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."

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.

Suggestions for future shows, ideas on how to improve P&A, and other comments or criticisms should be directed to Mary Pat Dooley at marypat.dooley@acgov.org or (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	Topics	Guests	30 min
April 25, 2016	(Batson/Wheeler reversal (*People v. Arellano*)		Elim. of Bias

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

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

This P&A handout contains three sections:

1. General Principles of *Batson/Wheeler*
2. A discussion of the *Arellano* opinion
3. Suggestions for making the prosecution's statement of "permissible, nondiscriminatory justifications" for excusing a juror

I. *General Principles of Batson/Wheeler*

A. The Three Stage Process

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

2. Second, if the trial court finds a prima facie case, then the prosecution must offer nondiscriminatory reasons for the challenge. Second, if the prima facie case has been made, the burden shifts to the proponent of the strike to explain adequately the basis for excusing the juror by offering permissible, nondiscriminatory justifications.

3. Third, the trial court must determine whether the prosecution's offered justification is credible and whether, in light of all relevant circumstances, the defendant has shown purposeful race

discrimination." *(People v. Manibusan* (2013) 58 Cal.4th 40, 75.)

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

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

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

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

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

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

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

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

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

e. The Supreme Court in *Scott* explained the effect of doing so: "[W]here (1) the trial court has determined that no prima facie case of discrimination exists, (2) the trial court allows or invites the prosecutor to state his or her reasons for excusing the juror for the record, (3) the prosecutor provides nondiscriminatory reasons, and (4) the trial court determines that the prosecutor's nondiscriminatory reasons are genuine, an appellate court should begin its analysis of the trial court's denial of the *Batson/Wheeler* motion with a review of the first-stage ruling." (*Scott*, at p. 391.)

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

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

C. The Third Stage of *Batson/Wheeler*

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

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

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

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

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

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

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

A. General Background

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

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

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

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

B. Prospective Juror V.B.

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

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

3. In response to a question by the prosecutor, V.B. said both her sons went to prison. She did not feel the system treated them fairly. She said, " '[B]efore my son went up, one person went up. They were both similar.' " But the other man was white and got probation, and she believed the difference in treatment was racial. However, she said this was "all in the past" because it happened 10-15 years ago and she would not hold it against the District Attorney's Office. V.B. remained on the panel through hardships.

C. Prospective Juror V.K.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

812.

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

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

G. Juror W.W. – Voir Dire

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

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

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

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

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

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

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

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

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

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

4. The following exchange occurred:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Court of Appeal also gave these examples:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

10. The takeaway from the *Arellano* opinion to always keep in mind: The prosecutor must accurately represent what occurred during voir dire. This means taking good notes, or asking the court reporter to read back the portion of the prospective juror's answer on which you are relying when, as in *Arellano*, there is disagreement at to your accuracy. As *Arellano* emphasizes, when a prosecutor states reasons that are objectively contrary to the facts in the record, this discrepancy

raises serious doubts about the genuineness of the prosecutor's reasons. In these instances, the justifications may be found (as in *Arellano*) to be a pretext for purposeful discrimination. John's Brouhard's next suggestion is another way to help ensure the accuracy of the prosecutor's representations.

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

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

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

POINTS AND AUTHORITIES

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Week Of	Topic	Guest	30 min
June 13, 2016	*Foster v. Chatman*: U.S. Supreme Court issues a decision on *Batson* claims	Santa Clara County Deputy DA Jeff Rubin	Bias

This week's P&A discusses the United States Supreme Court decision in *Foster v. Chatman* ((2016) 136 S.Ct 1737.

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

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

I. General Background

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

b. The United States Supreme Court explained the jury selection process in this case: "In the first phase, each prospective juror completed a detailed questionnaire, which the prosecution and defense reviewed. The trial court then conducted a juror-by-juror voir dire of approximately 90 prospective jurors. Throughout this process, both parties had the opportunity to question the prospective jurors and lodge challenges for cause. This first phase whittled the list down to 42 'qualified' prospective

jurors. Five were black." (p.*4.)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. Foster's Challenge

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

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

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

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

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

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

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

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

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

IV. The Supreme Court's Conclusion

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

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

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

for certiorari." (p.*18.)

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

V. Takeaways

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

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

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

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

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

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

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

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

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

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

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

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

- Jeff Rubin's IPG is available on the CDAA website. Or you can contact Jeff at jrubin@da.sccgov.org
- Prosecutors in the Alameda County District Attorney's Office can email Mary Pat for a link to the IPG.

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

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

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

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

I. Events in the Trial Court

A. Factual Background and Convictions

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

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

3. Jeffery drove off, with the defendant and Sharpe following. Jeffrey became concerned and ran several stoplights to get away. He got on the freeway, but the defendant Sharpe followed, and a high speed chase ensued. According to Jeffrey, the defendant pointed a gun at him through the passenger window. Jeffrey, fearing for his safety, swerved his car into the defendant's car. Sharpe lost control and his car spun out. The defendant shot several times at Jeffrey and one bullet hit Jeffrey's car. Jeffrey's car was damaged, but he drove a short distance and then ran for help. Meanwhile, the

defendant's car, now disabled on the freeway, was hit by two passing motorists.

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

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

B. The Issue on Appeal

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

C. Jury Selection: The Two Prospective Jurors

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

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

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

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

responded that the term "dark side" was his friend's term, not his, and that he could make a decision based on the facts of the case.

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

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

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

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

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

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

D. The *Batson/Wheeler* Motion

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

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

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

him. He also cited D.J.'s statement that the public defender considered district attorneys as "the dark side." The prosecutor stated that he did not believe the People could get a "fair shake in the case" from D.J.

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

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

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

II. The Court of Appeal Analysis

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

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

The Court of Appeal said that the Fourth District Court of Appeal, in *People v. Garcia* (2000) 77 Cal.App.4th 1269, 1275, 1280-1281, also found that excluding gay men and lesbians on the basis of group bias violates the California Constitution. The Court of Appeal stated: "Like *Garcia* and

SmithKline, we, too, find that excluding prospective jurors solely on the basis of sexual orientation runs afoul of the constitutional principles espoused in *Batson/Wheeler*." (p.*5.)

