***Johnson v. California*:**
Rewriting the Script for Peremptory Challenge Issues in the California Courts
by: Michelle May, CCAP Staff Attorney

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JOHNSON v. CALIFORNIA: REWRITING THE SCRIPT FOR PEREMPTORY CHALLENGE ISSUES IN CALIFORNIA COURTS

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I. Overview

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On June 13, 2005, the U.S. Supreme Court overruled about sixteen years of errors in the California state courts' constructions of *Batson v. Kentucky* (1986) 476 U.S. 79 ["*Batson*"], the landmark opinion on unlawful discrimination in challenges to prospective trial jurors. The 8-1 decision in *Johnson v. California* (2005) 545 U.S. 162 [125 S. Ct. 2410, 162 L. Ed. 2d 129], reversing *People v. Johnson* (2003) 30 Cal.4th 1302, resolved conflicts between the Ninth Circuit and the California Supreme Court on how *Batson* is to be interpreted. This time, the Ninth Circuit prevailed on every conflict at issue.

With its opinions in *Johnson v. California* and the companion case of *Miller-El v. Dretke* (2005) 545 U.S. 231 [125 S.Ct. 2317, 162 L.Ed.2d 196], the U.S. Supreme Court has now provided a full range of authority on basic issues of how Batson claims are to be litigated at both the trial and appellate levels.

As of this writing (February 2006), it has also made *Batson* claims very timely in California appellate courts. By now, a host of cases which were tried before *Johnson v. California* – and thus under California state legal standards which that opinion rejected – either have reached or are about to reach the various California appellate courts. *Johnson v. California* has also made *Batson* arguments far easier to make on appeal in California state courts than ever before, as well as also being very important to preserve for federal habeas in appropriate cases. It is thus important for appellate defense attorneys to understand *Johnson v. California*, and the most likely grounds of California appellate litigation that it creates.

This article is intended to provide appellate attorneys at all levels with an understanding of how *Johnson v. California* has changed appellate litigation of *Batson* issues in California, and a guide to some principles and techniques that appellate attorneys can use in this interesting and crucial area. This article is written for all panel attorneys and is intended to be detailed; nonetheless, it is not definitive and is not intended to be anything more than a guide (as of the time it was written). In addition, case authority in the area may continue to change and evolve, so in every case, appellate counsel should do their own research along with verifying the status of cited cases independently.

One practical point should be made early on: When reviewing the record, if there is any hint of a defense counsel objection to a prosecutor's peremptory challenge of a prospective juror, or if the words "*Batson*" or "*Wheeler*" (*People v. Wheeler* (1978) 22 Cal.3d 258, a California forerunner to *Batson*) are found in any minute order of jury voir dire, appellate defense counsel should always give very serious consideration to – and usually should – request a transcript of jury voir dire in a motion to augment, if one is not already in the record. It is not possible to evaluate a potential Batson argument, or make such an argument in a reasoned manner, without

an adequate record of what happened in voir dire. Getting an adequate record to evaluate and/or raise a *Batson* issue is discussed further in part VI below.

For appeals with *Batson* or *Wheeler* issues that are still pending but have been briefed, or where a *Batson* or *Wheeler* objection was made below but not raised in the Appellant's Opening Brief, appellate counsel may wish to review the briefing in light of this article in the event a request to file a supplemental brief may be warranted.

A brief explanation of terminology: This article frequently refers to both the California Supreme Court's *Johnson* opinion, and the U.S. Supreme Court's *Johnson* opinion which reversed the California Supreme Court. Usually, to keep those two opinions straight, this article will use the full case title (*People v. Johnson* in the California Supreme Court, *Johnson v. California* in the U.S. Supreme Court). There are a few shorthand references to *Johnson* without more, which are generally references to the *Johnson* case as a whole. (This article also cites a couple of older unrelated cases named *Johnson*; shorthand references to those cases will include the year in which they were decided, e.g., "*Johnson* 1989.")

This article will also discuss two different opinions from the U.S. Supreme Court in a case with the same defendant named *Miller-El* (one on the original cert. petition, and one on the cert. petition after the remand from the first opinion). Most of those references – including any shorthand reference to the *Milller-El* case – will be to the June 2005 companion case to *Johnson v. California, Miller-El v. Dretke*. On the occasions when the article refers to the other *Miller-El* case (*Miller-El v. Cockrell* (2003) 537 U.S. 322), that will be spelled out.

II. *Batson* Basics [Return to Index]

The U.S. Supreme Court's 1986 *Batson* opinion set up a three-stage procedure of peremptory challenge litigation which has been repeatedly reiterated in the federal courts, most recently by the U.S. Supreme Court in *Johnson v. California*. To summarize briefly:

A. Prima facie case stage - The defendant must make a prima facie case that one or more prosecutorial peremptory challenges are based on unlawful discrimination. *Batson* repeatedly discusses the prima facie case in terms of raising an inference. (See *Id*., 476 U.S. at pp. 93-94, 94, 95, 96, 97.)

B. Explanation stage - If the trial court finds a prima facie case of unlawful discrimination as to one or more challenges, the prosecution must explain those challenges with an adequate group-neutral (nondiscriminatory) reason.

C. Rebuttal stage - If the prosecution has made the explanation required in (2) above, the trial court must evaluate the bona fides of the prosecutor's explanation, and decide the ultimate question of whether the jury strike was discriminatory.

(*Johnson v. California, supra*, 545 U.S. at p.168 [125 S.Ct. at p. 2416].) The party making the *Batson* objection always has the burden of proof, no matter what stage is being litigated. (*Rice v. Collins* (2006) 546 U.S. 333 [126 S.Ct. 969, 973-974, 163 L.Ed.2d 824]; *Purkett v. Elem* (1995)

514 U.S. 765, 768.)

The three *Batson* stages will be discussed at greater length throughout this article.

The three-stage approach is merely a procedural device, which *Batson* drew directly from federal employment discrimination (Title VII) litigation. (*Johnson v. California*, *supra*, 545 U.S. at p. 171 [125 S.Ct. at p. 2418 fn. 7]; *Batson*, *supra*, 476 U.S. at pp. 94-96 & fns. 18, 19, 21; *People v. Johnson*, *supra*, 30 Cal.4th at pp. 1311, 1314-1316 [rev'd on other grounds sub nom. *Johnson v. California]*; see also, e.g., *Hernandez v. New York* (1991) 500 U.S. 352, 359, 364-365 [resolving *Batson* procedural question by reference to procedure in Title VII and other equal protection cases]; *Miller-El v. Cockrell*, *supra*, 537 U.S. at pp. 340-341 [citing Title VII opinion as authority on *Batson* matter].) It is "essentially just a means of arranging the presentation of evidence," sequentially allocating the burden of *production* though not the burden of proof. (*Johnson v. California*, *supra*, 545 U.S. at p. 171 [125 S.Ct. at p. 2418, fn. 7].) The burden-shifting mechanism is "intended to progressively sharpen the inquiry," in light of the reality that the question of intentional discrimination requires determining what was in a person's mind, an "elusive factual question." (*Watson v. Ft. Worth Bank & Trust* (1988) 487 U.S. 977, 986; see also, e.g., *Guz v. Bechtel National, Inc*. (2000) 24 Cal.4th 317, 354 [direct evidence of discriminatory intent will be "rare"]; *Miller-El v. Cockrell*, *supra*, 537 U.S. at p. 339 [in *Batson* inquiries, "there will seldom be much evidence bearing on [the] issue [of discriminatory intent]"; *Bui v. Haley* (11th Cir. 2003) 321 F.3d 1304, 1314-1315 ["[I]t is axiomatic that one cannot know another's state of mind."].) But as discussed above, although the burden of production shifts, the burden of *proof* – the burden of proving an intentional act of discrimination – always remains with the party making the *Batson* objection (for this article, the defendant), at each of the three stages.

It is important to recognize that the reasons for a peremptory challenge need not rise to the level of a challenge for cause, and need not even be good reasons or reasons that every attorney would share. Furthermore, they can still be based on hunch and intuition. The only restriction is that they cannot be discriminatory reasons.

Of course, an explanation can hardly be required every time a party challenges a member of a cognizable group. That would eviscerate *Batson*'s prima facie case requirement. It would also seriously distort *Batson*'s intent, given that every prospective juror will be a member of at least two cognizable groups, gender and ethnicity.

Nonetheless, a defendant's burden of production to make a prima facie case and get to the *Batson* second stage is "not onerous." (*Texas Dept. of Community Affairs v. Burdine* (1981) 450 U.S. 248, 253 [Title VII case, cited in *Batson*, 476 U.S. at p. 94, fn. 18, as setting forth the procedures to be used in peremptory challenge inquiries].) However, as this article will discuss in detail, California for years treated the burden of making a *Batson* prima facie case as very onerous. In light of *Johnson v. California*, the difference can be a source of potential appellate issues, as is further discussed in part V below.

Batson is a Fourteenth Amendment Equal Protection opinion. It is grounded in the pernicious effects of ethnic, gender, and other group discrimination in jury selection – up to and

including its effect on the integrity of the entire judicial system:

> Defendants are harmed, of course, when racial discrimination in jury selection compromises the right of trial by impartial jury, but racial minorities are harmed more generally, for prosecutors drawing racial lines in picking juries establish 'state-sponsored group stereotypes rooted in, and reflective of, historical prejudice.' [And w]hen the government's choice of jurors is tainted with racial bias, that 'overt wrong . . . casts doubt over the obligation of the parties, the jury, and indeed the court to adhere to the law throughout the trial . . . .' That is, the very integrity of the courts is jeopardized when a prosecutor's discrimination 'invites cynicism respecting the jury's neutrality,' and undermines public confidence in adjudication.

(*Miller-El v. Dretke*, *supra*, 545 U.S. at pp. 237-238 [125 S. Ct. at pp. 2323-2324] [citations omitted].)

Although not everyone considers the issue completely settled, the overwhelming weight of authority – including *Batson* itself – is that *Batson* error in the selection of seated trial jurors is reversible *per se*, with no showing of prejudice required and no showing of harmlessness permitted. (See, e.g., *Batson*, *supra*, 476 U.S. at p. 100 [holding that "our precedents require that petitioner's conviction [must] be reversed" – citing prior Supreme Court reversals on other jury discrimination issues – if on remand, trial court were to find a prima facie case and prosecution did not provide an adequate group-neutral explanation]; *J.E.B. ex rel. Alabama v. T.B.* (1994) 511 U.S. 127, 146 [reversing and remanding without any "harmless error" inquiry, in a case where otherwise a finding of harmlessness might have been warranted {see *Id*. at p. 159 [dis. opn. of Scalia, J.]}]; *People v. Snow* (1987) 44 Cal.3d 216, 226 [same rule for *Wheeler* error]; *Turner v. Marshall* (9th Cir. 1997) 121 F.3d 1248, 1254, fn. 3 ["*Turner II*"]; *Tankleff v. Senkowski* (2d Cir. 1998) 135 F.3d 235, 248 [also citing Third, Seventh and Eighth Circuit cases to same effect]; *United States v. McFerron* (6th Cir. 1998) 163 F.3d 952, 955 ["Th[e] suggestion [that *Batson* error could be considered harmless] has been resoundingly rejected by every circuit court that has considered the issue."]; cf. *Vasquez v. Hillery* (1986) 474 U.S. 254, 262 [discrimination in grand jury selection is never harmless, though it has no actual effect on a trial, because "discrimination on the basis of race in the selection of grand jurors strikes at the fundamental values of our judicial system and our society as a whole," and because such discrimination "is a grave trespass, possible only under color of state authority, and wholly within the power of the State to prevent] [cited as authoritative precedent on jury discrimination issues in *Batson*, 476 U.S. at pp. 84 fn. 3, 90 fn. 13]; *Avery v. Georgia* (1953) 345 U.S. 559, 561 [same, in selection of petit jury pool] [cited as authoritative precedent on jury discrimination issues in *Batson*, 476 U.S. at pp. 84 fn. 3, 88 & fn. 10, 96].)

For years after *Batson* was issued, and perhaps still on occasion today, many trial attorneys made what they called "*Wheeler* motions" without mentioning *Batson*. The Attorney General would at times claim this didn't preserve a *Batson* issue for appeal, on the ground *Wheeler* was decided solely under the state constitution, while *Batson* is under the federal constitution. However, by now it is clear that if trial counsel makes a "*Wheeler* motion," the peremptory challenge issue can be raised on direct appeal, and then in federal habeas if necessary, under the Fourteenth Amendment and *Batson*. (*People v. Yeoman* (2003) 31 Cal.4th

93, 117-118; *People v. Gray* (2005) 37 Cal.4th 168, 184, fn. 2; *People v. Roldan* (2005) 35 Cal.4th 646, 699, fn. 18; *Paulino v. Castro* (9th Cir. 2004) 371 F.3d 1083, 1088, fn. 4; see also generally *People v. Partida* (2005) 37 Cal.4th 428 [similar for federalization of evidentiary error claims, with discussion].)

Batson is not limited to African-American jurors; it extends to any "cognizable group." "Cognizable groups" recognized by either federal or state caselaw include African-Americans (*Batson*, *supra*); *Caucasian-Americans* (see *United States v. Parsee* (5th Cir. 1999) 178 F.3d 374, 378-379); Hispanic-Americans (*Hernandez v. New York*, *supra*, 500 U.S. 352); Blacks and Hispanics together (*Green v. Travis* (2d Cir. 2005) 414 F.3d 288, 298-299; *Fernandez v. Roe* (9th Cir. 2002) 286 F.3d 1073, 1077); minorities (*United States v. Stephens* (7th Cir. 2005) 421 F.3d 503, 513-514; *United States v. Alvarado* (2d Cir. 1991) 923 F.2d 253, 255-256); ethnicity (*People v. Crittenden* (1994) 9 Cal.4th 83, 115; see also *People v. Garcia* (2000) 77 Cal.App.4th 1269, 1281 & fn. 9); naturalized citizens (a form of stereotype based on ethnicity) (*People v. Gonzalez* (1989) 211 Cal.App.3d 1186, 1200); women (*J.E.B. v. T.B.*, *supra*, 511 U.S. at p. 130); men (*United States v. DeGross* (9th Cir. 1992, en banc) 960 F.2d 1433, 1443 & fn. 13; *People v. Cervantes* (1991) 233 Cal.App.3d 323, 334); African-American women (*People v. Cornwall* (2005) 37 Cal.4th 50, 70 & fn. 4); African-American men (*People v. Gray* (2001) 87 Cal.App.4th 781, 789-790); White men (*People v. Willis* (2002) 27 Cal.4th 811, 813; on gender/ethnic combinations, see *People v. Motton* (1985) 39 Cal.3d 596, 605-606); religious affiliations (*People v. Crittenden*, *supra*, 9 Cal.4th at p. 115[1]; *People v. Garcia*, *supra*, 77 Cal.App.4th at p. 1281); lesbians (also including gay males, and lesbians/gays in general) (*People v. Garcia*, *supra*, 77 Cal.App.4th at p. 1272); and working-class people (*People v. Turner* (1986) 42 Cal.3d 711, 722-723 [citing *Thiel v. Southern Pacific Ry. Co.*, *supra*, 328 U.S. at p. 220]).[2]

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[1] There is some disagreement nationally over the extent to which – if at all – the federal Equal Protection Clause (or First Amendment) forbids peremptory challenges based on religion; or if it does, whether a peremptory challenge may still be exercised on a case-specific basis that has some relation to religion, such as the doctrine of the prospective juror's particular religion which is perceived as potentially impairing his or her ability to sit in judgment on others (e.g., Jehovah's Witnesses). For a discussion of this subject as of 2003, see *United States v. Brown* (2d Cir. 2003) 352 F.3d 654, 666-667, 670 & fns. 13-14, 19. Cf. *People v. Schmeck* (2005) 37 Cal.4th 240, 266 [noting the U.S. Supreme Court has not decided the issue under *Batson*, but some state and federal courts have considered religion to be a cognizable group].)

