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Peremptory Challenges of a Cognizable Group--Denial of Fair Trial--People v. Wheeler

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Hopefully the unusual factual and procedural situation in *Jackson* will be distinguished by other courts and the resulting impact of the decision will be slight. On the other hand, if *Jackson* is followed, the result could be even more confusion.

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PEREMPTORY CHALLENGES OF A COGNIZABLE GROUP—DENIAL OF FAIR TRIAL

People v. Wheeler[1]

In 1965, the United States Supreme Court implicitly approved the use of peremptory challenges to exclude blacks from the jury in the trial of a black defendant. The case, *Swain v. Alabama*,[2] involved a black defendant convicted of rape by an all-white jury. All six blacks in the venire had been peremptorily stricken by the prosecution. In addition, no black had served on a petit jury in that county for at least twelve years, although 10-15% of veniremen during that period had been black.[3] The defendant contended that this course of conduct violated the equal protection clause. The Supreme Court flatly rejected his claim, concluding that the use of peremptory challenges to exclude blacks from a particular jury does not offend the Constitution.[4] This result was based on a presumption that a prosecutor uses his peremptories to obtain a fair and impartial jury.[5] This presumption was not overcome, the Court said, by allegations that in the case at hand all blacks were stricken.

The peremptory challenge is one which may be exercised during voir dire to exclude a prospective juror without assigning any reason. Unlike

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1. 583 P.2d 748, 148 Cal. Rptr. 890 (1978).
2. 380 U.S. 202 (1965).
3. *Id.* at 205. In fact, defendant alleged that there had *never* been a black on a petit jury in either a civil or criminal case in that county. *Id.* at 222-23.
4. Apparently, the dissenters agreed with the majority on this point, 380 U.S. at 245 (Goldberg, J., dissenting). Thus it appears that not a single justice on what was probably the most liberal Supreme Court in history believed that the peremptory exclusion of black jurors in a single case, without proof of systematic exclusion, violated constitutional principles.
5. The validity of this presumption is doubtful. In any voir dire, each attorney will strive, not for a jury without bias, but for the most biased jury possible—in his favor. Kuhn, *Jury Discrimination: The Next Phase*, 41 S. CAL. L. REV. 235, 286 (1968).

challenges for cause, peremptory challenges traditionally need not be defended by the attorney nor approved by the judge.[6] The existence of the challenge is based in part on the inadequacy of challenges for cause in minimizing jury bias.[7] An attorney can peremptorily strike a potential juror whom he believes to be, but cannot prove to be, biased.[8] The number of peremptory challenges allotted to each side is determined by statute, and will vary depending on the jurisdiction, the type of action and the party the attorney is representing.[9] The challenge originated for the protection of the accused, "a provision full of that tenderness and humanity to prisoners, for which our English laws are justly famous."[10] It has been used frequently, however, to exclude certain groups, particularly blacks, from jury service.[11]

In *Swain*, the Court indicated in dicta that a pattern of *systematic* exclusion of blacks from jury service might violate the fourteenth amendment.[12] As an example, the Court suggested that if a county prosecutor peremptorily struck blacks "in case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim may be . . . with the result that no Negroes ever serve on petit juries," the fourteenth amendment claim would take on added significance.[13] Whether the Court intended this dicta to represent a minimum standard for establishing systematic exclusion is debatable. However, lower federal courts and state courts have unanimously accepted the language as their test. In all cases after *Swain* in which courts have dealt with the issue, no defendant has successfully established systematic exclusion. *Swain* was specifically relied on for support in most of these cases.[14]

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6. J. VAN DYKE, JURY SELECTION PROCEDURES, 145 (1977).

7. Grounds for challenge for cause are generally quite narrow and unrealistic. Kuhn, *supra* note 5, at 243. *See, e.g.*, State v. Logan, 344 Mo. 351, 126 S.W.2d 256 (1939) (veniremen's former Ku Klux Klan membership not ground for challenge for cause in murder trial of black defendant). In addition, a prospective juror who admits prejudice or bias may not be excluded if he can convince the court that he can lay aside his feelings and judge the case with an open mind. Kuhn, *supra* at 243; Note, *The Jury: A Reflection of the Prejudices of the Community*, 20 HASTINGS L.J. 1417, 1429 (1969).

8. J. VAN DYKE, *supra* note 6, at 146.

9. A fairly up-to-date table containing this information is found in J. VAN DYKE, *supra* note 6, at 281-84, Appendix D.

10. 4 W. BLACKSTONE, COMMENTARIES* 346.

