POINTS AND AUTHORITIES

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Week Of	Topic	Guest Speaker	Elim. of Bias	Ethics
Oct. 27 2003	Our Annual "Wheeler" Update: The Latest Cases on Jury Selection Inimitably Discussed By California's Leading Expert in the Field (Part II of III)	Jerry Coleman (SF ADA)	10	20

Factors Which Courts Can Consider in Evaluating Claims of Discriminatory Jury Selection.

Miller-El v. Cockrell (2003) 123 S.Ct. 1029 [537 U.S. 322]

Facts: In 1986, Dallas prosecutors used peremptory strikes to exclude 10 of 11 African-American jurors eligible to serve on the jury. Evidentiary hearings were held bearing on the questions of whether the prosecutor's office engaged in a pattern of discriminatory use of jury challenges and whether the individual prosecutor had engaged in discriminatory use of jury challenges. The facts elicited at those hearings will be discussed below as relevant. (At pp. 1035-1036.)

Procedural Stance: After his conviction, defendant filed several unsuccessful appeals and petitions for a writ of habeas corpus based on the claim that prosecutors used their challenges in violation of the Equal Protection Clause. The state courts denied relief, the federal district court denied relief on defendant's federal habeas corpus petition, and the federal appellate court denied a certificate of appealability which, under federal law, prevented the defendant from appealing the matter. Ultimately, the case ended up in the U.S. Supreme Court on the question of what the defendant needed to show in order to obtain a certificate of appealability. (At pp. 1035-1036, 1039.)

1. It was not contested that the defendant had made a prima facie showing that peremptory challenges had been exercised on the basis of race. Nor was it contested that the prosecutor had offered race-neutral explanations for striking the jurors. What was at issue was whether the defendant had shown purposeful discrimination. (At p. 1040.)

2. The Supreme Court discussed several principles for assessing whether there has been a showing of purposeful discrimination at the final stage (where the court evaluates the prosecutor's justifications).

3. "The critical question in determining whether a prisoner has proved purposeful discrimination at step three is the persuasiveness of the prosecutor's justification for his peremptory strike." (At p. 1040.)

4. In the third stage, "the issue comes down to whether the trial court finds the prosecutor's race-neutral explanations to be credible." (At p. 1040.)

5. "Credibility can be measured by, among other factors, the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy." (At p. 1040.)

6. "[I]mplausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination." (At p. 1040.)

7. In deciding whether the superficially neutral explanations provided were, in fact, race-based, the court can consider "the facts and circumstances that were adduced in support of the prima facie case." (At p. 1041.)

8. **Statistical Evidence**: The Court noted that the statistical evidence alone raised "some debate" as to whether the prosecution acted with a race-based reason when striking prospective jurors. The court pointed out that prosecutors used their peremptory strikes to exclude 91% of the eligible African-American venire members, and only one served on the jury. In total, 10 of the prosecutors' 14 peremptory strikes were used against African-Americans. (At p. 1042.)

   Editor's Note: In People v. Johnson (2003) 30 Cal.4th 1302, the Court noted that the statistical evidence in Miller-El was **not** cited "to show that it alone necessarily established a prima facie case." (Id., at p. 1328.) In the recent Ninth Circuit case of Williams v. Woodford (9th Cir. 2002) 306 F.3d 665, 681-682, the court noted that "[s]tatistical facts like a high proportion of African-Americans struck and a disproportionate rate of strikes against African-Americans can establish a pattern of exclusion on the basis of race that gives rise to a prima facie Batson violation. The Williams court then cited two federal decisions illustrating this principle: Fernandez v. Roe (9th Cir. 2002) 286 F.3d 1073, 1078 [prima facie case when the prosecutor struck four out of seven (57%) Hispanics, and 21% (four out of nineteen) of the prospective juror challenges were made against Hispanics who constituted only about 12% of the venire]; and Turner v. Marshall (9th Cir. 1995) 63 F.3d 807, 813 [five of nine (56%) African-Americans struck, and 56% (five out of nine) of the challenges were made against African-Americans who constituted only about 30% of the venire].

