II. Wheeler Batson Motion

A. Background

1. During jury selection, the prosecution exercised four peremptory challenges against African-American male prospective jurors. The trial court granted all four motions. The jury as seated included one African-American woman and five Caucasian men, but no African-American men. (p.*14.)

2. The Supreme Court states that groups lying at the intersection of race and gender are cognizable under *Wheeler*. African-American men are a cognizable class (p.*16.)

3. The four excused African-American men are identified in the opinion as S.L., R.C., E.W., and R.P.

B. Overview

1. The Supreme Court majority opinion analyzed the reasons stated by the prosecutor for her challenges to each of the four prospective jurors. It concluded there was no error.

2. Justice Liu, the author of the dissent, agreed that with the challenge to juror R.C. As to the other three strikes, however, Justice Liu stated the defendant "raised more substantial objections." Justice Liu stated that the challenge to E.W. was the most troublesome. Justice Liu concluded the prosecutor's reasons were not supported by the record, and thus the challenge to E.W. required reversal of the convictions. (p.*38.)

C. Analysis: Majority and Dissenting Views on Challenge to Prospective Juror E.W.

1. Justice Liu's analysis in his dissent focuses on E.W. only. Justice agreed that the prosecutor's reasons for striking R.C. were supported by the record. As to the three strikes, Justice Liu said the defendant raised "substantial objections," but the strike of E.W. was "especially troublesome." (p.*38.)

2. E.W. was a 28-year-old homeowner in Signal Hill who worked as a satellite engineer for Boeing and had been the student body vice-president at the University of California at Irvine. He planned on returning to school for postgraduate studies and considered focusing on astronautics, law, or business. (p.*39.)

3. When the defendant challenged the use of a peremptory on prospective juror E.W., the trial court found a prima facie case and solicited the prosecution's reasons. The prosecutor was seeking a death verdict, and her concerns about that penalty underlie her reasons. After discussing a number of responses from E.W. that gave her pause, the prosecutor identified two as dispositive: "The two things that really bother me [are] that he believes that life without the possibility of parole is the most severe sentence and he also believes that since if the death penalty is imposed it cause[s] so much additional

litigation, he doesn't believe it should be, just let it go, is what he says. To me that is indicative of what his [penalty] verdict is going to be." Later, she reiterated that E.W.'s view of life without possibility of parole as the more severe sentence was her "primary motivation for exercising the peremptory challenge," and she had exercised peremptories against Whites who held the same view. (p.*21.)

4. The trial court evaluated these concerns and concluded they were genuine. Because the prosecutor's "concern has nothing to do with race[,] it has to do with whether or not [E.W.] could impose the death penalty," the court denied the motion. (p.*21.)

5. The Supreme Court majority said the record substantiates that E.W. held the views the prosecutor ascribed to him. E.W. said the death penalty in its "current form is so slow that it's really useless. Justice delayed." E.W. was "OK [with the death penalty] in principle, but if it creates so much additional litigation, maybe [the state] should just let it go." On the questionnaire, he circled that life in prison without possibility of parole was a more severe punishment than death. (p.*21.)

6. The defendant argued that other jurors, like E.W., indicated that they thought the death penalty was imposed too seldom or too randomly. But the majority states that the prosecutor never identified this reason as a basis for striking E.W. The prosecutor's principal concern was that E.W. thought a life sentence more severe than the death penalty and should perhaps be discontinued. Seated jurors and alternates did not share these views. The Supreme Court stated: "The record supports the prosecutor's assertion that she had more reason to be concerned about E.W.'s potential verdict than a verdict from jurors the dissent and the defendant posit as comparable." (p.*23.)

7. The Supreme Court majority points out the dissenting opinion highlights E.W.'s profession as an engineer. The defendant and the dissenting opinion relied heavily on the fact that the prosecutor mentioned that E.W.'s profession as an engineer was area of concern, explaining that she feared E.W. might put her to a higher standard of proof. In explaining her challenge to E.W., the prosecutor stated, "The next thing that concerns me is his training, as an engineer. He is trained to look at all possible doubt. There is no way I can prove this case to him beyond a reasonable doubt." Justice in his dissenting opinion wrote that "it is dubious to say the prosecutor did not regard E.W.'s engineering background as a main reason for the strike." (p.*39.) The majority stated, however, that the prosecutor did not identify E.W.'s profession as one of the "two things that really bother me" about E.W., and the trial court did not originally consider the prosecutor to have proffered E.W.'s profession as a justification. "We may infer that in the prosecutor's eyes the juror's profession alone was an insufficient reason to exercise a strike." (p.*23.)

