2008

Inside the Box - When Exercising Peremptory Challenges, Attorneys Should Keep in Mind the Three-Step Framework of Batson/Wheeler

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When exercising peremptory challenges, attorneys should keep in mind the three-step framework of *Batson/Wheeler*

**PEREMPTORY** challenges are an important tool at trial, enhancing confidence in the jury’s fairness by permitting parties to remove jurors in whom they perceive bias or hostility even if that perception cannot be objectively verified. But as case law increasingly demonstrates, peremptories must be used with caution, because they may draw objections that call into question the integrity of the party seeking to exercise them.

Peremptory challenges are “used precisely when there is no identifiable basis on which to challenge a particular juror for cause” and “may be wielded in a highly subjective and seemingly arbitrary fashion, based upon mere impressions and hunches.” The latitude accorded peremptories is essential to their central functions: “to enable a litigant to remove a certain number of potential jurors who are not challengeable for cause, but in whom the litigant perceives bias or hostility,” “to reassure litigants—particularly criminal defendants—of the fairness of the jury that will decide their case,” and to “enhance the right to challenge jurors for cause because they allow litigants to strike prospective jurors who may have become antagonized by probing questions during voir dire.” With this latitude, however, comes the risk that peremptories may be exercised based on impermissible criteria such as race.

The case law that has developed around this risk has established a three-step framework for addressing challenges to the exercise of peremptories based on claims of discriminatory intent. These challenges are known, after the seminal cases, as *Batson/Wheeler* challenges. Within this framework, to effectively support (or oppose) such challenges, counsel must understand the method of jury selection used by the court and must be prepared to assist the court in developing the necessary record.

In 1965, in the midst of the civil rights movement, the U.S. Supreme Court in *Swain v. Alabama* first recognized that the exercise of peremptories by prosecutors deliberately
to exclude potential jurors “on account of race” violated the equal protection clause.\textsuperscript{4} The Court, however, recognized a presumption that prosecutors properly exercise peremptory challenges—and placed on defendants the burden of proving discriminatory intent. Thus defendants were required to show that a prosecutor intentionally used challenges to deny African American potential jurors “the same right and opportunity to participate in the administration of justice enjoyed by the white population” for “reasons wholly unrelated to the outcome of the particular case on trial.”\textsuperscript{5} Applying these standards in\textit{Swain}, the Court found no equal protection violation despite the prosecutor’s striking of all six African American potential jurors and despite evidence that no African American had served on a criminal petit jury in Alabama since approximately 1950. A number of lower courts interpreted\textit{Swain} as requiring defendants to present “proof of repeated striking of blacks over a number of cases,” a “crippling” burden that left prosecutors’ peremptory challenges “largely immune from constitutional scrutiny.”\textsuperscript{6}

The California Supreme Court rejected this approach in 1978, holding in\textit{People v. Wheeler} that under the California Constitution, the presumption that peremptories are properly exercised could be overcome with a prima facie showing based solely on the pattern of peremptories in a given case. Once this showing was made, the burden would shift to the other party to “show that the peremptory challenges in question were not predicated on group bias alone.”\textsuperscript{7} In 1986, the U.S. Supreme Court followed suit, rejecting\textit{Swain’s} approach in\textit{Batson v. Kentucky}. In\textit{Batson}, the Court reiterated that while a defendant has no right to a jury composed in whole or in part by members of his or her race, the defendant unequivocally has the right “to be tried by a jury whose members are selected pursuant to nondiscriminatory criteria.”\textsuperscript{8} The Court held that the required initial prima facie showing of discriminatory intent could be made based “solely on evidence concerning the prosecutor’s exercise of peremptory challenges at the defendant’s trial.”\textsuperscript{9} Further, the Court adopted what has developed into the now familiar three-step process for challenging peremptory strikes:

\textbf{Jury Selection Methods}

In California, the exercise of peremptories is governed by statute, which provides that “peremptory challenges shall be taken or passed by the sides alternately,” that “each party shall be entitled to have the panel full before exercising any peremptory challenge,” and that the “number of peremptory challenges remaining with a side shall not be diminished by any passing of a peremptory challenge.”\textsuperscript{19} In federal court, there is no similar governing statute and the only rule addressing peremptory challenges, Federal Rule of Criminal Procedure 24(b), “does not prescribe any method for the exercise of those challenges. Rather, ‘trial courts retain a broad discretion to determine the way peremptory challenges will be exercised.’”\textsuperscript{20} As a result, federal courts employ a range of differing jury selection methods.

