appeared to be untimely and therefore

forfeited because he had not objected to the strikes until after the jurors had been sworn, but nonetheless the trial court went on to address the merits.

[**Note**: As the Supreme Court explained, the trial judge erred when it ruled the defendant's motion was untimely because the defendant did not object until the 12 jurors were sworn. A *Batson/Wheeler* motion is timely if it is made before jury impanelment is completed, which does not occur until the alternates are selected and sworn. The defendant properly objected before the alternate jurors were selected and sworn so his motion was not untimely. In any event, the trial court ruled on the merits of the motion.]

3. As to R.C., the trial court doubted that any prosecutor would have kept her on the jury, and concluded that "no prima facie case could be made" as to R.C. Later as to R.C., the trial court stated: "if anyone who reads this transcript thinks that Miss [C.] would be a fair juror to the People, then I give up making decisions." Turning to H.R., the trial court said it "suspected there may well be a neutral race explanation," but added, "I believe that it could be argued that a prima facie case could be made."

4. The trial court then asked the prosecutor, "You feel that you want to respond, or do you want to rest on the Court's ruling on the {legally incorrect} waiver? I'll leave that to you, sir."

5. The prosecutor replied, "I don't want to say anything until I'm required to by the Court," and the prosecutor asked whether the court had ruled that there was no prima facie case as to both jurors. The court said as to R.C., it was obvious there was no prima facie case, and as to H.R., the court said, "There would probably be a legitimate basis" based on his answers and reluctance to the death penalty in the questionnaire. The prosecutor responded, "Okay. And if you are saying that you have not found a prima facie case, then I will state my reasons as to H.R. for the record. But I am not agreeing that there has been a prima facie showing. But I will say it out of an abundance of caution to preserve the record, but I am not agreeing, and I want it clear whether or not the Court has made the ruling that there is a prima facie case." As the Supreme Court summarized here, "The prosecutor continued to resist offering any statement of reasons until he was satisfied the record 'clearly reflected' the trial court's finding that the defendant had failed to make a prima facie case of discrimination." [1]

6. The prosecutor then accepted the court's invitation to discuss his reasons as to H.R., stating that based on H.R.'s inconsistent answers and explanations, the prosecutor did not know where H.R. stood on the death penalty and that was the reason for excusing him. The trial court then agreed that that a challenge based on reluctance to impose the death penalty is an

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[1] The trial judge was not very clear, but apparently he was clear enough that the prosecutor was willing to go forward with his statement of reasons and the Supreme Court was willing to conclude that the trial court found no prima facie case. Part II of this P&A (next week) will discuss the "takeaways" from this opinion, and one of those recommendations will be to get an unequivocal, unambiguous finding from the trial court that the defendant has failed to make a prima facie showing of discrimination.

appropriate basis for the exercise of a challenge.

D. The Supreme Court's Analysis

1. "The now familiar *Batson/Wheeler* inquiry consists of three distinct steps. First, the opponent of the strike must make out a prima face case by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose in the exercise of peremptory challenges. Second, if the prima facie case has been made, the burden shifts to the proponent of the strike to explain adequately the basis for excusing the juror by offering permissible, nondiscriminatory justifications. Third, if the party has offered a nondiscriminatory reason, the trial court must decide whether the opponent of the strike has proved the ultimate question of purposeful discrimination."

2. Although the question at the first stage concerning the existence of a prima facie case depends on consideration of the entire record of voir dire as of the time the motion was made, the Supreme Court noted that certain types of evidence may prove particularly relevant. Such evidence includes the fact that a party has struck most or all of the members of the identified group from the venire; that a party has used a disproportionate number of strikes against the group; that the party has failed to engage these jurors in more than desultory voir dire; that the defendant is a member of the identified group, and that the victim is a member of the group to which the majority of the remaining jurors belong. A court may also consider nondiscriminatory reasons for a peremptory challenge that are apparent from and "clearly established" in the record and that necessarily dispel any inference of bias.

3. On appeal, the defendant here argued that the prosecutor struck two of the three African who made it into the jury box, that he is African American, and that the victim was white. He urged the court to find a prima facie case of discrimination on those facts alone. The Supreme Court said it is required to consider the totality of the relevant facts in determining whether an inference of discrimination exists. It concluded that viewed as a whole, the record in this case clearly established nondiscriminatory reasons for excusing R.C. and H.R. that dispel any inference of bias.

E. The Supreme Court's Clarification of its Practice in Reviewing *Batson/Wheeler*

1. The Supreme Court summarized the procedural events in the hearing on the *Baston/Wheeler* motion as follows: "In this case, the trial court determined first that the defendant had failed to raise an inference of discrimination in connection with the strikes of R.C. and H.R. It then granted the prosecutor an opportunity to state his reasons for excusing those jurors. After being assured that the trial court had found no prima facie case of discrimination, the prosecutor made a record of his reasons for excusing H.R. The prosecutor did not offer reasons for excusing R.C., presumably because of the trial court's statement that the reasons for

excusing her were obvious. The trial court, as an alternative holding, then credited the prosecutor's reasons and determined that the strike of H.R. did not constitute purposeful discrimination."

2. Thus, the Supreme Court concluded the trial court found no prima facie case of discrimination (first stage *Batson/Wheeler*) and also made an alternative finding that the reasons offered by the prosecutor were not purposeful discrimination (third stage *Batson/Wheeler*).

So where does appellate review begin? Does the appellate court start with the first stage and review whether there was no prima facie case? Or does the appellate court bypass stage one and go directly to the third stage finding that there was no purposeful discrimination? This was the question to be resolved in *Scott*. The United States Supreme Court has not weighed in on this question, and has given some flexibility to state and federal appellate courts to implement *Batson* procedures. The California Supreme Court majority, after noting its own cases have been inconsistent on this issue, said it would use *Scott* as an opportunity to clarify its practice.

3. The Supreme Court majority noted that Justice Liu agrees that an appellate court properly reviews a trial court's first stage ruling of no prima facie case when the court makes that ruling, then allows or invites the prosecutor to state reasons for excusing the juror, but then refrains from ruling on the validity of those reasons.

4. There is no agreement, however, between the majority and Justice Liu as to "whether the same procedure applies when the trial court, having determined that no prima facie case was established and having heard the proffered justifications, goes ahead and makes an alternative holding that those reasons were genuine." In other words, the Supreme Court justices disagree on the review procedure in circumstances where the trial judge has made a first stage ruling *and*, alternatively, a third stage ruling.

5. The Supreme Court majority reviewed the concerns that informed its decision making on this question. The *Batson/Wheeler* framework is designed to enforce the constitutional prohibition on exclusion of persons from jury service on account of their membership in a cognizable group. On the other hand, it is also designed to preserve the historical privilege of peremptory challenges free of judicial control. The majority said its formulation must harmonize these two aspects of *Batson/Wheeler*. "A balancing of these competing interests explains why the party exercising a peremptory challenge has the burden to come forward with nondiscriminatory reasons only when the moving party has first made out a prima facie case of discrimination."