However, because religious discrimination is often subject to the strictest form of scrutiny as is race discrimination, a peremptory challenge based on religion alone might fail in the appellate courts, though courts might be more charitable if the challenge is bound up with a case-specific reason (such as the one above) that goes beyond religion alone. (See *United States v. Brown*, *supra*, 352 F.3d at pp. 667-669.) Logically this area may be ripe for litigation in future years.

[2] *Garcia* was decided under *Wheeler* and the California Constitution; would the result be the same under *Batson* and the federal Constitution? It seems very likely that lesbians, gay men, or LGBT group members constitute a cognizable group under *Batson*, which as discussed above has cognizable group standards similar to *Wheeler*. (See *Garcia*, *supra*, 77 Cal.App.4th at p. 1279 ["[W]e cannot think of anyone who shares the perspective of the

Examples of characteristics that have been found not to create a "cognizable group" for these purposes include age (*People v. McCoy* (1995) 40 Cal.App.4th 778, 783; *United States v. Pichay* (9th Cir. 1992) 986 F.2d 1259, 1260); status as a battered woman (*People v. Macioce* (1987) 197 Cal.App.3d 252, 280), ex-felon (*Rubio v. Superior Court* (1979) 24 Cal.3d 93), or resident alien (*Ibid.*); scruples against the death penalty (*People v. Fields* (1983) 35 Cal.3d 329, 353); appearance (*Purkett v. Elem*, *supra*, 514 U.S. at p. 769); and disability (*United States v. Harris* (7th Cir. 1999) 197 F.3d 870, 875).

The test for a "cognizable group" has been stated in California as "whether another group – or groups – in the community could adequately represent the views of [the group in question]." (*People v. Garcia*, *supra*, 77 Cal.App.4th at pp. 1278-1279.) Similar formulas have been used in federal cases. (See, e.g., *United States v. Murchu* (1st Cir. 1991) 926 F.2d 50, 54.)

Batson can be utilized by any defendant to claim the jury has been tainted by discrimination against any cognizable group, irrespective of the defendant's or excluded jurors' particular ethnicity, gender, or other group status. (*Powers v. Ohio* (1991) 499 U.S. 400, 402.) *Batson*'s prohibitions against discriminatory juror challenge apply to peremptories by all parties, including the defense as well as the prosecution. (*Georgia v. McCollum* (1992) 505 U.S. 42.)[3]

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homosexual community. Outside of racial and religious minorities, we can think of no group which has suffered such pernicious and sustained hostility, and such immediate and severe opprobrium, as homosexuals."].) Although they are not a specifically protected class under the federal Constitution, state action aimed solely at discriminating against them still violates the Fourteenth Amendment Equal Protection Clause (*Romer v. Evans* (1996) 517 U.S. 620), and thus discriminatory challenges against such prospective jurors based on their group status should be as cognizable under *Batson* as any other form of group status discrimination. (Cf. *J.E.B. v. T.B.*, *supra*, 511 U.S. at p. 145, fn. 19 [*quoting Thiel v. Southern Pac. Co.* (1946) 328 U.S. 217, 220, a case involving jury discrimination against daily wage earners, who are also not a specifically protected class under the federal Equal Protection Clause]; *People v. Turner*, *supra*, 42 Cal.3d at pp. 722-723 [*Wheeler* applies to truck drivers as daily wage earners, based on *Thiel*]; but cf. *United States v. Ehrmann* (8th Cir. 2005) 421 F.3d 774, 782 ["we seriously doubt *Batson* and its progeny extend federal constitutional protection to . . . sexual orientation"].)

Nonetheless, the prosecution and defense counsel usually wouldn't know a juror's relational or sexual orientation, and questioning jurors on a matter of that nature would almost always be inappropriate – and could reveal biases of the attorney asking the questions. (See *Splunge v. Clark* (7th Cir. 1992) 960 F.2d 705, 707-708 [bias revealed partly because prosecutor asked only African-American jurors certain questions reflecting group stereotypes].) So the issue might not come up much. On the other hand, it is entirely possible a prosecutor could strike a male prospective juror perceived as too "effeminate," or a female prospective juror perceived as too "masculine," so the issue could come up by more indirect means. Juror strikes of that nature would be open to question under *Batson* for (among other bases) group stereotype by gender. (Cf. *Price Waterhouse v. Hopkins* (1990) 490 U.S. 228, 251 [Title VII case].)

[3] However, the prosecution may be unable to take a *Batson* issue into an appellate court as a defendant could, because the prosecution can't appeal an acquittal. Furthermore, if the defense is violating *Batson*, that does not justify the prosecution also violating *Batson*; such a

And *Batson* extends to civil cases as well as criminal cases. (*Edmonson v. Leesville Concrete Co.* (1991) 500 U.S. 614, 616.)

III. Background: Historical Evolution Of The Caselaw

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This part doesn't contain any techniques for litigation, and could be skipped by those who want to get immediately to further discussions of legal principles. For those who wish to bypass the history and go straight to the analysis section, it begins in part IV below.

However, it might be easier to understand the full import of *Johnson v. California* and how significantly it affects California state caselaw on peremptory challenge litigation, if one understands where California caselaw was and how it got there, and the Ninth Circuit's rejection of that caselaw beginning in 2000 – a rejection with which the U.S. Supreme Court eventually agreed. The Ninth Circuit's repeated rejection of the California approaches, and the fact that the Ninth Circuit and its district courts review California criminal convictions on federal habeas, created the deep split that made final resolution by the U.S. Supreme Court almost inevitable.

It is also useful to know where California caselaw was in the past, because the Attorney General may still try to use principles left over from that prior caselaw, even if those principles may now be superseded by *Johnson v. California* or *Miller-El v. Dretke*. Moreover, California judges are used to viewing *Batson* issues in a much more restrictive light than the recent U.S. Supreme Court cases call for, and may continue to do so simply because it is difficult to change course so dramatically and quickly – potentially creating opportunities for appellate issues, or at least a greater need for preserving *Batson* claims for federal habeas.

A. Origins; *Swain v. Alabama* (Up To 1978)

Peremptory challenges of jurors, i.e., the practice of dismissing jurors for reasons (or lack of reasons) that don't rise to the level of a challenge for cause, are a centuries-old practice in the Anglo-American legal system. Parties and attorneys are usually granted a specified number of peremptory challenges to exclude prospective jurors about whom they have a 'hunch,' or for whom they can't articulate a reason rising to the level of a challenge for cause. As an early U.S. Supreme Court case put it: "The right of challenge comes from the common law with the trial by jury itself, and has always been held essential to the fairness of trial by jury." (*Lewis v. United States* (1892) 146 U.S. 370, 376.) In criminal cases, the peremptory challenge was said to be "a

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scenario still creates an unlawfully discriminatory jury by prosecution action, and thus is grounds for reversal if the defendant is convicted. (See, e.g., *Eagle v. Linahan* (11th Cir. 2001) 279 F.3d 926, 942-943 & fn. 20; *United States v. De Gross*, *supra*, 960 F.2d at p. 1443 & fn. 13; *People v. Snow*, *supra*, 44 Cal.3d at p. 225; *Wheeler*, *supra*, 22 Cal.3d at p. 283 fn. 30; see also *Miller-El v. Dretke*, *supra*, 545 U.S. at p. 255, fn. 14 [125 S.Ct. at p. 2333, fn. 14].) "Certainly there are unfortunate costs to affording [such] a petitioner with unclean hands a new trial, but much as the Supreme Court has said in the context of racial discrimination in the composition of a grand jury, 'we believe such costs as do exist are outweighed by the strong policy the Court has consistently recognized of combating racial discrimination in the administration of justice." (*Eagle v. Linahan*, *supra*, 279 F.3d at p. 943, fn. 20 [citation omitted].)

provision full of that tenderness and humanity to prisoners, for which our English laws are justly famous." (*Id*.)

Peremptory challenges proved to be an effective means of excluding minorities from juries. In particular over the years, some prosecutors (perhaps overlooking the "tenderness and humanity" passage above) found it expedient to use peremptories in racial discrimination by preventing African-Americans from serving on juries, especially in cases with African-American defendants. (See *Batson*, s*upra*, 476 U.S. at p. 101 [conc. opn. of White, J.] [noting that in 1986, the problem was still "widespread"].) The practice at times also encompassed exclusion of other minorities and women.

Yet for a long time, our legal system considered this form of discrimination acceptable in any individual case, because of the perceived importance of unreviewable peremptory challenges. In *Swain v. Alabama* (1965) 380 U.S. 202, the U.S. Supreme Court held that the Constitution required no inquiry if a prosecutor excluded all the African-American prospective jurors from the actual (petit) jury in a case, and no discrimination could be found unless "the prosecutor in a county, in case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim may be, is responsible for the removal of Negroes who have been selected as qualified jurors by the jury commissioners and who have survived challenges for cause, with the result that no Negroes ever serve on petit juries." (*Id*. at pp. 223-224.)

Needless to say, that was a virtually impossible burden to meet. The U.S. Supreme Court recently characterized the former Swain standard as "difficult to the point of unworkable." (*Miller-El v. Dretke*, *supra*, 545 U.S. at p. 239 [125 S.Ct. at p. 2324].)

B. <u>*Wheeler* And Its Enforcement (1978-1987)</u>

California was originally the nation's leader in combating discrimination in jury selection and the first to reject *Swain v. Alabama*, when in 1978, the late Justice Stanley Mosk wrote his path-breaking opinion for the California Supreme Court in *People v. Wheeler* (1978) 22 Cal.3d 258. That was a case with two Black defendants and an all-White jury, thanks to the prosecutor's peremptory challenges of every African-American called to the jury box. *Wheeler* held that *Swain* would no longer be recognized in California courts, because "[i]t demeans the Constitution to declare a fundamental personal right under that charter and at the same time make it virtually impossible for an aggrieved citizen to exercise that right." (*People v. Wheeler*, *supra*, at p. 287.)

Instead, *Wheeler* came up with a three-stage procedure for inquiring into possible discrimination in peremptory challenges that, at first blush, may have appeared to be quite similar to what *Batson* would establish under the U.S. Constitution eight years later (as it might have been when written). However, because *Swain* was then the governing caselaw under the federal Constitution, *Wheeler* was written solely under the jury trial provision of the California Constitution, rejecting *Swain* as a rule in California courts. (*Wheeler*, *supra*, 22 Cal.3d at p. 287.) There was no model; this opinion was the first of its kind anywhere.

After the 1978 *Wheeler* opinion and before the 1986 *Batson* opinion, there were at least

six major published opinions with reversals in *Wheeler* cases. (See *People v. Trevino* (1985) 39 Cal.3d 596, 667; *People v. Motton, supra*, 39 Cal.3d 596; *People v. Hall* (1983) 35 Cal.3d 161; *Holley v. J & S Sweeping Co.* (1983) 143 Cal.App.3d 598; *People v. Fuller* (1982) 136 Cal.App.3d 403; *People v. Allen* (1979) 23 Cal.3d 286; see also *People v. Johnson* (1978) 22 Cal.3d 296 [companion case to *Wheeler*].)

Wheeler was a 5-2 opinion. Justice Richardson dissented, joined by Justice Clark; they contended that *Swain* should govern, and the new *Wheeler* system was "illusory and unworkable in application" and "wholly antithetic to procedural rules which governed civil and criminal trials for many years." (*Wheeler, supra*, 22 Cal.3d at p. 288.) After Proposition 8 in 1982, the Attorney General asked the California Supreme Court to overrule *Wheeler* essentially on the grounds in Justice Richardson's dissent, but the effort was rejected. (*People v. Hall* (1983) 35 Cal.3d 161, 169.)

In 1985, then-Justice Lucas, who was soon to become Chief Justice with the change in court composition in 1986, issued two separate opinions in cases with *Wheeler* reversals, expressing his view that *Wheeler* was wrongly decided and Justice Richardson's dissent was right all along. (*People v. Trevino, supra*, 39 Cal.3d at p. 676 [dis. opn. of Lucas, J.]; *People v. Motton, supra*, 39 Cal.3d at p. 608 [conc. opn. of Lucas, J.].) These separate opinions may have been suggestive of California's major retrenchment in *Wheeler* jurisprudence beginning in about 1989. (See section (D) below.)

Wheeler held that at the prima facie case stage (first stage), "the court must determine whether a **reasonable inference** arises that peremptory challenges are being used on the ground of group bias alone." (*Id.*, 22 Cal.3d at p. 281 [boldface added].) "Raising an inference" was also the prima facie case standard used by *Batson* eight years later (*Id.*, 476 U.S. at pp. 96-97), and it was the traditional burden of parties seeking to make a prima facie case in other areas of California law. (See, e.g., *Meyer v. Glenmoor Homes, Inc.* (1966) 246 Cal.App.2d 242, 270; *Dougherty v. Lee* (1946) 74 Cal.App.2d 132, 137.) However, two paragraphs before that, *Wheeler* seemed to describe the prima facie case burden differently – "from all the circumstances of the case, [the party objecting to the juror strike] must show a **strong likelihood** that such persons are being challenged because of their group association." (*Wheeler, supra*, 22 Cal.3d at p. 280 [boldface added].)

"Strong likelihood," in common English, sounds like a much more onerous test than "reasonable inference." (See *People v. Buckley* (1997) 53 Cal.App.4th 658, 663, fn. 17, and discussion of that issue and case in section (D) below.) However, to construe them as having significantly different meanings would mean that "our high court [in *Wheeler*] intended to create different options for trial judges within one page of each other in so carefully crafted an opinion as the *Wheeler* opinion." (*People v. Fuller* (1982) 136 Cal.App.3d 403, 423, fn. 25 ["*Fuller*"].) Because this would have been an anomalous result, and because "reasonable inference" presented a legal standard long familiar to attorneys and judges whereas "strong likelihood" did not, a pre-*Batson* Court of Appeal opinion, *People v. Fuller, supra*, concluded the correct prima facie case standard was in fact "reasonable inference." (*Id.* at p. 423 & fn. 25.) The Ninth Circuit would later agree with *Fuller*'s conclusion that "the *Wheeler* Court itself understood ‘a strong likelihood' to mean a ‘reasonable inference.'" (*Wade v. Terhune* (9th Cir. 2000) 202 F.3d 1190,

1196.) So would the California Supreme Court, albeit to reach a very different result. (*People v. Johnson*, *supra*, 30 Cal.4th at p. 1313 ["We believe it obvious that we considered the two terms to be different phrasing of the same standard."].)

While California trial courts may have relied on *People v. Fuller's* interpretation of the "strong likelihood" and "reasonable inference" language for a while, eventually those appellate winds shifted. With that, *Fuller* appeared destined for historical oblivion – until it was revived under the U.S. Constitution by the Ninth Circuit, eighteen years after it was issued. (See section (E) below.)

C. *Batson* (1986)

In 1986, the U.S. Supreme Court overruled *Swain v. Alabama* in its *Batson* opinion, which was similar to *Wheeler* but based on the federal constitution's Equal Protection Clause.

