HOW TO MAKE A *BATSON* CASE ON APPEAL

By Michelle May, CCAP Staff Attorney

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This article is a continuation of the previous *Batson* article, "*Johnson v. California*: Rewriting the Script for Peremptory Challenge Issues in California Courts," which was previously posted to this website. The focus of this second installment is a "how to" – what techniques can be used by appellate counsel to evaluate, argue, prevail on, and preserve *Batson* claims at all stages in reviewing courts.

VII. Evaluating And Litigating The Three *Batson* Stages On Appeal

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A. First Stage (Prima Facie Case)

To begin with, although discrimination can be established even when there is only one excluded juror from a cognizable group (*Batson v. Kentucky* (1986) 476 U.S. 79, 95; *People v. Silva* (2001) 25 Cal.4th 345, 386), it is easier to make a prima facie case when there are more challenges against more people in that group. Conversely, although discrimination is often easiest to establish where no members of the group end up seated as trial jurors, that isn't necessary for a prima facie case – or for that matter, for a final finding of discrimination, since a *Batson* challenge can result in reversal when it is successful as to only one prospective juror. (*E.g., Montiel v. City of Los Angeles* (9th Cir. 1993) 2 F.3d 335, 340.) Indeed, sometimes courts that are faced with *Batson* issues as to multiple jurors will reverse based on a finding as to only one, reasoning that once one is found, all the others are redundant. (*E.g., Snyder v. Louisiana* (2008) 552 U.S. ___ [128 S.Ct. 1203, 1208, 170 L.Ed.2d 175]; *Kesser v. Cambra* (9th Cir. 2006, en banc) 465 F.3d 351, 369.)

In light of *Johnson v. California* (2005) 545 U.S. 162, a finding that there is no prima facie case presents a question of law reviewed under the generous *de novo* standard. (*See* prior installment of this article, parts V(B) and V(C).)

(As of this writing (December 2008), although there appears to be some movement in California courts toward this standard, our state's courts have not appeared to adopt a uniform approach to standard of review after *Johnson*; some still appear to be using the "hypothetical speculative reason" approach to *Batson* prima facie case determinations that was rejected in *Johnson*, as discussed in part V(C) of this article. Appellate counsel litigating a *Batson* prima facie case issue should continue to use the *de novo* standard of independent review, and to avoid a "hypothetical speculative reason" approach and reject any effort by a respondent to use such an approach, for the reasons previously discussed in parts V(B) and V(C) of this article.)

Several different methods are commonly used in showing the existence of a prima facie case. They are especially effective when they can be used in combination, so appellate counsel considering a *Batson* issue should look for as many different factors as possible. However, a

combination is not necessarily required. Some methods found in caselaw are set forth below, but this is not intended to be an exhaustive list.

1. Pattern Of Strikes Against Cognizable Group Members

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There has long been a misconception among many attorneys and even some judges that *Batson* or *Wheeler* requires a "pattern" of discriminatory strikes; or more recently, that all *Batson* prima facie case analysis requires a particular type of record suitable for demonstrating a pattern. These are myths, nowhere supported by *Batson*; and after *Johnson v. California*, clearly not true. They were not true before *Johnson v. California* either. (*See, e.g., Batson,* 476 U.S. at p. 95; *Walker v. Girdich* (2d Cir. 2005) 410 F.3d 120,123, fn. 3; *Holloway v. Horn* (3d Cir. 2004) 355 F.3d 707, 728-729; *Fernandez v. Roe* (9th Cir. 2002) 286 F.3d 1073, 1077; *United States v. Horsley* (11th Cir. 1989) 864 F.2d 1543, 1436.) *Swain v. Alabama* (1965) 380 U.S. 202 required a pattern; *Batson* does not.

Nonetheless, a strong enough pattern – one that would raise at least an inference of discrimination – is a well-recognized method for making a prima facie case, either in conjunction with other factors, or even by itself. (*See, e.g., Batson,* 476 U.S. at p. 97; *Overton v. Newton* (2d Cir. 2002) 295 F.3d 270, 278-279 & fn. 9; *People v. Wheeler* (1978) 22 Cal.3d 258, 280.)

"Pattern" arguments need not be made solely on their own. Appellate counsel can often make "pattern"-type arguments in conjunction with other methods of showing a prima facie case (such as those discussed in this section), even in situations where one or more prerequisites for a stand-alone pattern argument are missing. (*See, e.g., People v. Turner* (2001) 90 Cal.App.4th 413, 419-420 [when the only two African-American jurors who were questioned in voir dire were excused, the defendant was African-American, and comparative analysis indicated that prospective jurors with similar characteristics other than race were not excused, a prima facie case was made]; *Valdez v. State* (Colo. 1998) 966 P.2d 587, 595-596 [stand-alone pattern argument would have failed because of other factors working against a prima facie case; however, on *de novo* review appropriate at first *Batson* stage, prosecutor's race-related remarks during jury voir dire combined with pattern to establish prima facie case]; *People v. Alvarado* (2006) 365 Ill.App. 216, 224 [848 N.E.2d 269, 276] [peremptory challenge of the sole Hispanic member of the jury pool found to present a prima facie case, in conjunction with comparative analysis indicating that other prospective jurors with similar characteristics were not challenged, and the fact that the defendant was Hispanic]; *United States v. Stephens* (7th Cir. 2005) 421 F.3d 503, 513-514 [pattern argument involving African-Americans bolstered by the Government's use of peremptory challenges against other minorities as well, such that no peremptories were used against Caucasian jurors who were 75% of the jury pool, and all six peremptories at the time were against minority jurors].)

However, the possibility of a stand-alone "pattern" argument should not be discounted, particularly with either (a) peremptories that eliminate an unusually high proportion of the prospective jurors in that particular cognizable group, and/or (b) the prosecutor using an unusually high proportion of its peremptories against that group. Both of these factors are important to consider in trying to show a pattern at the prima facie case stage.

The Ninth Circuit's opinion in *Turner v. Marshall* (9th Cir. 1995) 63 F.3d 807 ["*Turner I*"], provides an excellent illustration of the paragraph above, *i.e.* on how a "pattern" can be shown in terms of both factors above, (a) the proportion of cognizable group jurors excluded by challenges (there, 56%); and (b1) the proportion of challenges used to exclude members of the cognizable group (there, also 56%), especially in light of (b2) a significantly smaller group proportion in the jury pool (30%). The relevant passages are too long to quote here, but counsel who are researching "pattern" issues would probably do well at least to look at *Turner I*, both for its own discussion and for its citations to other useful authority in the area.

One of the cases cited by *Turner I*, *United States v. Alvarado* (2d Cir. 1991) 923 F.2d 253, also has a good discussion on percentage data in *Batson* prima facie case litigation. *Alvarado* used that type of information to find a prima facie case on the ground that minorities were challenged at twice the rate of their proportion in the community (29%) (assumed to be equivalent to their proportion in the jury pool), even though the prosecution used 'only' 57% of its challenges against minorities. (*Id*. at pp. 255-256.)

Both *Turner I* and *Alvarado* recognized that the group composition of the original jury pool can also be important in seeking to establish a pattern, when that effort is based on the number or proportion of challenges the prosecutor uses against group members. (*See also, e.g., United States v. Hill* (6th Cir. 1998) 146 F.3d 337, 342.) "[F]or example, if the minority percentage of the venire was 50, it could be expected that a prosecutor, acting without discriminatory intent, would use 50 percent of his challenges against minorities. Only a rate of minority challenges significantly higher than the minority percentage of the venire would support a statistical inference of discrimination." (*United States v. Alvarado, supra*, 923 F.2d at p. 255; *see also, e.g., Fernandez v. Roe, supra*, 286 F.3d at p. 1078 [57% of Hispanics excluded by the prosecutor, who used 21% of his challenges overall and 29% by the time of trial court's first *Batson* warning, when the minority population of the venire was 12%; held, prima facie case found].) However, when a particular group is only a very small percentage of the population, these kinds of percentage deviations might be less persuasive. (*E.g., Soria v. Johnson* (5th Cir. 2000) 207 F.3d 232, 237-238 [if a prosecutor uses 2 of her 16 strikes against minorities and the total jury pool percentage is only 6.5% – approximately 1 in 16 – the fact that the prosecutor has stricken minorities at twice their proportion in the jury pool is of reduced significance].)

California authority supporting "pattern" analysis at the prima facie case stage tends to be harder to find than federal authority, in significant part because of California's misunderstanding of the prima facie case standard prior to *Johnson v. California*, as discussed in part V of this article's previous installment. (There has been some movement in California cases after *Johnson*, but federal published opinions favorably applying the principles of *Johnson* tend to be easier to find.) Federal authority is thus fully appropriate to cite here, reflecting the receptiveness to prima facie cases found in *Johnson v. California* and other federal court cases in accord with it. Even if not, *Batson* "pattern" arguments are appropriate to preserve for federal habeas corpus, because Ninth Circuit published opinions have over time generally been much more receptive to them than California courts have been.

An excellent example is the pre-*Johnson v. California* case of *Paulino v. Castro* (9th Cir. 2004) 371 F.3d 1083 ["*Paulino I*"], a federal habeas opinion which was quoted favorably by the U.S. Supreme Court in *Johnson v. California*. In *Paulino I*, the prosecutor had used five of his first six peremptory challenges to strike African-Americans, resulting in five of the six African-Americans in the entire jury pool being kept off the actual jury – strong evidence of a "'pattern' of strikes [that] might give rise to an inference of discrimination" (*see Batson*, 476 U.S. at p. 97). Nonetheless, the California trial court and Court of Appeal – using the pre-*Johnson v. California* approach of the state's courts – rejected the *Batson* motion based on their "speculat[ion] on "objective reasons" the prosecutor "might have" used to strike each of the five African-Americans, though there was no way to know if these were the prosecutor's actual reasons because the prosecutor was never asked.

The Ninth Circuit held this legally inadequate: "[I][t does not matter that the prosecutor might have had good reasons to strike the prospective jurors. What matters is the *real* reason they were stricken." (*Paulino I, supra*, 371 F.3d at p. 1090 [emphasis in original] [quoted with approval in *Johnson v. California, supra*, 545 U.S. at p. 172].) The Ninth Circuit held there had been a "'pattern' of strikes" raising a "plausible inference of discrimination," which was a prima facie case under *Batson*. (*Paulino I, supra*, 371 F.3d at p. 1092.)

In light of *Johnson v. California*, *Paulino I* is a proper and direct application of clearly established federal constitutional law binding on the state courts. This type of approach, rather than the unreviewable speculation approach of pre-*Johnson v. California* caselaw in California, is appropriately used to evaluate and litigate *Batson* pattern claims at the prima facie case stage.

It is sometimes mistakenly thought that if one or more jurors of the cognizable group end up on the jury, that defeats a "pattern." Commensurately, prosecutors who are of a mind to make group-based challenges might try to fly under the *Batson* radar by letting one or two African-Americans (or members of other cognizable groups) get onto the jury, or peremptorily challenging a few non-minorities. Or, a prosecutor who has excluded jurors based on group stereotype may begin letting minorities onto the jury after the exclusions are called into question.

As numerous cases hold, however, this does not insulate the prosecution from scrutiny under *Batson* ; a prosecutor who is of a mind to discriminate should not be insulated from review by merely letting a small number of group members onto the jury. (*People v. Snow* (1987) 44 Cal.3d 216, 225-226; *Hardcastle v. Horn* (3d Cir. 2004) 368 F.3d 246, 258-259; *Holloway v. Horn, supra*, 355 F.3d at pp. 720, 722-723 [cited with approval in *Johnson v. California, supra*, 545 U.S. at p. 172]; *United States v. Alvarado, supra*, 923 F.2d at p. 256.) That is especially true when the prosecutor keeps a group member on the jury after a warning from the trial court on a prior *Batson* objection. (*Fernandez v. Roe, supra*, 286 F.3d at p. 1079.) As another example, it may be of little relevance that the prosecutor leaves a cognizable group member on the jury, if that group member would seem to be aligned fairly closely with the prosecution. (*Montiel v. City of Los Angeles, supra*, 2 F.3d at p. 340.)

Some of the most difficult cases occur when the prosecution exercises peremptory challenges on a cognizable group that has no more than one or two members in the jury pool,

which can happen in areas with a low minority population. Even the Ninth Circuit, which has generally been somewhat ahead of the curve with respect to *Batson* prima facie case issues, has recognized that a "small size of the sample of blacks in [a] venire diminishe[s] the significance of a comparison between these percentages [of challenges exercised against group jurors, vs. proportion of group jurors in the jury pool]." (*Paulino I, supra,* 371 F.3d at p. 1091; *see also, e.g., Soria v. Johnson* (5th Cir. 2000) 207 F.3d 232, 237-238.) A solid and well-reasoned *Batson* argument as to the only minority juror in the pool may still be susceptible to a court saying "merely challenging one minority juror isn't enough for a *Batson* motion." On the other hand, there is occasional authority for the proposition that removing the only members of a cognizable group in the jury pool is itself a prima facie case (*e.g., United States v. Joe* (10th Cir. 1993) 8 F.3d 1488, 1499; *McCants v. State* (Ind. 1997) 686 N.E.2d 1281, 1284), though the weight of authority is generally against that proposition (*see, e.g., United States v. Wills* (9th Cir. 1996) 88 F.3d 704, 715); and it is likely that such cases also involve other relevant factors (*see, e.g., United States v. Esparza-Gonzalez* (9th Cir. 2005) 422 F.3d 897, 904) or an unusually high number of removals, which could be as few as three (*see Tankleff v. Senkowski* (2d Cir. 1998) 135 F.3d 235, 249).

Counsel who are considering a *Batson* claim as to only a small number of excluded jurors should therefore be especially careful to find as many other grounds as possible, beyond the group status of the excluded jurors. (*See Paulino I, supra,* 371 F.3d at p. 1092.) This is only common sense; it is almost always good to find as many grounds as possible in a *Batson* setting. But it is particularly important here.

In the end, a "pattern" argument is cognizable at the prima facie case stage if enough non-Caucasian jurors are excluded that "happenstance is unlikely to produce this disparity." (*Miller-El v. Cockrell* (2003) 537 U.S. 322, 342 ["*Miller-El I*"]; *United States v. Stephens, supra,* 421 F.3d at p. 514.) Since the prima facie case standard under *Johnson v. California* – establishing merely an inference of discrimination – is not onerous (*id.*, 545 U.S. at p. 170) and indeed is "quite low" (*Boyd v. Newland* (9th Cir. 2006) 467 F.3d 1139, 1145), pattern arguments are certainly one valid method of establishing a prima facie case. As one would expect, a stronger "pattern" might require little or nothing in the way of additional indicia of discrimination, while a weaker "pattern" might need more bolstering from elsewhere in the record.

2. One Or More Defendants Being A Member Of The Cognizable Group

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This should be self-evident: If the prosecutor is challenging African-American jurors, it is certainly relevant that the defendant is also African-American. (*E.g., Batson,* 476 U.S. at p. 97; *Johnson v. California, supra,* 545 U.S. at p. 167; *People v. Turner, supra,* 90 Cal.App.4th at pp. 419-420.) The same is obviously true for defendants of other cognizable groups. (*E.g., United States v. Mitchell* (9th Cir. 2007) 502 F.3d 931, 957 [defendant and challenged panel member were Native American; trial court disallowed the challenge]; *United States v. Joe, supra,* 8 F.3d at p. 1499 [similar; reviewing court found prima facie case]; *United States v. Lorenzo* (9th Cir. 1992) 995 F.2d 1448, 1453-1454 [in case involving native Hawai'ian defendants, trial court found prima facie case as to two Hawai'ian-surnamed prospective jurors challenged by

prosecution]; *People v. Alvarado, supra,* 365 Ill.App. at p. 224 [848 N.E.2d at p. 276] [defendant and challenged prospective juror were Hispanic; court reversed trial court's finding of no prima facie case, based on this factor in combination with others].)

Nonetheless, a *Batson* violation can be established even when no defendants are a member of the cognizable group. Because of the harm caused by group-based discrimination to the system as a whole as well as to the jurors and cognizable group(s) involved, and because the excluded prospective jurors are not in a practical position to seek redress for that harm themselves, any party who makes a *Batson* objection has standing to assert the equal protection rights of the excluded jurors. (*Powers v. Ohio* (1991) 499 U.S. 400, 413-415.) Consequently, while this factor is relevant, it is not dispositive at either the prima facie case stage or any later stage.

3. One Or More Among The Alleged Victim, Decedent, Or Other Major Actor Who Is Not Aligned With The Defense, **Not** Being A Member Of The Cognizable Group

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Usually, this criterion refers to the alleged victim, and in most such cases the named victim is Caucasian. This point is commonly used in conjunction with point (2) above (defendant a member of the prospective juror's cognizable group). For example, if there is an African-American defendant on trial for the murder of someone who was Caucasian, courts should be especially sensitive to the possibility that the prosecutor will want to keep African-Americans off the jury. (*See, e.g., People v. Fuller, supra,* 134 Cal.App.3d at p. 419 & fn. 12; *Mahaffey v. Page* (7th Cir. 1998) 162 F.3d 481, 485; *People v. Andrews* (1992) 146 Ill.2d 413, 433 [588 N.E.2d 1126, 1137].) That was also the situation in *Johnson v. California,* where an African-American man was on trial for assault and murder of a 19-month-old Caucasian infant, and the prosecution's peremptories resulted in an all-white jury. (*Id.,* 545 U.S. at p. 164.)

However, the same analysis could apply to any actor not obviously aligned with the defense case. For example, in *Holloway v. Horn, supra,* 355 F.3d 707, the defendant was African-American, but so were the victim and the key prosecution witness. But the officer who took the defendant's custodial statement was Caucasian, and the defense case largely turned on the credibility of that officer's testimony. The Court held this was a circumstance supporting a prima facie case. (*Id.* at p. 724.) Similarly in *United States v. Stephens, supra,* 421 F.3d 503, the prima facie case was furthered by the fact that all of the witnesses were Caucasian, the defendant was African-American and the case turned on the credibility of the defendant in a manner that was particularly prone to race-based stereotyping. (*Id.* at p. 515.)