6. In addition, the Supreme Court said its approach to *Batson/Wheeler* motions has also been shaped by practical considerations. A peremptory challenge is designed to be used "for any reason, or no reason at all," and a party exercising a strike thus has no obligation to articulate a reason until an inference of discrimination has been raised. But the Supreme Court said it has

nonetheless repeatedly encouraged trial courts to offer prosecutors the opportunity to state their reasons in order to create an adequate record for an appellate court, in the event the appellate court disagrees with the first-stage ruling and must then go onto the third stage to determine whether any constitutional violation has been established.

Allowing the prosecutors to state their reasons gives the reviewing court in this circumstance a complete record to look at the question of pretext. "After all, when a trial court erroneously fails to discern an inference of discrimination and terminates the inquiry at that point, an appellate court is generally required to order a remand to allow the parties and the trial court to continue the three-step *Batson/Wheeler* inquiry. An investigation into the prosecutor's motives many years after the fact, when memories have faded and the parties' written notes can no longer be found, is an inferior substitute for a contemporaneous record of the prosecutor's justification and the defendant's response."

F. The Supreme Court's Solution

1. The Supreme Court next considered the nature of the procedure to devise. It realized that if the trial court ruled that the defense failed to establish a prima facie case of discrimination, prosecutors would be reluctant to state their reasons for the record if doing so would jeopardize this favorable ruling. The Supreme Court pointed to the prosecutor's reluctance to state his reasons in this *Scott* case as illustrating the dilemma. Prosecutors want an assurance that when a trial court has concluded that a prima facie case has not been made, the trial court's request for a statement of reasons will not convert a first-stage *Batson/Wheeler* case into a third-stage case.

2. The defendant and Justice Liu proposed that whenever the trial court – as here in *Scott* – determines *both* that no prima facie case of discrimination exists *and* that no purposeful discrimination occurred, then the first stage should be considered moot and the reviewing court should proceed directly to the third stage.

3. The Supreme Court majority disagreed, concluding the appellate court should begin its review with the first-stage *Batson/Wheeler* ruling. It stated the following procedure:

"In sum, where (1) the trial court has determined that no prima facie case of discrimination exists, (2) the trial court allows or invites the prosecutor to state his or her reasons for excusing the juror for the record, (3) the prosecutor provides nondiscriminatory reasons, and (4) the trial court determines that the prosecutor's nondiscriminatory reasons are genuine, an appellate court should begin its analysis of the trial court's denial of the *Batson/Wheeler* motion with a review of the first-stage ruling."

"If the appellate court agrees with the trial court's first-stage ruling, the claim is resolved."

4. Practical translation: The trial court, after finding no prima facie case of discrimination (first stage) asks or allows the prosecutor to state his or her reasons for the strikes (second stage) and rules that the reasons proffered by the prosecutor were nondiscriminatory and genuine (third stage.) Thus in the trial court, the prosecutor has been taken through the *entire Batson/Wheeler* procedure, but the appellate court will STOP its review at the first step if the record supports the trial courts finding of no prima facie case.

The appellate court will go on to the third stage *only* if it disagrees with the trial court's conclusion as to the prima facie case. If the appellate court disagrees, it can proceed directly to review of the third-stage ruling, aided by a full record of reasons and the trial court's evaluation of their plausibility.

5. However, if the prosecutor is asked or volunteers his reasons for the strikes and there is discriminatory intent inherent in the explanation offered by the prosecutor, then "[r]eviewing courts should not blind themselves to the record in the 'rare' circumstance that a prosecutor volunteers a justification that is discriminatory on its face. The facially discriminatory justification must be weighed with the relevant facts to determine if they give rise to an inference of discrimination, and thus compel the reviewing court to continue on with the subsequent steps in the *Batson/Wheeler* framework."

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

7. **Note**: The Supreme Court while not *requiring* this procedure of doing the full three-stage *Batson/Wheeler* analysis in the trial court, the court is making it clear that this procedure is its preferred practice. The Supreme Court is recommending this practice in order to create a full record in the event the appellate court disagrees that no prima facie case was shown. If the appellate court *agrees* that no prima facie case was made, nothing has been lost by the prosecutor for stating his or her reasons and getting a ruling by the trial court on those reasons. In the event the appellate court *disagrees* on the prima facie finding and proceeds to the third stage, it is far better to have a statement of reasons by the prosecutor and conclusions and observations from the trial judge than to have an appellate court research attorney analyze a cold record for the first time on appeal.

8. An important footnote in the opinion: If the trial court solicits the prosecutor's reasons for his or her strikes *before* the trial court has ruled whether the defendant made a prima facie showing, then appellate courts will infer an "implied prima facie finding" and proceed directly to

the third stage to review the ultimate question of purposeful discrimination. (Fn. 1, slip opn.) Therefore prosecutors should not volunteer their reasons for their strikes or accept the court's invitation to do so until the trial court has clearly stated that the defense has not made a prima showing. (More on this point in next week's P&A, Part II.).

II. ***Davis v. Ayala*** **(June 18, 2015, No. 13-1428) __ U.S. __ [2015 WL 2473373]**

Although the California trial court erred in the procedure by which it ruled on the defendant's *Batson* claims, the U.S. Supreme Court majority concludes that the Ninth Circuit's decision granting habeas relief was a "misapplication of basic rules of harmless error."

A. California Trial Court Background

1. The defendant was convicted of three counts of murder and sentenced to death. As part of the jury selection process, more than 200 potential jurors completed a questionnaire and were questioned in court. Jurors who were not dismissed for cause were called back in groups for voir dire, and the parties exercised their peremptory challenges. Each side was allowed 20 peremptories, and the prosecution used 18 of its allotment. It used seven peremptories to strike all of the African–Americans and Hispanics who were available for service. The defendant, who is Hispanic, raised *Batson* objections to those challenges.

2. It was the unusual manner in which the *Batson* motion unfolded that gave rise to the appeal in state court and the federal habeas. After the prosecutor peremptorily challenged two African-American jurors, the trial judge stated these two strikes failed to establish a prima facie case of racial discrimination, but he nevertheless required the prosecution to state the reasons for the strikes in order to make a recrod. The prosecutor asked to do this outside the presence of the defense so as not to disclose trial strategy. Over the defendant's objection, the judge granted the request. After hearing and evaluating the prosecutor's explanations, the judge concluded that the prosecution had valid, race-neutral reasons for these strikes.