Recognizing as an undisputed reality that "peremptory challenges constitute a jury selection practice that permits those to discriminate who are of a mind to discriminate" (*Batson*, *supra*, 476 U.S. at p. 96), *Batson* held that the *Swain* standard imposed a "crippling burden of proof" that left prosecutors' race-based use of peremptories "largely immune from constitutional scrutiny." (*Id*. at pp. 92-93.) *Batson* thus overruled *Swain* and held that peremptory challenges could be the subject of objection in any individual case, on the basis that challenges in that case were the product of unlawful discrimination. (*Id.* at pp. 93, 95-96.) Even a single improper peremptory challenge could constitute a *Batson* violation, for "'[a] single individiously discriminatory governmental act' is not 'immunized by the absence of such discrimination in the making of other comparable decisions.'" (*Id*. at p. 95 [citation omitted]; accord, e.g., *People v. Silva* (2001) 25 Cal.4th 345, 386 [reversing death judgment after penalty retrial on finding *Batson* error as to only one prospective juror].)

Batson held (among other things) that "a prima facie case of discrimination can be made out by offering a wide variety of evidence, so long as the sum of the proffered facts gives "rise to **an inference** of discriminatory purpose." (*Batson*, *supra*, 476 U.S. at p. 94 [boldface added].) That brought *Batson*'s prima facie case test in line with *Wheeler*'s "reasonable inference" language, and *People v. Fuller*'s holding that "reasonable inference" was *Wheeler*'s prima facie case standard. (Accord *Wade v. Terhune*, *supra*, 202 F.3d at p. 1196.) This was a key area where California caselaw would sharply deviate from *Batson* shortly after the latter was issued, which is at the heart of *Johnson v. California* and this article.

D. California's Retrenchment In *Wheeler* Jurisprudence (1989-2005)

Not long after the 1986 *Batson* opinion, a series of California appellate opinions began, that would interpret *Wheeler* with much more restrictiveness, deem *Batson* to be basically the same as *Wheeler*, and eventually put California caselaw squarely into conflict with federal authority. This type of retrenchment had perhaps been forecast by then-Justice Lucas's 1985 calls to overrule *Wheeler* altogether (see section (B) above). By 1987, *Wheeler* could no longer be overruled because the U.S. Supreme Court had established similar principles in *Batson*, and in fact there were three major published *Wheeler* reversals in 1986-1987 after *Batson* was issued.

(*People v. Snow*, *supra*, 44 Cal.3d at pp. 222-227; *People v. Turner*, *supra*, 42 Cal.3d at pp. 715-728; *People v. Granillo* (1987) 197 Cal.App.3d 110.) However, both *Wheeler* and *Batson* would soon begin receiving very restrictive interpretations in California courts.

An early opinion which signaled this turn in *Wheeler/Batson* review was *People v. Johnson* (1989) 47 Cal.3d 1194 ("*Johnson* 1989"). This was a case where the defendant was Black, the victim was apparently White, the prosecutor struck all the Blacks, Asians, and Jews from the jury (eight all told), and the trial court simply deferred to the explanations of the prosecutor for the reason that the prosecutor was an officer of the court. (See *Id*. at pp. 1254, 1290 [dis. opn. of Mosk, J.].) In affirming a death judgment, *Johnson 1989* overruled earlier California Supreme Court opinions, to cut back severely the role of the reviewing court in evaluating *Wheeler* and *Batson* claims. (*Id*. at p. 1221.) *Johnson 1989* – apparently for the first time in any published opinion – also refused to use, and in fact nullified, "comparative juror analysis" in California peremptory challenge cases. (*Id*. at pp. 1220-1221.) Justice Mosk, the author of *Wheeler*, wrote a detailed dissent (joined by Justice Broussard) that severely criticized the Court's new methods of reviewing peremptory challenge issues and its decision to overrule its own prior opinions, expressed the view that the Court was merely "pay[ing] lip service to the *Batson* rule," and went so far as to openly recommend that the defendant seek federal review under *Batson*. (*Id*. at p. 1254 [dis. opn. of Mosk, J.].)

Shortly after that, in *People v. Bittaker* (1989) 48 Cal.3d 1046, the California Supreme Court began to use *Wheeler*'s "strong likelihood" language as its own prima facie case test – i.e., without also including *Wheeler*'s "reasonable inference" language – in declining to find a prima facie case and affirming a death judgment. (*Id*. at p. 1092.)

In numerous cases after, the Court rejected *Batson* arguments based on *Wheeler*'s "strong likelihood" language without *Wheeler*'s "reasonable inference" language; and briefly mentioned *Batson*, but without separate analysis of or reference to *Batson*'s "inference" language. (See *People v. Hayes* (1999) 21 Cal.4th 1211, 1284; *People v. Welch* (1999) 20 Cal.4th 701, 745; *People v. Williams* (1997) 16 Cal.4th 635, 663-664; *People v. Mayfield* (1997) 14 Cal.4th 668,723; *People v. Arias* (1996) 13 Cal.4th 92, 134-135; *People v. Davenport* (1995) 11 Cal.4th 1171, 1199-1200; *People v. Crittenden* (1994) 9 Cal.4th 83, 115; *People v. Turner* (1994) 8 Cal.4th 137, 164; *People v. Fudge* (1994) 7 Cal.4th 1075, 1096; *People v. Montiel* (1993) 5 Cal.4th 877, 909; *People v. Howard* (1991) 1 Cal.4th 1132, 1153; *People v. Fuentes* (1991) 54 Cal.3d 707, 713-714; *People v. Sanders* (1990) 51 Cal.3d 471, 498, 502, fn. 10; *People v. Stankewitz* (1990) 51 Cal.3d 72, 105.) In a few such cases, the Court used the same "strong likelihood" language of *Wheeler* without mentioning *Batson* at all. (*People v. Jones* (1998) 17 Cal.4th 279, 293; *People v. Garceau* (1993) 6 Cal.4th 140, 171; *People v. Sims* (1993) 5 Cal.4th 405, 428; *People v. Bittaker*, *supra*, 48 Cal.3d at p. 1046.) The Court's opinions also sometimes placed visual emphasis on the "strong likelihood" language. (See *People v. Boyette* (2002) 29 Cal.4th 381, 422; *People v. Williams*, *supra*, 16 Cal.4th at pp. 663-664; *People v. Mayfield*, *supra*, 14 Cal.4th at p. 723; *People v. Davenport*, *supra*, 11 Cal.4th at pp. 1199-1200; *People v. Crittenden*, *supra*, 9 Cal.4th at p. 115; *People v. Turner*, *supra*, 8 Cal.4th at p. 164; *People v. Garceau*, *supra*, 6 Cal.4th at p. 171; *People v. Howard*, *supra*, 1 Cal.4th at p. 1153; see also *People v. Buckley*, *supra*, 53 Cal.App.4th at p. 664, fn. 17 [noting the California Supreme Court had emphasized the "strong likelihood" phraseology].)

The "strong likelihood" standard was coupled with California caselaw that held a finding of no prima facie case was a factual finding, subject to one of the very restrictive types of review given questions of fact (i.e., substantial evidence, clear error, or abuse of discretion). (See, e.g., *People v. Yeoman*, *supra*, 31 Cal.4th at pp. 117-118; *People v. Johnson*, *supra*, 30 Cal.4th at p. 1320; *People v. Mayfield*, *supra*, 14 Cal.4th at p. 723; *People v. Alvarez*, *supra*, 14 Cal.4th at pp. 196-197; *People v. Crittenden*, *supra*, 9 Cal.4th at p. 116; *People v. Garceau*, *supra*, 6 Cal.4th at pp. 171-172; *People v. Howard*, *supra*, 1 Cal.4th at p. 1155; *People v. Sanders*, *supra*, 51 Cal.3d at p. 501; see also, e.g., *People v. Cleveland* (2004) 32 Cal.4th 704, 732-733; *People v. Boyette* (2002) 29 Cal.4th 381, 423; *People v. Davenport*, *supra*, 11 Cal.4th at p. 1201; *People v. Turner*, *supra*, 8 Cal.4th at pp. 167-168] [other opinions describing *Wheeler* or *Batson* prima facie case in terms and with a standard of review appropriate only to a factual finding].) The two were related to each other, because whether there is an "inference" in other areas of law is generally considered to be a question of law subject to de novo review (see discussion *post*, part V(A)(2)); so for California courts to review more restrictively, making a prima facie case would have to be more difficult than merely establishing the existence of an "inference." The combination of a "strong likelihood" standard, and judicial opinions deeming the prima facie case determination to be a question of fact, made it extraordinarily difficult to prevail on appeal of a California trial court's finding of no prima facie case under *Batson* or *Wheeler*.

For example, in a 1990 death penalty case, the defendant was tried jointly with an alleged aider and abettor who was Spanish-surnamed. After challenges for cause were concluded, the prosecutor used peremptory challenges to exclude all four Spanish-surnamed prospective jurors from the trial jury, but the trial court found no prima facie case. On appeal, the defendant cited *Wheeler* and *Batson* in contending the exclusion of all four Spanish-surnamed prospective jurors made for a prima facie case, both because that was a pattern of strikes, and also because the four excluded jurors were "as heterogeneous as the community as a whole" – which encompassed two of the criteria used by *Wheeler* as example bases for finding a prima facie case. (*Id.*, 22 Cal.3d at p. 280 [bottom partial par.].) In affirming, the California Supreme Court did not engage in its own analysis, and it declined to compare excluded jurors to each other despite *Wheeler*'s references to juror heterogeneity in making a prima facie case. Rather, "[a]pplying [its] standard of giving considerable deference to the determination of the trial court," the Court held "we see no good reason to second-guess [the trial court's] factual determination' that the prosecutor was not motivated by bias against Hispanics." (*People v. Sanders*, *supra*, 51 Cal.3d at p. 501 [citation omitted].)[4]

In that context, the California Supreme Court was also holding that if the record showed reasons the prosecutor "might reasonably have used" for each of its peremptory challenges, no

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[4] This was one juror more than the three Black prospective jurors who were excluded in Johnson v. California, which the California Supreme Court called "troubling" and "suspicious" but still not a prima facie case. (*People v. Johnson*, *supra*, 30 Cal.4th at pp. 1326, 1328.) However, the U.S. Supreme Court held that that a "troubling" and "suspicious" exclusion of all three Black prospective jurors is by definition a prima facie case. (*Johnson v. California*, supra, 545 U.S. at pp. 167, 173 [125 S.Ct. at pp. 2415, 2419].)

error would be found in the trial court's failure to find a prima facie case, even though there was no evidence those were the prosecutor's actual reasons because the prosecutor hadn't been called upon to give actual reasons yet. This line of California Supreme Court cases apparently began with *People v. Bittaker*, *supra*, 48 Cal.3d at p. 1092; and also included the case highlighted in this article, *People v. Johnson*, *supra*, 30 Cal.4th at p. 1325 [rev'd sub nom. *Johnson v.* California, *supra*], as well as *People v. Roldan* (2005) 35 Cal.4th 606, 702-703; *People v.* Panah (2005) 35 Cal.4th 395, 439; *People v. Young* (2005) 34 Cal.4th 1149, 1172-1173; *People v. Cleveland* (2004) 32 Cal.4th 704, 733; *People v. Yeoman*, *supra*, 31 Cal.4th at p. 116; *People v. Farnam* (2002) 28 Cal.4th 107, 135; *People v. Box* (2000) 23 Cal.4th 1153, 1188; *People v. Welch*, *supra*, 20 Cal.4th at p. 746; *People v. Mayfield*, *supra*, 14 Cal.4th at p. 723; *People v.* Davenport, *supra*, 11 Cal.4th at p. 1200; *People v. Crittenden*, *supra*, 9 Cal.4th at p. 117; *People v. Turner*, *supra*, 8 Cal.4th at p. 165; *People v. Garceau*, *supra*, 6 Cal.4th at p. 172; and *People v. Howard*, *supra*, 1 Cal.4th at p. 1155.) (See also, e.g., *People v. Sanders*, *supra*, 51 Cal.3d at pp. 499-501 [using this standard without identifying it explicitly].)

That functionally made it more difficult for a defendant to make a prima facie case (stage 1), than to prove intentional discrimination if somehow a prima facie case was found (stage 3) – turning customary prima facie case procedure on its head. For if the trial court could think of a hypothetical race-neutral reason the prosecutor "might have had," it could find there was no stage 1 prima facie case, and the finding would be basically unreviewable; the defense could hardly show discrimination in a "reason" that was merely a trial judge's hypothetical speculation (which would obviously be group-neutral). By contrast, in a stage 3 *Batson* inquiry, the prosecution would be limited to the reasons the prosecutor actually gave, and the defense could try to show those reasons were evidence of discrimination. (Cf. *Mahaffey v. Page* (7th Cir. 1998) 162 F.3d 481, 483-484 & fn. 1 [defense wanted to show prosecution's "reasons" were pretextual, but what prosecution provided was only "apparent" reasons and never its actual reasons, so court could not assess credibility of the "apparent" reasons and was limited to determining whether there was a prima facie case, which it found].)

The confluence of these standards basically eviscerated appellate review of a California trial court's failure to find a *Batson* or *Wheeler* prima facie case. There appears to be no California published opinion between 1989 and 2005 reversing a judgment for trial court error in failing to find a *Batson* or *Wheeler* prima facie case, based on an appellate conclusion that the trial court applied correct legal standards for a prima facie case, but erred in applying them.

The new prima facie case standard of "strong likelihood," without reference to "inference" or "reasonable inference," was challenged in a 1994 Court of Appeal case. Rejecting the defense challenge, the court held in *People v. Bernard* (1994) 27 Cal.App.4th 458 that *Wheeler*'s "strong likelihood" language meant what it said, the California Supreme Court had promulgated this as the prima facie standard, and this was the defendant's burden at the prima facie case stage. (*Id.* at pp. 465-466.) *Bernard* held this "strong likelihood" prima facie case standard was stricter than "a mere inference," thus expressly rejecting a standard that required only an inference (the language of *Batson*), and also rejecting the1982 Fuller opinion's analysis of why "reasonable inference" was the actual standard of *Wheeler*. (*Id*. at p. 465.) The *Bernard* Court noted the existence of *Batson*, implying it said the same thing as *Wheeler* (*Id*. at p. 464), but offered no separate analysis of *Batson* or *Batson*'s use of an "inference" standard.

E. The Ninth Circuit's Split With California On California's "Strong Likelihood" Standard (2000-2005)

In common English, "strong likelihood" sounds like a far heavier burden than merely establishing an "inference." (See *People v. Buckley*, *supra*, 53 Cal.App.4th at p. 663, fn. 17 ["... the phrase conveys the clear message that the test is not an easy one ..."]; *Wade v. Terhune*, *supra*, 202 F.3d at p. 1197 [same, quoting *Buckley*].) This led to arguments that the then-existing California interpretation of *Wheeler* was unconstitutional in light of *Batson*, on the ground (among others) that *Batson* used only an "inference" standard for a prima facie case (*Id.*, 476 U.S. at pp. 96-97) which is less than a "strong likelihood", and California courts were thus violating the Fourteenth Amendment by using a prima facie case standard incompatible with *Batson*.