An unusual variation on that theme was found in *Tankleff v. Senkowski, supra,* 135 F.3d 235, where the defendant and all of the police witnesses were Caucasian, but the case turned on the police witnesses' credibility concerning an alleged confession, and the defense pointed out that there is a belief in certain parts of society that African-Americans are less likely to trust the police than are Caucasians, which might have led the prosecutor to make race-based peremptories as suggested by the record. (*Id.* at p. 249, fn. 3.) The Court didn't decide that question, and such a motivation on a prosecutor's part might be difficult to nearly impossible to

prove. But it is certainly not unheard of for prosecutors to exclude African-Americans on that type of basis, related to stereotyped assumptions of what African-Americans are more likely to think of police witnesses. (*See Cochran v. Herring* (11th Cir. 1995) 43 F.3d 1404, 1410.)

4. Relationship Between The Alleged Crime And The Cognizable Group
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This doesn't turn up often, but it's important when it does. For example, if the defendant was charged with assisting money launderers based in Russia, and the prosecution strikes prospective jurors who have Slavic surnames, this could be a factor supporting a *Batson* objection.

A real-life example can be found in *United States v. Esparza-Gonzalez, supra*, 422 F.3d 897, where the defendant was charged with illegal re-entry (an immigration crime). While illegal re-entry was not itself an ethnically charged crime, it took on greater ethnic characteristics where the defendant was a Mexican national, and the excused prospective jurors both had Hispanic surnames. Under these circumstances, the Court held that this was a factor that should be considered in evaluating the possibility of discriminatory intent at the prima facie case stage. (*Id*. at pp. 905-906.)

5. Prosecutor's Statements And Questions During Jury Selection
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When this is a factor at the prima facie case stage, it is usually in one of two ways: the prosecutor (a) asks too few meaningful questions of cognizable group members, or (b) asks too *many* meaningful questions of cognizable group members.

However, this factor is not limited to the prosecutor's questions. It could more appropriately be rephrased to refer to statements or conduct of the prosecutor toward anyone – including the trial judge – that was arguably inconsistent with a genuine desire to exclude the prospective juror on a group-neutral basis. (*See, e.g., Fernandez v. Roe, supra,* 286 F.3d at p. 1079.)

a. Too Few (Or Too Perfunctory) Questions

If the prosecutor is asking virtually no questions of "cognizable group" jurors before striking them, but is more careful in questioning other prospective jurors, that might suggest the prosecutor didn't really care what answers the cognizable group prospective jurors gave. This can support an inference of forbidden discrimination. (*People v. Wheeler, supra,* 22 Cal.3d at p. 280; *United States v. Esparza-Gonzalez, supra,* 422 F.3d at pp. 904-905; *Fernandez v. Roe, supra,* 286 F.3d at p. 1079; *Emerson v. State* (Tex. Ct. Crim. App. 1993) 851 S.W.2d 269, 274.)

While this is an important prima facie case consideration, a caution is in order. If the excluded juror was questioned fairly early in voir dire and not asked about a particular topic, but none of the other prospective jurors was asked about that topic at that time either (*e.g.*, because it only came up midway through voir dire, at which time the prosecutor began asking every prospective juror about it), the fact that the prosecutor didn't ask the question of the excluded

juror might itself be clearly tied to race-neutral reasons with no suggestion of a possible race-based explanation, and therefore not raise any inference of discrimination. So the fact that a particular prospective juror isn't asked about a topic, by itself, doesn't necessarily create an inference of discrimination; the omission usually has to be viewed in its full context. This underscores the importance of taking into account all the circumstances underlying a peremptory challenge in evaluating and making a prima facie case argument, or for that matter, any other *Batson* argument. (*See Batson, supra,* 476 U.S. at pp. 96-97.)

b. Too Many (Or Too Detailed) Questions

Conversely, if the prosecutor's questions of cognizable group prospective jurors are far more detailed than questions of non-group members, it may mean the prosecutor is working extra hard to develop reasons for striking the cognizable group members. "[I]f the use of disparate questioning is determined by race at the outset, it is likely a justification for a strike based on the resulting divergent views would be pretextual. In this context the differences in the questions posed by the prosecutors are some evidence of purposeful discrimination." (*Miller-El I, supra,* 537 U.S. at p. 344.)

In the *Miller-El* case, the Texas prosecutor was adding extra details to his characterization of the death penalty, and asking a trick question, much more commonly for African-American prospective jurors than for others. The prosecution also used a graphic description of the death penalty as to 6% of Caucasian prospective jurors, but 53% of African-American prospective jurors; and it informed 94% of Caucasian prospective jurors about the minimum possible sentence for murder, but only 12 1/2% of African-Americans. The U.S. Supreme Court held that both supported an inference of discrimination. (*Miller-El v. Dretke* (2005) 545 U.S. 231, 254-266 ["*Miller-El II*"]; *Miller-El I, supra,* 537 U.S. at pp. 344-345.)

c. Disparate Questioning That Itself Appears Group-Related Or Otherwise Creates A Group-Based Inference

On occasion, the prosecution's questions *themselves* can support the required inference for a prima facie case, for example, because some of them aren't asked of other prospective jurors or because they have a group-based component.

For example, in *Splunge v. Clark* (7th Cir. 1992) 960 F.2d 705, the prosecutor had asked the only two African-American prospective jurors questions about whether they could be fair in a case with an African-American defendant, and didn't ask that question of anyone else. The prosecutor also asked one of those two if he knew anyone who had been *charged with* robbery or murder, but asked the next three prospective jurors if they knew anyone who had been *victims of* robbery or murder. The Seventh Circuit held that the race-based questioning itself, plus the facts that these were the only two African-American prospective jurors, provided an inference that the exclusions were not group-neutral and thus established a prima facie case. (*Id*. at pp. 707-708.)

6. Typicality Of Excluded Juror's Characteristics

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If an excluded juror's known characteristics are fairly representative of the community as a whole, and nothing appears to stand out about that juror except possibly his or her group status, this can support a prima facie case of discrimination in challenging that juror, especially in combination with other factors. (*People v. Snow*, *supra*, 44 Cal.3d at pp. 223, 226; *People v. Moss* (1986) 188 Cal.App.3d 268, 276.) *People v. Wheeler*, *supra*, had indicated this would support a prima facie case inference (*id*., 22 Cal.3d at p. 280), and it was part of the basis of the appellate reversal in the 1987 *Snow* case (*id*., 44 Cal.3d at pp. 223, 226) and the 1986 *Turner* case (*People v. Turner* (1986) 42 Cal.3d 711, 719); but, subsequent California caselaw was more unreceptive toward appellate review on this ground. (*See, e.g., People v. Sanders* (1990) 51 Cal.3d 471, 501.) Nonetheless, in light of *Johnson v. California*, this ground too is appropriately raised in support of a prima facie case. (*See, e.g., Paulino I*, *supra*, 371 F.3d at p. 1092 [peremptory challenge of only minority member of venire not a prima facie case; more is required, but "the absence of plausible reasons for the strike could be the 'more' that gives rise to an inference of bias"].)

This factor is implicit in many *Batson* challenges, when phrased as an argument that there is no apparent reason for challenging this juror besides his or her group status. (*See, e.g., Paulino I*, *supra*, 371 F.3d at p. 1092.) It is also sometimes argued by stating that nothing in the juror's answers to questions demonstrated any reasonable basis to believe the juror could not be fair or objective. (*See, e.g., Lancaster v. Adams* (6th Cir. 2003) 324 F.3d 423, 431; *Johnson v. Love* (3d Cir. 1994) 40 F. 3d 658, 666.)

7. Excluded Juror's Likely Pro-Prosecution Leanings

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An inference can also be supported if an excluded juror would likely have been desirable jurors for the prosecution, absent his or her group status. (*See, e.g., People v. Allen* (1979) 23 Cal.3d 286, 294.) This is a strong factor because it can be difficult for the prosecution to explain why it would want to exclude such prospective jurors.

For example, in *People v. Allen* (2004) 115 Cal.App.4th 542, a *Batson* reversal case, the Court of Appeal held that where the prosecution excused the only two African-Americans in the jury box, "both of whom had experiences or contacts that would normally be considered favorable to the prosecution" (one had been the victim of a residential burglary; the other had two cousins who worked in law enforcement), this established a prima facie case even under the now-overruled "strong likelihood" standard. (*Id*. at p. 550.) This had been conceded by the Attorney General. (*Ibid*.) Another California case applying this criterion was *People v. Turner*, *supra*, 42 Cal.3d 711, in which the two African-Americans in question had characteristics which would generally be seen as desirable for the prosecution (one had been the victim of an armed robbery and had a friend who was a policeman, while the other had been the victim of an auto burglary); this, combined with other factors, was sufficient to create a prima facie case under *Wheeler*. (*Turner*, 42 Cal.3d at p. 719.) Similarly in *People v. Bolling* (1992) 79 N.Y. 317 [582 N.Y.S.2d 950, 591 N.E.2d 1136], a disproportionate number of exclusions of African-Americans, coupled with the defense's uncontested assertion that two of the four African-American prospective jurors excused had pro-prosecution backgrounds, was sufficient for a prima facie case. (*Id*. at pp. 324-325 [582 N.Y.S.2d at p. 955]; *see also People v. Rodriguez*

(1995) 211 A.D.2d 275, 278 [627 N.Y.S.2d 614, 616] [excluding the only three Hispanics in the jury pool was a prima facie case by itself, but that was all the more clearly established when two of the three excluded prospective jurors had characteristics generally considered desirable for the prosecution].)

8. Heterogeneity Of Excluded Cognizable Group Members

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This refers to excluded prospective jurors of the cognizable group having little or nothing in common with each other, besides their apparent membership in that group. *People v. Wheeler*, *supra*, stated as a factor supporting a prima facie case that "the jurors in question share only this one characteristic – their membership in the group – and that in all other respects they are heterogeneous as the community as a whole." (*Id*., 22 Cal.3d at p. 280.)

An example can be found in *People v. Turner*, *supra*, 42 Cal.3d 711, in which the two excluded African-American prospective jurors "apparently had only their race in common; they were of different sexes and marital status, lived in different communities, and engaged in different occupations." The Court held that this factor, combined with others, sufficed for a prima facie case. (*Id*. at p. 719.)

9. Similarity Between Excluded Cognizable Group Members, And Non-Group Members Whom The Prosecution Did Not Challenge

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Finally, there is a powerful form of *Batson* argument that has long been embraced by the federal courts but has been more controversial in California caselaw, which involves comparing the characteristics of challenged prospective jurors from a cognizable group with the characteristics of unchallenged prospective jurors who aren't from that cognizable group. The idea is to show that the challenged prospective jurors were not different from the unchallenged jurors in any way material to the case or to their potential fitness as jurors, and the major difference is in group status.

This method, often called "comparative juror analysis" or "comparative analysis," was well explained in a Seventh Circuit opinion reversing the denial of a habeas petition at the *Batson* prima facie case stage:

> [T]he trial judge should have been comparing the excused African-Americans to the jurors who remained, for only through such a comparison could the judge assess whether race played any role in the State's challenges. If an excused African-American juror had characteristics and opinions that were similar to those of a juror who sat, for example, then an obvious inference, at least prior to the articulation of a race-neutral explanation for the strike, would be that the strike was racially-motivated. As far as the voir dire record would reveal, the stricken juror's race would be the only characteristic distinguishing the African-American from the juror who was retained.

(*Mahaffey v. Page*, *supra*, 162 F.3d at pp. 485-486.)

"Comparative juror analysis" can be a particularly strong form of evidence in *Batson* cases, especially since it is so difficult to prove a person has discriminatory mental state (*see* prior installment of this article, part II). Since it is almost impossible to obtain an admission of discrimination, circumstantial evidence is almost always required (*e.g., Miller-El I, supra,* 537 U.S. at p. 339; *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 354); and as federal courts have repeatedly and strongly recognized, comparisons of this nature between challenged and unchallenged prospective jurors provide for some of the most persuasive circumstances available. (*See, e.g., Miller-El II, supra,* 545 U.S. at p. 241; *Coulter v. Gilmore* (7th Cir. 1998) 155 F.3d 912, 921; *Lewis v. Lewis* (9th Cir. 2003) 321 F.3d 824, 832.) Indeed, one could easily maintain that "comparative analysis" is the very essence of a *Batson* claim, since its nature involves determining whether similarly situated persons are treated differently based on race or other group status (*see Coulter v. Gilmore, supra,* at p. 921), which is at the heart of what unlawful discrimination is.

California courts were highly unreceptive to "comparative juror analysis" between 1989 and the *Johnson v. California* opinion, so this remained controversial in California as *Batson* topics go. The California Supreme Court's recent opinion in *People v. Lenix* (2008) 44 Cal.4th 602, approving of the use of "comparative analysis" for third-stage *Batson* arguments – even if "comparative analysis" is not mentioned until the appeal – has resolved some of the issues in the area. (*Cf. Miller-El II, supra,* 545 U.S. at p. 283 [dis. opn. of Thomas, J.]; *Snyder v. Louisiana, supra,* ___ U.S. at p. ___ [128 S.Ct. at p. 1214] [dis. opn. of Thomas, J.] [arguing in both cases that "comparative analysis" should not be used because it wasn't done in the trial court; however, neither of those dissenting arguments prevailed, and the majority reversed in part or whole on "comparative analysis" grounds anyway].) But the applicability of "comparative analysis" to the prima facie case stage is still an open question in California caselaw.

In order to present better the subject of "comparative analysis" as it applies to the prima facie case stage, the entire subject of "comparative analysis" will be discussed in more detail in its own portion of this article, section (D) below.

B. Litigating *Batson* Second-Stage (Group-Neutral Explanation) Issues On Appeal [Return to Index]

Batson second-stage issues also get the generous *de novo* standard of review on appeal. However, they should not be very common, because the prosecution's second-stage burden of production – giving any group-neutral explanation (*Purkett v. Elem* (1995) 514 U.S. 765, 767) – is so minimal. (*Hardcastle v. Horn, supra,* 368 F.3d at p. 257 ["[T]he Supreme Court has purposely set a relatively low bar at step two. It therefore is rare for a case to be decided at this stage of the analysis."]; *Coulter v. Gilmore, supra,* 155 F.3d at p. 920 [though explanations for two stricken jurors "seemed to verge on the patently absurd," they still satisfied the minimal *Purkett v. Elem* standard].) However, it can happen on occasion. When it does, the reviewing court may proceed to stage three anyway to make a determination of whether there was unlawful discrimination, because that is the only and ultimate issue after stage I (*see* section (C)(1) below). But in most such cases it will still reverse, because the absence of any group-neutral reason will itself be a circumstance supporting discrimination, and there will usually be nothing to rebut that inference. (*Paulino v. Harrison* (9th Cir. 2008) 542 F.3d 692, 702-703 ["*Paulino*

II"]; *see also Johnson v. California, supra,* 545 U.S. at p. 171, fn. 6.)

One way a prosecutor can flunk stage two is with a reason that is simply inadequate to meet even the very low *Purkett v. Elem* standard of giving any group-neutral explanation at all. For example, in *Hardcastle v. Horn, supra,* 368 F.3d 246, a federal habeas case, the Pennsylvania court had concluded that the striking of two prospective jurors was group-neutral solely because the prosecutor had an opportunity to observe them during voir dire. However, the record was bereft of evidence regarding what the prospective jurors' demeanor or the prosecutor's observations or impressions were. The Third Circuit held that this "reason" (the prosecutor's "opportunity to observe") amounted to no more than a blanket assertion that the prosecutor acted on nondiscriminatory intuition, which was legally insufficient to meet the *Batson* stage-two requirement. (*Id.* at p. 258.)

Incompetence of prosecution evidence might also be a basis for failing second-stage analysis. In *Bui v. Haley, supra,* 321 F.3d 1304, the assistant prosecutor gave a series of race-neutral explanations for eight of nine African-American prospective jurors. Race-neutral explanations would normally pass the second-stage *Batson* test – but here, it was the lead prosecutor who struck the nine prospective jurors, there was no evidence the assistant had actual knowledge of the lead prosecutor's reasons, the lead prosecutor absented himself from the postconviction *Batson* hearing, and he had made a remark just before jury selection implying a possible belief he could strike African-Americans based on race merely because the defendant was Vietnamese. The Eleventh Circuit held it was unreasonable to conclude the assistant prosecutor's *post hoc* 'explanations' were the lead prosecutor's actual reasons, since the lead prosecutor himself never gave any reasons that would satisfy *Batson*, and also since even the assistant prosecutor couldn't come up with an adequate race-neutral explanation for striking one of those nine prospective jurors. Consequently, the court ordered that federal habeas relief be granted. (*Id*. at pp. 1314-1317.)

The Ninth Circuit reached a similar conclusion more recently, on a second appeal after remand for a postjudgment *Batson* hearing. In *Paulino II, supra,* 542 F.3d 692, the prosecutor could not remember her actual reasons for a presumptively biased pattern of strikes (using five of six challenges to strike five of the six African-American prospective jurors on the panel), but proceeded to offer speculative reasons drawn after the fact from her reading of the voir dire transcript. The district court granted habeas corpus, and the Ninth Circuit affirmed on the ground that "*Batson*'s step two requires evidence of the prosecutor's *actual* reasons for exercising her peremptory challenges," and this record didn't contain any. (*Id*. at pp. 699-700 [italics in original].)

Another way for a prosecutor to flunk stage two is to answer the trial court's request for a *Batson* explanation with a reason that shows group discrimination on its face. Who would expect that, long after *Batson*? But on rare occasion, it does happen – such as the prosecutor's explanation in *Walker v. Girdich, supra,* 410 F.3d at p. 123, which included the statement "one of the main things I had a problem with was that this is an individual who was a Black man with no kids and no family"; or the prosecutor's statement in *United States v. De Gross* (9th Cir. 1992, en banc) 960 F.3d 1433 that the challenged juror was a woman and he wanted more men

on the jury (*id*. at p. 1443); or the prosecutor's explanations in *Johnson v. Love* (3d Cir. 1994) 40 F.3d 658, 668-669 (where the prosecutor said the victim "was not an individual who I felt would get a lot of sympathy from . . . a young black girl," referring to the excluded juror, and also volunteered that counsel for the defendant was African-American), which the Court of Appeals found were expressly race-based.

