POINTS AND AUTHORITIES

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Week Of	Topic	Guest Speaker	Elim of Bias
Nov. 3, 2008	BATSON-WHEELER CHALLENGES: PREPARING FOR AND PRE-EMPTING A BATSON-WHEELER MOTION	Jerry Coleman San Francisco Asst District Atty	30 Minutes

I. BATSON-WHEELER Basics

A. Constitutional Basis

"[T]he use of peremptory challenges to remove prospective jurors on the sole ground of group bias violates the right to trial by jury drawn from a representative cross-section of the community under article I, section 16, of the California Constitution." (People v. Wheeler (1978) 22 Cal.3d 258, 276-277.)

"[T]he Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant." (Batson v. Kentucky (1986) 476 U.S. 79, 89.)

B. Basic Procedure When a Claim is Made That an Attorney is Exercising His or Her Challenges in an Unconstitutionally Discriminatory Manner

For both federal and state constitutional claims, there is a three-step inquiry whenever a Batson-Wheeler challenge is made. (People v. Lenix (2008) 44 Cal.4th 602, 612-613.)

1. First Step

a. The party objecting to the challenge must make out a prima facie case "by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose." (Johnson v. California (2005) 545 U.S. 162, 168.)

b. Although the term "systematic exclusion" is sometimes used "to describe a discriminatory use of peremptory challenges,...[t]he term is not apposite in the Wheeler context, for a single discriminatory exclusion may violate a defendant's right to a representative jury." (People v. Fuentes (1990) 54 Cal.3d 707, 716, fn. 4; accord, People v. Montiel (1993) 5 Cal.4th 877, 909; see also People v. Reynoso (2003) 31 Cal.4th 903, 927, fn. 8 ["the unconstitutional exclusion of even a single juror on improper grounds of racial or group bias requires the commencement of jury selection anew"]; but see the 11/17/08 P&A memo [discussing how relying on a single challenge to a member of the cognizable group will rarely be sufficient, by itself, to create an inference of discrimination].)

c. When a Batson-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.)

d. "The three-step Batson analysis, however, is not so mechanistic that the trial court must proceed through each discrete step in ritual fashion." (People v. Adanandus (2007) 157 Cal.App.4th 496, 500.)

e. A trial court may invite the prosecutor to state neutral reasons for the challenged strikes before announcing its finding on whether a defendant met the first step of the Batson test by making out a prima facie case of discrimination. (People v. Bonilla (2007) 41 Cal.4th 313, 343, fn. 13; People v. Adanandus (2007) 157 Cal.App.4th 496, 500.) Indeed, the California Supreme Court has stated "it is the ***better*** practice for the trial court to have the prosecution put on the record its race-neutral explanation for any contested peremptory challenge, even when the trial court may ultimately conclude no prima facie case has been made out. This may assist the trial court in evaluating the challenge and will certainly assist reviewing courts in fairly assessing whether any constitutional violation has been established." (People v. Bonilla (2007) 41 Cal.4th 313, 343, fn. 13; People v. Adanandus (2007) 157 Cal.App.4th 496, 500.) (Emphasis added by P&A.)

2. Second Step

Once a prima facie case is made, the "'burden shifts to the [party who originally challenged the juror] to explain adequately the racial [or other cognizable class] exclusion' by offering permissible...neutral justifications for the strikes." (Johnson v. California (2005) 545 U.S. 162, 168 [bracketed portions and other modifications added by P&A].)

The party who originally challenged the juror must then provide a "'clear and reasonably specific' explanation of his 'legitimate reasons' for exercising the challenges." (People v. Lenix (2008) 44 Cal.4th 602, 613, citing to Batson v. Kentucky (1986) 476 U.S. 79, 98, fn. 20.) "Certainly a challenge based on racial prejudice would not be supported by a legitimate reason." (People v. Lenix (2008) 44 Cal.4th 602, 613.)

On the other hand, a legitimate reason is simply "one that does not deny equal protection" and "a prosecutor may rely on any number of bases to select jurors[.]" (People v. Lenix (2008) 44 Cal.4th 602, 613, citing to Purkett v. Elem (1995) 514 U.S. 765, 769.)

