Opinion Analysis: People v. Gutierrez (S224724)

The California Supreme Court's opinion *People v. Gutierrez, People v. Ramos, People v. Enriquez* (S224724, hereinafter *Gutierrez*) issued on June 1, 2017,[1] has gained more than the usual media coverage for a criminal case.[2] Long-time SCOCA commentator Gerald Uelman was reported as calling the decision "dynamite" and "a profound change."[3] In *Gutierrez*, the Court reversed a criminal conviction because it concluded that the prosecutor had excluded a prospective Hispanic juror because of her ethnicity, in violation of *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*)[4] and *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*).[5]

In reviewing a *Batson/Wheeler* issue, appellate courts are generally very deferential to the trial court's ruling, which here was the denial of defendant's *Batson/Wheeler* motion. The *Batson/Wheeler* issue was raised on appeal when Gutierrez appealed his entire criminal conviction to the Court of Appeal. The Court of Appeal opinion affirmed the trial court's denial of the *Batson/Wheeler* issue, and SCOCA granted review on this issue and reversed the court of appeal and the trial court. As I discuss below, by expanding the space in which an appellate court can decline to show deference to a trial court's ruling, *Gutierrez* represents an evolution—but not a revolution—in *Batson/Wheeler* doctrine at the California Supreme Court.

1. ***Batson/Wheeler* Law and Procedure**

In selecting a jury, attorneys can exclude prospective jurors in two ways. The first way is through a challenge for cause, which is a motion that the trial court grants or denies. For-cause challenges must be based on specific reasons, which are usually related to the potential bias of the prospective juror. The fact that a prospective juror is related to the defendant would be a classic example. But attorneys can also exclude prospective jurors through *peremptory* challenges. These do not have to be granted by the trial court, nor is the attorney required to provide a reason in exercising a peremptory challenge. The classic example is when the attorney excuses a prospective juror simply because the attorney did not like "the cut of his jib" or his haircut. Such peremptory challenges are legally arbitrary in the sense

that the attorney does not have to provide a reason to the trial court. But, as a practical matter, attorneys have their reasons in excluding whom they do. They want to end up with jurors who are the most sympathetic to—or are, at least, less hostile towards—the party they represent.

An attorney can therefore exercise a peremptory challenge for any reason at all or for no reason at all, which amounts to the same thing legally. But an attorney cannot exercise a peremptory challenge for a *constitutionally improper* reason, that is to say, because of the prospective juror's race, sex, ethnicity, religion, or age. This is the essence of *Batson*/*Wheeler* doctrine. The procedure for a *Batson*/*Wheeler* motion produces a brief trial-within-a-trial. I will use the example of a *Batson*/*Wheeler* motion brought against the peremptory challenges of a prosecutor in a criminal case (as was the case in *Gutierrez*), but it should be remembered that *Batson*/*Wheeler* applies to both the prosecution and the defense and to civil as well as criminal jury trials.

After the prosecutor exercises a peremptory challenge against a juror, the defense attorney makes a *Batson*/*Wheeler* objection. The defense attorney expresses the facts that support the inference that the prosecutor has exercised a peremptory challenge based on race, sex, etc. Generally, this will be in the form of the assertion that the prosecutor has excused X number of prospective jurors of a certain group. In *Gutierrez*, the prosecutor had exercised 10 of his 16 peremptory challenges against individuals identified as Hispanic, either by appearance or surname.[6] This is the so-called first stage of a *Batson*/*Wheeler* motion, in which the defense must demonstrate a prima facie case by showing that the totality of the relevant facts give rise to an inference of discriminatory purpose by the prosecutor. At this stage, the trial court can either deny the motion, which can be subsequently raised on appeal as a so-called "first-stage" *Batson*/*Wheeler* issue. Or the trial court can, as in *Gutierrez*, grant that the defense has met the threshold for demonstrating a prima facie case, which has the consequence that the prosecutor is required to provide a clear and reasonably specific explanation of the legitimate reasons for exercising the challenges.[7]

The prosecutor is then required to state his or her reasons for making the peremptory challenges in question. Unless the prosecutor expressly admits a

forbidden discriminatory purpose in the stated reasons (which practically never happens), the trial court must further proceed to evaluate the reasons given by the prosecutor as legitimate or pretextual. This is the so-called "third-stage" *Batson*/*Wheeler* issue that was on review in *Gutierrez*. The trial court in *Gutierrez* accepted the prosecutor's non-racially-based reasons for the exclusions, described below.