9. **Comparative Analysis**: The Court noted that some of the rationales provided by prosecutors for striking African-American jurors pertained equally to white jurors who were not challenged. For example, some of the proffered reasons for kicking some of the African-American jurors were because of their ambivalence about the death penalty, hesitancy to vote to execute defendants capable of being rehabilitated, or the juror's family history of criminality. Yet, several white jurors with such characteristics (albeit not all of the characteristics) were not bumped. (At p. 1043 [**but see** dissenting opinion of Justice Thomas, at p. 1053, noting that similarly situated does not refer to jurors who match in some characteristics but in **all** relevant characteristics])

10. **Disparate Questioning**: The Court noted that different types of questions were asked of African-American jurors than of the white jurors. The different type of questioning could be viewed as an attempt by the prosecution to elicit responses from African-American jurors which were bound to reflect greater opposition to the death penalty than from white jurors who were not asked similarly skewed questions, thus providing

justification for removal of the African-American jurors. That is, disparate questioning can be a tool for obscuring the real reason for booting jurors and is some evidence of purposeful discrimination. (At p. 1043.)

The State sought to explain the different types of questioning by asserting that the additional questions asked were not the result of the juror's race but the result of how the jurors answered the questionnaires. Those jurors expressing doubts about the death penalty were questioned more extensively. The Court did not challenge the notion that disparate questioning could be the result of factors that were not race-related, but found factual support for such an interpretation lacking: 20 jurors expressed some hesitation about the death penalty (10 whites and 10 African-Americans) but 7/10 African-American juror were questioned in "disparate" fashion and only 2/10 white jurors were questioned in "disparate" fashion. (At p. 1043.)

11. **Jury Shuffling**: In Texas there is a procedure called "jury shuffling," which permits parties to rearrange the order in which members of the jury panel are examined so as to increase the likelihood that visually preferable panel members will be moved forward and empaneled. (Kind of like an open-card poker game in which players can request the dealer take back the cards dealt - but only the cards dealt - and then re-shuffle, and re-deal.) Shuffling can affect jury composition because jurors not questioned during voir dire are dismissed at the end of the week and a new panel is called; jurors shuffled to the back are less likely to serve. The Court found that the prosecution's decision to seek a jury shuffle when a predominate number of African-Americans were seated in the front of the panel and its decision to delay a formal objection to the defense's shuffle until after the new racial composition was revealed raised a suspicion of discrimination. (At p. 1044.)

12. **Historical Evidence of Discriminatory Use of Challenges**: The Court also accorded some weight to historical evidence of racial discrimination by the District Attorney's Office. Although most, if not all, of the more concrete evidence of any office policy to exclude African-Americans pre-dated the jury selection in the instant case, the Court found it relevant to the extent it cast doubt on the motives of the prosecutors in the instant case. The court noted that even presuming the prosecutors were not part of a past culture of discrimination, they were not likely ignorant of the culture since they joined the office when prosecutors were still being trained to exclude minorities from juries. (At pp. 1044-1045.)

The Court also noted that the supposition that race was a factor in jury selection was reinforced by the fact the prosecutors marked the race of each prospective juror on their juror cards. (At p. 1045.)

13. Ultimately, the Court found it was a debatable issue whether there had been purposeful discrimination and remanded the case for further determination. (At p. 1045.)

Note: It must be kept in mind that the Supreme Court was not making a finding the prosecutor used his challenges in a racially discriminatory manner; that issue was reserved for the court hearing the habeas petition. Rather, the High Court simply held that there was enough evidence presented to allow the habeas petition to go forward (i.e., that there was a "substantial showing of the denial of a constitutional right"). That is,

"reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" (At pp. 1041-1042.)

Loss of Juror Questionnaires Doesn't Necessarily Require Reversal When *Wheeler/Batson* Claim Made in Death Case.

People v. Heard (2003) 31 Cal.4th 946 [969-971 only]

Facts: In a capital case, the defendant claimed the prosecutor was using his peremptory challenges in a discriminatory manner. In responding to the trial court's finding of a prima facie case, the prosecutor referred in part to answers contained in juror questionnaires as the basis for booting jurors. On appeal, it became clear all juror questionnaires were lost except those for the jurors who were actually empaneled. It was not possible to reconstruct the information on the questionnaires. (At p. 969.)

