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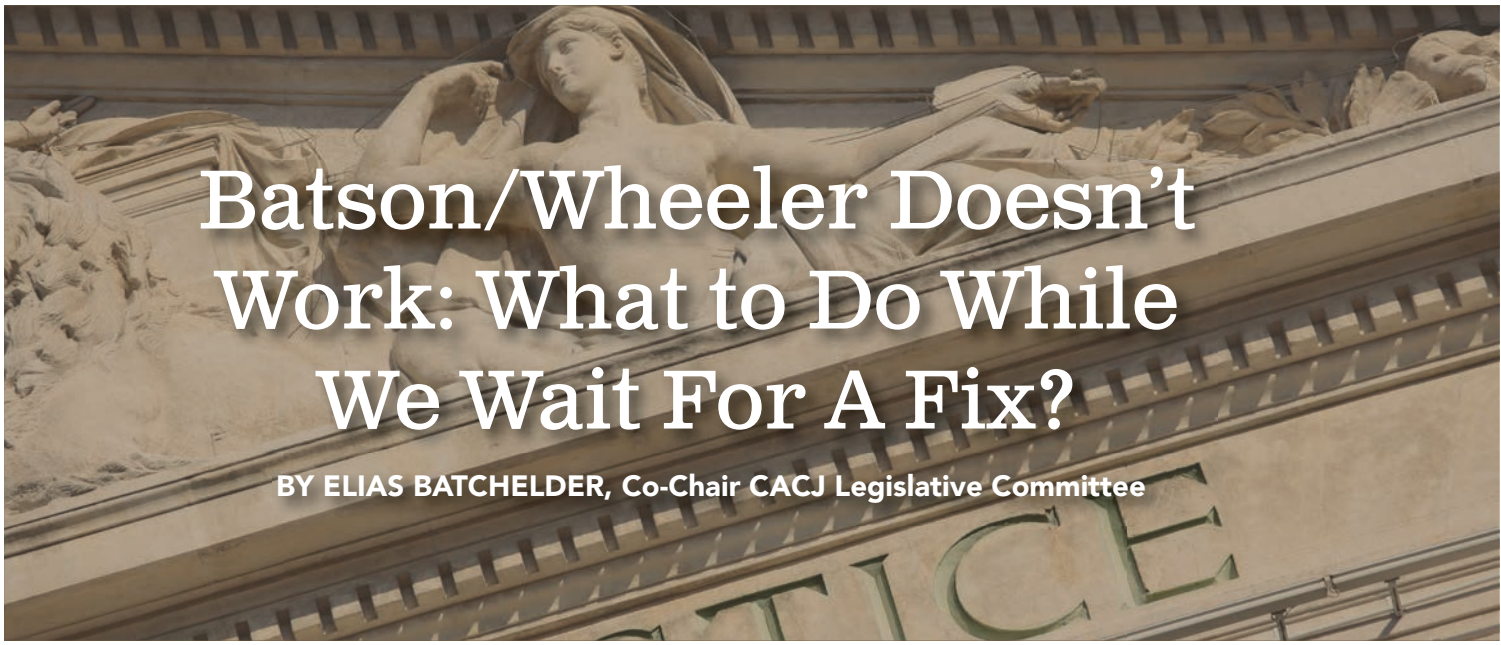

Batson/Wheeler Doesn't Work: What to Do While We Wait For A Fix?

BY ELIAS BATCHELDER, Co-Chair CACJ Legislative Committee

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At the CACJ/CPDA Capital Case Defense Seminar a few months back, I gave a presentation on *Batson/Wheeler* along with the inimitable Lis Semel. The news was mostly grim: the California Supreme Court continues to reinforce its "see no evil, hear no evil" *Batson* jurisprudence, and has extended its uninterrupted string of denying *Batson* claims in capital cases to nearly twenty years (thirty, if restricted to anti-black discrimination). As a result, the case law is terrible, which in turn is reflected in the operation of *Batson/Wheeler* in the trial courts. Our message that *Batson/Wheeler* was still not working should come as no surprise to any defense attorney, either at the trial or appellate level. The only truly good news we had to offer was that CACJ is sponsoring a bill in the Legislature to fix the problem. At the time of this writing, AB 3070 passed through the Assembly (by an impressive 53-16 margin!), and our fingers are crossed that it will pass the Senate and be signed into law. But what should defense attorneys do while we wait hopefully for a January 1, 2021 effective date? How can we seize the moment in wake of the protests against racial discrimination triggered by the callous killing of George Floyd?