The first published opinion in this area was *People v. Buckley*, *supra*, 53 Cal.App.4th 658, a 2-1 affirmance with a strong dissent. The Buckley Court had called for supplemental briefing on the question of whether the prima facie case standard was different under *Wheeler* than under *Batson*, but the majority opinion affirming the judgment didn't cite *Batson* or any other federal case. (*Wadev. Terhune, supra*, 202 F.3d at p. 1194.) The dissent recognized the assumption that the *People v. Wheeler* "strong likelihood" language imposed a more stringent standard than *Batson*'s "inference" language, though adding that "as pointed out in *People v. Fuller*, *supra*, the *Wheeler* court's intention in this respect is not at all clear." (*Buckley*, *supra*, 53 Cal.App.4th at p. 670 & fn. 1 [dis. opn. of Kline, J.].) However, the dissent concluded that the majority's approach of "surmise and 'isolated bits of evidence'" to find no prima facie case rendered *Wheeler* "a dead letter except in the rare instance in which the bias of counsel is overt" (*Id.* at p. 670). While professing fealty to a "strong likelihood" standard under California caselaw (*Id.* at pp. 671, 672, 674, 675, 679, 682), the dissent also used an "inference" standard at one point with citation to *Batson*. (*Id.* at p. 676.)

Buckley was taken into federal habeas, resulting in a Ninth Circuit rejection of the California caselaw. In *Wadev. Terhune*, *supra*, 202 F.3d 1190, the Ninth Circuit – accepting the argument of petitioners Buckley and *Wade*– held that California's "strong likelihood" standard violated the "inference" standard established by the U.S. Supreme Court in *Batson*. (*Wade v. Terhune*, 202 F.3d at p. 1197.) The Ninth Circuit noted the 1982 holding in *People v. Fuller*, *supra*, that *Wheeler* had intended "strong likelihood" and "reasonable inference" to mean the same thing. (*Id.* at p. 1196.) However, it recognized that the 1994 opinion in *People v. Bernard* rejected that construction in favor of the more stringent "strong likelihood" standard; and also, that the California Supreme Court was routinely using "strong likelihood" as the sole prima facie case standard despite *Batson*'s "inference" language. (*Id.* at pp. 1196-1197.)

Subsequently, the Ninth Circuit continued to hold that California courts between at least 1994 and 2000 were presumed to have used the "strong likelihood" prima facie case standard – and that they were all wrong on that score. (See *Williams v. Runnels* (9th Cir. 2006) 432 F.3d 1102, 1105 & fn. 3; *Paulino v. Castro*, *supra*, 371 F.3d at p.1090, fn. 5; *Fernandez v. Roe*, *supra*, 286 F.3d at p. 1077; *Cooperwood v. Cambra* (9th Cir. 2001) 245 F.3d 1042, 1046-1047.) The Ninth Circuit also concluded from these holdings that much of the very stringent AEDPA

standard of federal habeas review was inapplicable, because the state courts used a legal standard that violated the federal constitution. (See *Ibid.*; *Wadev. Terhune, supra*, 202 F.3d at p. 1192.)

The California Supreme Court attempted to resolve this problem in its 2000 *Box* opinion, by declaring that "strong likelihood" meant the same as "reasonable inference." (*People v. Box* (2000) 23 Cal.4th 1153, 1188, fn. 7; see also *People v. Young*, *supra*, 34 Cal.4th at p. 1172; *People v.* Morrison (2004) 34 Cal.4th 698, 709; *People v. Cleveland*, *supra*, 32 Cal.4th at p. 732; *People v. Johnson*, *supra*, 30 Cal.4th at p. 1306; *People v. Boyette*, *supra*, 29 Cal.4th at p. 423; *People v. Farnam*, *supra*, 28 Cal.4th at p. 135; *People v. Ayala* (2000) 24 Cal.4th 243, 260 [all to same effect].) But it did not clarify in *Box* what it was construing both to mean. That did not happen until its 2003 opinion in *People v. Johnson*.

F. The *Johnson* Case In The California Courts (2000-2003)

1. *In The Court of Appeal*

Johnson began in the California appellate courts as an opinion certified for publication, from the same Court of Appeal that had issued 1997 the *Buckley* opinion. (*People v. Johnson* (2001, depublished on grant of review) 88 Cal.App.4th 318 [cited for historical purposes only].) In fact, it was the same panel; except that one of the three Justices, who didn't write either opinion, changed his vote. That changed the Court of Appeal affirmance in *People v. Buckley* into a reversal in *People v. Johnson*, and began the process which ended up in the U.S. Supreme Court with *Johnson v. California*.

In the *Johnson* trial proceedings, an African-American defendant was accused of killing his Caucasian girlfriend's child. There were only three African-Americans in the entire jury panel, and the prosecutor used peremptory challenges to get rid of all of them, resulting in an all-Caucasian jury including the alternates.

The Court of Appeal concluded that *Batson*'s prima facie case requirement of an "inference" meant what it said; and thus, that a higher "strong likelihood" standard would be constitutionally impermissible. In a passage later quoted by the U.S. Supreme Court, the Court of Appeal was unwilling to construe the California Supreme Court's *Box* footnote as holding that "strong likelihood" meant the same as "reasonable inference": "To conclude so would 'be as novel a proposition as the idea that 'clear and convincing evidence' has always meant a 'preponderance of the evidence." (*People v. Johnson* [depublished on grant of review], *supra*, 88 Cal.App.4th at p. 326 [cited for historical purposes only] [quoted with approval in *Johnson v. California*, *supra*, 545 U.S. at p.166, fn. 2 [125 S.Ct. at p. 2415, fn. 2]].)

Instead, the Court of Appeal concluded that the *Box* footnote merely meant the *Wheeler* phrase "strong likelihood" would be considered to mean the same thing as an "inference," since otherwise *Wheeler* would be inconsistent with *Batson* which is constitutionally impermissible. (*People v. Johnson*, *supra*, 88 Cal.App.4th at p. 327 [cited for historical purposes only].) This holding, that "strong likelihood" in *Wheeler* would be construed to mean "reasonable inference," was essentially the same holding on the subject as that of *People v. Fuller*, *supra*, some 18 years earlier.

2. *In The California Supreme Court*

The California Supreme Court granted review, and in a 5-2 opinion, reversed the Court of Appeal. It said the peremptory challenges of the only three African-Americans in the jury pool "certainly look[] suspicious" (*People v. Johnson*, *supra*, 30 Cal.4th. at p. 1326), and that "the statistics are indeed troubling" (*Id.* at p. 1327). However, the trial court in *Johnson* had found no prima facie case, and the California Supreme Court concluded it had to defer to that finding. (*Id.* at p.1310, 1328.) The Court held "we must rely on trial courts to determine, from all the relevant circumstances, whether a prima facie case . . . exists" (*Id.* at p. 1327), again indicating a trial court rejection of a prima facie case would be rarely (if ever) reviewable if the trial court followed the correct steps procedurally. Since the record in *People v. Johnson* suggested reasons why the prosecution "might reasonably have challenged" the jurors – even though it was only the prima facie case stage, so the prosecutor never said those were his actual reasons – the Court held the ruling was supportable. (*Id.* at p. 1325.)

In that process, the California Supreme Court held that the phrases "strong likelihood" and "reasonable inference" in *Wheeler* did mean the same thing – but that they both meant "more likely than not." (*People v. Johnson*, *supra*, 30 Cal.4th at p. 1316; see also *People v. Young*, *supra*, 34 Cal.4th at p. 1172; *People v. Cleveland*, *supra*, 32 Cal.4th at p. 732 [to like effect].) The U.S. Supreme Court thus characterized the California Supreme Court's holding on *Batson* prima facie cases as being:

> A prima facie case under *Batson* establishes a '"legally mandatory, rebuttable presumption,'" it does not merely constitute "enough evidence to permit the inference" that discrimination has occurred. *Batson*, the [California Supreme C]ourt held, "permits a court to require the objector to present, not merely 'some evidence' permitting the inference, but 'strong evidence' that makes discriminatory intent more likely than not if the challenges are not explained." (*Johnson v. California*, *supra*, 545 U.S. at pp. 166-167 [125 S.Ct. at p. 2415].)

Ironically, the California Supreme Court attributed that legal theory to *Batson* itself. (*People v. Johnson*, *supra*, 30 Cal.4th at p. 1315.) However, the U.S. Supreme Court would ultimately reject that holding too: "*Batson* . . . on its own terms provides no support for the California rule." (*Johnson v. California*, *supra*, 545 U.S. at p.169 [125 S.Ct. at p. 2417].)

Justice Kennard, joined by Justice Werdegar on this issue, dissented on the grounds that *Batson*'s prima facie case standard was merely an inference; the Title VII authority on which the majority relied didn't require more than an inference either; and "[t]he threshold for establishing a prima facie case should be relatively low." (*People v. Johnson*, *supra*, 30 Cal.4th at pp. 1333-1340 [dis. opn. of Kennard, J.].) The dissent also pointed out that "[t]he ultimate issue raised by a *Wheeler-Batson* motion is not whether the trial judge, or an appellate court, can find a possible neutral reason why a prosecutor might want to challenge a juror, but whether the prosecutor's actual reason for the challenge was based on group bias." (*Id.* at p. 1339 [quoting *People v. Fuentes*, *supra*, 54 Cal.3d at p. 720].) Ultimately, the U.S. Supreme Court would agree with Justice Kennard's dissent on all of these points.

3. *California's Continuing Conflict With The Ninth Circuit*

In the meantime, the Ninth Circuit had been reviewing California criminal cases in federal habeas by construing *Batson*'s "inference" standard for a prima facie case to mean exactly that – an inference. (*Fernandez v. Roe, supra*, 286 F.3d at p. 1077; *Cooperwood v. Cambra*, *supra*, 245 F.3d at p. 1047; *Wade v. Terhune*, *supra*, 202 F.3d at p. 1197.) This was now directly contrary to the California Supreme Court's holding in *People v. Johnson* that a prima facie case is not merely "enough evidence to permit [an] inference." (*Id.*, 30 Cal.4th at pp. 1315-1316.)

In addition, *People v. Johnson* reached its "more likely than not" holding in part on the (correct) recognition that *Batson* relied on Title VII federal discrimination cases for the procedure it established. (*People v. Johnson*, *supra*, 30 Cal.4th at pp. 1311, 1314-1316 [rev'd on other grounds *sub nom. Johnson v. California*, *supra*]; see discussion ante, part II.) In Title VII cases, the Ninth Circuit had held the prima facie case burden was merely "some evidence, giving rise to an inference of discrimination" – which it characterized as a "low threshold" of "very little," "minimal" evidence that didn't need to rise to a preponderance. (See, e.g., *Lyons v. England* (9th Cir. 2002) 307 F.3d 1092, 1113; *Wallis v. J.R. Simplot Co.* (9th Cir. 1994) 26 F.3d 885, 889.)

Finally, the Ninth Circuit appeared skeptical of the California Supreme Court's fix of the "strong likelihood"/"reasonable inference" problem via footnote 7 of *Box*. It stated that "regardless of the California Supreme Court's 'clarification' of the language in *Wheeler* [via the *Box* footnote] . . . state courts [that] use the 'strong likelihood' standard . . . are applying a lower standard of scrutiny to peremptory strikes than the federal Constitution permits." (*Cooperwood v. Cambra*, *supra*, 245 F.3d at p. 1047.) This may have been dictum if it suggested that *Box* didn't change anything, but it was a further indication that the Ninth Circuit and the California Supreme Court were looking at *Batson* prima facie case issues through very different legal standards.

Faced with the likelihood that the California Supreme Court would continue to reject numerous *Batson* challenges which the Ninth Circuit – and the federal District Courts bound by its authority – could then accept on federal habeas, particularly on the legal standard for a prima facie case, the Attorney General agreed to the certiorari petition filed by appellate defense counsel in the *Johnson* case. (*Johnson v.* California, *supra*, 545 U.S. 164 [125 S.Ct. at p. 2413].)

The U.S. Supreme Court framed the question on which it granted certiorari as: "Whether to establish a prima facie case under *Batson v. Kentucky*, 476 U.S. 79 (1986), the objector must show that it is **more likely than not** that the other party's peremptory challenges, if unexplained, were based on impermissible group bias." (*Johnson v.* California, 545 U.S. at p. 164 [125 S.Ct. at p. 2413] [boldface added, to quote the holding of *People v. Johnson*, *supra*].)

G. The U.S. Supreme Court's *Johnson v. California* Opinion

The answer came in the first paragraph of the U.S. Supreme Court opinion: "We agree with the Ninth Circuit that the question presented must be answered in the negative, and

accordingly reverse the judgment of the California Supreme Court." (*Id.*, 545 U.S. at p. 164[125 S.Ct. at pp. 2413-2414].)

The U.S. Supreme Court was specific in rejecting the California "more likely than not" standard, as unsupported by and contrary to *Batson*'s requirement of an inference:

> [I]n describing the burden-shifting framework, we assumed in *Batson* that the trial judge would have the benefit of all relevant circumstances, including the prosecutor's explanation, before deciding whether it was more likely than not that the challenge was improperly motivated. We did not intend the first step to be so onerous that a defendant would have to persuade the judge--on the basis of all the facts, some of which are impossible for the defendant to know with certainty--that the challenge was more likely than not the product of purposeful discrimination. Instead, defendant satisfies the requirements of *Batson*'s first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred. (*Johnson v. California*, *supra*, 545 U.S. at p. 170 [125 S.Ct. at p. 2417].)

"Inference" is a much lower standard than "more likely than not": A set of facts can yield several different reasonable inferences (e.g., *Boehm v. C.I.R.* (1945) 326 U.S. 287, 294; *Grainger v. Antoyan* (1957) 48 Cal.2d 805, 807; *People v. Hills* (1947) 30 Cal.2d 694, 701); but to get to "more likely than not," a party has to establish that one of the competing inferences is to be chosen above all others.

The U.S. Supreme Court in *Johnson v. California* used the broad, traditional definition of "inference" originally proffered by the California Court of Appeal in the same case: "An ‘inference' is generally understood to be a ‘conclusion reached by considering other facts and deducing a logical consequence from them.'" (*Johnson v. California*, *supra,* 125 S.Ct. at p. 2416, fn. 4 [quoting Black's Law Dictionary (7th ed. 1999), p. 781]; accord *People v. Johnson* [depublished opinion], *supra,* 88 Cal.App.4th at p. 326 [cited only for historical analysis]; see also Evid. Code, § 600, subd. (b) [quoted in *People v. Johnson*, *supra*, 30 Cal.4th at p. 1334 [dis. opn. of Kennard, J.]]; *People v. Gray*, *supra*, 37 Cal.4th at p. 186 [post-*Johnson v. California* case from the California Supreme Court, quoting this U.S. Supreme Court definition].) There are often many possible logical consequences from the same set of facts; deciding among them is a traditional function of a trier of fact considering all the evidence. But at the prima facie stage, when the central evidence (the prosecutor's explanation) has not been heard yet, only an inference – even one of many possible inferences – is required.

Furthermore, "more likely than not" implies that all relevant evidence is before the trier of fact, since otherwise there isn't any way to know whether the proposition in question (here, whether the prosecutor has discriminated) is actually "more likely than not." (See *Johnson v. California*, *supra*, 545 U.S. at p. 170 [125 S.Ct. at p. 2417]). But at the *Batson* prima facie case stage, the central evidence – the prosecutor's explanation – has not been heard.

Johnson v. California also held that review of a trial court's denial of a *Batson* prima facie case is de novo, because the prima facie case determination presents a question of law.

This too rejected years of prior California authority. The California Supreme Court has since recognized and implemented this holding of *Johnson v. California*. The subject is discussed post, part V(A)(2).