California’s statute, codified at Code of Civil Procedure Section 231(d), makes it most likely that a California court will use some variant of the “jury box” method. This involves 12 prospective jurors being seated in the jury box and subjected to voir dire. In this method’s purest form, when a party exercises a challenge, whether for cause or a peremptory, a new juror is drawn at random from the remaining venire to be seated, questioned, and subject to challenge.\textsuperscript{21} The parties thus know the precise composition of the potential jury panel at the time they elect whether or not to exercise peremptory challenges, but they do not know which juror from the venire will replace a challenged juror. The focus when exercising peremptories under this system, therefore, is primarily on the individual juror in context with those in the box at the time, as opposed to the potential overall makeup of the jury panel, which cannot be known at the time an individual challenge is exercised.\textsuperscript{22}

When exercising peremptories under the jury box method, parties must be sure to understand the effect of passing. The Ninth Circuit has stated that a court may not treat a pass as a waiver of the passed peremptory but may treat a pass as a waiver of the subsequent ability to reach back and exercise a challenge against a juror who was in the jury box at the time of the pass.\textsuperscript{23} A variant on the jury box method seats and conducts voir dire on some additional number of jurors (most commonly 6) outside the jury box at the same time 12 are seated in the box. This typically saves time by permitting replacements for jurors challenged within the box to be drawn from a pool of prospective jurors who have already been subjected to voir dire.

The “struck jury” method is another common form of jury selection. Under this system, voir dire is conducted on an entire venire. Thereafter:

\textit{[A]n initial panel is drawn by lot from those members of the array who have not been challenged and excused for cause; the size of this initial panel equals the total of the number of petit jurors who will hear the case (twelve in a federal criminal case), plus the combined number of peremptories allowed to both sides (normally sixteen in federal felony trials, Fed. R. Crim. P. 24(b)). Counsel for each side then exercise their peremptory challenges, usually on an alternating basis, against the initial panel until they exhaust their allotted number and are left with a petit jury of twelve.}\textsuperscript{25}

A variant of the struck jury system is the “blind strike” method. Under this method, rather than alternating peremptories against
MCLE Test No. 174

The Los Angeles County Bar Association certifies that this activity has been approved for Minimum Continuing Legal Education elimination of bias credit by the State Bar of California in the amount of 1 hour.

1. A prosecutor’s exercise of peremptory challenges with the intent of excluding potential jurors on the basis of race violates the equal protection clause of the U.S. Constitution.
   - True.
   - False.

2. A prima facie showing of discriminatory intent in the exercise of peremptory challenges may be made based solely on evidence concerning a prosecutor’s exercise of peremptories in a particular case.
   - True.
   - False.

3. Only a defendant of the same race as the juror may oppose a peremptory challenge directed at that juror on the grounds that it is premised on race.
   - True.
   - False.

4. Exercises of peremptory challenges by criminal defense attorneys are subject to challenge under the equal protection analysis set forth in Batson.
   - True.
   - False.

5. Batson and Wheeler only apply to criminal cases.
   - True.
   - False.

6. In California state and federal courts, peremptory challenges may not be exercised on the basis of gender.
   - True.
   - False.

7. In California state courts, peremptory challenges may not be exercised based on the sexual orientation of a potential juror.
   - True.
   - False.

