

# POINTS AND AUTHORITIES

The District Attorney of Alameda County Presents a Weekly Video Survey of  
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Week Of	Topic	Guest	30 min
May 1, 2017	Peremptory Challenges Against Gay Jurors/ Mixed-Motive Analysis	Danielle Hilton	Ethics

***People v. Douglas* (April 11, 2017) \_\_ Cal.App.5th \_\_ [2017 WL 1325849]**

**Holding: The prosecutor's exercise of peremptory challenges against two "openly gay" prospective jurors violated *Batson/Wheeler*.**

The Court of Appeal holds that when both discriminatory and nondiscriminatory reasons are given for exercising a peremptory strike, the trial court should engage in a "mixed-motive" analysis in which the challenged party must establish that the strike would have exercised on the basis of the neutral reason, even without considering the discriminatory basis.

## **I. Events in the Trial Court**

### **A. Factual Background and Convictions**

1. The defendant, Clifton Sharpe, and the defendant's former boyfriend, Martin Andrade, lived together. Andrade was working as a male escort or prostitute. Andrade arranged for Jeffrey B. to come to the house, where they engaged in sex. Although the defendant and Sharpe were home at the time, Jeffrey did not see them.

2. After Jeffrey left, Andrade told the defendant that Jeffrey had not paid the amount agreed upon for Andrade's services. Defendant and Sharpe left the house to find Jeffrey. Sharpe drove and the defendant sat in the front passenger seat. They caught up with Jeffrey, pulled alongside his car and the defendant yelled at Jeffrey, "Where's your money at?"

3. Jeffrey drove off, with the defendant and Sharpe following. Jeffrey became concerned and ran several stoplights to get away. He got on the freeway, but the defendant Sharpe followed, and a high speed chase ensued. According to Jeffrey, the defendant pointed a gun at him through the passenger window. Jeffrey, fearing for his safety, swerved his car into the defendant's car. Sharpe lost control and his car spun out. The defendant shot several times at Jeffrey and one bullet hit Jeffrey's car. Jeffrey's car was damaged, but he drove a short distance and then ran for help. Meanwhile, the

defendant's car, now disabled on the freeway, was hit by two passing motorists.

4. When law enforcement arrived, the defendant was untruthful about the events, initially claiming that Jeffrey's car sideswiped his car for no reason. Police eventually recovered a semiautomatic handgun in the spare tire compartment of the defendant's car, and two spent casings were found on the freeway shoulder that matched the ammunition in the gun.

5. The jury convicted the defendant of various offenses, including attempted second-degree robbery, assault with a firearm and shooting at an occupied motor vehicle, and the jury found true various enhancements.

## **B. The Issue on Appeal**

The defendant argued that the trial court erred in denying his *Batson/Wheeler* motion after the prosecutor peremptorily excused "two openly gay prospective jurors." (p.\*1)

## **C. Jury Selection: The Two Prospective Jurors**

1. During the voir dire, both the prosecutor and defense counsel asked questions about the panel's feelings or perceptions of homosexuality and sexual orientation since the defendant and several witnesses were gay. No one on the panel responded that they would have a problem deciding the case based on the facts and not on the ground of sexual orientation.

2. Based on answers given during voir dire, it became known that two men in the jury venire were openly gay. The opinion states that in discussing their general biographical information, prospective jurors D.J. and S.L. both explained that they lived with their male partners. (p.\*2.)

3. D.J. had a doctorate degree from U.C. Berkeley in molecular biology, and was the director of a company specializing in growing microorganisms to prevent crop damage. He knew a public defender in Yolo County where the case was being tried. They were friends and he knew her "fairly well." In fact, he had lunch with her the day before this voir dire, and had recently attended her baby shower. He estimated he saw her about once a week, and that she had visited his home. The public defender had discussed her work with D.J., although she did not discuss specific details. She had told D.J. about different attorneys in the Public Defender's Office as well as the District Attorney's Office. She had never mentioned the prosecutor assigned to this case, however. (p.\*2.)

