The *Batson/Wheeler* Nightmare: *Being Reversed Because of Racial Bias*

by Daniel B. Bernstein

You have won a hard-fought conviction after overcoming several challenges at trial, including a *Batson/Wheeler*[1] motion claiming that you discriminated on the basis of race during jury selection. The conviction has been affirmed on direct appeal, but the case is not yet over. A year or so later, the defendant files a federal habeas petition. The federal district court denies the petition, and the defendant turns to the Ninth Circuit Court of Appeals.

Long after you have forgotten about the case, the Ninth Circuit finally issues its decision: The state court got it wrong when it upheld the trial court's *Batson/Wheeler* ruling because the record shows that one of your challenges was substantially motivated by racial bias. The conviction is automatically vacated and your office must now decide whether to retry the case. What's worse, you now have to report yourself to the State Bar. Sound like a nightmare?

Unfortunately, scenarios like these are becoming more common as federal courts in California—both the United States District Court and the Ninth Circuit—have granted several habeas petitions in recent years based on *Batson* violations.[2] In California appellate courts, reversals based on *Batson/Wheeler* violations remain exceedingly rare.[3] But despite the heavy burden on habeas petitioners under the Antiterrorism and Effective Death Penalty Act (AEDPA), federal courts often refuse to afford deference to state court decisions after finding that they contained legal errors or unreasonable factual determinations.[4] The result is that some convictions are overturned in federal court many years after trial, in some cases based on a single, faulty peremptory challenge during jury selection.

The purpose of this article is to give prosecutors a better understanding of how state and federal courts analyze *Batson/Wheeler* claims on appeal and habeas review, with the goal of helping prosecutors make a record at trial that will reduce the chances of a reversal. It begins with a discussion of the *Batson* framework for evaluating claims of racial discrimination in jury selection, including the legal standards for each of the three steps of the inquiry. It goes on to discuss "comparative juror analysis," which has become a preferred method of analyzing *Batson* claims on appeal. This article also provides some "tips" for prosecutors on how to avoid the nightmare of a *Batson* reversal many years after trial.

The *Batson* Framework

As prosecutors are undoubtedly aware, the use of racial discrimination during jury selection violates both the United States and California Constitutions. *Batson v. Kentucky* explains that this practice violates a defendant's right to equal protection under the Fourteenth Amendment, while *People v. Wheeler* holds that it violates the right to a jury drawn from a representative cross-section of the community under article 1, section 16 of the California Constitution. *Batson/Wheeler* principles also are implicated when a prosecutor exercises peremptory challenges based on gender, ethnicity, or sexual orientation.[5] *Batson/Wheeler* is a two-way street: Prosecutors—like defense lawyers—can bring a motion if they suspect opposing counsel are striking prospective jurors based on membership in any of these cognizable groups.[6] But the overwhelming majority of *Batson/Wheeler* issues on appeal involve challenges to a prosecutor's use of peremptory strikes.

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Because the standards for evaluating claims under *Batson* and *Wheeler* are identical, for simplicity they will be referred to as *Batson* claims in this article.

When defense counsel challenges a prosecutor's peremptory strike (or strikes) on *Batson* grounds, it triggers a three-step process. First, defense counsel must make a prima facie case by showing that the totality of the relevant facts give rise to an inference of discrimination. Second, if a prima facie showing is made, the prosecutor must provide race-neutral reasons for excusing the prospective juror or jurors. Third, if the prosecutor has offered non-discriminatory reasons, defense counsel must persuade the trial court that those reasons were pretextual and that the prosecutor engaged in purposeful discrimination.[7] Otherwise, the *Batson* motion is denied upon a finding (usually implied) that the prosecutor's reasons were genuine.

Step One

The defendant's burden of establishing a prima facie case in Step One is "minimal."[8] In this stage, the trial court considers the entire record of voir dire at the time the motion was made with certain types of evidence being particularly relevant, including whether:

> the [prosecutor] has struck most or all of the members of the identified group from the venire, [the prosecutor] has used a disproportionate number of strikes against the group, [the prosecutor] has failed to engage these jurors in more than desultory voir dire, [ ] the defendant is a member of the identified group, and [ ] the victim is a member of the group to which the majority of the remaining jurors belong.[9]

The trial court may also consider any other non-discriminatory reasons for a peremptory challenge that are apparent from the record.[10] This includes information in juror questionnaires.