11. The cases are too numerous for citation. For a recent compilation of decisions dealing with the issue, *see* Annot., 79 A.L.R.3d 14 (1977).

12. The Court was not required to decide this issue because the record did not establish that the state alone, as opposed to the defense, was responsible for the exclusion of blacks. 380 U.S. at 224. Justice Harlan, concurring in *Swain*, specifically stated that it was his opinion that the Court did not decide this question. 380 U.S. at 228 (Harlan, J., concurring).

13. 380 U.S. at 223.

14. *See, e.g.*, authorities cited note 49 *infra*.

As adopted by the courts, *Swain*'s burden for defendants has been denounced as nearly impossible, and the case itself has been heavily criticized for perpetuating systematic exclusion.[15] Systematic exclusion of certain groups from jury service affects more than the fair trials of individual defendants. It also prevents participation by the excluded classes in the judicial process.[16]

Swain has also been attacked on the ground that it did not go far enough, since the Constitution guarantees impartiality of the jury itself, not merely the venire. Due process and equal protection safeguards created by a representative jury panel may be obliterated by skewing the petit jury through peremptory challenges. In fact, *Swain* has been repeatedly condemned for subordinating a constitutional right to the exercise of a non-constitutional procedural device.[17] The defendant's burden is so great, it has been said, that constitutional rights are left inadequately protected.[18]

People v. Wheeler[19] confronted the California Supreme Court with a similar claim of prosecutorial misuse of peremptories. Two black defendants were charged with murder. During voir dire, a number of black veniremen[20] were questioned and passed for cause. However, each black was then peremptorily challenged by the prosecutor and stricken. The jury which subsequently convicted the defendants was all white. The California Supreme Court reversed the convictions and remanded for a new trial,

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15. *E.g.*, Bradshaw, *Peremptory Challenges in Criminal Cases—Trial by a Jury of Whose Peers?*, 33 J. MO. BAR 170 (1977); Kuhn, *supra* note 5; Note, *supra* note 7; Comment, *A Case Study of the Peremptory Challenge: A Subtle Strike at Equal Protection and Due Process*, 18 ST. LOUIS U.L. REV. 622 (1974); Comment, *Swain v. Alabama: A Constitutional Blueprint for the Perpetuation of the All-White Jury*, 52 VA. L. REV. 1157 (1966); Comment, *Fair Jury Selection Procedures*, 75 YALE L.J. 322 (1966); Note, *Limiting the Peremptory Challenge: Representation of Groups on Petit Juries*, 86 YALE L.J. 1715 (1976); Note, 79 HARV. L. REV. 135 (1965).

16. Bradshaw, *supra* note 15, at 176.

17. *See, e.g.*, Bradshaw, *supra* note 15, at 176; Kuhn, *supra* note 5, at 287-88; Note, *supra* note 7, at 1431; Comment, *supra* note 15, 18 ST. LOUIS U. L. REV. at 666-67.

18. Kuhn, *supra* note 5, at 302. There is ample opportunity for blacks to experience prosecutorial misuse of peremptories. Blacks represented 11.6% of the United States population in 1977, but they were the subject of 25.7% of total arrests in that year. 33.5% of the persons arrested for serious crimes were black, including 47% of forcible rape, 51% of non-negligent homicide, and 57% of robbery arrests. UNITED STATES BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1978 (99th ed.).

19. 583 P.2d 748, 148 Cal. Rptr. 890 (1978).

20. Defendants' counsel asserted at trial, and defendants contended on appeal, that seven blacks were excluded. The prosecutor never conceded that figure as correct, but the California Supreme Court found the matter immaterial. *Id.* at 763 n.20, 148 Cal. Rptr. at 904 n.20.

holding that the prosecutor's conduct violated defendants' right to trial by impartial jury as guaranteed by the California Constitution.[21]

Laying the groundwork for its decision, the *Wheeler* court first reviewed a line of United States Supreme Court decisions underscoring the importance of the representative cross-section rule. This rule emanates from the sixth amendment right to trial by impartial jury and is applicable to the states through the fourteenth amendment.[22] The representative cross-section rule prohibits the systematic exclusion from jury venires of any significant group distinguishable from the general population.[23] However, upon recent consideration of the rule, the United States Supreme Court reaffirmed its position that the rule does not require the jury actually chosen to be representative of the community.[24] As required by the federal constitution, the representative cross-section rule applies to the selection of jury wheels and venires, but not to the selection of petit juries from those larger pools.[25]