Thus, "[t]he justification need not support a challenge for cause, and even a 'trivial' reason, if genuine and neutral, will suffice." (People v. Lenix (2008) 44 Cal.4th 602, 613.) "A prospective juror may be excused based upon facial expressions, gestures, hunches, and even for arbitrary or idiosyncratic reasons." (Ibid; accord, People v. Adanandus (2007) 157 Cal.App.4th 496, 506.) The "'second step of this process does not demand an explanation that is persuasive, or even plausible'; so long as the reason is not inherently discriminatory, it suffices." (Rice v. Collins (2006) 546 U.S. 333, 338.)

Burden of Production: The burden in this second step is merely "the burden of production." (Paulino v. Harrison (9th Cir. 2008) 542 F.3d 692, 699.) **Editor's Note**: For a more thorough discussion of what reasons are, or are not, legitimate, see the 11/17/08 P&A memo.

3. Third Step

If a "neutral explanation is tendered, the trial court must then

decide...whether the opponent of the strike has proved purposeful racial [or other cognizable group] discrimination." (Johnson v. California (2005) 545 U.S. 162, 168 [bracketed portion added by P&A].) The proper focus is on "the subjective genuineness of the race-neutral reasons given for the peremptory challenge, not on the objective reasonableness of those reasons." (People v. Reynoso (2003) 31 Cal.4th 903, 924; People v. Adanandus (2007) 157 Cal.App.4th 496, 506.)

At the third step, "the issue comes down to whether the trial court finds the prosecutor's race-neutral explanations to be credible. Credibility can be measured by, among other factors, the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy." (People v. Lenix (2008) 44 Cal.4th 602, 613, citing to Miller-El v. Cockrell (2003) 537 U.S. 322, 339 [discussed in depth in 8/01/05 P&A memo].) The trial court has a duty to "assess the plausibility" of the prosecutor's proffered reasons for striking a potential juror, "in light of all evidence with a bearing on it." (People v. Lenix (2008) 44 Cal.4th 602 at p. 625.)

In assessing credibility, the court draws upon its contemporaneous observations of the voir dire. It may also rely on the court's own experiences as a lawyer and bench officer in the community, and even the common practices of the advocate and the office who employs him or her." (People v. Lenix (2008) 44 Cal.4th 602, 613, citing to People v. Wheeler (1978) 22 Cal.3d 258, 282.)

"In addition, race-neutral reasons for peremptory challenges often invoke a juror's demeanor (e.g., nervousness, inattention), making the trial court's first-hand observations of even greater importance. In this situation, the trial court must evaluate not only whether the prosecutor's demeanor belies a discriminatory intent, but also whether the juror's demeanor can credibly be said to have exhibited the basis for the strike attributed to the juror by the prosecutor." (Snyder v. Louisiana (2008) 128 S.Ct. 1203, 1208; People v. Lenix (2008) 44 Cal.4th 602, 613.)

Although a judge may not be able to observe every gesture, expression, or interaction relied upon by the prosecutor (i.e., the judge has a different vantage point and may have, for example, been looking at another panelist or making a note when the described behavior occurred), the trial "court must be satisfied that the specifics offered by the prosecutor are consistent with the answers it heard and the overall behavior of the panelist." (People v. Lenix (2008) 44 Cal.4th 602, 625.) "The record must reflect the trial court's determination on this point (see Snyder, supra, 128 S.Ct. at p. 1209), which may be encompassed within the court's general conclusion that it considered the reasons proffered by the prosecution and found them credible." (People v. Lenix (2008) 44 Cal.4th 602, 625-626.)

"Both court and counsel bear responsibility for creating a record that allows for meaningful review." (People v. Lenix (2008) 44 Cal.4th 602, 621.)

"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. But when 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." (People v. Stevens (2007) 41 Cal.4th 182, 193; People v. Silva (2001) 25 Cal.4th 345, 386.)

If the court is going to deny the challenge, it "should be discernable from the record that "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.)

"The ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike." (People v. Lenix (2008) 44 Cal.4th 602, citing to Rice v. Collins (2006) 546 U.S. 333, 338; see also Yee v. Duncan (9th Cir. 2006) 463 F.3d 893, 895, citing Purkett v. Elem (1995) 514 U.S. 765, 768.)

