POINTS AND AUTHORITIES

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Week Of	Topic	Guest Speaker	Elim. of Bias	Ethics
Nov. 3 2003	Our Annual "Wheeler" Update: The Latest Cases on Jury Selection Inimitably Discussed By California's Leading Expert in the Field (Part III of III)	Jerry Coleman (SF ADA)	10	20

Trial Court's Conclusion that Prosecutor's Exercise of Peremptory Challenges Were Not Based on Group Bias Entitled to Great Deference on Appeal & Court Need Not "Verify" on the Record Every Single Observation Cited By Party Justifying Use of Challenge.

People v. Reynoso (2003) 31 Cal.4th 903 [3 Cal.Rptr.3d 769] [pin cites are to Cal.Rptr]

Facts: The defendants were jointly tried and convicted of first degree murder. The victim was Hispanic; as were the defendants. During jury selection, the prosecution exercised four peremptory challenges. Two challenges were used against Hispanic jurors, although the prosecution had passed on the jury four times before kicking the first Hispanic juror and 14 times before kicking the second Hispanic juror. The court found a prima facie case of exclusion for group bias. The prosecutor justified his exclusion of the first juror on grounds she was a counselor for "at-risk youth" and would have undue sympathy for the defendants (who could be categorized as "at-risk youth"). The prosecutor justified his exclusion of the second juror on grounds she was a customer service representative (and thus lacked educational experience), that she did not seem to be paying attention to the proceedings, and because she was not involved in the process. The trial court accepted the reasons as race-neutral. At that juncture, defense counsel piped up and argued that there was nothing in the second juror's background that would make her sympathetic to the defense and she had relatives in law enforcement; ergo, she was excused for racial reasons. The trial judge noted that another Hispanic female juror who likewise had law enforcement contacts had not been peremptorily challenged by the prosecutor but by the defense. No Hispanic jurors were ultimately empaneled. (At pp. 775-776, 789.)

The **court of appeal** concluded that in light of the California Supreme Court decision of People v. Silva (2001) 25 Cal.4th 345 [see 5/20/03 P&A memo], it had to reverse the conviction on grounds the trial judge failed to adequately satisfied its obligation to evaluate the prosecutor's reasons for booting the second juror. First, the court of appeal believed that the initial reason given by the prosecution - that the juror was a customer service representative with a lack of educational experience - was not supported by the record and lacked any content related to the case being tried. Second, the court of appeal believed that failure of the trial court to expressly comment upon the prosecutor's claim (disputed by the defense) that the juror was not paying attention undermined the

prosecutor's claim. The court of appeal also criticized the trial court for considering a challenge exercised by the defense in its analysis. (At p. 777)

1. There is a general presumption "that a party exercising a peremptory challenge is doing so on a constitutionally permissible ground." (At p. 773 [albeit noting this presumption can be rebutted upon a proper showing - **see** last week's P&A memo at pp. 1-3.]

2. It is important to distinguish between the second step of Wheeler/Batson inquiry (i.e., whether a race-neutral explanation is tendered) from the third step of the inquiry (i.e., whether there has nevertheless been a showing of purposeful discrimination).

   - "The second step of this process does not demand an explanation that is persuasive, or even plausible. 'At this [second] step of the inquiry, the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral.'" (At p. 779, citing to Purkett v. Elem (1995) 514 U.S. 765, 767.)

   - "It is not until the *third* step that the persuasiveness of the justification becomes relevant - the step in which the trial court determines whether the opponent of the strike has carried his burden of proving purposeful discrimination." (At p. 779, citing to Purkett v. Elem (1995) 514 U.S. 765, 768.)

   - "To say that a trial judge may choose to disbelieve a silly or superstitious reason at step three is quite different from saying that a trial judge must terminate the inquiry at step two when the race-neutral reason is silly or superstitious. The latter violates the principle that the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike." (At p. 779, citing to Purkett v. Elem (1995) 514 U.S. 765, 768.)

3. **What is a legitimate reason?** A prosecutor must give "legitimate reasons" for exercising his challenges and the reasons "must be related to the particular case to be tried." However, this just means that the prosecution cannot "satisfy his burden of production by merely denying that he had a discriminatory motive or by merely affirming his good faith." (At p. 780, citing to Purkett v. Elem (1995) 514 U.S. 765, 768-769.)

4. A "'legitimate reason' is not a reason that makes sense, but a reason that does not deny equal protection." For example, the prosecutor's reasons for bumping a juror in Purkett (i.e., that the juror had long, unkempt hair, a mustache, and a beard) "was deemed by the high court to be an entirely valid, race-neutral reason that satisfied the prosecutor's burden under step two of articulating a nondiscriminatory reason for the peremptory challenge under scrutiny." (At p. 780.)

