Wheeler

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Responding to a *Wheeler/Batson* Motion

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The Motion

I CONSIDER TRIAL BY JURY AS THE ONLY ANCHOR YET IMAGINED BY MAN, BY WHICH A GOVERNMENT CAN BE HELD TO THE PRINCIPLES OF ITS CONSTITUTION.
- THOMAS JEFFERSON

What is "Group Bias?"

- "Group Bias": The presumption "that certain jurors are biased merely because they are members of an identifiable group distinguished on racial, religious, ethnic, or similar grounds[.]" (*People v. Wheeler* (1978) 22 Cal.3d 258, 276.)

Batson v. Kentucky

- 14th Amendment's Equal Protection Clause requires that jurors not be peremptorily challenged solely based on race (or protected classification) or due to assumption of group bias (*id.* at 89)
- Promulgated Three-Part Inquiry for Trial Court to use in monitoring a *Batson*-type challenge

Three-Part Inquiry

- PRONG 1: Opponent must make prima facie case that *totality of circumstances* raises an *inference* of discriminatory kick
- PRONG 2: Burden shifts to proponent to give permissible reasons
- PRONG 3: Trial Court decides whether opponent has proven discriminatory purpose

Prong 1: *Johnson v. California* (2005) 545 U.S. 162

- Prong 1 of the original *Wheeler* test required opponent to show "strong likelihood" that jurors being kicked due to group bias
- *Johnson* held that standard too high; CA should be using mere "inference" language of *Batson* (totality of the circumstances)

What if No Prima Facie Case Found Against You?

- If Trial Court finds no prima facie case…
- Ask to put your classification-neutral reasons on the record for purposes of appeal
  - –If says no, file them in a written declaration
  - –This way, you won't forget your reasons later

Tip for Prong 2, Analysis Prong: Enunciation of Neutral Reasons

- Calmly remember and state your reasons
- Put your evidence on the record (*see infra* re: Comparative Analysis, etc.)
- List *all* your reasons, for *each* juror you're accused of kicking unfairly

Prong 2: What If You Forget Why You Kicked the Jurors?

- If you absolutely can't remember your reasons…see *Gonzalez v. Brown* (9th Cir. 2009) 585 F.3d 1202:
- Which found that while not forgetting is preferable, a TC can still credit as neutral a reason not stated b/c attorney can't remember the reason for the kick when other factors showed the attorney to be non-discriminatory, such as:
  - (a) remembering neutral reasons for kicking others in the class;
  - (b) not kicking many in the class; and
  - (c) having others in the class remain on the panel

Timing: When Is it Too Late to Object?

- Too late to *Wheeler* if jury AND alternates sworn
  - (*People v. Ortega* (1984) 156 Cal.App.3d 63, 70)

- But can still *Wheeler* as to entire panel if alternates not yet sworn!
  - (*People v. Gore* (1993) 18 Cal.App.4th 692, 703)

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If at First They Don't Succeed... Can They Try, Try Again?

- *People v. Avila* (2006) 38 Cal.4th 491, 548-552:
  - Where TC found no Prima Facie case as to Black Juror S.A.
  - But did find Prima Facie case as to Black Juror V.J.
  - Held: TC *not* required to go back and ask for P's reasons for excusing S.A.
  - *But....*

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Δ can renew prior objection

Try, Try Again (Cont'd)

"Although we hold that the court has no sua sponte duty to revisit earlier *Batson/Wheeler* challenges that it had previously denied, upon request it may appropriately do so when the prosecutor's subsequent challenge to a juror of a protected class casts the prosecutor's earlier challenges of the jurors of that same protected class in a new light, such that it gives rise to a prima facie showing of group bias as to those earlier jurors. But the burden is on the party making the later motion to so clarify, for that party ultimately has the burden of proof." (*Avila* at 552)

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Pre-2016 Non-Cognizable Group Examples

