POINTS AND AUTHORITIES

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Week Of	Topic	Guest Speaker	Ethics
Aug. 1, 2005	THE NEW RULES ON ASSESSING WHETHER JURY CHALLENGES ARE BEING EXERCISED IN A DISCRIMINATORY FASHION FROM THE U.S. SUPREME COURT: HIGHLIGHTING JOHNSON & MILLER-EL	Jerry Coleman, San Francisco DA's Office	30

Defense Only Has to Raise a Reasonable Inference (Not a "Strong Likelihood" of Discriminatory Purpose) in Order to Make Out a Prima Facie Case of Purposeful Discrimination Under Batson.

Johnson v. California (2005) 125 S.Ct. 2410

Facts:

During jury selection, after challenges for cause were completed, the prosecutor used three of his 12 peremptory challenges to remove all the black jurors remaining in the venire. After the second black juror was challenged, and again, after the third black juror was challenged, the defense objected that the prosecutor's challenges were unconstitutionally based on race under both the California and United States Constitutions. (At p. 2414)

Even though the trial judge warned the prosecutor "we are very close," the judge did not ask the prosecutor to explain his dismissal of the second black juror. The judge found no explanation was necessary as the defendant had failed to establish a prima face case under People v. Wheeler (1978) 22 Cal.3d 258, which requires that there be a "strong likelihood" that the exercise of the peremptory challenges were based upon a group rather than an individual basis. (At p. 2414.)

The trial judge also did not ask the prosecutor for an explanation after the prosecutor challenged the third black juror. Instead, the judge stated that his own examination of the record convinced him that the strikes could be justified by race-neutral reasons, specifically, the judge opined that the black jurors had offered equivocal or confused answers in their written questionnaires. (At p. 2414.)

Procedural History:

The case eventually ended up before the California Supreme Court on the issue of whether the trial judge erred in requiring the defense to make a showing of a "strong likelihood" that the peremptory strikes had been based on race, instead of just a showing of an "inference" of discrimination, when establishing a prima face case. The California Supreme Court noted that in Batson v. Kentucky (1986) 476 U.S. 79, the United States Supreme Court used the latter terminology. However, the California Supreme Court concluded that, despite the difference in language, the standard for making out a prima facie case was really the same under the state and the federal standard. (At p. 2415.) The case went up to the United States Supreme Court on the same issue.

1. Under Batson v. Kentucky (1986) 476 U.S. 79, there is a three-step process for deciding whether peremptory strikes are being used in an unconstitutionally

discriminatory manner.

"First, the defendant must make out a prima facie case 'by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose.'" (At p. 2416.)

"Second, once the defendant has made out a prima facie case, the 'burden shifts to the State to explain adequately the racial exclusion' by offering permissible race-neutral justifications for the strikes." (At p. 2416.)

"Third, '[i]f a race-neutral explanation is tendered, the trial court must then decide...whether the opponent of the strike has proved purposeful racial discrimination.'" (At p. 2416.)

2. California's standard, which requires that the person objecting to the challenge show "that it is more likely than not the other party's peremptory challenge, if unexplained, [was] based on impermissible group bias," is an "inappropriate yardstick by which to measure the sufficiency of a prima facie case." (At p 2416.) Rather, "a defendant satisfies the requirements of Batson's first step by producing evidence sufficient to permit the trial judge to draw an **inference that discrimination has occurred**." (At p. 2417.)

3. The High Court reiterated that the person challenging the strikes has the "burden of persuasion" to "prove the existence of purposeful discrimination" and this burden "rests with, and never shifts from, the opponent of the strike." (At p. 2417.)

4. Thus, even if the State produces only a frivolous or utterly nonsensical justification for its strike, the case does not end—it merely proceeds to step three." (At p. 2417.)

5. "The first two Batson steps govern the production of evidence that allows the trial court to determine the persuasiveness of the defendant's constitutional claim. '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. 2418.)

6. "In the unlikely hypothetical in which the prosecutor declines to respond to a trial judge's inquiry regarding his justification for making a strike, the evidence before the judge would consist not only of the original facts from which the prima facie case was established, but also the prosecutor's refusal to justify his strike in light of the court's request. Such a refusal would provide additional support for the inference of discrimination raised by a defendant's prima facie case." (At p. 2418, fn. 6.)

Editor's Note regarding whether to state reasons where the judge finds no prima facie case: Under the new Johnson standard, an appellate court is even more likely to find a prima facie case has been met - even if the trial judge found it was not. Thus, to avoid having the case remanded in that circumstance, it still makes sense to state the reasons for exercising the challenges even if the trial judge finds no prima facie case.

Coleman's suggestion as to cases involving Wheeler/Batson issues that are on appeal or pending sentencing: If a case is on appeal and has been sent back down in light of the decision in Johnson, our response should be two-fold. First, make sure the trial judge initially re-decides whether a prima facie showing has been met under the new Johnson standard. The judge may still find no prima facie case has been shown. Second, assuming the trial judge finds a prima facie case has been met, make sure to provide justifications of your challenges; if you persuade the trial court that your challenges are for neutral motives, the conviction

should stand on appeal.

Once a Prima Facie Case of Discriminatory Use of Juror Challenges is Found, Courts Should Consider Various Factors in Determining Whether That Showing Has Been Rebutted, Including Looking at the Type of Questions Asked of Each Juror and Comparing Jurors Who Were Bumped to Those Who Remained.

Miller-El v. Dretke (2005) 125 S.Ct. 2317

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 p. 2322.)

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 United States Supreme Court on the question of what the defendant needed to show in order to obtain a certificate of appealability. The first time the case came before the Supreme Court, the court found a sufficient showing had been made to permit a review in the Fifth Circuit Court of Appeals and sent the case back down to the Fifth Circuit for a determination of the appeal on the merits. The Fifth Circuit rejected defendant's claim on the merits, and the case made its way back up to the United States Supreme Court. (At pp. 2322-2323.)

