

email from Michael Schwartz to DDAs 6/13/05, new Wheeler/Baston cases:

The United States Supreme Court issued its opinion today in *Johnson v. California* (June 13, 2005, 04-6964) 2005 U.S. LEXIS 4842, changing the procedure by which *Wheeler* challenges to jury selection are made. Johnson, a black male, was convicted of murdering the 19-month-old white child of his white girlfriend. The prosecution exercised peremptory challenges to remove all 3 black prospective jurors. The court noted that there are three steps under *Baston v. Kentucky* (1986) 476 U.S. 79 for the trial court to determine if there has been purposeful discrimination in jury selection: (1) the defendant must make a prima facie case of a discriminatory purpose, (2) if a prima facie case is made, the burden shifts to the state to offer race-neutral justifications, and (3) the court must determine if purposeful racial discrimination has been established.

Under *People v. Wheeler* (1978) 22 Cal.3d 258, at the first step, the defense must show that it is **more likely than not** that the peremptory challenges, if unexplained, were based on impermissible group bias. Applying this test, the Contra Costa Superior Court ruled that while the circumstances were "suspicious" and "the question was close," the defense failed to show a "strong likelihood" of group bias. Without requiring a statement of justification from the state, the trial court denied the *Wheeler* motion.

The U.S. Supreme Court held that the "more likely than not" standard is not appropriate. Instead, upon the defense producing sufficient evidence to raise an **inference** of discrimination, the prosecution should be required to explain its reasons. However, "the defendant ultimately carries 'the burden of persuasion' to 'prove the existence of purposeful discrimination.'" The Supreme Court reversed the conviction and remanded.

Also today, the U.S. Supreme Court reversed a Texas death judgment in another *Baston* case, *Miller-El v. Dretke* (June 13, 2005, 03-9659) 2005 U.S. LEXIS 4658. Evidence of purposeful discrimination included the fact that prosecutors used peremptory strikes to exclude 91% of the eligible black jurors, a disparity unlikely to happen by chance. A side-by-side comparison of black jurors who were stricken and white jurors who were not stricken showed that the prosecutor's proffered reasons for striking black jurors had strong similarities to white jurors who were not stricken. The judge must assess the plausibility of the reason offered by the prosecution in light of all the evidence; it is not a mere exercise in thinking up any rational basis.

There was also a disparity in the questions asked black and nonblack panel members. For example, 94% of white jurors were given a bland description of the death penalty before they were asked for their feelings on the subject, but 53% of black jurors were given a graphic description of the death penalty before they were questioned.

Texas law allows the attorneys to shuffle the cards of prospective jurors in the audience to determine the order in which they are questioned. In this case, prosecutors shuffled the cards in a manner that black members seated in the front of the panel would be placed in the back and not questioned.

Finally, there was evidence of a systematic policy to exclude black jurors, as confirmed in a jury selection manual.