Elim

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Subject:	Weekly MCLE Video link - Batson/Wheeler reversal -Elim of Bias credit
Attachments:	04-25-16 (Batson-Wheeler).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 4/25/16
Topics:	*Batson/Wheeler* reversal. (*People v. Arellano* (2016) 235 Cal.App.4th 1139.)
Video link:	http://vimeo.com/163576208
MCLE:	.50 hours **Elimination of Bias** credit (self study)
Password:	[redacted]
Handout:	attached

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.*)

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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."