H. Life After *Johnson v. California*

Unfortunately, the problems of discrimination that *Batson* was intended to counteract are still ever-present. In 2006 after *Johnson v. California*, "the use of race- and gender-based stereotypes in the jury selection process" is still present, but now it "seems better organized and more systematized than ever before." (*United States v. Stephens*, *supra*, 421 F.3d at p. 515 [quoting *Miller-El v. Dretke*, *supra*, 545 U.S. at p. 232 [125 S.Ct. at p. 2342] [conc. opn. of Breyer, J.], and citing detailed discussion with examples therein (*Id.* at pp. 2342-2343)].) Furthermore, "racial stereotyping and unconscious bias is not limited to one particular area of society, and certainly cannot be limited to cases of violent interracial crimes. The evidence of continued racial stereotyping in employment, housing, insurance, and many other areas makes that apparent. . . . There is no reason to believe that a jury would be immune to those racial stereotypes in determining credibility or analyzing motives, or that a prosecutor would not see an advantage in an all-white jury in [such a] case." (*United States v. Stephens*, *supra*, 421 F.3d at p. 515.)

In light of that reality – as well as the human reality that California judges' extensive use of erroneous *Batson* standards since 1989 may be slow to change – appellate counsel should be attuned to the possibility that trial courts and the Attorney General's office may continue to offer peremptory challenge theories and discussions that perpetuate the errors of California courts from before *Johnson v. California* and *Miller-El v. Dretke*.

Moreover, it should not be assumed that any published California opinion in the area prior to *Johnson v. California* and *Miller*-El *v. Dretke* (even the favorable ones!) would necessarily reflect an accurate reading of the law. Many propositions from California caselaw before *Johnson v. California* and *Miller*-El *v. Dretke* might now be subject to doubt. Appellate counsel should thus independently satisfy themselves of the accuracy of any such propositions.

IV. The Three *Batson* Stages After *Johnson v. California*

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A. Summary Of The Three Stages

After *Johnson v. California*, the three-stage *Batson* procedure – summarized in part II above – has now been clearly defined.

The ultimate burden of persuasion (burden of proof) always rests with the party objecting to the juror exclusion, at every stage. (*Johnson v. California*, *supra*, 545 U.S. at p. ___ [125 S.Ct. at pp. 2417-2418].) The three-stage procedure merely defines a burden of production, an order of presenting evidence. (*Ibid.*) It was discussed briefly earlier in this article, and is described in a bit more detail here.

1. *Prima facie case stage*:

The defendant's sole burden is to show that "the totality of the relevant facts give rise to an inference of discriminatory purpose." (*Johnson v. California, supra*, 545 U.S. at p. 168 [125 S.Ct. at p. 2416].) An inference is not a "strong likelihood," nor is it a preponderance of the evidence or "more likely than not." (*Id.* at pp. 2416-2417.) It is merely a showing of facts that, if otherwise unexplained, would lead a finder of fact to conclude there has been discriminatory purpose. (*Id.* at p. 2416.) Of course, if the facts truly remained unexplained – i.e., if a prosecutor were to refuse to explain them – the refusal would also be "additional support for the inference of discrimination raised by a defendant's prima facie case." (*Id.*, at p. 2417, fn. 6; see also *Furnco Construction Corp. v. Waters* (1978) 438 U.S. 567, 577 [it is generally assumed that people will not act in a totally arbitrary manner; for that reason, a prima facie case implies discrimination because it is presumed the acts in question, if unexplained, are more likely than not based on impermissible factors].)

Stage (1) drops out of the inquiry, and the inquiry proceeds to stages (2) and (3), either if (a) the trial court finds a prima facie case, or (b) the prosecutor gives an explanation without an express prima facie case finding. (E.g., *People v. Fuentes*, *supra*, 54 Cal.3d at pp. 716-717; *Hernandez v. New York*, *supra*, 500 U.S. at p. 359; *Holloway v. Horn*, *supra*, 355 F.3d at p. 723; *Bell v. Ozmint* (4th Cir. 2003) 332 F.3d 229, 240, fn. 5; *Stubbs v. Gomez* (9th Cir. 1999) 189 F.3d 1099, 1104; *Garrett v. Morris* (8th Cir. 1987) 815 F.2d 509, 511-513.) This follows Title VII authority – which, as noted above, is the basis for *Batson* procedure (see ante, part II) – to the same effect: "Where the [allegedly discriminating party] has done everything that would be required of him if the [objecting party] had made out a prima facie case, whether the plaintiff really did so is no longer relevant. The . . . court has before it all the evidence it needs to decide [the ultimate question of whether there was intentional discrimination]." (*United States Postal Service Bd. of Governors v. Aikens* (1983) 460 U.S. 711, 715.)

(Prior California caselaw had imposed an extra restriction on that rule, holding that it did not apply when the trial court had expressly found there was no prima facie case, but the prosecutor had spoken anyway. (*People v. Boyette*, *supra*, 29 Cal.4th at p. 422; *People v. Welch*, *supra*, 20 Cal.4th at p. 746; *People v. Turner*, *supra*, 8 Cal.4th at p. 166-167.) In the last of those cases, Justice Kennard authored a dissent stating that she had reconsidered her prior agreement with that proposition, found it "contrary to the overwhelming weight of authority in other jurisdictions," and was now convinced the restriction was wrong based on that authority. (*Boyette*, *supra*, 29 Cal.4th at pp. 469-470 [dis. opn. of Kennard, J.].) After *Johnson v. California*, it is unclear whether the Attorney General or the California Supreme Court is intending to pursue that restriction. (See *People v. Ward* (2005) 36 Cal.4th 186, 200-201 & fn. 2 [Attorney General conceded prima facie case where trial court had declined to find one, but invited and received an explanation from the prosecutor; Supreme Court assumed a prima facie case arguendo, and affirmed on third-stage grounds].) Further discussion of this topic is beyond the scope of this article.)

Similarly, if the prosecutor gives an explanation which fails stage (2) as a matter of law, stage (1) becomes moot and *Batson* error is established. (*Walker v. Girdich* (2d Cir. 2005) 410 F.3d 120, 123-124.)

Since stage (1) drops out of the inquiry once a prima facie case is found or reasons are given, a court cannot properly deny relief on the ground of no prima facie case, if the prosecutor has already given an explanation that either fails stage (2) or has been found to show discrimination in stage (3). (*Durant v. Strack* (E.D.N.Y. 2001) 151 F.Supp.2d 226, 237-238, 242 [trial court erroneously reconsidering prima facie case finding after prosecutor continued to reargue the point, when after prima facie case finding, prosecutor gave reasons which trial court had rejected in part]; *Lancaster v. Adams* (6th Cir. 2003) 324 F.3d 423, 433-435 [trial court reconsidering prior finding of discrimination, on erroneous legal ground that prosecutor stopped challenging African-Americans after the finding].)

2. *Explanation Stage*:

If the trial court finds a prima facie case, the prosecution must then give reasons for the peremptory challenges in question. Its sole burden is to put forth a race-neutral explanation, though it must at least be a "clear and reasonably specific explanation of [the prosecutor's] legitimate reasons for exercising the challenges" (*Batson*, 476 U.S. at p. 98, fn. 20; *Miller-El v. Dretke*, 545 U.S. at p. 239 [125 S.Ct. at p. 2324]), and in some way "related to the particular case to be tried." (*Batson*, at p. 98; *Purkett v. Elem*, *supra*, 514 U.S. at p. 768.) This is a very low burden, because the bona fides of the prosecutor's stated reason are not at issue in the second stage; that is for the third stage. If the prosecution's explanation is minimally specific and race-neutral, then the second-stage burden has been met, even if the explanation may seem frivolous or silly. (*Elem*, at p. 767.)

However, the Attorney General is not permitted on appeal to argue other considerations purportedly justifying the challenge which the prosecutor didn't state during voir dire. (*Miller-El v. Dretke*, *supra*, 545 U.S. at p. 252 [125 S.Ct. at p. 2332]); *Turner II*, *supra*, 121 F.3d at p. 1253; *People v. Turner* (1986) 42 Cal.3d 711, 722, fn. 7; *People v. Allen*, *supra*, 115 Cal.App.4th at p. 551, fn. 5;) This is only logical, because the prosecutor's actual reasons are all that matters in determining whether the prosecutor was engaging in racial discrimination. "[W]hen illegitimate grounds like race are in issue, a prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives. A *Batson* challenge does not call for a mere exercise in thinking up any rational basis. If the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appellate court, can imagine a reason that might not have been shown up as false." (*Miller-El v. Dretke*, 545 U.S. at p. 252 [125 S.Ct. at p. 2332].)

Once a prima facie case is found, it doesn't appear that the defense is required to make a further objection or specific request that the trial court proceed to stages two or three. Its *Batson* objection and the establishment of a prima facie case are sufficient. (*United States v. Alanis* (9th Cir. 2003) 335 F.3d 965, 968.)

3. *Rebuttal stage*:

If the prosecution meets its minimal stage (2) burden of providing a race-neutral explanation, then the trial court must "undertake a sensitive inquiry into such circumstantial and direct evidence of intent as may be available" (*Batson*, 476 U.S. at p. 93 [citation omitted]), to

fulfill its "duty to determine if the defendant has established purposeful discrimination." (*Id.* at p. 98; see also *Johnson v. California*, *supra*, 545 U.S. at p. 168 [125 S.Ct. at p. 2416].) Once the prosecutor has stated a reason for excluding the juror, the law "requires the judge to assess the plausibility of that reason in light of all evidence with a bearing on it." (*Miller-El v. Dretke*, *supra*, 545 U.S. at p. 252 [125 S.Ct. at p. 2332].)

If the prosecutor's explanation is found to be pretextual, that is not dispositive of itself, but it is very strong evidence of a purposefully discriminatory act. (*Reeves v. Sanderson Plumbing Products, Inc*. (2000) 530 U.S. 133, 147.) But it is important to reiterate: The ultimate factual inquiry at a *Batson* third stage is not whether the prosecutor has made up a pretextual explanation; but rather, whether the prosecutor committed a discriminatory act by striking the prospective juror. A finding of pretext often leads to a finding of discrimination, but does not guarantee one.

Conversely, it is certainly possible for a prosecutor to discriminate even when his or her explanation is not pretextual. A prosecutor may believe honestly that she/he is not discriminating and give an explanation for a juror strike that s/he genuinely and sincerely believes to reflect nondiscrimination, but still be engaging in discrimination on a subconscious level (e.g., by group stereotyping). Though these instances may be harder to spot, they still constitute a violation of the Equal Protection Clause under *Batson*.

So it is important to remember that the true third-stage *Batson* issue is not whether the prosecutor's explanation was pretextual, but rather, whether the prosecutor's explanation showed an intentional act of discrimination. Similarly, while the third *Batson* stage is often phrased in terms of whether the prosecutor's explanation was credible, and that is usually the most important issue, it is possible for a prosecutor to have engaged in discrimination even with a credible explanation that may sound race-neutral on its face.

A *Batson* issue usually arises in a criminal appeal when the trial judge has rejected the defense's *Batson* objection. In theory, that can happen at any of stages (1), (2) or (3). In practice, it usually happens at stages (1) and (3), but stage (2) *Batson* issues are not unheard of. Later, this article will discuss appellate litigation at each of the three *Batson* stages.

B. Appellate Standards Of Review At Each Stage

1. *Prima Facie Case (First) Stage*

The appellate standard of review at stage (1) is the generous de novo standard for a question of law. This was one of the issues decided in the *Johnson v. California* opinion, and will be discussed further post, part V(A)(2).

2. *Explanation (Second)Stage*

Review here is also de novo. The legal question is whether, as a matter of law, the prosecution's explanation is legally sufficient evidence to meet the minimal burden of providing a group-neutral explanation. (*People v. Alvarez* (1996) 14 Cal.4th 155,198, fn. 9; *United States*

v. Bishop (9th Cir. 1992) 959 F.2d 820, 821, fn. 1.)

3. *Rebuttal/Factfinding (Third) Stage*

The standard of review at the third stage is very restrictive. As the U.S. Supreme Court put it: "In *Batson*, we explained that the trial court's decision on the ultimate question of discriminatory intent represents a finding of fact of the sort accorded great deference on appeal[.]" (*Hernandez v. New York*, *supra*, 500 U.S. at p. 364.) Thus, appellate review of a *Batson* third-stage issue will be under the kind of strict standard used for appeals of findings of fact, a "clearly erroneous" standard in the federal courts (*Rice v. Collins*, *supra*, 546 U.S. 333, 338 [126 S.Ct. 969, 974, 163 L.Ed.2d 824, 831]), and a "substantial evidence" standard in California courts. (*People v. Ward* (2005) 36 Cal.4th 186, 200.) Since *Batson* presents a federal constitutional issue, and in light of the possibility that the "substantial evidence" standard is legally too strict, a "clearly erroneous" standard may in some situations be more appropriate for federal habeas preservation. (See *Hernandez v. New York*, *supra*, 500 U.S. at pp. 369-370 [in which the U.S. Supreme Court used the federal "clearly erroneous" standard, and its own caselaw on the subject, in reviewing a New York appeal on a *Batson* third-stage issue]; *McClain v. Prunty*, *supra*, 217 F.3d at p. 1220 [similar, for Ninth Circuit review of District Court finding of nondiscrimination in federal habeas case from California].)[5]

[5] It is not clear if there is any significant distinction between the two; in California practice, arguably not. (*Cal. Hotel & Motel Ass'n v. Industrial Welfare Comm*. (1979) 25 Cal.3d 200, 212, fn. 30; see also, e.g., *People v. Alvarez* (1996) 14 Cal.4th 155, 196 [the two are "practically" the same]; *People v. Mickey* (1991) 54 Cal.3d 612, 649; *McCoy v. Hearst Corp*. (1986) 42 Cal.3d 835, 846, fn. 7 [both similar].)

However, in federal appellate court review of federal trial court decisions, there may be a difference: A judgment supported by substantial evidence could still be clearly erroneous, if the reviewing tribunal considers it against the clear weight of evidence or otherwise is "left with the definite and firm impression that a mistake has been committed." (See discussion in *Jackson v. Hartford Acc. & Indemnity Co.* (8th Cir. 1970) 422 F.2d 1272, 1275-1278 [conc. opn. of Lay, J.] [quoting the "clearly erroneous" standard in *United States v. United States Gypsum Co.* (1948) 333 U.S. 364, 395].) "There is a significant difference between the standards of ‘substantial evidence' and of ‘clearly erroneous,' and in close cases this difference can be controlling. Policy, authority and history all thus show that the 'clearly erroneous' rule gives the reviewing court broader powers than the 'substantial evidence' formula[.]" (*Tandon Corp. v. U.S. International Trade Comm*. (Fed. Cir. 1987) 831 F.2d 1017, 1019.)

Both standards are very restrictive, and neither should be used lightly. But if there is an appropriate third-stage *Batson* argument to be made, and any doubt of whether the federal standard of review might yield a better result, the federal standard should be considered, since the California courts cannot constitutionally provide a lesser measure of procedural protection in appeals on *Batson* issues than would be called for by *Batson* itself. (*Johnson v. California*, supra, 545 U.S. at pp. 168, 173 [125 S.Ct. at pp. 2416, 2419].) *Batson* procedure is modeled after federal Title VII litigation (see *ante*, part II), in which review of findings of fact is under the "clearly erroneous" standard. (*Bazemore v. Friday* (1986) 478 U.S. 385, 398.)

The very restrictive standard of review on a third-stage *Batson* issue leads to the practical question of why trial judges don't just find a prima facie case and go through the *Batson* inquiry if they have any reasonable doubt. (Cf. *Johnson v. United States*, *supra*, 545 U.S. at p. 172 [125 S.Ct. at p. 2418] ["The inherent uncertainty present in inquiries of discriminatory purpose counsels against engaging in needless and imperfect speculation when a direct answer can be obtained by asking a simple question."].) But they often don't – and 16 years of erroneous California caselaw hasn't helped them. In light of many years of California's overall unreceptiveness to *Batson* prima facie case arguments, trial judges may continue to be reluctant to find prima facie cases.