- The Young (*see, e.g., People v. Estrada* (1979) 93 Cal.App.3d 76, 93)
- The Old (*see, e.g., People v. McCoy* (1995) 40 Cal.App.4th 778, 783)

CCP 231.5: 2016 Version (The 2015 Amendment)

- Took away the "simple" laundry list and gave us…
- "[A] characteristic listed or defined in Section 11135 of the Government Code, or similar grounds."
- (GC § 11135 outlaws govt discrim./equal access re: benefits)

↳ housing

don't kick off young people just b/c young

Gov't Code § 11135 (amended 2015 and again 2016)

- Race
- Color
- Ancestry
- National Origin
- Ethnic Group Identification
- Religion
- Sex
- Sexual Orientation
- Medical Condition
- Age
- Marital Status
- Mental Disability
- Physical Disability
- Genetic Information (per Government Code § 12926 [§(g) defines it as: genetic test info of the person or their family, a disease/disorder manifesting within the family]

Religion: *People v. Jones* (2011) 51 Cal. 4th 346

- Where P excused black juror partly b/c she attended the 1st A.M.E. Church, which P called a "controversial" organization, and said he didn't want anyone "controversial". . .
- Cal Sup's said P "did not excuse her because of her religious views but because he believed she belonged to a controversial organization." (*Id.* at 368.)

didn't want someone who would sow discord, and that's OK

Bilinguals #1: *Hernandez v. New York* (1991) 500 U.S. 352

PLURALITY OPINION

- 4-justice opinion stated the Trial Court did not commit clear error in believing DA's claim that he kicked the Spanish-speaking jurors because they gave him reason to think they would reject the interpreter's version in favor of their own, and not because he wanted Latinos off the jury
- BUT: "[A] policy of striking all who speak a given language, without regard to the particular circumstances of the trial or the individual responses of the jurors, may be found by the trial judge to be a pretext for racial discrimination. But that case is not before us." (*Id.* at 371-72.)

Bilinguals #2: *People v. Cardenas* (2007) 155 Cal. App. 4th 1468

- Recognized the U.S. Supreme Court's plurality in *Hernandez*
- Upheld the TC's decision that "the prosecutor had put forth a valid, race-neutral reason for excluding" the Spanish-speaking jurors on grounds DA thought they'd reject the official translation, and not as a pretext for racial kick

"Similar Grounds": State

- CCP 231.5 was meant "to codify the decision in" *Garcia*.
  (CAL. CODE CIV. PROC 231.5 (2000 Note).)
- *Garcia* recites plurality language in *Rubio v. Superior Court*, (1979) 24 Cal. 3d 93, suggesting the following as the first prong of a two-prong definition:
- Groups whose members "'share a common perspective arising from their life experience in the group, i.e., a perspective gained precisely *because* they are members of that group.'"
  (*Garcia*, *supra*, at 1276 (quoting *Rubio* (lead op.), *supra*, at 98).)

"Similar Grounds": State (cont'd)

- *Garcia* notes the *Rubio* court gave a two-prong test, but only the first part seemed to have majority support
- Still, *Garcia* also used the second prong in its analysis ("that no other members of the community are capable of adequately representing the perspective of the group" in question) (*Id.* at 1278 (quoting *Rubio*, *supra*, at 98)

Statistics, Comparative Analysis, and Disparate Questioning

New Forms of Evidence to Prove or Disprove Discriminatory Intent

Miller-El (cont'd)

Evidence of Past DA's Office Policy of Jury Selection Discrimination

- Testimony of former prosecutors of office climate of race-based voir dire
- Prosecutor-written manual discussing types of people not to choose (written 1968, circulated through 1976, at least one had access to it during trial)

Miller-El (cont'd)

Notation of Race on Jury Selection Cards

- P annotated race on cards; but trial was before *Batson*, so Ct. not impressed with excuse of annotating to avoid *Batson* error