4. D.J.'s public defender friend told him that "she would never go to the dark side," which D.J. explained meant that she would never work as a prosecutor. Following up on this statement, the prosecutor asked, since he was from the "dark side," whether D.J. believed the charges were somehow contrived or that his ability to listen to the evidence and apply the law would be affected. D.J.

responded that the term “dark side” was his friend’s term, not his, and that he could make a decision based on the facts of the case.

5. D.J. said he disliked guns and strongly believed the Second Amendment should be revoked, but he could follow the judge’s instructions. He said his only bias was against guns.

6. A short time later, the prosecutor exercised a peremptory challenge excusing D.J.

7. Following the questioning of other prospective jurors and more peremptory challenges from both the prosecution and the defense, S. L. was called into the jury box. S.L. graduated from high school and owned a travel agency. He had no prior jury experience and told the court there was “absolutely no reason why he could not be fair.”

8. Defense counsel asked the new panel members generally whether anyone wanted to respond to one of his questions. No one answered, and defendant’s counsel said he had no further questions for the group. Sharpe’s counsel likewise had no questions.

9. The prosecutor asked S.L. whether he could listen to testimony from a witness who had visited a male prostitute and judge the witness’s credibility fairly. S.L. responded that he “definitely” could listen to that testimony without prejudging the witness. S.L. also responded “no” when asked by the prosecutor whether he believed that persons engaged in illegal activities deserve what they get for engaging in such activities. He said “yes” when asked whether, if selected, he could share his opinion about the facts of the case, work with others in applying those facts to the law, and use his common sense.

10. A short time later, the prosecutor peremptorily excused S.L.

#### **D. The *Batson/Wheeler* Motion**

1. Following S.L.’s excusal, Sharpe’s counsel made a *Batons/Wheeler* motion, arguing the prosecutor had systematically used his peremptory challenges to excuse the only two openly gay men in the jury venire. The defendant’s counsel joined in the motion. While Sharpe’s counsel acknowledged D.J.’s friendship with the attorney in the Yolo County Public Defender’s Office, he argued there was no other reason why D.J. or S.L. were excused except for t being openly gay men.

2. Although the court was not sure whether sexuality was a proper subject for a *Wheeler* motion, it allowed the motion “out of an abundance of caution.”

3. The prosecutor then gave his reasons for striking both jurors. He excused D.J. based on his close relationship with the Yolo County public defender, noting that D.J. gone to her baby shower recently and that she had discussed the personality traits of several members of the prosecutor's office with

him. He also cited D.J.'s statement that the public defender considered district attorneys as "the dark side." The prosecutor stated that he did not believe the People could get a "fair shake in the case" from D.J.

As to S.L., the prosecutor said he excused him based on his demeanor. The prosecutor said that when the defendant's counsel got up, the prosecutor saw that S.L. changed his body posture, leaned forward, and seemed to be more attentive. In contrast, the prosecutor said that when he spoke to S.L., S.L. seemed to be leaning back more and that his answers were very short and not descriptive. Neither the defendant's counsel nor Sharpe's counsel contradicted the prosecutor's description of S.L.'s demeanor.

4. The prosecutor then added another reason as to both D.J. and S.L. The prosecutor said that in a case like this, where the victim was "not out of the closet and actually was untruthful with the police about the extent of his relationship with a male prostitute," the prosecutor believed an openly gay person might hold a biased view of the testimony of such a witness because the witness was willing to lie about or not be open regarding his sexuality. Sharpe's counsel responded that the prosecutor's reasoning would allow him to "kick" any openly gay person.

5. The trial court denied the motion. As the opinion explains: "Citing D.J.'s close personal relationship with the public defender, his conversations with her about members of the District Attorneys' office as well as the Public Defender's office, and the 'dark side' comment, the court found the prosecutor was amply justified in excusing D.J. for nondiscriminatory reasons. The court also accepted the prosecutor's demeanor-based observations regarding S.L., stating: 'With regard to [S.L.], the observations of body posturing, his answers being short and not descriptive, I don't find that that would signify a wholesale basis on the prosecution's part of excluding those who are openly or even gay.'" (p.\*4.) [Notably, the trial court did not mention the prosecutor's reason listed in #4 above.]