8. Justice Liu further pointed out that the prosecutor, in articulating her concern about engineers, stated, "[T]here are no other engineers in this panel and he is the only engineer." Justice Liu stated: "This was not true. Juror No. 11, whom the prosecutor had accepted, was a white woman who had worked as an engineer for Conoco Phillips for over 20 years. The trial court did not notice this discrepancy, and the record contains no explanation for the prosecutor's misstatement." (p.*41.)

9. The majority opinion responded: "The fact another engineer, Juror No. 11, remained on the jury

does not demonstrate the expressed doubt about engineers, as part of the overall calculus, was insincere. The seated juror differed from E.W. on each of the two grounds the prosecutor gave as her principal reasons for exercising a strike. Unlike E.W., Juror No. 11 indicated death was a more severe punishment than life in prison. Unlike E.W., Juror No. 11 did not think the state should consider abandoning the death penalty. An engineer with these views might be acceptable, even if not ideal, while an engineer with views like E.W.'s was deemed too big a risk to take in selecting the jury. Comparative juror analysis has force 'when the compared jurors have expressed a substantially similar combination of responses, in all material respects, to the jurors excused." [Citation.] No such combination appears here." (*Id.* at p. *24.)

10. The majority stated in a footnote: "Later in voir dire, the prosecutor described her general approach to strikes and listed five areas of principal concern, none of which focused on a juror's profession: (1) belief that life in prison was as or more severe a punishment than death; (2) belief in rehabilitation; (3) bad experiences with the police; (4) reluctance to judge others; and (5) prior service on a hung jury." (*Id.* at p. *23, fn. 15.)

11. The majority opinion also posits in a footnote another possible reason why neither the prosecutor nor the defense attorney nor the trial court mentioned Juror No. 11's profession as an engineer during voir dire: "Alternatively, it is possible that in the course of reviewing 50-page questionnaires, each containing responses to 237 questions, from more than 400 jurors — more than 20,000 pages in all — the prosecutor, defense counsel, and trial court all overlooked Juror No. 11's profession. Neither at the time [of voir dire] nor in a later new trial motion rearguing the *Wheeler/Batson* motions did defense counsel argue the challenge to E.W. and the failure to strike Juror No. 11 were inconsistent." (p.*26, fn. 16.)

12. Justice Liu at oral argument addressed at length the prosecutor's proffered reason that E.W. had been subject to questionable stops by Long Beach police officers. Justice Liu pointed out that questionable stops by police officers was a reason that would disqualify a large number of African-American men. In his dissenting opinion, Justice Liu wrote: "[I]t give it gives me pause to credit a reason that is so widely applicable to African Americans and that may itself be the product of racial bias, whether conscious or unconscious." (p.*46.) Justice Liu's also identifies other factors identified by E.W. in his questionnaire that are discussed in the paragraph below.

13. The majority opinion, addressing these other factors, stating: "The prosecutor herself highlighted the considerations that concerned her most. The trial court took her at her word and evaluated those reasons for their genuineness and neutrality. Once they passed muster, it was not error to omit express consideration of secondary factors. Nor, in any event, do these lesser factors undermine the trial court's credibility finding. The voir dire transcript and E.W.'s questionnaire show that E.W. indicated prosecutors 'tend to be overzealous to convict,' and that E.W. had negative experiences with the police. He believed misconduct by police and lawyers was inadequately punished and that failure was one of the most important problems with the criminal justice system. In addition, E.W. was neither firmly for nor against the death penalty, thought the system needed reform, and was familiar with legal terminology. These are factors that, considered with all other circumstances, could

fairly give an advocate pause. They provide no basis for us to substitute our judgment for that of the trial court's and conclude the prosecutor acted with racial bias." (p.*25.)

14. Justice Liu in his dissent, concluded: "The record here contains a number of proffered explanations for the strike of a black juror that are implausible, misleading, contradicted by the record, or difficult to credit in light of the prosecutor's disparate treatment of similarly situated jurors," and Justice Liu concluded the trial court's denial of defendant's *Wheeler-Batson* claim was unreasonable. (p.*47.)

15. In response to the vigorous dissent of Justice Liu as to E.W., the majority wrote: "The first line of vigilance rests with those in the trial court, who see and hear the questions, responses and nuances of the interaction. The rules of review also require vigilance, and humility. Appellate courts must surely call out misconduct. But we are aided in this endeavor by the trial judge who ruled in the first instance. In the face of a trial court's supported factual findings regarding the genuineness of the prosecutor's racially neutral reasons for exercising a strike, we should be hesitant to draw a contrary conclusion unless well-founded on fair inference, rather than surmise." (p.*26.)

16. The majority concluded: "The trial court in this case determined that the strike of E.W. was made on genuine, race-neutral bases. Reviewing that ruling with the deference precedent requires, the record supports the trial court's conclusion." (p.*26)

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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