II. Anticipating the Batson-Wheeler Challenge

A. Request Batson-Wheeler Claims Be Made Outside Jury's Presence

It is a commonly held belief among prosecutors that some defense attorneys do not act in good faith when making a claim the prosecutor is exercising his or her peremptory challenges in a discriminatory fashion. Prosecutors often assume, especially when neutral reasons for removing a particular juror are obvious, that the defense attorney is actually making the Batson-Wheeler claim not because of an honest belief the prosecutor has improperly exercised a peremptory challenge but as a tactic to render the prosecutor "gun shy" in exercising peremptory challenges against members of a cognizable class. The tactic is premised on the idea that the fear of being subjected to a Batson-Wheeler challenge (and the attendant possibility that it will be erroneously granted) will dissuade the prosecutor from exercising a challenge against any other panelist belonging to the same cognizable class even though those other panelists might be unfavorably disposed toward the prosecution. An even more nefarious reason that is sometimes given to explain why the defense is making an apparently disingenuous Batson-Wheeler claim is that it is done in an attempt to prejudice the jury against the prosecutor by implying the prosecutor is a bigot or racist. Finally, it is sometimes speculated that the disingenuous Batson-Wheeler claim is made in order to discover the prosecutor's strategy in selecting jurors and, indirectly, the prosecutor's trial strategy.

Certainly, the belief that defense attorneys sometimes use Batson-Wheeler claims for tactical purposes may arise simply from a difference in perspective. A juror who appears to the prosecutor to be a "bad juror" may appear to the defense counsel as a juror whom the prosecutor should, but for the juror's membership in a cognizable group, want to keep on the jury (although from a purely tactical standpoint, if, in fact the prosecutor is removing jurors who would be predisposed to the prosecution for reasons of irrational prejudice, the defense should want to encourage such challenges). On the other hand, some defense attorneys appear to be much more prone than others to making Batson-Wheeler challenges, either in general or at least when appearing in front of a judge who has a reputation for giving such challenges a generous reception.

If a prosecutor is aware that a particular defense attorney has a history of making apparently tactical Batson-Wheeler challenges and/or making the challenges before the jury in a manner calculated to prejudice the jury against the prosecution, is there anything a prosecutor can do?

As a matter of course (not just when there is a belief the defense attorney may attempt to use Batson-Wheeler challenges in an improper fashion), the prosecutor should ask that any Batson-Wheeler claim made by either party be done at sidebar or otherwise outside the presence of the jury. (See, e.g., People v. Willis

(2002) 27 Cal.4th 811, 822 [noting the ABA recommends that "[a]ll challenges, whether for cause or peremptory, should be addressed to the court outside the presence of the jury, in a manner so that the jury panel is not aware of the nature of the challenge, the party making the challenge, or the basis of the court's ruling on the challenge," but recognizing that this procedure may be cumbersome and alternative procedures may be used to help avoid any prejudice to counsel making the challenge].) Requiring that Batson-Wheeler motions be made at sidebar helps ensure that (i) the jury in general will not be "poisoned" against the attorney accused of improperly exercising a juror challenge; and (ii) helps keep viable the option of reseating a juror by minimizing the possibility the reseated juror will hold his or her initial removal against the attorney who asked that the juror be removed. (See People v. Willis (2002) 27 Cal.4th 811, 822.)

If the defense attorney has a particularly egregious habit of abusing Batson-Wheeler, a prosecutor may want to be ready with evidence (i.e., transcripts) of such past abuse to bring to the attention of the court in support of a request that Batson-Wheeler motions be made outside the presence of the jury.

B. Ask Court to Use Juror Questionnaires

For entirely plausible reasons, prosecutors do not typically ask the exact same questions of every single juror. Because of time constraints, a prosecutor has to pick and choose which questions will be most likely to elicit information from a particular juror or address the prosecutor's concerns raised by the court's questioning of the juror. A prosecutor may choose not to waste time asking questions of jurors the prosecutor knows he or she will definitely keep or bump. A prosecutor may not want to ask questions of a juror the prosecutor likes for fear that too much questioning might elicit answers highlighting the juror's pro-prosecution bent to the defense. A prosecutor may want to ask additional questions of a juror who is difficult to read or who gives answers that demand follow-up questions.