1. Under Batson v. Kentucky (1986) 476 U.S. 79, a defendant may rely on the "totality of the relevant facts" about a prosecutor's conduct in attempting to make out a prima facie case of discriminatory jury selection (i.e., raise of inference of purposeful discrimination). (At pp. 2324-2335.)

2. Once the defendant makes a prima facie showing, the burden shifts to the State to come forward with a neutral explanation for challenging jurors within an arguably targeted class. (At p. 2324.)

3. Although there may be any number of bases on which a prosecutor reasonably might believe that it is desirable to strike a juror who is not excusable for cause, the prosecutor must give a clear and reasonably specific explanation of his legitimate reasons for exercising the challenge. (At p. 2324.)

4. The court recognized that "peremptories are often the subjects of instinct," and that "it can sometimes be hard to say what the reason is." (At p. 2332.) But went on to say when "illegitimate grounds like race are in issue, a prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives." (At p. 2332.)

5. "The trial court then will have the duty to determine if the defendant has established purposeful discrimination." (At p. 2325.)

6. The Miller-El court discussed several factors that should be considered in making the determination of whether the defendant has established purposeful discrimination. (At pp. 2325-2340.)

7. **Statistically Significant Numerical Disparity:** A court may consider the total number of members of a protected class who are in the jury panel in comparison to the number of members of the class who actually sit on the jury. A large disparity supports a finding of discriminatory use. (At p. 2325.)

☐ The court noted that out of 20 black members of a 108 person venire panel, only one served on the jury. (At p. 2325.)

☐ The court recognized that 9 black members were excused for cause or by agreement although this fact did not appear to be something the court placed any emphasis upon. (At p. 2325.)

☐ However, the court pointed out that "prosecutors used their peremptory strikes to exclude 91% of the eligible African-American venire members" and that happenstance was "unlikely to produce this disparity." (At p. 2325.)

8. **Comparison of the Jurors Who Were Struck With Those Were Kept:** The court looked at the reasons given for striking a black juror and compared them to the reasons given for striking an "otherwise similar non-black juror" who was allowed to serve. If the reasons given "for striking a black panelist applies just as well to an otherwise-similar non-black who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at Batson's third step." (At p. 2325.)

☐ The court considered this factor a "more powerful" indication of purposeful discrimination than the statistical disparity. (At p. 2325.)

☐ The court **rejected** the dissent's argument that, in order for two jurors to be deemed "similarly situated" for comparison purposes, the individuals must have given similar responses in all relevant areas. Rather, the court stated: "None of our cases announces a rule that no comparison is probative unless the situation of the individuals compared is identical in all respects, and there is no reason to accept one." (At p. 2329, fn. 6.)

9. **Examples of How Court Conducted Comparative Analysis:**

Juror Fields

The court looked at the whether the reasons provided by the prosecutor for bumping a black juror named Fields, who had expressed "unwavering support for the death penalty," were credible.

At one point in the questioning, the juror indicated that the possibility of rehabilitation might be relevant to the likelihood that a defendant would commit future acts of violence, but, upon follow-up questioning, stated that while he believed anyone could be rehabilitated, this belief would not stand in the way of a decision to impose the death penalty. The juror was also questioned about his brother, whom the juror had noted in his questionnaire had a criminal history. In response to those questions, the juror stated his brother had been arrested and convicted on a number of occasions for possession of a controlled substance but he didn't really know too much about it and that it would not interfere with his service on the jury. (At pp. 2326-2327.)

When asked to provide race neutral reasons, the prosecutor claimed the juror had stated he "could only give death if he thought the a person could not be rehabilitated and he later made a comment that any person could be rehabilitated if they find God or are introduced to God and the fact that we have a concern that his religious feelings may affect his jury service in this case." (At p. 2327.)

When defense counsel pointed out that the prosecutor had mischaracterized the

juror's position on rehabilitation, the prosecutor neither defended what he said or withdrew the strike, but "suddenly" came up with the fact the juror's brother had a prior conviction." (At p. 2327.)

The court dinged the prosecutor for the mischaracterization of testimony. The court refused to credit the idea the prosecutor was simply mistaken since, in light of the juror's unequivocal support for the death penalty, unless the prosecutor had a racially-motivated reason for bumping the juror, the prosecutor would have cleared up any misunderstanding by asking further questions before striking the juror. (At p. 2327.)

The court then noted that two other white jurors and a Hispanic juror were not challenged even though they expressed similar thoughts on rehabilitation to those the prosecutor assumed juror Fields had expressed. The court observed that the prosecutor asked no further follow-up questions of these jurors about their views on rehabilitation despite the fact their remarks on rehabilitation could well have signaled a limit on their willingness to impose a death sentence. (At pp. 2327-2328.)

Editor's Note: The fact the prosecution struck other non-black jurors who expressed views similar to juror Fields was noted but considered of no import. (At p. 2328.)

The court discredited the prosecutor's second ground for dismissing the juror (e.g., that the juror had a brother with a criminal history), stating it "reeked of afterthought." The court found the explanation pretextual based not only on when it was raised but on other reasons, rendering it implausible; specifically, the juror's testimony indicated he was not close to his brother and the prosecution did not inquire further about the influence the brother's history might have had on the juror. (At p. 2328.)

Editor's Note: The court did not discount this factor as a ground for bumping a juror but its assumption that a lack of further questioning on the topic reflected a lack of concern is disturbing since there may be lots of reasons not to delve into the subject further, especially, if doing so might tend to alienate the juror or bring out information that could taint the other jurors. Moreover, as pointed out by the dissent, the prosecutor did engage in fairly significant questioning in this area: the prosecutor asked about where the offenses occurred, whether the brother had been tried or convicted, and whether it would affect the juror's ability to serve. (Dis. opn. at pp. 2356-2357.)

Editor's Note: When asked to state neutral reasons for striking a juror, be sure to state **all** the reasons you have decided to exercise your challenge. Reasons that are left unstated (i.e., because the prosecutor simply forgot to mention them at the earliest opportunity) may be viewed as prextual post hoc explanation.