3. The defendant next made a *Batson* objection when the prosecutor challenged two Hispanic jurors. The trial court again found no prima facie case, but again ordered the prosecutor to state his reasons for striking the jurors, which was again done ex parte. The trial court, after hearing the prosecutor's reasons, concluded there were race neutral reasons for the strikes.

4. The third time the defendant raised *Batson* challenges, the trial court determined that a prima facie case of discrimination had been shown, and the trial court said it would hear the prosecutor's response outside the presence of the jury. The prosecutor offered his reasons in this ex parte hearing and the trial concluded for a third time that the prosecutor had offered

race-neutral explanations

5. On appeal to the California Supreme Court, the defendant contended the trial court committed reversible error by excluding the defense from part of the *Batson* hearing.

6. The California Supreme Court, after noting that the prosecution had not offered matters of trial strategy in these ex parte hearings, concluded it was error under state law to bar defendant's attorney from these hearings.

7. Turning to the question of prejudice, the Supreme Court (5-2 ruling) noted that the error was harmless under state law, and that if federal due process error occurred, this error too was harmless under the federal harmless error standard (*Chapman v. California.*)

8. The California Supreme Court reviewed the prosecutor's reasons for striking the seven prospective jurors. The majority concluded "on this well-developed record, we are confident that defense counsel could not have argued anything substantial that would have changed the court's rulings. Accordingly, the error was harmless." The court concluded that the record supported the trial judge's implicit determination that the prosecution's justifications were not fabricated and were instead grounded in fact. The court emphasized that the " 'trial court's rulings in the ex parte hearing indisputably reflect both its familiarity with the record of voir dire of the challenged prospective jurors and its critical assessment of the prosecutor's proffered.'"

B. Federal Habeas

1. The defendant filed a petition for habeas corpus in the federal district court, based on the ex parte hearings as violating federal constitutional rights. The federal district court denied his petition.

2. However, a divided panel of the Ninth Circuit granted federal habeas corpus relief, based on the dismissal of three potential jurors. The Ninth Circuit required California either to release the defendant or retry him. The Ninth Circuit held that the California Supreme Court's harmlessness decision was not an adjudication on the merits under the Antiterrorism & Effective Death Penalty Act (AEDPA), and therefore de novo review should apply to the defendant's claim. The Ninth Circuit applied the federal test for harmlessness (defendant must show actual prejudice) "without regard for the state court's harmless error determination."

C. The United State Supreme Court: Standard of Review

1. The Supreme Court decision was a 5-4 majority written by Justice Alito, reversing the Ninth Circuit.

2. The majority said it would assume for sake of argument that the defendant's federal rights

were violated when the defense was excluded from the ex parte hearings, but this does not necessarily mean the defendant is entitled to habeas relief.

3. Unlike the Ninth Circuit, the U.S. Supreme Court majority concluded that the California Supreme Court *did* adjudicate the defendant's claim on the merits by holding that any federal error was harmless beyond a reasonable doubt. Under the AEDPA, high deference must be given to the state court's adjudication. As the U.S. Supreme Court majority stated here, under this highly deferential standard, "we may not overturn the California Supreme Court decision unless the court applied the *Chapman* harmless error standard in an objectively unreasonable manner."

D. The United State Supreme Court: Review on the Merits

1. The Supreme Court majority stated: "The question is whether the defendant was harmed by the trial court's decision to receive the prosecution's explanation for its challenged strikes without the defense present. In order for this argument to succeed, the defendant must show that he was actually prejudiced by this procedure, a standard that he necessarily cannot satisfy if a fairminded jurist could agree with the California Supreme Court's decision that this procedure met the *Chapman* standard of harmlessness."

2. The Supreme Court majority then proceeded, in significant detail, to analyze the reasons given by the prosecutor for the seven peremptory challenges at issue, devoting most of its analysis to the three potential jurors who were the focus of the Ninth Circuit.

3. The Supreme Court majority ultimately determined Ninth Circuit erred and the exclusion of defendant's attorney from the ex parte hearings was harmless as to all seven strikes. Without detailing the conclusions as to each juror, below are some of the statements made by the Supreme Court majority reflecting general principles in the voir dire process:

a. "In a capital case, it is not surprising for prospective jurors to express varying degrees of hesitancy about voting for a death verdict. Few are likely to have experienced a need to make a comparable decision at any prior time in their lives. As a result, both the prosecution and the defense may be required to make fine judgment calls about which jurors are more or less willing to vote for the ultimate punishment. These judgment calls may involve a comparison of responses that differ in only nuanced respects, as well as a sensitive assessment of jurors' demeanor.

We have previously recognized that peremptory challenges 'are often the subjects of instinct,' and that 'race-neutral reasons for peremptory challenges often invoke a juror's demeanor.' A trial court is best situated to evaluate both the words and the demeanor of jurors who are peremptorily challenged, as well as the credibility of the prosecutor who exercised those strikes. As we have said, 'these determinations of credibility and demeanor lie peculiarly within a trial judge's province,' and 'in the absence of exceptional circumstances, we will defer to the trial court.' 'Appellate judges cannot on the basis of a cold record easily second-guess a

trial judge's decision about likely motivation.' " (internal citations omitted.)

b. "In ordering federal habeas relief based on their assessment of the responsiveness and completeness of [the juror's] answers, the members of the Ninth Circuit majority misunderstood the role of a federal court in a habeas case. The role of a federal habeas court is to 'guard against extreme malfunctions in the state criminal justice systems,' not to apply de novo review of factual findings and to substitute its own opinions for the determination made on the scene by the trial judge." (internal citations omitted.)

E. The United State Supreme Court: Majority's Conclusion

In reversing the Ninth Circuit, the United States Supreme Court majority had strong words for the Ninth Circuit in its concluding remarks:

"In *Batson*, this Court adopted a procedure for ferreting out discrimination in the exercise of peremptory challenges, and this procedure places great responsibility in the hands of the trial judge, who is in the best position to determine whether a peremptory challenge is based on an impermissible factor. This is a difficult determination because of the nature of peremptory challenges: They are often based on subtle impressions and intangible factors. In this case, the conscientious trial judge determined that the strikes at issue were not based on race, and his judgment was entitled to great weight. On appeal, five justices of the California Supreme Court carefully evaluated the record and found no basis to reverse. A federal district Judge denied federal habeas relief, but a divided panel of the Ninth Circuit reversed the District Court and found that the California Supreme Court had rendered a decision with which no fairminded jurist could agree. [¶] For the reasons explained above, it was the Ninth Circuit that erred. The exclusion of the defendant's attorney from part of the *Batson* hearing was harmless error. There is no basis for finding that the defendant suffered actual prejudice, and the decision of the California Supreme Court represented an entirely reasonable application of controlling precedent. [¶] The judgment of the Ninth Circuit is reversed."