Miller-El (cont'd)

Comparative Analysis

- Compared P's stated reasons for striking black potential jurors
- If same quality applied to non-black potential jurors whom P didn't strike, evidence of discrimination

Statistics in *Williams v. Runnels*

- D pointed out P used 3 of first 4 kicks against blacks, and only 4 of first 49 potential jurors were black (*id.* at 1107)
- Found "these bare facts present a statistical disparity" (*Id.*)
- Noted line of other cases where PF case shown based on using 5 of first 6 peremptories against blacks, where 4 of 7 Hispanics and 2 blacks kicked, etc. (*Id.*)

Prima Facie Case: Weighing Bare Statistics Against Other Facts in Record in Prong 1

- How much can TC look to other circumstances to see if the inference raised by the bare statistics actually has a patent neutral explanation without proceeding to Prong 2?
- *Williams v. Runnels*: "[T]o rebut an inference of discriminatory purpose based on statistical disparity, the 'other relevant circumstances' must do more than indicate that the record would support race-neutral reasons for the questioned challenges." (*Williams* at 1108.)

People v. Sanchez (2016) 63 Cal.4th 411: Bare Statistics Refutation in Prong 1

- *Williams v. Runnels*: It's possible to refute the statistical inference at Prong 1 stage, but not on facts of that case; TC can't just presume what was in challenger's head, because the issue is the challenger's TRUE reason, not some POSSIBLE reason.
- *Sanchez* (at 434): In Prong 1, "[a] court may...consider nondiscriminatory reasons for a peremptory challenge that are apparent from and 'clearly established' in the record." (Citation omitted.)

Lenix: Make Your Record

- Cal Sup's prefer we make our own record and do our own Comparative Analysis at trial
- So that "defendant can make an inclusive record, [and] the prosecutor can respond to the alleged similarities"
  (Id. at 624.)

Lenix: Don't Cut Off Voir Dire Time

Lenix recognizes TC's CCP 223 power to limit voir dire time, but said this:

"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." (*Id.* at 625.)

*Amended Law Alert: AB 1541 (2017) Amending CCP 223

Prior to AB 1541

- "The court 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[.]"

Eff. January 2018

- "The trial judge shall not impose specific unreasonable or arbitrary time limits or establish an inflexible time limit policy for voir dire."
- "As voir dire proceeds, the trial judge shall permit supplemental time...based on individual responses or conduct[.]"

Foster and "New Evidence": An Extension of *Miller-El*

- Holding based on:
- Comparative Analysis of similarly situated white jurors who were kept
- Record Belied some of P's stated reasons
- New Evidence of Notes in P's File indicated race consciousness ("B" by black jurors' names, "No Black Church," etc.)

Notations to "Help" with *Batson* Objections?

- Noted P's argument that they notated the juror cards b/c "*Batson*, after all, had come down only months before Foster's trial. The prosecutors, according to the State, were uncertain what sort of showing might be demanded of them and wanted to be prepared."
- Rejected argument b/c the notes showed preoccupation w/keeping blacks off jury

Justice Thomas's Lone Dissent in *Foster*

- "The notion that this 'newly discovered evidence' [of P's file notes] could warrant relitigation of a *Batson* claim is flabbergasting." (Thomas, J., dissenting, at 1766.)
- The issue should be whether TC had good reason to credit P's stated reasons, which often rests on a credibility determination. (*Id.* at 1766-67.)

Tips on Comparative Analysis: List of Attributes

- Keep a list of the attributes leading you to kick

- If you kept someone with that attribute, have a list of juror # and why you didn't kick them (why they were distinguishable)
- Perform your own Comparative/Distinguishing Analysis proactively!

Tips on Comparative Analysis Make Your Own Record!