   The Purkett court noted: "It matters not that another prosecutor would have chosen to leave the prospective juror on the jury. Nor does it matter that the prosecutor, by peremptorily excusing men with long unkempt hair and facial hair on the basis that they are specifically biased against him or against the People's case or witnesses, may be passing over any number of conscientious and fully-qualified potential jurors." (At p. 786.)

5. The proper focus of a Batson/Wheeler inquiry, of course, is on the subjective genuineness of the race-neutral reasons given for the peremptory challenge, not on the objective reasonableness of those reasons. (At p. 786, citing to Purkett v. Elem (1995) 514 U.S. 765, 769.)

6. **Reliance on Intangibles**: "Peremptory challenges based on counsel's personal observations are not improper." (At p. 780.)

7. "Indeed, even less tangible evidence of potential bias may bring forth a peremptory challenge: either party may feel a mistrust of a juror's objectivity on no more than the 'sudden impressions and unaccountable prejudices we are apt to conceive upon the **bare looks and gestures of another**' (citation omitted)—upon entering the box the juror may have smiled at the defendant, for instance, or glared at him." (At p. 780.)

8. "[N]othing in Wheeler disallows reliance on the prospective jurors' **body language or manner of answering questions** as a basis for rebutting a prima facie case" of exclusion for group bias." (At p. 780.) For example, an observation that the juror was "**laughing at an inappropriate point** during voir dire" has been upheld as a valid ground for bumping a juror even though the appellate court could not verify the conduct occurred based on the record. (At p. 780.)

9. "If a prosecutor can lawfully peremptorily excuse a potential juror based on a hunch or suspicion, or because he does not like the **potential juror's hairstyle**, or because he observed the potential juror glare at him, or smile at the defendant or defense counsel, then surely he can challenge a potential juror whose **occupation**, in the prosecutor's subjective estimation, would not render him or her the best type of juror to sit on the case for which the jury is being selected." (At p. 786; see also People v. Robinson (2003) 110 Cal.App.4th 1196, 1206 - discussed in this P&A memo, below, at p. 10 - ["Exclusion based on hunches and other arbitrary reasons are permissible as long as the reasons are not based on improper group bias"].)

   Moreover, a attorney may legitimately peremptorily excuse a potential juror because he or she feels the potential juror's occupation reflects **too much education**, and that a juror with that particularly high a level of education would likely be specifically biased against their witnesses, or their client's position in the case. (At p. 787, fn. 6.)

10. "Nowhere does Wheeler or Batson say that trivial reasons are invalid. What is required are reasonably specific and neutral explanations that are related to the particular case being tried." (At p. 780.)

11. **Reasons May Change Depending on Mix of Jurors & Number of Challenges Left**: "[I]t 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. 781.)

   - "It may be acceptable, for example, to have one juror with a particular point of view but unacceptable to have more than one with that

view." (At p. 781.)

- "If the panel as seated appears to contain a sufficient number of jurors who appear strong-willed and favorable to a lawyer's position, the lawyer might be satisfied with a jury that includes one or more passive or timid appearing jurors. However, if one or more of the supposed favorable or strong jurors is excused either for cause or peremptory challenge and the replacement jurors appear to be passive or timid types, it would not be unusual or unreasonable for the lawyer to peremptorily challenge one of these apparently less favorable jurors even though other similar types remain. These same considerations apply when considering the age, education, training, employment, prior jury service, and experience of the prospective jurors. (At p. 781.)

- "[T]he same factors used in evaluating a juror may be given different weight depending on the number of peremptory challenges the lawyer has at the time of the exercise of the particular challenge and the number of challenges remaining with the other side. Near the end of the voir dire process a lawyer will naturally be more cautious about 'spending' his increasingly precious peremptory challenges. Thus at the beginning of voir dire the lawyer may exercise his challenges freely against a person who has had a minor adverse police contact and later be more hesitant with his challenges on that ground for fear that if he exhausts them too soon, he may be forced to go to trial with a juror who exhibits an even stronger bias." (At p. 781.)

- "Moreover, as the number of challenges decreases, a lawyer necessarily evaluates whether the prospective jurors remaining in the courtroom appear to be better or worse than those who are seated. If they appear better, he may elect to excuse a previously passed juror hoping to draw an even better juror from the remaining panel." (At pp. 781-782.)

12. **Passing on the Jury With the Juror Eventually Booted Still Present**: "Although not a conclusive factor, "the passing of certain jurors may be an indication of the prosecutor's good faith in exercising his peremptories, and may be an appropriate factor for the trial judge to consider in ruling on a Wheeler objection." (At p. 788; accord, People v. Gutierrez (2002) 28 Cal.4th 1083, 1122 [discussed in this P&A memo, below at p. 7].)