B. Application of the *Batson/Wheeler* Analysis

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

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

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

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

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

6. The Court of Appeal noted a distinction between a challenge based solely on a prospective juror's membership in a particular group and a challenge to the juror's attitude about the justice system and society which may be group *related*. The Court of Appeal gave examples. In *People v. Hamilton* (2009) 45 Cal.4th 863, the California Supreme Court upheld a peremptory challenge where the prosecutor said one of the reasons he struck the prospective Black juror was because the juror said he had considerable sympathy for Black people on trial and thought the justice system was unfair to Blacks. In finding substantial evidence supported the challenge, the court implicitly rejected the defendant's argument that the prosecutor's reason was based on race itself. (*Id.* at pp. 901-902.) The court found the juror's responses to several questions on the juror questionnaire form indicated that the

prospective juror harbored a skepticism regarding the fair treatment of Blacks within the criminal justice system, thus supporting the prosecutor's concerns. (*Id.* at p. 902.) In other words, the juror's skepticism was race-related, but the prosecutor was not striking the jury because of his race.

The Court of Appeal also pointed to *People v. Martin* (1998) 64 Cal.App.4th 378, 385, in which the prosecutor exercised a peremptory challenge against a juror who was a Jehovah's Witness. The court found the strike was based on the juror's relevant personal values and thus not improper, even though those views are founded in religious beliefs. The prosecutor struck the juror because, in his experience, members of that religion had a hard time with criminal trials as " 'they couldn't judge anybody at all.' " (*Id.* at p. 381.) The court in *Martin* found that "[t]he prosecutor's perception that the juror's religious views might render her uncomfortable with sitting in judgment of a fellow human being was a specific bias related to the individual juror's suitability for jury service" sufficient to support the strike. (*Id.* at p. 384.)

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

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

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

The Court of Appeal also noted that the prosecutor asked prospective jurors whether "anybody [had] an automatic reaction where they would vote guilty or not guilty because some of the people involved in this case, either witnesses or people who are accused are homosexual." The Court of

Appeal said, "One inference from this line of questioning is that the prosecutor sought to ferret out any biases *for or against* gay persons, and not that he was trying to oust all gay people from serving on the jury." (p.*7, italics in original.) The Court said this interpretation is especially likely since *all* the main witnesses in the case – prosecution and defense – were gay.

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

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

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

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

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

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

2. The defendant urged the adoption of the "per se" rule of unconstitutionality. As recounted in the opinion, the defendant explained this approach as "when a party offers multiple rationales for a peremptory strike, some of which are permissible and one of which is not, the taint from the impermissible reason mandates reversal and essentially moots any other neutral reason given." Under

this approach, a discriminatory peremptory challenge cannot be saved because the proponent of the challenge puts forth a nondiscriminatory reason. (p.*9.)

3. Other jurisdictions, primarily federal, have adopted a "mixed-motive" or "dual motivation" analysis. As explained, " 'after the defendant makes a prima facie showing of discrimination, the state may raise the affirmative defense that the strike would have been exercised on the basis of the neutral reasons and in the absence of the discriminatory motive. If the state makes such a showing, the peremptory challenge survives constitutional scrutiny.' " (p.*9, quoting *Gattis v. Snyder* (3d. Del. (2002) 278 F.3d 222, 223.)

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

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

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

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

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

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

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

People v. Gutierrez (2017) 2 Cal 5th 1150

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

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

I. Background

A. Factual and Procedural Background

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

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

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

B. The *Batson/Wheeler* Motion

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

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

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

C. *Batson/Wheeler* Standard

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

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

3. Second, if the court finds the moving party has established a prima facie case, the burden shifts to the opponent of the motion to give an adequate nondiscriminatory explanation for the challenges. The opponent of the motion must provide a "clear and reasonably specific explanation" of his "legitimate reasons" for exercising the challenges. (*Batson, supra*, 476 U.S. at p. 98, fn. 20.) In other words, the opponent must offer a neutral basis for the challenge, one not based on race, ethnicity, or similar grounds. The United States Supreme Court has said that unless "a discriminatory intent is inherent in the prosecutor's explanation,' " the reason will be deemed neutral." (*Purkett v. Elem* (1995) 514 U.S. 765, 768.) (p.*4.)

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

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

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

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

II. Justification for the Strikes

A. Overall

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

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

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

B. Three Prospective Jurors

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

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

C. Prospective Juror No. 2723471

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

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

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

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

any of her other responses that bore on her possible reaction to Trevino's testimony. The Supreme Court stated, "We have found no other answers in the record to support the People's position on this point." (*Id.* at p.*5.)

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

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

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

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

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

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

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

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

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

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

law enforcement ties—though he expressed his tendency to favor this characteristic with regard to other panelists—is a relevant circumstance in assessing the credibility of the prosecutor's reasoning." (*Id.* at p. *11.)

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

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

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

12. As to courts, the Supreme Court said, "The court, too, has its own obligations under the progeny of *Batson* and *Wheeler.* '[W]hen the prosecutor's stated reasons are either unsupported by the record,

inherently implausible, or both, more is required of the trial court than a global finding that the reasons appear sufficient.' " (*Id.* at p. *12.)

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

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

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

IV. The Court of Appeal

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

2. The Supreme Court stated: "Defendants argue that the Court of Appeal erred in refusing to

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

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

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

VI. Takeaways

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

A. Make a Thorough and Complete Record

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

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

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

2. There is no going back

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

challenges.

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

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

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

B. <u>How to Make a Thorough and Complete Record</u>

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

1. Take detailed and extensive notes

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

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

2. Notes Should Include:

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

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

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

C. Responding to the *Baston/Wheeler* Challenge

1. Take a deep breath

2. Ask the court for a break

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

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

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

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

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

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

6. There may be specific facts about your case that support a reason for striking a panelist, perhaps

the particular witnesses who are going to testify or the nature of the evidence. You must be able to articulate this concern to the trial judge.