For example, assume there are only two prospective jurors in the venire who are black—the defendant is also black—and the prosecutor uses an early strike to excuse the only black person sitting in the jury box. If that prospective juror provided no hint during voir dire that he or she would be unfavorable to the prosecution, those circumstances probably would constitute a prima facie case. If, on the other hand, there are numerous Hispanics in the venire, and the prosecutor has struck two or three jurors who revealed antipathy toward law enforcement during voir dire, that might not constitute a prima facie case, even if the defendant is Hispanic.[11]

If a trial court finds that no prima facie case has been established, the *Batson* motion can be denied without inquiring into the prosecutor's reasons. However, even if it finds no prima facie case, a trial court may invite the prosecutor to place his or her reasons for exercising the peremptory strike or strikes on the record—a practice that the California Supreme Court has encouraged so further proceedings are avoided if an appellate court disagrees with the trial judge's prima facie finding.[12] In that case, the trial judge can find both no prima facie case and, alternatively, no purposeful discrimination.[13] Note, however, that if a trial court does not explicitly make a ruling on the existence of a prima facie case before finding no purposeful discrimination, an appellate court will presume a prima facie case and the Step One inquiry will be deemed moot.[14]

Step Two

If the trial court finds a prima facie case, Step Two of *Batson* requires the prosecutor to provide a "'clear and reasonably

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specific' explanation of his 'legitimate reasons' for exercising the challenges."[15] This explanation need not be "persuasive, or even plausible."[16] The United States Supreme Court has said: "Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral."[17] Accordingly, when the prosecutor in that case explained that he excused two black jurors because he did not like their long hair or the fact that they had mustaches and goatees, the Court found those reasons to be race neutral.[18] Likewise, the California Supreme Court has said that a prospective juror "may be excused based upon facial expressions, gestures, hunches, and even for arbitrary or idiosyncratic reasons" as long as that reason does not deny equal protection.[19]

The more the prosecutor bases his or her reasons on a prospective juror's specific responses, background, or demeanor–rather than general preferences (such as marital status or level of education)–the better the odds that the reasons will survive scrutiny on appeal.

That is not to say that such reasons ultimately will pass muster, particularly if they appear to be fanciful. Thus, as a practical matter, a prosecutor's reasons must not only be race neutral, but they also should be as persuasive as possible. Ideally, a prosecutor will be able to say why a prospective juror's background and/or responses to questions (either on a juror questionnaire or during voir dire) raised concerns that he or she might be sympathetic toward the defendant or unreceptive to the prosecution's case. In other instances, it should suffice for a prosecutor to articulate concerns relating to a prospective juror's ability to understand the case or to deliberate properly. The more the prosecutor bases his or her reasons on a prospective juror's specific responses, background, or demeanor—rather than general preferences (such as marital status or level of education)—the better the odds that the reasons will survive scrutiny on appeal.

As examples, courts have upheld peremptory challenges based on a prospective juror's disclosure that a family member has been incarcerated,[20] that the juror has had a negative encounter with the police,[21] or that the juror works as a teacher, social worker, or another job that might engender sympathy toward criminal defendants.[22] On the other hand, courts have found that prosecutors hid racial motives when they stated that prospective jurors lacked sufficient "life experience,"[23] held a low-level customer service job,[24] or "looked very nervous."[25]

Step Three

Step Three of the *Batson* inquiry involves an evaluation of the prosecutor's credibility to determine "whether the defendant has shown purposeful discrimination."[26] In making that determination, the trial judge considers various factors, including: the prosecutor's demeanor; how reasonable or how improbable his or her explanations are; and whether the proffered rationale has some basis in accepted trial strategy.[27] The judge also should evaluate the prosecutor's stated reasons in light of the evidence: If a prosecutor mischaracterizes a prospective juror's testimony, it is considered evidence of pretext.[28] Similarly, if the prosecutor strikes a prospective juror based on demeanor, the judge may rely on his or her own impressions of that juror.[29]

What is a reasonable reason? It is one that has some relevance to the case or is based on something in the record to suggest that the prospective juror might sympathize or identify with the defendant.[30] For example, if the defendant in a murder case plans to argue that he could not form the specific intent to kill because he was drunk, that should be a good reason to strike jurors who have been convicted of Driving Under the Influence (DUI). Or if the case involves extensive expert testimony regarding DNA evidence, the fact that a prospective juror never attended college should be sufficient to strike that juror.