2. ***People v. Gutierrez***

In *Gutierrez*, the dismissed prospective juror upon which the California Supreme Court based its *Batson*/*Wheeler* reversal was identified as Prospective Juror No. 2723471. She was a teacher from the City of Wasco, divorced, and without children. Her former husband was a correctional officer and she had other relatives in law enforcement positions, including an uncle who worked for the California Highway Patrol. Neither she nor anyone close to her had any connections to gangs.[8]

During voir dire, the prosecutor asked No. 2723471 whether there were gangs that were active in the Wasco area, to which she replied "No." The prosecutor pointed to this as the reason he exercised the peremptory challenge against her, stating that "she's from Wasco and she said that she's not aware of any gang activity going on in Wasco, and I am unsatisfied by some of her other answers as to how she would respond when she hears that Gabriel Trevino is from a criminal street gang, a subset of the Surenos out of Wasco."[9]

Gabriel Trevino was a gang member from the same gang as defendant Gutierrez (the Surenos), who was going to testify for the prosecution under an immunity agreement. However, even with that additional bit of information, the connection is unclear between what No. 2723471 stated during voir dire (that she was unaware of gang activity in her hometown of Wasco) and the prosecutor's reason for excusing her.[10] On appeal, the Attorney General contended that, because prosecution witness Trevino was an important witness in the case who would testify about his own gang affiliation and criminal activity in Wasco, the prosecutor could have thought the potential juror's unawareness of gang activity in Wasco could cause this potential juror to disbelieve or be skeptical of Travino when he testified that there was in fact gang activity in Wasco.[11]

The Attorney General's argument here does draw a connection between what the prospective juror said and why the prosecutor might find that what she said supports an inference that she would be biased against a prosecution witness. But the California Supreme Court concluded—quite reasonably in my view—that "such a deduction is tenuous."[12] The Court went on to observe that the more natural inference from the prosecutor's stated reason for the exclusion would be the following. If the prosecutor genuinely believed gang activity was rampant in Wasco, the prosecutor would have thought that this prospective juror must have been either untruthful or uninformed in denying her awareness of Wasco gang activity.[13] This would be a comprehensible and valid non-race-based reason for a prosecutor to exercise a peremptory challenge.

But the prosecutor did not give this reason. And as the Court noted, quoting from a United States Supreme Court decision, "[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."[14] The Court went on to state: "Some neutral reasons for a challenge are sufficiently self-evident, if honestly held, such that they require little additional explication. . . . Yet when it is not self-evident why an advocate should harbor a concern, the question of whether a neutral explanation is genuine and made in good faith becomes more pressing."[15]

The Court then turned to the role of the trial court in making an adequate record when, as in this case, the reason behind the prosecutor's stated reason for exercising the peremptory challenge was unclear. Under prior California Supreme Court cases, the trial court is required to make "a sincere and reasoned attempt to evaluate the prosecutor's explanation." The Court explained that while the trial court here may have made a sincere attempt, the trial court nonetheless failed to follow up and clarify the prosecutor's none-too-clearly-stated reason for the exclusion. The Court therefore found that the trial court had failed to make a *reasoned* attempt to determine whether the prosecutor's stated justification was credible.[16]

Because the trial court had fallen short of this required standard, the appellate court was not obligated to show its usual deference to the trial court's ruling. The Court went on to find the trial court's ruling against the *Batson*/*Wheeler* unreasonable in

light of the record of the voir dire proceeding. Because a violation of *Batson*/*Wheeler* is a "structural" error, no additional showing of prejudice is required. In other words, a violation of *Batson*/*Wheeler* can never be deemed "harmless error."[17] The trial verdicts against defendant Gutierrez and all his codefendants are reversed and the prosecution must seek a new trial against them.

