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Batson-Wheeler motions

A short course on trial objection to peremptory challenges based on group bias

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Welcome to the first issue of *Plaintiff* magazine and our column dedicated to trial practice. This month's column will focus on what is required to support an objection to the exercise of peremptory challenges made by the defense during jury selection based on group bias (generally racial, but may also include gender, ethnicity and even homosexuals), commonly known as a *Wheeler* motion or *Batson-Wheeler* motion.[1, 2]

First, a historical overview of this motion; it has been well established that the exercise of challenges during *voir dire* solely based upon group bias is a violation of both the United States and California Constitutions. (*Batson v. Kentucky* (1986) 476 U.S. 79 [106 S.Ct. 1712]; *People v. Wheeler* (1978) 22 Cal.3d 258 [148 Cal.Rptr. 890]).

Since 1986, there has been a long line of cases which implement, distinguish or explain *Batson* and *Wheeler*. The most recent California Supreme Court decision is *People v. Jay Shawn Johnson* (2006) 38 Cal.4th 1096 [45 Cal.Rptr.3d 1]. In this Contra Costa County criminal case first filed in 1996, jury selection was concluded in December 1998 in the trial of Jay Shawn Johnson. During voir dire, the prosecutor challenged three African-American prospective jurors. Johnson, an African-American man, objected on the grounds that the prospective jurors were challenged as part of a systematic attempt to exclude black jurors from the panel. This objection was overruled by the trial court. The panel, including alternates, at the conclusion of jury selection, was all white.

At the end of the trial, Johnson was convicted of second degree murder and assault of a white 19-month-old child. On appeal, Johnson argued that there was error because the court failed to find a prima facie case of group bias. The Court of Appeal agreed and reversed the judgment. The California Supreme Court granted review on the grounds that the objector must show that *it is more likely than not* the other party's peremptory challenges, if unexplained, were based upon impermissible group bias. *People v. Johnson* (2003) 30 Cal.4th 1302, 1306.

The United States Supreme Court then reversed after granting *certiorari* concerning only the question of the applicable test to establish a prima facie case. *Johnson v. California* (2005) 545 U.S. 162 [125 S.Ct. 2410]. The Supreme Court held that the "more likely than not" standard which had been used in California was inappropriate, and that, instead, the standard was met if the objecting party "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." (*Id*. at p. 2410.) The Supreme Court went on to summarize the three-step process by which a trial court should analyze an objection based upon discriminatory peremptory challenges (commonly known in California as a *Wheeler* or *Batson-Wheeler* objection.) These steps are as follows:

a) The first step is to make a prima facie case by showing that the "totality of the relevant facts gives rise to an inference of discriminatory purpose." *(Batson, supra,*476 U.S. at 93-94.) This requirement may be met by a wide variety of evidence, as long as all of the facts, taken together, "gives rise to an inference of discriminatory purpose." In *Batson*, the objection was made by a black criminal defendant that all black persons were being challenged. This was sufficient to establish the first requirement. It is not necessary to prove a pattern or practice; it is sufficient to show that the objector relies solely on the facts concerning the selection in his particular case. It is possible, therefore, to establish the first step even by a single discriminatory act. (See, *e.g.*, *Arlington Heights v. Metropolitan Housing Development Corp*. (1977) 429 U.S. 252, 266, n.14 [97 S.Ct. 555].) The Supreme Court has accepted the definition of "inference" as a "conclusion reached from considering other facts and deducing a logical consequence from them." *(Johnson*, 545 U.S. at p. 162 at fn. 4.) It is enough if the objector produces evidence by

which the trial judge may draw an inference that discrimination has occurred.

b) The second step is to shift the burden to the party exercising the questionable strikes by demanding that he or she give permissible and discrimination-free justifications for the strikes. The purpose at this stage is for the trial court to discern the true reason why the prospective juror was stricken, not necessarily the stated reasons. The justification cannot be frivolous or nonsensical. Moreover, a refusal to provide any justification will require the trial court to move to the third step.

c) The third step is that if there is a race-neutral explanation given, then the court must decide. "whether the opponent of the strike has proved purposeful racial discrimination." (*Johnson*, *supra,*125 U.S. at p. 2416.) This means the court tests the credibility of the proffered reasons for the challenge and determines whether it is genuine or pretextual.

It should be noted that each objection is to a particular challenge; in other words, one would not wait until there have been three questionable challenges and then object. Each particular strike is amenable to an individual objection. "The issue is not whether there is a pattern of systemic exclusion; rather, the issue is whether a particular prospective juror has been challenged because of a group bias." (*People v. Avila* (2006) 38 Cal.4th 491, 549 [43 Cal.Rptr.3d 1].) It is possible, however, for the court to entertain an objection to previously challenged jurors if a subsequent strike causes the earlier strikes to establish a prima facie case of group bias. The safer method would be to be aware of the potential for group bias at the start of jury selection and preserve your objections as each juror is challenged. If the court denies the motion on the grounds that a prima facie case has not been established, it is important to still make a record of the grounds for your objection to preserve the issue for appeal. Finally, once peremptory challenges have been exercised by the objecting party, object again when the entire panel has been seated.

The obvious remedy for the erroneous refusal to grant a *Wheeler* motion would be an appeal. The more complicated matter is what to do if the court grants the *Wheeler* motion. There have been several alternatives pronounced by the courts over the years. What is important is that the objector must be prepared to state what remedy he wants parsed out if he is successful. Some remedies that have been discussed are to reseat the improperly stricken juror, to impose monetary sanctions on the party who engaged in the offending act, to add peremptory challenges to the successful objector, or even to seek a new panel or seek a mistrial (but not if it is apparent that the purpose in making the improper challenges was for the purpose of obtaining a new panel). Most of these remedies were discussed by the California Supreme Court in *People v. Willis* (2002) 27 Cal.4th 811 [118 Cal. Rptr.2d 301]. The case, therefore, among other things, stands for the proposition that there are many remedies that are available to a trial court which upholds a *Wheeler* challenge.

As disturbing as the challenge of a prospective juror based upon his race is, discretion must be exercised when considering the use of a *Wheeler* motion. Accusations of racial or gender bias may have potentially adverse repercussions affecting the clients, the attorneys, the judge, the jury and the trial.

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Notes:

[1] California Code of Civil Procedure section 231.5 also provides an independent ground for objection to improper use of peremptory challenges and should accompany the *Batson-Wheeler* motion. "A party may not use a peremptory challenge to remove a prospective juror on the basis of an assumption that the juror is biased merely because of his race, color, religion, sex, national origin, sexual orientation or similar grounds."

[2] Objecting under both *Batson* and *Wheeler* preserves federal issues on appeal.