The court ultimately concluded that while there was both similarities and some differences between the non-black jurors similarly situated to juror Fields, "the differences seem far from significant," particularly when read in light of Fields' voir dire testimony in its entirety. Upon that reading, Fields should have been an ideal juror in the eyes of a prosecutor seeking a death sentence, and the prosecutors' explanations for the strike cannot reasonably be accepted." (At p. 2329.)

Juror Warren

The court also did a side-by-side comparison of the answers provided by another black juror named Warren regarding his views on the death penalty (i.e., that death might be too lenient of a punishment in comparison to life imprisonment) against the answers provided by jurors who were kept on the jury. The court found

other "similarly situated" jurors gave similar answers and were kept. (At p. 2329.)

The court discounted the prosecutor's explanation that jurors with similar views were kept but juror Warren was booted because at the time juror Warren was struck, the prosecution had 10 peremptory challenges left and could afford to be liberal in using them. The court discounted this explanation because one of the jurors with similar views was kept even though that juror was passed on before juror Warren was booted. (At p. 2330.)

Moreover, the court noted that the prosecutor had asked follow-up questions of juror Warren in which he repeatedly stated he could impose death despite his views, whereas the juror who came up earlier and was kept was never even asked similar follow-up questions. (At p. 2330.)

The court also placed little emphasis on the fact that juror Warren had a brother-in-law convicted of a crime having to do with food stamps as a legitimate ground for striking juror Warren because the prosecutor never questioned juror Warren about his errant relative at all, and his "failure to ask undermines the persuasiveness of the claimed concern." Moreover, the court noted juror Warren's brother's criminal history was comparable to those of relatives of other panel members not struck by prosecutors. (At p. 2330, fn. 8.)

10. **Disparate Questioning -Use of Different "Set" of Questions Depending on Race of Juror:** If the prosecution uses a different "type" of questioning when questioning jurors of the group allegedly being discriminated against than when questioning other jurors, this can be evidence of a discriminatory state of mind.

☐ The court noted that the prosecutors' statements preceding questions about a juror's thoughts on capital punishment fell into two categories. One set of prefatory statements was cast in general terms; the other set went into more graphic detail about how the punishment would be carried out. (At p. 2334.)

☐ The defendant contended that the latter statement was given to "prompt some expression of hesitation to consider the death penalty and thus to elicit plausibly neutral grounds for a peremptory strike of a potential juror subjected to it, if not a strike for cause." The defendant argued that the more graphic prefatory statement was given to a higher proportion of blacks than whites and, thus, it provided evidence that prosecutors more often wanted blacks off the jury absent some neutral and extenuating explanation. (At p. 2334.)

☐ The court accepted the basic premise of the defendant's argument and found prosecutors disproportionately used the bland prefatory statement when questioning white jurors: 94% of the white venire panel members, but only 47% of the black venire panel members, were given the bland set. (At p. 2334.)

☐ The court rejected the State's argument that the giving of the different prefatory statements depended on whether the jurors expressed an ambivalence about the death penalty in their answers on the juror questionnaire. (At p. 2335.) The court observed that the State's explanation did not hold up because that explanation did not account for the discrepancy as accurately as the explanation that the questioning differed based on race. (At p. 2336.)

Editor's Note: The dissenting opinion does a pretty good job of skewering the majority analysis and showing the prosecution's expressed grounds did, in fact, show the jurors were questioned for the purported, rather than for a racially discriminatory, reason. (At pp. 2356-2360.)

☐ Another gambit that the court stated showed the prosecution was using its challenges improperly involved the prosecution asking members of the panel how low

a sentence they would consider imposing for murder. "Most potential jurors were first told that Texas law provided for a minimum term of five years, but some members of the panel were not, and if a panel member then insisted on a minimum above five years, the prosecutor would suppress his normal preference for tough jurors and claim cause to strike." (At p. 2337.) "Ninety-four percent of whites were informed of the statutory minimum sentence, compared [with] only twelve and a half percent of African-Americans. No explanation is proffered for the statistical disparity." (At p. 2337.) The court discounted the state's alternative explanation for why some jurors were asked the question and others were not (e.g., based on the stated opposition to the death penalty, or ambivalence about it on the questionnaires or during voir dire) because "only 27% of non-blacks questioned on the subject who expressed these views were subjected to the trick question, as against 100% of black members." (At p. 2338.)

11. **Use of Process to Attempt to Avoid Selection of Members of Group:** 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. The court found "the prosecution's decision to seek a jury shuffle when a predominant number of African-Americans were seated in the front of the panel, along with its decision to delay a formal objection to the defense's shuffle until after the new racial composition was revealed, raise a suspicion that the State sought to exclude African-Americans from the jury." (At p. 2333.)

Some Rules to Assist the Courts in Assessing Whether Challenge Was Used in a Discriminatory Manner.

12. **Failure to Inquire About Particular Subject of Alleged Concern:** "[T]he State's failure to engage in any meaningful voir dire examination on a subject the State alleges it is concerned about is evidence suggesting that the explanation is a sham and a pretext for discrimination." (At p. 2329.)

13. **Logic of the Reasons Given in Light of Accepted Trial Strategy:** "[T]he credibility of reasons given can be measured by 'how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy." (At p. 2329.)

14. **Selection of a Member of Group Allegedly Being Discriminated Against:** The court noted the prosecution had left an African-American juror on the panel. However, the court found the weight of this factor was diminished in light of the prosecution's statement that jurors who might have been unacceptable early on in jury selection would be left on when fewer challenges were available to the prosecution; when the juror was selected, 11 of the prosecution's 15 peremptories were gone and three of the persons yet to be questioned were opposed to capital punishment. (At p. 2330.)

Editor's Note: In a concurring opinion, Justice Breyer recommended reviewing the whole question of whether peremptory challenges themselves should be eliminated in order to end racial discrimination in the jury selection process. (At p. 2344.)