## **II. The Court of Appeal Analysis**

### **A. Is Sexual Orientation a Group Classification for *Batson/Wheeler*?**

1. The Court of Appeal said although the United States Supreme Court has yet to address whether *Batson* extends to sexual orientation, the Ninth Circuit held in *SmithKline Beecham Corp. v. Abbott Labs.* (9th Cir. 2014) 740 F.3d 471, that equal protection prohibits peremptory strikes based on sexual orientation under *Batson*. In doing so, the court relied heavily on the Supreme Court's decision in *United States v. Windsor* (2013) --U.S.-- [186 L.Ed.2d 808], which held that the Defense of Marriage Act's definition of marriage as excluding same sex partners violated equal protection and due process.

The Court of Appeal said that the Fourth District Court of Appeal, in *People v. Garcia* (2000) 77 Cal.App.4th 1269, 1275, 1280-1281, also found that excluding gay men and lesbians on the basis of group bias violates the California Constitution. The Court of Appeal stated: "Like *Garcia* and

*SmithKline*, we, too, find that excluding prospective jurors solely on the basis of sexual orientation runs afoul of the constitutional principles espoused in *Batson/Wheeler*.” (p.\*5.)

## **B. Application of the *Batson/Wheeler* Analysis**

1. Because the prosecutor gave reasons for his peremptory challenges, the Court of Appeal proceeded directly to the second and third steps of the *Batson/Wheeler* analysis to determine whether the trial court erred in concluding that the proffered reasons were nondiscriminatory.

2. The Court of Appeal stated: “We review a trial court's determination regarding the sufficiency of a prosecutor's justifications for exercising peremptory challenges with great restraint. (*People v. Thomas* (2011) 51 Cal.4th 449, 474.) The trial court’s determination is a factual one, and as long as the trial court makes a sincere and reasoned effort to evaluate the nondiscriminatory justifications offered, its conclusions are entitled to deference on appeal when they are supported by substantial evidence. ([*People v.*] *Hamilton*, [2009] 45 Cal.4th [863], 900-901; *Thomas*, at p. 474.)” (p.\*6.)

3. The Court of Appeal noted that the first two reasons given by the prosecutor – “that D.J. had a close personal relationship with a public defender that may have made him less sympathetic to the prosecution and that S.L. had an unfavorable demeanor -- are clearly permissible because they do not facially invoke group bias.”

4. However, the Court of Appeal also said this: “The third reason--the assumption that openly gay men may harbor a bias or hostility towards a witness who was not openly gay--is troubling, however.” (p.\*6.)

5. In the Court of Appeal, the defendant argued that the prosecutor’s “third reason” is “outrightly discriminatory against openly gay persons, and thus does not constitute a neutral explanation for excusing these two jurors.” (p.\*6.) However, the Court of Appeal said it was not entirely persuaded “that defendant has fully characterized the nature of the prosecutor’s challenge. The record, we believe, can also be read to indicate a concern not about sexual orientation, but rather a concern about an underlying attitude or belief regarding truthfulness. The reason for the challenge, then, is arguably more nuanced than defendant contends.” (*Ibid.*)

6. The Court of Appeal noted a distinction between a challenge based solely on a prospective juror’s membership in a particular group and a challenge to the juror’s attitude about the justice system and society which may be group *related*. The Court of Appeal gave examples. In *People v. Hamilton* (2009) 45 Cal.4th 863, the California Supreme Court upheld a peremptory challenge where the prosecutor said one of the reasons he struck the prospective Black juror was because the juror said he had considerable sympathy for Black people on trial and thought the justice system was unfair to Blacks. In finding substantial evidence supported the challenge, the court implicitly rejected the defendant’s argument that the prosecutor’s reason was based on race itself. (*Id.* at pp. 901-902.) The court found the juror’s responses to several questions on the juror questionnaire form indicated that the

prospective juror harbored a skepticism regarding the fair treatment of Blacks within the criminal justice system, thus supporting the prosecutor's concerns. (*Id.* at p. 902.) In other words, the juror's skepticism was race-related, but the prosecutor was not striking the jury because of his race.