Finally, if a prosecutor gives a *Batson* explanation that is both subjective and too vague to amount to a specific reason – such as a mere denial of discrimination, or a blanket statement that the challenge was based on hunch, intuition, gut feelings, "didn't like their looks," or the prosecutor's familiarity with the case, without more – that may fail the *Batson* second-stage requirement on the ground that legally, it is tantamount to no *Batson* explanation at all. (*See Hardcastle v. Horn, supra*, 368 F.3d at p. 258; *Bui v. Haley, supra,* 321 F.3d at p. 1316; *United States v. Hill, supra,* 146 F.3d at p. 342; *Jones v. Davis* (11th Cir. 1990) 906 F.2d 552, 553-555 [*Swain* case]; *People v. Turner, supra,* 42 Cal.3d at pp. 725-726.) More specific subjective explanations, however, are more likely to be deemed at least facially race-neutral, requiring a trial court finding on the question of whether it was discriminatory. This subject is also discussed in section (C) below, on third-stage *Batson* challenges.

It is important to reiterate that peremptory challenges *can* properly be based on vague subjective factors like "hunch" and "intuition." At the same time, as discussed above, it is usually not enough for a prosecutor to use vague subjective factors like "hunch" and "intuition" as second-stage *Batson* explanations after a prima facie case has been found. "Hunch" and "intuition" do not address the question of whether the prosecutor's explanation was race-neutral and sufficient to overcome the existing inference of bias, since an attorney could easily have a "hunch" or "intuition" that an African-American – or a person with the characteristics of the particular excluded African-American – shouldn't be serving on the jury. Rather, once a defendant makes a prima facie case under *Batson*, the prosecutor's explanation must not only be race-neutral, it must at least be specific enough to overcome the inference of bias that has already been found in the trial court's (express or implied) prima facie case ruling. (*Cf. Williams v. Runnels, supra,* 432 F.3d at p. 1109, fn. 12 ["[E]ven accepting that being a 'loner' or not having previously served on a jury can be a race-neutral basis for exercising a peremptory challenge, it is not the type of reason that weighs against an inference of bias. Indeed, were the state court's rationale on Juror 18 accepted, it is difficult to imagine how any defendant could prevail on a *Batson* claim following a trial court's summary rejection of the *Batson* challenge at the first step of the Batson test. The Supreme Court's exhaustive review of the record in *Miller-El* forecloses such an approach."])

Although it is occasionally possible to make a pure second-stage *Batson* argument, most *Batson* objections that get past the prima facie case (first) stage are decided at the third stage, because the second-stage burden is so low, and the ultimate issue becomes whether a trial court erred factually in holding that a prosecutor's facially group-neutral explanation has adequately rebutted the inference of discrimination from the prima facie case. That is the subject of section (C) below.

C. Litigating *Batson* Third-Stage (Rebuttal/Pretext) Issues On Appeal

1. How Do We Define The Question? Conscious And Subconscious Discrimination In *Batson* Issues

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This section discusses how to frame a *Batson* issue, so that it is less likely to come across as a personal attack on the prosecutor (or even on the trial judge), and more likely to be evaluated objectively as what it is – a question of whether the prosecutor has engaged in unlawful discrimination. Whether discrimination is subjectively intentional or unintentional is irrelevant; the only question is whether the intentional act of a peremptory challenge amounts to unlawful discrimination.

The caption of this section isn't merely a rhetorical question. It is meant to lead into a reality that should be remembered in doing *Batson* claims: Few if any judges would want to call a prosecutor a racist or sexist (in his challenges) or a liar (in giving race-neutral explanations of the challenges that the defense might consider pretextual).

That's normal human instinct. But in addition, prosecutors appear before judges a lot, even more in smaller counties; the Attorney General's office that defends them appears before our appellate courts regularly; and almost all are highly regarded by the jurists before whom they appear.

That is one significant reason why it will generally be a very uphill battle to persuade a judge or panel that relief should be granted on a *Batson* claim. A *Batson* objection often is thought of as having personal connotations. It might not be phrased as an attack on the prosecutor's morals or ethics, but that is how it may be perceived. As one example, consider this passage in a concurring opinion that was more favorable to the defense than the panel opinion, but reflected a reality of perception in third-stage *Batson* litigation where the prosecutor's credibility is often said to be the key issue:

> Only in the most extreme and unusual case will there be enough in the record to allow an appellate court to fix a bad faith label on a prosecutor. In essence, to do so means calling a particular prosecutor a deliberate liar.

(*People v. Davis* (1987) 189 Cal.App.3d 1177, 1202 [conc. and dis. opn. of Johnson, J.].) And similarly, on whether a prosecutor should be deemed a racist (or sexist, etc.) merely by virtue of a *Batson* objection:

> [T]he trial court remarked that "*Batson* is always difficult because it suggests that one attorney believes the other attorney is a racist, and the judge then has to decide whether the attorney is a racist." (Tr. 224). The *Batson* test is quite different, it requires trial courts to determine whether a juror has been struck because of his or her race [or other cognizable group status], and has nothing whatsoever to do with whether a prosecutor harbors racist tendencies.

(*Valentine v. New York* (No. 04 Civ. 1411 (HB), S.D.N.Y. Dec. 1, 2005) 2005 U.S. Dist. LEXIS 30141, p. 16.)

It is therefore important to keep in mind, and to argue if needed, that the sole question in a *Batson* inquiry is whether or not the prosecutor has engaged in an act of discrimination against a member of a cognizable group. *Batson* is not a personal referendum on the prosecutor, or whether s/he is racist or sexist, or whether s/he is a liar. It is merely a means for orderly litigation of legitimate questions of whether there has been unlawful discrimination in a peremptory challenge. Such discrimination can be entirely unintentional or subconscious, and yet still violate *Batson*. This is true in the Title VII area as well (*e.g., Thomas v. Eastman Kodak Co.* (1st Cir. 1999) 183 F.3d 38, 58-61), which is the area from which *Batson* jurisprudence is derived. (*See Johnson v. California, supra,* 545 U.S. at p. 171, fn. 7; *Batson,* 476 U.S. at pp. 94 fn. 18, 96 fn. 19, 98 fn. 21.)

And in fact, discrimination in our society *is* often unintentional or subconscious. "A growing body of social science recognizes the pervasiveness of unconscious racial and ethnic stereotyping and group bias." (*Chin v. Runnels* (N.D. Cal. 2004) 343 F.Supp.2d 891, 906-907 [citing numerous works].) Often, "[w]e do not recognize the ways in which our cultural experience has influenced our beliefs about race or the occasions on which those beliefs affect our actions. In other words, a large part of the behavior that produces racial discrimination is influenced by unconscious racial motivation." (Lawrence, "The Id, The Ego, and Equal Protection: Reckoning with Unconscious Racism" (1987) 39 Stan. L. Rev. 317, 322 [quoted in *United States v. Bishop* (9th Cir. 1992) 959 F.2d 820, 827-828].) The same is true for other forms of discrimination as well; as one court observed three decades ago, "[o]ne familiar aspect of sex discrimination is the practice, whether conscious or unconscious, of subjecting women to higher standards of evaluation than are applied to their male counterparts." (*Sweeney v. Board of Trustees* (1st Cir. 1979) 604 F.2d 106, 114.)

In the Title VII context on which *Batson* jurisprudence is based (*see* previous installment of this article, part II), it is well recognized that "unlawful discrimination can stem from stereotypes and other types of cognitive biases, as well as from conscious animus." (*Thomas v. Eastman Kodak Co., supra,* 183 F.3d at p. 59.) "The ultimate question is whether the employee has been treated disparately 'because of race.' This is so regardless of whether the employer consciously intended to base the evaluations on race, or simply did so because of unthinking stereotypes or bias." (*Id.* at p. 58.)

The same applies, of course, to discrimination against any cognizable group. As it was explained in a gender discrimination Title VII opinion approved by the U.S. Supreme Court:

> In keeping with [Title VII's remedial] purpose, the Supreme Court has never applied the concept of intent so as to excuse an artificial, gender-based employment barrier simply because the employer involved did not harbor the requisite degree of ill-will towards the person in question. . . . [T]he requirement of discriminatory motive in disparate treatment cases does not function as a "state of mind" element, but as a method of ensuring that only those arbitrary or artificial employment barriers that are related to an employee or applicant's race, sex, religion, or national origin are eliminated.

(*Hopkins v. Price Waterhouse Co.* (D.C. Cir. 1987) 825 F.2d 458, 468, *aff'd on this grd.* (1989)

490 U.S. 228 [by plurality opinion and separate opinions of Justices White and O'Connor].)

The problem of attitudinal or subconscious discrimination is exacerbated in the *Batson* context, because lawyers have little information on which to base peremptory challenges – and the very arbitrariness of peremptory challenges may also promote decisionmaking by stereotype. (*See, e.g.,* Page, "*Batson*'s Blind Spot: Unconscious Stereotyping and the Peremptory Challenge" (2005) 85 B.U.L. Rev. 155, 261-262.) For example, "A prosecutor's own conscious or unconscious racism may lead him easily to the conclusion that a prospective black juror is 'sullen,' or 'distant,' a characterization that would not have come to his mind if a white juror had acted identically." (*United States v. Milan* (3d Cir. 2002) 304 F.3d 273, 283, fn. 11 [quoting *Batson*, 476 U.S. at p. 106 [conc. opn. of Marshall, J.].) "[C]ourts must [also] be aware that an attorney may lie even to himself in an attempt to convince himself that his motives for a strike are nondiscriminatory." (*Somerville v. State* (Tex. Ct. App. 1990) 792 S.W.2d 265, 269.)

As one commentator recently summarized the problem of subconscious discrimination, in a *Batson* context:

> In our society race and gender, because they are highly salient characteristics, still unconsciously form and trigger the use of stereotypes. These stereotypes, once triggered, can greatly affect how we process information and thus ultimately affect our decision-making. Stereotyping almost inevitably introduces categorization related errors in social perceptions. Worst of all, these processes are rarely accessible to our conscious minds.

(Page, "*Batson*'s Blind Spot," *supra*, 85 B.U.L. Rev. at p. 261.)

It is therefore important to emphasize that a finding of discrimination under *Batson* does not necessarily mean the prosecutor is lying or engaging in a deliberately racist act. The third-stage *Batson* question which courts must decide is not whether the prosecutor's explanation is a pretext, but rather, whether the prosecutor has committed an act of discrimination in jury selection.

Accordingly, although many published opinions talk about the third-stage *Batson* issue being "pretext," that is **not** the third-stage *Batson* issue. The trial court decides whether the prosecutor has engaged in an act of discrimination, not whether the prosecutor is lying. If the latter is found, it will usually be strong evidence of the former. (*See Reeves v. Sanderson Plumbing Products, Inc.* (2000) 530 U.S. 133, 147-148.) But the former does not always depend on the latter.

Keeping these principles in mind can help appellate counsel minimize possible claims that a prosecutor has to be branded a racist, sexist, etc. for there to be a *Batson* violation; while at the same time, lessening the defense's burden with respect to the difficult question of intent. Because subconscious discrimination can violate *Batson* as much as conscious discrimination, the question is not whether the prosecutor intentionally set out to discriminate. The question is merely whether the prosecutor intentionally committed a discriminatory act.

2. General Third-Stage Principles

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In a stage-three *Batson* issue, review is much more circumscribed, because the entire three-step process creates a question of fact; namely, the credibility of the prosecutor's explanation. (*See* part IV(B)(3) of this article, in its previous installment.) If a trial court overrules a *Batson* objection at stage three, finding the prosecutor's explanation credible (implicitly or explicitly), it can be very difficult to persuade an appellate court to disagree and reverse a conviction. Techniques for doing so are discussed in this section; nonetheless, issues of this nature should only be considered if a solid argument can be made to overcome the stringent standards used for reviewing questions of fact.

a. Trial Court Errors In Legal Standards Or Procedure

Having said that, there is an important exception: If the trial court uses the wrong legal standard or makes some other procedural error in the *process* of evaluating a third-stage *Batson* claim, then that can be cast as the primary error of law, in which case the standard of review is often found to be *de novo*.

For example, if a trial court hears the prosecution's second-stage explanation and says: "That's a race-neutral explanation, so the prosecution has met its burden, and the defendant's *Batson* objection is overruled," the trial court has committed an error of law by failing to "evaluate meaningfully the persuasiveness of the prosecutor's [group]-neutral explanations," and to "make a deliberate decision whether purposeful discrimination occurred." (*United States v. Alanis, supra,* 335 F.3d at pp. 968-969 & fns. 2-3; *accord, e.g., Lewis v. Lewis, supra,* 321 F.3d at p. 832; *Barnes v. Anderson* (2d Cir. 1999) 202 F.3d 150, 157; *People v. Fuentes, supra,* 54 Cal.3d at pp. 718-721.) This was the rationale the California Supreme Court used, in two of its three post-1987 reversals based on *Batson* or *Wheeler* grounds. (*People v. Silva, supra,* 25 Cal.4th at p. 386; *People v. Fuentes, supra,* 54 Cal.3d at pp. 718-721.)

Similarly, if the trial court merely recites that the prosecution has given a group-neutral explanation, without giving any indication that it has considered the credibility of the explanation or engaged in the third-stage process required by *Batson*, that is an error of law which may warrant reversal or remand. (*See, e.g., United States v. Hill* (6th Cir. 1998) 146 F.3d 337, 342; *Coulter v. Gilmore, supra,* 155 F.3d at pp. 920-922; *Montiel v. City of Los Angeles, supra,* 2 F.3d at p. 340; .) If the prosecutor gives a third-stage *Batson* explanation which is too vague for a trial court to evaluate on the record, and the trial court fails to obtain clarification of the explanation, that too is an error of law warranting a finding of *Batson* error. (*People v. Allen, supra,* 115 Cal.App.4th at pp. 551- 553.) And if the trial court makes a finding or even an offhanded remark which implies a reluctance to use the proper legal standard, that is also an error of law and a potential issue on appeal. (*See, e.g., Valentine v. New York, supra,* 2005 U.S. Dist. LEXIS 30141, at pp. 16-17 [trial court's offhanded remark that under *Batson*, judge "has to decide whether the [prosecutor] is a racist" indicated belief in wrong legal standard, because the question is whether a juror has been struck due to race [group status], not whether a prosecutor harbors racist tendencies; since remark implied a reluctance to question prosecutor's motivation and thus his intent, trial court committed *Batson* error, and relief ordered]; *People v. Tapia*

(1994) 25 Cal.App.4th 984, 1015 [*Batson* error found when trial court's statements indicated its subjective determination that there was "good cause" for peremptory challenges, without making a reasoned effort to evaluate the prosecutor's actual reasons]; *United States v. Alanis, supra,* 335 F.3d at pp. 968-969 [similar]; *United States v. Harris* (6th Cir. 1999) 192 F.3d 580, 587-588 [*Batson* error found where trial court's third-stage analysis was far too terse, and appeared to rely excessively on the fact that one African-American was seated on the jury]; *State v. Ross* (1998) 154 Ore.App. 121, 128-129 [961 P.2d 241, 245] [*Batson* error found when trial court relied on its off-the-record, personal knowledge of the prosecutor].)

If a trial court makes such an error in the legal standard used to evaluate a *Batson* objection, a reviewing court should not be determining in the first instance that the prosecutor's explanation was credible. That is partly true for the same reasons that review of a finding of fact below is so restricted – the reviewing court's judges weren't at the trial, have only a paper record, and didn't have the opportunity to observe the prosecutor or any of the jurors. Nor should a trial or reviewing court be giving "reasons" for juror exclusion which the prosecutor did not give (*Miller-El II, supra,* 545 U.S. at p. 252; *Lewis v. Lewis, supra,* 321 F.3d at pp. 833-834) – particularly after *Johnson v. California* and *Miller-El II.* In those cases, the U.S. Supreme Court made clear that only the prosecutor's actual reasons matter in a *Batson* inquiry; it is not up to a court to speculate on reasons the prosecutor "might have had," without any evidence they were the prosecutor's actual reasons. (*Johnson v. California, supra,* 545 U.S. at pp. 172-173; *Miller-El II, supra,* 545 U.S. at p. 252.)

Another type of procedural error, albeit more unusual, is a situation where trial defense counsel is effectively silenced at the third stage because the trial court rules peremptorily or otherwise makes clear that it doesn't want to hear from defense counsel. There appears to be no definitive opinion on whether the trial court is obligated to give defense counsel the right to speak at stage three, *i.e.*, to present argument on why the prosecutor's reason is pretextual. (*See Lewis v. Lewis, supra,* 321 F.3d at p. 831, fn. 27.)

However, if the trial court simply rules on a *Batson* objection, on the heels of the prosecutor's explanation and without giving defense counsel a fair opportunity to respond, it may be violating *Batson*'s requirement that it thoroughly and meaningfully evaluate the *bona fides* of the prosecutor's stated reason. The problem in such a situation is that the trial court has not heard from the only party that could make a factual argument that this stated reason was in reality pretextual. (*United States v. Alanis, supra,* 335 F.3d at pp. 968-969 & fns. 2-3; *Jordan v. Lefevre* (2d Cir. 2000) 206 F.3d 196, 201-202; *Montiel v. City of Los Angeles, supra,* 2 F.3d at p. 340; *People v. Mendoza* (Colo. Ct. App. 1994) 876 P.2d 98, 101-102.) The U.S. Supreme Court has issued at least one analogous holding in the Title VII context (*McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 804-805), and the Ninth Circuit has held that summarily ruling without hearing from the objecting party constitutes a "clear disregard for even the most basic of *Batson* safeguards." (*Montiel v. City of Los Angeles, supra,* 2 F.3d at p. 340.)