That being said, trial courts are empowered to consider disparate questioning (i.e., asking different types of questions of the jurors depending on whether they fall into the cognizable class at issue) or perfunctory questioning (i.e., asking fewer or no questions of jurors in the cognizable class) in assessing a prosecutor's motive when a Batson-Wheeler motion is made. With that in mind, prosecutors should consider asking for the use of juror questionnaires that ask identical questions of each juror. Questionnaires also can provide support to help show that a panelist was removed because the remainder of the pool of panelists looked better or because the next juror in the box was a significantly better juror for the prosecution. Finally, questionnaires can help avoid a claim that questioning was perfunctory. (See People v. Bell (2007) 40 Cal.4th 582, 598, fn. 5 [quoting the trial court for the proposition that when an extensive questionnaire is used with every juror, "it can never be a perfunctory examination"].)

If a trial court is not inclined to use questionnaires, be cognizant that disparate questioning of jurors (especially in the absence of any explanation for disparate questioning) may be seized upon, fairly or unfairly, by the trial court or the reviewing court as evidence of a discriminatory purpose. "The 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." (Green v. LaMarque (9th Cir. 2008) 532 F.3d 1028, 1033, citing Miller-El v. Dretke (2005) 545 U.S. 231, 246.)

C. Ask the Court for Sufficient Time to Conduct Voir Dire - Have Lenix at Hand

The less opportunity the attorneys have to question the juror, the more difficult it will be for the judge to assess the real reason a juror has been challenged. A prosecutor might want to have a bench memorandum ready with the following information derived from People v. Lenix (2008) 44 Cal.4th 602, when appearing in front of judges who are reluctant to allow a significant amount of time on voir dire:

> "Trial courts ***must*** give advocates the opportunity to inquire of panelists and make their record. If the trial court truncates the time available or otherwise overly limits voir dire, unfair conclusions might be drawn based on the advocate's perceived failure to follow up or ask sufficient questions. Undue limitations on jury selection also can deprive advocates of the information they need to make informed decisions rather than rely on less demonstrable intuition." (People v. Lenix (2008) 44 Cal.4th 602, 625, emphasis added.)
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> In Lenix, the California Supreme Court recognized that, under Code of Civil Procedure section 223, a criminal trial court may limit counsel's questioning of prospective jurors and "may specify the maximum amount of time that counsel for each party may question an individual juror, or may specify an aggregate amount of time for each party, which can then be allocated among the prospective jurors by counsel." (Id., at p. 625, fn. 16.) Moreover, the Lenix court recognized that "the exercise of discretion by trial judges in conducting voir dire is accorded considerable deference by appellate courts." (Id., at p. 625, fn. 16.) However, the Lenix court stated: "in exercising that discretion, trial courts should seek to balance the need for effective trial management with the duty to create an adequate record and allow legitimate inquiry." (Id., at p. 625, fn. 16.)

Editor's Note: Providing the court with a copy of Lenix may be even more beneficial since not only does the decision provide authority for allowing adequate voir dire time, it provides an excellent guideline for how courts and attorneys should handle a Batson-Wheeler challenge. Indeed, in this regard, Lenix is one of the most valuable and insightful opinions ever written on the subject.

D. Think About and Be Prepared to Explain the Reasons for Challenging a Juror

Gut instinct may be the best indicator of whether a panelist will make a good juror and that is a genuinely neutral reason for removing a juror. Be aware, however, that the less concrete the grounds provided for removing a juror, the more likely it is that those grounds will be scrutinized with a skeptical eye by a judge or reviewing court.

Make notes of the demeanor, attitude, and other intangibles of all jurors, not just those who seem like they might be adverse to the prosecution. This is especially important when the judge allows limited or no voir dire and will help the judge see beneath superficial similarities between jurors who were kept and those whom the prosecutor challenged.

E. Notes on the Race, Ethnicity, or Gender of the Jurors

In the case of Miller-El v. Dretke (2005) 545 U.S. 231, the fact a prosecutor had taken notes regarding the juror's race was used as evidence of a racially motivated intent. (Id., at p. 266.) And in Green v. LaMarque (9th Cir. 2008) 532 F.3d 1028, the Ninth Circuit, citing to Miller-El, held that the fact the prosecutor had noted the race of each venire member next to the member's name provided additional evidence of racial discrimination.