One thing we can do is take cues from the changes AB 3070 proposes, and prod trial courts to remedy the problems the law intends to address—now. Of course, no trial judge is going to implement AB 3070 prior to passage by the Legislature. Nor should defense attorney even suggest such an approach. However, at least some judges out there recognize that the *Batson* procedure is, shall we say, imperfect. At least one House of the Legislature has loudly agreed. *Batson/Wheeler*'s acknowledged defects should be voiced in every case. Defense attorneys should—indeed must—remind trial courts of the tools that are *already within their power* to address some of the problems that have for years plagued the proper implementation of *Batson/Wheeler*. Perhaps many (and let's be honest, likely most), trial judges may not immediately agree. However, "working the ref" is likely not going to hurt trial attorneys that much. Moreover, there are several new appellate issues that can be generated by strategic work in the trial court.

Using AB 3070 Before It Is Passed

AB 3070, if passed, will be effective in all trials "in which jury selection has not been completed as of January 1, 2021." Although it makes numerous changes, this article will highlight the three most important: 1) the elimination of the prima facie case, 2) the adoption of an "objective" standard recognizing implicit bias and not requiring intentional discrimination, and 3) the creation of a list of presumptively invalid reasons for strikes. This article will discuss how trial attorneys can immediately use these proposals before the bill is passed to assist defendants in jury trials and, later, on appeal.

1. AB 3070 Eliminates the Prima Facie Case Because It Serves to Mask Discrimination. Trial Courts Can Address this Problem Now.

In proposed Penal Code sections 231.7(b) & (c), AB 3070 eliminates the prima facie case. If an attorney objects, a reason must be given. What can we do now? No trial court is going to get rid of the prima facie case without legislative authority. But it is important to remind the trial court *why* the prima

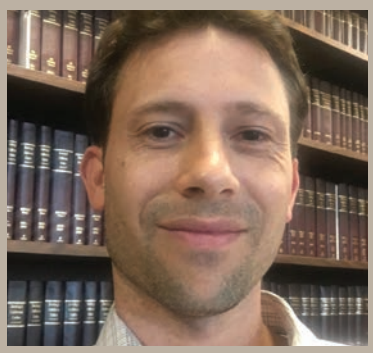
facie case was eliminated in AB 3070. Many defendants are tried in jurisdictions where, due to a general lack of diversity and issues with how jurors are summoned, only one or two jurors of a certain protected class are ever even subject to challenges. Even in diverse jurisdictions, defendants may often draw a non-diverse pool. In these cases, prosecutors can currently strike these jurors with impunity, knowing that they will never even be asked the reason for the strike. Prosecutors have been trained to flagrantly abuse this loophole to their advantage: An Orange County *Batson/Wheeler* training presentation advises prosecutors to strike the "most hostile jurors first" before "defense gains 'evidence' for Wheeler objections" and "possible reseating of challenged (hostile) juror." This problem is exacerbated by the 2016 reduction of peremptory challenges in misdemeanor cases from ten to six. With only six peremptories, it is much harder to demonstrate the "pattern" required for the prima facie case.

Defense counsel should discuss the problem with the trial court and propose a solution. First, it is well within the trial court's power to take into consideration the total or near-total exclusion of jurors of a protected class—even if there are only one or two. Numerous jurisdictions have held that total exclusion of a protected group demonstrates a prima facie case. California has not done so, but it nonetheless has reminded trial courts—repeatedly—that total or near-total exclusion is "especially relevant" to the first-stage inquiry. (*People v. Woodruff* (2018) 5 Cal.5th 697, 749; *People v. Reed* (2018) 4 Cal.5th 989, 999.) Moreover, if the case is a misdemeanor, defense attorneys should argue that the recent reduction in peremptory challenges must necessarily reduce the prima facie burden (and argue that the 2016 change in the law thus distinguishes any prior, unhelpful cases).