NEXT WEEK: JERRY COLEMAN RETURNS TO DISCUSS THE CALIFORNIA SUPREME COURT'S FIRST POST-JOHNSON/MILLER-EL DECISION AS WELL AS OTHER CASES INVOLVING BATSON/WHEELER CHALLENGES, INCLUDING THE LATEST CASES ON ALTERNATIVE REMEDIES TO DISMISSING THE PANEL WHEN SUCH VIOLATIONS ARE FOUND.

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.

Week Of	Topic	Guest Speaker	Elim of Bias
Nov. 10 2008	**RESPONDING TO *BATSON-WHEELER* CHALLENGES (PART II OF III: MAKING A GOOD RECORD)**	**Jerry Coleman San Francisco Asst District Atty**	**30 min**

This week's P&A video is a continuation of last week's 11/03/08 P&A video. Accordingly, pagination and titles pick up from where last week's memo ended.

III. Responding to an Unjustified *Batson-Wheeler* Claim in the Trial Court

It goes without saying that, for legal, ethical, and tactical reasons, no prosecutor should exercise a peremptory challenge against a juror based solely on that juror's gender, sexual orientation, or membership in a racial, ethnic, or religious group. Prosecutors who engage in discriminatory jury selection will receive condemnation, not support, from fellow prosecutors. On the other hand, a prosecutor should not refrain from challenging a juror for *permissible* reasons out of a concern that the defense will raise a disingenuous or frivolous ***Batson-Wheeler*** claim.

Note: While this P&A is geared to how a prosecutor should respond to a ***Batson-Wheeler*** claim, the principles, procedures and obligations imposed by the federal and state constitution when it comes to juror challenges "apply equally to all advocates." (***People* v. *Lenix*** (2008) 44 Cal.4th 602, 612.)

If an unjustified ***Batson-Wheeler*** challenge is raised by the defense, we respectfully recommend the following response.

A. Step One: The Prima Facie Case

1. Holding the Defense to Its Burden, Light Though It Be

There is somewhat of a disconnect between the different principles that govern what constitutes a prima facie case, i.e., an inference of discriminatory purpose in use of peremptory challenges.

On the one hand, it has often been stated that simply pointing out that the prosecutor has challenged one or more members of a particular cognizable class is insufficient to show a prima facie case of discrimination. (**See *People* v. *Box*** (2000) 23 Cal.4th 1153, 1188-1189 [insufficient showing where the "only basis for establishing a prima facie case cited by defense counsel was that the [three] prospective jurors-like defendant-were" of the same cognizable class]; ***People* v. *Farnam*** (2002) 28 Cal.4th 107, 136 -137[insufficient showing where defendant's only "stated bases for establishing a prima facie case were that (1) four of the first five peremptory challenges exercised by the prosecution were" [members of the same cognizable class], and (2) a very small minority of jurors on the panel were [members of that class]"].) This is especially true where the prosecutor has passed on a panel containing one or more members of the cognizable class in issue. (**See *People* v. *Adanandus*** (2007) 157 Cal.App.4th 496, 503; ***People* v. *Cornwell*** (2005) 37 Cal.4th 50, 69-70.)

On the other hand, as pointed out in last week's P&A memo, "the unconstitutional exclusion of even a single juror on improper grounds of racial or group bias requires the commencement of jury selection anew[.]" (***People* v. *Reynoso*** (2003) 31 Cal.4th 903, 927, fn. 8.) And, to be sure, the ultimate issue to be addressed on a ***Wheeler-Batson*** motion "is not whether there is a pattern of systematic exclusion; rather, the issue is whether a particular prospective juror has been challenged because of group bias." (***People* v. *Bell*** (2007) 40 Cal.4th 582, 598, fn. 3; ***People* v. *Avila*** (2006) 38 Cal.4th 491, 549.)

Language from the California Supreme Court in ***People* v. *Bell*** (2007) 40 Cal.4th 582, however, provides a basis for explaining these two somewhat inconsistent perspectives. The general rule is that if the defense can show a prosecutor has challenged a single juror for a discriminatory purpose, there has been a ***Batson-Wheeler*** violation. However, if the court is being asked to "draw an inference of discrimination from the fact one party has excused 'most or all' members of the cognizable group," and that is the ***sole basis*** provided for the inference to be drawn, the court is "necessarily relying on an apparent pattern in the party's challenges" (***Bell***, at p. 598, fn. 3.) In ***that*** situation, while it is possible to imagine circumstances "in which a prima facie case could be shown on the basis of a single excusal, in the ordinary case . . . to make a prima face case after the excusal of only one or two members of a group is very difficult." (***Bell***, at p. 598, fn. 3; **accord *Wade* v. *Terhune*** (9th Cir. 2000) 202 F.3d 1190, 1198.) This is because, as a practical matter, "the challenge of one or two jurors can rarely suggest a *pattern* of impermissible exclusion." (***People* v. *Bell*** (2007) 40 Cal.4th 582, 598 [and noting that where there is a very small number of panelists falling into the cognizable class, it is impossible to draw an inference of discrimination from the fact that the prosecutor challenged a large percentage of the panelists falling into the class, i.e., two of a total of three].)

With those principles in mind, the burden on the defense of making out a prima facie case is relatively light. ADA Coleman believes that prosecutors can expect a trial court to find a prima facie case when two panelists of a cognizable class are challenged or even when only a single panelist of a cognizable class has been challenged but there has been no voir dire of that panelist or the panelist is the only member of the cognizable class at issue in the jury venire.

This does not mean, however, the prosecutor should simply concede the issue of whether a prima facie case has been made out. To the contrary, "[w]hen a ***Wheeler*** motion is made, the party opposing the motion should be given an opportunity to respond to the motion, i.e., to argue that no prima facie case has been made." (***People* v. *Fuentes*** (1990) 54 Cal.3d 707, 716, fn. 5.)