- Don't wait for D; make your own Comp. Analysis argument, or App. Ct. will draw judgment on an artificially short record
- Shield rather than a Sword—point out when you kicked others w/same attribute

Tips on Comparative Analysis: Final Composition

- If a *Wheeler/Batson* objection was made against you and overruled...
- Consider noting for the record the final racial composition of the jury that was seated
- (Deputy Attorneys General are starting to ask us to do this for appellate record purposes.)

Douglas Facts (cont'd): Mixed Motives

- P kicked "two openly gay jurors" for multiple reasons:
  - Juror "J" had close PD friend who didn't like DA's
  - Juror "L" had positive body language toward def. counsel, and negative toward P
  - Then gave the fateful 3rd reason: in a case wherein 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,'" that he believed an "'openly gay'" juror might be biased against the testimony of that victim.

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Douglas: the Trial Court's "Ruling" & *Douglas* #2's Finding

- TC found kicking J due to PD friend justified
- TC found kicking L due to demeanor reasons justified
- But TC apparently never bothered to rule on the 3rd proffered reason

- *Douglas* #2 found P's 3rd reason to have been discriminatory on sexual orientation grounds, as it was based on "his *assumption* that the only two openly gay veniremen would look askance at the victim's lifestyle simply because they were openly gay and he was not." (at WL/Cal.Rptr."312-13.)

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Jurisdictional Split on Mixed Motives and CA's Rule

- *Douglas* #1 noted JX split, unresolved by CA & US, re: "how to evaluate a *Batson/Wheeler* challenge when a party gives both permissible and impermissible reasons"
- Some States: "per se rule of unconstitutionality" (one bad reason spoils the bunch)
- Other Jx's, esp. Federal: "mixed-motive approach" allows kicker to show would have kicked even w/o the bad motive existing
- 9th Circuit: "substantial motivating factor approach" to see if kicker substantially motivated by the bad reason
- And the winner (per *Douglas* #2) is...

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Demeanor Strikes and the Cold Appellate Record

So what happens when you kick because of the juror's demeanor, but that demeanor is not reflected in the record?

Demeanor Strikes Without Record Support

- *People v. Silva* (2001) 25 Cal. 4th 345 (guilt-phase jury hung on death; 2nd death jury's death penalty verdict reversed when P's non-demeanor reasons belied by record, and demeanor reason not supported by it)
- *Snyder v. Louisiana*, *supra* (reversed where P gave 2 reasons, 1 of which belied by Comp. Analysis and 1 was demeanor not in record; TC didn't state which it credited)

Vague Demeanor Reasons Unsupported by Record

- *People v. Allen* (2004) 115 Cal. App. 4th 542, 546

  (reversed where P gave demeanor reason of "her very response to your answers, and her demeanor, and not only dress but how she took her seat" being indicative of an independent thinker; App. Ct. had no idea what P was talking about)

probably a weirdo, and P wanted to be nice

Demeanor-Based Tips & Strategies

- Weave your observations into voir dire record

  -*"I realized you were smiling at D. I'm curious as to why?"*

  -*"You seem a little upset with me. Have we met before?"*

  -*"So I noticed you looking around during questioning. Is there something else on your mind besides these proceedings?"*

Demeanor-Based Tips & Strategies

- During 2nd Prong, specifically ask TC to tell you whether she/he saw the same thing you did

  -*"Did the Court also see that Juror A kept coming in late after the breaks?"*

  -*"Does the Court agree with my observation that Juror A rolled his eyes when the bailiff asked him to take his hat off?"*

Demeanor-Based Tips & Strategies

- App. Ct.'s won't consider a reason that you didn't give (and TC can't, either)
  (*Paulino v. Castro* (9th Cir. 2004) 371 F.3d 1083)
- So make sure you give all your reasons
  - But "per se rule of unconstitutionality" per *Douglas* in CA if one of your reasons ends up being judged bad
- Make TC specify its findings—which reasons accepting, and which rejecting
  - To avoid unnecessary remand and clarify record

