POINTS AND AUTHORITIES

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Week Of	Topic	Guest Speaker	Elim. of Bias	Ethics
Oct. 20 2003	Our Annual "Wheeler" Update: The Latest Cases on Jury Selection Inimitably Discussed By California's Leading Expert in the Field (Part I of III)	Jerry Coleman (SF ADA)	10	20

Batson (Federal) and Wheeler (State) Standards for Determining Whether Prima Facie Case of Discriminatory Use of Jury Challenges are Consistent & Use of Comparative Analysis for First Time on Appeal is Unreliable and Should Not Be Done

People v. Johnson (2003) 30 Cal.4th 1302

Facts: A prosecutor used three of his twelve peremptory challenges to exclude all the African-American jurors on the jury panel. After the second challenge to an African-American juror, defense counsel argued the prosecutor had no apparent reason to challenge the second juror other than her racial identity. The judge stated there was no "strong likelihood" that the challenge was done for a group rather than individual basis. After the third challenge to an African-American juror, the trial court again denied the defense claim that there had been a prima facie case made out. The trial court noted that the juror had a sister with drug charges and that the jury questionnaire indicated the juror would have difficulty understanding things. The trial court also noted that the second African-American juror challenged had neglected to mention in her questionnaire that her parent had a robbery or arrest, that the juror stated she didn't know if she could be fair, and that the juror's answers indicated she might decide the case on emotions rather than facts. (At pp. 1307-1308.)

1. Using peremptory challenges to remove prospective jurors solely because of group bias, for example, on racial grounds, violates both the California Constitution (People v. Wheeler (1978) 22 Cal.3d 258) and the United States Constitution (Batson v. Kentucky (1986) 476 U.S. 79). (At pp. 1305-1306.)

2. Both Wheeler and Batson require the person objecting to the other party's use of a peremptory challenge to first establish a "prima facie case" of discriminatory use of a peremptory challenge before the challenged party must provide non-discriminatory reasons for the challenge(s). (At p. 1306.)

Establishing the Prima Facie Case Under *Wheeler* and *Batson*.

3. In Wheeler, the court specifically laid out how this prima facie case must be established: "If a party believes his opponent is using his peremptory challenges to strike jurors on the ground of group bias alone, he must raise the point in timely fashion and make a prima facie case of such discrimination to the satisfaction of the court. First,...he should make as complete a record of the circumstances as is feasible. Second, he must establish that the persons excluded are members of a cognizable group within the meaning of the representative cross-section rule. Third, from all the circumstances of the case he must show a ***strong likelihood*** that such persons are being challenged because of their group association rather than because of any specific bias." (At p. 1309, emphasis added.)

4. In Batson, the court specifically laid out how this prima facie case must be established: "To establish such a case, the defendant first must show that he is a member of a cognizable racial group..., and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact,...that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.'...Finally, the defendant must show that these facts and any other relevant circumstances ***raise an inference*** that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race."***** (At pp. 1311-1312, emphasis added.)

*****Subsequent cases have made clear that defendant need not be a member of the group excluded. (See Powers v. Ohio (1991) 499 U.S. 400 at p. 1311, fn. 1.)

5. In Wheeler, the court also identified **the types of evidence the objector may present to make the prima face case** (emphasis added to highlight the gist of the principle):

- "[T]he party may show that his opponent has ***struck most or all of the members*** of the identified group from the venire, or has ***used a disproportionate number of his peremptories*** against the group." (At p. 1309.)

- "He may also demonstrate that the ***jurors in question share only this one characteristic***—their membership in the group—and that in all other respects they are as heterogeneous as the community as a whole." (At p. 1309.)

- "Next, the showing may be supplemented when appropriate by such circumstances as the ***failure of his opponent to engage these same jurors in more than desultory voir dire***, or indeed to ask them any questions at all." (At p. 1309.)

- "Lastly,...the defendant need not be a ***member of the excluded group*** in order to complain of a violation of the representative cross-section rule; yet, if he is, and especially if in addition his ***alleged victim is a member of the group to which the majority of the remaining jurors belong***, these facts may also be called to the court's attention."

6. In Batson, the court also identified some of **the types of evidence the objector may present to make the prima face case**:

- If there is a "pattern of strikes against [an identified group of] jurors included in the particular venire, [this] might give rise to an inference of discrimination." (At p. 1312.)

- "Similarly, the prosecutor's questions and statements during voir dire examination and in exercising his challenges may support or refute an inference of discriminatory purpose." (At p. 1312.)