Moreover, passing on a jury with a juror of the same class as the jurors who have allegedly been bumped for a discriminatory reason lends itself to an inference of non-discriminatory purpose -even when the juror is later bumped by the opposing party. The court **rejected** the argument that passing on a jury in which a member of the allegedly targeted class remains cannot be considered on appeal where the juror is ultimately bumped by the opposing party because it cannot be known with certainty whether the prosecutor would in fact not have peremptorily challenged the juror, had the defense not itself first peremptorily excused her. (At p. 790, fn. 9.)

Editor's Note: In Hayes v. Woodford (9th Cir. 2002) 301 F.3d 1054 (see this P&A memo, below at p. 9), the court noted that while "a trial court cannot rely exclusively on the racial makeup of the jury to determine that there has been no discrimination," the fact an attorney has accepted a jury containing members of the allegedly discriminated against class is "a permissible, relevant factor in assessing the genuineness of the prosecutor's race-neutral reasons." (Id., at p. 1081, 1083 [and noting the

number of jurors belonging to the class allegedly discriminated against who were seated proportionately far exceeded the number who might be expected to be seated given the small percentage of the class in the relevant jurisdiction]; see also Lewis v. Lewis (9th Cir. 2003) 321 F.3d 824, 834, fn. 39 (see this P&A memo, below, at p. 7) [while fact juror of targeted class not struck relevant in deciding whether prima facie case made out and is a sign of good faith on the part of the prosecutor, "it does not alone support an affirmative credibility finding"].)

Trial Judge Not Obligated to Verify On the Record Every Race-Neutral Reason Given for Bumping Jurors.

13. Where "the trial court is fully apprised of the nature of the defense challenge to the prosecutor's exercise of a particular peremptory challenge, where the prosecutor's reasons for excusing the juror are neither contradicted by the record nor inherently implausible (citation omitted) and where nothing in the record is in conflict with the usual presumptions to be drawn, i.e., that all peremptory challenges have been exercised in a constitutional manner, and that the trial court has properly made a sincere and reasoned evaluation of the prosecutor's reasons for exercising his peremptory challenges, then those presumptions may be relied upon, and a Batson/Wheeler motion denied, notwithstanding that the record does not does contain detailed findings regarding the reasons for the exercise of each such peremptory challenge." (At p. 790.)

14. The trial court "must make 'a sincere and reasoned attempt to evaluate the prosecutor's explanation in light of the circumstances of the case as then known, his knowledge of trial techniques, and his observations of the manner in which the prosecutor has examined members of the venire and has exercised challenges for cause or peremptorily." (At p. 782.)

15. "But in fulfilling that obligation, the trial court is not required to make specific or detailed comments for the record to justify every instance in which a prosecutor's race-neutral reason for exercising a peremptory challenge is being accepted by the court as genuine. This is particularly true where the prosecutor's race-neutral reason for exercising a peremptory challenge is based on the prospective juror's demeanor, or similar intangible factors, while in the courtroom." (At p. 782.) "The impracticality of requiring a trial judge to take note for the record of each prospective juror's demeanor with respect to his or her ongoing contacts with the prosecutor during voir dire is self-evident." (At p. 790.)

16. "[W]hen 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." (At p. 785.)

17. "When the prosecutor's stated reasons are both inherently plausible and supported by the record, the trial court need not question the prosecutor or make detailed findings." (At p. 785.) Specific inquiry by the trial court is not required to show compliance with its obligation under Wheeler. (At p. 782.)

18. Thus, in the instant case, **it was wrong** for the appellate court to find that the record on appeal did not support the prosecutor's stated reasons

for exercising a peremptory challenge against the second Hispanic juror and did not support the trial court's express determination that those reasons were sincere and genuine. (At p. 785.)

- **Was the prosecutor so wrong about customer service reps?**

The question for the trial court was not whether the notion that all persons employed as customer service representatives would have insufficient 'educational experience' to effectively serve on juries was objectively valid. Nor was it whether, subjectively speaking, the specific juror (who was employed as a customer service representative) herself had insufficient "educational experience" to sit on the jury. (At pp. 786-787.) Rather, the pertinent question is whether the reason given was legitimate or was a disingenuous reason given to cover a challenge made for a discriminatory purpose. (At p. 787.)

Similarly, the proper function of the reviewing court was not to objectively validate or invalidate the broadly stated premise about customer representatives. (At p. 786.) Rather, a reviewing court (in a deferential manner) simply assesses whether the prosecutor's ***subjective*** race-neutral reasons for exercising the peremptory challenges at issue were sincere and whether the defense met their burden of showing a strong likelihood the challenge was exercised for an improper purpose. (At p. 786.)