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

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

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

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

1. As the Supreme Court makes clear in *Gutierrez*, the trial court must meet its obligation to make a sincere and reasoned review of the prosecutor's explanations. Any flaws in the trial court's assessment will weigh against a "reasoned' review and may result in a reversal.

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

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

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

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

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

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

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POINTS AND AUTHORITIES

The District Attorney of Alameda County Presents a Weekly Video Survey 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	
Sept. 18, 2017	Aranda Bruton (*Peo. v. Washington*); Jury Challenges Based on Youth and Lack of Life Experience (*Peo. v. Jones*); Victims as Uncharged Coconspirators in Human Trafficking Cases (*Peo. v. Brown*)	April Smith Mark Bennett	10 min Bias 20 min General

- *People v. Washington* (2017) __ Cal.App.5th __ [2017 WL 3866413]

The issue presented: Did the narrowing of the confrontation clause in *Crawford v. Washington* have the effect of narrowing the reach of the *Aranda/Bruton* rule?

The Court of Appeal says yes. The *Aranda/Bruton* rule rests exclusively on the Sixth Amendment right to confrontation and cross examination. As a result of *Crawford* and its progeny, the Sixth Amendment confrontation clause has been narrowed to protect only against testimonial statements. Therefore, a codefendant's nontestimonial confession or incriminating statements do not fall within the *Aranda/Bruton* rule.

I. Background

A. Factual

1. At almost midnight, the defendant Washington walked into the Avalon Gardens housing complex in Los Angeles, knocked on the door of an apartment and asked the 20-year-old man who answered, "Where you from?" When the man responded, "Avalon," the defendant shot him in the chest, killing him.

2. Defendant was a member of a gang affiliated with the Bloods. The defendant was with two others men at the time of the shooting, Scott and Kendricks. They were also members of a Bloods gang.

3. The victim's response to the defendant's question indicated the victim was aligned with the rival Avalon Gardens Crips street gang.

4. The defendant was arrested minutes after the shooting fleeing from the Avalon Gardens housing complex. He was wearing colors associated with the Bloods, and carrying a gun with cartridges that

matched the cartridge found near the victim's body. When questioned by police after his arrest, the defendant told the police that he traveled to Los Angeles that day to meet a girl he met over the Internet, that he found the gun somewhere near the girl's house, that he had never been to the Avalon Gardens housing complex, and that he did not know Scott or Kendricks.

5. Scott and Kendricks were also arrested soon after the shooting and were placed in the same jail cell along with a hidden recording device. During the 55 hours they were in the cell, they made several statements implicating themselves and defendant in the shooting: At one point, Kendricks stated that the defendant asked the victim where he was from and the victim responded. Scott asked Kendricks if he saw where the victim was shot and Kendricks responded, "In the chest." Scott commented, "like I ain't trying to throw Shaggy under the bus like that, but he threw [himself] under the bus." The defendant goes by the name "Shaggy."

B. Procedural

1. The defendant, Scott and Kendricks were all charged with murder, and tried jointly. The trial court admitted "snippets" of the jailhouse recordings the conversations between Scott and Kendricks, but expressly instructed the jury not to consider the recordings against the defendant.

2. The defendant took the stand in his own defense. Contradicting his post-arrest statement, the defendant testified that he had traveled to Los Angeles with Scott and Kendricks to see if he could stay with his cousin; that he brought the gun with him; that the three of them went to the Avalon Gardens housing complex to buy marijuana; that a 20-year-old man was standing on an apartment porch and, when he saw defendant, asked, "Where you from?"; that the 20-year-old man became aggressive when Scott and Kendricks came into view; and that defendant responded by firing off a single shot in a random direction as he fled.

3. The jury convicted defendant of first degree murder and found true all of the firearm and gang allegations. The jury was unable to reach verdicts on Scott or Hendricks.

4. The defendant appealed, arguing that his trial counsel was constitutionally ineffective for not moving to sever his trial from that of his co-defendants Scott and Kendricks. The Court of Appeal states that the defendant "seems to suggest" that he was entitled to severance under the *Aranda/Bruton* doctrine; as a matter of due process; and under Penal Code section 1098.

5. This P&A will discuss only the Court of Appeal's *Aranda/Bruton* analysis since it seems likely the defendant will petition for review in the California Supreme Court. Grounds for petition for review include the necessity "to settle an important question of law." (Cal. Rules of Court, Rule 8.5(b)(1).)

C. The Court of Appeal's *Aranda/Bruton* Analysis

1. The Sixth Amendment secures the defendant's right to right to confront and cross-examine

witnesses. If, in a joint trial, the jury is allowed to hear a codefendant's confession directly implicating the defendant, but the codefendant does not take the witness stand, then the defendant cannot cross-examine the codefendant because of the codefendant's privilege against self-incrimination.

2. In theory, an instruction telling the jury not to consider the codefendant's confession against the defendant would obviate any Sixth Amendment violation. However, courts view a codefendant's confession that directly implicates a defendant to be such "powerfully incriminating" evidence that jurors are deemed incapable of " 'put[ting it] out of their minds' " even when given an instruction to do so. (*Bruton v. United States* (1968) 391 U.S. 123, 129, 135.)

3. As a result, a trial court faced with a prosecutor's request to admit a codefendant's confession at a joint trial must resort to other options beyond a limiting instruction, such as (1) redacting the codefendant's confession in a way that both omits the defendant but does not prejudice the codefendant; (2) severing the trial or using separate juries for each defendant; or (3) excluding the evidence altogether.

4. The *Aranda/Bruton* doctrine rests exclusively on the Sixth Amendment. But the Sixth Amendment right to confront and cross-examine witnesses has evolved since the *Aranda/Bruton* doctrine came into being. For many years, the confrontation clause barred the admission of any out-of-court statement admitted for its truth if the hearsay declarant was not available for cross-examination, unless the statement bore "adequate 'indicia of reliability.'" This was the test enunciated in *Ohio v. Roberts* (1980) 448 U.S. 56.