3. ***Batson*/*Wheeler*** **Doctrine at the California Supreme Court**

The *Gutierrez* opinion was authored by Justice Cuéllar, and the opinion's unanimity is a testament to its balanced approach, in what is often a contentious area of the law. But I would like to add some observations about this opinion regarding the positions of Justice Liu, who has for several years been critical about the Court's approach to *Batson*/*Wheeler* issues, and who wrote a concurring opinion in this case in which he stated that he would have found additional *Batson*/*Wheeler* violations for other dismissed prospective jurors here.

Justice Liu has been critical as to the amount of scrutiny the trial court is required, under existing case law, to bring to bear in evaluating the prosecutor's professed reasons at the third stage of a *Batson*/*Wheeler* motion. The standard has been: "When the prosecutor's stated reasons are both inherently plausible and supported by the record, the trial court need not question the prosecutor or make detailed findings. But when the prosecutor's stated reasons are either unsupported by the record, inherently implausible, or both, more is required of the trial court than a global finding that the reason appears sufficient."[18] The last reversal for *Batson*/*Wheeler* error made by the Court involved a case in which the prosecutor's professed reason for excusing the prospective juror was unsupported by the record.[19]

In a previous case, Justice Liu advocated that the California Supreme Court impose on the trial courts a more stringent requirement for evaluating all third-stage *Batson*/*Wheeler* motions—in effect requiring that a trial court in all cases make explicit findings pertaining to the prosecutor's stated reasons.[20] The Court has been reluctant to impose such an across-the-board duty, probably because requiring the trial court to make detailed findings as to all reasons expressed during a *Batson*/*Wheeler* hearing could have the consequence of greatly expanding the "trial within a trial" of the *Batson*/*Wheeler* hearing. The Court in the present case does not

call for detailed findings in all cases, but the reversal here does turn on the trial court's failure to interrogate and clarify the prosecutor's reason behind his stated reason. The Court, while not expressly imposing new obligations on the trial courts, is nonetheless reminding the trial courts to focus on their existing obligation to provide a "sincere and reasoned attempt" to evaluate the prosecutor's explanations.

4. **Comparative Juror Analysis**

Another significant issue addressed in the *Gutierrez* opinion is comparative juror analysis. Comparative juror analysis refers to arguments that compare the excluded prospective jurors with prospective jurors who were *not* excused. The gist of a comparative juror argument is this: if the prosecutor was so concerned about a certain trait as a reason for excusing prospective jurors, then why did he only focus on that trait when it came to Hispanics (or women or whatever the basis of the *Batson*/*Wheeler* motion was)? For example, if a prosecutor gives youth as a reason for excusing certain Hispanic jurors, then the defense might point out that the prosecutor had not excused any young white jurors. The implication, of course, is that this shows that the prosecutor's professed reason is pretextual, and should be rejected by the trial court.

Comparative juror analysis thus seeks to compare "similarly situated" prospective jurors. But the problem is that jurors are rarely completely the same in all traits except for race or gender. The prosecutor might plausibly be tolerant of an unappealing-to-the-prosecution trait (such as youth) when it is combined with an appealing-to-the-prosecution trait (such as family members in law enforcement) but not tolerant of the same trait when combined with another unappealing-to-the-prosecution trait (such as being a member of a prisoners' rights advocacy group).

Because of the large number of possibly relevant traits possessed by each prospective juror, comparative juror analysis is best conducted at trial during the hearing on the *Batson*/*Wheeler* motion, where each side can discuss the possibly relevant traits, and make a record of the reasons concerning them. When comparative juror analysis arguments are raised by the defense for the first time on appeal, it is much more difficult for the appellate court to assess the strength of such arguments because the prosecutor's reasons for favoring or disfavoring certain traits in certain jurors have not been discussed in the record.