Thus, it is appropriate to hold the defense to its burden at this first step, especially in light of the presumption that a prosecutor exercising a peremptory challenge is doing so on a constitutionally permissible ground. (***People v. Cleveland*** (2004) 32 Cal.4th 704, 732; ***People* v. *Farnam*** (2002) 28 Cal.4th 107, 134.)

This burden, as identified in ***People* v. *Wheeler*** (1978) 22 Cal.3d 258 is the following:

"First, as in the case at bar, 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 [reasonable inference] that such persons are being challenged because of their group association rather than because of any specific bias." (***Wheeler***, at p. 280 [with bracketed modification by P&A to reflect the holding in ***Johnson* v. *California*** (2005) 545 U.S. 162].)

Per ***Wheeler***, certain types of evidence are relevant to this showing:

(i) the prosecutor "has struck most or all of the members of the identified group from the venire" (***Wheeler***, at p. 280; ***People* v. *Bell*** (2007) 40 Cal.4th 582, 597);

(ii) the prosecutor "has used a disproportionate number of his peremptories against the group" (***Wheeler***, at p. 280;

People v. *Bell* (2007) 40 Cal.4th 582, 597-598 [and noting that a "more complete analysis of disproportionality compares the proportion of a party's peremptory challenges used against a group to the group's proportion in the pool of jurors subject to peremptory challenge" while noting that a small absolute sample size can render such an analysis uninformative];

(iii) "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" (*Wheeler*, at p. 280; *People* v. *Bell* (2007) 40 Cal.4th 582, 597 **see also** *People* **v.** *Yeoman* (2003) 31 Cal.4th 93, 115 [finding no prima facie showing because, inter alia, defense counsel made no effort to discuss prospective juror's individual characteristics]);

(iv) the prosecutor failed "to engage these same jurors in more than desultory voir dire, or indeed to ask them any questions at all" (*Wheeler*, at p. 281; *People* v. *Bell* (2007) 40 Cal.4th 582, 597 **see also** *People* **v.** *Yeoman* (2003) 31 Cal.4th 93, 115 [finding no prima facie showing because, inter alia, defense counsel made no effort to discuss nature of prosecutors' voir dire or juror's answers]); and

(v) the defendant is a member of the excluded group and "especially if in addition his alleged victim is a member of the group to which the majority of the remaining jurors belong" - although the court made it clear this is just a relevant factor and not a prerequisite to making the showing. (*Wheeler*, at p. 281; *People* v. *Bell* (2007) 40 Cal.4th 582, 597 [and, indicating at p. 599, that the fact the victim is in the same cognizable class as the challenged juror tends to rebut an inference of discrimination].)

Other circumstances that should be placed on the record:

(i) the number of members of the identified group in the jury box and panel (**see** *Miller-El* **v.** *Dretke* (2005) 545 U.S. 231, 240-241 [court may consider the total number of members of a protected class who are in the jury panel in comparison to the number of members of the class who actually sit on the jury; a large disparity supports a finding of discriminatory use];

(ii) whether the challenged juror shares characteristics of one or more unchallenged panelists belonging to groups other than the cognizable group at issue (**see** *Miller-El* **v.** *Dretke* (2005) 545 U.S. 231, 244 and next week's 11/17/08 P&A memo discussing comparative analysis);

(iii) whether there has been disparate questioning of jurors, i.e., whether panelists belonging to the cognizable group were questioned in a different manner than panelists not belonging to the cognizable group (**see** *Miller-El* **v.** *Dretke* (2005) 545 U.S. 231, 255-257)

(iv) any evidence of the historical practice of the prosecutor or the prosecutor's office of discriminatory jury selection practice (*Miller-El* **v.** *Dretke* (2005) 545 U.S. 231, 253, 264-266)

2. What should a prosecutor do if it is not clear that the challenged juror is actually a member of the cognizable class to which the defense claims the juror belongs?

Courts have long recognized the dilemma of trying to figure out whether a juror fits into a particular cognizable class. As pointed out in *Wheeler* itself, this dilemma arises because "veniremen are not required to announce their race, religion, or ethnic origin when they enter the box, and these matters are not ordinarily explored on voir dire. The reason, of course, is that the courts of California are or should be blind to all such distinctions among our citizens." (**Id**. at p. 263; **accord** *People* **v.** *Trevino* (1985) 39 Cal.3d 667, 687; *People* **v.** *Motton* (1985) 39 Cal.3d 596, 603.) Asking jurors to identify their race or ethnicity can be awkward or offensive. (**See** *People* **v.** *Trevino* (1985) 39 Cal.3d 667, 687 [noting counsel's decision to make the *Wheeler* motion on the basis of easily identifiable surnames, rather than risk juror animosity in quizzing selected individuals as to whether or not they are Mexican-American, was proper]; *People* **v.** *Motton* (1985) 39 Cal.3d 596, 603 [noting while "direct questions on racial identity would help to make a clear and undisputable record" such questions are not required because, inter alia," such questions may be offensive to some jurors and thus are not ordinarily asked on voir dire"].)

This dilemma arises not just in assessing whether the challenged juror belongs to a particular class but in assessing the cognizable class of **all** the other panelists and jurors. The latter assessment is necessary, of course, in order to effectively utilize the mechanisms for determining whether discriminatory challenges are being made, i.e., disparate questioning analysis, comparative analysis, disproportionality analysis, etc.

Moreover, the dilemma of trying to figure out whether a juror fits into a particular cognizable class is only going to become more frequent as the various ethnic and racial groups that populate California intermarry. Indeed, it is questionable whether the current framework for analyzing ***Batson-Wheeler*** challenges can even rationally be applied when it comes to multiracial or multiethnic jurors.