NEXT WEEK: We continue with Part II in our discussion of the California Supreme Court's decision in *People v. Scott* with advice on what to do generally when you are the subject of a *Batson/Wheeler* motion, and how to make this three-stage *Batson/Wheeler* record that is discussed in *Scott*.

Suggestions for future shows, ideas on how to improve P&A, and other comments or criticisms should be directed to Mary Pat Dooley at (510) 272-6249. Technical questions should be addressed to Gilbert Leung at (510) 272-6327. Participatory students: MCLE Evaluation sheets are available on location and certificates of attendance are constructively maintained in your possession in the Ala. Co. Dist.Atty computer banks.

POINTS AND AUTHORITIES

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Week Of	Topic	Guest	
June 29 2015	CA Supreme Court clarifies its *Batson/Wheeler* practice (*Peo. v. Scott*) – Part I; and U.S. Supreme Court reverses Ninth Circuit on *Batson/Wheeler* (*Davis v. Ayala*)	John Brouhard	Elim. of Bias 30 min

I. *People v. Scott* (2015) 61 Cal.4th 691

The California Supreme Court clarifies the *Batson/Wheeler* procedure on appellate review: a) when trial court finds no prima facie case of discrimination, b) after which prosecution offers or is asked to state its reasons for the strikes, c) and the trial court rules on those reasons, appellate courts must begin their analysis of the trial court's denial of the *Batson/Wheeler* motion at the first step (finding of no prima facie case.).

A. Introduction

The defendant was convicted of first degree murder with felony murder special circumstances, and was sentenced to death. The majority opinion is a per curiam opinion, signed by five justices, meaning it is a decision rendered by the majority of the court acting collectively, without identifying any particular judge as the author of the opinion. The majority affirmed the judgment in its entirety, including rejecting the defendant's claim of a *Batson/Wheeler* violation. Justice Liu, joined by Justice Krueger, wrote separately, concurring in the result on the merits and agreeing that no *Batson/Wheeler* error occurred. But Justice Liu disagreed with the majority's recommended procedure for appellate review of *Batson/Wheeler* claims when the trial court finds no prima facie case of discrimination, after which the trial court invites or receives the prosecutor's reasons for striking the challenged jurors and rules on reasons.

B. Factual Background of *Batson/Wheeler* Motion

1. The defendant, who is African American, based his *Batson/Wheeler* claim on the prosecutor's peremptory challenges of two African American prospective jurors, identified in the opinion as "R.C." and "H.R."

2. R.C. stated in her questionnaire that the deputy district attorney assigned to *this* case had also prosecuted her son. R.C. visited her son in prison as often as possible, and believed that her son had not been treated fairly by law enforcement or the district attorney's office. Before voir dire, the defense stipulated to R. C.'s excusal, but the trial court did not accept the stipulation, believing it was to inquire into R.C.'s ability to be fair.

3. When asked in voir dire whether there was anything that would affect her ability to be fair to both sides in this case, R.C. reiterated that the assigned deputy district attorney had successfully prosecuted her son and sent him to prison a year or two earlier, and reiterated her belief that her son was not treated fairly by the district attorney's office. Additionally, the same police department and the same lead investigator from her son's case were involved in this case. Although R.C. admitted having been very upset at the time of her son's trial, she said could be fair in this case, but said she did not know whether the district attorney would want someone like her on the jury.

4. Prospective juror H.R. stated in his questionnaire that he would consider all the aggravating and mitigating evidence presented before deciding the question of penalty and could vote for death in an appropriate case. However, in response to question 75, which asked jurors to read five options that described views about imposing the death penalty and to "check the one that best describes" their views, H.R. put a checkmark next to three different boxes: group five, which stated, "I oppose the death penalty. I will never vote for the death of another person"; group four, which stated, "I have doubts about the death penalty, but I would not vote against it in every case,"; and group three, which stated, "I neither favor nor oppose the death penalty."

5. During questioning by the trial court, H.R. said he could return a death verdict, but when asked by the court which of the three groups he checked off in the questionnaire best represented his view about imposing a death sentence, H.R. said he had to think about it. He finally replied that "I think group four would be more the way I feel." Under questioning by the prosecutor, H.R. e said made a mistake when looking at question 75, and was leaning toward group 4. When asked if he could imagine a crime warranting the death penalty, H.C. said, "I guess that's possible," "I guess I could," and "I think I can."

C. The Motion to Dismiss the Panel

1. After the jurors were sworn, but before the alternate jurors were selected, the defendant moved to dismiss the panel, claiming the prosecutor's decisions to strike R.C. and H.R. were racially motivated. Defense counsel relied in particular on R.C.'s statements that she could put aside the "situation" with her son and decide the case solely on the evidence, and on H.R.'s statements that he could be a fair and impartial juror and would be able to vote for death in an appropriate case.

2. The trial court ruled that the defendant's motion appeared to be untimely and therefore

forfeited because he had not objected to the strikes until after the jurors had been sworn, but nonetheless the trial court went on to address the merits.

[**Note**: As the Supreme Court explained, the trial judge erred when it ruled the defendant's motion was untimely because the defendant did not object until the 12 jurors were sworn. A *Batson/Wheeler* motion is timely if it is made before jury impanelment is completed, which does not occur until the alternates are selected and sworn. The defendant properly objected before the alternate jurors were selected and sworn so his motion was not untimely. In any event, the trial court ruled on the merits of the motion.]

3. As to R.C., the trial court doubted that any prosecutor would have kept her on the jury, and concluded that "no prima facie case could be made" as to R.C. Later as to R.C., the trial court stated: "if anyone who reads this transcript thinks that Miss [C.] would be a fair juror to the People, then I give up making decisions." Turning to H.R., the trial court said it "suspected there may well be a neutral race explanation," but added, "I believe that it could be argued that a prima facie case could be made."

4. The trial court then asked the prosecutor, "You feel that you want to respond, or do you want to rest on the Court's ruling on the {legally incorrect} waiver? I'll leave that to you, sir."

5. The prosecutor replied, "I don't want to say anything until I'm required to by the Court," and the prosecutor asked whether the court had ruled that there was no prima facie case as to both jurors. The court said as to R.C., it was obvious there was no prima facie case, and as to H.R., the court said, "There would probably be a legitimate basis" based on his answers and reluctance to the death penalty in the questionnaire. The prosecutor responded, "Okay. And if you are saying that you have not found a prima facie case, then I will state my reasons as to H.R. for the record. But I am not agreeing that there has been a prima facie showing. But I will say it out of an abundance of caution to preserve the record, but I am not agreeing, and I want it clear whether or not the Court has made the ruling that there is a prima facie case." As the Supreme Court summarized here, "The prosecutor continued to resist offering any statement of reasons until he was satisfied the record 'clearly reflected' the trial court's finding that the defendant had failed to make a prima facie case of discrimination." [1]

6. The prosecutor then accepted the court's invitation to discuss his reasons as to H.R., stating that based on H.R.'s inconsistent answers and explanations, the prosecutor did not know where H.R. stood on the death penalty and that was the reason for excusing him. The trial court then agreed that that a challenge based on reluctance to impose the death penalty is an

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[1] The trial judge was not very clear, but apparently he was clear enough that the prosecutor was willing to go forward with his statement of reasons and the Supreme Court was willing to conclude that the trial court found no prima facie case. Part II of this P&A (next week) will discuss the "takeaways" from this opinion, and one of those recommendations will be to get an unequivocal, unambiguous finding from the trial court that the defendant has failed to make a prima facie showing of discrimination.

appropriate basis for the exercise of a challenge.