The California court in *Wheeler* determined that the representative cross-section requirement is guaranteed equally by the United States and California Constitutions, but that the cross-section rule as interpreted under the California Constitution should be extended to include voir dire.[26] "[A] party is constitutionally entitled to a petit jury that is as near an approximation of the ideal cross-section of the community as the process of random draw permits." The court observed that although a peremptory challenge is one for which no reason need be given, this does not mean that no reason need exist. Declaring that peremptory strikes based on group bias alone frustrate the purposes of the representative cross-section rule, the *Wheeler* court held that such strikes violate the California Constitution's guarantee of trial by impartial jury.[27]

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21. "Trial by jury is an inviolate right and shall be secured to all. . . ." CAL. CONST. art. I, § 16. *Cf.* U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . ."); MO. CONST. art. I, § 22(a) ([T]he right of trial by jury as heretofore enjoyed shall remain inviolate. . . .").

22. Taylor v. Louisiana, 419 U.S. 522, 538 (1975).

23. Note, 7 CONN. L. REV. 508, 527 (1975).

24. Taylor v. Louisiana, 419 U.S. 522, 531 (1975). To require petit juries to actually represent each group in the community would require court officials to select jurors individually. Aside from the potential for abuse, such a requirement might necessitate compilation and consideration of large amounts of information about each individual juror (*e.g.*, race, sex, age, religion, education, etc.), in order to ensure representativeness. Note, *supra* note 15, at 1732. Some significant population segments could never appear on a "representative" jury, being too small to appear in a sample of twelve.

25. Taylor v. Louisiana, 419 U.S. 522, 531 (1975).

26. Although the California court cites several United States Supreme Court cases as support, it is obvious in light of *Swain* that the court's holding can be based on the California Constitution alone.

27. The court defined "group bias" as a presumed bias based solely on racial, religious, ethnic or similar grounds. "Specific bias" on the other hand,

The *Swain* presumption that an attorney is using his peremptories in a constitutional manner is retained in *Wheeler*. However, the chief importance of *Wheeler's* holding is that, unlike *Swain*, the presumption is rebuttable in a single case. To make a prima facie case against his opponent, a party must establish on the record that the persons excluded are part of a cognizable group for purposes of the representative cross-section rule.[28] A cognizable group might be defined in terms of any identifiable group characteristic that results in a sharing of distinctive experiences and perspectives.[29] The Supreme Court has held that racial groups[30] and women[31] constitute cognizable groups. Lower courts have recognized groups defined by ethnic background,[32] religion[33] and occupation.[34]

The second element of a prima facie case requires a party to show on the record a "strong likelihood" that the questioned challenges are based on group association alone. Relevant evidence includes: the opponent's striking of most group members from the venire or the use of a disproportionate number of his peremptories against the group; the opponent's failure to engage these jurors in more than desultory questioning; the fact that the only characteristic shared by the jurors in question is their group membership; and the defendant's membership in the excluded group or the alleged victim's membership in the group to which a majority of the remaining jurors belong.[35]

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relates to the particular case on trial or the parties or witnesses involved.

Swain based his constitutional attack on the fourteenth amendment's equal protection guarantee. The *Wheeler* decision, on the other hand, is grounded on the right to trial by jury as guaranteed by the California Constitution. The California court explicitly refused to distinguish the cases on this ground, assuming that the United States Supreme Court would reaffirm *Swain* and reach the same result under the representative cross-section rule as it did under the equal protection clause. 583 P.2d at 767, 148 Cal. Rptr. at 908.

28. *Id.* at 764, 148 Cal. Rptr. at 905.

29. Note, *supra* note 15, at 1736.

30. *See* Peters v. Kiff, 407 U.S. 493 (1972); Whitus v. Georgia, 385 U.S. 545 (1967).

31. *See* Duren v. Missouri, 99 S. Ct. 246 (1979); Taylor v. Louisiana, 419 U.S. 522 (1975); Ballard v. United States, 329 U.S. 187 (1946).

32. *See* United States *ex rel.* Leguillou v. Davis, 115 F. Supp. 392 (D.V.I. 1953), *rev'd on other grounds*, 212 F.2d 681 (3d Cir. 1974) (persons of Puerto Rican descent); International Longshoremen's & Ware. Union v. Ackerman, 82 F. Supp. 65 (D. Hawaii 1943), *rev'd on other grounds*, 187 F.2d 860 (9th Cir.), *aff'd*, 342 U.S. 859 (1951) (Filipinos); State v. Plenty Horse, 85 S.D. 401, 184 N.W.2d 654 (1971) (American Indians).

33. *See* Juarez v. State, 102 Tex. Crim. 297, 277 S.W. 1091 (1925) (Roman Catholics).