Here, the juror's occupation was confirmed by her answers to the general questions, as were the additional circumstances that she had no prior jury experience or past contact with the criminal justice system in any capacity. It was legitimate (especially when coupled with the juror's inattentiveness) for the prosecutor to believe that such a juror would not be the best person to decide a multi-defendant murder case. (At pp. 786-787.)

Note: The fact that one of the other Hispanic jurors was a counsel for at-risk youth was deemed a reasonable ground for bumping the juror in the instant case. (At p. 785, fn. 5; but see United States v. Murillo (9th Cir. 2002) 288 F.3d 1126, 1135-1137 [claim juror was bumped because juror worked for a casino was not given much credence where a large part of the county's citizens also worked in casinos].)

- **What about the prosecutor's observation the juror was not paying attention and was not sufficiently involved in the jury selection?**

There was nothing inherently implausible about this reason, nor was it contradicted by the record, especially in light of her lack of prior jury service and lack of any contact with the criminal justice system. (At p. 787.)

Implied Finding: It was not necessary for the trial judge to specifically clarify or probe the prosecutor's claim regarding the juror's demeanor. When the trial judge expressly accepted this race-neutral reason as sincere and genuine, this was tantamount to an implied acceptance of the reason as real. (At p. 788.)

- **Other reasons for upholding the trial court's determination?**

Passing: If the prosecutor's "reasons for excusing the second Hispanic juror] were indeed pretextual, and he was in actuality bent on removing her from the jury because of her Hispanic ancestry, his acceptance of the jury 14 times with [her] seated in the jury box, on four such occasions with [another] Hispanic prospective juror also seated on the jury, was hardly the most failsafe or effective way to effectuate that unconstitutional discriminatory intent." (At p. 788.)

Victim & Defendant Both of Same Class: "[B]oth the defendants and the murder victim were of Hispanic ancestry, a circumstance that might be viewed as neutralizing any suspected untoward belief on the prosecutor's part that Hispanic jurors would tend to be biased in favor of, and thereby be more inclined to vote to acquit, the Hispanic defendants. (At p. 788, fn. 7.)

Propriety of Considering Defense Counsel's Challenges in Assessing Prosecutor's Alleged Discriminatory Intent.

18. It is settled that "the propriety of the prosecutor's peremptory challenges must be determined without regard to the validity of defendant's own challenges." (At p. 788.)

19. The court noted that the trial judge's mention of the fact that defense counsel had booted a Hispanic juror not bumped by the prosecution was simply made to point out that, contrary to defense counsel's claim, the prosecution did attempt to keep law enforcement jurors despite their Hispanic ancestry and therefore it was reasonable to believe that the Hispanic juror challenged by the prosecution was booted for other reasons than her ancestry. (At p. 789.)

20. Bottom line: Great deference must be given to the trial court's determination that the use of peremptory challenges was not for an improper purpose or class bias purpose. (At pp. 790-791.)

Folks With Hispanic Surnames Only Through Marriage are Not Hispanic For Wheeler/Batson Purposes.

People v. Gutierrez (2002) 28 Cal.4th 1083

1. Where a court declines to find a prima facie case but allows the prosecutor to state his reasons for the peremptory challenge, this does ***not*** constitute an implied finding of a prima facie case. (At p. 1122.)

2. However, where a court makes no express finding that a prima facie case had not been demonstrated but instead immediately asks the prosecutor to justify the questioned challenges, this suggests an implied finding of a prima facie case. (At pp. 1122-1123; see also People v. Cash (2002) 28 Cal.4th 703, 723 (discussed in this P&A memo, below at p. 9; People v. Muhammad (2003) 108 Cal.App.4th 313, 317 (discussed in this P&A memo, below at p. 11).)

3. "Spanish surnamed" sufficiently describes the cognizable class under Wheeler. However, this is a sufficient definition "only where no one knows at the time of the challenge whether the Spanish-surnamed juror is Hispanic." (At p. 1123.)

Where, as in the instant case, a juror is not of Hispanic origin, but only acquires her Hispanic surname through marriage, and indicates on her juror questionnaire and in court that she is not Hispanic, the juror is not Hispanic for Wheeler/Batson purposes. (At p. 1123.)

4. In discussing whether the asserted reasons given by the prosecutor for bumping Hispanic jurors, the court had occasion to condone the following reasons as race-neutral grounds that would properly merit booting a juror:

Jurors View About Applying Death Penalty in Death Penalty Case
A juror who had serious reservations about death penalty stated he could not face defendant after voting to put him to death, indicated death penalty frightened him, claimed if he voted for death he would have to "pay for it in the end" and said he would rather have someone else make the decision was properly bumped on these grounds. (At p. 1123.)

A juror who felt death penalty was unfair would vote to abolish it and would automatically vote for life imprisonment on questionnaire (but who seemed to say otherwise during voir dire) was properly bumped. (At p. 1126.)