5. However, *Ohio v. Roberts* was overruled by *Crawford v. Washington* (2004) 541 U.S. 36. The *Crawford* decision, issued in 2004, dramatically reshaped the confrontation clause. It narrowed the clause's reach from all out-of-court statements admitted for their truth to only those out-of-court statements that qualify as "testimonial." However, *Crawford* completely barred the admission of such testimonial statements, regardless of the reliability, if the defendant had no current or prior opportunity to cross-examine the declarant. (*Crawford*, supra, at pp. 51, 53-54.) The Supreme Court later held that the clause "has no application" to nontestimonial statements. (*Whorton v. Bocking* (2007) 549 U.S. 406, 420; *Davis v. Washington* (2006) 547 U.S. 813, 821.)

6. The Court of Appeal here stated that the jailhouse conversation between Scott and Kendricks qualifies as *nontestimonial* under *Crawford* and its progeny, which the defendant conceded. Whether an out-of-court statement is testimonial turns on whether the "objective evidence" indicates that the statement was obtained for the "primary purpose" of "establish[ing] or prov[ing] past events potentially relevant to later criminal prosecution." (*Davis v. Washington*, *supra*, 547 U.S. at p. 822; *Michigan v. Bryant* (2011) 562 U.S. 344, 356-357, 367.) As the Court of Appeal noted, under this definition, "statements from one prisoner to another" or "made unwittingly to a [g]overnment informant" are not testimonial. (*Davis v. Washington*, p. 825; *People v. Hajek and Vo* (2014) 58 Cal.4th 1144, 1214 ["Private communications between inmates are not testimonial"].)

7. Nevertheless, the defendant "strenuously" argued that *Crawford* did not narrow the reach of the

Aranda/Bruton rule. He argued that a codefendant's confession that directly implicates a defendant is just as "powerfully incriminating"—and, thus, is just as difficult for a jury to put out of its mind notwithstanding an instruction to do so—regardless of whether that confession qualifies as testimonial or nontestimonial under *Crawford.*

8. The Court of Appeal acknowledged that the defendant's argument "is not without persuasive force, " but concluded it ultimately lacks merit because the *Aranda/Bruton* doctrine is grounded exclusively in the confrontation clause "and can extend no farther than the metes and bounds of the clause defined by the United States Supreme Court."

P&A will continue to watch developments in this decision.

- **Challenges to Prospective Jurors Based on Youth and Limited Life Experience**

The impetus for the P&A segment is Jerry Coleman's recent article in the CDAA publication *Do You Know*, August 2017 edition. The P&A author encourages CDAA members to read this very informative article now that age is a protected class for jury selection in California. In this article, Jerry discusses the voir dire in *People v Jones* (2017) 7 Cal.App.5th 787, in which youthfulness and lack of life experience were issues. This P&A will reference some of Jerry's observations and notes his excellent suggestions for voir dire questions to help assess the youthful juror.

A. Age as a Protected Class in Jury Selection

1. Effective January 2016, Code of Civil Procedure section 231.5 was amended to align the list of list of classification s protected under Government Code section 11135 with the list of protected classifications for purposes of non-discriminatory peremptory challenges in California.

2. This amended statute states: "A party shall not use a peremptory challenge to remove a prospective juror on the basis of an assumption that the prospective juror is biased merely because of a characteristic listed or defined in Section 11135 of the Government Code, or similar grounds." (Code Civ.Proc., § 231.5)

3. As a result, a prospective juror may not be challenged on the assumption of bias because of his or her ethnic group identification, age, genetic information, or disability, in addition to race, color, religion, sex, national origin or similar grounds as had been provided under existing law.

4. Thus the challenge of a prospective juror cannot be justified based on age, young or old.

B. Limited Life Experience

1. As Jerry Coleman points out in his article, limited life experience remains a valid and non-protected class.

2. In his article, Jerry Coleman discussed *People v. Jones* (2017) 7 Cal.App. 5th 787, in which the prosecutor excused two young African American jurors because of "lack of life experience." The trial in *Jones* preceded the amendment of CCP 231.5.

C. *People v. Jones* (2017) 7 Cal.App.5th 787

1. Juror 2372 was a single, African-American man with no children. He worked for Google as a field operator. (*Id.* at p. 799.) The prosecutor used her sixth peremptory challenge to excuse him, and shortly thereafter the defense made its first *Batson/Wheeler* motion.

2. In response to defense counsel's argument, the trial court found no prima facie case of discrimination, but invited the prosecutor to state her reasons for the challenge for the record. The prosecutor said she excused this prospective juror because he is "young, single, zero children." She said, "That sort of lack of life experience is to me an unfavorable characteristic in a juror," and "They're not jurors I would choose to have on my jury." Additionally, the prosecutor noted she had excused a similar Hispanic female, "single, no children." (*Id.* at p. 800.)

3. Also, as to this first *Batson/Wheeler* motion, the prosecutor pointed out that she had excused an African American woman who had served on a hung jury, who "thought nothing frustrating about that." (*Id.* at p. 800.)

4. The trial court found no prima facie case of discrimination against African-American jurors. (*Id.* at p. 800.)

5. After the denial of the first *Batson/Wheeler* motion, additional prospective jurors were called into the box. The prosecutor exercised two more peremptory challenges and twice accepted the panel. Prospective Juror No. 7766 was an African-American woman who was single and employed as an eligibility worker for the Department of Public Social Services as an eligibility worker. The prosecutor exercised her ninth peremptory challenge to excuse this prospective juror. (*Id.* at p. 800.)

6. Defense counsel made his second *Batson/Wheeler* motion. After stating his reasons, the trial court asked the prosecutor if she wanted to respond. The prosecutor stated, "As I indicated before, individuals who are young, and unmarried and have no children lack a certain life experience that I prefer jurors to have. She fits the criteria. She is a younger female who is single with no children." (*Id.* at p. 801.) In a footnote, the Court of Appeal noted this juror never stated that she had no children, "but the prosecutor reasonably may have inferred this given that she was young and single, and did not mention any children in responding to the trial court's standard voir dire questions." (*Id.* at p. 806,

fn. 4.)

