A Primer on Batson-Wheeler Claims
By Patrick McKenna

A. Introduction.

One of the most fruitful – though underexplored – challenges we can bring on appeal are claims pursuant to *Batson v. Kentucky* (1986) 476 U.S. 79 and *People v. Wheele*r (1978) 22 Cal.3d 25 (hereinafter referred to as "*Batson-Wheeler* claims"). So long as we can show the claim is meritorious, the error is reversible per se; no prejudice must be shown. (*Id.* at p. 283.)

Despite this, this error is not one we frequently see litigated. A lot of attorneys – myself included – can be intimidated by the often complex nature of these claims. Worse yet, it can be tough to tell from the normal record on appeal whether a *Batson-Wheeler* objection was even made. And even if one was, the issue may not have been adequately preserved.

In this article, I hope to provide an overview as to how these claims should be analyzed and litigated. To be sure, there are many facets to *Batson-Wheeler* arguments, each requiring proper research and investigation. Nonetheless, I encourage counsel to take a methodical approach in evaluating the "three-step" process necessary to assess such claims. And, in light of the evolving case law on this topic, I hope to embolden counsel to more frequently litigate such issues when they arise.[1]

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[1] Two articles provided great starting points for my research and can help panel attorneys when confronting this issue. While the present article is intended to merely provide appellate counsel with an overview of the law governing *Batson-Wheeler* claims, these other articles may be truly beneficial for the wealth of case law that they cite. The first,

B. What are *Batson-Wheeler* claims?

As a new attorney, *Batson-Wheeler* objections were something I often heard discussed but did not really understand. In essence, these claims are intended to protect the integrity of courts by eliminating the taint of discriminatory bias in jury selection, while also ensuring that our clients receive the right to a fair trial to which they are constitutionally entitled. (*Miller-El v. Dretke* (2005) 545 U.S. 231, 238 ("*Miller-El II*"); see also *Powers v. Ohio* (1991) 499 U.S. 400, 411.)

Traditionally, these objections have been most frequently made when a prosecutor removed prospective jurors on the basis of race or gender, though, at least in California, it has now been applied to protect members of other cognizable groups. (See *People v. Cash* (2002) 28 Cal.4th 703, 724 [U.S. Supreme Court has only applied *Batson* to race and gender]; but see *People v. Johnson* (1989) 47 Cal.3d 1194, 1257, overruled on other grounds in *People v. Gutierrez* (2017) 2 Cal.5th 1150, 1174 [Jews constitute cognizable group]; *People v. Garcia* (2000) 77 Cal.App.4th 1269, 1281 [homosexuals constitute cognizable group]; *People v. Bell* (2007) 40 Cal.4th 582, 599 overruled on other grounds by *People v. Sanchez* (2016) 63 Cal.4th 665, 686, fn. 13 [lesbians presumed to constitute cognizable group].)

"*Wheeler/Batson* Developments," was written by my colleague Jonathan Grossman and is available on the SDAP website. The second, "How to Make a *Batson* Case on Appeal," was written by Michelle May Peterson and is available on the CCAP website. (This expands upon a prior article, "*Johnson v. California*: Rewriting the Script for Peremptory Challenge Issues in California Courts," also written by Ms. Peterson and available on the CCAP website.)

This distinction can be significant and rests upon the analytical underpinnings of *Wheeler* (in California courts) and *Batson* (in federal court). Federal jurisprudence typically requires that defense counsel must show that the group members are experiencing discriminatory treatment and need "protection from community prejudices." (*Murchu v. United States* (1st Cir. 1991) 926 F.2d 50, 54.) In California, courts consider "whether any specific prospective juror is challenged on account of bias against an identifiable group distinguished on racial, religious, ethnic, or similar grounds." (*Gutierrez, supra,* 2 Cal.5th at p. 1158, citation omitted; see also *People v. Fields* (1983) 35 Cal.3d 329, 349 [cognizable group consists of individuals who share a common background or distinctive viewpoint].)

Counsel should note that under the prevailing federal standard, a past history of discriminatory treatment is typically required to show that a group is protected under *Batson* and its progeny. (See, e.g., *Purkett v. Elem* (1995) 514 U.S. 765, 769 (per curiam) [men with beards not cognizable group].) In California, however, a past history of discriminatory treatment need not be necessarily shown; the prospective juror must merely be part of an "identifiable group," particularly one sharing a common background or viewpoint. (See *Fields, supra,* 35 Cal.3d at p. 349.) With that said, there are limits – even in California – as to the nature of a group entitled to protection under *Wheeler*. (See, e.g., *People v. Carpenter* (1997) 15 Cal.4th 312, 352, superseded by statute on other grounds [poor people not cognizable group].)