However, striking even a single prospective juror based on race violates both the U.S. and California Constitutions.[31] Additionally, the Ninth Circuit has repeatedly held that the defendant is not required to establish that the prospective juror's race was the deciding factor (but-for cause) in exercising the strike; it is enough to prove that the peremptory challenge was motivated in "substantial part" by discriminatory intent.[32]

If a *Batson* motion is granted during voir dire, a mistrial is declared and jury selection must start over. The violation is a form

of prosecutorial misconduct that may be reported to the State Bar.[33] While that sounds like a kick in the stomach, it gets even worse if a *Batson* error is found on appeal or habeas review. Because this type of error is considered "structural," there is no harmless error analysis and the judgment is automatically reversed, regardless of the strength of the evidence in the case.[34] When a judgment is reversed based on a finding of prosecutorial misconduct, you are required to report yourself to the State Bar.[35]

Comparative Juror Analysis

During Step Three of the *Batson* inquiry, a defense attorney might argue that the same characteristics or responses you have cited as reasons for a strike apply to other jurors you have not challenged. This argument can be effectively countered by pointing out that the non-challenged jurors have other characteristics that make them more favorable to the prosecution. Perhaps the acceptable juror has relatives in law enforcement or previously sat on a jury that reached a verdict. This type of comparative juror analysis is best performed in the trial court, where the judge can consider these explanations, but also appreciate that prospective jurors may convey different messages with the same words.[36]

But even if a defendant does not raise these comparisons while arguing the *Batson* motion, he or she may later raise them on appeal—or for the first time on federal habeas review.[37] That gives appellate attorneys time to pore over transcripts of voir dire and identify every conceivable comparison. Although both the United States Supreme Court and the California Supreme Court have stated that juror comparisons based on a "cold appellate record" have limitations,[38] federal courts have used these cold-record comparisons to grant federal habeas relief in several cases in recent years.

In a case decided in May 2016, the United States Supreme Court drew several comparisons between stricken black jurors and sitting white jurors in finding *Batson* error in a Georgia capital case in which the prosecutor peremptorily challenged all four black prospective jurors.[39] Indeed the Ninth Circuit has called comparative juror analysis an "established tool ... for determining whether facially race-neutral reasons are a pretext for discrimination."[40] This tool is often used as a hammer. Consider these recent cases:

- A Sacramento County prosecutor gave nine reasons for excusing a black prospective juror, including that she had a bad experience with law enforcement, that she voiced irritation when the prosecutor asked her about it during voir dire, and that she expressed a belief that the criminal justice system treats people unfairly. After comparing her responses to those of other jurors who were allowed to serve, a federal judge found—and the Ninth Circuit later agreed—that most of the prosecutor's reasons were pretextual. Thus, a habeas petition was granted based on striking a single black prospective juror.[41] A retrial of the defendant 17 years later resulted in an acquittal.[42]

- A Butte County prosecutor excused the only black prospective juror in a capital case after she expressed ambivalence toward the death penalty. The trial court found no prima facie case and did not invite the prosecutor to state his reasons; perhaps because they seemed obvious.[43] A federal judge disagreed with that finding and conducted an evidentiary hearing 14 years after the trial to hear the prosecutor's reasons. At that hearing, the state produced the prosecutor's notes, which included a rating system using √ and X marks for each prospective juror. The juror in question was one of only two prospective jurors who received the worst rating: XXXX. Rather than view that rating as evidence that the prosecutor genuinely believed that the black prospective juror would be unfavorable based on her responses, the judge compared her responses to those jurors who received a more favorable rating and found that the rating system itself revealed evidence of bias. The judge concluded that striking the black juror was motivated in substantial part by racial discrimination, and the Ninth Circuit agreed. As of April 2016, a retrial was pending.