Nonetheless, despite the problems associated with raising comparative juror analysis arguments for the first time on appeal for third-stage *Batson*/*Wheeler* arguments, the United States Supreme Court has held that such arguments are not per se excluded on appeal.[21] The California Supreme Court has concurred.[22] The Court of Appeal declined to address the comparative juror analysis arguments raised for the first time on appeal by Gutierrez. The California Supreme Court found that this was error.[23]

5. **Beyond Traditional Conceptions of Discrimination**

Finally, I want to make a few comments concerning Justice Liu's brief but suggestive concluding remarks to his dissent in this case. He states that the finding of a *Batson*/*Wheeler* violation should not "brand the prosecutor a liar or a bigot" and that "[s]uch loaded terms obscure the systematic values that the constitutional prohibition on racial discrimination in jury selection is designed to serve."[24] This seems an attempt to make a finding of a *Batson*/*Wheeler* violation more palatable to appellate courts by removing the traditional stigma associated with such a violation.

Justice Liu's comments seem to be based on a concept of unconscious racial bias. The idea is that while people may not be consciously or intentionally racist in their actions, they might nonetheless fail to sufficiently interrogate their responses to see whether unconscious racism has played a role. In the case of jury selection, a prosecutor might realize: I believed that I objected to this prospective juror because of a non-race-based quality (her youth), not because of her race, but I may not have appreciated how I was more likely to see youth as a negative quality in persons of a certain racial group.

There is a limit, however, to how far *Wheeler/Batson* violations can be cast in such a model of unconscious racism. If the professed non-race-based trait is indeed present in the struck prospective juror and the trait is indeed connected to a plausible reason why a prosecutor could disfavor such a prospective juror (something not evident in *Gutierrez*) then the prosecutor would not be violating *Batson*/*Wheeler*, even if it could somehow be shown that the prosecutor was influenced by unconscious bias.

Significantly, neither the California nor the United States Supreme Court has yet

reached the issue of "mixed motive" in the exercise of a peremptory challenge. A "mixed motive" issue involves a case in which it could somehow be shown that the prosecutor was motivated *both* by an impermissible *and* a permissible reason in exercising the peremptory challenge. The so-far unanswered legal question is whether the existence of any trace of animus (no matter how slight) would completely taint the peremptory challenge such that the existence of any unbiased motivation (no matter how substantial) would be deemed irrelevant. Alternatively, the courts could treat the issue of mixed motive through harmless error analysis, in which a small amount of biased motivation would be deemed harmless when weighed against a substantial unbiased motivation. Although contemporary discourse on race, gender, and ethnicity seeks to overcome some of the simple dichotomies of the past, *Batson*/*Wheeler* law remains starkly binary in that it is focused on whether a peremptory strike was motivated entirely by bias or not. Whether *Batson*/*Wheeler* doctrine could or should move in another direction remains an issue for future decisions.

David Aram Kaiser is a Senior Research Fellow with the California Constitution Center. He was a Judicial Staff Attorney at the California Supreme Court of California for 11 years, but the views expressed here are solely those of the author. This article does not purport to reflect the views of the California Supreme Court or any of its justices, and is based entirely on information available to the public.

[1] *People v. Gutierrez* (2017).

[2] http://www.santacruzsentinel.com/general-news/20170602/california-court-judges-must-evaluate-juror-bias-claims.

[3] http://www.latimes.com/local/lanow/la-me-ln-jury-bias-court-20170601-story.html.

[4] *People v. Wheeler* (1978).

[5] *Batson v. Kentucky* (1986).

[6] *Gutierrez* at 5.

[7] Id. at 8.

[8] *Gutierrez* at 10.

[9] *Gutierrez* at 11.

[10] *Gutierrez* at 11.

[11] Id. at 21-22.

[12] *Gutierrez* at 22.

[13] Ibid.

[14] *Gutierrez* at 22.

[15] Id. at 24.

[16] *Gutierrez* at 26.

[17] Id. at 26-27

[18] *People v. Silva* (2001) at 385.

[19] Ibid.

[20] See *People v. Williams* (2013), dissent. opn. of Werdegar, J., 56 Cal.4th 630, 699, dissent opn. of Liu, J. at 709-713.

[21] *Gutierrez* at 27, citing *Miller-El v. Dretke* (2005) at 241.

[22] *Gutierrez* at 29, citing *People v. Lenix* (2008) at 622.

[23] *Gutierrez* at 29.

[24] *Gutierrez*, concur. Opn. Of Liu, J. at 29.