In relation to our clients, the true import of *Batson-Wheeler* claims rests upon the constitutional rights they help to protect. Indeed, "the use of peremptory challenges to

remove prospective jurors on the sole ground of group bias violates the right to trial by a jury from a representative cross-section of the community under article I, section 16 of the California Constitution [citation]; as well as the equal protection clause of the Fourteenth Amendment to the United States Constitution. [Citation.]" (*People v. Burgener* (2003) 29 Cal.4th 833, 869.) As such, these issues can often warrant review in federal court.

C. How to Determine Whether a Potential *Batson-Wheeler* Claim Exists.

Batson-Wheeler objections must be timely made during voir dire if they are to be considered on appeal. (*Wheeler, supra,* 22 Cal.3d at p. 280; see also *Gutierrez, supra,* 2 Cal.5th at p. 1156 [claim not preserved when defense counsel made objection but did not push for ruling on it].) As we all know, however, transcripts from voir dire proceedings are not part of the normal record on appeal under California Rules of Court, rule 8.320 (c). In some counties, the clerk will write on the minute order that such an objection was made. Better yet, others will include a copy of the reporter's transcript of the objection. In these instances, appellate counsel is placed on notice that the issue requires further investigation and augmentation of the record.

Quite often, however, there will be nothing in either the clerk's or reporter's transcripts indicating that such an objection was made, thereby preventing appellate counsel from ever learning about such litigation. In light of this problem, I encourage appellate counsel to contact the trial attorney when beginning to work on any jury trial appeal, specifically asking him or her whether a *Batson-Wheeler* objection was made or whether anything else occurred during voir dire that would require augmentation of the

record. Only by employing such a process can counsel ensure that a potentially meritorious claim is not missed.

When moving to augment the record in light of a *Batson-Wheeler* claim, the totality of the reporter's transcript from voir dire should be requested. A transcript of the objection itself is insufficient to examine the claim's merits. Counsel may very well need to undertake comparative juror analysis, which, as explained more below, seeks to compare the challenged panelist with "similarly situated but unchallenged panelists who are not members of the challenged panelist's protected group." (*Gutierrez, supra,* 2 Cal.5th at p. 1173, citing *Miller El, supra,* 545 U.S. at p. 241.) This can only be done if counsel has a copy of the questioning of each of the potential jurors, thereby requiring that the entire transcript of these proceedings be produced. It is worth noting that significant delays are common when the entirety of jury selection is subject to augmentation. Accordingly, counsel should request copies of these transcripts early on in the case.

D. Analyzing the Merits of a *Batson-Wheeler* Claim.

1. Introduction.

As noted above, there are three steps that a trial court must employ to determine if a violation of *Batson-Wheeler* exists. "First, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race; second, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question; and third, in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination." (*Snyder v.*

Louisiana (2008) 552 U.S. 472, 476-477, internal citations omitted.) Since different legal principles apply to each step, counsel should be clear about the distinctions between each of them. Nonetheless, reversal is warranted if an error occurs at any point.

2. First Step – Prima Facie Showing.

In order to make a prima facie showing, trial counsel must make an adequate record of the circumstances and establish that the excluded person is part of a cognizable group. (*Wheeler, supra,* 22 Cal.3d at p. 280.)[2] Additionally, "the *Batson[-]Wheeler* movant must demonstrate a prima facie case by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose. The moving party satisfies this first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred." (*Gutierrez, supra,* 2 Cal.5th at p. 1158, citations omitted; see also *Johnson v. California* (2005) 545 U.S. 162, 168 ("*Johnson*").) Most courts review such challenges for substantial evidence (*People v. Welch* (1999) 20 Cal.4th 701, 746), though the analysis in *Johnson* may support an argument that such claims can be reviewed de novo. (See May, "*Johnson v. California*: Rewriting the Script for Peremptory Challenge Issues in California Courts" at part V [available on CCAP website].)

[2] It is at the first stage that the federal and California distinctions between the nature of a "cognizable group" may become relevant. As noted above, counsel will make such a showing under both standards if the objection is premised on race or gender. While we may hope that the United States Supreme Court eventually broadens its definition of a "cognizable group," any other types of groups will, at this juncture, only meet the California standard.