1. The court noted that, in view of California Rule of Court 39.51, in capital cases, all juror questionnaires must be scrupulously maintained. (At p. 969.)

2. The loss of jury questionnaires does not require automatic reversal. The defendant must show the loss is prejudicial to the defendant's ability to prosecute his appeal. (At p. 970.)

3. The court rejected all three grounds asserted by the defendant in support of his claim that the loss of the questionnaires prejudiced his ability to obtain meaningful appellate review of the trial court's rulings relating to the Wheeler/Batson claim (even though he proffered no substantive objection to the trial court's rejection of the Wheeler/Batson claim):

   - Defendant's first ground was that it was impossible to know the race of the excluded jurors because that information was in the missing questionnaires. However, from the transcript of the arguments on the Wheeler/Batson motion the race of the excluded jurors was made clear. (At p. 970.)

   - Defendant's second ground - that he could not challenge the justifications proffered by the prosecutor deriving from the questionnaires - was also lacking in merit because there was no indication that the prosecutor's recounting of the information in the questionnaires was wrong. The court noted that defense counsel had an obligation at trial to being to the trial court's attention any disagreement with the prosecutor's representations as to the questionnaires content. (At pp. 970-971.)

   - Defendant's third ground was that without the missing questionnaires, he could not do a comparative analysis of the excused jurors versus the seated jurors. However, the court reiterated its holding in Johnson that absent any attempt to engage in comparative juror analysis at the trial level, it should not be done on appeal. (At p. 971.)

No Prima Facie Case Made Out By Defense Counsel Where Counsel Simply Made Cursory Reference to Jurors By Name, Number, Occupation, and Race.

People v. Yeoman (2003) 31 Cal.4th 93, 115-118 [only]

Facts: After 12 jurors were selected but not yet sworn, defense counsel made a motion claiming the prosecution had peremptorily challenged four African-American jurors on account of race. Defendant's entire presentation consisted of naming the four jurors in question, noting their numbers, occupation, and race and citing to Wheeler. The court found no prima facie case had been made out as to three of the four jurors and accepted the prosecutor's reasons for bumping the fourth juror as not being based on group bias. (At p. 115.)

1. Defendant's motion should more properly have been brought as a motion to dismiss the venire than as a motion for mistrial, but it was still considered by the court on review. (At p. 115.)

2. Counsel seeking to make out a prima facie case of unconstitutional use of peremptory challenges must make "as complete a record as feasible of the relevant circumstances, establishing that the excluded persons belong to a cognizable group, and showing that the other party has more likely than not exercised its peremptory challenges because of group association rather than any specific bias." (At p. 115.)

3. A cursory reference to prospective jurors by name, number, occupation and race without making "any effort to set out the other relevant circumstances, such as the prospective jurors' individual characteristics, the nature of the prosecutor's voir dire, or the prospective jurors' answers to questions" will be deemed insufficient. (At p. 115.)

4. Thus, the defendant in the instant case failed to make out a prima facie case. (At p. 115.)

5. On appeal, when a trial court denies a motion under Wheeler, after finding no prima facie case of group bias, the entire record of voir dire is considered for evidence to support the trial court's ruling. If the record suggests grounds upon which the prosecutor might reasonably have challenged the prospective jurors in question, the judgment is affirmed. (At p. 116.)

6. Here, the jurors gave answers to questions that might reasonably have caused the prosecutor to challenge each of the three jurors against whom no prima facie case was made, namely:

   - The first juror indicated she "would not like to sit as a juror," "cannot judge another," and felt "frustrated" that the Supreme Court is far to the right." (At p. 116.)

   - The second juror indicated she had not favored the initiative reinstating the death penalty and that the causes of and solution to "crime problems," were respectively "haves and have nots" and the "possibility of socialism." (At p. 116.)

   - The third juror left blank several questions intended to explore her attitudes toward crime and capital punishment. (At p. 116.)

7. The court rejected defendant's attempt to show the booted jurors' response were comparable to the responses of jurors who were not bumped but, per Johnson (see last week's P&A memo), the court declined to do any comparative juror analysis on appeal for the first time. (At p. 116.)