7. **Deference given to trial judge under both *Wheeler* and *Batson* in determining discriminatory purpose**:

- In Wheeler, the California Supreme Court noted trial judges are deemed "to be a good position to make such determinations...on the basis of their knowledge of local conditions and of local prosecutors.'...They are also well situated to bring to bear on this question their powers of observation, their understanding of trial techniques, and their broad judicial experience. We are confident of their ability to distinguish a true case of group discrimination by peremptory challenges from a spurious claim interposed simply for purposes of harassment or delay. (At p. 1310.)

- In Batson, the United States Supreme Court noted that "trial judges, experienced in supervising voir dire, will be able to decide if the circumstances concerning the prosecutor's use of peremptory challenges creates a prima facie case of discrimination against black jurors." (At p. 1312.)

8. "Wheeler's standard for establishing a prima facie case of discriminatory use of peremptory challenges is, and always has been, compatible with Batson. It merely means that to state a prima facie case, the objector must show that **it is more likely than not** the other party's peremptory challenges, if unexplained, were based on impermissible group bias" (At p. 1318.)

   The ***standard for making out a prima facie case is the same*** under both cases despite the fact that in Batson, the High Court discussed the prima facie showing as being one in which the objecting party has shown "an inference of discriminatory purpose," while the Wheeler, the court discussed the prima facie showing as there being a "strong likelihood" or "reasonable inference" of discriminatory use of the challenges. (At p. 1306.)

9. The California Supreme Court observed that despite its repeated statements that its standard for determining whether a prima facie case has been made is the same standard as the federal standard, the Ninth Circuit has been kind of dense about recognizing that this is so. (At pp. 1313-1314, 1317.)

   Instead, the Ninth Circuit essentially insists that if the state court (trial or appellate) uses the term "strong likelihood" to describe the standard for determining whether a prima facie case has been established, then the state court has applied an impermissibly lower standard of scrutiny than required by the federal Constitution. (At p. 1313.)

   Editor's Note re: Consideration of Previous Findings of Improper Use of Peremptory Challenges:

   The fact a trial judge is expected to take into consideration the judge's knowledge of local prosecutors does not mean that prior findings that the prosecutor has used peremptory challenges in a discriminatory manner will be held against the prosecutor. In Williams v. Woodford (9th Cir. 2002) 306 F.3d 665 (discussed in next week's 10/27/03 P&A memo), the court ***rejected*** defendant's argument that an inference of discrimination in making a prima facie case could arise where there were "(1) two, unrelated California Supreme Court decisions that found the prosecutor of Williams's case to have used peremptory challenges in a racially discriminatory manner in those cases, and (2) the prosecutor's closing argument at trial, in which Williams argues that the prosecutor made a racist analogy, a claim that the district court rejected and Williams does not appeal." (At p. 682.) The Williams court held "these circumstances irrelevant because they are not "the circumstances concerning the prosecutor's use of peremptory challenges" at Williams's trial." (At p. 682.) Moreover, the Williams court stated: "Even if we assumed some relevance, the cited circumstances are not sufficient to raise an inference that the prosecutor exercised peremptory challenges in a racially discriminatory manner in Williams's case. (At p. 682.)

What Happens Once the Prima Facie Case is Made Out

10. Under Wheeler, "[i]f the court finds that a prima facie case has been made, the burden shifts to the other party to show if he can that the peremptory challenges in question were not predicated on group bias alone. The showing need not rise to the level of a challenge for cause. But to sustain his burden of justification, the allegedly offending party must satisfy the court that he exercised such peremptories on grounds that were reasonably relevant to the particular case on trial or its parties or witnesses—i.e., for reasons of specific bias as defined herein." (At p. 1310.)

The allegedly offending party may "support his showing by reference to the totality of the circumstances: for example, it will be relevant if he can demonstrate that in the course of this same voir dire he also challenged similarly situated members of the majority group on identical or comparable grounds." (At p. 1310.)

"If the court finds that the burden of justification is not sustained as to any of the questioned peremptory challenges, the presumption of their validity is rebutted." (At p. 1310.)

11. Similarly, under Batson, "[o]nce the defendant makes a prima facie showing, the burden shifts to the State to come forward with a neutral explanation for challenging black jurors.*****...The prosecutor...must articulate a neutral explanation related to the particular case to be tried. The trial court then will have the duty to determine if the defendant has established purposeful discrimination." (At p. 1312.)

*****Editor's Note: The language quoted reflects the group that was challenged was black jurors; Batson, of course, applies to challenges made against all racial or ethnic groups.

