Bias

Lyytikainen, Lisa

From:	Lyytikainen, Lisa
Sent:	Tuesday, May 22, 2018 1:57 PM
To:	DA Attorneys; DA Investigators; Broggie, Carrie; Goodin, Stephen; Hurley, Ruth; Ibarra-Cortez, Danali; Miller, Paula; Mitchell, Christine; Pampalone, Yvonne; Rodriguez, Maria; Rosenthal, Carissa; Simpson, Karen; Wright, Connie
Subject:	Weekly MCLE video link - BIAS credit!
Attachments:	05-21-18(BastonWheeler-Per Se Analysis).P&A.doc

Weekly MCLE video link from Alameda County is below. These videos generally contain 30 minutes of self-study content.

Date:	Week of 5/21/18
Topic(s):	*Batson/Wheeler:* The per se rule for discriminatory peremptory challenges
Video link:	https://vimeo.com/270213511
MCLE:	.50 hours **BIAS** credit for each part (self study)
Password:	[redacted]
Handout:	attached

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: #172--
The Alameda County District Attorney's Office is a State Bar of California Approved MCLE Provider.

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.

If you wished to be added to or removed from the P&A mailing list, contact Mishel Jackson; mishel.jackson@acgov.org