Second, in the (unfortunately likely) event that the trial court believes that total or near-total exclusion of a protected group of jurors will not alone suffice, defense attorneys must demand discovery into the prosecutor's past cases to demonstrate a broader pattern. Otherwise, it will be impossible to demonstrate a prima facie case. Of course, it helps to do your homework instead of letting the trial court describe your discovery request as a "fishing expedition." Find defense attorney(s) in recent cases this prosecutor tried and have them fill out a declaration saying that the prosecutor struck all (or at least a disproportionate share) of the jurors of the protected class in a recent case. If the trial court denies this request, at least it will set up an issue on appeal: trial courts cannot simultaneously hold that discovery into past patterns is foreclosed while also ruling that low numbers of strikes forecloses defendants from establishing a prima facie case.

2. AB 3070 Changes the Standard to an Objective Standard, Taking into Account Implicit Bias

In proposed section 231.7(d)(2), AB 3070 changes the standard from subjective—intentional discrimination—to an objective standard, taking into account "implicit, institutional, and unconscious biases." The intentionality requirement is a crippling burden, requiring trial courts to accuse colleagues of lying to them in order to hide their concealed bigotry. Once again, it is plain that trial courts will not retreat from the intentionality requirement imposed under current law. However, nothing stops trial courts from admonishing prosecutors to take into account their own implicit biases in exercising peremptory



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challenges. Indeed, a strong argument could be fashioned that such an admonishment is required.

The Judicial Counsel cosponsored the recently enacted AB 242, a bill which directs the Judicial Counsel to develop mandatory trainings on the subject of implicit bias for all lawyers and all public-facing court staff in California. (See Stats. 2019, c. 4189, § 1-3, pp. 91-93.) In enacting AB 242, the Legislature specifically found that "most people have an implicit bias that disfavors African Americans and favors Caucasian Americans, resulting from a long history of subjugation and exploitation of people of African descent[]" and reached the obvious conclusion that "[j]udges and lawyers harbor the same kinds of implicit biases as others." (*Ibid.*)

Although these trainings have not gotten off the ground yet, the defense should request that, in the interim, prosecutors who have not yet attended such trainings be admonished regarding implicit bias in the context of peremptory challenges. Depending on your judge, you might leave the contours of such an admonishment to the trial court. Or perhaps you could suggest that the prosecutor be made to watch the Washington United States District Court video on unconscious bias. Again, if denied, it will create a novel appellate issue: is an instruction on implicit bias required upon request during jury selection? Either way, it will be elucidating (and useful on appeal) to hear what the prosecutor and/or judge has to say about the need to address implicit bias in jury selection.

3. AB 3070 Creates a List of Presumptively Invalid Reasons

The most powerful tool in AB 3070 is the enumerated list of presumptively invalid reasons for excusing prospective jurors, which according to the bill's findings "are in fact associated with stereotypes about those groups or otherwise based on unlawful discrimination." On the top of the list—by no accident—are "[e]xpressing a distrust of or having a negative experience with law enforcement or the criminal legal system" and "[e]xpressing a belief that law enforcement officers engage in racial profiling or that criminal laws have been enforced in a discriminatory manner" and "[h]aving a close relationship with people who have been stopped, arrested, or convicted of a crime." These justifications are sensitive subjects for prosecutors and trial judges. Countless thousands of jurors of color have been excused from juries based upon these reasons, often by the very judge presiding over the *Batson/Wheeler* motion, and unquestionably at least by the judge's colleagues. Undoubtedly, judges, believing themselves and their friends and co-workers are free from invidious bias, strongly disagree with the conclusion that these justifications are discriminatory.

And yet…we are living in a moment in which the conclusion that black and brown Americans have a powerful basis to distrust law enforcement and that the law is unequally applied based on race is blaring across every conceivable media and social media channel. How can this moment be combined with the *existing* rules of *Batson/Wheeler* to prevent jurors from being excused on these bases?