7. As to Prospective Juror No. 7766, the prosecutor also pointed out that she had excused a young Hispanic female with no children and that "she was not prohibited from excusing prospective jurors because they were young. The trial court agreed that youth and a lack of children were not protected categories." (*Id.* at p. 801.) [*Again, this case preceded the addition of age to CCP 231.5 as a protected category.*] The trial court noted that other African-American jurors remained on the panel. Finding no prima facie case, the trial court denied the defense motion. Both parties accepted the panel as constituted. (*Id.* at p. 801.)

D. The Court of Appeal's Ruling

1. The Court of Appeal, noting that the prosecutor had used three of nine peremptory challenges to excuse African-American prospective jurors, concluded this "was insufficient , standing alone, to establish a prima facie case of race discrimination." (*Id.* at p. 804.)

2. On appeal, the defendant argued that he also made a prima facie showing of discrimination because the prosecutor excused prospective jurors Nos. 2372 and 7766 because they were young, single, and did not have children, thus reflecting a lack of life experience. But the Court of Appeal stated, "As the Supreme Court has observed, a prospective juror's youth and corresponding lack of life experience can be a valid race-neutral reason for exercising a peremptory challenge." (*Id.* at p. 805.) The Court of Appeal cited several cases, including *People v. Lomax* (2010) 49 Cal.4th 530, 575, in which the California Supreme Court stated, "A potential juror's youth and apparent immaturity are race-neutral reasons that can support a peremptory challenge."

[3. The Court of Appeal also noted that as to Prospective Juror No. 4131, prior service on a hung jury can be a legitimate, non-discriminatory reason for a peremptory challenge, citing *People v. Manibusan* (2013) 58 Cal.4th 40, 78.)]

E. Practical Tips

1. A prosecutor can no longer argue, as did the prosecutor here in *Jones*, that excusing a prospective juror because he or she is young is not prohibited. Since January 2016, age is now a protected class. (Code Civ. Proc. 231.5)

2. As Jerry Coleman points out in his article, "Now no one can justify a juror challenge based on any age – young or old." Jerry notes, however, that "limited life experience remains a valid and non-protected class, which means to justify challenging a youthful person, prosecutors should first get into the record both the characteristics of such details and the justification of such details."

3. Jerry gives such examples as "single, childless, perhaps still living with parents, never voted, not a

full-time worker, never owned or rented a residence."

4. Additionally, Jerry notes: "[L]ike the prosecutor in the *Jones* case, be consistent when challenging all others who can fit that criteria," as such a justification can invite a comparative analysis challenge.

5. Some additional thoughts – the Supreme Court's decision in *People v. Lenix* (2008) 44 Cal.4th 602, teaches that advocates should assess a prospective juror beyond his or her spoken words. As with any prospective juror, consider the young juror against the intangibles that play a role in jury selection. As to the answer given, "[m]yriad subtle nuances may shape it, including attitude, attention, interest, body language, facial expression and eye contact." (*Lenix,* at p 622.) " '[T]he manner of the juror while testifying is oftentimes more indicative of the real character of his opinion than his words.' " (*Id.* at p. 622.) Other aspects play a role too, such as demeanor generally in the courtroom, and interaction with other jurors. But make a record of these observations, and invite the trial court's assessment of your observations. The Court of Appeal is reviewing the cold record.

6. Also, apart from youth and lack of life experience, if the juror has given other answers that raise concerns indicating a basis for a challenge, articulate them. Here in *Jones*, for example, Juror No. 7766 had a brother who had been arrested. Additionally, the prospective juror's occupation as an eligibility worker with an agency involved in social services, if developed more, might have been significant. However, the prosecutor limited her reason for the challenges to the fact that Juror No. 7766 was young, single and childless, as she did with Juror No. 2372.

- *People v. Chester Brown* (2017 143 Cal.App.5th 320

Issue: The victim did not appear for trial in this human trafficking case. The trial court admitted into evidence the victim's text messages to the defendant, taken from the victim's cell phone. On appeal, the defendant claimed these messages were inadmissible hearsay. The Court of Appeal disagreed, holding the text messages were admissible as statements of an uncharged coconspirator.

A. Factual and Procedural Background

1. The defendant was found guilty of two counts of human trafficking involving two different victims, who worked together for the defendant. One of the victims, identified as "B" was 17 years old. The second victim, identified as "D" was 14-years old.

2. The prosecutor moved in limine to introduce texts from the defendant to both victims to show he induced or persuaded them to engage in commercial sex acts. The parties had expected that both B and D would testify. B finished her testimony, and D was expected to testify the next day. However, the next morning, the prosecutor told the court he had learned that D was afraid and did not want to

testify. The trial court stated that whether or not D testified, she was a coconspirator.

3. Although D did not testify, the trial court admitted texts from her cellphone, which the defendant argued were inadmissible hearsay.

B. The Court of Appeal's Analysis

1. The defendant argued on appeal that D's text statements from her phone were not admissible under the coconspirator exception to the hearsay rule. He argued that she could not be a coconspirator because she was protected from prosecution under Proposition 35. However, the defendant did not claim that the evidence was insufficient to find that D met the general statutory definition of a co-conspirator. And he did not challenge the sufficiency of the evidence to support any of the alleged overt acts.

2. As the Court of Appeal explained, the defendant's claim was predicated on Evidence Code section 1161. This statute as enacted by Proposition 35 provides: "Evidence that a victim of human trafficking, as defined in Section 236.1 of the Penal Code, has engaged in any commercial sexual act as a result of being a victim of human trafficking is inadmissible to prove the victim's criminal liability for any conduct related to that activity."

3. The defendant's claim was that, because D enjoyed protection from prosecution provided to her by Proposition 35, she could not be a coconspirator as to offenses charging her as the victim.