The Good, Old-Fashioned Remedies

- *Wheeler*: Dismiss entire panel and start over with new panel
- Because opponent "is entitled to a random draw from an entire venire—not one that has been partially or totally stripped of members of a cognizable group . . . ." (*Wheeler*, *supra*, at 282.)
- *Batson*: US Supremes remanded to allow TC to engage in 3-Part Inquiry
- EXPLICITLY LEFT OPEN possible remedies of:
  - -Discharging entire panel and starting over
  - -Re-seating the offended juror

Wheeler Gone Wild: *People v. Willis* (2002) 27 Cal. 4th 811

But what if the opponent doesn't *want* to dismiss the panel? Opponent holds all the cards...

Willis: *Wheeler* Gone Wild

- Defense attorney purposely violated *Wheeler* b/c didn't like mostly white panel
- Rather than reward defense w/ new panel, TC fined defense attorney $1500 as an alternate remedy
- (To the chagrin of the higher courts, TC later vacated the sanction order)

State Bar Reporting: At Trial

- BP 6086.7(a)(3): TC must report if monetarily sanctions you for $1000 or more
- BP 6068(o)(3): You must report self w/in 30 days if TC monetarily sanctions you for $1000 or more

State Bar Reporting: On Appeal

- BP 6086.7(a)(2): TC must report if judgment reversed "in whole or in part" b/c of attorney misconduct
- BP 6068(o)(7): You must report self w/in 30 days if judgment reversed "in whole or in part" b/c of misconduct

State Bar Reporting: On Appeal
cont'd

- Coleman thinks *Wheeler* error means attorney made Jury Trial unfair–and if pretext finding, deceptive; thinks reporting duty.

  (JERRY P. COLEMAN, MR. *WHEELER* GOES TO WASHINGTON–THE FULL FEDERALIZATION OF JURY CHALLENGE PRACTICE IN CALIFORNIA 43 (2006))

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SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF SAN JOAQUIN

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, vs. DEFENDANT(S) Defendant(s)	Case No.: 12-3-456789-1 PEOPLE'S TRIAL BRIEF: *WHEELER/BATSON* OBJECTIONS

POINTS AND AUTHORITIES

I. "GROUP BIAS" CHALLENGES AND THE THREE-PART INQUIRY

In the context of jury selection, "group bias" is the presumption "that certain jurors are biased merely because they are members of an identifiable group distinguished on racial, religious, ethnic, or similar grounds[.]" (*People v. Wheeler*, (1978) 22 Cal.3d 258, 276, *overruled on other grounds by Johnson v. California* (2005) 545 U.S. 162.) When trial counsel utilizes a peremptory challenge to excuse a potential juror from the panel based on a pre-conceived notion of "group bias," the trial court will entertain opposing counsel's objection thereto by utilizing a three-part inquiry established

classification—but it provides a list of "particularly relevant" evidence that may aid the court in coming to a conclusion on the prima facie case element. (*Scott*, *supra*, at 384.)

Further, the undersigned knows of no published California decision or United States Supreme Court decision declaring that a single peremptory challenge to a single member of a particular racial or other cognizable group, without more, constitutes a valid prima facie case. The Ninth Circuit case of *Williams v. Runnels*, (9th Cir. 2006) 432 F.3d 1102, found a prima facie case was made based on statistics when the prosecutor exercised "three of his first four peremptory challenges to remove African-Americans from the jury[]" and the record did not sufficiently dispel the inference raised by the statistical disparity (*id.* at 1107-09); however, "three of his first four" is not the same as a single peremptory used to strike a single member. *Williams* provides a list of Ninth Circuit cases finding "that a defendant can make a prima facie showing based on a statistical disparity alone[,]" as a single illegally discriminatory strike would be unconstitutional, but those cases listed most certainly did not find a prima facie case based solely on a single strike. (*Id.* at 1107; *see id.*) Rather, they included finding "an inference of bias where the prosecutor had used five out of six peremptory challenges to strike African-Americans[;...] where four of seven Hispanics and two African-Americans were excused by the prosecutor[;... and] where the prosecutor exercised peremptory challenges to exclude five out of a possible nine African-Americans." (*Id.* (citations omitted).)