Appellate counsel can rely on several different factors to show that a prima facie showing of discriminatory purpose has been made. The most common factors include:

(1) A Pattern of Strikes against Members of a Particular Group. (See *Batson, supra,* 476 U.S. at pp. 96-97; *Wheeler, supra,* 22 Cal.3d at p. 280; *Miller El v. Cockrell* (2003) 537 U.S. 332, 342 ("*Miller-El I*") [prosecution used peremptory strikes to exclude 91% of African-Americans in venire].) This is by far the most common way to make a prima facie case. Even so, discrimination can be established even if only one excluded juror is from a cognizable group; a pattern is not required to make a prima facie showing. (*Batson, supra,* 476 U.S. at p. 386; *Snyder, supra,* 552 U.S. at p. 478, internal quotation marks omitted [The "Constitution forbids striking even a single prospective juror for a discriminatory purpose"].)

In cases where a pattern cannot be clearly shown, counsel will likely need to rely upon other factors. (*United States v. Vazquez-Lopez* (9th Cir. 1994) 22 F.3d 900, 902 [when cannot show pattern, must rely on other factors]; see, e.g., *People v. Turner* (1991) 90 Cal.App.4th 413, 419-420.) Indeed, many courts have found an inadequate showing of a prima facie case when only one or two potential jurors from a cognizable group are excluded. (See, e.g., *People v. Panah* (2005) 35 Cal.4th 395, 442; *People v Yeoman* (2003) 31 Cal.4th 93, 115.)[3]

[3] Comparative juror analysis will be discussed in depth as to the third step of *Batson-Wheeler* claims. While no court has required that such an analysis must be done as to the first step, this can be another factor that can aid counsel in making the requisite showing. (See *Batson, supra,* 476 U.S. at pp. 96-97 ["all relevant circumstances" can be considered].)

(2) Lack of Other Obvious Characteristics that would Warrant Use of Peremptory Strike. (*Wheeler, supra,* 22 Cal.3d at p. 280.) This factor can be particularly powerful when, beyond race, the questioning of the excluded juror indicates that he or she has typically pro-prosecution leanings. (*People v. Allen* (2004) 115 Cal.App.4th 542, 550.)

(3) Nature of a Prosecutor's Questions and Statements that Show a Discriminatory Purpose. (See *Batson, supra*, 476 U.S. at pp. 96-97.) Most often, this factor comes up when the prosecution's questioning of potential jurors from a cognizable group is markedly different from potential jurors not from this group – i.e., when the questioning of the group's members goes on at length or when few questions are asked at all, as compared to the entire venire. (See, e.g., *Miller-El II, supra,* 545 U.S. at p. 254.)

(4) Whether a Defendant is a Member of a Cognizable Group. Or Conversely, When a Victim is *Not* a Member of a Cognizable Group. (*Johnson, supra,* 545 U.S. at p. 167 [prima facie showing when all three black potential jurors excused in trial of a black defendant and a white victim]; *Batson, supra,* 476 U.S. at p. 97.) Certainly, this factor ties in nicely with one of the underpinnings of *Batson* itself – that a defendant is entitled to a fair and impartial jury of his peers.

The aforementioned list is certainly not exhaustive. As *Batson* itself states, "all relevant circumstances" should be considered. (*Batson, supra,* 476 U.S. at pp. 96-97.) Accordingly, counsel should search for – and rely upon – any other pertinent factors to show that a prima facie case has been made.

Typically, the remedy for an error at the first step is to remand the case so that the prosecutor can provide reasons for the peremptory challenge. (*Batson, supra*, 476 U.S. at p. 100.) Of course, the problem – at least for the prosecutor – is that this remedy puts him or her in the position of trying to remember his or her actual reasons for the removal well after this occurred. (See, e.g., *Paulino v. Harrison* (9th Cir. 2007) 542 F.3d 692, 699-700 [after case remanded, court reverses again since counsel's stated basis for the removal of a juror was based on his speculation about what he was thinking years prior].)