8. When using the “jury box” method of jury selection, a federal district court in the Ninth Circuit may treat the pass of a peremptory challenge as waiving the subsequent ability to reach back and exercise a peremptory challenge against a juror seated in the box at the time of the pass.
   - True.
   - False.

9. The “blind strike” method of jury selection is invalid in federal court because it permits one party to lose a peremptory challenge by exercising it against a juror who that party does not know has also been the subject of a peremptory challenge by another party.
   - True.
   - False.

10. In the Ninth Circuit, under a “struck jury” system of jury selection, sequentially numbering potential jurors so that the parties know who will be the next to enter the box may result in the pass of a peremptory challenge being treated as the exercise of a peremptory challenge subject to challenge under Batson.
    - True.
    - False.

11. Because jury selection is supposed to be color blind, it is always improper to ask the court to note the race of potential jurors for the record.
    - True.
    - False.

12. Once a party raises a Batson/Wheeler challenge to the exercise of a peremptory, the court has the sole responsibility to ensure that the record is sufficient to preserve the point for review.
    - True.
    - False.

13. In federal and state courts in California, “comparative juror analysis” is an important tool in assessing Batson/Wheeler challenges that should be used by the appellate court even if it was not used by the trial court.
    - True.
    - False.

14. Some California state courts have questioned whether comparative juror analysis may be used in assessing whether a prima facie case of discriminatory intent has been made at the first step of the Batson/Wheeler analysis.
    - True.
    - False.

15. In California state courts, absent a subsequent renewed objection, a trial court’s ruling regarding a Batson/Wheeler challenge is reviewed based on the record as it stands at the time the ruling is made.
    - True.
    - False.

16. Demonstrating a prima facie case of discriminatory intent is impossible if a party has used a peremptory to strike only one member of a particular group.
    - True.
    - False.

17. In assessing a Batson/Wheeler challenge premised on race, only the race of the jurors against whom the party has exercised peremptories is relevant.
    - True.
    - False.

18. At the second step of the Batson/Wheeler analysis of a claim of racial discrimination, the court may assess the persuasiveness and plausibility of a proffered rationale that is facially race-neutral.
    - True.
    - False.

19. If a court skips directly to the third step of the Batson/Wheeler analysis, it moots the preliminary issue of whether the party asserting the Batson/Wheeler challenge has made a prima facie showing.
    - True.
    - False.

20. Exercising peremptories to remove all members of a particular race from a pool of potential jurors will always demonstrate racial discrimination in jury selection.
    - True.
    - False.

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20. □ True □ False
the initial panel, each party exercises all the peremptories that party chooses to exercise, in writing, at the same time, and all the parties then present their lists of peremptory challenges to the court. This means that contending parties may exercise a peremptory challenge against the same juror. Courts have rejected claims that this results in the denial of a party’s right to exercise a peremptory, and they have repeatedly upheld use of the blind strike method of jury selection. In contrast to the jury box method, the struck jury method “emphasizes the overall excluded this juror. The defense sought to challenge the waiver, but, after a “short recess to research case law on whether waiver of a peremptory strike could constitute a Batson violation,” the district court concluded “that the failure to use a peremptory strike, without other evidence of discriminatory intent, cannot constitute a prima facie showing.”

In determining whether a party has made a prima facie case of discrimination, the Court in Batson provided two examples of “relevant circumstances” courts should consider: “a ‘pattern’ of strikes against black jurors included in the particular venire,” and “the prosecutor’s questions and statements during voir dire examination and in exercising his challenges.”

Voir dire questions and statements must be examined for substance and consistency. Obviously, statements or questions directly demonstrating group bias can establish a prima facie case of discrimination and likely will go a long way toward satisfying the burden of proving actual discriminatory intent.

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The court cited two primary justifications for its holding. First, while acknowledging that the struck jury method has been upheld as constitutionally valid, it noted that courts and commentators had criticized this system as “allowing the racial engineering of juries.”