Moreover, since the credibility of the prosecutor's explanation is the only issue in a *Batson* third-stage inquiry and the explanation is the only testimonial evidence before the trial court – in effect, making a *Batson* third-stage inquiry a one-minute mini-trial on the prosecutor's

stated reasons (*see People v. Buckley* (1997) 53 Cal.App.4th 658, 681 [dis. opn. of Kline, J.]) – there could be serious Sixth and Fourteenth Amendment issues arising from denying the defense a fair opportunity to be heard on the meaning, significance, and credibility of the sole testimonial-type evidence before the trial court. (*See, e.g., Herring v. New York* (1975) 422 U.S. 853 [Sixth and Fourteenth Amendment violation to deny defense counsel closing argument at bench trial, since that is an essential part of the adversarial process and the only opportunity for counsel to present their version of the case as a whole, argue the inferences to be drawn from the evidence, and point out weaknesses in adversaries' positions]; *Hunter v. Moore* (11th Cir. 2002) 304 F.3d 1066, 1071-1072, and cases cited [similar]; *United States v. King* (4th Cir. 1981) 650 F.2d 534, 536-537 [similar].) But the trial court would probably not be required to give the defendant or trial counsel an opportunity to cross-examine the prosecutor. (*See Majid v. Portuondo* (2d Cir. 2005) 428 F.3d 112, 127-128.)

b. Review Considerations In More Typical Cases [Return to Index]

For the more typical case where the trial court doesn't commit error independent of the prosecutor's explanation, a narrow standard of review doesn't mean review is impossible. After all, the U.S. Supreme Court has recognized that peremptory challenges permit "those to discriminate who are of a mind to discriminate" (*Batson*, 476 U.S. at p. 96) – and that prosecutors are no exception. (*Miller-El II*, 545 U.S. at pp. 237-238.) There are numerous published opinions where federal courts, even under the exceptionally stringent AEDPA and third-stage *Batson* standards of review, have found pretext as a matter of law in a prosecutor's explanations – including recently by the U.S. Supreme Court, in *Miller-El II*, *supra*, 545 U.S. at pp. 265-266 and *Snyder v. Louisiana*, *supra*, ___ U.S. at p. ___ [128 S.Ct. at pp. 1209-1212]). And "several [federal] courts of appeals have acknowledged that the traditional level of deference should not govern appellate review when a prosecutor's explanations are obviously not credible." (*Riley v. Taylor* (3d Cir. 2001, en banc) 277 F.3d 261, 285 [Third Circuit case, citing other cases from the First, Seventh, and Ninth Circuits].)

Still, appellate courts are not about to jettison the traditional rule that the trier of fact is much better able to decide among competing inferences than appellate judges on a cold paper record, as the cases above also point out. (*See, e.g., Snyder v. Louisiana*, *supra*, ___ U.S. at p. ___ [128 S.Ct. at pp. 1207-1208].) The U.S. Supreme Court's opinion in *Collins v. Rice* (2006) 546 U.S. 333, 338-339, 341-342 – though decided on a point of federal habeas law under the AEDPA standards (far more stringent than any direct appeal standard) – reiterated this basic rule of postconviction review: Reviewing tribunals do not and cannot substitute their judgment for the trier of fact.

The standards of third-stage review are restrictive and deferential for obvious reasons – trial courts are far better suited to resolving the credibility of the prosecutor's explanation, and reviewing courts have only a cold transcript to work with. "[T]he critical question in determining whether a prisoner has proved purposeful discrimination at step three is the persuasiveness of the prosecutor's justification for his peremptory strike. . . . Deference is necessary because a reviewing court, which analyzes only the transcripts from *voir dire*, is not as well positioned as the trial court to make credibility determinations." (*Miller-El I*, 537 U.S. at

pp. 338-339.) In federal courts, the standard used is "clearly erroneous" (*Snyder v. Louisiana, supra*, ___ U.S. at p. ___ [128 S.Ct. at p. 1207]; in state courts, it is "substantial evidence." (*People v. Lenix* (2008) 44 Cal.4th 602, 613.) In the real world, they come down to basically the same thing – the reviewing court will give great deference to a trial court's ruling on a *Batson* motion, and if there is any fair and reasonable support for it in the record, then that ruling will prevail. So appellate counsel considering third-stage *Batson* issues face what is usually a very difficult task of showing that a *Batson* objection could not have been properly overruled under *any* reasonable view of credibility or of the facts.

Nonetheless, "deference does not imply abandonment or abdication of judicial review. Deference does not by definition preclude relief." (*Miller-El I*, 537 U.S. at p. 340.) So, how does appellate counsel go about determining whether there is an arguable third-stage *Batson* issue, and making the argument if there is?

To begin with, every factor applicable to the *Batson* first stage (prima facie case) still applies in review of a third-stage *Batson* denial. (*Miller-El I*, 537 U.S. at pp. 340-341.) "[The] evidence [supporting a prima facie case] and inferences properly drawn therefrom may be considered by the trier of fact on the issue of whether the defendant's explanation is pretextual." (*Texas Dep't of Community Affairs v. Burdine* (1981) 450 U.S. 248, 256, fn. 10 [case cited in *Batson*, 476 U.S. at pp. 94 fn. 18, 98 fn. 20].) As will be discussed shortly, some of those factors can be particularly useful at the third stage.

Furthermore, as discussed above, reviewing court deference is not abdication. For example, even under the California substantial evidence standard, appellate courts may find a lack of substantial evidence in situations where testimonial evidence is self-contradictory or otherwise too weak to rise to the level of substantial evidence. (*See, e.g., People v. Ibarra* (1982) 134 Cal.App.3d 413, 420-421 [defendant's testimony that he had no intent contradicted other portions of his own testimony, and was therefore equivocal and unsubstantial]; *Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 652-654 [discussing cases where self-contradicted testimony was rejected as insubstantial].) "It is the reviewing court's duty to determine from the whole record whether the contradicting and conflicting evidence so discredits the supportive evidence as to render it insubstantial." (*Mendoza v. Workers' Comp. Appeals Bd.* (1976) 54 Cal.App.3d 820, 823.) This is a natural corollary of the fact that a reviewing court doing substantial evidence review must review the entire record as a whole rather than merely snippets of evidence in isolation (*People v. Johnson* (1980) 26 Cal.3d 557, 577); "[n]ot every bald assertion rises to the level of substantial evidence." (*Roddenberry v. Roddenberry, supra*, 44 Cal.App.4th at p. 654.)

Similar techniques can be used by appellants in third-stage *Batson* situations. (*Accord, e.g., Kesser v. Cambra, supra*, 465 F.3d at p. 367 [rejecting prosecutor explanations that were inconsistent with each other].) For where the potential evil being addressed is unlawful race, gender, or other group-based discrimination, "[t]he trier of fact may not turn a blind eye to purposeful discrimination obscured by race-neutral excuses." (*Id.* at p. 359.) "[I]f a review of the record undermines the prosecutor's stated reasons, or many of the proffered reasons, the reasons may be deemed a pretext for racial discrimination." (*Id*. at p. 360 [quoting *Lewis v.*

Lewis, supra, 321 F.3d at p. 830].) As the Ninth Circuit recently explained:

> The court need not accept any proffered rationale. We have recognized that "[w]hen there is reason to believe that there is a racial motivation for the challenge, neither the trial courts nor we are bound to accept at face value a list of neutral reasons that are either unsupported in the record or refuted by it." [Citation.] The court must evaluate the record and consider each explanation within the context of the trial as a whole because "[a]n invidious discriminatory purpose may often be inferred from the totality of the relevant facts." [Citation.]

(*Kesser v. Cambra, supra,* 465 F.3d at p. 359.)

Therefore, when it comes to evaluating *Batson* third-stage issues, "each piece of evidence should not be reviewed in isolation. It is clear that 'an explanation for a particular challenge need not necessarily be pigeon-holed as wholly acceptable or wholly unacceptable. The relative plausibility or implausibility of each explanation for a particular challenge . . . may strengthen or weaken the assessment of the prosecution's explanation as to other challenges.' [Citation.] In short, '[a] reviewing court's level of suspicion may . . . be raised by a series of very weak explanations for a prosecutor's peremptory challenges. The whole may be greater than the sum of its parts.' [Citation.]" (*Riley v. Taylor, supra,* 277 F.3d at p. 283; *accord Miller-El II, supra,* 545 U.S. at p. 265 [even if evidence regarding prosecutor's reasons is at times open to judgment calls, relief warranted when evidence taken cumulatively "is too powerful to conclude anything but discrimination"]; *Kesser v. Cambra, supra,* 465 F.3d at pp. 367-368 [same].) The California Supreme Court some time ago offered a similar view of substantial evidence review (*People v. Johnson, supra,* 26 Cal.3d at pp. 577-578; *see also Roddenberry v. Roddenberry, supra,* 44 Cal.App.4th at pp. 651-652 [quoting and following this California Supreme Court formulation].)

The Ninth Circuit recently spelled out this type of approach in discussing factors relevant to review of third-stage *Batson* claims on appeal:

> For example, **[1]** if a review of the record undermines the prosecutor's stated reasons, or many of the proffered reasons, the reasons may be deemed a pretext for racial discrimination. Similarly, **[2]** a comparative analysis of the struck juror with empaneled jurors ["comparative juror analysis"] "is a well-established tool for exploring the possibility that facially race-neutral reasons are a pretext for discrimination." After analyzing each of the prosecutor's proffered reasons, our precedent suggests that the court should then step back and evaluate all of the reasons together. The proffer of various faulty reasons and only one or two otherwise adequate reasons, may undermine the prosecutor's credibility to such an extent that a court should sustain a *Batson* challenge.

(*Lewis v. Lewis, supra,* 321 F.3d at pp. 830-831 [bracketed boldfaced numbering added]; *see also Caldwell v. Maloney* (1st Cir. 1998) 159 F.3d 639, 651 [to like effect].)

As mentioned earlier, comparative juror analysis will have its own discussion later in this article. This section focuses on other types of third-stage *Batson* arguments. How does one establish that the record does not fairly support a finding that the prosecutor's explanation was

credible, without running afoul of *Batson*'s command that a reviewing court must give "great deference" to the trial court's third-stage finding of fact that there was no intentional discrimination?

3. Some Factors That Can Support Third-Stage *Batson* Arguments [Return to Index]

a. Anything That Supports A Prima Facie Case

As noted above, the factors that support a prima facie (first-stage) *Batson* case can also support a third-stage case for discrimination. (*Miller-El I, supra,* 537 U.S. at pp. 340-341.) They will not usually suffice by themselves in light of a facially race-neutral explanation, but they will often be a very good place to start. The factors that support a prima facie case were discussed earlier in this article (section (A) above).

b. Explanation Contrary To Or Unsupported By The Record

"Where the facts in the record are objectively contrary to the prosecutor's statements, serious questions about the legitimacy of a prosecutor's reasons for exercising peremptory challenges are raised." (*McClain v. Prunty* (9th Cir. 2000) 217 F.3d 1209, 1220; *accord, e.g., People v. Silva, supra,* 25 Cal.4th at p. 385.) This is equally true where the record provides no factual support for the prosecutor's statements. (*People v. Silva, supra,* 25 Cal.4th at p. 385.) In practice, those two considerations are functionally the same and are so treated. (*See, e.g., Miller-El II, supra,* 545 U.S. at p. 265 ["The prosecutors' chosen race-neutral reasons for the strikes do not hold up and are so far at odds with the evidence that pretext is the fair conclusion, indicating the very discrimination the explanations were meant to deny."])

For example, in *McClain v. Prunty, supra* [cited with approval in *People v. Silva, supra,* 25 Cal.4th at p. 385], two of the prosecutor's stated reasons were unsupported by the record. The prosecutor said he excused juror SR (who stated unequivocally that she could be fair) in part because she mistrusted the system and believed she was treated unfairly in an incident where her son was arrested. But the record showed neither was true – SR said her son didn't trust the public defender; and although she initially believed her son was treated unfairly, she changed her mind and no longer believed that. The same prosecutor said he excused Juror JH because she would "root for the underdog" as a volunteer counselor at a drug program, except that she'd never been such a volunteer counselor; she was a research drug information pharmacist at the Veterans Administration. And the prosecutor said JH "didn't speak in ordinary language," "gave highly intellectual answers" and was "overly educated," but the record didn't support any of those explanations either. Similarly in *Miller-El II*, the prosecutor's reason for striking prospective juror Fields was that Fields wouldn't vote for the death penalty if rehabilitation was possible, when he actually said he could vote for the death penalty irrespective of the prospects of rehabilitation. (*Id*., 545 U.S. at pp. 244, 247.)

Similar discussions may be found in other cases such as *People v. Silva, supra,* 25 Cal.4th at pp. 385-386; *Snyder v. Louisiana, supra,* ___ U.S. at p. ___ [128 S.Ct. at pp. 1210-1211]; *Kesser v. Cambra, supra,* 465 F.3d at pp. 363-364; *Johnson v. Vasquez* (9th Cir. 1993) 3 F.3d 1327, 1330-1331 [cited with approval in *People v. Silva, supra,* 25 Cal.4th at p. 385];

Splunge v. Clark, supra, 960 F.2d at pp. 708-709; and *Zakour v. UT Medical Group, Inc.* (Tenn. 2006) 215 S.W.3d 763, 771.

c. Explanation Inherently Implausible Or Illogical In Light Of The Record

In some situations, a prosecutor's explanation for a juror strike – even if nearly impossible to verify or refute on the record of that one strike -- in general won't make sense as an actual reason why the prosecutor would have exercised a peremptory challenge, in light of known reality. This is not merely an explanation that a reviewing court (or appellate counsel) might not agree with, because reviewing courts won't second-guess a prosecutor's genuine, non-group-based reasons. It is an explanation that truly seems illogical or irrational if taken at face value; basically, one that has difficulty passing the 'straight face test.' Usually, there needs to be more in the record than one strike claimed to be inherently implausible.

Still, courts – especially federal courts – have been willing to reject prosecutors' stated reasons on this ground. "At [the third] stage, implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination." (*Snyder v. Louisiana, supra,* ___ U.S. at p. ___ [128 S.Ct. at p. 1212] [quoting *Purkett v. Elem* (1995) 514 U.S. 765, 768].)

For example, in *State v. McFadden* (Mo. 2007) 216 S.W.3d 673 ["*McFadden II*," the second reversal of a capital conviction on *Batson* grounds in the same case], the prosecutor's stated reasons for excluding an African-American prospective juror were that she didn't have a driver's license, she had bright red hair, and she seemed "hostile." The trial court found the driver's license irrelevant and that there was no hostility, but allowed the challenge based on the red hair, despite defense counsel's observations that (i) the prospective juror was neatly dressed, and (ii) this hair color was quite fashionable in the local African-American community. The state Supreme Court found the prosecutor was merely stating subjective, stereotypical assumptions about a juror who happened to be of a different culture than the prosecutor, and reversed for *Batson* error. (*Id*. at pp. 676-677.) In *State v. Bryant* (1995) 104 Ohio App.3d 512 [662 N.E.2d 846], the prosecutor's stated reason was that the African-American prospective juror had prior jury service and therefore would be less able to concentrate during the trial or more likely to become irritable. The appellate court held that this didn't make any sense when the prosecutor cited nothing in the record to support the claim, and reversed for *Batson* error. (*Id*. at pp. 518-519 [662 N.E.2d at pp. 849-850].) In *People v. Davis* (1997) 287 Ill.App.3d 46 [677 N.E.2d 1340], one of the bases for granting relief on *Batson* grounds was the prosecutor's explanation that he challenged an African-American prospective juror for being approximately the defendant's age, when the juror was 21 and the defendant was 36, and the prosecutor accepted Caucasian prospective jurors much closer in age to the defendant. (*Id*. at p. 53 [677 N.E.2d at p. 1345].) In *Robinson v. State* (Miss. 2000) 773 So.2d 943, some of the prosecutor's justifications included "wild[] speculat[ion]" that two stricken African-Americans might be the parents of illegitimate children, a claim that a third was staring at the prosecutor though the prosecutor himself didn't sense any hostility or ill will, and a claim that a fourth slept through major portions of voir dire even though the trial court never saw any of it. The state Supreme Court had no problem finding the prosecutor's strikes to be pretextual. (*Id*. at p. 948.) And in

McClain v. Prunty, supra, 217 F.3d 1209, one of the prosecutor's reasons for challenging JH was that her body language was unacceptable because she rested her elbow on her chair; however, there was nothing in the record to suggest what that might have meant, or why it might indicate unfavorable disposition toward the prosecution. The Ninth Circuit called this "nonsensical," and assigned it as one of the reasons for granting the writ on *Batson* grounds. (*Id*. at p 1223.)

This factor is often used in conjunction with "comparative juror analysis." As will be discussed in section (D) below, if a prosecutor's explanation for striking an African-American prospective juror could have applied just as easily to one or more Caucasian jurors, then the explanation may rise to the level of implausibility. An example is *Devose v. Norris* (8th Cir. 1995) 53 F.3d 201, in which the prosecutor's explanation for striking three of the four African-American prospective jurors (two seated jurors, one alternate) was that they had served on juries before, and the prosecutor was supposedly concerned about "jury burnout." That rather thin explanation, even if facially plausible, would mean the prosecutor would be expected to ask everyone if they had previously served on a jury and excuse everyone who had – a number which could threaten to exceed the total number of available peremptories, and leave few or no peremptories left for grounds related to trial strategy. More importantly, the prosecutor did not challenge at least five Caucasian jurors who had previously served on juries, and in fact praised one of them for having an extra understanding of the jury system. On that basis, the federal district court found the explanation pretextual and granted relief on *Batson* grounds, and the Eighth Circuit affirmed. (*See also, e.g., Miller-El II,* 545 U.S. at pp. 244-248; *People v. Blackwell* (1996) 171 Il.2d 338, 354-355 [665 N.E.2d 782, 789].)

d. Explanation Having Nothing To Do With The Case Or The Prospective Juror's Attitudes

Instinctively, it makes sense that if a *Batson* prima facie case is found, the prosecutor can't justify it by saying "I observed this prospective juror and saw that he was left-handed, and that concerned me." (*See, e.g., McFadden II, supra,* 216 S.W.3d at pp. 676-677 [explanation for striking African-American prospective juror was that she had bright red hair; conviction reversed for *Batson* violation].) Rather, once a prima facie case is found, "the prosecutor must . . . articulate a neutral explanation related to the case to be tried." (*Batson,* 476 U.S. at p. 98.) Explanations that fail this standard can be bases for finding a *Batson* violation.

For example, in *Kesser v. Cambra, supra,* 465 F.3d 351, one of the prosecutor's explanations was that prospective juror Rindels was "misty" and "emotional about the system" when talking about her daughter having been molested. However, the record didn't show that any purported emotion by Ms. Rindels had anything to do with "the system," it wasn't clear that she showed any emotion at all, and the prosecutor never explained what any "mistiness" might have had to do with the case. This was one of the circumstances underlying the finding of a *Batson* violation. (*Id*. at p. 364.) In *United States Xpress Enterprises, Inc. v. J.B. Hunt Transport, Inc.* (8th Cir. 2003) 320 F.3d 809, the explanation for the challenge against the only remaining African-American on the panel was that he was the only remaining juror with any kind of medical background (a pharmacy purchasing coordinator) and counsel didn't want anyone who would speculate on whether any decedent temporarily survived the accident;

however, both parties acknowledged no evidence of this nature was going to be presented. The Eighth Circuit held that based on this factor, plus disparate questioning, the trial court properly disallowed the challenge. (*Id*. at pp. 814-815.) In *State v. McFadden* (Mo. 2006) 191 S.W.3d 648 ["*McFadden I*"], one of the reasons for the strike against an African-American was that she lived in a "high crime area" and had never heard gunshots. The state Supreme Court found this explanation invalid because the case involved no issues of witness recognition of gunshots, and even if it did, there was no showing of why a juror's lack of experience in this area would be relevant. Moreover, no "gunshot" questions were asked of Caucasian prospective jurors. (*Id*. at pp. 653-654.)