D. The Supreme Court's Analysis

1. "The now familiar *Batson/Wheeler* inquiry consists of three distinct steps. First, the opponent of the strike must make out a prima face case by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose in the exercise of peremptory challenges. Second, if the prima facie case has been made, the burden shifts to the proponent of the strike to explain adequately the basis for excusing the juror by offering permissible, nondiscriminatory justifications. Third, if the party has offered a nondiscriminatory reason, the trial court must decide whether the opponent of the strike has proved the ultimate question of purposeful discrimination."

2. Although the question at the first stage concerning the existence of a prima facie case depends on consideration of the entire record of voir dire as of the time the motion was made, the Supreme Court noted that certain types of evidence may prove particularly relevant. Such evidence includes the fact that a party has struck most or all of the members of the identified group from the venire; that a party has used a disproportionate number of strikes against the group; that the party has failed to engage these jurors in more than desultory voir dire; that the defendant is a member of the identified group, and that the victim is a member of the group to which the majority of the remaining jurors belong. A court may also consider nondiscriminatory reasons for a peremptory challenge that are apparent from and "clearly established" in the record and that necessarily dispel any inference of bias.

3. On appeal, the defendant here argued that the prosecutor struck two of the three African who made it into the jury box, that he is African American, and that the victim was white. He urged the court to find a prima facie case of discrimination on those facts alone. The Supreme Court said it is required to consider the totality of the relevant facts in determining whether an inference of discrimination exists. It concluded that viewed as a whole, the record in this case clearly established nondiscriminatory reasons for excusing R.C. and H.R. that dispel any inference of bias.

E. The Supreme Court's Clarification of its Practice in Reviewing *Batson/Wheeler*

1. The Supreme Court summarized the procedural events in the hearing on the *Baston/Wheeler* motion as follows: "In this case, the trial court determined first that the defendant had failed to raise an inference of discrimination in connection with the strikes of R.C. and H.R. It then granted the prosecutor an opportunity to state his reasons for excusing those jurors. After being assured that the trial court had found no prima facie case of discrimination, the prosecutor made a record of his reasons for excusing H.R. The prosecutor did not offer reasons for excusing R.C., presumably because of the trial court's statement that the reasons for

excusing her were obvious. The trial court, as an alternative holding, then credited the prosecutor's reasons and determined that the strike of H.R. did not constitute purposeful discrimination."

2. Thus, the Supreme Court concluded the trial court found no prima facie case of discrimination (first stage *Batson/Wheeler*) and also made an alternative finding that the reasons offered by the prosecutor were not purposeful discrimination (third stage *Batson/Wheeler*).

So where does appellate review begin? Does the appellate court start with the first stage and review whether there was no prima facie case? Or does the appellate court bypass stage one and go directly to the third stage finding that there was no purposeful discrimination? This was the question to be resolved in *Scott*. The United States Supreme Court has not weighed in on this question, and has given some flexibility to state and federal appellate courts to implement *Batson* procedures. The California Supreme Court majority, after noting its own cases have been inconsistent on this issue, said it would use *Scott* as an opportunity to clarify its practice.

3. The Supreme Court majority noted that Justice Liu agrees that an appellate court properly reviews a trial court's first stage ruling of no prima facie case when the court makes that ruling, then allows or invites the prosecutor to state reasons for excusing the juror, but then refrains from ruling on the validity of those reasons.

4. There is no agreement, however, between the majority and Justice Liu as to "whether the same procedure applies when the trial court, having determined that no prima facie case was established and having heard the proffered justifications, goes ahead and makes an alternative holding that those reasons were genuine." In other words, the Supreme Court justices disagree on the review procedure in circumstances where the trial judge has made a first stage ruling *and*, alternatively, a third stage ruling.

5. The Supreme Court majority reviewed the concerns that informed its decision making on this question. The *Batson/Wheeler* framework is designed to enforce the constitutional prohibition on exclusion of persons from jury service on account of their membership in a cognizable group. On the other hand, it is also designed to preserve the historical privilege of peremptory challenges free of judicial control. The majority said its formulation must harmonize these two aspects of *Batson/Wheeler*. "A balancing of these competing interests explains why the party exercising a peremptory challenge has the burden to come forward with nondiscriminatory reasons only when the moving party has first made out a prima facie case of discrimination."

6. In addition, the Supreme Court said its approach to *Batson/Wheeler* motions has also been shaped by practical considerations. A peremptory challenge is designed to be used "for any reason, or no reason at all," and a party exercising a strike thus has no obligation to articulate a reason until an inference of discrimination has been raised. But the Supreme Court said it has

nonetheless repeatedly encouraged trial courts to offer prosecutors the opportunity to state their reasons in order to create an adequate record for an appellate court, in the event the appellate court disagrees with the first-stage ruling and must then go onto the third stage to determine whether any constitutional violation has been established.

Allowing the prosecutors to state their reasons gives the reviewing court in this circumstance a complete record to look at the question of pretext. "After all, when a trial court erroneously fails to discern an inference of discrimination and terminates the inquiry at that point, an appellate court is generally required to order a remand to allow the parties and the trial court to continue the three-step *Batson/Wheeler* inquiry. An investigation into the prosecutor's motives many years after the fact, when memories have faded and the parties' written notes can no longer be found, is an inferior substitute for a contemporaneous record of the prosecutor's justification and the defendant's response."

F. The Supreme Court's Solution

1. The Supreme Court next considered the nature of the procedure to devise. It realized that if the trial court ruled that the defense failed to establish a prima facie case of discrimination, prosecutors would be reluctant to state their reasons for the record if doing so would jeopardize this favorable ruling. The Supreme Court pointed to the prosecutor's reluctance to state his reasons in this *Scott* case as illustrating the dilemma. Prosecutors want an assurance that when a trial court has concluded that a prima facie case has not been made, the trial court's request for a statement of reasons will not convert a first-stage *Batson/Wheeler* case into a third-stage case.

2. The defendant and Justice Liu proposed that whenever the trial court – as here in *Scott* – determines *both* that no prima facie case of discrimination exists *and* that no purposeful discrimination occurred, then the first stage should be considered moot and the reviewing court should proceed directly to the third stage.