To begin with, the entire list of presumptively invalid reasons are included in the bill, in part, because these reasons disproportionately impact prospective jurors of color. *Existing* doctrine explains that the fact that a justification disproportionately impacts a protected class of jurors "is relevant to the inquiry as to whether the reasons were sincere and not merely pretextual." (*People v. Melendez* (2016) 2 Cal.5th 1, 18.) Remind the trial court of this law and how it should apply to each of the presumptively invalid reasons—they each merit careful attention.

Second, ask in discovery for prosecutorial training manuals on *Batson*. Regardless of whether you get them in discovery, write the D.A. a request under the Public Records Act, perhaps tailored to your specific prosecutor (what trainings materials they have received, and what events they have attended). You can also contact the Office of the State Public Defender, which has a collection of prosecution training manuals—perhaps from your county—on file. And peruse the section on D.A. training manuals in the Berkeley Death Penalty Clinic's newly published report: *Whitewashing the Jury Box, How California Perpetuates the Discriminatory Exclusion of Black and Latinx Jurors*. From each of these sources, you should learn that prosecutors are routinely trained with lengthy lists of "race-neutral" reasons to provide trial courts, reasons which neatly map onto many of the reasons AB 3070 renders presumptively invalid. And the Berkeley Death Penalty Clinic study also shows how frequently certain potentially pretextual justifications are used in the trial courts (for instance, according to the report, there is a suspicious epidemic of black jurors with allegedly hostile "demeanor" being called for jury duty). Prosecutors are even provided "cheat sheets" which list such reasons all on one page for convenience. Call out prosecutors on this practice. If they are repeating reasons listed in a training, put that fact in your record.

More importantly, the chain of inference engaged in by prosecutors is *necessarily* not simply that a juror of color has a negative experience with law enforcement, or a belief in discrimination in the legal system, or a relative with prior involvement in the criminal justice

system. Instead, prosecutors must hold a sincere belief that these expressed views or characteristics will bias jurors against the prosecution. Defense attorneys should ask the prosecutor—in front of the judge—to think long and hard before exercising a strike on one of the presumptively invalid bases. Not necessarily because the reasons are presumptively discriminatory under AB 3070, but because the reasons are ready masks for the action of implicit bias. One house of the Legislature has found these reasons are problematic. Hopefully another will follow, as will the Governor. The fact that the law has not yet become effective does not render these findings irrelevant. The defense must *demand* that, after careful consideration, prosecutors confirm within themselves that the chain of inference—that stricken jurors are biased against the prosecution—*is in fact true* (hopefully with a reference to an instruction on implicit bias previously requested).

If asked in the right way, many jurors of color will honestly proclaim that they can set aside any past negative experiences or distrust in law enforcement and focus on the facts of the case and be fair and impartial. Go down the whole list of reasons (or your personal favorites) and read them out loud to the jury and ask, if any of them apply to any of you, can you be fair, unbiased against the prosecution, and able to focus on the facts of the case. Get them each to say it! True, courts routinely ignore such statements in considering *Batson* challenges. But, depending on the judge, consider asking the judge directly whether *they* disbelieved the jurors' responses that they could set aside any feelings and be fair and impartial. Of course, the ultimate question is what the prosecutor believed, not the judge. But a judge's finding is certainly relevant to jurors' apparent credibility. If judges are willing at least to say that *they* accepted as credible the jurors' response that they can be fair, what a coincidence that the prosecutor comes to a different conclusion than everyone else in the courtroom (again and again)?

Most important: do not forget the political moment. Ask for a show of hands among all jurors whether there is a basis for people of color to distrust law enforcement or the criminal justice system. Hopefully, in the wake of the ongoing protests against racial injustice, the number of raised hands will be higher than usual. If the prosecutor nonetheless targets minority jurors on these bases, vigorously attack the prosecutor's "race-neutral" justification by comparison with other jurors who answered similarly. And if the prosecutor engaged in a longer colloquy with jurors of color on these topics, make sure to point that out as well. After all, as an Orange County training manual attests, prosecutors are trained to "develop dissimilarities" among jurors with shared characteristics.