See also People v. McDermott (2002) 28 Cal.4th 946, 970-979 (see last week's 10/27/03 P&A memo, below, at p. 6 [discussing the booting of numerous jurors because of views on death penalty].)

Relatives Involved in Crime
A juror whose father had been imprisoned for drug crimes properly booted on this ground alone. (At pp. 1123.)

Prior Bad Experience With Police
A juror who said CHP had stopped him for traffic offense and had tried to "rough him up and harass" him could be booted on this ground alone - even though juror claimed to have no hard feelings about incident. (At p. 1124.)

A juror who gave a lengthy and detailed account of her son's arrest for drunk driving and claimed he had been harassed and falsely accused of using drugs and who felt she herself had been unfairly given a parking ticket (which she successfully fought) was properly bumped on these grounds. (At p. 1125.)

Tendency to Rely Too Heavily on Expert Opinion
Where a juror said he could not vote for the death penalty if a psychologist concluded defendant had a mental problem that affected his conduct (thus indicating he might rely too heavily on the expert opinion testimony of psychologists), this provided non-racial reason for bumping juror in case involving psychological defense. (At p. 1124.)

Where a juror who was teacher said he never disagreed with psychologist's evaluation of a student and expressed hesitancy in disagreeing with an expert, this was a non-discriminatory reason for bumping the juror in a case involving expert witnesses. (At pp. 1124-1125.)

Factors Indicating Difficulty or Inability to Concentrate or Undue

Emotionality
A juror who appeared extremely emotional (she cried twice during voir dire) and overwhelmed by outside stresses was properly bumped because factors indicating a difficulty or inability to focus on the evidence may serve to justify a peremptory challenge. (At p. 1124.)

Appearance of Favoring Defense
Where a juror seemed to keep agreeing with the defense and stated that in a previous jury experience he believed the other jurors had made up their minds before the defense presented their case, this would indicate the juror might be skeptical of the People's evidence and, alone, could justify a challenge. (At p. 1125.)

Hostile Looks
Hostile looks from a prospective juror can themselves support a peremptory challenge. (At p. 1125.)

Bias Against Group to Which Victim Belongs
Where juror stated that he felt "transsexuals were sick" and victim was a transsexual, prosecutor could properly be concerned the juror might be biased against victim and bump the juror. (At p. 1125.)

Close-Mindedness to Other's Opinions
Where juror said he would not be influenced by anyone's opinion but his own, this provided valid grounds for bumping the juror because prosecutor could be concerned juror would not listen to the opinions of other jurors. (At p. 1125.)

Other Juror Characteristics Which Were Deemed to Be Legitimate Grounds for Bumping Jurors Identified in Recent Decisions:

Expressed opinions about the judicial system: A juror's expressed opinion about the judicial system, including the ***belief that racial discrimination may taint the criminal justice system***, is a race-neutral reason for using a peremptory challenge. (See United States v. Steele (9th Cir. 2002) 298 F.3d 906, 913-914 [and noting line of questioning gave rise to eliciting this information proper where prospective juror raises the issue first].)

Juror's reading and television preferences: The fact a juror claimed that she ***never read a book*** and her statement that ***"Judge Judy" was her favorite TV show*** were legitimate grounds for bumping a juror. (See United States v. Murillo (9th Cir. 2002) 288 F.3d 1126, 1135-1137.)

Trouble communicating: Juror's apparent ***trouble communicating*** was a proper ground for a peremptory challenge. (See United States v. Murillo (9th Cir. 2002) 288 F.3d 1126, 1135-1137.)

Juror's possible resentment against law enforcement: The fact a juror had been ***refused full-time employment with a police department*** (so he might have some resentment about being turned down) was a legitimate reason for bumping juror. Similarly, fact a ***juror was going through a divorce with a police officer*** and had a ***warrant out for her arrest*** was also a race-neutral ground for challenging a juror. (See Hayes v. Woodford (9th Cir. 2002) 301 F.3d 1054, 1082-1083.)

Juror Prone to Exaggerate or Lie: The fact a juror claimed he had been accepted for employment with a police department (when that would have been impossible because of the department's age requirement) and appeared prone to exaggeration (i.e., juror made a comment he had a "photostatic" mind) provided legitimate grounds for booting the juror. (See Hayes v. Woodford (9th Cir. 2002) 301 F.3d 1054, 1082-1083.)

Juror Connection to Case: A prosecutor's challenge to a juror was upheld as race-neutral where a person's wallet had been found at a crime scene pertinent to this case, and the juror's daughter employed the wallet's owner. (See Hayes v. Woodford (9th Cir. 2002) 301 F.3d 1054, 1082-1083.)

Excluding Jurors Who Have a Religious Bent or Bias Making It Difficult For Them to Impose the Death Penalty is Proper Nondiscriminatory Ground for a Peremptory Challenge.