This factor too is often used in conjunction with "comparative juror analysis," discussed in section (D) below. If an explanation for a peremptory against a cognizable group prospective juror seems to have nothing to do with the case or jurors' attitudes, and non-group prospective jurors with characteristics similar to the explanation were not challenged, that is a strong factor supporting discrimination. All three of the cases in the paragraph above utilized "comparative analysis" in addition to the apparent irrelevance of the explanation.

e. Prosecutor's Questioning Of Prospective Jurors [Return to Index]

In section (A) above, dealing with ways of making a prima facie case, three types of prosecution questioning were discussed:

(i) Asking too few questions of cognizable group jurors, in a manner that suggested the prosecutor didn't really care about the answers (section (A)(5)(a));

(ii) Asking too many or too detailed questions of cognizable group jurors, in a manner that suggested the prosecutor was taking extra pains to create a record to justify excluding the cognizable group jurors (section (A)(5)(b)); or

(iii) Asking disparate or group-based questions of cognizable group jurors, in a manner that suggested the prosecutor was interested in the prospective juror's group status (section (A)(5)(c)).

As discussed above, these prima facie case factors can also be used in a *Batson* third-stage pretext argument. In addition, two more factors relating to the prosecutor's questioning of jurors, which would be inapplicable at the prima facie case stage because they deal with the prosecutor's explanations, can be important in a *Batson* third-stage argument:

(iv) Not asking any meaningful questions on a topic that is later the subject of the prosecution's explanation for excusing that juror. If the prosecutor gives a reason for striking a cognizable group prospective juror, but didn't develop that reason in questioning the prospective juror, that can support an inference of discrimination. (*Miller-El II*, 545 U.S. at p. 246.) Similarly, when a prosecutor defends a peremptory strike on the basis of a purported characteristic of the prospective juror, but fails to ask sufficiently probing questions to determine if the prospective juror actually has that characteristic, this too will be a factor supporting a finding of discrimination. (*See, e.g., Emerson v. State, supra,* 851 S.W.2d at p. 274 [prosecutor

said he struck venireperson who was either a college student, professor or teaching assistant because people in the collegiate environment are allegedly liberal, but failed to ask any questions to confirm that the prospective juror had any such "liberal" characteristics]; *Davidson v. Harris* (8th Cir. 1994) 30 F.3d 963, 966 [to similar effect]; *Jackson v. State* (Ala. Ct. Crim. App.) 594 So.2d 1289, 1294 [similar].)

(v) Not asking clarifying or follow-up questions of a cognizable group juror who gave a response that is claimed to be vague, ambiguous, or conflicting with other responses, when that response is later used as a reason for excluding that juror. For example, in *Miller-El II*, the prosecutor's stated reason for excusing prospective juror Fields was a concern over whether he could impose the death penalty based on answers he allegedly gave. However, the prosecutor had misstated the answers, and the record actually showed Fields's outspoken support for the death penalty. The Supreme Court held that in this light, if the race-neutral reason was genuine, "we expect the prosecutor would have cleared up any misunderstanding by asking further questions before getting to the point of exercising a strike." (*Id*., 545 U.S. at p. 244.) This passage was applied and quoted in *Kesser v. Cambra, supra*, 465 F.3d at p. 364 and *United States v. Odeneal* (6th Cir. 2008) 517 F.3d 406, 420-421, both of which reached similar conclusions in granting habeas relief.

Similarly in *People v. Turner, supra*, 42 Cal.3d 711, prospective juror Shepherd's remark about her status as a mother was ambiguous and could have signified no more than general discomfort with the case, a feeling other jurors naturally expressed as well (the case was a robbery-murder of two prominent members of the community). The Court held that although follow-up questions would have clarified the matter, the immediate use of peremptory challenges without any follow-up was suggestive of pretext. (*Id*. at p. 727.)

f. Prosecutor Switching Justifications in Midstream [Return to Index]

If a prosecutor offers multiple justifications for peremptorily striking a prospective juror, there is usually nothing wrong with that; s/he is merely offering information. But if a prosecutor offers an explanation, the trial court or defense counsel reacts to it with some negativity, and the prosecutor then tries to suggest its dominant explanation was really something else, the attempt to switch primary justifications could be a factor suggesting neither is reliable. (*See Miller-El II*, 545 U.S. at pp. 245-246; *State v. Jensen* (2003) 2003 UT App 273, par. 20 [76 P.3d 188, 194].)

Along these lines, a trial court also cannot switch rulings in midstream. If the trial court finds purposeful discrimination as to a peremptory challenge, it cannot later change its mind based on subsequent events and decide that there was no purposeful discrimination after all. (*Durant v. Strack* (E.D.N.Y. 2001) 151 F.Supp.2d 226, 242.)

g. Other Findings That The Prosecutor's Explanations Were Pretextual

Falsus in uno, falsus in omnibus. (*In re Vargas* (2000) 83 Cal.App.4th 1125, 1144 & fn. 4; *Kanawha & Michigan Ry. Co. v. Kerse* (1916) 239 U.S. 576, 581.) If some of the explanations by the prosecutor are found to be pretextual, that isn't necessarily dispositive, but it can

sometimes go a long way toward indicating that all of the prosecutor's explanations are pretextual, which strengthens the argument that at least one was based on unlawful discrimination. (*See, e.g., United States v. Chinchilla, supra,* 874 F.2d at p. 699 [though prosecutor's explanations would have been adequately neutral taken at face value, the fact that two of the prosecutor's four reasons did not hold up under judicial scrutiny militated against the sufficiency of all four]; *Lewis v. Lewis, supra,* 321 F.3d at pp. 833-834 [trial court's finding that two of prosecutor's explanations were not credible undermined credibility of prosecutor's third explanation, and also of state Court of Appeal's effort to create a fourth explanation].)

h. One Or More Group-Based Explanations Tending To Undermine Other Ostensibly Group-Neutral Explanations

This is further discussed in the portion of this article dealing with "dual motivation" peremptory challenges, section (C) (8) below.

i. Explanation With A Group-Based Context [Return to Index]

Not every explanation that turns out to be group-based is facially so. Therefore, the issue of whether an explanation is group-based sometimes will survive second-stage *Batson* analysis (facial group bias), but provide grounds for reversal in third-stage analysis (group bias based on examination of all circumstances) when placed in a broader context. For example, in *Kesser v. Cambra, supra,* 465 F.3d 351, the prosecutor's explanations for striking Ms. Rindels were race-neutral and "at least plausible"; however, the broader context of the prosecutor's other statements as well as comparative analysis "reveal[ed] the prosecutor's purposeful and plainly racial motives in excusing Rindels and others." (*Id.* at pp. 361-362; *see also, e.g., Johnson v. Vasquez* (9th Cir. 1993) 3 F.3d 1327, 1329-1330 [prosecutor's statements reflected racial motivations, and other explanations could not overcome that presumption].)

j. Record Of Group-Based Strikes In Other Cases

Although *Swain v. Alabama, supra,* 380 U.S. 202 was overruled by *Batson,* and multiple group-based strikes across multiple cases are no longer required, that doesn't mean evidence of the prosecutor's peremptory challenges in other cases – or the DA's office's policies or actions in other cases – can never appear on the record. If there is such evidence in the record, it too can be a factor supporting a third-stage *Batson* showing. (*See, e.g., Miller-El II,* 545 U.S. at pp. 263-264; *Riley v. Taylor, supra,* 277 F.3d at pp. 283-284, 286-287.)

k. Trial Court Express Or Implied Finding Of Group-Based Bias

It should go without saying that if a trial court actually makes a finding of group-based bias, or makes statements that indicates this is its conclusion, appellate counsel should raise that in support of a *Batson* issue and it should prevail. However, appellate counsel managed not to raise such a winning issue in *Eagle v. Linahan* (11th Cir. 2001) 279 F.3d 926. Fortunately, the defendant in *Eagle* managed to file a *pro. per.* IAC petition on the merits and to have it ultimately considered by the Eleventh Circuit, which resulted in a federal habeas grant. Hopefully, other appellate attorneys won't leave this type of near-certain claim to that kind of

chance.

4. "Proxy For Bias" Analysis [Return to Index]

Another type of third-stage *Batson* argument occurs when the prosecutor's proffered explanation can be argued to be a "proxy for bias," also called a "proxy for race [or other group status]." This is an explanation that may appear to be group-neutral on its face, but can potentially be found to be group-biased because its characteristics are shared predominantly by a *Batson* cognizable group.

Although some opinions discuss "proxy for bias" as part of a third-stage *Batson* analysis, it might in some circumstances be seen as a *Batson* second-stage issue, since it doesn't argue the prosecution's explanation was pretextual; but rather, argues that it wasn't group-neutral as a matter of law. Usually, however, "proxy for bias" isn't a facial analysis as a second-stage issue would be; it generally requires understanding the prosecutor's explanation in the greater context of the voir dire, which is more accurately framed as a third-stage issue. In any event, second- and third-stage issues are often taken together, because they both concern the legal adequacy of the prosecutor's explanation. (*See also Paulino II, supra*, 542 F.3d at pp. 702-703 [if reviewing court gets past stage one, then it cannot stop at stage two and must always go to stage three, because once a prima facie case is shown, the only question remaining is whether the party exercising the peremptory has engaged in unlawful discrimination]; *but see contra, e.g., State v. Jensen, supra,* 2003 UT App 273, par. 21 [76 P.3d at p. 194] [reversing for prosecutor's failure to provide a group-neutral explanation].) So it may often be appropriate to use third-stage *Batson* analysis as a means of supporting second-stage issues or vice versa, as long as the standards of review are kept separate. As discussed in the previous installment of this article, review of whether a prosecutor's explanation was group-neutral is *de novo* for a question of law, but the ultimate third-stage review is more deferential because it involves a question of fact.

One of the best-known examples of "proxy for bias" is the Ninth Circuit's opinion in *United States v. Bishop* (9th Cir. 1992) 959 F.2d 820. There, the prosecutor said he wasn't challenging the prospective juror because she was African-American; but rather, because she lived in Compton, allegedly "a poor and violent community whose residents are likely to be 'anesthetized to such violence' and 'more likely to think that the police probably used excessive force'" (*id*. at p. 825) - which also happens to be overwhelmingly minority, mostly African-American. The Ninth Circuit held that this "amounted to little more than the assumption that one who lives in an area heavily populated by poor black people could not fairly try a black defendant." (*Ibid*.)

To like effect is *People v. Turner* (2001) 90 Cal.App.4th 413, where the prosecutor's primary stated reason for a challenge was that the prospective juror lived in Inglewood and he thought people from Inglewood looked at drug cases the way others do. The population of Inglewood was predominantly African-American. The Court of Appeal (over a dissent) reversed the conviction, holding: "To state that 'Inglewood jurors' have a different attitude toward the drug culture is just as stereotypical as the reason given in *Bishop* [*supra*]. Crediting past experiences with Inglewood jurors as the foundation for this view is a "mere surrogate or proxy

for group membership.*"* (*Id*. at p. 420 [citation omitted].)

The U.S. Supreme Court alluded to this possibility in *Hernandez v. New York* (1991) 500 U.S. 352, where the plurality recognized that in some cases (though not in *Hernandez* itself), "proficiency in a particular language, like skin color, [c]ould be treated as a surrogate for race under an equal protection analysis" (*id*. at pp. 371-372, citing prior cases), and Justice Stevens' dissent agreed that "[a]n explanation that is 'race neutral' on its face is nonetheless unacceptable if it is merely a proxy for a discriminatory practice." (*Id*. at p. 379 [dis. opn. of Stevens, J.].) Shortly after, the Pennsylvania Supreme Court affirmed a lower court's grant of a new trial by relying on *Hernandez* and *Bishop* to find a *Batson* violation, when the prosecutor's explanation for striking an African-American prospective juror was that the latter lived in a "high-crime area." (*Commonwealth v. Horne* (1994) 535 Pa. 406, 408-411 [635 A.2d 1033].)

The California Supreme Court has cited approvingly to *Bishop* and the concept of "proxy for bias": "A trial court is required to assess whether the prosecutor stated adequate neutral reasons for the peremptory challenges in question--in other words, whether the reasons for the strikes were 'explanation[s]' 'connecting . . . specific [prospective] juror[s] to the facts of the case,' and were not mere 'surrogate[s]' or 'prox[ies]' for group membership. [Citations to *Bishop* and *People v. Hall* (1983) 35 Cal. 3d 161, 167.]" (*People v. Alvarez* (1997) 14 Cal. 4th 155, 197.)

One can't carry this kind of reasoning too far, however. The U.S. Supreme Court has held it acceptable for a prosecutor to excuse two prospective jurors on the ground that they were bilingual in English and Spanish, on the explanation he didn't want bilingual jurors because the record provided a basis for concern that they might not always accept the official in-court translation of a Spanish-speaking witness's testimony. (*Hernandez v. New York, supra,* 500 U.S. at pp. 361-362.) Similarly, the Seventh Circuit held it a proper race-neutral reason for a prosecutor to challenge an African-American juror on the grounds that he was wearing a Malcolm X hat in court. (*United States v. Hinton* (7th Cir. 1996) 94 F.3d 396, 397-398.) The Third Circuit held it a proper race- and religion- neutral reason for a prosecutor to challenge African-American jurors based on their heightened religious involvement (not based on their religion *per se*) which suggested the possibility that they might be less willing to pass judgment on another human being. (*United States v. DeJesus* (3d Cir. 2003) 347 F.3d 500, 507-508.)

On the other hand, *Batson* is violated if the record shows that the prosecutor was acting on the basis of group stereotype rather than specific characteristics of indidvidual jurors – even in a situation which might otherwise be race-neutral had it been specific to that particular juror's attitudes toward the case or the legal system. (*Compare People v. Gonzales* (2008) 165 Cal.App.4th 620, 629-632 [when prosecutor merely assumed that Spanish-speaking prospective jurors might be unwilling to accept the interpreter's official translation, without questioning any of them, language was merely a proxy for group stereotype – notwithstanding *Hernandez v. New York, supra*; conviction reversed] *with People v. Cardenas* (2007) 155 Cal.App.4th 1468, 1475-1477 [distinguished by *Gonzales*; court followed *Hernandez v. New York* to affirm in case where Spanish-speaking prospective jurors were individually questioned and expressed some hesitancy about following the official translation at all times]; *see also, e.g., Somerville v. State* (Tex. Ct.

App. 1990) 792 S.W.2d 265, 267-269 [prospective juror's membership in NAACP found to be a proxy for race-based peremptory, warranting reversal, when prosecutor did not explore the subject any further with the prospective juror]; *People v. Holmes* (1995) 272 Ill.App.3d 1047, 1057-1058 [651 N.E.2d 608, 615-616] [to like effect at prima facie case stage, when unchallenged prospective jurors also belonged to community organizations at least one of which was ethnicity-based].)

Bishop and similar cases therefore illustrate a key point in *Batson* second-stage litigation (*i.e.* an issue of whether the prosecutor's explanation was legally sufficient to meet the minimal burden of providing a group-neutral reason): Peremptory challenges based on case-specific reasons will usually be upheld, but peremptory challenges based on group assumption can often be the kind of stereotyping *Batson* held is proscribed. (*Id*., 476 U.S. at pp. 97-98.) So in evaluating *Batson* second-stage issues (and third-stage issues as well), it is often useful to ask: Was the prosecutor's explanation specific to this juror's answers, or was it based on a group stereotype, *i.e.*, "collective experiences and feelings that [the prosecutor] could just as easily have ascribed to vast portions of the [racial, ethnic, or other *Batson* group]?" (*United States v. Bishop, supra,* 959 F.2d at p. 826.)

Each case is different, but a common theme appears to be that if the prosecutor's explanation has a plausible relation to the juror's attitudes toward the case or the legal system, based on something other than group stereotype, it is more likely to be deemed race-neutral. However, if there is nothing to support the explanation beyond group stereotype, or if stereotype appears to be the predominant basis of the explanation, a *Batson* violation is more likely to be found.

5. Inadequately Supported "Subjective Explanations" [Return to Index]

The phrase "subjective explanation" is here used to mean an explanation that cannot be verified by the four corners of a transcript. This is one of the more difficult areas of *Batson* third-stage procedure, both because some types of explanations (such as appearance) may be accurate but have different connotations depending on who is asked, and because other types of explanations (such as inattentiveness) may be difficult or impossible to verify. Some types of subjective explanations (such as "body language" or "demeanor") may fit into both categories.

Even though a peremptory challenge can sometimes be justified by a prospective juror's appearance when it can reasonably be seen as indicative of a person's attitudes – for example, coming to court with disheveled clothing and unkempt hjair – it is not enough for a prosecutor to defend a challenge, after a *Batson* prima facie case finding, by dismissively saying "I didn't like his looks" without more. (*People v. Allen, supra,* 115 Cal.App.4th at pp. 551-553.) Similarly, it is not enough for a prosecutor, without more, to defend a challenge on vague, subjective explanations such as "body language" or "demenanor." (*Id*.) Vague or inadequately supported subjective explanations such as these may fail the *Batson* requirements of a "neutral explanation related to the case to be tried" and a "clear and reasonably specific explanation for [the prosecutor's] legitimate reasons for the challenge." (*Id*., 476 U.S. at p. 98 & fn. 20 [citation omitted].)