Second, it cited the Supreme Court’s decision in Miller-El v. Dretke, which it read as holding “that jury selection procedures may give rise to an inference of discriminatory intent even though the prosecutor is not actively striking potential jurors.”

To date, no other circuit has followed Esparza-Garza, and its holding is directly contrary to that of two state courts. In the Ninth Circuit, however, its holding mandates that under a struck jury system in which the jurors are numbered for selection, a waiver of a peremptory challenge must be treated as the exercise of a peremptory for the purposes of Batson analysis. Indeed, given the court’s reasoning, its holding may extend to any jury selection method in which the parties know the identities of the jurors who will be seated in the absence of the exercise of a peremptory. This would include the jury box variant that provides the parties with notice as to an identified subset of jurors (those seated outside the jury box) who will be excluded if peremptories are passed.

Making the Record

The California Supreme Court noted in Wheeler that the ordinary record on appeal does not contain facts necessary to assess challenges to peremptories on the basis of group bias. The court observed, “Not surprisingly, the record is unclear as to the exact number of blacks struck from the jury by the prosecutor: veniremen are not required to announce their race, religion, or ethnic origin when they enter the box, and these matters are not ordinarily explored on voir dire. The reason, of course, is that the courts of California are—or should be—blind to all such distinctions among our citizens.”

This blindness to distinctions ends, however, when a group bias challenge is asserted, at which point “it is incumbent upon counsel, however delicate the matter, to make a record sufficient to preserve the point for review.” The obligation to make a sufficient record to support or defend against a claim of group bias applies at all three steps of the Batson/Wheeler inquiry.

In determining whether a party has made a prima facie case of discrimination, the Court in Batson provided two examples of “relevant circumstances” courts should consider: “a ‘pattern’ of strikes against black jurors included in the particular venire,” and “the prosecutor’s questions and statements during voir dire examination and in exercising his challenges.”

Voir dire questions and statements must be examined for substance and consistency. Obviously, statements or questions directly demonstrating group bias can establish a prima facie case of discrimination and likely will go a long way toward satisfying the burden of proving actual discriminatory intent. But even absent facially discriminatory state-
ative juror analysis is appropriately used in purportedly nonracial basis for dismissing variance reflects an attempt to generate a minority and nonminority jurors. A significant differences between the questions asked of statements or questions, a court can engage in permutations or questions, a court can engage in "comparative juror analysis" to identify differences between the questions asked of minority and nonminority jurors. A significant difference may support the inference that the variance reflects an attempt to generate a purportedly nonracial basis for dismissing jurors based on group bias.  

The Ninth Circuit has held that comparative juror analysis is appropriately used in assessing a prima facie case; that it is "an important tool that courts should use on appeal" even if it was not used by the trial court; and that it requires examination of the entire voir dire, prior to and after the exercise of the challenged peremptory, to permit a meaningful comparison between what was asked of jurors belonging to varying groups. Both in making and defending Batson/Wheeler challenges, therefore, parties will need to make sure the record reflects the group membership not only of struck jurors but also of any jurors to whom the party wants to point for comparison of voir dire questions and statements, whether those questions and statements occurred before or after the challenged peremptory.

Demonstrating a prima facie case does not require a showing that a party struck more than one member of a particular group. Nevertheless, a recent Third Circuit decision suggests the crucial importance of developing the record regarding two different measures relating to the pattern of strikes: the "strike rate," which is "computed by comparing the number of peremptory strikes the prosecutor used to remove black potential jurors with the prosecutor's total number of peremptory strikes exercised," and the "exclusion rate," which is "calculated by comparing the percentage of exercised challenges used against black potential jurors with the percentage of black potential jurors known to be in the venire."  

The case, Abu-Jamal v. Horn, involved the highly publicized death penalty conviction of a black man for the murder of a white Philadelphia policeman. The record revealed the strike rate, which was 66.67 percent, resulting from the prosecution exercising 10 out of 15 peremptories against black jurors. But the record contained no "factual finding at any level of adjudication, nor evidence from which to determine the racial composition or total number of the entire venire—facts that would permit the computation of the exclusion rate and would provide important contextual markers to evaluate the strike rate."  