- A Sacramento County prosecutor struck two prospective jurors who were black, but passed on another black individual who ultimately was seated on the jury. A *Batson* motion was denied based on the defendant's failure to establish a prima facie case. A federal judge found that ruling was erroneous, and the prosecutor was summoned to federal court to provide his reasons—eight years after jury selection in 2005.[44] Not surprisingly, the prosecutor could not recall his reasons. But after reviewing the transcript of voir dire, he testified that he excused one prospective juror

(L.L.) because she stated that the defendant looked familiar, she had recently discussed business with a man who may have been related to the defendant, and she had been convicted of a crime as an adult. He surmised that he struck the other prospective juror (R.O.) because she "lacked life experience"—based on her youth, lack of college education, and remaining in the area where she had grown up.[45] While finding it unnecessary to decide the validity of the prosecutor's reasons for striking L.L., the Ninth Circuit found that his reasons for excusing R.O. were pretextual "largely on the basis of a comparative juror analysis with a young white veniremember who was seated."[46]

- During jury selection in a Los Angeles County gang-related murder case, the defense made a *Batson/Wheeler* motion after the prosecutor used four of his first six peremptory challenges to excuse Hispanic venirepersons.[47] The prosecutor gave reasons for striking three of those prospective jurors and the court denied the motion. The jury that was empaneled included seven Hispanics. When the case got to federal court, a magistrate judge invited the State to provide a declaration from the prosecutor more clearly stating his reasons for dismissing two of the jurors, and the prosecutor did so. The State also submitted DMV records showing photographs of each venireperson. The federal district court denied the habeas petition. But the Ninth Circuit—nine years after trial—found *Batson* error based on a "side-by-side" comparison of one stricken juror with seated jurors—even though the record indicated that the prosecutor had mixed up two jurors when stating his reasons.[48] A retrial is pending.

Obviously, you do not want to suffer a similar fate. How can you avoid it? Here are some tips:

Tip 1: Be Evenhanded in Your Questioning

As part of comparative juror analysis, reviewing courts look not only to your reasons, but also to any disparities in your questioning of prospective jurors. Obviously, some responses merit follow-up questions more than others to ferret out potential bias. But to the extent you question jurors about their attitudes toward the criminal justice system, or their beliefs about police practices, do not focus on minority prospective jurors. Also avoid loaded questions: Asking jurors if they believe that blacks are treated unfairly or profiled by the police undoubtedly will result in more "yes" answers from blacks than whites; using those responses as a basis to exclude black jurors probably will be seen as pretextual. Similarly, if you have asked prospective jurors whether they agree with principles that bear upon a defendant's constitutional rights, be very careful about using those responses.

Tip 2: Don't Be Afraid of a Prima Facie Case

Understandably, many prosecutors consider it a personal affront when a defense lawyer makes a *Batson/Wheeler* motion. In effect, you are being called a racist. But fighting tooth and nail to preclude a prima facie finding in a close case can backfire if an appellate court disagrees with the trial court's ruling, and you have to provide reasons years later when you can barely remember the facts of the case. So do not fear a finding of a prima facie case. That being said, you should also state for the record any circumstances to show that the defendant has not met his or her burden at Step One, such as that most of your prior strikes involved non-minority prospective jurors or that other minority group members remain in the venire or in the jury box. While these circumstances will be noticed by the trial court, they will not appear in the trial transcripts. So help make a record.

Tip 3: Help the Judge Keep the Steps Separate

As noted above, a judge may ask for your reasons even before he or she has determined whether a prima facie case has been made. Before accepting the invitation, ask the judge to rule first on Step One. Then offer your reasons to support an alternate ruling based on Step Three. (Of course, if the judge finds a prima facie case, the ruling on Step Three is the only basis for the denial.) Even if the judge wants to hear your reasons before ruling on Step One, point out that your reasons are being offered only for purposes of Step Three, and press for a ruling on Step One apart from those reasons. Even if the judge does not ask for your reasons before ruling that no prima facie case has been shown, put your reasons on the record anyway to avoid the possibility of being asked to do so years later.[49]