People v. Cash (2002) 28 Cal.4th 703, 723-726 [only]

Facts: One of the several African-American jurors in a capital case was bumped by the prosecutor. The prosecutor gave different reasons for bumping the juror. Among the reasons: the juror was raised as a Jehovah's Witness and members of that religion are "taught not to pass judgment" and so would be unwilling to vote for death; the juror gave abrupt answers suggesting he resented being questioned; and the juror appeared reluctant to serve - he was sitting on the edge of his seat holding his backpack as if he was ready to leave. (At pp. 723-724.)

1. The vice that Wheeler seeks to address is the exclusion of any juror based on the "presumption that certain jurors are biased merely because they are members of an identifiable group distinguished on racial, religious, ethnic, or similar grounds." (At p. 724.)

2. Although the United States Supreme Court has only applied Batson to forbid group exclusion based on race or gender, the California Supreme Court has described the protections against group exclusion as including religious affiliation. (At p. 724.)

3. Nevertheless, "[e]xcusing prospective jurors who have a religious bent or bias that would make it difficult for them to impose the death penalty is a proper, nondiscriminatory ground for a peremptory challenge." (At p. 725.)

4. None of the prosecutor's reasons were inherently implausible and all found support in the record. (At p. 725.)

Once a Trial Court Has Found a Prima Facie Case of Discriminatory Use of Challenges, It Must Consider Every Challenged Juror.

People v. Robinson (2003) 110 Cal.App.4th 1196 **[NOT SPECIFICALLY DISCUSSED IN P&A VIDEO]**

Facts: The defense made a Wheeler motion based on the prosecution using three of seven challenges to bump African-American jurors. In response to the Wheeler motion, the trial judge stated he could understand the prosecutor's reasons for excusing two of three African-American jurors but found a prima facie case as to one of them. Counsel then argued the merits of the

prosecution's challenge to the juror against whom a prima facie case had been found but never addressed the challenge to the other two African-American jurors. (At pp. 1204-1205.)

Subsequently, the prosecution bumped an African-American juror who was a chaplain in a jail and an investigator with the L.A. Sheriff's Department. After another Wheeler motion based on this challenge, the prosecutor explained that he typically did not leave people that work in the religious professions on his jury because they are too sympathetic to the defendants. He bumped the juror in question because she was a chaplain in a men's jail, which, in the prosecutor's mind, outweighed the fact the juror worked for the sheriff's department. (At p. 1205.)

Challenge Based on Religious Activity

1. While exclusion on the basis of religion alone would be improper, membership in a religious group can be used to strike a prospective juror, as long as the prosecution explains how religion would affect the juror's duty to deliberate. That is, if it can be shown the juror has a specific, rather than a group, bias the challenge will be upheld. (At p. 1207.)

   - For example, in People v. Martin (1998) 64 Cal.App.4th 378, the prosecution bumped a Jehovah's witness in a theft case where the juror had stated her beliefs would not cause a problem unless she were sitting in a capital case, because she was opposed to the death penalty. The prosecutor's explanation that, based on his experience, Jehovah's Witnesses had a hard time with criminal trials because they couldn't judge anybody at all, was held a legitimate justification. (At p. 1206.)

   - For example, in People v. Allen (1989) 212 Cal.App.3d 306, a pastor was held to have been properly booted when she conceded her religious views might interfere with her ability to deliberate. (At p. 1206.)

2. In the instant case, it was reasonable to believe a chaplain who ministered to gang members in jail might be improperly influenced, i.e., possess a specific and legitimate, as opposed to group, bias. (At p. 1207.)

Short-Circuiting Wheeler Requirement

3. "A Wheeler motion challenges the selection of a jury, not the rejection of an individual juror; the issue is whether a pattern of systematic exclusion exists." (At p. 1208; accord, People v. McGee (2002) 104 Cal.App.4th 559, 570 [see this P&A memo, below at p. 13.)

4. "Accordingly, once the trial court has found a prima facie case of improper use of peremptory challenges to exclude jurors based on perceived group bias, the burden shifts to the prosecutor to provide race-neutral explanations for **all** challenges involved and for the court to evaluate the prosecutor's explanation in light of the circumstances of the case as then known." (At p. 1208, emphasis added; accord, People v. McGee (2002) 104 Cal.App.4th 559, 570 [see this P&A memo, below at p. 13.)

5. Here, the trial court short-circuited the process by not requiring the prosecutor to justify why he bumped some of the African-American jurors who were alleged to have bumped for improper reasons. (At p. 1208.)