8. As to the juror against whom a prima facie case was made out, the court upheld the trial court's determination the juror was not bumped for a discriminatory purpose: Although the juror worked as a correctional officer, the **other jurors kept had stronger death penalty views** - the juror had not answered questions intended to explore his view on the death penalty and said he had not given the subject much thought. (At p. 117.)

9. The court reiterated that the inquiry required by the trial court into possibly discriminatory use of peremptory challenges is identical under Batson and Wheeler. (At pp. 117-118.)

People v. Morris (2003) 107 Cal.App.4th 402 [also discussed in next week's P&A memo]

1. Where defendant made a Wheeler motion but only noted that three of the six jurors excused by the prosecution were Black or Hispanic and did not identify which the six jurors were Black or Hispanic, the defendant did not comply with the requirement that the moving party make a complete as record as is feasible. (At pp. 407-409.)

2. The court **rejected** defendant's argument that the record is sufficient to demonstrate error - even though it did not identify which of the prosecutor's six challenges were at issue in the defendant's Wheeler motion nor the race of any of the jurors - because there could be no race-neutral rationale for any of the prosecutor's peremptory challenges except for one. (At p. 408.)

3. The argument was rejected because there were race-neutral grounds: "The brother of one of the challenged jurors was a public defender, and the prosecutor might reasonably believe that he would be biased in favor of defendant or against the prosecution. The nephew of another challenged juror was incarcerated, and the prosecutor might reasonably be concerned that this would make her sympathetic towards defendant. A third challenged juror stated that her close friend was "murdered" by a prison guard, which suggests that she might be biased against peace officers (all of the prosecution witnesses were peace officers)." (At p. 409.)

4. "Because there were race-neutral grounds for challenging some of the jurors, defendant can demonstrate error only if he shows that those jurors were not the Black or Hispanic jurors who were the subject of his Wheeler motion. But defendant did not do that." (At p. 409.)

Williams v. Woodford (9th Cir. 2002) 306 F.3d 665, 681-682 [only] **[not discussed on video]**

1. No prima facie case was made out where prosecutor used 2 of 19 challenges to remove the only African-American females and 1 of 3 challenges to remove an African-American male during the selection of alternates but defendant "failed to allege, and the record does not disclose, facts like how many African-Americans (apparently men, if any) sat on the jury, how many African-Americans were in the venire, and how large the venire was," making it impossible to say whether any statistical disparity existed that might support an inference of discrimination. (At pp. 681-682.)

Coleman Recommendation: Take a look at People v. Walker (1998) 64

Cal.App.4th 1062, which lays out what is a good prima facie case versus what is a bad prima facie case.

Coleman Recommendation: Even if a court denies a prima facie case, the prosecution should provide reasons for the challenges. This is because doing so will assist the appellate court in finding reasons to uphold the denial of the prima facie case.

Wheeler/Batson Timely If Made Before Jury Impaneled.

People v. McDermott (2002) 28 Cal.4th 946 [969-981 only]

1. A Wheeler/Batson motion is timely if made before jury empanelment is completed (i.e., before the alternates are sworn and before any remaining unselected prospective jurors are dismissed). (At p. 969.)

2. Such a motion is timely not only as to the prospective jurors challenged during the selection of the alternate jurors, but also to those dismissed during selection of the twelve jurors already sworn. (At p. 969.)

3. It is not required that the prosecutor give separate reasons for challenging each of the jurors who the prosecutor allegedly booted for discriminatory reasons nor is it required that the court make separate findings as to each challenged juror.

   However, it is generally preferable to have individual reasons and individual findings for each challenged juror. (At p. 980.)

4. When the prosecutor claims he challenged certain jurors because he believed the pool of jurors coming up were more in favor of the death penalty, it is not required that the trial court undertake a comparison between the jurors not as yet selected and those bumped. (At pp. 980-981.)

If Some Reasons for Bumping Jurors are Legitimate But Others Are Not, Wheeler/Batson Violation Still May Be Found.