After the jury is empaneled, place on the record the racial composition of the entire panel, including how many members of the minority group that you were accused of targeting are now seated. If you would have accepted any members of the relevant minority group who were challenged by the defense, put that on the record too. On appeal, these circumstances can help show that the challenged strikes were not motivated by racial bias.[50]

Tip 4: Limit or Prioritize Your Reasons

Many considerations go into making a peremptory challenge, so you may be able to cite a half dozen or more "reasons" for exercising the strike. Be judicious. The more reasons you offer, the more opportunities you provide appellate lawyers (and judges) to engage in comparative juror analysis. So even if a relatively small percentage of your reasons are found to be pretextual, that can support a conclusion that one of your strikes was substantially motivated by race. The better practice is to limit your reasons, particularly if you have one or two very strong ones. If you wish to articulate all of your reasons, and there are several of them, indicate which ones are predominant.

In addition, if some of the reasons you have cited apply to prospective jurors you do not plan to challenge, explain why those unchallenged jurors are more favorable in your eyes. You also should be as specific as possible when articulating your reasons, particularly those based on demeanor. Did the juror fold his arms across his chest when you were asking questions? Did he or she hesitate or look away before responding to you? What exactly was he or she wearing that made you think the person was not respectful of the court system? Try to have the judge confirm your observations, if possible.

Tip 5: Keep Your Notes

Many lawyers take notes during jury selection, but some do not keep them. It is good practice to preserve these notes, as they may help jog your memory in the event that you are asked to justify your peremptory challenges in a subsequent proceeding. Based on the Ninth Circuit's analysis in two recent cases, the use of a rating system alone may prove troublesome, as some courts are inclined to suspect that the ratings are influenced by racial stereotypes. Notes that refer to specific characteristics or responses are more likely to be found probative, but referring to the race of a prospective juror is likely to raise a red flag.

Conclusion

Both state and federal courts in California are applying more scrutiny than ever to *Batson* claims raised on direct appeal and in habeas petitions. Some of these courts seem to be guided by Justice Thurgood Marshall's concern that it is all too easy for a prosecutor to assert facially neutral reasons for striking a juror to conceal racial prejudice.[51] Prosecutors have a duty to uphold both the U.S. and California Constitutions, which includes not using racial stereotypes while exercising peremptory challenges. But they also must be mindful of the perception of racial discrimination, and do everything possible to have the record reflect that they are free of such bias. ■

ENDNOTES

1. *Batson v. Kentucky* (1986) 476 U.S. 79; *People v. Wheeler* (1978) 22 Cal.3d 258.
2. Because federal habeas claims must be based on violations of the United States Constitution, only *Batson* comes into play in these decisions.
3. See *People v. Harris* (2013) 57 Cal.4th 804, 865 (Liu, J., concurring) [pointing out that in the more than 100 cases the California Supreme Court has adjudicated with *Batson* claims during the past 20 years, it has found unlawful discrimination in jury selection only once–in *People v. Silva* (2001) 25 Cal.4th 345].
4. Under the AEDPA, federal habeas relief is precluded unless the state court adjudication either was contrary to, or involved an unreasonable application of clearly established United States Supreme Court law, or was based on an unreasonable determination of the facts in light of the evidence presented in state court. (28 U.S.C. § 2254(d).) Combined with the deference prescribed for a trial court's credibility determinations, this standard should result in a "doubly deferential" standard of review of *Batson* claims in federal habeas. (See *Briggs v. Grounds* (9th Cir. 2012) 682 F.3d 1165, 1170.)
5. *Rivera v. Illinois* (2009) 556 U.S. 148, 153 ["Under *Batson* [ ], and later decisions building upon *Batson*, parties are constitutionally prohibited from exercising peremptory challenges to exclude jurors on the basis of race, ethnicity, or sex."]; *People v. Garcia* (2000) 77 Cal.App.4th 1269, 1281 [homosexuals meet the criteria for a cognizable group that cannot be discriminated against in jury selection]; but see *People v. Martin* (1998)