That in turn may make the prima facie case area, or *Batson* in general, fertile ground for appellate litigation after *Johnson v. California*. Certainly, appellate counsel should be alert to the possibility that California trial judges may be slow to adapt to the U.S. Supreme Court's requirements in *Johnson v.* California and *Miller-El v. Dretke*.

V. How *Johnson v.* California and *Miller-El v. Dretke* Affect Prior California Caselaw

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This part addresses three areas that may provide some of the more significant potential bases for appellate issues in light of *Johnson v. California* and *Miller-El v. Dretke*: (a) the change in prima facie case standard, with *Johnson v. California* now requiring the relatively low "inference" standard rather than the "more likely than not" or "strong likelihood" standards of prior California caselaw; (b) the change to a prima facie case denial being reviewed de novo as a question of law, rather than prior California caselaw which reviewed it for substantial evidence as a question of fact; and (c) the repudiation of California's former method of reviewing a trial court's finding of no prima facie case by speculation on reasons the prosecutor "might have used" to exclude a prospective juror from a cognizable group (the "substantial evidence" referred to in (b) above), when the prosecutor had never given actual reasons for excluding that prospective juror at the prima facie case stage. This part also briefly mentions (d) the use of "comparative juror analysis" as a technique appropriate to *Batson* arguments at both the first and third stages after *Johnson v. California* and *Miller-El v. Dretke*.

A. Standard For Finding A Prima Facie Case: "Inference" (*Johnson v. California*), Not "More Likely Than Not" Or "Strong Likelihood" (Prior California Caselaw)

As discussed earlier, in the *Johnson* case, the California Supreme Court had held that the defendant had to demonstrate *at the prima facie case stage*, before the prosecutor was ever called upon to explain anything, that it was more likely than not that the challenge was based on

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Having said all that, in most cases, a discussion like this might be making a mountain out of a molehill. But since part of the purpose of raising *Batson* issues on appeal can be to preserve them for federal habeas if they don't prevail in state court – and also, since California appears to believe there is no difference – it may sometimes be logical to use the federal standard anyway (either alone or in addition to the state standard), thus enabling appellate counsel to preserve that as one of the federal habeas issues if so desired.

discrimination. That former California standard was directly overruled by the U.S. Supreme Court in *Johnson v. California*.

This represents a major change in this area from prior California caselaw. If the trial court used the wrong legal standard, that may be a ground of appellate argument by itself.

This drastic change in governing caselaw may have an especially significant effect in *Batson* cases where jury selection occurred prior to *Johnson v. California* (June 13, 2005). Under *Auto Equity Sales, Inc. v. Superior Court (*1962) 57 Cal.2d 450, 455 ["*Auto Equity*"], every California trial and appellate court after *People v. Johnson* was decided on June 30, 2003, and before *Johnson v. California* was decided on June 13, 2005, was duty-bound to follow the California Supreme Court's *People v. Johnson* opinion. Even after the U.S. Supreme Court granted certiorari, *Auto Equity* required state courts to follow *People v. Johnson*; there is no "cert. granted" exception to *Auto Equity*. (*People v. Hammond* (1994) 22 Cal.App.4th 1611, 1626, fn. 12 [Fifth District]; *People v. Peregrina-Larios* (1994) 22 Cal.App.4th 1522, 1524; *People v.* Lopez (1993) 20 Cal.App.4th 897, 904 & fn. 5; *People v. Jaramillo* (1993) 20 Cal.App.4th 196, 198.) In any event, plenty of California Supreme Court cases for which certiorari was not granted reaffirmed the "more likely than not" standard before the U.S. Supreme Court reversed in *Johnson*, and certiorari wasn't granted in any of those cases. (See *People v. Young* (Jan. 31, 2005) 34 Cal.4th 1149, 1172; *People v. Griffin* (July 19, 2004) 33 Cal.4th 536, 555; *People v. Cleveland* (March 25, 2004) 32 Cal.4th 704, 732-733; *People v. Yeoman* (July 17, 1993) 31 Cal.4th 93, 115.)

No trial or appellate court in this time period could lawfully refuse to follow *Auto Equity*, and without anything to the contrary, state law presumes the courts did their legal duty of following *Auto Equity*. (Evid. Code, § 664; see, e.g., *People v. Belmontes* (1988) 45 Cal.3d 744, 816.) So these trial courts are presumed to have followed the California Supreme Court's *People v. Johnson* opinion, which was overruled by the U.S. Supreme Court.

Accordingly, every trial and appellate court in California is presumed (absent any contrary evidence) to have used the erroneous and unconstitutional "more likely than not" standard for a *Batson* prima facie case, in evaluating *Batson* issues between June 30, 2003 and June 13, 2005.[6]

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[6] In an appeal with a pre-June 30, 2003 jury selection (increasingly rarer in noncapital cases), there would also be no legal basis to assume the trial courts were using the correct legal standard. They still had to use a "strong likelihood" standard, and even though the California Supreme Court had said this was to be considered the equivalent of a "reasonable inference," there would have been no basis on which to assume trial courts were deeming a "strong likelihood" standard to be as low as the true reasonable inference standard of *Johnson v. California* – as the California Supreme Court later held in *People v. Johnson*. Moreover, the California Supreme Court in *People v. Johnson* also held that Evidence Code section 115 applied to a *Wheeler* or *Batson* prima facie case determination, and for that reason as well, concluded (erroneously) that the prima facie case standard was a preponderance of the evidence (*People v. Johnson, supra*, 30 Cal.4th at p. 1317); Evidence Code section 115 was around long before the "strong likelihood" standard was created. (For pre-*Box* trials in 2000 and before, trial courts

For jury selections after June 13, 2005, the record could still affirmatively show that the trial court used the wrong standard. That would be most likely for trials in the early days and weeks before *Johnson* became common knowledge in the California trial courts. (Cf. *People v. Estrada* (B175493, June 22, 2005) 2005 Cal. App. Unpub. LEXIS 5401, pp. 5-6 [nine days after *Johnson v. California*].) However, a trial court might err at any time if it is unfamiliar with the U.S. Supreme Court's opinions or fails to understand their ramifications.

Thus, in many or most of these types of cases, an appellate argument may often be available that the trial court violated the requirements of *Batson* by using an erroneous legal standard for a prima facie case, one more stringent than the law permitted. An argument of this nature could result in a partial or even total win, especially since it is generally held that *Batson* error as to seated trial jurors can never be harmless. (See part I discussion *ante*.) At the least, making such an argument when appropriate could significantly improve your client's state court record for federal habeas purposes.

Accordingly, appellate counsel with a proper record should be especially alert to the possibility of making a *Batson* argument, based directly on the main holding of *Johnson v.* California regarding the legal standards for a prima facie case. This also increases the importance of determining whether there is a proper record for making a *Batson* argument, which is discussed in part VI below.

B. Standard Of Review Of Failure To Find A Prima Facie Case: De Novo For A Question Of Law (*Johnson v. California*), Not Clearly Erroneous Or Substantial Evidence For A Question Of Fact (Prior California Caselaw)

The caption states the point. *Johnson v. California* overrules years of California caselaw which had previously found the prima facie case issue to be a question of fact subject to a stringent standard of review typical for questions of fact (and, in practice, essentially unreviewable on appeal from a final judgment). Now after *Johnson v. California*, the prima facie case issue is a question of law, and is thus properly reviewed under the far more generous de novo standard used for questions of law. Furthermore, all caselaw to the contrary that was issued before *Johnson v. California* – or that relies on citations of caselaw issued before *Johnson v. California* – has been superseded, and must yield to the binding U.S. Supreme Court opinion. (U.S. Const., Art. VI, cl. 2.)

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would be presumed to have followed the "strong likelihood" standard promulgated in *People v. Bernard*, *supra*, because that was required by *Auto Equity*. (See *Id.* at pp. 455-456; see also *Cooperwood v. Cambra*, *supra*, 245 F.3d at p. 1047 [so presuming].)

The California Supreme Court's use of Evidence Code section 115 for the prima facie case stage was also in error. The prima facie case stage is merely a burden of production (burden of going forward), not a burden of proof (burden of persuasion). (*Johnson v. California*, *supra*, 545 U.S. at p. 170-171 [125 S.Ct. at pp. 2417-2418].) Accordingly, the correct Evidence Code provision would be Evidence Code section 110. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850-851.)

The California Supreme Court has so held in two post-*Johnson v. California* opinions. In both, it held that it was empowered to review the record itself to determine de novo whether there was a *Batson* prima facie case, because the prima facie case determination presents a "legal question." (*People v. Gray, supra,* 37 Cal.4th at p. 187; *People v. Cornwell, supra,* 37 Cal.4th at p. 73 [italics in original in both].) These California Supreme Court holdings are binding on California's Courts of Appeal under *Auto Equity* (57 Cal.2d at p. 455), and thus by themselves should settle the issue in the state appellate courts.

These holdings follow, *inter alia,* from *Johnson v. California*'s holding that the *Batson* prima facie case standard is merely an inference. Whether there is evidentiary support for a particular inference is traditionally a question of law, reviewed de novo. (E.g., *People v. Barnett* (1998) 17 Cal.4th 1044, 1145; *People v. Hannon* (1977) 19 Cal.3d 588, 597-598; Estate of Tarrant (1951) 38 Cal.2d 42, 51.) (By contrast, the question of which inference should be chosen, among multiple permissible inferences supported by the evidence, is a question of fact.) After all, the question of whether there is evidentiary support for an inference is essentially whether there is sufficient evidence in the facts of record to meet a particular legal standard (see, e.g., *Int'l Brotherhood of Teamsters v. United States* (1977) 431 U.S. 324, 358; *Heard v. Lockheed Missiles & Space Co.* (1996) 44 Cal.App.4th 1735, 1750-1751; *Norris v. City and County of San Francisco* (9th Cir. 1990) 900 F.2d 1326, 1329-1330); here, the legal standard for an inference. Whether there is sufficient evidence in the facts of record to meet a legal standard is a question of law. (*Ornelas v. United States* (1996) 517 U.S. 690, 696-697; *People v. Cromer* (2001) 24 Cal.4th 889, 894; *People v. Saterfield* (1967) 65 Cal.2d 752, 759.) For example, in Title VII cases (the basis for *Batson* procedure, see *ante,* part II), the determination of whether there is a prima facie case has long been held to be a question of law, which is consequently reviewed de novo. (*Texas Dep't of Community Affairs v. Burdine, supra,* 450 U.S. at p. 254, fn. 8; *Quinn v. City of Los Angeles* (2000) 84 Cal.App.4th 472, 481-482; *Cello-Suarez v. Puerto Rico Elec. Power Auth.* (1st Cir. 1993) 988 F.2d 275, 278, fn. 3; *Gay v. Waiters' & Dairy Lunchmen's Union* (9th Cir. 1982) 694 F.2d 531, 540.)

Thus in the two post-*Johnson v. California* cases discussed above, the California Supreme Court held that even though the trial court used too stringent a legal standard, the reviewing court could "review[] the record and, like the United States Supreme Court in *Johnson, supra,* 545 U.S. 162 [162 L. Ed. 2d 129] . . . apply the high court's standard and resolve the legal question whether the record supports an inference" making a prima facie case. (*People v. Gray, supra,* 37 Cal.4th at p. 187; *People v. Cornwell, supra,* 37 Cal.4th at p. 73.) The Court's conclusion that an appellate court could review the paper record independently, to determine whether that record contained sufficient evidence to meet the legal standard for an inference of purposeful discrimination in peremptory juror challenges, conforms to the traditional approach to such questions described above.

The California Supreme Court was correct in holding that in *Johnson v. California,* the U.S. Supreme Court also conducted de novo review of a ruling of no prima facie case, as a "legal question." In the *Johnson* case, if the state courts' rulings of no prima facie case had presented a fact-bound question intensively based on the trial judge's personal observations, as the California courts had held before (see, e.g., *People v. Johnson, supra,* 30 Cal.4th at p. 1325; *People v. Jones, supra,* 17 Cal.4th at p. 294; *People v. Howard, supra,* 1 Cal.4th at p. 1155; see also

Wheeler, 22 Cal.3d at p. 281, for the original context on judges' observations), the U.S. Supreme Court could have done no more than remand; it couldn't have made its own prima facie case determination on findings grounded in "personal observations" which only the trial judge was there to observe. Instead, the U.S. Supreme Court itself reviewed the paper record, found an inference and thus a prima facie case, and reversed and remanded for further proceedings consistent with its opinion – including its finding that there was a prima facie case. (*Johnson v. California*, *supra*, 545 U.S. at pp. 171-172 [125 S.Ct. at pp. 2418-2419].) That is de novo review, which an appellate court gives to a legal question – exactly as the California Supreme Court recognized, and as it did in the post-*Johnson v. California* cases of *Gray* and *Cornwell* cited above.

In short, *Johnson v. California* is compatible only with a prima facie case ruling being reviewed de novo as a question of law, and the California Supreme Court has held review of a prima facie case ruling is exactly that.

The same result is obtained from *Johnson v. California* by other routes as well.

First, in *Johnson v. California*, the U.S. Supreme Court held that stages one and two of the three-stage *Batson* procedure "'can involve no credibility assessment' because 'the burden-of-production demonstration necessarily precedes the credibility-assessment stage." (*Id.*, 545 U.S. at p. 171, fn. 7 [125 S.Ct. at p. 2418, fn. 7] [italics in original].) Fact-finding inherently involves credibility assessments. (*Weiler v. United States* (1945) 323 U.S. 606, 608; *People v.* Cagle (1971) 21 Cal.App.3d 57, 66.) So in light of *Johnson v. California*'s holding that the prima facie case stage "can involve no credibility assessment," that stage necessarily cannot implicate any fact-finding – as is also true in the Title VII context. (*Furnco Construction Corp. v. Waters*, *supra*, 438 U.S. at p. 579; see *ante*, part II, for discussion of how *Batson* procedure is modeled after Title VII cases.) It thus presents a question of law.

Second, *Johnson v. California* reiterated what *Batson* had previously established, that *Batson* procedure was derived from and intended to be consistent with employment discrimination cases under Title VII of the Civil Rights Act. (*Johnson v. California*, 545 U.S. at p. 171, fn. 7 [125 S.Ct. at p. 2418, fn. 7].) Moreover, the California Supreme Court had previously agreed. (*People v. Johnson*, *supra*, 30 Cal.4th at pp. 1311, 1314-1316; see discussion ante, part II.) In Title VII cases, whether a prima facie case has been made based on the underlying facts is a question of law, reviewable de novo on appeal – in effect, a question of sufficiency of evidence to support the desired inference. (See discussion and citations earlier in this section.) The same conclusion follows in *Batson* cases.

Third, as *Johnson v. California* makes clear, the first and second *Batson* stages (like the first and second Title VII stages) involve merely burdens of production; only the third stage implicates the burden of proof on the ultimate question. (*Johnson v. California*, *supra*, 545 U.S. at p. 171 [125 S.Ct. at pp. 2417-2418].) Whether a party has carried a burden of production on a particular legal issue is a question of law reviewed de novo. (*Quinn v. City of Los Angeles*, *supra*, 84 Cal.App.4th at p. 481; *Lew v. Moss* (9th Cir. 1986) 797 F.2d 747, 750; *Gay v. Waiters and Dairy Lunchmen's Union*, *supra*, 694 F.2d at p. 543, fn. 10.) (One of the most traditional burden of production questions arises on a summary judgment motion (see, e.g., *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850-851); review of a grant of summary judgment

is obviously de novo. (*Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 65-66.))