3. The Supreme Court majority disagreed, concluding the appellate court should begin its review with the first-stage *Batson/Wheeler* ruling. It stated the following procedure:

"In sum, where (1) the trial court has determined that no prima facie case of discrimination exists, (2) the trial court allows or invites the prosecutor to state his or her reasons for excusing the juror for the record, (3) the prosecutor provides nondiscriminatory reasons, and (4) the trial court determines that the prosecutor's nondiscriminatory reasons are genuine, an appellate court should begin its analysis of the trial court's denial of the *Batson/Wheeler* motion with a review of the first-stage ruling."

"If the appellate court agrees with the trial court's first-stage ruling, the claim is resolved."

4. Practical translation: The trial court, after finding no prima facie case of discrimination (first stage) asks or allows the prosecutor to state his or her reasons for the strikes (second stage) and rules that the reasons proffered by the prosecutor were nondiscriminatory and genuine (third stage.) Thus in the trial court, the prosecutor has been taken through the *entire Batson/Wheeler* procedure, but the appellate court will STOP its review at the first step if the record supports the trial courts finding of no prima facie case.

The appellate court will go on to the third stage *only* if it disagrees with the trial court's conclusion as to the prima facie case. If the appellate court disagrees, it can proceed directly to review of the third-stage ruling, aided by a full record of reasons and the trial court's evaluation of their plausibility.

5. However, if the prosecutor is asked or volunteers his reasons for the strikes and there is discriminatory intent inherent in the explanation offered by the prosecutor, then "[r]eviewing courts should not blind themselves to the record in the 'rare' circumstance that a prosecutor volunteers a justification that is discriminatory on its face. The facially discriminatory justification must be weighed with the relevant facts to determine if they give rise to an inference of discrimination, and thus compel the reviewing court to continue on with the subsequent steps in the *Batson/Wheeler* framework."

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

7. **Note**: The Supreme Court while not *requiring* this procedure of doing the full three-stage *Batson/Wheeler* analysis in the trial court, the court is making it clear that this procedure is its preferred practice. The Supreme Court is recommending this practice in order to create a full record in the event the appellate court disagrees that no prima facie case was shown. If the appellate court *agrees* that no prima facie case was made, nothing has been lost by the prosecutor for stating his or her reasons and getting a ruling by the trial court on those reasons. In the event the appellate court *disagrees* on the prima facie finding and proceeds to the third stage, it is far better to have a statement of reasons by the prosecutor and conclusions and observations from the trial judge than to have an appellate court research attorney analyze a cold record for the first time on appeal.

8. An important footnote in the opinion: If the trial court solicits the prosecutor's reasons for his or her strikes *before* the trial court has ruled whether the defendant made a prima facie showing, then appellate courts will infer an "implied prima facie finding" and proceed directly to

the third stage to review the ultimate question of purposeful discrimination. (Fn. 1, slip opn.) Therefore prosecutors should not volunteer their reasons for their strikes or accept the court's invitation to do so until the trial court has clearly stated that the defense has not made a prima showing. (More on this point in next week's P&A, Part II.).

II. *Davis v. Ayala* (June 18, 2015, No. 13-1428) __ U.S. __ [2015 WL 2473373]

Although the California trial court erred in the procedure by which it ruled on the defendant's *Batson* claims, the U.S. Supreme Court majority concludes that the Ninth Circuit's decision granting habeas relief was a "misapplication of basic rules of harmless error."

A. California Trial Court Background

1. The defendant was convicted of three counts of murder and sentenced to death. As part of the jury selection process, more than 200 potential jurors completed a questionnaire and were questioned in court. Jurors who were not dismissed for cause were called back in groups for voir dire, and the parties exercised their peremptory challenges. Each side was allowed 20 peremptories, and the prosecution used 18 of its allotment. It used seven peremptories to strike all of the African–Americans and Hispanics who were available for service. The defendant, who is Hispanic, raised *Batson* objections to those challenges.

2. It was the unusual manner in which the *Batson* motion unfolded that gave rise to the appeal in state court and the federal habeas. After the prosecutor peremptorily challenged two African-American jurors, the trial judge stated these two strikes failed to establish a prima facie case of racial discrimination, but he nevertheless required the prosecution to state the reasons for the strikes in order to make a recrod. The prosecutor asked to do this outside the presence of the defense so as not to disclose trial strategy. Over the defendant's objection, the judge granted the request. After hearing and evaluating the prosecutor's explanations, the judge concluded that the prosecution had valid, race-neutral reasons for these strikes.

3. The defendant next made a *Batson* objection when the prosecutor challenged two Hispanic jurors. The trial court again found no prima facie case, but again ordered the prosecutor to state his reasons for striking the jurors, which was again done ex parte. The trial court, after hearing the prosecutor's reasons, concluded there were race neutral reasons for the strikes.

4. The third time the defendant raised *Batson* challenges, the trial court determined that a prima facie case of discrimination had been shown, and the trial court said it would hear the prosecutor's response outside the presence of the jury. The prosecutor offered his reasons in this ex parte hearing and the trial concluded for a third time that the prosecutor had offered

race-neutral explanations

5. On appeal to the California Supreme Court, the defendant contended the trial court committed reversible error by excluding the defense from part of the *Batson* hearing.

6. The California Supreme Court, after noting that the prosecution had not offered matters of trial strategy in these ex parte hearings, concluded it was error under state law to bar defendant's attorney from these hearings.

7. Turning to the question of prejudice, the Supreme Court (5-2 ruling) noted that the error was harmless under state law, and that if federal due process error occurred, this error too was harmless under the federal harmless error standard (*Chapman v. California.*)

8. The California Supreme Court reviewed the prosecutor's reasons for striking the seven prospective jurors. The majority concluded "on this well-developed record, we are confident that defense counsel could not have argued anything substantial that would have changed the court's rulings. Accordingly, the error was harmless." The court concluded that the record supported the trial judge's implicit determination that the prosecution's justifications were not fabricated and were instead grounded in fact. The court emphasized that the " 'trial court's rulings in the ex parte hearing indisputably reflect both its familiarity with the record of voir dire of the challenged prospective jurors and its critical assessment of the prosecutor's proffered.'"

B. Federal Habeas

1. The defendant filed a petition for habeas corpus in the federal district court, based on the ex parte hearings as violating federal constitutional rights. The federal district court denied his petition.

2. However, a divided panel of the Ninth Circuit granted federal habeas corpus relief, based on the dismissal of three potential jurors. The Ninth Circuit required California either to release the defendant or retry him. The Ninth Circuit held that the California Supreme Court's harmlessness decision was not an adjudication on the merits under the Antiterrorism & Effective Death Penalty Act (AEDPA), and therefore de novo review should apply to the defendant's claim. The Ninth Circuit applied the federal test for harmlessness (defendant must show actual prejudice) "without regard for the state court's harmless error determination."