34. *See* Thiel v. Southern Pac. Co., 328 U.S. 217 (1946) (daily wage earners); International Longshoremen's & Ware. Union v. Ackerman, 82 F. Supp. 65 (D. Hawaii 1943), *rev'd on other grounds*, 187 F.2d 860 (9th Cir.), *aff'd*, 342 U.S. 859 (1951) (wage earners); Simmons v. State, 182 So. 2d 442 (Fla. 1966) (manual laborers).

35. People v. Wheeler, 583 P.2d at 764, 148 Cal. Rptr. at 905.

If the court finds that a prima facie showing has been made, the burden shifts to the opponent to show that the challenges were not based on group bias alone. Justifications need not rise to the level of a challenge for cause. However, the grounds must be reasonably relevant to the particular case on trial, its parties or its witnesses. A showing that members of the majority group or other groups were challenged on comparable grounds would also be relevant.[36] If *any* of the questioned challenges cannot be justified on grounds of specific bias, the jurors already selected must be dismissed and the remaining venire quashed. The jury selection process then must begin anew.

The state, as well as an individual defendant, is constitutionally entitled to invoke the representative cross-section rule under the *Wheeler* approach. However, the court specifically declined to pass on the applicability of its decision to civil cases.[37]

The *Wheeler* procedure is one of a number of suggested solutions to the peremptory challenge problem. Other proposals include a strict scrutiny/compelling state interest analysis,[38] elimination of peremptory challenges by the state,[39] elimination of all peremptories,[40] or the allowance of a very limited number (perhaps three to five) of "true" peremptories to each side.[41] The last approach would probably require a corresponding expansion of the scope of voir dire questioning to permit a more informed and individualized exercise of the limited number of challenges.[42]

Since the *Swain* decision, writers have urged the courts to allow a defendant to question the use of peremptory challenges in his own case.[43] *Wheeler*, however, is not a panacea: The approach carries potential problems. Trials may be unreasonably disrupted or delayed by objection to peremptory challenges. Extensive sham questioning, in an attempt to amass a credible record to support a claim of reasonable peremptory challenge, could also delay proceedings. Further, parties could conceivably be restrained from challenging certain jurors for legitimate reasons.[44] Another significant problem is hinted at in *Wheeler*'s companion case, *People v. Johnson*.[45]

In *Johnson*, a rape prosecution, one of the state's key witnesses had referred to a black man fleeing the scene as "the nigger." That reference was an important element in the process of identification linking the

36. *Id.* at 765, 148 Cal. Rptr. at 906.
37. *Id.* at n.29.
38. Note, *supra* note 7, at 1432.
39. J. VAN DYKE, *supra* note 6, at 167.
40. *Id.* at 167-68.
41. *Id.* at 169.
42. Note, *supra* note 15, at 1741.
43. *See, e.g.*, Kuhn, *supra* note 5, at 303; Note, *supra* note 7, at 1433.
44. Kuhn, *supra* note 5, at 294.
45. 583 P.2d 774, 148 Cal. Rptr. 915 (1978).

defendant to the offense charged, and the prosecutor had strong reason to believe that the racial epithet would come out at trial. He admitted on the record that he intended to peremptorily strike every black juror that he could, because he was concerned that his witness' derogatory remark would arouse hostility among black jurors. *Wheeler* had held that upon a prima facie showing of improper use, the burden shifted to the questioned attorney to show that the suspicious strikes "were not predicated on group bias *alone*."[46] By implication, if the attorney had a bona fide, good faith reason for the peremptory challenge other than the venireman's group affiliation, the attorney would have met his burden. In other words, so long as the proffered justification was not a sham, it appears that a court would not question the attorney's judgment concerning its relevance. In *Johnson*, the California Supreme Court found, as a matter of law, that the perhaps realistic possibility of juror hostility feared by the prosecutor was an insufficient justification for peremptory strikes. The *Johnson* court required the challenging party to justify questioned peremptory challenges "on grounds *unrelated to group affiliation*."[47] Thus, as construed in *Johnson*, *Wheeler* may do more than prohibit peremptory strikes based on group affiliation alone—it could forbid *any* consideration of a venireman's group affiliation in determining whether to exercise a peremptory challenge.

Assuming that the "group blind" peremptory challenge is a wise goal,[48] the aforementioned requirements may pose significant difficulties for an attorney exercising peremptory challenges against members of cognizable groups. Upon determination that a prima facie case of improper use has been made, *Wheeler* requires a questioned attorney to show a reason other than group bias for *each* questioned challenge. If the reasoning of *Johnson* is broadly construed, he would further have to show that the juror's race was not considered by him at all in deciding to exercise the challenge.