Nonetheless, if the prosecutor makes a specific record of what the "looks," "demeanor" or "body language" or other subjective basis were, and ties it to a group-neutral characteristic that would make sense as a reason for a peremptory challenge, that will usually be good enough for an explanation after a prima facie case. (*See, e.g., United States v. Hinton, supra,* 94 F.3d at pp. 397-398 ["body language" an acceptable race-neutral reason, when prosecutor specified the body language that the prospective juror folded his arms across his chest when the Government introduced its witnesses; prospective juror also had worn a Malcolm X hat in court]; *United States v. Changco* (9th Cir. 1993) 1 F.3d 837, 840 [body language suggesting timidity an adequate group-neutral reason]; *Reynolds v. Benefield* (8th Cir. 1991) 931 F.2d 506, 512-513 [reason held group-neutral when three witnesses testified that excluded prospective juror's "facial expressions and body language indicated hostility"].) However, if the proffered subjective reason would have been equally applicable to other jurors – for instance, if the prosecutor's stated reason was body language suggesting timidity, but the defense established that the record as to two Caucasian jurors suggested similar timidity – that might open the subjective explanation to further question or diminish its credibility. (*See, e.g., Kesser v. Cambra, supra,* 465 F.3d at pp. 362-368 [rejecting subjective reasons of prosecutor partly on this type of analysis, and granting habeas corpus].)

Conversely, subjective explanations are more likely to be arguably insufficient in an appellate context if they are the only explanations given – especially if the prosecutor doesn't offer and the trial court doesn't request any elaboration as to what, specifically, was troubling about the prospective juror (*see, e.g., People v. Allen, supra,* 115 Cal.App.4th at pp. 551-553, and authority cited); if they are given in tandem with other evidence of pretext or group-based reasons (*see, e.g., Kesser v. Cambra, supra,* 465 F.3d at pp. 363-364, 367-368); if the trial judge declines to accept the factual premise of the reason – *e.g.*, prosecutor claims he struck a prospective juror due to purportedly hostile demeanor, but judge saw nothing unusual about that prospective juror's demeanor (*People v. Collins* (Colo. 2008) 187 P.3d 1178, 1183); if the explanation doesn't make sense as a basis for excluding a juror (*McClain v. Prunty, supra,* 217 F.3d at p. 1223 ["[s]triking JH on the sole basis that she had her elbow on her chair is patently frivolous," partly because prosecutor did not explain how that gesture evidenced bias]; *United States v. Jackson* (A.F. Ct. Crim. Apps. 1999) 52 M.J. 756, 758 [woman's purported "stern demeanor" was not logically related to her ability to serve as a juror, and therefore was not a proper basis for a peremptory challenge]; *Kesser v. Cambra, supra,* 465 F.3d at p. 363); if it contradicts other statements by the prosecutor (*id*. at p. 367); or if the explanation does not meet *Batson*'s requirement for a "'clear and reasonably specific' explanation of [the] legitimate reasons for exercising the challenge[]." (*Kesser v. Cambra, supra,* 465 F.3d at p. 364; *Zakour v. UT Medical Group, supra,* 215 S.W.3d at p. 775.) Furthermore, an explanation based on a demeanor-based or similar subjective trait should not be given any deference on appeal if the record doesn't show that the trial judge made any determination regarding the alleged subjective trait. (*Snyder v. Louisiana, supra,* ___ U.S. at p. ___ [128 S.Ct. at p. 1209]; *see also Dorsey v. State* (Fla. 2003) 868 So.2d 1192, 1199-1202 [if a demeanor-based or other subjective explanation is challenged by opposing counsel, the court must review the record to establish support for the reason proffered, and a court's failure to do so can result in appellate finding of a *Batson* violation and reversal].)

In line with the observations above, the Second Circuit offered a good synopsis of the law in this area:

> An impression of the conduct and demeanor of a prospective juror during the voire dire may provide a legitimate basis for the exercise of a peremptory challenge. The fact that a prosecutor's explanations in the face of a *Batson* inquiry are founded on these impressions does not make them unacceptable if they are sufficiently specific to provide a basis upon which to evaluate their legitimacy. Yet, because such after-the-fact rationalizations are susceptible to abuse, a prosecutor's reason for discharge bottomed on demeanor evidence deserves particularly careful scrutiny. Prosecutors would be well advised--when contemplating striking a juror for reasons of demeanor--to make contemporaneous notes as to the specific behavior on the prospective juror's part that renders such person unsuitable for service on a particular case.

(*Brown v. Kelly* (2d Cir. 1992) 973 F.2d 116, 121; *see also United States v. Sherrills* (8th Cir. 1991) 929 F.2d 393, 395 [similar explanation].)

This is consistent with one of the most useful California cases in this area, *People v. Allen, supra,* 115 Cal.App.4th at pp. 551-553. *Allen* and *Brown* are excellent starting points for evaluating and developing a *Batson* issue on this basis.

6. Defense Peremptories [Return to Index]

On much rarer occasions, a *Batson* issue will arise on appeal because the *defense* has exercised a peremptory challenge, and the prosecution makes a *Batson* objection which is sustained by the trial court. Example cases in this area include *United States v. Kimbrel* (6th Cir. 2008) 532 F.3d 461, *United States v. McFerron* (6th Cir. 1998) 163 F.3d 952, and *State v. Reiners* (Minn. 2002) 644 N.W.2d 118, 126-127.

7. *Batson* Habeas Issues [Return to Index]

A discussion of whether and to what extent there exists a remedy for ineffective assistance of counsel in failing to raise a potentially meritorious *Batson* claim, is beyond the scope of this article. Nonetheless, appellate counsel should also be alert to possible *Batson* issues for a pragmatic reason on top of all the others – there is caselaw holding that appellate counsel may be found constitutionally ineffective in failing to raise a properly preserved *Batson* issue. That was the scenario in *Grate v. Stinson* (E.D.N.Y. 2002) 224 F.Supp.2d 496, which granted federal habeas when "appellate counsel's failure to raise [a] *Batson* issue was an omission of a very strong argument that could have led to automatic reversal of Grate's conviction," while the arguments appellate counsel did raise were much weaker. (*Id.* at pp. 516, 518.) Similarly, in *Eagle v. Linahan, supra,* 279 F.3d 926, appellate counsel raised three issues which were rejected, but didn't raise a properly preserved *Batson* issue which was meritorious on the face of the appellate record. The case landed in the Eleventh Circuit, which granted federal habeas.

8. "Mixed Motive Analysis" vs. "Taint Analysis" In Dual Motivation Cases

An interesting second- or third-stage *Batson* issue is presented when an appellate court is reviewing a "mixed motive" or "dual motivation" case, one in which the prosecutor gives multiple reasons, one of which is not group-neutral. Is this automatically a *Batson* violation because of the group-biased reason, or can the prosecution overcome that group-biased reason based on the group-neutral reasons? As of this writing, the California Supreme Court has never addressed the question of what to do in "mixed motive" cases (*see People v. Schmeck* (2005) 37 Cal.4th 240, 276); it ordered supplemental briefing on such an issue in *In re Freeman* (2006) 38 Cal.4th 630, but ultimately denied relief on other grounds and didn't reach the question.

Most federal courts that have considered the issue, and a minority of state courts, have concluded that a "mixed motive" case is not necessarily a *Batson* violation, but the burden shifts to the prosecution to show the nonneutral (discriminatory) reason was not a primary or predominant factor in the challenge. One of the earlier cases in the area is *Howard v. Senkowski* (2d Cir. 1993) 986 F.2d 24, 30; some of the other cases relied expressly on *Howard*. Cases include *Gattis v. Snyder* (3d Cir. 2002) 278 F.3d 222, 234-235; *Guzman v. State* (Tex. Ct. Crim. App. 2002) 85 S.W.3d 242, 251-254; *People v. Hudson* (2001) 195 Ill.2d 117, 137 [745 N.E.2d 1246, 1258]; *Wallace v. Morrison* (11th Cir. 1996) 87 F.3d 1271, 1274; *United States v. Darden* (8th Cir. 1995) 70 F.3d 1507, 1530-1532; and *Jones v. Plaster* (4th Cir. 1995) 57 F.3d 417, 421-422.) This is sometimes said to be in line with "mixed motive" analysis in Title VII cases. (*See, e.g., Village of Arlington Heights v. Metropolitan Housing Devt. Corp.* (1977) 429 U.S. 252, 270, fn. 21; *Price Waterhouse v. Hopkins* (1989) 490 U.S. 228, 244-245.)

A majority of state courts as well as at least one federal court have rejected "mixed motive" analysis in favor of a "taint rule," with which any group-based reason "taints" a group-neutral reason and violates *Batson* by itself. Under this type of analysis, "[r]egardless of how many other nondiscriminatory factors are considered, any consideration of a discriminatory factor directly conflicts with the purpose of *Batson* and taints the entire jury selection process." (*State v. Lucas* (2001) 199 Ariz. 366, 369 [18 P.3d 160, 163].) Cases include *State v. Lucas, supra*; *McCormick v. State* (Ind. 2004) 803 N.E.2d 1108, 1112-1113; *State v. Jensen, supra,* 2003 UT App 273, par. 19 [76 P.3d at pp. 193-194]; *Payton v. Kearse* (1998) 329 S.C. 51, 59-60 [495 S.E.2d 205, 210]; *Ex parte Sockwell* (Ala. 1995) 675 So. 2d 38, 41; *Rector v. State* (1994) 213 Ga. App. 450, 454-455 [444 S.E.2d 862, 865]; *State v. King* (Wis. Ct. App. 1997) 215 Wis.2d 295, 307 [572 N.W.2d 530, 535]; and *United States v. Greene* (C.M.A. 1993) 36 M.J. 274, 281. A thoughtful opinion on why Title VII "mixed motive" analysis cannot logically be transplanted into the *Batson* arena may be found in *Wilkerson v. Texas* (1989) 493 U.S. 924, 927-928 (Marshall, J., dissenting from denial of certiorari), which is also cited by some of the "taint rule" opinions listed above.

The U.S. Supreme Court has so far declined to decide whether the burden-shifting "mixed motive" approach is good law, but has stated that "a peremptory strike motivated in substantial part by discriminatory intent [cannot] be sustained based on any lesser showing by the prosecution." (*Snyder v. Louisiana, supra*, ___ U.S. at p. ___ [128 S.Ct. at p. 1212].) The Ninth Circuit also has not yet squarely decided what to do about *Batson* "mixed motive" cases; the issue was presented to an en banc (11-judge) panel of that Court, but the en banc panel reversed the conviction on other *Batson* grounds. (*Kesser v. Cambra, supra,* 465 F.3d 351.)

Having said all of this, the presence of a group-based reason among other reasons that were not group-based doesn't necessarily mean counsel is consigned to arguing taint vs. mixed-motive analysis. Sometimes, the group-based reason can so undermine the legitimacy of the non-group-based reasons as to compel a finding of discrimination, even on review. For example, in *Kesser v. Cambra, supra*, 465 F.3d 351, the state courts accepted the prosecutor's explanation that a prospective juror (Rindels) was stricken because the prosecutor believed her answer to a particular question indicated a feeling of self-importance. However, her answer didn't objectively appear to connote that; and more importantly, the prosecutor had also made race-based statements identifying the juror as a "darker skinned . . . Native American Female" whose employer, a Native American tribe, had too much influence. Taking these and all other circumstances into account, including comparative juror analysis, the Ninth Circuit (en banc) concluded that the tenuous "self-importance" reason was belied by the prosecutor's expressed race-based concerns, and reversed the denial of habeas. (*Id*. at pp. 363-364.) Notably, the Ninth Circuit said it was not deciding any questions related to "mixed motive" analysis (an issue that it hasn't yet decided), because the pervasiveness of race relatedness in the prosecutor's statements required a conclusion that the prosecution gave *no* race-neutral reasons. (*Id*. at p. 358.)

"Taint analysis" is far more favorable to the defense than "mixed motive analysis." It is also easy to apply, which is good for both simplicity and federal habeas preservation. And the cases supporting "taint analysis" – of which there are plenty nationwide – have a very simple theme: Where the prosecutor (or other party exercising a peremptory challenge) has admitted a discriminatory basis for a challenge, that is the end of the inquiry, for the very reason that the prosecutor has admitted discrimination. Accordingly, an argument in this area would do well to utilize "taint analysis" in this type of situation.

Nonetheless, most such arguments can also have a "mixed motive" analysis as a backup, with a contention that the prosecution has failed to meet its burden of proving that the group-based reason was not the primary or predominant reason for the strike. In many cases, the rationale behind "taint analysis" will still be adaptable to a "mixed motive analysis" as part of an argument that the prosecution has failed to meet its burden.

D. Comparing Excluded Jurors' Characteristics With Those Of Nonexcluded Jurors ("Comparative Juror Analysis") [Return to Index]

1. Overview

The previous sections referred at times to the method of establishing a *Batson* case that is sometimes called "comparative juror analysis." Much has been written about this technique, and on occasion it has seemed to acquire some extra form of significance, as if it were something unique and mysterious.

"Comparative juror analysis" is little or nothing more than a fancy name for a routine juror comparison, *i.e.*, comparing the responses of stricken prospective cognizable group jurors, with those of non-stricken jurors who aren't from a cognizable group. It is based on the essential premise of any equal protection analysis – if a person treats similarly situated qualified people differently, that is a prima facie case of discrimination (*McDonnell Douglas Corp. v. Green*

(1973) 411 U.S. 792, 802); and if that difference in treatment cannot be satisfactorily explained on a non-group basis, it warrants a finding of discrimination. (*Batson*, 476 U.S. at p. 94.)

As an easy example, suppose A is African-American and B is Caucasian, both are single parents, A is excused and B is not, and the prosecutor's explanation is that he didn't want single parents on the jury. Facially, a prosecutor could properly choose to excuse all single parents. But if the prosecutor lets one single parent onto the jury while excusing another, and only the excused prospective juror is African-American, that can create a logical inference that the "single parent" explanation was merely a pretextual attempt to justify a discriminatory challenge.

In some respects, this kind of evidence may often be the most persuasive kind available. Since direct evidence of discrimination is so rare (*see* part II of this article, previous installment), circumstantial evidence is usually all a litigant has to go on. But in *Batson* situations, the prosecution – or any attorney who makes a peremptory challenge – can usually find *some* seemingly group-neutral characteristic to justify a challenge. If the challenging party is not too obviously discriminatory in its questioning of prospective jurors, and doesn't do anything that reflects a too-overt bias, that seemingly group-neutral characteristic can be a perfect cover for discrimination – unless juror comparisons are permitted to show it is exactly that. Sometimes, that may be the *only* way to prove unlawful discrimination; certainly, it is a "powerful" tool for doing so. (*Miller-El II*, 545 U.S. at p. 241.)

The Seventh Circuit offered a similar observation of the importance of juror comparisons, and the far greater difficulty of enforcing *Batson*'s mandate without them:

> Regrettably, the juror-by-juror inquiry that the trial judge conducted, unsupplemented by any final look at the record as a whole despite counsel's efforts to present this evidence to the court, practically guaranteed the conclusion that the prosecution was acting race neutrally. (Indeed, in light of [U.S. Supreme Court authority], a procedure that omits the totality inquiry would exonerate the user of peremptories in virtually every case, unless the lawyer was foolish enough to announce her discriminatory purpose in so many words.)

(*Coulter v. Gilmore*, *supra*, 155 F.3d at p. 921.)

The technique can also be valuable because if a prosecutor *is* actually engaging in racial discrimination by striking a minority juror, it's possible the prosecutor will have to make up a non-group-related reason for the strike more or less on the spot. In those circumstances, the prosecution's explanation might fall back on a characteristic of the excused juror that is shared by jurors whom the prosecutor didn't challenge, simply because the prosecutor might not have been able to think quickly of anything better. If the prosecutor didn't challenge those other jurors based on that characteristic, then arguably, the characteristic wasn't the real reason for the challenge of the excluded juror – *i.e.*, the *Batson* explanation, though race-neutral, was a pretext. If on the other hand, the prosecutor had genuine group-neutral reasons for challenging the juror, he or she would have no problem coming up with a valid explanation, because it would be the truth.

Finally, juror comparisons are often an essential technique in arguing *Batson* claims when fewer jurors are involved, because it's much more difficult to argue a pattern of discriminatory strikes from one or two jurors. This is particularly important in counties with a relatively low minority population, due to the extra difficulties of proving discrimination in those situations. (*See* discussion in section (A)(1), *ante*.) In some situations, "comparative analysis" may be the only potentially effective means of ferreting out peremptory challenge discrimination.

In summary, "'[c]omparative juror analysis' refers, in this context, to an examination of a prosecutor's questions to prospective jurors and the jurors' responses, to see whether the prosecutor treated otherwise similar jurors differently because of their membership in a particular group." (*Boyd v. Newland* (9th Cir. 2006) 467 F.3d 1139, 1145.) This type of comparison can be a highly persuasive form of evidence on whether a prosecutor's explanation for a peremptory challenge is pretextual, and ultimately whether a prosecutor has discriminated in the peremptory challenge. (This is true whether or not the discrimination is intentional. (*See ante*, section (C)(1).))

Cases which illustrate this principle are legion. A few examples where the defense was successful, cited here to show how juror comparisons are done in the caselaw (and therefore how they might be done in appellate briefing), include *Snyder v. Louisiana*, *supra*, ___ U.S. at p. ___ [128 S.Ct. at pp. 1211-1212]; *Miller-El II*, *supra*, 545 U.S. at pp. 241-252; *Kesser v. Cambra*, *supra*, 465 F.3d at pp. 360-371; *McClain v. Prunty*, *supra*, 217 F.3d at pp. 1220-1224; *Turner v. Marshall* (9th Cir. 1997) 121 F.3d 1248, 1251-1252; *People v. Turner*, *supra*, 42 Cal.3d at pp. 724-725; and *People v. Hall* (1984) 35 Cal.3d 161, 168. Some other cases which combined juror comparisons with other methods of developing *Batson* arguments have been cited throughout this part.

The recent California Supreme Court opinion in *People v. Lenix* (2008) 44 Cal.4th 602 has had a significantly beneficial effect on some uses of "comparative analysis" in third-stage *Batson* cases in state courts. However, in first-stage *Batson* cases, the California courts continue to adhere to a minority view that rejects the use of "comparative analysis," just as California courts have significantly restricted – and often rejected outright – the use of "comparative analysis" since the late 1980s.

This section discusses juror comparisons ("comparative analysis"), and concludes that this method of evaluating a *Batson* case is appropriate at any stage, on an appellate record that supports it. To explain this further, and to provide a more in-depth understanding of "comparative analysis," it is appropriate first to describe the evolution of juror comparison jurisprudence and where it stands currently.