4. The Court of Appeal found that the defendant's claim could not be squared with the coconspirator exception to the hearsay rule. Evidence Code section 1223 permits the introduction of evidence of statements "made by the declarant while participating in a conspiracy to commit a crime or civil wrong and in furtherance of the objective of that conspiracy" if "made prior to or during the time that the party was participating in that conspiracy."

5. The Court of Appeal noted that in determining the application of the coconspirator exception, it generally does not matter whether or not an *uncharged coconspirator* is prosecutable or instead enjoys immunity. For example, the acts of coconspirator who has been granted prosecutorial immunity may be considered in establishing the culpability of other coconspirators. Applying that rule here, D's statements could be admitted as long as they were in furtherance of the conspiracy, even if she could not be prosecutor under Evidence Code section 1161.

6. On appeal, the defendant did not contend that any of the statement introduced at trial did not further the conspiracy.

7. The Court of Appeal found guidance in *People v. Bogan* (2007) 152 Cal.App.4th 1070, in which the defendant was charged with pimping, pandering and conspiracy to commit prostitution. The Court of Appeal in *Bogan* said that prostitutes cannot be charged as coconspirators with their pimps, because that would elevate their conduct to felony status. Instead, punishing prostitutes by a misdemeanor

and punishing the pimps and panderers as felons recognizes that prostitutes are criminally exploited by these persons. The Court in *Bogan* said the statutory scheme dealing with prostitution reveals a legislative intent to punish prostitutes less harshly than those who exploit them. However, the court in *Bogan* concluded that a pimp can be convicted of conspiracy to solicit prostitution, *with the prostitutes as uncharged coconspirators*. (*Bogan*, at p. 1075.)

6. The Court of Appeal said that *Bogan* bolstered its view that even though Proposition 35 strengthened protections for human trafficking victims by limiting the evidence that can be introduced against them, it does not preclude treating victims as uncharged coconspirators for purposes of the coconspirator exception to the hearsay rule. "Indeed . . . that result advances the purpose of Proposition 35 by facilitating prosecution of traffickers, rather than giving them the benefit of an evidentiary exclusion designed for their minor victims."

7. The Court of Appeal concluded: "Thus, D. was properly treated as an uncharged coconspirator for purposes of the coconspirator exception to the hearsay rule, and evidence of her statements was admissible to show defendant's liability as to both human trafficking counts."

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

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Week Of	Topic	Guest	30 min
May 21, 2018	*Batson/Wheeler*: The Per Se Rule for Discriminatory Peremptory Challenge	Danielle Hilton	Bias

People v. Douglas (2018) __ Cal.App.5th __ [2018 WL 2057237]

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

In a previously published decision, the Court of Appeal in this case unanimously held that when both discriminatory and nondiscriminatory reasons are given for exercising a peremptory strike, the trial court should engage in a "mixed-motive" analysis in which the challenged party must establish that the strike would have been exercised on the basis of the neutral reason, even without considering the discriminatory basis. If so, the strike survives constitutional scrutiny.

Following a rehearing petition, the Court of Appeal now holds, in a 2-1 decision, that the mixed motive analysis is not appropriate "in considering the remedy for invidious discrimination in jury selection," and that the per se test should be applied. Under this test, the taint from an impermissible reason mandates reversal, even if other legitimate reasons for the strike were proffered.

I. Events in the Trial Court

A. Factual Background and Convictions

1. The defendant and the defendant's former boyfriend, Martin Andrade, lived together. Andrade was working as a male escort. Andrade arranged for Jeffrey B. to come to the house, where they engaged in sex.

2. After Jeffrey left, Andrade told the defendant that Jeffrey had not paid the amount agreed upon for Andrade's services. Defendant and co-defendant Sharpe (who is not at issue in this appeal) left the house in their car to find Jeffrey. They caught up with Jeffrey, pulled alongside his car and the defendant demanded the money owed.

3. Jeffery drove off, with the defendant and Sharpe following. The defendant shot several times at Jeffrey and one bullet hit Jeffrey's car.

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

B. The Issue on Appeal

1. This is the second Court of Appeal opinion in this case. Initially, the Court of Appeal found the trial court did not properly evaluate the defendant's *Batson/Wheeler* motion based on the prosecutor's peremptory challenges against the only two openly gay prospective jurors.

2. The Court ordered a remand for the trial court to apply a mixed-motive analysis to the prosecutor's proffered reasons to determine whether the two members of the venire at issue would have been challenged regardless of their sexuality.

3. The Court of Appeal then granted the defendant's petition for rehearing, and obtained supplemental briefing. Briefing was supplied by the parties as well the following amici curiae: Equality California, Lambda Legal and the National Center for Lesbian Rights (collectively Equality California) and the Los Angeles County Public Defender's Office. (p.*1.)

4. The Court of Appeal this time reversed for a new trial "uninfected by discrimination." (p.*2.)

5. At issue again is the *Batson/Wheeler* claim, and the remedy for invalid challenges where the prosecutor proffered both discriminatory and legitimate reasons for the challenges.

C. Jury Selection: The Two Prospective Jurors

1. During the voir dire, both the prosecutor and defense counsel asked questions about the panel's feelings or perceptions of homosexuality. No one on the panel responded that they would have a problem deciding the case based on the facts and not on the ground of sexual orientation. (p.*2.)

2. Based on answers given during voir dire, it became known that two men in the jury venire, identified by the Court of Appeal as J. and L., were openly gay and lived with their partners. (p.*2.)

3. J. had a doctorate in science. He knew a public defender. He had lunch with her the day before

this voir dire, and had recently attended her baby shower. He saw her about once a week, and she had visited his home. The public defender had discussed her work with J., and talked to him about different attorneys in the Public Defender's Office as well as the District Attorney's Office. She had not mentioned the prosecutor assigned to this case, however. She told J. "she would never go to the dark side," meaning work as a prosecutor. (p.*2.)

5. J. conceded he was biased against guns and thought the Second Amendment should be repealed, but he could follow the judge's instructions. He said his only bias was against guns.