Lewis v. Lewis (9th Cir. 2003) 321 F.3d 824

Facts: The prosecutor struck one of two African-American jurors in the jury pool during the selection of alternate jurors. One African-American juror was impaneled. When asked about law enforcement connections, the juror was who struck said he had a niece who was a "nurse officer" and a nephew who was a jailer. The juror indicated that she did not talk with her niece or nephew about law enforcement and implied if she did not do so because it would not be an interesting conversation. (At p. 827.)

The trial judge found a prima facie case and the prosecutor was asked to provide reasons. The reasons provided were as follows: (1) there was no systematic exclusion because another African-American juror was left on the panel; (2) the juror's responses when asked about her niece and nephew indicated she had a disinterest in law enforcement issues; (3) the juror would potentially have information about jail and this association with jail might cause issues because the prosecutor was having protective orders on various witnesses; (4) the juror was watched closely because she was an African-American who the prosecutor thought might be associated with the defendants and during this observation, it appeared she did not relate well

and interact with other potential juror; (5) the prosecutor had concerns about how the juror described her occupation - it wasn't clear what she did; (6) the defense counsel - in a Freudian slip betraying his apparent affinity with the juror - referred to the defendant by the juror's last name. (At pp. 827-828.)

After listening to the prosecutor, the trial judge stated: "The arguments - some of the arguments are not convincing. But the argument with respect to the jail, that's probably a reasonable kind of - even though you don't know which one of the two, both of them would obviously work in the jail, either the nurse or the nephew who's a correctional officer. We don't know which one. But both of them - they would be working any place but the jail." (sic) (At p. 828.)

When defense counsel tried to interject and describe weaknesses in the record with respect to the reason the court had cited, the court ended the inquiry and denied the Wheeler/Batson motion. (At p. 828.)

The state appellate court upheld the conviction, noting that the prosecutor's concern that the juror would not be able to relate to the other jurors was by itself a legitimate reason to bump the juror. (At p. 828.)

1. The Ninth Circuit reversed, finding the trial judge had failed to perform its duty to determine whether purposeful discrimination had occurred and gave five reasons in support of its finding:

- First, contrary to the prosecutor's statement, only a possibility existed that one of the juror's relatives worked in the jail. The prosecutor never asked whether the juror's relatives worked in the jail. Moreover, the juror said she did not discuss her relatives' work with them, making the possibility that she would receive information about the witnesses held in the jail even more remote. Thus, the only reason actually verified as non-racial was based on a false assumption. (At p. 832.)

- Second, two jurors with even closer potential connections to the jail were not struck. Thus, a comparative analysis of the challenged juror with the empaneled jurors reveals that a finding of pretext was warranted. (At pp. 832-833.)

- Third, the trial court **rejected** at least two or three of the prosecutor's proffered reasons. Since the judge determined that several reasons offered by the prosecutor did not hold up under scrutiny and cited only one that was "probably reasonable," this undermined the prosecutor's credibility such that the trial court's finding one reason was legitimate was unwarranted. (At p. 833.)

- Fourth, while the fact a juror has a "loner" personality has been upheld as legitimate grounds for challenging a juror, an appellate court should not rely on this fact in the instant case. The trial court did not specify which reasons it rejected. Since it may have rejected this reason as being legitimate, an appellate court cannot assume that it accepted this reason as legitimate. Moreover, the prosecutor's self-proclaimed method of gathering the information about the juror was not race-neutral (i.e., he focused on her because she was an African-American). Finally, the reason given depends entirely on the prosecutor's credibility; the judge did not

confirm this observation and the judge's statements undermine the prosecutor's credibility. (At pp. 833-834.)

2. The court also noted that requiring a court to allow defense counsel to argue whether the prosecutor's reasons are legitimate is not clearly established law, "it seems wise for courts to allow counsel to argue, if only to remove some of the burden of record evaluation from the court." (At p. 831, fn. 27.)

NEXT WEEK: SAN FRANCISCO ADA JERRY COLEMAN RETURNS FOR A FINAL GO-ROUND ON SOME RECENT AND IMPORTANT CASES IN THE WHEELER/BATSON AREA.

Suggestions for future shows, ideas on how to improve P&A, and other comments or criticisms should be directed to Jeff Rubin at (510) 272-6232. Technical questions should be addressed to Art Garrett 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.