Nevertheless, if the prosecutor has doubts about whether the challenged juror or other members of the panel belong to the cognizable class identified by the defense, the issue should be raised.
The burden is clearly on the party making the ***Batson-Wheeler*** motion to establish the juror is a member of cognizable class at issue. (***Wheeler***, at p. 280.) And if the class membership of the other members of the venire is going to be relied on by the party making the motion to support a claim the other party is using challenges in a discriminatory fashion, the burden would remain on the party making to the motion to establish that class membership. (**See *People* v. *Bell*** (2007) 40 Cal.4th 582, 600.) Conversely, if the party who initially challenged the juror wants to rely on the class membership of the other members of the venire to defeat a ***Batson-Wheeler*** claim, then it would be incumbent on that party to establish the class membership of the jurors in the venire or on the eventual jury.
Sometimes, this burden can be met because, notwithstanding the implication in ***Wheeler*** that such questions might be inappropriate, the juror questionnaires ask individuals to identify their racial, ethnic, or religious background. Moreover, sometimes is unnecessary, at least in the context of alleged racial discrimination, to "establish the true racial identity of the challenged jurors" since discrimination is more often based on appearances than verified racial descent, and a showing that the party challenging the jurors was systematically excusing persons based on "appearances" could still establish a prima facie case. (***People* v. *Bell*** (2007) 40 Cal.4th 582, 599; ***People* v. *Motton*** (1985) 39 Cal.3d 596, 604.)

However, membership in some cognizable classes is difficult to ascertain. For example, in ***People* v. *Bell*** (2007) 40 Cal.4th 582, a case where the defense attempted to claim the prosecution was discriminating against lesbians, the court pointed out that "sexual orientation is usually not so easily discerned from appearance. Without any definite indication that the challenged prospective jurors either were lesbians or that the prosecutor believed them to be such, no prima facie case of discrimination against lesbians as a group can be made." (**Id**. at p. 599.) Similarly, in ***In re Freeman*** (2006) 38 Cal.4th 630, a case where the defense tried to claim the prosecution was discriminating against Jews, the ***Batson-Wheeler*** claim failed because there was an insufficient showing that challenged prospective jurors either were Jewish or were thought to be so by the prosecutor. (**Id**. at pp. 644-645.)

Unfortunately, the courts do not provide much guidance in how to ascertain membership in a cognizable class short of directly asking the juror. (**See** ***People* v. *Wheeler*** (1978) 22 Cal.3d 258, 263.) If such a question needs to be asked, it may be better to have the court make the inquiry.

3. Should the prosecutor make sure that the record includes facts that would undermine an inference of discrimination?

A prosecutor should point out the **absence** of evidence permitting an inference of discrimination if the trial court fails to note such an absence for the record.

a. Defendant Not a Member of the Cognizable Class

If the defendant is not a member of the cognizable class at issue, this fact should be reflected in the record. (**See *People* v. *Bell*** (2007) 40 Cal.4th 582, 599 [considering fact defendant was ***not*** a member of any of the cognizable classes at issue in finding the prosecutor's challenges created no inference of discrimination].
If the defense is claiming that the prosecutor has excluded members of a sub-group of a cognizable class (i.e., African-American women) but the prosecutor has not excluded members of the parallel sub-group (i.e., African-American men), this fact should be pointed out. (**See *People* v. *Bell*** (2007) 40 Cal.4th 582, 599 [considering fact prosecutor did not exercise peremptory challenges against most or all members of "parallel" group (African-American men) of the cognizable class at issue (African-American women) in finding the prosecutor's challenges created no inference of discrimination].)

b. Victim is a Member of the Cognizable Class

If the victim was a member of cognizable class at issue, this fact should be reflected in the record. (**See *People* v. *Bell*** (2007) 40 Cal.4th 582, 599 [considering fact victim was a member of the cognizable class at issue in finding the prosecutor's challenges created no inference of discrimination].)

c. Challenges Have Not Be Made in a Disproportionate Manner

The fact that a prosecutor has **not** used a disproportionate number of his or her challenges against members of the cognizable class is a factor that weighs against finding an inference of discrimination. (**See *People* v. *Bell*** (2007) 40 Cal.4th 582, 598 [considering fact prosecutor used only two of 16 peremptory challenges against members of the cognizable class at issue in finding the prosecutor's challenges created no inference of discrimination].)

d. No Desultory Questioning

The fact a prosecutor has not engaged in "desultory questioning" of members of the cognizable class at issue is a factor that weighs against finding an inference of discrimination. (**See *People* v. *Bell*** (2007) 40 Cal.4th 582, 598 [considering fact prosecutor did not engage members of the cognizable class at issue in "desultory" questioning in finding no inference of discrimination].)

e. The Challenged Jurors Shared Not Only Membership in the Cognizable Class But Other Characteristics
A prosecutor should point out that the jurors who were removed shared more in common (when it came to characteristics relevant to the prosecutor's concerns about their "favorability" as jurors) than just membership in the cognizable class. (**See *People* v. *Bell*** (2007) 40 Cal.4th 582, 599 [considering fact that defense failed to show that in respects other than their ethnic background or national origin the challenged members of the cognizable class were especially heterogeneous in finding no inference of discrimination].)

f. The Prosecution Has Passed on a Panel That Includes Members of the Cognizable Class

If a prosecutor has passed on a panel that includes members of the cognizable class, this fact should be mentioned as it undercuts an inference of discrimination. (**See *People* v. *Carasi*** (2008) 44 Cal.4th 1263, 1294-1295 [no prima facie case of discrimination against females shown because, inter alia, the prosecutor repeatedly passed on panels containing numerous women].)

4. Should the prosecutor state his or her reasons for challenging a juror if the trial court finds the defense has failed to make a prima facie showing?

Unless the court finds there has been a prima facie case made out at the first step, there is no obligation for the prosecutor to disclose any reasons for challenging the panelists, and a trial court is not required to evaluate them. (***People* v. *Carasi*** (2008) 44 Cal.4th 1263, 1292; ***People* v. *Zambrano*** (2007) 41 Cal.4th 1082, 1104-1105 & fn. 3; ***People* v. *Bell*** (2007) 40 Cal.4th 582, 596.)

It is, however, not only permissible, but recommended for a prosecutor to put neutral reasons on the record *even before* the trial judge makes its determination that a prima facie case has not been made out by the defense. (***People* v. *Bonilla*** (2007) 41 Cal.4th 313, 343, fn. 13; ***People* v. *Adanandus*** (2007) 157 Cal.App.4th 496, 500.)