Use of Comparative Analysis

Editor's Note: Essentially, comparative juror analysis is a method of attempting to "go behind" a party's asserted non-discriminatory reasons for booting a juror belonging to a particular class by looking at whether jurors belonging to other classes were booted for similar reasons.

12. Appellate courts should not engage in "comparative juror analysis" for the ***first time*** on appeal since it "is unreliable and inconsistent with the deference reviewing courts necessarily give to trial courts." (At p. 1318.) Neither Miller-El (see next week's 10/27/03 P&A memo) nor Batson require otherwise. (At pp. 1306, 1318, 1322, 1325.)

"If the trial court makes a '***sincere and reasoned effort***' to evaluate the nondiscriminatory justifications offered, its conclusions are entitled to deference on appeal. In such circumstances, an appellate court will not reassess good faith by conducting its own comparative juror analysis. Such an approach would undermine the trial court's credibility determinations and would discount '"the variety of [subjective] factors and considerations,"' including 'prospective jurors' body language or manner of answering questions,' which legitimately inform a trial lawyer's decision to exercise peremptory challenges." (At p. 1320 [and noting this principle applies both when the appellate court is evaluating whether a prima facie case has been made and when it is evaluating whether the reasons provided by party for booting the juror are valid]. (Emphasis added.)

The court **stopped short of prohibiting the practice** of doing comparative analysis on appeal **outright** but noted "we are hard pressed to envision a scenario where comparative juror analysis for the first time on appeal would be fruitful or appropriate." (At p. 1325.)

13. A trial court is not obligated, sua sponte, to do its own comparative analysis of jurors in assessing whether a party has been exercising his or her challenges in a discriminatory manner. (At p. 1319.) A trial judge need not consider arguments not made and evidence not presented. (At p. 1322.)

14. Moreover, even at the trial level, "comparative juror analysis is 'largely beside the point' because of the legitimate subjective concerns that go into selecting a jury." (At p. 1319.) By itself, it proves little. (At p. 1319.) "[U]se of a comparison analysis to evaluate the bona fides of the prosecutor's stated reasons for peremptory challenges does not properly take into account the variety of factors and considerations that go into a lawyer's decision to select certain

jurors while challenging others that appear to be similar. Trial lawyers recognize that it is a combination of factors rather than any single one which often leads to the exercise of a peremptory challenge. In addition, the particular combination or mix of jurors which a lawyer seeks may, and often does, change as certain jurors are removed or seated in the jury box." (At p. 1319.)

15. This does not mean, however, that a ***trial*** judge is prevented from engaging in comparative analysis in making its determination of whether a party is using peremptory challenges in a discriminatory manner. (At p. 1322.) Similarly, the party objecting to juror being booted may rely on such analysis in making a prima facie case. (At p. 1318.) Comparative juror analysis is not irrelevant. Properly presented to the trial court, it can be among the relevant circumstances the trial court must consider in making its determination. (At p. 1323.)

16. Moreover, a trial court should consider obvious matters even when not brought to the court's attention by either party. For example, a trial court can take note that the defendant is of the same class as the challenged jurors even though not mentioned by the challenging party. (At p. 1323.)

17. Note: The **Ninth Circuit permits the use of comparative analysis for the first time on appeal**. (At p. 1320.) (See also United States v. Alanis (9th Cir. 2003) 335 F.3d 965 [this P&A memo, below at p. 6].) Although, even the Ninth Circuit gives some deference to the trial judge when it comes to whether a prima facie case was made out. As noted in Tolbert v. Page (9th Cir. 1999) 182 F.3d 677, 683-684: "The trial judge is able to observe a juror's attention span, alertness, and interest in the proceedings and thus will have a sense of whether the prosecutor's challenge can be readily explained by a legitimate reason.... In addition, the trial court is 'experienced in supervising voir dire.' [Citations.] The appellate court, on the other hand, must judge the existence of a prima facie case from a cold record. An appellate court can read a transcript of the voir dire, but it is not privy to the unspoken atmosphere of the trial court—the nuance, demeanor, body language, expression and gestures of the various players. [Citation.]...[T]he prima facie inquiry is so fact-intensive and so dependent on first-hand observations made in open court that the trial court is better positioned to decide the issue...." (At pp. 1320-1321.)

No Prima Facie Case Made Out in the Instant Case

18. The court noted the trial judge did not discuss the reasons for booting the first African-American juror. However, the court went on to point out that defense counsel had never put forth arguments as to why no reasons existed for challenging the juror. Moreover, the following race-neutral reasons provided grounds for challenging the first African-American juror: "(1) she was **childless** (this case involved the death and alleged abuse of a minor), (2) the **police had made no arrest after the robbery of her home** five or six years ago, and (3) she **omitted to answer the two questions** in the questionnaire dealing with her opinions of prosecuting and defending attorneys." (At p. 1327.)