C. The United State Supreme Court: Standard of Review

1. The Supreme Court decision was a 5-4 majority written by Justice Alito, reversing the Ninth Circuit.

2. The majority said it would assume for sake of argument that the defendant's federal rights

were violated when the defense was excluded from the ex parte hearings, but this does not necessarily mean the defendant is entitled to habeas relief.

3. Unlike the Ninth Circuit, the U.S. Supreme Court majority concluded that the California Supreme Court *did* adjudicate the defendant's claim on the merits by holding that any federal error was harmless beyond a reasonable doubt. Under the AEDPA, high deference must be given to the state court's adjudication. As the U.S. Supreme Court majority stated here, under this highly deferential standard, "we may not overturn the California Supreme Court decision unless the court applied the *Chapman* harmless error standard in an objectively unreasonable manner."

D. The United State Supreme Court: Review on the Merits

1. The Supreme Court majority stated: "The question is whether the defendant was harmed by the trial court's decision to receive the prosecution's explanation for its challenged strikes without the defense present. In order for this argument to succeed, the defendant must show that he was actually prejudiced by this procedure, a standard that he necessarily cannot satisfy if a fairminded jurist could agree with the California Supreme Court's decision that this procedure met the *Chapman* standard of harmlessness."

2. The Supreme Court majority then proceeded, in significant detail, to analyze the reasons given by the prosecutor for the seven peremptory challenges at issue, devoting most of its analysis to the three potential jurors who were the focus of the Ninth Circuit.

3. The Supreme Court majority ultimately determined Ninth Circuit erred and the exclusion of defendant's attorney from the ex parte hearings was harmless as to all seven strikes. Without detailing the conclusions as to each juror, below are some of the statements made by the Supreme Court majority reflecting general principles in the voir dire process:

a. "In a capital case, it is not surprising for prospective jurors to express varying degrees of hesitancy about voting for a death verdict. Few are likely to have experienced a need to make a comparable decision at any prior time in their lives. As a result, both the prosecution and the defense may be required to make fine judgment calls about which jurors are more or less willing to vote for the ultimate punishment. These judgment calls may involve a comparison of responses that differ in only nuanced respects, as well as a sensitive assessment of jurors' demeanor.

We have previously recognized that peremptory challenges 'are often the subjects of instinct,' and that 'race-neutral reasons for peremptory challenges often invoke a juror's demeanor.' A trial court is best situated to evaluate both the words and the demeanor of jurors who are peremptorily challenged, as well as the credibility of the prosecutor who exercised those strikes. As we have said, 'these determinations of credibility and demeanor lie peculiarly within a trial judge's province,' and 'in the absence of exceptional circumstances, we will defer to the trial court.' 'Appellate judges cannot on the basis of a cold record easily second-guess a

trial judge's decision about likely motivation.' " (internal citations omitted.)

b. "In ordering federal habeas relief based on their assessment of the responsiveness and completeness of [the juror's] answers, the members of the Ninth Circuit majority misunderstood the role of a federal court in a habeas case. The role of a federal habeas court is to 'guard against extreme malfunctions in the state criminal justice systems,' not to apply de novo review of factual findings and to substitute its own opinions for the determination made on the scene by the trial judge." (internal citations omitted.)

E. The United State Supreme Court: Majority's Conclusion

In reversing the Ninth Circuit, the United States Supreme Court majority had strong words for the Ninth Circuit in its concluding remarks:

"In *Batson*, this Court adopted a procedure for ferreting out discrimination in the exercise of peremptory challenges, and this procedure places great responsibility in the hands of the trial judge, who is in the best position to determine whether a peremptory challenge is based on an impermissible factor. This is a difficult determination because of the nature of peremptory challenges: They are often based on subtle impressions and intangible factors. In this case, the conscientious trial judge determined that the strikes at issue were not based on race, and his judgment was entitled to great weight. On appeal, five justices of the California Supreme Court carefully evaluated the record and found no basis to reverse. A federal district Judge denied federal habeas relief, but a divided panel of the Ninth Circuit reversed the District Court and found that the California Supreme Court had rendered a decision with which no fairminded jurist could agree. [¶] For the reasons explained above, it was the Ninth Circuit that erred. The exclusion of the defendant's attorney from part of the *Batson* hearing was harmless error. There is no basis for finding that the defendant suffered actual prejudice, and the decision of the California Supreme Court represented an entirely reasonable application of controlling precedent. [¶] The judgment of the Ninth Circuit is reversed."

NEXT WEEK: We continue with Part II in our discussion of the California Supreme Court's decision in *People v. Scott* with advice on what to do generally when you are the subject of a *Batson/Wheeler* motion, and how to make this three-stage *Batson/Wheeler* record that is discussed in *Scott*.

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Week Of	Topic	Guest	
July 6 2015	CA Supreme Court clarifies its *Batson/Wheeler* practice (*Peo. v. Scott*) – Part II	John Brouhard	Elim. of Bias 30 min

People v. Scott (2015) 61 Cal.4th 691

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Part I (June 29, 2015) discussed the Supreme Court's analysis of the issue, and explains how prosecutors should approach each of the three *Batson/Wheeler* steps in light of *Scott*.

Part II, the focus of this P&A segment, discusses the practical implications for prosecutors and trial judges of the Supreme Court's decision, and offers suggestions for making the *Batson/Wheeler* record in light of *People v. Scott*.

A. Summary of Points and Authorities, Part I

1. The three-step *Batson/Wheeler* inquiry: The first step requires the defendant to make a prima facie showing of prohibited group bias; in the second step, if the prima facie case has been made, the burden shifts to the prosecutor to offer permissible, nondiscriminatory reasons for the strikes; in the third step, if the prosecutor offers such reasons, the trial court must decide whether the defendant has proved purposeful discrimination.

2. The Supreme Court in *Scott* described the *Batson/Wheeler* event in the trial court. It said the trial court determined, first, that the defendant had failed to raise an inference of discrimination in connection with the prosecutor's peremptory strike of the juror.[1] The trial court

[1] A second prospective juror ("R.C.") was also the subject of the defendant's *Batson/Wheeler* motion, but the trial court said that the prosecutor's reasons for striking R.C. were "obvious." R.C.'s son had been prosecuted by the same

then granted the prosecutor an opportunity to state his reasons for excusing the juror. After being assured that the trial court had found no prima facie case of discrimination, the prosecutor made a record of his reasons for excusing the juror. The trial court, as an alternative holding, then credited the prosecutor's reasons and determined that the strike did not constitute purposeful discrimination."

3. In other words, the trial court proceeded through all three steps of the *Batson/Wheeler* analysis, even though it determined that the defendant had not made a prima facie showing of discrimination.