The court found this failing fatal to the defendant's effort to challenge the state court's finding of no prima facie case under Batson: "Without this evidence, we are unable to determine whether there is a disparity between the percentage of peremptory strikes exercised to remove black venirepersons and the percentage of black jurors in the venire." This holding emphasizes the importance of developing a record regarding not only the group identity of the jurors against whom peremptories were exercised but also the numbers of group members in the venire as a whole. This includes, under the jury box method, not only those jurors against whom peremptories could have been but were not exercised but also those members of the venire who did not even make it to the jury box.

Once a prima facie case is established, the second Batson/Wheeler step requires the party seeking to exercise the peremptory to provide a race-neutral reason for exclusion. At this second stage, so long as the proffered rationale is facially race-neutral, a court can evaluate neither its persuasiveness nor its plausibility. But a court is not without the ability to assess the facial credibility of the proffered reason, and, in this regard, development of the record is crucial. Many proffered race-neutral reasons depend on physical characteristics or physical actions that will not be apparent from the transcript of voir dire. Take for example the rationales proffered for the striking of the two jurors at issue in Parkett v. Elen—namely, one juror's long, curly hair, and both jurors' facial hair. Whether challenging or supporting these rationales, a court finding whether or not the jurors at issue actually displayed these features would be critical to evaluating whether a credible, facially race-neutral rationale had been proffered.

Similarly, one of the facially race-neutral rationales proffered for exercise of a peremptory in the Supreme Court's recent decision in Snyder v. Louisiana was the statement that a juror "looked very nervous to me throughout the questioning." The record did not contain any finding by the court regarding the juror's demeanor, so the Court refused to "presume that the trial judge credited the prosecutor's assertion that [the juror] was nervous" and declined to defer to the trial judge's denial of the Batson challenge.

The third step of the Batson/Wheeler analysis is the determination whether the party acted with actual discriminatory intent. Courts occasionally skip directly to this third step without making a finding whether a prima facie case has been established, either granting or denying a Batson/Wheeler challenge on a determination that a proffered race-neutral reason either does or does not represent the actual reason the peremptory is being exercised. The law is clear that when this happens, "the preliminary issue of whether the defendant had made a prima facie showing becomes moot." Nevertheless,
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a party cannot neglect to develop the record on points relevant to establishing a prima facie case. To the contrary, developing the record regarding these points may provide the best evidence for supporting or challenging the trial court's determination. Particularly important is developing a record sufficient to support a comparative juror analysis regarding selective questioning of jurors and selective striking of jurors on the basis of the proffered race-neutral rationale. This may provide the best means of demonstrating that a proffered race-neutral rationale is not related to the facts and issues of the case to be tried and rests instead on misplaced assumptions that actually demonstrate group bias.

For example, in United States v. Omoruyi, a federal prosecutor used peremptory challenges to strike two single, unmarried, female prospective jurors. The defendant challenged the second peremptory, a challenge against a black woman, asserting that it was improperly exercised on the basis of race. In his defense to this claim, the prosecutor asserted that he had removed both women not because of their race but because they were single and would be attracted to the defendant, who was, in the prosecutor's opinion, an attractive young man. The district court allowed the removal of the two women jurors. The Ninth Circuit reversed, finding that the exercise of both peremptory challenges was improperly based on gender, relying in part on a record demonstrating that the prosecutor had not exercised similar challenges against single, unmarried, male prospective jurors.

In like manner, a Massachusetts appellate court found that in prosecuting a defendant for plying teenage girls with alcohol and drugs in order to molest them, defense counsel was properly precluded from peremptorily striking two women over 60 years of age when the proffered rationale for striking them—that they were too old—"amounted to no more than a pretext and that defendant's real reason for the challenges was to get as many women off the jury as he could." This finding was based in part on the defendant's initial explanation for striking eight of the nine female jurors drawn from the venire (including the two over 60), which was that "women with young children would be dangerous to the defendant in a case involving molestation of children."