The Court of Appeal also pointed to *People v. Martin* (1998) 64 Cal.App.4th 378, 385, in which the prosecutor exercised a peremptory challenge against a juror who was a Jehovah's Witness. The court found the strike was based on the juror's relevant personal values and thus not improper, even though those views are founded in religious beliefs. The prosecutor struck the juror because, in his experience, members of that religion had a hard time with criminal trials as "they couldn't judge anybody at all." (*Id.* at p. 381.) The court in *Martin* found that "[t]he prosecutor's perception that the juror's religious views might render her uncomfortable with sitting in judgment of a fellow human being was a specific bias related to the individual juror's suitability for jury service" sufficient to support the strike. (*Id.* at p. 384.)

The third case cited by the Court of Appeal here is *Hernandez v. New York* (1991) 500 U.S. 352, 372, where the United States Supreme Court affirmed the trial court's factual finding that the prosecutor's reason for striking two Latino jurors was race-neutral and genuine. The prosecutor said he excused the jurors because their demeanor and specific responses caused him to doubt their ability to defer to the official translation of the Spanish-language testimony anticipated from various trial witnesses. (*Id.* at pp. 356-357. The Supreme Court in *Hernandez* said the fact that the prosecutor's reasoning might disproportionately affect prospective Latino jurors did not render the reason nonneutral. (*Id.* at pp. 361-362.)

7. The Court of Appeal here highlighted remarks made by Justice O'Connor in her concurring opinion in *Hernandez*. Justice O'Connor stated: "No matter how closely tied or significantly correlated to race the explanation for a peremptory strike may be, the strike does not implicate the Equal Protection Clause unless it is based on race. (*Hernandez*, at p. 375.) She also noted that *Batson* "does not require that the [prosecutor's] justification be unrelated to race. *Batson* requires only that the prosecutor's reason for striking a juror not *be* the juror's race." (*Ibid.*) (p.\*8.)

8. The Court of Appeal here returned to its concern that the record could be read to indicate a concern not about sexual orientation, but rather a concern about an underlying attitude or belief regarding truthfulness. It noted the prosecutor was clearly concerned about how potential jurors would relate to or judge the credibility of someone who had lied about certain aspects of his life, as the prosecution's main witness had done. Defense counsel asked similar questions regarding lying and the different motivations for lying, showing that the topic of truthfulness was important to both sides. The Court of Appeal said, "The prosecutor could have genuinely been concerned with potential jurors' beliefs regarding a witness's purported truthfulness or, more appropriately, lack of truthfulness that was related to the facts presented by this specific case." (p.\*7.)

The Court of Appeal also noted that the prosecutor asked prospective jurors whether "anybody [had] an automatic reaction where they would vote guilty or not guilty because some of the people involved in this case, either witnesses or people who are accused are homosexual." The Court of

Appeal said, “One inference from this line of questioning is that the prosecutor sought to ferret out any biases *for or against* gay persons, and not that he was trying to oust all gay people from serving on the jury.” (p.\*7, italics in original.) The Court said this interpretation is especially likely since *all* the main witnesses in the case – prosecution and defense – were gay.

Finally, the Court of Appeal noted that the prosecutor asked the venire whether they believed a person might be motivated to lie if he was not necessarily open about his sexuality. “This question probed whether jurors could understand the motivation to lie under such circumstances and thus was an attempt to discern whether they would be empathetic to Jeffrey, the prosecution’s primary witness.” (p.\*8.)

### **C. Court of Appeal’s Conclusion on *Batson/Wheeler***

1. Nevertheless, after this review, the Court of Appeal said, “As far as we can tell from the voir dire transcript, however, the trial court never actually considered the prosecutor’s sexual orientation-related ground.” (p.\*8.) The Court of Appeal noted that although reviewing courts generally defer to a trial court’s factual findings under *Batson/Wheeler*, because the trial court here did not address the reason, it could not simply presume the court found the reason to be neutral and nondiscriminatory.