6. A short time later, the prosecutor exercised a peremptory challenge excusing J. (p.*2.)

7. Following the questioning of other prospective jurors and more challenges from both the prosecution and the defense, L. was questioned. L. had graduated from high school and owned a travel agency. He said there was "absolutely no reason why he could not be fair." (p.*2.)

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

9. When the prosecutor challenged L., codefendant Sharpe's counsel made a *Wheeler* motion, arguing the prosecutor systematically used peremptory challenges to excuse the only two openly gay men in the venire. Defendant' counsel joined the motion. The trial court "at this point" found sexuality was a protected category and considered the motion. (p.*2.)

10. The prosecutor then gave his reasons for striking both jurors. He excused J. based on his close relationship with a public defender, and because she had discussed the personality traits of several members of the prosecutor's office with J., and she told J. she considered prosecutors as "the dark side." (p. *3.)

11. As to L., the prosecutor said he excused L. based on his demeanor, stating that when the defendant's counsel got up, L. leaned forward, and seemed to be more attentive, but when the prosecutor spoke, L. leaned back and gave answers that were short and not descriptive. (p.*3.)

12. The prosecutor then added another reason as to both men: "[I]n a case like this where the victim was 'not out of the closet and actually was untruthful with the police about the extent of his relationship with a male prostitute,' that he believed an openly gay person might hold a biased view of the testimony of such a witness because the witness was willing to lie about or not be open regarding his sexuality." (p.*3.)

13. Codefendant Sharpe's counsel responded that the prosecutor's reasoning would allow him to "kick" any openly gay person. (p.*3.)

14. The trial court denied the *Wheeler* motion. As the opinion explains: "Citing J.'s relationship with the public defender and 'dark side' comment about prosecutors, the trial court found the prosecutor's challenge to J. was justified. As for L., the trial court accepted the prosecutor's demeanor-based rationale for the challenge. Because the trial court made no response to Sharpe's counsel's pointed objection, we presume the trial court simply found the facially non-discriminatory reasons were sufficient and had no need to address the effect of the last reason. In effect, that was the rough equivalent to applying a mixed-motive analysis to the challenges." (p.*3.)

II. The Court of Appeal Analysis

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

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

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

B. The Peremptory Challenges in this Case

1. The Court of Appeal said, "We have no trouble upholding the trial court's findings that the prosecutor had facially valid reasons for challenging these jurors. J.'s relationship with a deputy public defender who thought prosecutors worked for the 'dark side' could trouble any prosecutor, and L.'s terse answers and negative body language (something the trial court could observe but that we cannot second-guess on a cold transcript) could also give reasonable cause for concern." (p.*5.)

2. But the Court of Appeal focused on the other reason proffered as to both J. and L. "The prosecutor explained that because both of these jurors were openly gay, he thought they might be biased against the closeted victim, the main witness." The defendant on appeal argued that this additional reason was "baldly discriminatory," and the Court of Appeal agreed. (p.*5.)

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

The Court of Appeal also pointed to *People v. Martin* (1998) 64 Cal.App.4th 378, 385, in which the prosecutor exercised a peremptory challenge against a juror who was a Jehovah's Witness because in the prosecutor's experience, " 'they couldn't judge anybody at all.' " (*Id.* at p. 381.) The court in *Martin* found that "[t]he prosecutor's perception that the juror's religious views might render her uncomfortable with sitting in judgment of a fellow human being was a specific bias related to the individual juror's suitability for jury service" sufficient to support the strike. (*Id.* at p. 384.)

The third case cited by the Court of Appeal here is *Hernandez v. New York* (1991) 500 U.S. 352, 372, in which the United States Supreme Court affirmed the trial court's factual finding that the prosecutor's reason for striking two Latino jurors was race-neutral and genuine. The prosecutor said he excused the jurors because their demeanor and specific responses caused him to doubt their ability to defer to the official translation of the Spanish-language testimony anticipated from various trial witnesses. (*Id.* at pp. 356-357.) The Supreme Court in *Hernandez* said the fact that the prosecutor's reasoning might disproportionately affect prospective Latino jurors did not render the reason nonneutral. (*Id.* at pp. 361-362.) (p.*5.)

4. The Court of Appeal noted Justice O'Connor's concurring opinion in *Hernandez* in which she observed that *Batson* "does not require that the [prosecutor's] justification be unrelated to race. *Batson* requires only that the prosecutor's reason for striking a juror not *be* the juror's race." (*Hernandez*, at p. 375.) (p.*5.)

5. Based on this line of reasoning, the Court of Appeal said "we can certainly imagine a case where an openly gay venireperson who expressed contempt for or distrust of closeted homosexuals could properly be stricken, because the reason would not be their sexuality, but their inability to fairly judge testimony of closeted homosexuals, simply because they have chosen to remain closeted." (p.*6.) But the Court of Appeal said that is not what happened here.

6. The Court of Appeal concluded the prosecutor's reasons were discriminatory. "Both veniremen said they could be fair, and neither expressed concerns about closeted homosexuals. The bias alleged

by the prosecutor was a product of the prosecutor's impermissible group assumptions, unsupported by the record and based solely on the two jurors' sexuality. The prosecutor specifically asked the panel whether 'anybody [had] an automatic reaction where they would vote guilty or not guilty because some of the people involved in this case, either witnesses or people who are accused are homosexual.' No one responded in the affirmative. Thus, this is not a case where a challenge touching on homosexuality, but not based on it, is in play. The prosecutor gave as a reason for his challenge his assumption that the only two openly gay veniremen would look askance at the victim's lifestyle simply because they were openly gay and he was not. Whether intended or not, that rationale reflects invidious sexuality discrimination that is not permissible." (p.*6.)