64 Cal.App.4th 378, 385 [cert. for part. pub.] [peremptory challenges can be based on a juror's religious beliefs].
6. *People v. Willis* (2002) 27 Cal.4th 811, 813.
7. See, e.g., *Johnson v. California* (2005) 545 U.S. 162, 168; *People v. Scott* (2015) 61 Cal.4th 363, 383.
8. *Johnson v. Finn* (9th Cir. 2011) 665 F.3d 1063, 1071.
9. *Scott, supra*, at 384, citing *People v. Lenix* (2008) 44 Cal.4th 602, 624 and *Wheeler, supra*, at 280–281.
10. *Id.*
11. See *People v. Sanchez* (2016) ___ Cal.4th ___ [2016 WL 3435752, *11] ["A court ... may consider nondiscriminatory reasons for a peremptory challenge that are apparent from and 'clearly established' in the record [citation] and that necessarily dispel any inference of bias."]. However, there are limits on the extent to which trial courts can hypothesize a prosecutor's reasons for exercising a peremptory strike. See *id.* at fn. 5 ["[R]eviewing courts may not uphold a finding of no prima facie case simply because the record suggests grounds for a valid challenge"]; see also *Johnson v. Finn, supra*, 665 F.3d at 1069 ["Contrary to the [California] Court of Appeal's reasoning, the existence of 'grounds upon which a prosecutor could reasonably have premised a challenge,' does not suffice to defeat an inference of racial bias at the first step of the *Batson* framework."].
12. *People v. Howard* (2008) 42 Cal.4th 1000, 1020; *People v. Bonilla* (2007) 41 Cal.4th 313, 343, fn. 13.
13. If an appellate court agrees with the trial court's determination of no prima facie case, the prosecutor's reasons become moot–unless those reasons are discriminatory on their face. In that case, the appellate court may consider the stated reasons in determining the existence of a prima facie case. (See *Scott, supra*, at 391–392.)
14. *Hernandez v. New York* (1991) 500 U.S. 352, 359; *People v. Fuentes* (1991) 54 Cal.3d 707, 716.
15. *Batson, supra*, at 98, fn. 20, quoting *Texas Department of Community Affairs v. Burdine* (1981) 450 U.S. 248, 258.
16. *Purkett v. Elem* (1995) 514 U.S. 765, 768.
17. *Id.*, quoting *Hernandez, supra*, at 360.
18. *Id.*
19. *Lenix, supra*, at 613; see also *Harris, supra*, at 883, quoting *United States v. Collins* (9th Cir. 2009) 551 F.3d 914, 920 [The Step Two test "puts only a slight burden on the government" and the prosecutor "does not bear any burden to disprove discrimination."].
20. *People v. Roldan* (2005) 35 Cal.4th 646, 703.
21. *Lenix, supra*, at 628.
22. *People v. Mai* (2013) 57 Cal.4th 986, 1053.
23. *Shirley v. Yates* (9th Cir. 2015) 807 F.3d 1090, 1109–1111.
24. *Reynoso v. Hall* (9th Cir. 2010) 395 Fed.Appx. 344, 349.
25. *Snyder v. Louisiana* (2008) 552 U.S. 472, 479.
26. *Id.* at 484–485, quoting *Miller-El v. Dretke* (2005) 545 U.S. 231, 277.
27. *Miller-El v. Cockrell* (2003) 537 U.S. 322, 338–339.
28. In an unusual reversal on direct appeal, the California Court of Appeal, Fifth Appellate District, recently found *Batson/Wheeler* error based on a prosecutor's mischaracterization of testimony when he stated that he had excused an African-American prospective juror because she worked for a "liberal political organization" connected to the "Democratic Party or Congress." In fact, the prospective juror stated that she worked as a field representative for the Department of Commerce and collected information about residents of Kern County, which was reported to the President and Congress. (*People v. Arellano* (2016) 245 Cal.App.4th 1139, 1165–1166 [cert. for part. pub.].)
29. *Snyder, supra*, at 477.
30. *Jamerson v. Runnels* (9th Cir. 2013) 713 F.3d 1218, 1229.
31. *Snyder, supra*, at 478; *People v. Williams* (2006) 40 Cal.4th 287, 313.
32. *Yates, supra*, at 1109; *Crittenden v. Ayers* (9th Cir. 2010) 624 F.3d 943, 958–959 [*Crittenden I*]; *Crittenden v. Chappell* (9th Cir. 2015) 804 F.3d 998, 1017 [*Crittenden II*]; *Cook v. Lamarque* (9th Cir. 2010) 593 F.3d 810, 815.
33. Bus. & Prof. Code §§ 6068(a), 6106.
34. *Powers v. Ohio* (1991) 499 U.S. 400, 411–413; *Wheeler, supra*, at 283.
35. Bus. & Prof. Code § 6068(o)(7): Self-reporting to the State Bar is required within 30 days of "[r]eversal of judgment in a proceeding based in whole or in part upon misconduct, grossly incompetent representation, or willful misrepresentation by an attorney." Because a federal court does not have the power to revise a state court judgment, it could be argued that self-reporting is not required upon a grant of federal habeas relief due to *Batson* error. (See *Douglas v. Jacquez* (9th Cir. 2010) 626 F.3d 501, 504.) That, however, would seem to be a risky position in light of the purpose of the reporting requirements.
36. *Lenix, supra*, at 622, quoting *Tallman v. ABF* (N.M.Ct.App. 1988) 767 P.2d 363 ["In the trial court ... advocates and trial judges watch and listen as the answer is delivered. Myriad subtle nuances may shape it, including attitude, attention, interest, body language, facial expression and eye contact. 'Even an inflection in the voice can make a difference in the meaning.'"]
37. *Id.*; *Jamerson, supra*, at 1225–1226.
38. *Snyder, supra*, at 483; *Lenix, supra*, at 622.
39. *Foster v. Chatman* (May 23, 2016) ___ S.Ct. ___ [2016 WL 2945233, at *10-17]. The court also cited markings on jury lists and other notes from the prosecution's file demonstrating a "concerted effort to keep black prospective jurors off the jury." (*Id.* at *18.)
40. *Crittenden I, supra*, at 956.
41. *Williams v. Pliler* (9th Cir. 2015) 616 Fed.Appx. 864; *Williams v. Pliler* (E.D.Cal. 2013) 2013 U.S. Dist. LEXIS 165865.
42. Denny Walsh, "Retrial jury acquits Richard Williams of 1996 murder," (Nov. 1, 2015) *Sacramento Bee* <*http://www.sacbee.com/news/local/crime/article42403182.html*> (accessed Aug. 31, 2016).
43. *Crittenden II*, 804 F.3d at 1004.
44. *Shirley, supra*, at 1095–1097.
45. *Id.* at 1098–1099.