2. Evolution Of *Batson* Third-Stage "Comparative Analysis" Jurisprudence

a. Before *Miller-El II* [Return to Index]

Prior to 1987, California courts utilized juror comparisons as one tool among many for reviewing an appellate record in determining whether a prosecutor's explanation was a pretext

for discrimination. (*See People v. Turner, supra,* 42 Cal.3d at pp. 724-725; *People v. Trevino* (1985) 39 Cal.3d 667, 691; *People v. Hall, supra,* 35 Cal.3d at p. 168.)

Beginning in 1989, however, California courts came to reject "comparative juror analysis" outright (*see Burks v. Borg* (9th Cir. 1994) 27 F.3d 1424, 1427), a total rejection that would last at least 13 years. It emanated from a California Supreme Court opinion, *People v. Johnson*, which expressly rejected it on the bases that "nothing in [*People v.*] *Wheeler* disallows reliance on the prospective jurors' body language or manner of answering questions as a basis for rebutting a prima facie case, and because comparative analysis of jurors unrealistically ignores 'the variety of factors and considerations that go into a lawyer's decision to select certain jurors while challenging others that appear to be similar.'" (*People v. Fuentes* (1991) 54 Cal.3d 707, 715, quoting *People v. Johnson* (1989) 47 Cal.3d 1194, 1219, 1220.) *Johnson* and its progeny did not explain why "I didn't like her body language" or "His manner of answering questions concerned me" should be deemed a sufficient *Batson* third-stage explanation after a prima facie case is found (*see* section (C)(5) above), or why what would be strong circumstantial evidence of discrimination in other areas – including the Title VII area on which *Batson* relied (*see* part II of this article, previous installment; *Johnson v. California, supra,* 545 U.S. at p. 171, fn. 7; *Batson,* 476 U.S. at pp. 94-96 & fns. 18, 19, 21) – should be ignored in the area of juror discrimination.

At the same time, federal courts were fully embracing "comparative juror analysis" as a "well-established tool" (*Turner v. Marshall, supra,* 121 F.3d at pp. 1251-1252) in *Batson* cases. (*E.g., McClain v. Prunty* (9th Cir. 2000) 217 F.3d 1209, 1220-1221; *Jordan v. Lefevre* (2d Cir. 2000) 206 F.3d 196, 201; *Caldwell v. Maloney* (1st Cir. 1998) 159 F.3d 639, 653; *Holder v. Welborn* (7th Cir. 1995) 60 F.3d 383, 390; *Devose v. Norris* (8th Cir. 1995) 53 F.3d 201, 205; *Hollingsworth v. Burton* (11th Cir. 1994) 30 F.3d 109, 112; *United States v. Bentley-Smith* (5th Cir. 1993) 2 F.3d 1368, 1373-1374.) Many state courts were embracing it as well. (*E.g., State v. Page* (1998) 196 Ariz. 27, 30 [992 P.2d 1122, 1125]; *Stanley v. State* (1988) 313 Md. 50, 79 [542 A.2d 1267, 1281]; *State v. Butler* (Mo. 1987) 731 S.W.2d 265, 269; *State v. Gilmore* (1986) 103 N.J. 508, 541-542 [511 A.2d 1150, 1168].)

Despite this, the California Supreme Court continued to reject third-stage "comparative juror analysis" entirely through at least 2002. (*See, e.g., People v. Boyette* (2002) 29 Cal.4th 381, 422-423; *People v. Box* (2000) 23 Cal.4th 1153, 1190.) Consequently, for at least 13 years, the California courts refused to utilize this method – one of many available – of helping to determine whether the prosecutor had engaged in hidden discrimination, even as the federal courts consistently utilized it as a routine application of *Batson*.

However, in February 2003, the U.S. Supreme Court's opinion in *Miller-El I* – though perhaps not intending to resolve this conflict (which the High Court might not have even known about then) – made clear that "comparative juror analysis" on an appellate record could in fact yield a proper inference of peremptory challenge discrimination. (*Id.*, 537 U.S. at p. 343.)

The U.S. Supreme Court's 2003 *Miller-El I* opinion, however, didn't change the California courts' very strong reluctance to use juror comparisons. The defendant in *People v. Johnson* (2003) 30 Cal.4th 1202 – the opinion later overruled by *Johnson v. California, supra,*

545 U.S. 162 – raised *Miller-El I* as support for using juror comparisons. The California Supreme Court rejected that effort a scant four months after *Miller-El I* was decided, while enunciating a new gloss that juror comparisons could not be used *for the first time on appeal*. (*People v. Johnson, supra,* 30 Cal.4th at pp. 1321-1322.) Although the California Supreme Court did backtrack on its 14-year-old refusal to use juror comparisons at all (*id*. at pp. 1322-1324), "comparative juror analysis" was still sharply restricted as a method of evaluating disparate treatment of similarly situated group (minority) and non-group (Caucasian) prospective jurors, even if such treatment was plain from the face of the appellate record.

California courts were now clearly in the minority, however; because after *Miller-El I*, the majority of state courts had joined the federal courts in using third-stage "comparative juror analysis." (*E.g., Holloway v. Horn, supra,* 355 F.3d at p. 724; *Bell v. Ozmint* (4th Cir. 2003) 332 F.3d 229, 241 [citing *Miller-El I*]; *United States v. Smith* (9th Cir. 2003) 324 F.3d 922, 927; *Lewis v. Lewis, supra,* 321 F.3d at pp. 830-831.) However, the Ninth Circuit held for a short time that California courts were not unreasonable in refusing to do so for the first time on appeal. (*Boyd v. Newland* (9th Cir. 2004) 393 F.3d 1008, 1015, *overruled* (9th Cir. 2006) 467 F.3d 1139, 1148-1150.)

At the same time, during the time California courts were refusing to use juror comparisons at all, none had ever answered questions such as: How is "comparative juror analysis" different from any other form of appellate review, in which an appellate court reviews the correctness of a ruling based on whatever record has been developed? Certainly, some appellate records will be insufficient for some types of appellate review, and "comparative analysis" would be no different. But if an appellate record shows that "comparative analysis" is one basis for inferring a pretextual explanation and/or discriminatory treatment – and especially when it is not the only such basis – on what ground would a reviewing court properly decide to ignore the record that is in front of it, particularly after a prima facie case of discrimination has been made? Can an appellate court turn a blind eye to the equal protection guarantee of excluded prospective jurors once the issue is properly placed before it and there is a record on which to conduct review, when those prospective jurors are not in a position to protect that guarantee themselves? (*See Powers v. Ohio, supra,* 499 U.S. at pp. 414-415.)

b. After *Miller-El II*; Before *Lenix* [Return to Index]

The continuing conflict in authority on juror comparisons seemed to be put to rest – at least as to third-stage *Batson* issues – by the 2005 reprise of the *Miller-El* case before the U.S. Supreme Court.

The High Court's opinion in *Miller-El II* characterized as "powerful" the technique of "side-by-side comparisons of some black venire panelists who were struck and white panelists allowed to serve." (*Id.*, 545 U.S. at p. 241.) Reemphasizing its clear endorsement of juror comparisons, *Miller-El II* promptly reiterated: "If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson*'s third step." (*Id*.) The High Court then proceeded to rely extensively on such "side-by-side

comparisons." (*Id*. at pp. 241-252.) And the Court made clear that there was nothing magical about the technique; rather, it considered juror comparisons to be "simply one form of circumstantial evidence that is probative of intentional discrimination," albeit one that "may be quite persuasive." (*Id*. at p. 241 [quoting *Reeves v. Sanderson Plumbing Products, Inc.* (2000) 530 U.S. 133, 147, a Title VII Case].)

Yet *Miller-El II* also made clear – in a response to the dissent – that juror comparisons had not been raised in the trial court, and therefore were being considered for the first time on review. (*Id*. at p. 241, fn. 2.) Furthermore, *Miller-El II* was a federal habeas case in which state court appellate review concluded in 1993, at a time when *Batson* itself was the only U.S. Supreme Court opinion – the only kind cognizable in AEDPA federal habeas proceedings such as *Miller-El* – that addressed the procedures to be used in *Batson* litigation. (*See Kesser v. Cambra, supra,* 465 F.3d at p. 360.) This also strongly indicated that the U.S. Supreme Court considered *Batson* itself to mandate these results. (*See Boyd v. Newland, supra,* 467 F.3d at p. 1146.)

The conclusion from *Miller-El* may have seemed self-evident: "Comparative juror analysis" was an integral part of *Batson* third-stage review, to the extent it was supported by the appellate (or other postconviction) record – and had been so since *Batson* itself.

The Ninth Circuit had no problem reaching exactly this conclusion shortly after *Miller-El II*. (*Kesser v. Cambra, supra,* 465 F.3d at pp. 360-361 [quoting, *inter alia*, footnote 2 of *Miller-El II*].) It subsequently reversed itself in a case where it had once held the contrary in light of California caselaw, and reiterated its holding in *Kesser* that "comparative juror analysis" was in fact proper even if not specifically "raised" by counsel in the trial court. (*Boyd v. Newland, supra,* 467 F.3d at pp. 1148-1150.) Other federal courts similarly embraced juror comparisons in light of *Miller-El II*. (*E.g., United States v. Odeneal* (6th Cir. 2008) 517 F.3d 406, 420; *United States v. Taylor* (7th Cir. 2007) 509 F.3d 839, 844; *United States v. Haskell* (8th Cir. 2006) 468 F.3d 1064, 1071; *United States v. Houston* (11th Cir. 2006) 456 F.3d 1328, 1338 [all cases citing *Miller-El II*].) The import was clear: If there is evidence in the record probative of purposeful discrimination, such as a record that similarly situated people were treated differently, a reviewing court cannot simply close its eyes to that evidence.

Yet despite *Miller-El II*, California courts were reluctant. A California Supreme Court opinion issued days after *Miller-El II* declined to decide the question of whether juror comparisons could be done on appeal even though they were not done in the trial court. Instead, it stated "Even assuming that we must conduct a comparative juror analysis for the first time on appeal ..." cited footnote 2 of *Miller-El II*, and rejected the *Batson* claim on that "assumption." (*People v. Ward* (2005) 36 Cal.4th 186, 203.) The California Supreme Court then did the same thing repeatedly after that. (*People v. Cornwell* (2005) 37 Cal.4th 50, 71; *People v. Gray* (2005) 37 Cal.4th 168, 189; *People v. Schmeck* (2005) 37 Cal.4th 240, 270; *People v. Guerra* (2006) 37 Cal.4th 1067, 1106; *People v. Jurado* (2006) 38 Cal.4th 72, 105; *People v. Huggins* (2006) 38 Cal.4th 175, 232-233; *People v. Avila* (2006) 38 Cal.4th 491, 545-546; *People v. Ledesma* (2006) 39 Cal.4th 641, 679; *People v. Lewis* (2006) 39 Cal.4th 970, 1016-1017; *People v. Zambrano* (2007) 41 Cal.4th 1082, 1109; *People v. Stevens* (2007) 41 Cal.4th 182, 196.)

California's lower courts mostly followed this new trend. However, there were at least two holdouts that refused – despite *Miller-El II*, and the line of state Supreme Court authority above – to consider "comparative analysis" when it was not proffered in the trial court. (*People v. Jackson* (B177201, Dec. 27, 2005, nonpub.) 2005 Cal.App. Unpub. LEXIS 11834, at pp. 10-11 & fn. 2; *People v. Lenix* (F48115, Oct. 13, 2006, nonpub.) 2006 Cal.App. Unpub. LEXIS 9133, at pp. 23-24.)

Perhaps recognizing the problems that could be created if even a few California lower courts declined "comparative analysis" in this situation despite *Miller-El II*, and undoubtedly knowing the Ninth Circuit had just held – en banc, no less – that *Miller-El II* unequivocally requires "comparative analysis" in such cases (*Kesser v. Cambra, supra,* 465 F.3d at pp. 360-361), the California Supreme Court granted the defendant's petition for review in the second of those two 'holdout' cases. (*People v. Lenix* (S148029, rev. gtd. Jan. 24, 2007) 2007 Cal. LEXIS 557.)

c. *Lenix*; Demystifying "Comparative Analysis" For Third-Stage *Batson* Cases [Return to Index]

Although the defendant ended up losing in *People v. Lenix, supra,* 44 Cal.4th 602, the California Supreme Court unanimously accepted appellate counsel's argument and reasoning to the effect that third-stage "comparative analysis" is merely another tool for appellate review on an existing record – much like appellate courts conduct review on any record. Once a *Batson* issue is raised in the trial court, a reviewing court reviews the issue based on the appellate record before it. This isn't a reason for trial attorneys to avoid making the best record they can – the better the record at trial, the better the record on appeal. Still, at least at the third stage, *Batson* appellate review isn't treated differently from any other kind of review.

Consequently, *Lenix* concluded that in light of *Miller-El II* and *Snyder v. Louisiana* – which utilized "comparative analyses" for the first time on review – reviewing courts must do juror comparisons in third-stage *Batson* review, even when nobody uttered an incantation of juror comparisons below. The *Lenix* opinion began with those very principles:

> When read in their entirety, [*Miller-El II* and *Snyder v. Louisiana*] stand for the unremarkable principle that reviewing courts must consider all evidence bearing on the trial court's factual finding regarding discriminatory intent. Comparative juror analysis is evidence that, while subject to inherent limitations, must be considered when reviewing claims of error at *Wheeler/Batson*'s third stage when the defendant relies on such evidence and the record is adequate to permit the comparisons. In those circumstances, comparative juror analysis must be performed on appeal even when such an analysis was not conducted below.

(*People v. Lenix, supra,* 44 Cal. 4th at p. 607.)

The California Supreme Court candidly recognized in *Lenix* that *Miller-El II* and *Snyder v. Louisiana* repudiated its prior practice of not considering "comparative analysis" when that type of argument was not raised below, because all relevant circumstances must be considered:

> *Miller-El II, supra,* 545 U.S. 231 and *Snyder, supra,* 552 U.S. at p. ___ [128 S.Ct. 1203] demonstrate that comparative juror analysis is but one form of circumstantial evidence that is relevant, but not necessarily dispositive, on the issue of intentional discrimination. These cases stand for the proposition that, as to claims of error at *Wheeler*/*Batson*'s third stage, our former practice of declining to engage in comparative juror analysis for the first time on appeal unduly restricts review based on the entire record. n15 As the high court noted in *Snyder,* "In *Miller-El v. Dretke*, the Court made it clear that in considering a *Batson* objection, or in reviewing a ruling claimed to be *Batson* error, all of the circumstances that bear upon the issue of racial animosity *must* be consulted." (*Snyder,* at p. ___ [128 S.Ct. at p. 1208], italics added.) Thus, evidence of comparative juror analysis must be considered in the trial court and even for the first time on appeal if relied upon by the defendant and the record is adequate to permit the urged comparisons.

(*People v. Lenix, supra,* 44 Cal. at p. 622.)

The *Lenix* Court then went on to explain why there are still inherent limitations in conducting "comparative analysis" on a cold appellate record, and why it was much better for trial court litigants to make as complete a record as possible, including arguments of "comparative analysis" when appropriate. (*Id*. at pp. 622-625.) No doubt the Court was correct in this regard; *Batson* cases are no exception to the general rule that a better trial record makes for a better appellate record, and they are undoubtedly an even better example of the rule because highly subjective considerations can permissibly be used in making a peremptory challenge. And of course, in *Batson* third-stage litigation as in any other fact-based review, appellate courts do not second-guess the supportable findings of triers of fact. (*Id*. at pp. 626-627.)

Nonetheless, *Lenix* was a major triumph for litigants who seek review of third-stage *Batson* issues, as it repudiated both the earlier long-time California practice of not considering "comparative analysis" at all, and the later California practice of not doing so "for the first time on appeal." For third-stage *Batson* cases, California jurisprudence now appears to be on a par with federal jurisprudence, as both recognize *Miller-El II* and *Snyder v. Louisiana* as the definitive applications of *Batson* in this area.

3. First-Stage "Comparative Analysis" Jurisprudence [Return to Index]

a. Non-California Courts

Generally speaking, federal courts have been about as receptive to "comparative analysis" in first-stage *Batson* cases as in third-stage *Batson* cases. This overall receptiveness has at its basis the principles that a *Batson* prima facie case requires only an inference of discrimination – not actual fact-finding and a ruling of discrimination, since there is no explanation at that stage – and that the prima facie case stage burden is relatively low. (*See* parts II and III(F) of this article, prior installment; *see also Boyd v. Newland, supra,* 467 F.3d at p. 1145; *Johnson v. California, supra,* 545 U.S. at p. 170.) After all, this is only a question of the degree of evidence required for the trial court to ask for an explanation that should take only a few seconds, and that will result in an overruled *Batson* objection if it is genuinely race-neutral.

A Seventh Circuit opinion well explains the basis for using juror comparisons at the first *Batson* stage:

> Evidence of this type is indisputably part of the "relevant circumstances" that *Batson* requires a state court to consider at the prima facie stage. . . . [A reviewing court is] not actually making a finding that this evidence supports a finding of discrimination -- such a finding would be appropriate only after a proper statistical analysis. Nor [is it] conducting the comparison analysis or determining the validity of the State's justifications. . . . [W]hen a court does have before it all of the evidence necessary for a comparison analysis, it cannot simply ignore this evidence.

(*Henderson v. Walls* (7th Cir. 2002) 296 F.3d 541, 550 [vacated and rem'd on other grds. (2003) 537 U.S. 1230; reiterated on this ground in *Henderson v. Briley* (7th Cir. 2004) 354 F.3d 907, 910].)