Of course, not all comparative juror analysis will result in a finding that strikes are improper, even when they result in the removal of all members of a particular group from the jury. For example, a 2001 Seventh Circuit decision addressed an employer's peremptory strikes of all three women in the jury pool in a sexual harassment trial. The employer cited as reasons for the strikes one
woman’s unemployment, another’s participation in a lawsuit, and another’s employment with an insurance company and equivocal answers about the level of her education. Also, the employer objected to all three on the basis of their limited work experience. The plaintiff argued that these reasons were pretexts and noted in support that several of the empaneled male jurors had less formal education than the three female jurors. The court held this insufficient to demonstrate discrimination under a comparative juror analysis, explaining that when “a party gives multiple reasons for striking a juror, it is not enough for the other side to assert that the empaneled juror shares one attribute with the struck juror.”

To avoid and defend against claims that peremptories are being exercised on the basis of group bias, counsel should take pains to ensure that their voir dire questions and their exercises of peremptories are used consistently on the basis of valid rationales tied to the facts and issues to be presented in the case at hand. They should also be prepared to explain these rationales and develop a record that will support them under challenge by the court. With this approach, peremptory challenges can continue to serve their intended purpose of ensuring the confidence of parties and the public in the ability of the jury ultimately selected to serve as a fair and impartial trier of fact.

1 United States v. Annigoni, 96 F. 3d 1132, 1144 (9th Cir. 1996) (en banc).
2 Id. at 1137.
5 Id. at 224.
6 Batson, 476 U.S. at 92.
7 Wheeler, 22 Cal. 3d at 280-82, 283-87.
8 Batson, 476 U.S. at 85.
9 Id. at 96.
18 CODE CIV. PROC. §231.5, added by 2000 Cal. Stat. ch. 43, §3 (A.B. 2418). Section 1 of the enacting statute states that it reflects the intent of the legislature to codify the result of People v. Garcia.
19 CODE CIV. PROC. §231(d).
21 See United States v. Espana-Gonzalez, 422 F. 3d 897, 899 n.3 (9th Cir. 2005) (describing jury box method).
22 See United States v. Blevins, 466 F. 2d 796, 798 (2d Cir. 1972) ("The 'jury box' system tends to focus the parties' attention on one member of the venire at a time,

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as he or she is seated in the box, and prompts the parties to ask, “Is this juror acceptable?”). 31United States v. Turner, 538 F. 2d 515, 538 (9th Cir. 1977) (“We believe that such a forced waiver is an undue restriction on the exercise of peremptory challenges.”); but see United States v. Pimentel, 634 F. 2d 538, 540-41 (9th Cir. 1981) (characterizing discussion of forced waiver in Turner as dicta).

32 Turner, 538 F. 2d at 538 (“Our holding does not prevent a district judge from forbidding a challenge to any juror who was a member of the panel at the time the jury was accepted.”); see also Snyder v. Louisiana, 128 S. Ct. 1203, 1207 (2008) (discussing Louisiana law under which parties were permitted to exercise “backstrikes” against jurors they had initially accepted).

33 Blouin, 666 F. 2d at 796-97; see also United States v. Richls, 802 F. 2d 731, 733-37 (4th Cir. 1986) (discussing methodology and history of struck jury system).

34 See, e.g., United States v. Bermudez, 529 F. 3d 158, 164-65 (2d Cir. 2008) (joining “all five circuits that have considered similar challenges to the blind strike method” in upholding the method “as constitutional and consistent with Rulc 24(b)’); United States v. Warren, 25 F. 3d 890, 894 (9th Cir. 1994).