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

1. However, the Court of Appeal said its conclusion as to the impermissible nature of the prosecutor's proffered reason on sexual orientation did not end its inquiry. "We must now consider the effect, if any, of the trial court's finding that the prosecutor's other reasons were sufficient to continue with jury selection, or whether the trial court erred by not implementing a remedy for the *Batson/Wheeler* violation." (p.*6.) [The Court of Appeal pointed out in a footnote that "[n]ormally a successful *Wheeler* motion requires dismissal of the panel and restarting jury selection, but if the moving party consents, a trial court may implement lesser remedies, such as sanctioning the offending attorney or seating the improperly challenged juror(s)."] (p.*6.)

2. The Court of Appeal noted that although other jurisdictions have considered whether to apply a per se, mixed motive or substantial motivating factor approach, neither the United States Supreme Court nor California Supreme Court has done so. (p.*6.)

3. The Court of Appeal pointed out that some jurisdictions, primarily federal, have adopted a mixed motive analysis derived from non-*Batson* equal protection or statutory-based cases. Under the mixed-motive approach, " '[o]nce the claimant has proven improper motivation, dual motivation analysis is available to the person accused of discrimination to avoid liability by showing that the same action would have been taken in the absence of the improper motivation that the claimant has proven.' " [Citations omitted.] "[P]hrased another way, under the mixed-motive analysis, 'the Court allows those accused of unlawful discrimination to prevail, despite clear evidence of racially discriminatory motivation, if they can show that the challenged decision would have been made even absent the impermissible motivation. . . . [Citation.]' " (p.*6.)

4. The Ninth Circuit has adopted the "substantial motivating factor" approach, i.e. "whether the prosecutor was 'motivated in substantial part by discriminatory intent.' " (p.*7, *quoting Cook v. LaMarque* (9th Cir.2010) 593 F.3d 810, 814-815.) "Under this test, if a bad reason is given, it can be ignored so long as the prosecutor's motivation is not substantially driven by it." (p.*7.)

The Ninth Circuit in *Cook* said to make this determination of whether race was a substantial motivating factor, the trier of fact must evaluate the "persuasiveness of the justifications offered by

the prosecutor." *(Ibid.)*

5. The Court of Appeal notes that the "mixed motive" concept arose in non-*Batson* contexts, such as in employment discrimination lawsuits, where a defendant-employer seeks to show that the adverse action would have been taken against the plaintiff-employee regardless of any racial or other invidious animus. However, the Court of Appeal stated the "but for" causation requirement of employment cases is not appropriate in the *Batson* context. (p.*7.) It said the "difficult task of 'ferreting out discrimination' would be made nearly impossible by a 'but for' causation requirement," and, further, the mixed-motive approach "does not translate well to a *Batson* situation where the question is not only whether a prospective juror would have been challenged anyway, but also implicates systemic fairness." (p.*7.)

6. The Court of Appeal here adopts the per se approach which is says "while not universally held, is well grounded in the law." (p.*8.) The Court of Appeal says: "We endorse the following view, while acknowledging that it is not precedential: 'To excuse such prejudice when it does surface, on the ground that a prosecutor can also articulate [valid] nonracial factors for his challenges, would be absurd.' (*Wilkerson v. Texas* (1989) 493 U.S. 924, 928, (Marshall, J., dissenting from denial of certiorari).)" The Court of Appeal notes that while this case did not involve race-based discrimination in challenges as in *Batson*, "the same concern for preserving the integrity – and *perceived* integrity – of the judicial system is present." (p.*11.)

[Although the Court of Appeal did not further describe the per se approach in this opinion, it stated in the earlier 4/11/17 opinion, as used in race cases, "under this per se approach, 'a racially discriminatory peremptory challenge in violation of *Batson* cannot be saved because the proponent of the strike puts forth a nondiscriminatory reason.' "]

7. Finally, the Court of Appeal concludes the remedy for the error is "reversal for an untainted trial." (p.*9.)

IV. Dissenting Justice

The dissenting justice states: "[T]he per se test the majority adopts today misses a proper balance; the prosecutor may well have legitimately stricken the two prospective jurors regardless of their sexual orientation. The mixed motive approach, by contrast, strikes the proper balance between protecting a defendant's constitutional rights, preserving the public's confidence in the fairness of our system of justice, and recognizing the institutional interest in the finality of judgments. As we originally concluded, I would adopt the mixed motive approach whenever a party offers both neutral and nonneutral reasons for exercising a peremptory strike, and I would remand the matter here for the trial court to apply the mixed motive approach in the first instance." (p.*10.)

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

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Week Of	Topic	Guest	30 min
Feb. 25, 2019	***People v.Armstrong***: Supreme Court considers ***Wheeler/Batson*** issues		Bias

People v. Armstrong **(2019) __ Cal. 5th ___ 2019 WL 419062**

A large part of the accompanying P&A video consists of clips from oral argument in which Justice Liu, the author of the dissenting opinion, questions the deputy AG about the basis for the prosecutor's peremptory challenge of an African American man in this death penalty case.

This P&A video and accompanying handout focus only on the *Wheeler-Batson* claims made by the defendant at trial. The majority opinion is written by Justice Corrigan, with Chief Justice Cantil-Sakauye, and Justices Chin and Kruger joining. The dissenting opinion is written by Justice Chin with Justice Cuellar and pro tem Justice Perluss joining.

I. Factual and Procedural Background

1. Defendant Jamell Armstrong, an African-American man, was convicted of kidnapping, robbing, raping, torturing and murdering Peggy Sigler, a white woman. On automatic appeal, the California Supreme Court affirmed the convictions, but reversed the death penalty. Under the standards of *Witherspoon v. Illinois* (1968) 391 U.S. 510 and *Wainwright v. Witt* (1985), a juror is properly excluded if he or she is unable to conscientiously consider all of the sentencing alternatives, including the death penalty, set aside personal views about capital punishment and follow as the law as the judge instructs. The Supreme Court concluded that multiple prospective jurors were improperly excused for cause.

In a capital case, the erroneous exclusion of even one prospective juror for cause requires automatic reversal of the death sentence, although not the preceding guilt determinations.

2. The Supreme Court then proceeded to the prosecution's use of peremptory challenges against jurors not excused for cause.