3. Second Step – Group-Neutral Explanations.

As to the second step, "if the court finds the movant meets the threshold for demonstrating a prima facie case, the burden shifts to the opponent of the motion to give an adequate nondiscriminatory explanation for the challenges. To meet the second step's requirement, the opponent of the motion must provide a clear and reasonably specific explanation of his legitimate reasons for exercising the challenges." (*Gutierrez, supra,* 2 Cal.5th at p. 1158, citations and internal quotations omitted.) "'[U]nless a discriminatory intent is inherent in the prosecutor's explanation,' the reason will be deemed neutral." (*Ibid.*, citing *Purkett, supra,* 514 U.S. at p. 768 (per curiam).) This is so even if a prosecutor's explanation is not "persuasive or even plausible." (*Ibid.*) An appellate court independently reviews whether the prosecutor's stated reasons provide a nondiscriminatory basis for the removal. (*Tolbert v. Page* (9th Cir. 1999) 182 F.3d 677, 680, fn. 5.)

As the aforementioned discussion indicates, the prosecution has a very low bar to clear at the second step. Even so, the prosecutor's explanation must have some

specificity, and the reasons must have some indicia of legitimacy. As such, a prosecutor merely claiming that he or she did not strike a juror due to a discriminatory motive is insufficient to meet the standard. (*Batson, supra,* 476 U.S. at p. 98.) The prosecutor speculating as to his or her potentially nondiscriminatory reasons for removing a juror – i.e., when the reasons is placed on the record well after the fact – can also warrant reversal since only the prosecutor's *actual* reasons are pertinent. (*Paulino, supra,* 542 F.3d 692, 699-700.) Most other non-discriminatory reasons for striking the juror will allow the prosecutor to meet his or her burden as to step two.

4. Third Step – The Court's Inquiry.

The third step is far more fruitful than the second on appeal. Indeed, most *Batson-Wheeler* challenges relate to this stage of the inquiry.

At this step, "the trial court must decide whether the movant has proven purposeful discrimination. [Citation.] In order to prevail, the movant must show it was 'more likely than not that the challenge was improperly motivated.' [Citation.] This portion of the *Batson[-]Wheeler* inquiry focuses on the subjective genuineness of the reason, not the objective reasonableness. [Citation.]" (*Gutierrez, supra,* 2 Cal.5th at p. 1158.)

The credibility of the prosecutor's second step explanation is vital. "To satisfy herself that an explanation is genuine, the presiding judge must make a 'sincere and reasoned attempt' to evaluate the prosecutor's justification, with consideration of the circumstances of the case known at that time, her knowledge of trial techniques, and her observations of the prosecutor's examination of panelists and exercise of for-cause and

peremptory challenges. [Citation.]" (*Gutierrez, supra,* 2 Cal.5th at p. 1159.) Unlike the second step, "improbable or fantastic reasons" provided by the prosecutor should not be relied upon by the court (*id.*), which is only entitled to consider the actual reasons given by the prosecutor for removing the potential juror; a court cannot find that other valid, nondiscriminatory reasons may have premised the use of a peremptory challenge (*Miller-El II, supra,* 545 U.S. at p. 252; see also *People v. McGee* (2002) 104 Cal.App.4th 559, 571, overruled on other grounds by *People v. Avila* (2006) 38 Cal.4th 491, 549-550.). A court must individually analyze each removed potential juror to determine whether a violation of *Batson-Wheeler* occurred. (*People v. Fuentes* (1991) 54 Cal.3d 707, 720.)

While a trial court's determination is reviewed with "great restraint," the substantial evidence standard is normally employed on appeal. (*Gutierrez, supra,* 2 Cal.5th at p. 1159.) After all, the trial court is in a much better position to determine credibility than is true of an appellate court. (*Miller-El I, supra,* 537 U.S. at pp. 338-339.) "A trial court's conclusions are entitled to deference only when the court made 'a sincere and reasoned effort to evaluate the nondiscriminatory justifications offered.'" (*Ibid.*, citing *Burgener, supra,* 29 Cal.4th at p. 864.) If a trial court merely reiterates the same reasons provided by the prosecutor – with no explanation as to how those reasons are credible – then it has not made the requisite "sincere and reasoned effort" and reversal is warranted. (See, e.g., *United States v. Hill* (6th Cir. 1998) 146 F.3d 337, 342; see also *People v. Allen* (2004) 115 Cal.App.4th 542, 551-553 [no sincere and reasoned effort made when trial court's explanation is too vague to withstand meaningful appellate review].)