The court observed that "lack of family may have appeared relevant to the prosecutor in a case involving child abuse and reasonably could be deemed to constitute a non-discriminatory basis for striking the venireman." (At p. 1327.)

19. The court upheld the trial court's determination that the reasons given for booting the second juror (she **neglected to mention in her questionnaire that her parent had a robbery or arrest**; she **didn't know if she could be fair**, her answers indicated she **might decide the case on emotions** rather than facts) were legitimate. (At pp. 1307-1308, 1325.)

20. The court upheld the trial court's determination that the reasons given for booting the third juror (that the **juror had a sister with drug charges** and that the jury questionnaire indicated **the juror would have difficulty understanding**

things) were legitimate. (At pp. 1307-1308, 1325.)

21. The fact all three African-American jurors were challenged in a case in which an African-American defendant was charged with killing his white girlfriend's child was highly relevant to whether a prima facie case had been made out, but it was not dispositive in making out a prima facie case. (At p. 1326.)

22. The fact that the district attorney did not ask any questions of the African-American jurors could, in theory, be a relevant circumstance in deciding whether a prima facie case of discriminatory purpose has been shown. (At p. 1328.) However, since the trial was conducted at a time when the trial court had primary responsibility for jury voir dire and the prosecutor did not ask questions of any juror, it was not a significant factor in the case at bar. (At p. 1328.)

Not Enough for Judge to Simply Note Attorney Has Provided Plausible Reasons for Striking Men—There Must Be a Determination of Whether There Was Purposeful Discrimination

United States v. Alanis (9th Cir. 2003) 335 F.3d 965

Facts: The defendant was tried for abusive sexual conduct. The prosecutor used all six of her challenges against men. The trial judge found a prima facie case. The prosecutor "then offered a gender-neutral explanation for striking each man. One man was struck because he was from Glasgow, Montana, and so might disbelieve the government's Native American witnesses. Another was struck because he was old and might have trouble hearing or staying alert. Two were struck because they were young and because they had no children. And two more were struck because they had no children." The trial court then stated: "It appears to the court that the government has offered a plausible explanation based upon each of the challenges discussed that is grounded other than in the fact of gender of the person struck. The Batson challenge is denied." Trial proceeded. (At pp. 966-967.)

1. "A defendant's original objection to a prosecutor's allegedly discriminatory peremptory strikes, even after it is met with a prosecutor's gender-neutral explanation, imposes on the trial court an obligation to complete all steps of the Batson process without further request, encouragement, or objection from counsel." (At p. 968.)

2. "[U]nder Batson, it is not sufficient for equal protection purposes that a trial court deem a prosecutor's gender-neutral explanations facially plausible. Rather, in determining whether the challenger has met his or her burden of showing intentional discrimination, the district court must conduct a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." (At p. 969, fn. 3.)

3. The court recognized that "[o]rdinarily, it is for the trial court, rather than for the appeals court, to perform the third step of the Batson process in the first instance." Nevertheless, it went on to hold that "even on the cold record," the prosecutor's stated reasons for striking prospective male jurors was a pretext for purposeful discrimination. (At p. 969, fn. 5.)

4. Despite the fact that no comparative juror analysis had taken place at the trial level, the court found that had the trial judge properly proceed to step three, he would have concluded that the prosecutor's gender-neutral explanations were pretexts for purposeful discrimination: "The record shows that the prosecutor did not strike four female jurors who possessed the same objective characteristics the prosecutor claimed she found objectionable in the men she struck from the jury. Peremptory challenges cannot be lawfully exercised against potential jurors of one gender unless potential jurors of another gender with comparable characteristics are also challenged." (At p. 969.)

Editor's Note: The court seems to have warped evidence of purposeful discrimination into purposeful discrimination itself.

5. The court did observe that the Ninth Circuit has held "that there may be no Batson violation, even though prospective jurors of different races or genders provided similar responses and one was excused while the other was not, so long as the prosecutor struck jurors based on subjective grounds that were not "objectively verifiable." (At p. 969, fn. 4.)

NEXT WEEK: JERRY COLEMAN RETURNS FOR THE SECOND PART OF OUR WHEELER/BATSON UPDATE. WE FOCUS ON THE LATEST PRONOUNCEMENT FROM THE UNITED STATES SUPREME COURT AND PROVIDE YOU WITH MORE ELUSIVE ETHICS AND ELIMINATION OF BIAS MCLE CREDITS.

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