The Ninth Circuit came to that conclusion more recently. Before that, a Ninth Circuit panel had briefly given deference to the California courts' refusal to use juror comparisons at the first stage. But the Ninth Circuit ultimately overruled itself on that point, and concluded that juror comparisons are as appropriate at the first *Batson* stage as at the third. (*Boyd v. Newland, supra*, 393 F.3d at p. 1015, *overruled*, 467 F.3d at pp. 1148-1150.) Its opinion spells out many of the deficiencies in the California no-comparison approach, most specifically, that juror comparisons are essential for "meaningful[]" review:

> [B]ecause comparative juror analysis assists a court in determining whether the totality of the circumstances gives rise to an inference of discrimination, we believe that this analysis is called for on appeal even when the trial court ruled that the defendant failed to make a prima facie showing at the first step of the *Batson* analysis. Without engaging in comparative juror analysis, we are unable to review meaningfully whether the trial court's ruling at either step one or step three of *Batson* was unreasonable in light of Supreme Court precedent. . . .
>
> Some California courts have questioned whether comparative juror analysis is similarly appropriate at the first *Batson* step, where the prosecution has not voiced its rationales for the strikes, instead of at the third *Batson* step. . . . We believe, however, that Supreme Court precedent requires a comparative juror analysis even when the trial court has concluded that the defendant failed to make a prima facie case.
>
> * * * In some circumstances, a court may have to review the questions that the prosecution asked of jurors at step one of the *Batson* analysis to determine whether a defendant has made a prima facie showing of unlawful discrimination. There is nothing that suggests that it is more difficult or less desirable to engage in such analysis at step one rather than step three of *Batson*. *Cf. United States v. Esparza-Gonzalez*, 422 F.3d 897, 904-05 (9th Cir. 2005) (engaging, on direct review, in comparative juror analysis to hold that the defendant established a prima facie case of intentional unlawful discrimination). Further, both *Johnson* and *Miller-El II* suggest that courts should engage in a rigorous review of a prosecution's use of peremptory strikes. If a trial court's

> conclusion that a defendant failed to make a prima facie case could insulate from review a prosecution's use of peremptory strikes, the holdings of those Supreme Court opinions would be undermined.

(*Boyd v. Newland, supra,* 467 F.3d at pp. 1149-1150.)

The Eleventh Circuit has also issued opinions which expressly approved of juror comparisons at the prima facie case stage, including *United States v. Allison* (11th Cir. 1990) 908 F.2d 1531, 1538; and *United States v. Ochoa-Vasquez* (11th Cir. 2005) 428 F.3d 1015, 1044. The Second Circuit has utilized juror comparisons at the prima facie case stage, in *United States v. Diaz* (2d Cir. 1999) 176 F.3d 52, 77-78. The Tenth Circuit stated that juror comparisons were part and parcel of a prima facie case evaluation, in *United States v. Esparsen* (10th Cir. 1991) 930 F.2d 1461, 1467, as did the Eighth Circuit in *United States v. Thomas* (8th Cir. 1989) 892 F.2d 735, 736-737.) Similar opinions can be found in other state jurisdictions. (*See, e.g., People v. Davis* (2008) 231 Ill.2d 349, 361-362 [899 N.E.2d 238, 246]; *State v. Trotter* (La. Ct. App. 2003) 852 So.2d 1247, 1254; *Bishop v. State* (Ala. Ct. Crim. App. 1995) 690 So.2d 498, 500-501; *People v. Bolling* (1992) 79 N.Y.2d 317, 324 [582 N.Y.S.2d 950, 955, 591 N.E.2d 1136].) None of these cases suggested there was anything out of the ordinary about juror comparisons at the prima facie case stage; they all treated that method as one of several that could be used.

As with much of the other federal *Batson* jurisprudence, this follows directly from *Batson* and its progeny. *Batson* itself requires that a trial court must "consider all relevant circumstances" in determining whether a prima facie case has been made (*id*., 476 U.S. at p. 96); to the extent they are on the record, a reviewing court would necessarily consider the same circumstances that the trial court had a duty to consider. Furthermore, as *Johnson v. California* held, a *Batson* prima facie case is merely an inference of possible discrimination (*Johnson*, 545 U.S. at pp. 169-170), which means an inference of unequal treatment of prospective jurors who are similarly situated with respect to matters "related to the case to be tried." (*Batson*, at p. 98.) This in turn requires answering the question – are prospective jurors similarly situated with respect to matters related to the case to be tried? One of the best ways of answering that question is simply to look at the record, to see if the record shows any meaningful differences in material characteristics or attitudes. That basic reasoning echoes the federal caselaw in the area.

Finally, as discussed in parts V(B) and V(C) of this article (in its previous installment), whether a *Batson* prima facie case exists is a question of law on the face of the appellate record, which means it is independently reviewable on appeal. So it makes perfect sense for a reviewing court to compare juror responses as part of that process, since it is reviewing the transcript anyway.

b. California Courts [Return to Index]

Despite *Lenix*, California reviewing courts still are not required to make juror comparisons in first-stage *Batson* litigation (except to the extent trial counsel happens to bring up a specific comparison). The California Supreme Court so held in an opinion shortly after *Lenix*. (*People v. Carasi* (2008) 44 Cal.4th 1263, 1295-1296) (However, the opinion didn't mention *Lenix*, which as of this writing (December 2008) would at least raise some question as to whether

the Court considered its own analysis. It is assumed here, however, that this line of opinions would not be changed by express consideration of *Lenix*.)

Therefore, as of this writing, the California caselaw in this area appears to be continuing along the same lines as it has since 1989, rejecting juror comparisons on appeal unless the U.S. Supreme Court expressly requires otherwise.

The post-*Lenix* case cited above cited two pre-*Lenix* decisions, *People v. Bell* (2007) 40 Cal.4th 582, 600-601, and *People v. Bonilla* (2007) 41 Cal.4th 313, 350. *Bonilla*, in turn, merely relies on *Bell*. (*Bonilla*, at p. 350.)

Bell's rationale was, in essence, that juror comparisons at *Batson*'s first stage would be "formless and unbounded," and that *Miller-El II* doesn't require them:

> In the circumstances of this first-stage *Wheeler-Batson* case, comparative juror analysis would make little sense. In determining whether defendant has made a prima facie case, the trial court did not ask the prosecutor to give reasons for his challenges, the prosecutor did not volunteer any, and the court did not hypothesize any. Nor, obviously, did the trial court compare the challenged and accepted jurors to determine the plausibility of any asserted or hypothesized reasons. Where, as here, no reasons for the prosecutor's challenges were accepted or posited by either the trial court or this court, there is no fit subject for comparison. Comparative juror analysis would be formless and unbounded. *Miller-El v. Dretke, supra,* 545 U.S. at pages 241–252, does not mandate comparative juror analysis in these circumstances. As we have previously explained, *Miller-El* arose at the third stage of a *Wheeler-Batson* inquiry, "after the trial court has found a prima facie showing of group bias, the burden has shifted to the prosecution, and the prosecutor has stated his or her reasons for the challenges in question." (*People v. Gray* (2005) 37 Cal.4th 168, 189.) The high court did not consider whether appellate comparative juror analysis is required "when the objector has failed to make a prima facie showing of discrimination." (*Ibid.*)

(*People v. Bell, supra,* 40 Cal. 4th at pp. 600-601.)

The last of those points (that the U.S. Supreme Court never considered whether juror comparisons were required when the objector hadn't made a prima facie case) seems to put the cart before the horse, because juror comparisons are used at the first stage as a <u>means</u> of making a prima facie case. To say juror comparisons needn't be made at *Batson*'s first stage because no prima facie case has yet been made is a circularity.

The other point, that first-stage juror comparisons would be "formless and unbounded" and would have "no fit subject for comparison," is refuted by the many appellate cases which utilize them. The subject is further discussed further in the next section.

It has taken U.S. Supreme Court jurisprudence to bring California's approach to juror comparisons at the third stage more in line with the federal courts' approach, which has been derived directly from *Batson*. It could possibly take another U.S. Supreme Court case to resolve

the similar issue for first-stage *Batson* litigation. However, there is now a direct conflict on this issue between the Ninth Circuit (as represented by *Boyd v. Newland* and *Kesser v. Cambra*), and the California courts (as represented by cases such as *Carasi* and *Bell*). That type of conflict creates a heightened likelihood that the U.S. Supreme Court will ultimately have to step in to resolve the issue, exactly as it did in *Johnson v. California*. (*See id*., 545 U.S. at p. 164.)

In the meantime, it is fully appropriate to continue to argue juror comparisons at the first stage, in case the reviewing court considers them anyway, and in any event to preserve the issue for a possible U.S. Supreme Court certiorari petition or federal habeas corpus. (*See, e.g., People v. Cruz* (2008) 44 Cal.4th 636, 680; *People v. Eccleston* (2001) 89 Cal.App.4th 436, 450, fn. 7.) If such an argument is made in California courts despite adverse authority such as *Carasi* and *Bell*, it should expressly acknowledge the existence of such adverse authority (*e.g., Batt v. City and County of San Francisco* (2007) 155 Cal.App.4th 65, 82, fn. 9), though favorable authority such as *Lenix* or federal cases can also be acknowledged and discussed as warranted.

4. Further Discussion Of First-Stage Comparative Analysis [Return to Index]

It is worth keeping in mind that the prima facie case stage does not itself lead to a factual finding of discrimination. Rather, its function is essentially gatekeeping and procedural: Has the been enough in the record to warrant asking the prosecution (or other party in this situation) for its explanation of a juror strike and requiring the trial court to verify its lawfulness, a process that often takes less than a minute?

Batson requires that at the first (prima facie case) stage, a trial court must "consider all relevant circumstances." (*Id*., 476 U.S. at p. 96.) This by itself would support using juror comparisons at the first stage as well as the third stage. If a juror comparison can support an inference of discrimination at the third stage – as the availability of third-stage juror comparisons necessarily implies – then it can support an inference of discrimination at the first stage, which is a prima facie case. (*Johnson v. California, supra*, 545 U.S. at p. 170.) An inference is an inference, whatever the stage of the proceeding.

One court, citing as its authorities *Snyder v. Louisiana*, *Miller-El II* and *Lenix*, stated the proposition simply – juror comparisons, at any stage, are one relevant consideration among many: "We see no reason why a comparative juror analysis would not also be a relevant factor in the totality of factors that must be considered in determining whether a prima facie case exists in the first instance[, although] comparative juror analysis is just one factor in the totality of the circumstances that the court should take into consideration in considering the existence of a prima facie case." (*People v. Davis, supra*, 231 Ill.2d at pp. 361-362 [899 N.E.2d at p. 246].) This seems to make perfect sense.

It seems especially logical once the availability of juror comparisons at the third stage is established, as it was in *Lenix*. Since it is far easier to make a prima facie *Batson* case than a third-stage *Batson* case – due to the prima facie case standard, which is not onerous (*Johnson v. California, supra*, 545 U.S. at p. 170) and indeed is "quite low" (*Boyd v. Newland, supra*, 467 F.3d at p. 1145) – it doesn't seem very logical to prohibit proof in a first-stage *Batson* case, by methods that are permitted at the much more restrictive third stage. How does it make sense for

so much less to require so much more? Since juror comparisons are merely one means of establishing an inference of discrimination (*see, e.g., Miller-El II,* 545 U.S. at p. 241), and a *Batson* prima facie case is *no more than* an inference of discrimination (*Johnson v. California, supra,* 545 U.S. at pp. 169-170), why should a recognized method of establishing an inference at the final stage be forbidden for establishing an inference at a less restrictive earlier stage?

Nowhere does *Batson* say that a reviewing court can disregard highly persuasive evidence. Which is exactly what "comparative juror analysis" is – evidence. No more can a reviewing court properly disregard evidence in a trial record in considering a properly raised argument of a legal point which is supported by that evidence, merely because the trial attorney didn't happen to mention that extra evidentiary basis of support for the point. (*Accord Young v. State* (Tex. Ct. Crim. App. 1991) 826 S.W.2d 141, 145.)

For example, if Prospective Jurors A, B and C are African-American and Prospective Juror D is Caucasian, the prosecutor strikes A, B and C but not D, and the existing record doesn't facially suggest any meaningful difference "related to [the prosecutor's] view concerning the outcome of the case to be tried" (*Batson,* 476 U.S. at p. 89), that may yield an inference of discrimination that is on the face of the appellate record. It might be one inference among many, but it is still an inference.

Obviously, there could also be a non-group-related explanation for the challenge; that's why *Batson* has a second and third stage if the minimal first-stage burden is satisfied, to give the prosecutor a chance to provide such an explanation. But it wouldn't be sensible to have a rule that an acceptable method for showing an inference of discrimination at the third stage cannot be used to show an inference of discrimination at the first stage, where the burden on the objecting party is much less. Even if one can find some possible differences because "potential jurors are not products of a set of cookie cutters," "[n]one of [the U.S. Supreme Court's] cases announces a rule that no comparison is probative unless the situation of the individuals compared is identical in all respects, and there is no reason to accept one." (*Miller-El II,* 545 U.S. at p. 247, fn. 6.)

If there were any doubt, the U.S. Supreme Court itself made the same point in *Miller-El II*. The dissent in *Miller-El II* contended that juror comparisons should not be made in a third-stage *Batson* litigation because they were not presented to the trial courts. However, the Court rejected this contention, on the ground that it "conflates the difference between evidence that must be presented [in the trial court] and theories about that evidence." (*Miller-El II,* 545 U.S. at p. 241, fn. 2.) All that mattered to the *Miller-El II* Court is that "the transcript of *voir dire,* recording the evidence on which [the defendant] bases his arguments . . . was before the state [trial court]." (*Id*.) That analysis is equally valid whether at the third stage, the second, or the first.

In other areas of law, it would be unheard of to require that specific evidence be pointed out to the trial court, in order for the same evidence to be considered by a reviewing court from an appellate transcript. "Objection, Your Honor, under Evidence Code section 352" preserves a section 352 issue all by itself – and even preserves a Fourteenth Amendment issue based on the same facts (*see People v. partida* (2005) 37 Cal.4th 428, 436) – even if the trial attorney doesn't

then launch into an exegesis that explains all the precise ways in which Evidence Code section 352 was violated. Similarly, an objection to a jury instruction on a ground of insufficiency of evidence to support it doesn't require an appellate brief of all the possible analyses that would show this. And so forth. There is no suggestion that *Batson* litigation is any different from any other kind, especially since it is patterned after Title VII litigation. (*See* part II of this article, previous installment.)

Batson itself directed the contrary, since it placed the burden on trial courts: "We have confidence that trial judges, experienced in supervising voir dire, will be able to decide if the circumstances concerning the prosecutor's use of peremptory challenges creates a prima facie case of discrimination against black jurors. (*Id*., 476 U.S. at p. 97.) This is all the more appropriate because unconstitutional peremptory challenge discrimination is an injury to the entire judicial system, in which trial courts have a major interest. (*Accord, e.g., Miller-El II*, 545 U.S. at p. 238.)

Moreover, juror comparisons seem inevitable at the prima facie case stage, because they are inherent in the process. The *Batson* question, after all, is one of discrimination, *i.e.*, treating similarly situated people differently. But there usually isn't any way to find an inference that an excluded juror is similarly situated to an unchallenged juror, without making some comparison. The very phrase "similarly situated" itself connotes comparison.

In real life, the burden of following *Batson* and its progeny in this area is minimal. If a trial court isn't certain about what juror comparisons might yield and so resolves borderline prima facie case situations in favor of asking for an explanation, nothing is lost except a minute or two of time in a vastly longer trial. By contrast, basic principles of appellate review and equality of treatment – and a "powerful" tool in ferreting out discrimination – are sacrificed, if a reviewing court can decide to ignore evidence of discrimination in the record before it, merely because trial counsel didn't happen to think to point to that particular evidence. But even if a trial court doesn't resolve a doubtful case in favor of asking for an explanation and refuses to find a prima facie case, and the reviewing court finds one, the remedy is only a remand (*see, e.g., People v. Johnson* (2006) 38 Cal.4th 1096) – which will still be an effective remedy for the prosecution if the prosecutor has taken basic notes as one would expect of any attorney, all the more so when the attorney knows the issue is denial of a *Batson* prima facie case.

Having said that, trial counsel should certainly point out all evidence they can think of, as is true in any context. Trial counsel's goal is to win the case, not hope for a hypothetical appellate remedy that is at best uncertain and fraught with peril, especially in an era where there is such a strong presumption in favor of the judgment and relatively few criminal appeals succeed. But even if trial counsel doesn't point out all of the right evidence, as long as the evidence actually was before the trial court, it should be considered as long as the *Batson* objection is made in the first place. Trial attorneys don't have a transcript to work with any more than a trial judge does, and many trial attorneys have little or no experience with *Batson* issues. (A *pro. per.* defendant would not be expected to have any either.) Why, then, should the trial attorney (or defendant) rather than the trial judge shoulder the burden of raising every evidentiary point in *Batson* first-stage litigation – but only in first-stage litigation, and not in

third-stage litigation, or in any other kind of litigation – on pain of waiving it? Why, especially, when *Batson* itself calls upon trial judges to utilize their experience in supervising voir dire in "consider[ing] all relevant circumstances" bearing on the existence *vel non* of a prima facie case? (*Id.*, 476 U.S. at pp. 96-97.)

For all of these reasons, and undoubtedly more, the California courts' aversion to first-stage "comparative juror analysis" – *i.e.*, appellate review of the issue of pretext vs. no pretext on a full transcript – arguably is lacking in a logical basis consistent with existing U.S. Supreme Court authority beginning with *Batson*. While there is no way to know where California courts will go with this in the future, federal courts are not bound by a state court's creation of a procedural rule that unduly interferes with the enforcement of federal rights, and may review a record independently to determine if there has been such interference. (*Norris v. Alabama* (1935) 294 U.S. 587, 589-590; *Whitus v. Georgia* (1967) 385 U.S. 545, 550.)

Appellate counsel litigating first-stage *Batson* issues should therefore continue to use every tool at their disposal which, in their professional judgment, helps establish a case of pretext or otherwise demonstrate that a trial court's overruling of a *Batson* objection is clearly erroneous. The best that can happen is that it prevails. The worst that can happen is that it better preserves a record for certiorari to the U.S. Supreme Court or for federal habeas. And if a federal habeas court in California – which is bound by Ninth Circuit precedent (*e.g., Zuniga v. United Can Co.* (9th Cir. 1987) 812 F.2d 443, 450) – sees that a California state court has declined to consider one of the bases for a *Batson* argument in state appellate counsel's briefing, when that basis pointed heavily in favor of a finding of pretext, that alone may be enough to persuade the federal court that the very difficult AEDPA standard has been met.

As *Johnson v. California* demonstrates, the California courts are not necessarily the last word on *Batson* issues. Mistakes that have been made in state courts for well over a decade may be subjection to correction by federal courts. The California courts' overly restrictive definition of a *Batson* prima facie case – at issue in *Johnson v. California* – was one, and their restrictive views of juror comparisons ("comparative analysis") may yet be another. And while the California courts have made significant progress in third-stage *Batson* litigation with the recent decision in *People v. Lenix*, this only further highlights the strength of an argument that the same treatment is required for first-stage *Batson* litigation as well.

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