Furthermore, the recent California Supreme Court case of *People v. Sanchez*, (2016) 63 Cal.4th 411, found no prima facie case was made when "the prosecution had used two of its first eight peremptory challenges to excuse two of the five Hispanic jurors then available for challenge[.]" (*Id.* at 435.) Indeed, the Court stated:

> Exercising two of eight peremptory challenges to excuse two of the five Hispanic prospective jurors then subject to challenge did not itself provide an inference of discriminatory purpose. The prosecution had not excused most or all of the group and did not use a significantly

> Additionally, the record clearly establishes nondiscriminatory reasons for challenging T.M. [based on her questionnaire answers showing a reluctance to impose the death penalty].

(*Id.* at 439.) Therefore, though the threshold for making a prima facie case is a totality-of-the-circumstances burden rather than a burden of a higher mold, neither is the burden non-existent or extremely low. It is indeed a burden that the objecting party must meet before the trial court proceeds to the second and third prongs.

III. THE THIRD PRONG: A CREDIBILITY DETERMINATION

Once the matter proceeds to the third part of the inquiry, the trial court judge essentially makes a credibility determination. This stage "demands of the trial judge a sincere and reasoned attempt to evaluate" the truthfulness of the proffered legally neutral reason. (*People v. Hall* (1983) 35 Cal.3d 161, 167.) Indeed, the fact that this stage calls for a genuine credibility determination, rather than a mechanical weighing or application of factors upon a scale, is shown in the case of *Gonzalez v. Brown*, wherein the Ninth Circuit countenanced a trial court's crediting as neutral a reason not stated because the attorney could not remember the reasons for the challenge when other factors tended to show the attorney to be non-discriminatory, such as: remembering neutral reasons for excluding others in the class; not excluding many members of the class; and having other members of that class remain on the panel. (*See Gonzalez v. Brown* (9th Cir. 2009) 585 F.3d 1202.) Therefore, a trial court need not make a finding of discrimination simply because the factors listed in the prima facie case are numerous or persuasive on their own; rather, the trial court may, and indeed must, engage in "a sincere and reasoned attempt" to determine if the challenging attorney is being truthful in stating his or her legally neutral reasons.

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eventually finding a discriminatory purpose, that "the prosecution did not choose to question [the challenged juror] more deeply about this matter" that the prosecution later claimed caused it concern)), the trial attorneys should be given adequate time in order to engage in such questioning.

This truism has been highlighted by both the California Supreme Court as well as a recent amendment to the California Code of Civil Procedure by the Legislature. On January 1, 2018, an amendment to section 223 went into effect based on 2017's AB 1541, and the law now specifies that "[t]he trial judge shall not impose specific unreasonable or arbitrary time limits or establish an inflexible time limit policy for voir dire." It further clarifies, "[a]s voir dire proceeds, the trial judge shall permit supplemental time for questioning based on individual responses or conduct of jurors that may evince attitudes inconsistent with suitability to serve as a fair and impartial juror in the particular case." (CAL. CODE CIV. PROC. § 223). This amendment ultimately followed in time the plea by the California Supreme Court in the case of *People v. Lenix* to trial courts: "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." (*People v. Lenix* (2008) 44 Cal.4th 602, 625.)

Therefore, the People respectfully request some latitude with regard to time to conduct voir dire, consistent with *Lenix* and the 2018 amendment to section 223 of the California Code of Civil Procedure, especially when a situation appears to be developing wherein the established time limits, if any, do not seem to be giving enough time for follow-up questioning based on answers or conduct that call for more dialogue.

Dated: _____

Respectfully Submitted,

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By:

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