4. As the Supreme Court here stated, the trial court "determined both that no prima facie case of discrimination existed *and* that no purposeful discrimination occurred." The trial court made a *Batson/Wheeler* first step ruling and an alternative third step ruling.

5. Although the Supreme Court in *Scott* did not state that it is *requiring* trial courts to make these alternative rulings, the court is strongly indicating that this is its preferred practice. The Supreme Court said that is has "repeatedly encouraged trial courts to offer prosecutors the opportunity to state their reasons so as to enable creation of an adequate record for an appellate court, should the appellate court disagree with the first-stage ruling, to determine whether any constitutional violation has been established."

6. Moreover, the Supreme Court makes clear that the trial court should rule on the reasons offered by the prosecutor. "If the appellate court disagrees, it can proceed directly to review of the third-stage ruling, aided by a full record of reasons and the trial court's evaluation of their plausibility."

7. The issue for the Supreme Court to resolve was this: when a trial court makes a first-stage *Batson/Wheeler* ruling *and* an alternative third-stage *Batson/Wheeler* ruling, does the appellate court begin its review at the first-state ruling or the third-stage ruling? The United States Supreme Court has not ruled on this question.

8. The *Scott* court majority said the reviewing court should begin its review at the first stage. If the appellate court agrees with the trial court's first stage ruling, the claim is resolved. If the appellate court disagrees, the appellate court proceeds directly to review the third stage, relying on the prosecutor's reasons and the trial court's observations and conclusions.

9. The Supreme Court majority summarized the procedure as follows: "Where (1) the trial court has determined that no prima facie case of discrimination exists, (2) the trial court allows or

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deputy district attorney assigned to *this* case, and R.C. claimed her son had been treated unfairly by the district attorney's office.

invites the prosecutor to state his or her reasons for excusing the juror for the record, (3) the prosecutor provides nondiscriminatory reasons, and (4) the trial court determines that the prosecutor's nondiscriminatory reasons are genuine, an appellate court should begin its analysis of the trial court's denial of the *Batson/Wheeler* motion with a review of the first-stage ruling.

10. However, the Supreme Court majority said if the prosecutor, in stating his or her reasons, volunteers a justification that is discriminatory on its face, the following procedure should apply: "Where (1) the trial court has determined that no prima facie case of discrimination exists, (2) the trial court allows or invites the prosecutor to state his or her reasons for excusing the juror on the record, (3) the prosecutor provides a reason that is discriminatory on its face, and (4) the trial court nonetheless finds no purposeful discrimination, the appellate court should likewise begin its analysis of the trial court's denial of the *Batson/Wheeler* motion with a review of the first-stage ruling. In that (likely rare) situation, though, the relevant circumstances, including the facially discriminatory justification advanced by the prosecutor, would almost certainly raise an inference of discrimination and therefore trigger review of the next step of the *Batson/Wheeler* analysis."

B. The Takeaways for Prosecutors (Conversation with Assistant DA John Brouhard)

1. As a prosecutor, take charge of the proceedings surrounding the motion. Know the law that governs *Batson/Wheeler*. For example, the trial court in *Scott* incorrectly determined that the defendant's motion was untimely. If the trial court had terminated the *Batson/Wheeler* motion on this legally incorrect ground, the reasons for the prosecutor's strikes would not have been explored, and the trial court's ruling could have been grounds for reversal.

2. Guide the court to the rulings it needs to make in order to complete the *Batson/Wheeler* process as explained in *Scott*. Be certain that the trial court a) makes a clear ruling that it has found no prima facie showing of discrimination; b) invites the prosecutor to state his or her reasons for the strikes or allows that prosecutor to do so upon the prosecutor's request; c) rules that the prosecutor's reasons for the challenged strikes were genuine and that the defendant did not prove purposeful discrimination.

3. If the trial court hurries the *Batson/Wheeler* process, the prosecutor may need to slow it down ensure the steps are being done correctly. For example, in *Scott*, the trial judge invited the prosecutor to state his reasons before the trial judge himself had clearly articulated whether he found a prima facie case had been shown. [Keep in mind that if the prosecutor states his or her reasons *before* the trial court has stated its finding on the prima facie showing, appellate courts will conclude there's been an "implied" finding of discrimination and go immediately to a third-stage *Batson/Wheeler* analysis. Be firm, as was the prosecutor in *Scott*, and get a clear ruling from the trial court that it finds no prima facie case before stating the reasons for your strikes.]

4. Even if the trial court rules that no prima facie case has been shown, the prosecutor needs to state the reasons for the strike as thoroughly and seriously as if the trial court did find a prima facie case. There's much at stake ultimately if the appellate court finds a *Batson/Wheeler* violation, including the integrity of the conviction, and -- for the prosecutor personally -- reputation and status in the state bar.

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

6. [Words of advice from a former judge: In essence prosecutors should say with their attitude, "We have the opportunity to show the system is fair. So without apology, I'll explain my reasons." The onus is on the prosecutor to be prepared and to make his or her best case. Do not be defensive.]

7. Often *Batson/Wheeler* motions will be made at the end of a long and tiring jury selection. The trial judge's plan may have been to timely move forward to opening statements. But there's too much at stake for the prosecution to be rushed. This is not a process that anyone – the court, prosecution or defense – should take lightly. When the motion is brought, the prosecutor needs to review his or her notes and organize materials before responding. Ask the court for time to do so. For example, ask the court to address the motion after lunch or after a break. Alert the court that you want to be clear and thorough in order to assist the court with its ruling (which may include comparative analysis.) Make sure you have the citation to *Scott* with you, just in case the trial court is resistant to allowing you the time needed to prepare. *Scott* refers to the prosecutor making a "full record of reasons" for the strikes.

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

9. Prosecutors need to give a full explanation of the reasons for their challenges. This explanation cannot be abbreviated. One of the reasons for this thoroughness is comparative juror analysis. On appeal of the trial court's ruling on *Batson/Wheeler*, the defense may challenge the prosecutor's justifications by showing there were other jurors, not members of the identified class, who were similarly situated but not struck by the prosecutor, and therefore the prosecutor's

reasons are pretextual. So at the trial level, the prosecutor needs to be thinking about members of the jury that he or she did not strike, and if these jurors bear similarities to those who are the subject of the *Batson/Wheeler* motion, and address this disparity.

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

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

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

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

*** We will be preparing a checklist of issues that prosecutors should be focused on in responding to *Batson/Wheeler* motions in light of the *Scott* opinion. It will be distributed in a future P&A.

Miscellaneous: Accessing Past P&A videos

To see the 6/29/15 P&A and any others:

[redacted]

[redacted]

NEXT WEEK: The United States Supreme Court issues another Confrontation Clause decision, and more.

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