Finally, as discussed earlier (ante, part III(D)), the California courts had held since 1989 that both trial and appellate courts could decline to find a prima facie case by speculating on reasons the prosecutor "might have had" if only the prosecutor had been asked – though nothing in the record said those were the prosecutor's actual reasons, because at the prima facie case stage, the prosecution hasn't said anything about its reasons. The overruling of this former California approach by *Johnson v. California* and *Miller-El v. Dretke* also eliminates the doctrinal basis for deeming the prima facie determination to be a question of fact.

Probably every person in a jury pool has some individual characteristic or will say something which one could assign as a hypothetical basis for a peremptory challenge. After all, "potential jurors are not products of a set of cookie cutters." (*Miller-El v. Dretke, supra*, 545 U.S. at p. 299 [125 S.Ct. at p. 2329, fn. 6].) So leaving a ruling of no prima facie case – or an appellate review of such a ruling – to a trial or appellate court's speculating on reasons the prosecutor "might have had" effectively guaranteed affirmance of such rulings, based on any facially neutral "reason" the judge could think of. (See *ante*, part III(D).)

But as the U.S. Supreme Court made clear in *Miller-El v. Dretke*, "[i]f any facially neutral reason sufficed to answer a *Batson* challenge, then *Batson* would not amount to much more than *Swain*." (*Id.*, 545 U.S. at p. 240 [125 S. Ct. at p. 2325].) In light of *Johnson v. California* and *Miller-El v. Dretke*, that approach now fails because there is no evidence at a prima facie case stage, since the prosecution hasn't been called upon to state any actual reasons for excluding the prospective juror, and the only factual question in a *Batson* inquiry is whether the prosecutor was actually engaging in discrimination.

Johnson v. California rejected the California courts' approach to denying *Batson* prima facie cases by speculating on hypothetical possible reasons a prosecutor 'might have used' to strike a prospective juror, without any evidence of the prosecutor's actual reasons. "The *Batson* framework is designed to produce actual answers to suspicions and inferences that discrimination may have infected the jury selection process. [Citation.] The inherent uncertainty present in inquiries of discriminatory purpose counsels against engaging in needless and imperfect speculation when a direct answer can be obtained by asking a simple question. [Citations.]" (*Johnson, supra*, 545 U.S. at p. 252 [125 S.Ct. at p. 2418].)

The U.S. Supreme Court has thus made clear that judicial speculation on what the prosecutor "might have done" or "might have thought" is not evidence that can be considered on a *Batson* issue – not only at the prima facie case stage (*Johnson v. California, supra*, 545 U.S. at p. 172 [125 S.Ct. at pp. 2418-2419]), but also at the second and third stages. (*Miller-El v. Dretke, supra*, 545 U.S. at p. 252 [125 S.Ct. at p. 2332].) This overrules pre-*Johnson v.* California authority in the California courts, as discussed above.[7]

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[7] It also overrules prior Ninth Circuit authority which had approved of this judicial speculation approach to prima facie case determinations, and deemed them to present a question of fact on the same basis. (*Tolbert v. Page* (9th Cir. 1999, en banc) 182 F.3d 677, 683; contra *Id.* at p. 689 [dis. opn. of McKeown, J.].) The Ninth Circuit apparently has not yet had a California

With judicial speculation on reasons the prosecutor "might have used" eliminated as a possible source of evidence, the underlying rationale disappears for deeming a *Batson* prima facie case to be a question of fact, because the judicial speculation was the central "fact" that was being reviewed under that theory. (See, e.g., *People v. Howard*, *supra*, 1 Cal.4th at p. 1155 ["As with other findings of fact, we examine the record for evidence to support the trial court's ruling"; those findings of fact center on trial court's determination of "grounds upon which the prosecutor might reasonably have challenged the jurors"]; *People v. Mayfield*, *supra*, 14 Cal.4th at p. 723; *People v. Crittenden*, *supra*, 9 Cal.4th at pp. 116-117; *People v. Garceau*, *supra*, 6 Cal.4th at pp. 171-172 [all to like effect].) Since the record at the prima facie case doesn't have the prosecutor's actual reasons which would present a factual question (largely one of credibility), and since judicial speculation on hypothetical "reasons" is not factual evidence and cannot be considered as such, there is nothing left for an appellate court to review as a question of fact.

Since the U.S. Supreme Court opinions eliminate the only principled basis to treat the prima facie case stage as a question of fact, it must necessarily be a question of law. That is consistent with all of the other analyses above.

These alternative analyses have been proffered here, merely because *Johnson v. California* does not come out and state explicitly that a trial court's ruling of no prima facie case is reviewed as a legal question. Nonetheless, the California Supreme Court has come out and stated it explicitly. And the holding is necessarily implied from the U.S. Supreme Court opinion in multiple ways. Thus, appellate counsel who wish to utilize the more generous de novo standard for questions of law should determine on a case-by-case basis how much more elaboration of the issue is needed beyond the California Supreme Court opinions, if any; and also, whether and how much further discussion is warranted in reply to the respondent's brief.

Using the more generous *de novo* standard of review, appellate counsel should be

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case after *Johnson v. California* which presented this issue, particularly since it already reviews California courts' prima facie case rulings de novo and will do so for some time into the future, due to California's use of an erroneous legal standard before *Johnson v. California* was decided in June 2005. (E.g., *Wade v. Terhune*, *supra*, 202 F.3d at p. 1197; *Paulino v. Castro*, *supra*, 371 F.3d at p. 1090 & fn. 5; *Williams v. Runnels*, *supra*, 432 F.3d at p. 1105, fns. 3-4].) For that reason, federal habeas counsel in cases from California won't have any need to brief the issue in this section for some time, which also means the Ninth Circuit won't have any need or basis to adjudicate it in those cases. In addition, since *Johnson v. California's* rejection of treating prima facie case determinations as unreviewable questions of fact is not expressly stated and requires a careful reading of the opinion, attorneys in other Ninth Circuit jurisdictions may not quickly recognize this holding of *Johnson v. California* or its significance.

Consequently, the Ninth Circuit's early published opinions after *Johnson v. California* may still contain incorrect dicta on the general standard of review based solely on erroneous pre-*Johnson v. California* caselaw (such as *Tolbert v. Page*), as happened in *Williams v. Runnels*, *supra*, 432 F.3d at p. 1105, fn. 3]. Thus at least at this time, appellate counsel should be particularly cautious when evaluating Ninth Circuit caselaw in this one particular area.

especially alert to the various methods by which erroneous failure to find a prima facie case may be argued. Some of those methods are discussed later in this article.

Appellate counsel with pending appeals containing *Wheeler* or *Batson* issues should be using the de novo standard whenever feasible, and should argue against attempts by the respondent to rely on pre-*Johnson v. California* caselaw for one of the superseded factual standards of review such as substantial evidence. If the case has been briefed but not decided, submission of a supplemental brief may be warranted. If the Court of Appeal issues an opinion using the wrong standard, a petition for rehearing may be warranted, followed by a petition for review to preserve the issue for federal habeas if appropriate.

This can be an exceptionally important type of issue, particularly when the trial court found there was no *Batson* prima facie case under an erroneous pre-*Johnson v. California* standard which considered the prima facie case question to be one of fact.

If the Court of Appeal reviews this ruling as a question of law – the result reached so far (correctly) by the California Supreme Court, as discussed in this section – then your client ends up in a better position than when he started, whatever the result. He will either get relief, or he will at least have a much better record for federal habeas.

When an appellate court reviews de novo as a question of law what a court below it thought was a basically unreviewable question of fact, a reviewing court may come to a different and more favorable conclusion– exactly what happened in the U.S. Supreme Court in *Johnson v.* California. (*Id.*, 545 U.S. at p. 173 [125 S.Ct. at p. 2419]; see also, e.g., *Mahaffey v. Page*, *supra*, 162 F.3d at pp. 484-485 [on rehearing, remanding for *Batson* hearing after reviewing prima facie case denial de novo as question of law, when same panel in same appeal had previously denied all relief]; *Turner II*, *supra*, 121 F.3d at pp. 1255-1256 [granting federal habeas on the third-stage ground the prosecutor's explanation was pretextual as a matter of law, after prior panel opinion had reviewed first-stage ruling of no prima facie case de novo as a question of law; when under former California standards, ruling of no prima facie was an essentially unreviewable question of fact, and state courts thus had denied relief].) So even if the appellate court rules against your client, it will still have changed what would have been a basically unreviewable finding of fact, into a much more freely reviewable question of law. A petition for review to the California Supreme Court can then preserve the federal constitutional issue for federal habeas, with a much more favorable state court record.

(In federal habeas, a federal District Court should also consider the question one of law governed by *Johnson v. California*, because that opinion merely restates the 1986 holding of *Batson* that a prima facie case requires only an inference, as applied to the California "strong likelihood" and "more likely than not" prima facie case standards. In any event, a U.S. Supreme Court decision on an issue of federal constitutional law must be applied to cases for which direct review (including the time for filing a certiorari petition to the U.S. Supreme Court) had not concluded at the time of the decision. (*Griffith v. Kentucky* (1987) 479 U.S. 314, 322-328; *People v. Clair* (1992) 2 Cal.4th 629, 672.)

In some such cases, the appellate court might do better than merely affirming, and remand the matter to the trial court for a hearing on prosecutor's stated reasons for the challenge.

That is a win, because it keeps the proceedings alive. The defendant might then get a more favorable plea offer – especially if the prosecutor might be a little nervous about having to give reasons on the record. Or, the defendant might end up with a full win, as prosecutors do not always prevail in such proceedings. (See, e.g., *Turner II*, *supra*, 121 F.3d at pp. 1253-1255 [reversing habeas denial; in *Batson* hearing six years after the trial, prosecutor gave only one reason as to one of five African-American prospective jurors she struck, which court found pretextual as a matter of law on that case's record; though there was apparently no basis for relief as to the other four, finding of discrimination as to the fifth required granting a new trial]; *Harrison v. Ryan* (3d Cir. 1990) 909 F.2d 84, 87-88 [affirming habeas grant; in *Batson* hearing six years after the trial, prosecutor could not remember his reasons as to one of six African-American prospective jurors he struck; though there was apparently no basis for relief as to the other five, prosecutor's statement of inability to remember reasons for the sixth required granting a new trial].)

And in still other cases, the appellate court – on whatever grounds – might conclude that the only remedy is a full reversal, which in many cases has been the remedy for a trial court's erroneous failure to find a *Batson* (or *Wheeler*) prima facie case. (See, e.g., *People v. Snow*, *supra*, 44 Cal.3d at pp. 226-227 [rejecting argument for limited remand in that case]; *People v. Gray*, *supra*, 87 Cal.App.4th at pp. 789-790.) (An issue of the proper disposition on an appellate remand from an erroneous failure to find a prima facie case is now pending before the California Supreme Court on remand from the U.S. Supreme Court in *Johnson*, as discussed *ante*, part II.)

Even if the appellate court were to review the issue as a question of fact, it still should not be able to speculate on hypothetical reasons why the prosecutor "might have challenged" the excluded juror. If it does, it is using a legal standard rejected by the U.S. Supreme Court, as discussed earlier in this section and also in the next section. If it doesn't, it may have a difficult time explaining why it is reviewing the ruling as a question of fact anyway, as is also discussed earlier in this section. There appears to be no published opinion in the federal courts under *Batson* which has reviewed a finding of no prima case as a question of fact, without permitting speculation on hypothetical reasons the prosecutor "might have used" had he or she thought of them.

This is an important issue for appellate counsel, because as in so many other areas, the outcome of an appeal may sometimes turn primarily on which standard of review is used. Appellate counsel should therefore be conscious of it, both as a potential means of arguing trial court error in use of the wrong legal standard, and also as one of arguing to the appellate court that its review should be under the more generous *de novo* standard for questions of law.

C. Rejection Of Prior California Holdings That Trial And Appellate Courts Could Properly Decline To Find A Prima Facie Case By Speculating On Hypothetical Reasons The Prosecutor "Might Have Used"

In practice, this is basically a variation on how *Johnson v. California* overrules prior holdings that a trial court's failure to find a prima facie case is a question of fact reviewed for substantial evidence or the like, and establishes that it is a question of law reviewed de novo. It is thus discussed in section (B) above.

Between *Johnson v. California* and the writing of this article (February 2006), the Ninth Circuit has reiterated the principle that hypothetical reasons the prosecutor "might have used" are not properly part of the prima facie case inquiry, in another federal habeas case from California. In *Williams v. Runnels* (9th Cir. 2006) 432 F.3d 1102, a case where the California trial and appeal were held before *Johnson v. California*, the prosecutor had accepted the jury as first presented. However, after the defense exercised some peremptory challenges, the prosecutor exercised three of his first four challenges against African-Americans, which were three of the only four African-Americans in the original pool of 49 prospective jurors. The California Court of Appeal had affirmed the finding of no prima facie case, on the then-usual ground that there were bases on which the prosecutor "might reasonably have challenged" these three prospective jurors.

The Ninth Circuit, reversing a habeas denial and remanding for a hearing, found a prima facie case was established as a matter of law. It did not defer to the state courts' speculation on what the prosecutor "might have thought," and held the state courts' decisions to do so were contrary to *Johnson v. California*:

> The [federal] district court, however, as well as the California Court of Appeal, addressed a different issue: whether the record could support race-neutral grounds for the prosecutor's peremptory challenges. Although their conclusion that the record supported such grounds for the peremptory challenges may have been reasonable, the Supreme Court's clarification of *Batson* in *Johnson*, and its review of the record in *Miller-El*, lead to the conclusion that this approach did not adequately protect Williams' rights under the Equal Protection Clause of the Fourteenth Amendment or "'public confidence in the fairness of our system of justice.'" *Johnson*, 125 S. Ct. at 2418 (quoting *Batson*, 476 U.S. at 87); see also *Miller-El*, 125 S. Ct. at 2323-24. . . .
>
> The district court and the California Court of Appeal also reviewed all the evidence in the record concerning the challenged jurors and determined that the record contained evidence for each juror that would support peremptory challenges on non-objectionable grounds. This, however, does not measure up to the Supreme Court's pronouncement that the question is not whether the prosecutor might have had good reasons, but what were the prosecutor's real reasons for the challenges. *Johnson*, 125 S. Ct. at 2418; see also *Miller-El*, 125 S. Ct. at 2332 ("A *Batson* challenge does not call for a mere exercise in thinking up any rational basis."). (*Williams v. Runnels*, *supra*, 432 F.3d at pp. 1108, 1109.)

The Seventh Circuit, in a split decision, recently came to a similar conclusion. In United *States v. Stephens*, *supra*, 421 F.3d 503, the government tried to defeat a prima facie case by contending there were race-neutral reasons apparent in the record, even though of course the prosecutor hadn't stated any actual reasons yet. The Seventh Circuit accepted that a reviewing court could consider apparent (obvious) reasons in the record, and that they might even sometimes defeat a prima facie case; for example, if all of the stricken prospective jurors were attorneys, the mere fact that they also happened to be African-American would not itself present

an inference of discrimination, because non-discriminatory factors would also provide a clear reason for all of the strikes. (*Id.* at p. 516.) (Still, if there were also Caucasian attorneys among the prospective jurors but they were not stricken, a different result could ensue. (See *Ibid.*) However, "[a]fter *Johnson* and *Miller-El* . . . it is clear that this is a very narrow review," and is limited to situations where the strikes are "the court can readily attribute the challenges to [a] discernible, consistent explanation" to which the strikes are "clearly attributable" (as with the attorney example earlier). (*Ibid.*) It isn't enough for the prosecution merely to state possible race-neutral reasons in the record, unless it is totally clear that those were the actual reasons for the juror strikes (*Id.* at pp. 516-517) – since again, after *Johnson v. California* and *Miller-El v. Dretke*, only the prosecutor's actual reasons and not mere hypothetical possibilities count at any stage of a *Batson* inquiry. (See *ante*, section (B).)