Indeed, even if a court makes a determination that no prima facie case has been made, it is still important for the prosecutor to put reasons on the record. (**See e.g.**, ***People* v. *Farnam*** (2002) 28 Cal.4th 107, 135.) This is because it is possible that reviewing courts will find that the court erred in concluding no prima facie case was met (especially since the United States Supreme Court recently found that the standard California courts were using the wrong standard for prima face case -**see *Johnson* v. *California*** (2005) 545 U.S. 162), and the failure to put any reasons on the record ensures that the case will have to be sent back for a remand. On the other hand, if reasons were placed on the record, the appellate court may be able to consider them in finding the failure to find a prima facie showing was harmless error.

Moreover, putting the reasons on the records avoids the problem of having to remember what the reasons were for excusing a juror years later. (**See *Paulino* v. *Harrison*** (9th Cir. 2008) 542 F.3d 692, 700; ***Yee* v. *Duncan*** (9th Cir. 2006) 441 F.3d 851.)

B. Step Two: Stating the Grounds for the Challenges

1. Should the prosecutor ask to proffer his or her reasons for excluding a juror outside the presence of the defendant and defense counsel?

Prosecutors often are concerned that in responding to a ***Batson- Wheeler*** challenge, they will be forced to reveal jury-picking and/or trial strategies. Thus, there is an instinctual desire to want to explain the choices in an ex parte in camera proceeding.

In general, however, it is error for a trial court to allow a prosecutor to explain his or her reasons for excluding a particular juror outside the presence of defense counsel and defendant. (**See *People* v. *Ayala*** (2000) 24 Cal.4th 243, 259-269 [prosecutor's multiple ex parte hearings for justifications were error, albeit harmless] and dis. opn, J. George [hearings were prejudicial error]; ***United States* v. *Thompson*** (9th Cir. 1987) 827 F.2d 1254, 1260 [reversible error to hold ex parte hearing on prosecutor's explanations].)

The Ninth Circuit does recognize a limited exception to this rule in "those instances in which disclosing the reasons for excluding jurors would reveal the prosecutor's case strategy[.]" (***United States* v. *Alcantar*** (9th Cir. 1990) 897 F.2d 436, 438, fn. 2; ***United States* v. *Thompson*** (9th Cir. 1987) 827 F.2d 1254, 1259.)

And the California Supreme Court appears to recognize this very limited exception as well. In ***People* v. *Ayala*** (2000) 24 Cal.4th 243, for example, the court cited to ***Georgia* v. *McCollum*** (1992) 505 U.S. 42, 58 for the proposition that "[i]n the rare case in which the explanation for a challenge would entail confidential communications or reveal trial strategy, an in camera discussion can be arranged." (***Ayala*** at p. 262.) The ***Ayala*** court held, however, that the exception did not apply when all that was revealed, as in the case before it, were jury selection strategies. (**Ibid.**)

2. State <u>all</u> grounds for the challenge

While peremptory challenges are often based on instinct and it can sometimes be hard to articulate the reason for removing a juror, "a prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives." (***People* v. *Lenix*** (2008) 44 Cal.4th 602, 624.)
Prosecutors should "provide as complete an explanation for their peremptory challenges as possible." (***People* v. *Lenix*** (2008) 44 Cal.4th 602, 624.)

The fact a trial or reviewing court can think up reasons for why the prosecutor may have wanted to challenge a juror, "will not satisfy the prosecutors' burden of stating a racially neutral explanation." (***People* v. *Lenix*** (2008) 44 Cal.4th 602, 625.)

3. Should a prosecutor asked the trial court to confirm the prosecutor's observations regarding a juror's demeanor?

Although it may be awkward, if a prosecutor is basing a challenge to a juror on the basis of the juror's demeanor, it is important to ask whether the judge made the same observations as the prosecutor. As pointed out in Justice Moreno's concurring opinion in ***People* v. *Lenix*** (2008) 44 Cal.4th 602, "[w]hen a trial judge validates a prosecutor's challenge based on the prospective juror's demeanor, and makes clear that such demeanor is the primary reason for validating the challenge, then it is difficult to imagine any circumstance under which an appellate court would second-guess that judgment." (***Lenix***, at p. 634, conc. opn., J. Moreno.) Conversely, if the trial judge is not asked to validate the observation, an appellate court will not presume that the trial judge credited the prosecutor's explanation. (**See *Snyder***

v. *Louisiana* (2008) 128 S.Ct. 1203, 1209; ***People* v. *Lenix*** (2008) 44 Cal.4th 602, 619; **cf.**, ***People* v. *Adanandus*** (2007) 157 Cal.App.4th 496, 510 [where neither trial court nor defense counsel contradicted prosecutor's account of challenged jurors' demeanor or manner of responding to his questions, this suggests the prosecutor's description is accurate].)

4. Should the prosecutor place on the record why he or she kept jurors who were, at least, superficially similarly situated to the challenged panelist?

If the defense has relied on a comparative analysis in attempting to establish a prima facie case, it will be necessary to explain why a juror who the defense is claiming is similarly situated is not similarly situated.

If the defense has not relied on comparative analysis but there is a concern that the judge may do so, it may be wise to anticipate this analysis and short circuit it by explaining the reasons why jurors who might appear to be similarly situated are not, in fact, similarly situated.

Conversely, a prosecutor may wish to point out the fact that other panelists, *regardless of* whether or not they were members of the cognizable class at issue, were *also* challenged on the same ground or grounds as the panelist whom the defense is claiming was improperly excused. (**See *People* v. *Watson*** (2008) 43 Cal.4th 652, 680 [noting prosecutor challenged both jurors who were similarly situated regarding their exposure to gangs].)

5. Should the prosecutor point out that the victims or prosecution witnesses are members of the cognizable class the defense is claiming is being discriminated against?