Many of the same factors mentioned in relation to the first step can also be relied upon in assessing the trial court's determination at the third step. (See, e.g., *Miller-El I, supra,* 537 U.S. at pp. 340-341.) When the trial court provides reasons as to why it deems the prosecutor's explanations credible, appellate counsel should be sure to carefully review the record to ensure that substantial evidence supports these findings; indeed, counsel should be sure that the reasons provided are not contradicted by the record. (*Miller-El II, supra,* 545 U.S. at pp. 265-266 [explanation for striking juror not credible when prosecutor did not develop reason for removal when questioning juror].) And even when substantial evidence may support a factor relied upon by the prosecution, the trial court should not similarly rely upon it if it is illogical or implausible when viewed in context. (*Gutierrez, supra,* 2 Cal.5th at p. 1159.)

Appellate counsel should review the transcripts from voir dire carefully for other factors that may support an argument that the prosecutor's reasons are not credible. For example, a seemingly nondiscriminatory basis for removal may actually be a proxy for discriminatory bias. In *United States v. Bishop* (9th Cir. 1992) 959 F.2d 820, the prosecutor removed a juror since she lived in Compton and may have harbored anti-police views because of it; the Ninth Circuit reversed, finding the fact that the potential juror lived in Compton – which is largely made up of African-Americans – was merely a proxy for racial discrimination in violation of *Batson*. (*Id.* at p. 825.)

Very often, a prosecutor may state that a person's appearance, demeanor, or body language was a factor supporting the use of his or her peremptory strike. When this is relied upon, the prosecutor must provide some specificity about what aspects of a

person's demeanor or appearance was troubling; it is insufficient to cite a person's appearance – with no further explanation – as constituting a nondiscriminatory basis for removing the juror. (*Allen, supra,* 115 Cal.App.4th at pp. 551-553.) When the prosecutor does provide some specificity about why the person's appearance warranted the use of a strike (i.e., articles of clothing with political messages written on them, or nervousness when being questioned about certain topics), this can be sufficient to rebut the prima facie showing. (*United States v. Changco* (9th Cir. 1993) 1 F.3d 837, 840.) The United States Supreme Court has held, however, that there is no per se rule that a "demeanor-based explanation for a peremptory challenge must be rejected unless the judge personally observed and recalls the relevant aspect of the prospective juror's demeanor." (*Thaler v. Haynes* (2010) 559 U.S. 43, 47 (per curiam).) Still, if the trial court recalls the juror's demeanor differently than did the prosecutor, this can support an argument that the prosecution was providing pretextual reasons to cover up for discriminatory bias.

To the extent that anything in the *Batson-Wheeler* jurisprudence was considered controversial, it was the use of comparative juror analysis when analyzing the third step. Much of the resistance had been from California courts, which were reluctant to employ it. No longer. Both our state and federal supreme courts have found that comparative juror analysis is relevant and persuasive in the third step of *Batson-Wheeler* claims. (*Foster v. Chatman* (2016) 578 U.S. __ [136 S.Ct. 1737, 195 L.Ed.2d 1]; *Gutierrez, supra,* 2 Cal.5th 1150.) The opinions in both *Gutierrez* and *Foster* provide excellent examples as to how the third step can be analyzed.

In *Gutierrez, supra,* 2 Cal.5th 1150, the prosecutor exercised 10 of 16 peremptory challenges on Hispanic potential jurors in an attempted murder case involving three Hispanic defendants. (*Id.* at p. 1154.) The trial court found that the defense had made a prima facie showing of discriminatory bias and offered the prosecution the opportunity to justify the removal of all 10 of these jurors. (*Id.* at p. 1157.) The court individually reviewed the prosecution's stated reasons as to eight of the 10 jurors and made a global finding that the prosecution's reasons were neutral and not pretextual. (*Ibid.*)

At issue on appeal was the trial court's determination at the second and third steps. (*Gutierrez, supra,* 2 Cal.5th at p. 1154.) The California Supreme Court analyzed the removal of only one of these 10 prospective jurors but found that the record did not support the trial court's denial of the *Batson-Wheeler* motion as to this individual, thereby warranting a new trial. (*Ibid.*) The prosecutor had stated that his decision to use a peremptory strike on this prospective juror – identified as Prospective Juror No. 2723471 – was "a tough one." (*Id.* at p. 1160.) Ultimately, he did so because "'[s]he's from Wasco and she said that she's not aware of any gang activity going on in Wasco, and I was unsatisfied by some of her other answers as to how she would respond when she hears that Gabriel Trevino [a key prosecution witness] is from a criminal street gang, a subset of the Surenos out of Wasco.' The prosecutor did not specify which of her 'other answers' caused him dissatisfaction, nor do the People identify any such responses bearing on her possible reaction to Trevino's testimony. [The California Supreme Court] found no other answers in the record to support the People's position on this point." (*Ibid.*) The trial court found that the removal of this juror was justified "as a result of the