2. Thus, the Court of Appeal said this: “Given the evidence in the record, and in light of the important constitutional rights at stake . . . , we err on the side of constitutional caution by finding that the prosecutor’s third reason was sexual orientation-based as defendant argues.” (p.\*8.) In other words, the prosecutor’s statement -- that he believed openly gay men might be biased against the victim in this case who had lied to the police about his visit to the gay prostitute and who was not living an openly gay lifestyle -- was a discriminatory based on sexual orientation, and thus a constitutionally impermissible reason for striking D.J. and S.L.

### **III. Evaluation of *Batson/Wheeler* Challenge Based on Permissible and Impermissible Reasons**

1. However, the Court of Appeal said its conclusion as to the impermissible nature of the prosecutor’s proffered reason on sexual orientation did not end its inquiry. “Instead it compels us to examine how to evaluate a *Batson/Wheeler* challenge when a party gives both permissible and impermissible reasons for exercising a strike.” The Court of Appeal noted that although other jurisdictions have considered the issue, it was not aware of any published United States Supreme Court or California appellate court case deciding the matter. (p.\*8.)

2. The defendant urged the adoption of the “per se” rule of unconstitutionality. As recounted in the opinion, the defendant explained this approach as “when a party offers multiple rationales for a peremptory strike, some of which are permissible and one of which is not, the taint from the impermissible reason mandates reversal and essentially moots any other neutral reason given.” Under

this approach, a discriminatory peremptory challenge cannot be saved because the proponent of the challenge puts forth a nondiscriminatory reason. (p.\*9.)

3. Other jurisdictions, primarily federal, have adopted a “mixed-motive” or “dual motivation” analysis. As explained, “ ‘after the defendant makes a prima facie showing of discrimination, the state may raise the affirmative defense that the strike would have been exercised on the basis of the neutral reasons and in the absence of the discriminatory motive. If the state makes such a showing, the peremptory challenge survives constitutional scrutiny.’ ” (p.\*9, quoting *Gattis v. Snyder* (3d. Del. (2002) 278 F.3d 222, 223.)

3. The Ninth Circuit has adopted a third approach known as the “substantial motivating factor” approach, i.e. “whether the prosecutor was ‘motivated in substantial part by discriminatory intent.’ ” (p.\*9, quoting *Cook v. LaMarque* (9th Cir.2010) 593 F.3d 810, 814-815.) The Ninth Circuit in *Cook* said to make this determination of whether race was a substantial motivating factor, the trier of fact must evaluate the “persuasiveness of the justifications offered by the prosecutor.” (*Ibid.*)

4. The Court of Appeal here, relying on United States Supreme Court precedent as well as California case law in other contexts, concluded that a court should use the mixed-motive approach to determine the constitutionality of a peremptory strike whenever a party gives both neutral and nonneutral reasons for the strike. (p.\*9.)

5. However, in an effort to apply the mixed-motive analysis here, the Court of Appeal said it was not apparent from the transcript whether the trial court ever considered the prosecutor’s sexual orientation-based reason, “let alone concluded that it was a motivating but not determinative factor in the decision to strike D.J. and S.L.” (p.\*11.) Therefore, the Court of Appeal remanded the case for further proceedings so the trial court can apply a mixed-motive analysis to the peremptory challenges. (*Ibid.*)

6. The Court of Appeal stated on remand, “the prosecutor shall have the opportunity to show that he would have stricken both jurors even without considering their sexual orientation. [Citations.] If the prosecutor makes the necessary showing, the challenges stand. If not, the judgment must be reversed.” (p.\*11.)

7. Therefore the Court of Appeal conditionally reversed the judgment.

**A Takeway:** It is likely there will be further proceedings on this opinion. But in the meantime, prosecutors should make certain that the trial court rules on *all* the reasons the prosecutor gives for his or her peremptory challenges.

Suggestions for future shows, ideas on how to improve P&A, and other comments or criticisms should be directed to Mary Pat Dooley at (510) 272-6249, [marypat.dooley@acgov.org](mailto:marypat.dooley@acgov.org). Technical questions should be addressed to Gilbert Leung at (510) 272-6327. Participatory students: MCLE Evaluation sheets are available on location and certificates of

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