In ***People* v. *Bell*** (2007) 40 Cal.4th 582, the court held the fact the victims in a criminal case are members of the same cognizable class as the challenged juror can help show that defendant did not meet his burden of raising an inference of discrimination. However, the court also said it discussed this circumstance not because it affirmatively showed the absence of discrimination but only as an indication of why defendant did not make a prima facie showing at step on. (**Id**. at p. 600.)

Nevertheless, there is no harm in pointing out the fact the victims or witnesses are of the same cognizable class as the challenged juror as it provides some evidence that would tend to substantiate a lack of motive on the part of the prosecutor to exclude members of the cognizable class at issue.

6. Should the prosecutor point out the defendant is not a member of the cognizable class the defense is claiming is being discriminated against?

Although a defendant may properly bring a ***Batson- Wheeler*** motion based on a prosecutor's removal of members of a cognizable class to which the defendant does not belong, the fact the defendant is not a member of the cognizable class at issue "remains a subject of proper consideration by the court."

(***People* v. *Farnam*** (2002) 28 Cal.4th 107, 135.)

7. Should the prosecutor point out he or she is a member of the cognizable class the defense is claiming is being discriminated against?

The fact a prosecutor is a member of the same cognizable class as the challenged juror does not insulate a prosecutor from being found to have exercised his or her challenges in a discriminatory fashion. Although as a practical matter, a defense attorney is less likely to use a ***Batson- Wheeler*** challenge in an attempt to surreptitiously prejudice the jury against the prosecutor when the juror being challenged and the prosecutor are of the same cognizable class, P&A has found no case indicating that the fact the prosecutor is of the same or different cognizable class as the challenged juror is relevant. All prosecutors (regardless of the cognizable class to which they belong) are entitled to the presumption that they are exercising their challenges in a constitutional manner.

8. Should the prosecutor point out that he or she passed on the panel while it contained members of the cognizable class at issue?

If a prosecutor has passed on a panel that includes members of the cognizable class at issue, this should be pointed out. (**See *People* v. *Carasi*** (2008) 44 Cal.4th 1263, 1294-1295.). The fact a prosecutor has passed on a juror who is a member of the cognizable class in issue, while not conclusive on the issue of good faith, is "an indication of good faith in exercising peremptories, and an appropriate factor for the trial judge to consider in ruling on a ***Wheeler*** objection"].) (***People* v. *Turner*** (1994) 8 Cal.4th 13, 168; ***People* v. *Adanandus*** (2007) 157 Cal.App.4th 496, 511; ***People* v. *Irvin*** (1996) 46 Cal.App.4th 1340, 1355.)

If a prosecutor has passed on a panel that includes members of a different sub-group of the same cognizable class, this should be pointed out as well. For example, in ***People* v. *Bell*** (2007) 40 Cal.4th 582, the court noted that the fact the prosecutor did not exercise peremptory challenges against African-American males tended to undermine a prima facie showing that the prosecutor was exercising challenges against African-American females with a discriminatory purpose. (**Id**. at p. 599.)

9. What other factors should prosecutors consider putting before the court?

a. Prior Nondiscriminatory History: If the prosecutor has a prior history of accepting jurors belonging to the cognizable class at issue, this should be brought to the attention of the court.

b. Prior Office Training: If the prosecutor has evidence that his office had condemned use of discriminatory challenges, this should be brought to the attention of the court. (**Cf**., ***Miller-El* v. *Dretke*** (2005) 545 U.S. 231, 253, 264-266 [considering existence of office training *approving* use of discriminatory challenges].)

C. Step Three: Responding to the Judge's Concerns

1. Respond to any issues raised by the judge

If the defense has not supported a ***Batson- Wheeler*** claim with one or more of the relevant factors but the judge asks about the factors, the prosecutor should address those concerns.

2. Make sure the record reflects the necessary findings by the trial judge

The prosecutor should make sure the following is discernable from the record:

"1) the trial court considered the prosecutor's reasons for the peremptory challenges at issue and found them to be race-neutral; 2) those reasons were consistent with the court's observations of what occurred, in terms of the panelist's statements as well as any pertinent nonverbal behavior; and 3) the court made a credibility finding that the prosecutor was truthful in giving race-neutral reasons for the peremptory challenges." (***People* v. *Lenix*** (2008) 44 Cal.4th 602, 621.)

3. Should a prosecutor ask the trial judge to take note of the final composition of the jury?

As pointed out in ***People* v. *Lenix*** (2008) 44 Cal.4th 602, "[w]hen a ***Wheeler/Batson*** motion has been made, it is helpful for the record to reflect the ultimate composition of the jury." (**Id**. at p. 610., fn. 6.)

If the prosecutor passed on a final jury panel that includes a member of the cognizable class allegedly being improperly excluded, this "strongly suggests" that the prosecutor was not motivated in exercising challenges by the panelist's membership in the class. (***People* v. *Lenix*** (2008) 44 Cal.4th 602, 629; ***People* v. *Kelly*** (2007) 42 Cal.4th 763, 780; ***People* v. *Cornwell*** (2005) 37 Cal.4th 50, 69-70; ***People* v. *Reynoso*** (2003) 31 Cal.4th 903, 926; **but see *People* v. *Snow*** (1987) 44 Cal.3d 216, 226 ["although 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, it is not a conclusive factor"]; ***Brinson* v. *Vaughn*** (3d Cir.2005) 398 F.3d 225, 233 ["a prosecutor may violate ***Batson*** even if the prosecutor passes up the opportunity to strike some African American jurors" and "a prosecutor's decision to refrain from discriminating against some African American jurors does not cure discrimination against others"].)

NEXT WEEK: THE FINAL PART OF OUR SERIES ON RESPONDING TO *BATSON-WHEELER* CHALLENGES WHEREIN ADA JERRY COLEMAN FOCUSES ON RECENT DEVELOPMENTS IN THE SUBSTANTIVE CASE LAW SURROUNDING SUCH CHALLENGES.

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.