Wasco issue and also lack of life experience." (*Id.* at p. 1161.) Both parties conceded on appeal that the lack of life experience was never cited by the prosecutor; as such, only "the Wasco issue" was considered in determining whether the removal was proper. (*Ibid.*)

In analyzing the claim of error at the second step, the California Supreme Court initially observed that the potential juror's lack of knowledge of gang activity in her community was specific enough to meet the requirements of *Batson-Wheeler*. (*Gutierrez, supra,* 2 Cal.5th at p. 1167.) Similarly, it did not find that this reason was necessarily a proxy for racial discrimination even though Wasco is predominantly Hispanic. (*Ibid.*) Indeed, it distinguished the present case from *Bishop* in that it was not only the juror's affiliation with Wasco that warranted removal; it was her lack of knowledge of gang activity, which directly pertained to a key prosecution witness. (*Ibid.*) As such, it found the Wasco reason to be facially neutral and sufficient to rebut the prima facie showing. (*Ibid.*)[4]

Nonetheless, the court concluded that the Wasco issue was not credible when analyzing the third step. (*Gutierrez, supra,* 2 Cal.5th at p. 1175.) In so doing, it noted that the prosecutor did not comparably question non-Hispanic witnesses about gang activity. (*Id.* at pp. 1168-1169.) Further, it rejected the prosecution's claim that a

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[4] If I take issue with the *Gutierrez* opinion on any point, it is its discussion of the "proxy for racial bias" reason as relating only the second step of the inquiry. This point, of course, can – and should – be considered in determining the credibility of the reasons at the third step. Regardless, given that the court did not believe the Wasco issue was a proxy for racial bias, it would have had no bearing on the court's analysis on the third step.

potential juror unaware of gang activity in her own neighborhood would obviously be biased against a key prosecution witness who claimed to be a gang member in that area. (*Id.* at p. 1169.) It observed that if the prosecutor had stated that the potential juror's lack of awareness indicated that she was "untruthful or uninformed," the result may have been different. (*Ibid.*) But because this reason was not provided, the court could not consider it. (*Ibid.*)

Similarly, the court observed that the prosecutor's voir dire of this potential witness was limited to three questions, which only indicated that she lived in Wasco and was unaware of gang activity there. (*Gutierrez, supra,* 2 Cal.5th at pp. 1169-1170.) The lack of questioning did not indicate how she could be biased against the prosecution's key witness, nor did it show why the prosecutor could be concerned about her lack of awareness of gang activity. (*Id.* at p. 1170.) Moreover, the court's voir dire this potential juror indicated that she had ties to law enforcement, which had generally been considered a favorable trait by the prosecutor; this factor also weighed against the prosecutor's credibility. (*Ibid.*)

Taken together, the court concluded that a sincere and reasoned effort had not been made by the trial court to analyze the prosecutor's reasons for striking the juror; given the lack of explanation of the import of the Wasco issue by the trial court or prosecutor, the court concluded that the error warranted reversal. (*Gutierrez, supra,* 2 Cal.5th at pp. 1171-1172.) Most significantly, the California Supreme Court held that the lower court erred in failing to conduct comparative juror analysis as a per se rule; indeed,

it reaffirmed that such analysis must be done if presented by the defense, even if presented for the first time on appeal. (*Gutierrez, supra,* 2 Cal.5th at pp. 1173-1174.)[5]

Similarly, the United States Supreme Court reaffirmed the import of comparative juror analysis in Justice Robert's majority opinion in *Foster, supra,* 578 U.S. __ [136 S.Ct. 1737, 195 L.Ed.2d 1]. There, the defendant had been convicted of capital murder and challenged the prosecution's use of peremptory strikes against all four black prospective jurors in his habeas petition. (*Foster, supra,* 195 L.E.2d at p. 7.) The United States Supreme Court limited its analysis to the third step of the *Batson-Wheeler* inquiry and, more specifically, to the peremptory strikes as to two potential jurors. (*Id.* at p. 12-13.)