46. *Id.* at 1107.
47. *Castellanos v. Small* (9th Cir. 2014) 766 F.3d 1137, 1140–1142.
48. *Id.* at 1148–1149.
49. Also note that while California appellate courts do not engage in comparative juror analysis when reviewing a trial court's finding of no prima facie case, see, e.g., *People v. Taylor* (2010) 48 Cal.4th 574, 616-617; *People v. Bonilla* (2007) 41 Cal.4th 313, 350, the Ninth Circuit will do so when such a finding is based on hypothesized reasons for a peremptory challenge. See, e.g., *Crittenden v. Ayers* (9th Cir. 2010) 624 F.3d 943, 956; *United States v. Collins* (9th Cir. 2009) 951 F.3d 914, 922. This is another reason why it may be beneficial in the long run for the trial court to consider your actual reasons and make a Step Three determination.
50. See, e.g., *Gonzalez v. Brown* (9th Cir. 2009) 585 F.3d 1202, 1209–1210 [The fact that black jurors remained on the panel was indicative of a non-racial motive for challenges.]; *United States v. Chinchilla* (9th Cir. 1989) 874 F.2d 695, 698, fn. 4 ["[T]he willingness of a prosecutor to accept minority jurors weighs against the findings of a prima facie case."]; *Turner v. Marshall* (9th Cir. 1997) 121 F.3d 1248, 1254 [While not dispositive, "the fact that the prosecutor accepted four African-Americans on the jury may be considered indicative of a nondiscriminatory motive."].
51. *Batson*, *supra*, at 106 [Marshall, J., concurring].