35 Blouin, 666 F. 2d at 798.
36 Id.
37 See id. at 798 n.3.
38 See United States v. Harper, 33 F. 3d 1143, 1145-46 (9th Cir. 1994). The Fourth Circuit’s holding in Ricks suggests that this method of selecting jurors from the remaining array may be required if the blind strike method is used or if the initial array is sufficiently large that “more than twelve names will remain” even if both sides exercise all their peremptory challenges. See Ricks, 802 F. 2d at 733-34, 736-37. But see United States v. Patterson, 91 F. Supp. 2d 9-12-13 (N.D. Ill. 1996) (rejecting defendant’s claim that random shuffling of remaining jurors after exercise of peremptories on oversized array was error when defendants were advised in advance that this would occur).

39 United States v. Esparza-Garza, 422 F. 3d 897, 898-904 (9th Cir. 2005).
40 Id. at 899-900.
41 Id. at 902.
42 Id. at 902-03.
44 Esparza-Garza, 422 F. 3d at 903. In Miller-El, the Court considered the prosecutors’ “resort during voir dire to a procedure known in Texas as the jury shuffle,” under which either side had, at various times, the ability to have the court shuffle the “cards bearing panel members’ names, thus rearranging the order in which members of a venire panel are seated and reached for questioning.” 545 U.S. at 253. The prosecutors in that case had twice requested a shuffle when a number of potential black jurors were seated at the front of the venire panel. 545 U.S. at 254. What was at issue in Miller-El, however, was not the resort to the jury shuffle but rather the prosecutors’ exercise of peremptory challenges to exclude 10 of 11 black jurors. The Court looked to the prosecutors’ use of the jury shuffle as evidence of discriminatory intent in exercising these peremptories, not as a free-standing Batson violation.

45 The Arizona Supreme Court had previously reached the contrary conclusion, reasoning that treating a waiver as equivalent to the exercise of a strike would come too close to requiring a prosecutor to strike a juror in order to avoid removing another juror solely because of the latter’s race—a requirement that would itself implicate equal protection concerns. State v. Paleo, 200 Ariz. 42, 22 F. 3d 35, 37 (2001). Subsequently, a Missouri appellate court explicitly rejected Esparza-Garza’s holding, siding with the reasoning of the Arizona Supreme Court in Paleo. See State v. Amerson,
failings regarding to make out a prima facie case despite the noted record by the prosecution during voir dire" that could serve
from the jury. A district court must consider the rele-
stitutional, without more, to strike one or more Blacks
v. Gray, 37 Cal. 4th 1067 (2005)).
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also People v. Johnson, 30 Cal. 4th 1302 (2003); People v. Cornell, 37 Cal. 4th 50 (2005). This year, however, the California Supreme Court rejected this approach, holding that, at least during the third Batson step, comparative juror analy-
"must be performed on appeal even when such an analysis was not conducted below." Lenix, 44 Cal. 4th at 624. Boyd’s approach continues to differ with California courts on two issues. First, as Boyd notes, “some California courts have questioned whether com-
parative juror analysis is similarly appropriate at the
first Batson step, where the prosecution has not voiced
its rationale for the strikes, instead of at the third
Batson step.” Boyd, 467 F. 3d at 1149 (citing People v. Gray, 37 Cal. 4th 168 (2005); People v. Guerra, 37 Cal. 4th 1067 (2006)). Second, though Boyd does not
limit reliance on events occurring after the challenged
peremptory, California courts take a different view,
holding that “the trial court’s finding is reviewed on the
record as it stands at the time the Wheeler/Batson rul-
ing is made. If the defendant believes that subsequent
events should be considered by the trial court, a renewed
objection is required to permit appellate considera-
tion of these subsequent developments.” Lenix, 44 Cal.
4th at 624.

See United States v. Vasquez-Lopez, 22 F. 3d 900,
902 (9th Cir. 1994) ("We have held that the
Constitution forbids striking even a single prospec-
tive juror for a discriminatory purpose."). It is equally
clear, however, that "just as one is not a magic num-
ber which establishes the absence of discrimination, the
fact that the juror was the one Black member of the
venire does not, in itself, raise an inference of dis-

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