Although the discussions in this section and section (B) above suggest this issue should be settled by now, the Attorney General may still argue the other side in some appeals – sixteen years of contrary California precedent might be hard to let go of. Even some judges might still prefer that type of approach despite *Johnson v. California* and *Miller-El v. Dretke*. (See *United States v. Stephens*, *supra*, 421 F.3d at pp. 525-527 [dis. opn. of Kanne, J.].)

But as shown above, the Attorney General and the courts should no longer be using the former California practice of supporting trial court rulings of no prima facie case, by speculating on reasons the prosecution 'might have used' had it been asked. If a pending appeal was briefed under the speculative "might have used" standard, a supplemental brief may be appropriate in light of *Johnson v. California* and *Miller-El v. Dretke*. If a Court of Appeal uses the speculative "might have used" standard in an opinion, a petition for rehearing and then review may be appropriate, again because that standard is manifestly inconsistent with *Johnson v. California* and *Miller-El v. Dretke*. The issue is also appropriate to preserve for federal habeas – and in light of recent Ninth Circuit authority, federal habeas may be promising in this area. (See *Williams v. Runnels*, *supra*, 432 F.3d at p. 1109 & fn. 12].)

D. "Comparative Juror Analysis": The Effect Of *Johnson v. California*'s Companion Case, *Miller-El v. Dretke*

This is a somewhat complex subject that is better explained later in this article. For the moment, it will only be noted here that although the California Supreme Court had previously rejected "comparative juror analysis" on a consistent basis, beginning with *Johnson 1989* (see *ante*, part III(D)), it is now deeming at least some "comparative juror analysis" issues to present open questions. (See, e.g., *People v. Schmeck* (2005) 37 Cal. 4th 240, 270 ["assuming without deciding that this aspect of [*Johnson* 1989] has been called into question by the decision in *Miller-El v. Dretke* "].)

VI. Setting The Stage: The Essential Element Of Getting An Adequate Appellate Record

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Appellate issues don't appear out of nowhere. They require an adequate record for appellate counsel to evaluate and then raise them if appropriate, including record augmentation where that is warranted. (*People v. Barton* (1978) 20 Cal.3d 513, 519-520 [citing *Anders v.*

California (1967) 386 U.S. 738, 743].) *Batson* issues are no different.

Appellate counsel should be especially aware of how to obtain an adequate *Batson* record, for in the vast majority of criminal appeals in the Third and Fifth Appellate Districts, a *Batson* record cannot be found in the original appellate record furnished to appointed counsel. *Batson* records are found in jury voir dire, and in most California appellate districts including the Third and Fifth, jury voir dire is not part of the mandatory "normal record on appeal" even for trials that had a *Wheeler* or *Batson* issue. (See Cal. Rules of Court, rule 31(c)(3) [specifically excluding jury voir dire from normal record].) (It is a part of the normal record on appeal in such circumstances only in the Second Appellate District. (See 2d Dist. Loc. R. 1(1).))

Still, the Courts of Appeal will generally be receptive to Motions to Augment which seek jury voir dire, if they have sufficient information to show that a motion or objection was made at voir dire which presents a potential issue that appellate counsel must evaluate, and raise if appropriate. In other words, if trial counsel made a *Batson* or *Wheeler* motion or similar objection at any time, that can be stated in an augment motion. The Court will usually grant such a motion if it is presented with fair specificity, and order a transcript of jury voir dire.

Appellate counsel have two excellent sources to determine whether a *Batson* or *Wheeler* objection was made below: Trial counsel, and the minute orders in the Clerk's Transcript. Those sources, along with other considerations governing the appellate record in potential *Batson* cases, are discussed next.

A. Trial Counsel

Appellate counsel should always be trying to contact trial counsel before the expiration of the time for an augment motion, to hear their thoughts on the trial and any input they may have on possible record issues or AOB issues. (For helpful perspectives on this important task, see the CCAP article by Madeline McDowell and Gary Nichols, "The Relationship Between Trial and Appellate Counsel." Sometimes, trial counsel's recollections are invaluable in framing augment motions, dealing with the client, or writing the AOB. Other times, trial counsel might have little recollection or useful information. Occasionally, trial attorneys (who are often exceptionally busy and besieged with trials) might not even return a call.

Nonetheless, if appellate counsel asks a specific question (even on an answering machine or in a fax if need be) such as "Were any *Batson* or *Wheeler* objections made in jury voir dire?" they can usually get an answer from even the busiest or most reluctant trial attorney. It is essential to make this effort, because although minute orders in the Clerk's Transcript are an essential source of information, and usually will contain necessary information on defense objections that the trial court overruled, they might not always be fully reliable (especially in smaller, less automated counties).

If trial counsel states that s/he made a *Batson* or *Wheeler* objection in jury voir dire, that information alone is usually sufficient grounds on which to base a motion to augment seeking a full transcript of jury voir dire. But even then, it is still vital to scrutinize the minute orders carefully. And when seeking a long augmented transcript, which jury voir dire often can be – or,

when seeking a transcript that contains information about jurors, which is also usually found in jury voir dire – the augmentation request might receive a little more scrutiny than most others, so it may sometimes be useful to present the Court of Appeal with as much specificity as appellate counsel can offer. That might not always be a lot, since appellate counsel wasn't at the trial. But since it is impossible to evaluate or raise a *Batson* argument without a voir dire transcript, counsel should be particularly attentive to giving the Court of Appeal the type of detail the court may wish to see in augment requests for jury voir dire.

B. Clerk's Transcript Minute Orders

These documents are the most basic source of official information about a trial, and thus are as essential to scrutinize carefully as the most important record documents (e.g., jury instructions, sentencing transcripts). In most cases, *Batson* or *Wheeler* objections will be listed in the minute orders of jury voir dire. Appellate counsel can then refer specifically to the date of the minute order and its page number in the Clerk's Transcript, in citing that minute order as support for obtaining an augmented reporter's transcript with jury voir dire.

However, appellate counsel should be careful not to look solely for the words "*Batson*" or "*Wheeler*," because the Superior Court deputy clerks who write minute orders are not lawyers and don't always speak in lawyer shorthand. A jury voir dire minute order that refers generically to a defense objection or motion regarding one or more particular jurors, or any matter relating to group status (e.g., race, ethnicity, gender, etc.), or a peremptory challenge or just "challenge," or a motion to strike the venire (jury panel), could well be talking about a *Batson* or *Wheeler* motion.

Also, there are various non-*Batson* motions which would warrant seeking a reporter's transcript of jury voir dire, so appellate counsel should be looking for those when reading minute orders as well. A minute order that refers to any defense objection or motion relating to individual jurors, or to the composition of the jury panel or pool, should be scrutinized carefully for possible record augmentation. If in doubt, appellate counsel may wish to call or email the CCAP attorney assigned to the case, to discuss the options.

Appellate counsel should also make sure that they have scrutinized the minute orders at least up to the point of opening statements for possible *Batson*-related information. Sometimes, a *Batson*-type objection (or other objections in the area, such as a challenge to the method of selecting jurors) is first made as a challenge to the composition of the selected jury, occasionally even an objection to the jury after it is sworn. Or, a *Batson*-type objection made previously might be reiterated at that point.

Finally, it is important to check the selection of alternate jurors as well as the main jurors. On occasion, *Batson* cases have been won based on a defense argument regarding the selection of an alternate juror. An excellent example is *Lewis v. Lewis* (9th Cir. 2003) 321 F.3d 824, which granted federal habeas corpus to a California conviction based on a *Batson* violation as to a single alternate juror, when that alternate was one of two African-American members of the jury pool, and the other was not challenged by the prosecutor. An even more explicit example is *United States v. Harris* (6th Cir. 1999) 192 F.3d 580, which granted relief (in the form of a

Batson hearing) for *Batson* error as to two prospective alternate jurors who never sat on the trial jury. (See discussion of this case in the footnote below.) A less remarkable but still noteworthy example is *People v. Gore* (1993) 18 Cal.App.4th 692, where the trial court found a *Wheeler* objection untimely when it came during selection of the alternates, but the Court of Appeal reversed, holding that a pattern of challenging Hispanic prospective jurors permeated both selection of trial jurors and alternates and was properly made at the latter time.

C. Jury Questionnaires

If the case involved written jury questionnaires, appellate counsel who are already making a motion to augment to request a transcript of jury voir dire should consider carefully whether to request copies of the jury questionnaires (bound into a supplemental Clerk's Transcript) at the same time. Jury questionnaires contain part of the information the prosecutor, defense counsel and trial judge had at their disposal during jury voir dire, and thus are relevant (when they exist) to any *Batson* motion and potential *Batson* argument. Since it is generally easier for a Court of Appeal to process one augment motion rather than two, it is often better to request jury questionnaires along with jury voir dire, when the basis for requesting jury voir dire is a *Batson*-type objection or motion.

D. Redaction of Juror Identifying Information

A full discussion of this very complex and sometimes perplexing topic is well beyond the scope of this article. A few basic pieces of information, and perspectives on how this question relates to *Batson* appellate litigation, will be provided here.

Court reporters preparing transcripts of jury voir dire must comply with Rules of Court, rule 31.3(b), which states:

(1) The name of each trial juror or alternate sworn to hear the case must be replaced with an identifying number wherever it appears in any document. The superior court clerk must prepare and keep under seal in the case file a table correlating the jurors' names with their identifying numbers. The clerk and the reporter must use the table in preparing all transcripts or other documents.

(2) The addresses and telephone numbers of trial jurors and alternates sworn to hear the case must be deleted from all documents.

See also the Fifth District's policy on redaction of juror information on CCAP's website: http://www.capcentral.org/resources/procedure/policy_redact.aspx

Generally, this may not pose a significant problem. But, it does mean appellate counsel will usually have to evaluate and/or argue *Batson* issues with only juror identifying numbers. In most circumstances, a juror voir dire transcript of that nature will be sufficient for *Batson* issues.

However, the use of numbers can occasionally make the process of evaluating or raising a *Batson* issue more complicated. The problem becomes even more complicated in cases where

appellate counsel cannot feel confident that the right numbers are always assigned to the right prospective jurors. If that happens, then where appropriate, counsel should not hesitate to double-check with the court reporter, or even request a record settlement hearing in the most extreme cases.

In a few situations – generally, *Batson* objections addressed to cognizable groups with distinctive names (such as Hispanics) – it may be more difficult to evaluate or raise a *Batson* issue without knowing the names of the excluded and/or seated jurors.

On request and an adequate showing, appellate counsel might be able to obtain the names of prospective jurors who were not actually trial jurors. Code of Civil Procedure section 237, subdivision (a)(2), and Rules of Court, rule 31.3(c), provide that only the court's record of identifying information as to "trial jurors" is to be sealed. "Trial jurors," as defined in Code of Civil Procedure section 194, subdivision (o), is limited to "[t]hose jurors sworn to try and determine by verdict a question of fact," a definition which does not include prospective jurors who were never sworn as jurors. (It is unclear whether they would include alternates who don't serve as trial jurors, and who thus do not try or determine any questions of fact by verdict.)

However, since it is arguably within the Court of Appeal's discretion to grant or deny an augment motion in the first place, the court may consider its discretion to include the terms on which augmentation is granted, including requiring a sufficient showing that names of prospective jurors who weren't seated (as opposed to identifying numbers) are necessary for appellate counsel to evaluate and/or raise an appellate issue. In other words, appellate counsel may still need to make an extra showing of why names are necessary instead of numbers, though less of a showing than would be required for seated jurors.

Even though it may be difficult to obtain the names of seated trial jurors, it can certainly happen upon an adequately detailed showing. Appellate counsel in such a situation should be prepared in their motion to make clear the limitations of such a request, e.g., that only juror names are required, and not any other identifying information such as addresses or telephone numbers. Of course, any order granting such information will probably have significant confidentiality restrictions which appellate counsel will be expected to honor.

If appropriate, a motion for names of prospective or seated jurors may also contain its own federalization, i.e., may state that the information is necessary for adequate evaluation and review of a federal constitutional issue under *Batson* and the Fourteenth Amendment.

Most *Batson* issues can be briefed with only juror identifying numbers. Requests for transcripts of jury voir dire with names instead of numbers should generally be reserved for unusual circumstances where appellate counsel has reviewed the transcript containing only identifying numbers, and has tangible and specific reason to conclude that more is required for proper evaluation or argument of the *Batson* issue. In those unusual situations, however, appellate counsel should not hesitate to make the request as needed, to discharge the duty of obtaining an adequate record on appeal.

E. <u>The Equally Essential Element Of Carefully Reading The Appellate Record One</u>

Gets

There is no one correct way to review a jury voir dire transcript, and often, a jury voir dire transcript will be easier and faster to read than a normal trial transcript. Nevertheless, it is important for appellate counsel not to miss any relevant details relating to a *Batson* or other peremptory challenge objection. In situations with a potential *Batson*-type issue, voir dire needs to be read, not just skimmed; and, it needs to be read in detail. Extensive notetaking and/or charting the jurors is often a valuable adjunct to this process.

For example, in many *Batson* cases, appellate counsel's arguments may include comparisons among excluded jurors, or between excluded jurors and non-excluded jurors. That will require finding prospective jurors with particular characteristics whom the prosecution did not challenge; even though in many situations, no motion or objection will have been addressed to those prospective jurors (they are, after all, the ones the prosecutor did not exclude), so it may not always be easy to determine who they are. That is often easier in a single detailed reading of jury voir dire from which appellate counsel is able to obtain all relevant information, which can then be put into appellate counsel's notes for future reference during research and writing on the issue. It can often be more time-consuming and imprecise to have to go back through voir dire several times to try to find needed information.

So it may sometimes be helpful for appellate counsel to identify first the prospective jurors as to whom there was a *Batson* objection or motion, and either make notes of the characteristics of those jurors, or simply photocopy the relevant voir dire pages and keep them close at hand for reference. The characteristics of those prospective jurors might be referred to repeatedly, so counsel should usually have them close at hand from an early stage of jury voir dire review. Appellate counsel should also make an early note of the numbers or names of the seated jurors (numbers are often listed in the Clerk's Transcript), because they are an obvious point of comparison when juror comparisons are warranted.

Then, as appellate counsel is reviewing jury voir dire as to each prospective juror, s/he may wish to make notes or a chart listing the numbers or names of all prospective jurors, and the prospective juror's characteristics that seem like they might have some relation to the case or the prospective juror's attitudes relevant to the case or the judicial system. Special attention should be paid to prospective jurors – and extra special attention to seated jurors – who have one or more characteristics similar to those of the subjects of the *Batson* objections.

Obtaining this kind of information during a detailed and methodical review of a jury voir dire transcript ends up being a lot easier and more effective, than having to go through the voir dire transcript multiple times to try to find prospective jurors who have specific kinds of characteristics.

There are of course many different ways to review jury voir dire, and every appellate attorney will find the way that works best for them. The important thing is that jury voir dire should be reviewed in appropriate detail when there is a potential *Batson* issue, not merely skimmed.