Wheeler / Batson Guide

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Seminal Cases

P v. Wheeler (1978) 22 C3 258; *Batson v. Kentucky* (1986) 476 US 79

3 Prong Test

1. Party objecting to challenge (defense) must make a prima facie case
   - Showing that the totality of facts gives rise to an inference of discriminatory purpose
2. If prima facie case shown, burden shifts and party (DA) must explain adequately the challenge
   - Offer permissible race-neutral justification
3. Court then makes decision
   - Whether party objecting (defense) has proved purposeful discrimination

(*Johnson v. California* (2005) 545 US 162, 168)

Burden of Proof

- Defense has ultimate burden of proof. (*Gonzalez v. Brown* (9th Cir. 2009) 585 F3 1202, 1207; *Purkett v. Elem* (1995) 514 US 765, 768)
- Defense must show purposeful discrimination by a preponderance of the evidence. (*P v. Hutchins* (2007) 147 CA4 992; *Paulino v. Harrison* (9th Cir. 2008) 542 F3 692, 703)
- Consider totality of circumstances. (*P v. Lenix* (2008) 44 C4 602, 626)
- Presumption that challenge is proper. (*P v. Neuman* (2009) 176 CA4 571)

Rebut Prima Facie Case (1st Prong)

- Whether members of group discriminated against were challenged/excused by defense. (*People v. Wheeler* (1978) 22 C3 258, 283)
- DA passed with excused juror on panel. (*P v. Williams* (2013) 56 C4 630)
- Whether jury includes members of group discriminated against (*P v. Ward* (2005) 36 C4 186, 203)
- DA did not know juror was member of cognizable group. (*P v. Barber* (1988) 200 CA3 378, 389)
- Admit mistake (if challenge was made in error). (*P v. Williams* (1997) 16 C4 153, 188-190)
- Justify prospective challenges before you even make them. (*US v. Contreras* (9th Cir. 1988) 83 F3 1103)

Justifications (2rd Prong)

- Justification need not support a challenge for cause. (*P v. Thomas* (2011) 51 C4 449, 474)
- "Trivial" reason (if genuine) will suffice. (*P v. Arias* (1996) 13 C4 92, 136)
- Reasons must be inherently plausible & supported by the record. (*P v. Silva* (2001) 25 C4 345, 386)
- Must state reasons for each challenge. (*P v. Cervantes* (1991) 223 CA3 323 ["I don't recall" fatal]; but see *Gonzalez v. Brown* (9th Cir. 2009) 585 F3 1202 [based on totality of circumstances, "I don't recall" not fatal])
- Could be combination of factors (change in dynamic of jury, change in mix of jurors, number of preemptory challenges left, etc.). (*P v. Johnson* (1989) 47 C3 1194, 1220-1221)
- Give your justifications even if prima facie showing is not made (necessary for appellate review).

Factors in Court's Analysis (3rd Prong)

- Statistical evidence (percentage of jurors excused, remaining, etc.). (*P v. Garcia* (2011) 52 C4 706, 744)
- Comparative analysis (see box below).
- Disparate questioning (court looks at differences in the way questions were phrased to different jurors). (*Miller-El v. Dretke* (2005) 545 US 231, 254)
- Historical evidence of discrimination (by individual prosecutor and/or office). (*Miller-El v. Dretke* (2005) 545 US 231)
- Credibility of prosecutor. (*P v. Williams* (2013) 56 C4 630)

Comparative Analysis

- Side-by-side comparison of jurors who were struck vs. jurors serving.
- If DA's proffered reason for striking juror applies just as well to an otherwise-similar juror, that is evidence tending to prove purposeful discrimination. (*Miller-El v. Dretke* (2005) 545 US 231, 241)
- Comparative juror analysis is but one form of circumstantial evidence that is relevant, but not necessarily dispositive. (*P v. Lomax* (2010) 49 C4 530, 572)

Remedy

- Traditional: mistrial → draw an entirely different jury panel and start selection anew.
- Other alternatives (need consent of aggrieved party): disallow discriminatory challenge and reseat wrongfully excluded juror; monetary fines; allow aggrieved party additional peremptory challenges. (*P v. Willis* (2002) 27 C4 811; *P v. Mata* (2012) 203 CA4 898 [Def's personal waiver])