However, the Green court completely missed the significance of the note-taking regarding the juror's race in Miller-El. In Miller-El, the prosecutor's own notes identifying every potential juror by race were used to show the prosecutor was following an office policy of emphasis on race. The notes were significant because, at the time of the trial in Miller-El, there was no reason to note the juror's race; Batson was only decided after the defendant in Miller-El was tried. (Miller-El, at p. 264, fn. 38.) In Green, of course, the Batson-Wheeler principles were well-established and there was every reason to note a juror's membership in a cognizable class.

As pointed out in People v. Lenix (2008) 44 Cal.4th 602, a case where the court *did* understand the significance of the race-identifying notes in Miller-El, the court emphasized that "post-Batson, recording the race of each juror is an important tool to be used by the court and counsel in mounting, refuting or analyzing a Batson challenge." (Lenix, at p. 617, fn. 12.)

Although prosecutors should strive for a color-blind approach to jury selection, in light of the fact a prosecutor's jury selection decisions may be reviewed years later, purposefully omitting to note the membership of a juror in a cognizable class because of the analysis in Green is like teaching a child to smoke based on claims made in a 1950's cigarette ad. (See United States v. Philip Morris USA, Inc. (D.D.C. 2006) 449 F.Supp.2d 1, 154 [in 1953, L&M cigarettes were advertised as "just what the doctor ordered"].)

Jerry Coleman noted that the Los Angeles District Attorney's Office provides a form to prosecutors for writing down observations of panelists during jury selection that has a pre-printed notation on it essentially stating that the identification the juror's race, gender, or ethnicity is done solely for the purpose of responding to a Batson-Wheeler motion. In the absence of such a form, prosecutors can convey the same intent by simply making a notation in the file of the purpose for identifying the cognizable class to which a panelist belongs or putting the reason for such notation on the record.

F. Have Ready Access to Notes From Other Trials and/or Office Manuals

In People v. Lenix (2008) 44 Cal.4th 602, the court stated that in assessing credibility of the prosecutor, a trial court may "rely on the court's own experiences as a lawyer and bench officer in the community, and ***even the common practices of the advocate and the office who employs him or her***." (Lenix, at p. 613, citing to People v. Wheeler (1978) 22 Cal.3d 258, 282; cf., Miller-El v. Dretke (2005) 545 U.S. 231, 253 [appearance of discriminatory intent supported by "widely known evidence of the general policy of the Dallas County District Attorney's Office to exclude black venire members from juries at the time Miller-El's jury was selected"].)

A prosecutor's past history of non-discriminatory practices should be compelling evidence of continuing non-discriminatory practices. It may be useful for a

prosecutor to keep records of the composition of previous juries so that they are available to show the prosecutor has previously accepted jurors of the same cognizable class as the jurors the prosecutor is presently being accused of having improperly excluded.

It may also be worthwhile to keep notes of any office training class or copies of training publications (i.e., this very memo) establishing the office unequivocally condemns the exercise of peremptory challenges for discriminatory purposes.

UPDATE ON CASES PREVIOUSLY REPORTED UPON

The California Supreme Court has taken up the following recently reported upon cases for review:

People v. Sutton (2008) 165 Cal.App.4th 646 [finding good cause existed to continue a case involving codefendant where counsel for one of the codefendants was engaged in another trial and the continuance was relatively brief] - reported on in the 9/1/08 P&A memo.

People v. Diaz (2008) 81 Cal.Rptr.3d 215 [finding a search of a cell phone seized from the defendant an hour after the suspect was arrested and transported to the station was permissible as a search incident to arrest] - reported on in the 8/18/08 P&A memo.

NEXT WEEK: OUR SERIES ON BATSON-WHEELER DEVELOPMENTS CONTINUES WITH JERRY COLEMAN EXPLAINING THE PROPER METHOD OF RESPONDING TO BATSON-WHEELER MOTIONS IN LIGHT OF THE RECENT CASE LAW.

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.