As to the first juror (hereinafter referred to as "Ms. Garrett"), the prosecution provided a "laundry list" of ten potentially nondiscriminatory reasons for her removal. (*Foster, supra,* 195 L.Ed.2d at p. 13.) The court found that "much of the reasoning provided by [the prosecutor] ha[d] no grounding in fact." (*Id.* at p. 14.) The court took great issue with several misrepresentations made by the prosecutor as to how he arrived at his decision to strike Ms. Garrett. (*Ibid.*) According to the prosecutor, this was a "last minute decision" between two jurors he had previously marked as "questionable;" he had not planned on striking either of them but, given an additional strike he was not

[5] It's worth noting that Justice Liu authored a well-written concurring opinion, finding that there was *Batson-Wheeler* error as to two other jurors. (*Gutierrez, supra,* 2 Cal.5th at pp. 1176-1180 (concur. op. of Liu, J.).) Appellate counsel would be well-advised to read this opinion in its entirety. As always, Justice Liu makes a number of thoughtful points, none of which are necessarily different or unique, however, to those presented in Justice Cuellar's majority opinion.

expecting, he concluded that Ms. Garrett was a less favorable juror and removed her. (*Ibid*.) The prosecutor's file, which had been obtained by the defense, contradicted this explanation. Ms. Garrett had been included on a list entitled "definite NO's;" the first five names on this list, which included Ms. Garrett, were all African-American. (*Id*. at p. 15) The prosecutor struck four of these five prospective jurors, and the fifth was removed for cause. (*Ibid*.)[6] Compounding the prosecutor's lack of credibility was his allegation that the defense had not asked Ms. Garrett any questions about three topics important to the trial; in fact, she had been questioned about each of them. (*Ibid*.)

The *Foster* court then conducted comparative juror analysis, which similarly did not support the prosecutor's stated reasons. (*Foster, supra,* 195 L.Ed.2d at p. 15.) In particular, the prosecutor claimed he struck Ms. Garrett because she was divorced; nonetheless, he declined to strike three out of four white prospective jurors who were also divorced. (*Id.* at pp. 15-16.) Similarly, he claimed that Ms. Garrett was too young to serve on the jury since she was 34, yet eight white prospective jurors under the age of 36 were not stricken. (*Id.* at p. 16.) Finally, the prosecutor did not remove a white juror who claimed no knowledge of the area of the crime, despite living and working nearby; as such, similar answers from Ms. Garrett held little weight as a basis for her removal. (*Ibid*.) Given as much, the court found "compelling evidence" pointing to purposeful discrimination as the basis for Mr. Garrett's removal. (*Id.* at p. 20.) Similar problems

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[6] The prosecution's bias against African-American jurors was made all the more important due to several other documents located in its file. (*Foster, supra,* 195 L.Ed.2d at pp. 20-21.) Given as much, it is unsurprising that the court found a *Batson-Wheeler* violation as to the third step. More than that, however, is how troubling the level of discrimination was in the first place.

were observed as to the second prospective juror. (*Id.* at pp. 16-20.) The denial of the defendant's habeas petition was reversed. (*Id.* at p. 21.)

In sum, *Gutierrez* and *Foster* are useful on several fronts. Both cases include extensive analysis as to the many types of factors a court can consider in determining the credibility of the prosecutor's stated reasons. In particular, *Gutierrez* relied upon: (1) the different nature of a prosecutor's questioning to potential jurors who were not members of the challenged group; (2) the prosecution's failure to explain how a particular nondiscriminatory trait could reasonably warrant removal; and (3) pro-prosecution characteristics of the challenged juror that had been possessed by other jurors who were not stricken. In *Foster*, the racial discrimination was readily apparent based largely on the abhorrent notations in the prosecution's file.[7] Even so, the opinion more broadly indicates that a prosecutor's stated reasons – even when race-neutral and reasonable enough on their face – cannot be relied upon absent a thorough review of all relevant circumstances. When this was done in *Foster*, the court found that the stated reasons were contradicted on numerous fronts and that the import of certain race-neutral reasons carried little weight when comparative juror analysis was conducted. As such, both of these decisions can provide useful starting points when raising a third step issue on appeal.

[7] How some of the court's justices did not sign on to the *Foster* majority opinion is truly confounding.

E. Conclusion.

Through this article, I hope I've convinced you that *Batson-Wheeler* claims are not necessarily as daunting as we might expect. Appellate counsel should carefully review for errors at each of the three steps. Additionally, as shown in *Gutierrez* and *Foster*, a careful review of the entirety of voir dire is necessary so that counsel can persuasively marshal as many factors as possible in support of his or her arguments.