Whatever happens with AB 3070, defense attorneys should not simply sit idly by and do nothing to agitate for change. Our clients, and ourselves, deserve to see a criminal justice system in which jurors of color are not systemically removed from juries.

Footnotes

1 *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*) and *People v. Wheeler* (1978) 22 Cal.3d 258.

2 See, e.g., *People v. Bryant* (2019) 40 Cal. App.5th 525, 544 (conc. opn. of Humes, J.) [highlighting the "serious shortcoming" of *Batson* and joining "those calling for meaningful reform."]; *People v. Miles* (Cal., May 28, 2020, No. S086234) 2020 WL 2761063, at *57-64 (dis. opn. of Liu, J.) [detailing many shortcomings of California Supreme Court *Batson/Wheeler* jurisprudence].

3 Shockingly, the conservative Alliance for California Judges recently wrote to the Legislature indicating their belief that Justice Thurgood Marshall was right: the only way to eliminate bias in jury selection was to prohibit peremptory challenges altogether. (Letter from Hon. Judge White, President of Alliance for California Judges, to Hon. Anthony Rendon; Hon. Shirley Weber, Hon. Mark Stone, and Hon. Reggie Jones-Sawyer (June 10, 2020).)

4 If there is a prospect that jury selection begins in 2020 but for whatever reasons will continue into January 2021 make sure to use the bill to your advantage!

5 *Batson, supra,* 476 U.S. at p. 105 (conc. opn. of Marshall, J.) [lamenting that "where only one or two black jurors survive the challenges for cause, the prosecutor need have no compunction about striking them from the jury because of their race"].

6 See, e.g., *City of Seattle v. Erickson* (Wash. 2017) 398 P.3d 1124 [single strike established prima facie case when it resulted in total exclusion]; *United States v. Chalan* (10th Cir.1987) 812 F.2d 1302, 1314 [exercise of a peremptory challenge to strike the last remaining juror of defendant's race is sufficient to raise an inference of discrimination]; *Pearson v. State* (Fla. Dist. Ct. App. 1987) 514 So.2d 374, 375-376 [prima facie case established when prosecutor struck only member of jury venire of the same race as defendant]; *People v. Portley* (Colo.Ct.App.1992) 857 P.2d 459, 464 [prima facie case of discrimination is established if no members of a cognizable racial group are left on a jury as a result of the prosecutor's exercise of peremptory challenge]; *Hollamon v. State* (Ark. 1993) 846 S.W.2d 663, 666 [appellant "clearly" established prima facie case "when he pointed to a peremptory strike by the state dismissing the sole black person on the jury"]; *State v. Rhodes* (Wash. Ct. App. 1996) 917 P.2d 149, 154 [striking only African American on panel created a prima facie case of discrimination]; *Highler v. State* (Ind. 38 2006) 854 N.E.2d 823, 827 [removal of the only African–American juror raises an inference that the strike was racially motivated].

7 Although discovery under Penal Code section 1054 et seq. does not list such materials, *Batson* itself indicates that a prosecutor's pattern and practice is relevant to the analysis. (See *Batson, supra*, 476 U.S. at p. 80 [inference of discrimination could be supported by showing that the prosecutor "in case after case . . . is responsible for the removal of Negroes who have been selected as qualified jurors"].) Indeed, cases have repeatedly held that practices of *other* attorneys may even be relevant. (*Riley v. Taylor* (3d Cir. 2001) 277 F.3d 261, 280 [office's strikes in other cases "within one year" of trial relevant to *Batson* inquiry].) Although a full theory of discoverability is beyond the scope of this article, the pleadings in *People v. Maurice Jones*, No. S255826 (filed Oct. 23, 2019), a case in which the petitioner seeks discovery of prosecution jury selection notes under Penal Code section 1054.9 for purposes of establishing a *Batson* violation, lays out constitutional discovery theories which could be adapted to the training manual context.

8 United State District Court for the Western District of Washington, *Unconscious Bias*, available at https://www.youtube.com/watch?v=XHu-zU-et8Tw.

9 Available at: https://www.law.berkeley.edu/wp-content/uploads/2020/06/Whitewashing-the-Jury-Box.pdf