6. Wheeler error is reversible per se. (At p. 1206.)

7. The court remanded the case to the trial judge "for a hearing to have the prosecutor explain race neutral reasons for each of his challenges." (At p 1208.) The court ordered that, after hearing those reasons, the judge must then determine the validity of those challenges based upon the entire record. (At p. 1208.) If the judge determines that the reasons given by the prosecutor for the first Wheeler motion are valid, then it must reconsider the second Wheeler motion taking into account all of the evidence it has heard in the first Wheeler motion in order to determine if there has been a pattern of systematic exclusion. (At pp. 1208-1209.)

8. The court then ordered that if the judge determines it is impossible for the prosecutor to remember why certain challenges were made or for the judge to adequately evaluate those reasons, the judgment must be reversed and a new trial granted. (At p. 1209.)

All Peremptory Challenges Should Be Considered Even Though No Prima Facie Case as to Those Challenges Had Been Made Earlier.

People v. McGee (2002) 104 Cal.App.4th 559 [**NOT SPECIFICALLY DISCUSSED IN P&A VIDEO**]

Facts: Defendant (an African-American) made a Wheeler/Batson motion after the People used five of six peremptory challenges to remove African-American jurors. The trial court denied this motion, finding no prima facie case had been made. When the prosecutor excused another African-American juror, the defense made a second Wheeler/Batson motion and the trial court found a prima facie case as to that juror. Although defense counsel asked that the court review the prosecutor's reasons for striking all the African-American jurors, the trial court declined. The prosecutor explained his reason for kicking the last African-American juror and this was accepted as a legitimate challenge by the trial court. The defense made two more Wheeler/Batson motions after the prosecutor, respectively, struck two more African-American jurors before the jury was sworn and two more African-American jurors during voir dire of the alternate jurors. In each case, the trial court found no prima facie showing. (At pp. 565-568.)

1. After the trial court found a prima facie case in response to the second Wheeler/Batson motion, it was error for the trial court to limit its finding of a prima facie case (and the concomitant requirement the prosecutor provide race-neutral explanations) to the most recent African-American juror who had been excused at that point. (At p. 570.)

   Editor's Note: See also People v. Gore (1993) 18 Cal.App.4th 692 [even if Wheeler/Batson motion made during selection of alternate jurors, court should consider jurors in targeted group who defense retroactively claims were erroneously bumped during the initial phase of jury selection].

2. With each successive Wheeler/Batson motion, "the objecting party retains the initial burden to establish a prima facie case—that is, to raise a reasonable inference that the opposing party has challenged jurors because of their race or other group association." (At p. 572.)

3. "[O]nce a prima facie showing has been refuted, it is incumbent on the moving party to make a new prima facie showing with regard to any

subsequent Wheeler motion pertaining to different jurors of the identified group from the venire." (At p. 572.)

4. "Subsequent Wheeler motions, however, may be based on evidence presented in prior Wheeler motions, to the extent necessary to establish a discriminatory pattern of peremptory challenges." (At p. 572.)

5. Thus, because the defendant was unable to support his third and fourth motions with evidence that ***should*** have been in the record had the second motion been properly done, the case has to be remanded for rehearing on all three motions. (At pp. 572-573.)

Trial Court Does Not Have Power to Impose Monetary Sanction for Wheeler Violation Unless Preceded By Court Order Not to Engage in Discriminatory Use of Jury Challenges.

People v. Muhammad (2003) 108 Cal.App.4th 313

Facts: After the prosecutor had exercised nine challenges (a white male, two Asians, three African-Americans, one Hispanic, one white Caucasian, and one person of unknown ethnicity), defense counsel made a Wheeler motion based on the "systematic exclusion of minorities." (At p. 317.) The trial judge then effectively found a prima facie showing by requiring the prosecutor to explain her reasons. The trial judge accepted the reasoning for some of the jurors. However, it found the other reasons provided were pretextual. (At p. 317.)

Specifically, the reasons the trial judge deemed illegitimate were the following: "For several of the other ethnic minority prospective jurors, the explanation was that the trial would involve technical evidence, especially from the coroner, and, based on their occupations, the prosecutor did not believe the prospective jurors were up to understanding the case. One was "a janitor or a tailor," two others were "janitors" and one a custodian, which was the reason for excusing her. Another prospective juror, an Hispanic female, was a clerk with a public health agency, and the prosecutor could "only assume as a county employee she's much like our clerks, she's basically a filing individual. Based on that, again, I didn't believe she could comprehend the testimony." Still another dismissed prospective juror, a female African-American, was a customer service representative, "they're the individuals that you call when you want your phone company service...based on technical, but a background in whether or not they could comprehend the testimony, I just base it—based on a calculated assumption or guess as to what their level of comprehension's going to be." [sic] (At p. 317.)

The trial judge was very upset with the prosecutor, claiming that what she did was not only illegal, but immoral and unethical. The judge then imposed monetary sanctions in the amount of $1,500 pursuant to Code of Civil Procedure Section 177.5. The court also threatened to prevent the prosecutor from using any more peremptory challenges but never made good on this threat. (At p. 318.) The defendant ultimately pled guilty but the People appealed the imposition of the sanctions.

1. The People's appeal was authorized under Code of Civil Procedure Section 904.1(b), which permits an appeal after final judgment from a sanction order where the amount is less than $5,000. (At p. 319.)

The trial court properly found a Wheeler/Batson violation.

2. "As a general proposition, an honestly held belief that a prospective juror will be unable to understand the case is a legitimate basis for a peremptory challenge." (At p. 322.)

3. Nevertheless, a "trial court's judgment is entitled to considerable deference. This is especially true when the bench officer is an experienced trial judge." (At p. 322.) Where a trial judge finds the prosecutor's explanation was a pretext, no less deference is due to that determination than if it had been the reverse. (At p. 323.)

4. Hence, the trial court properly declared a mistrial and dismiss the remaining venire.*****

*****The alternative sanction of reseating the bumped jurors (see People v. Willis (2002) 27 Cal.4th 811, 823) was not an option because the prospective jurors had already been excused. (At p. 323.)

The court was incorrect in imposing a monetary sanction.

5. Aside from a contempt proceeding, a monetary sanction can only be imposed against an attorney when authorized by a statute. (At p. 323.)

6. Under Section 177.5, a monetary sanction can be imposed "for any violation of a lawful court order by a person, done without good cause or substantial justification." (At p. 324.)

7. Section 177.5 applies to criminal and civil cases and does not require the offending act be "willful," only that it be committed without good cause or substantial justification. (At p. 324.)

8. Absent an order, Section 177.5 has no application. (At p. 325.)

9. In the instant case, no order was made before the judge imposed the monetary sanction. Accordingly, the monetary sanction must be lifted. (At pp. 325-326.)

10. If the court wants to impose a monetary sanction for a Wheeler/Batson violation, it must first order the counsel not to violate the Equal Protection Clause in selecting jurors. However, it seems "degrading to the judicial process and to the attorneys who practice before our courts for a court to have to warn counsel that, on penalty of a monetary sanction, they must not violate the Constitution." (At pp. 325-326.)

11. The court anticipates that monetary sanctions will only be imposed after a second Wheeler motion - the first Wheeler motion providing the opportunity for an admonition/order from the court. (At p. 326.)
If a court "admonishes counsel that a repetition of specific conduct will result in a monetary sanction, that statement is tantamount to an order not to repeat the conduct, and should suffice under section 177.5. (At p. 325.)

12. A monetary sanction may be imposed **in addition to** the granting of the mistrial. (At pp. 324-325.) Indeed, where the alternative sanction of

reseating a challenged juror is not available, there is a stronger reason to impose a monetary sanction. (At p. 325.)

13. Note: The court's order imposing a monetary sanction was also deficient because it did not comply with Section 177.5(b)'s requirement that it "be in writing and shall recite in detail the conduct or circumstances justifying the order." (At p. 324.)

Defendant Cannot Assert Wheeler Error on Appeal When Error is Based on Defendant's Own Improper Exercise of Juror Challenges [**NOT SPECIFICALLY DISCUSSED IN P&A VIDEO**].

People v. Morris (2003) 107 Cal.App.4th 402

Note: Some of the facts relating to a different Wheeler issue were discussed in last week's 10/27/03 P&A memo at p. 5.

Facts: After a defendant made a Wheeler motion, the prosecutor also made a Wheeler motion based upon defendant's exercise of challenges against white males. The trial judge denied the motion, but after defendant used four more challenges against white males, the prosecutor made a second Wheeler motion. The trial judge found a prima facie case and then determined that the defendant had exercised his challenges in a discriminatory fashion. The prosecutor argued that having found such discrimination, the court must grant the People's Wheeler motion and excuse the panel. The court declined to do in the interest of proceeding with the trial. (At p. 409.)

On appeal, the defendant contended that, once the trial court found that jurors were excused on the basis of group bias, the court was required to grant the People's motion and to dismiss the entire jury panel and venire and start voir dire with a new venire. Failure to do so, defendant claimed was error requiring reversal. (At p. 410.)

1. Although a trial judge has the discretion to impose an alternative remedy or sanction to dismissing the venire when a Wheeler motion is granted, "trial courts lack discretion to impose alternative procedures in the absence of consent or waiver by the complaining party." (At pp. 410-411.)

2. Since the prosecutor did not consent to the trial court's alternative procedure of admonishing defense counsel and proceeding with the trial, it was error for the trial court to do so. (At p. 411.)

3. Nevertheless, a defendant does not have standing on appeal to take advantage of the trial court's error since the error was based on counsel's own improper exercise of peremptory challenges to exclude a legally cognizable group. (At p. 413.)

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