Wheeler represents a radical break from traditional concepts concerning peremptory challenges. By contrast, Missouri cases have consistently rejected defendants' attacks against peremptory exclusion of blacks by prosecutors.[49] The Missouri position is exemplified by *State v.*

46. *Id.* at 764-65, 148 Cal. Rptr. at 906 (emphasis added).

47. *Id.* at 775, 148 Cal. Rptr. at 916 (emphasis added).

48. In appropriate circumstances, the race, religion, sex, nationality, occupation or affiliation of prospective jurors may be a relevant consideration in attempting to select the most impartial jurors from a venire. *Id.* at 770, 148 Cal. Rptr. at 911 (Richardson, J., dissenting).

49. *See, e.g.*, State v. Baker, 524 S.W.2d 122 (Mo. En Banc 1975) (all four blacks stricken); State v. Collor, 502 S.W.2d 258 (Mo. 1973) (all stricken); State v. Brown, 470 S.W.2d 543 (Mo. 1971) (all stricken); State v. Brookins, 468 S.W.2d 42 (Mo. 1971) (all stricken); Clark v. State, 465 S.W.2d 557 (Mo. 1971) (all stricken); State v. Smith, 465 S.W.2d 482 (Mo. 1971) (all 13 stricken); State v. Huddleston, 462 S.W.2d 691 (Mo. 1971) (all four stricken); State v. Bradford, 462 S.W.2d 664 (Mo. 1971) (all stricken); State v. Davison, 457 S.W.2d 674 (Mo. 1970) (all 15 peremptories used to strike 15 of 17 blacks on panel); State v. Eaton,

Baker,[50] wherein the defendant alleged a pattern of peremptory strikes against blacks by the prosecutor in case after case, particularly where the accused was also black. The Missouri Supreme Court in 1975 said that the clear inference from this allegation was that blacks were not excluded from juries where the accused was *not* black. Thus, the court concluded, the allegation failed to meet the *Swain* requirement that the exclusion be made in case after case "*whoever the defendant or the victim may be . . .* with the result that no Negroes ever sit on petit juries."[51]

Baker and other Missouri cases show that the *Swain* viewpoint is firmly entrenched in this state.[52] It is highly unlikely that Missouri will quickly follow the *Wheeler* rationale. Nonetheless, if the *Wheeler* approach is successful in California, it may prompt other states to modify their peremptory challenge systems or their constitutional interpretations of fair trial. If *Wheeler*'s requirements prove to be unworkable, California itself may reverse its position. California's attempt to balance these competing considerations will be an interesting experiment.

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568 S.W.2d 541 (Mo. App., D.K.C. 1978) (all three removed); State v. Hatten, 561 S.W.2d 706 (Mo. App., D.K.C. 1978) (all three removed); State v. Williams, 535 S.W.2d 128 (Mo. App., D.K.C. 1976) (all six removed); Ford v. State, 530 S.W.2d 25 (Mo. App., D.K.C. 1975) (in 16 trials involving black defendants in Jackson County, all blacks removed); State v. Davis, 529 S.W.2d 10 (Mo. App., D. St. L. 1975) (in 31 trials of black defendants, 75% of blacks stricken; in 27 trials of white defendants, 40% of blacks stricken); State v. Brown, 527 S.W.2d 15 (Mo. App., D.K.C. 1975) (all seven stricken); State v. Jacks, 525 S.W.2d 431 (Mo. App., D.K.C. 1975) (all four stricken); State v. Booker, 517 S.W.2d 937 (Mo. App., D. St. L. 1974) (over 18 month period, 68% of blacks stricken); State v. Langston, 515 S.W.2d 852 (Mo. App., D. St. L. 1974) (all stricken); State v. Dinkins, 508 S.W.2d 1 (Mo. App., D. St. L. 1974) (only black on panel stricken); State v. Kelly, 506 S.W.2d 61 (Mo. App., D.K.C. 1974) (60% of peremptories used to strike 100% of blacks who constituted 18% of panel).

50. 524 S.W.2d 122 (Mo. En Banc 1975) (reversed and remanded for resentencing on other grounds).

51. *Id.* at 125, *citing* Swain v. Alabama, 380 U.S. 202, 223 (1965).

52. Proposed legislation before the Missouri General Assembly would provide an even greater opportunity for prosecutorial misuse of peremptory challenges than presently exists. House Bill 575 would give the state and the defendant an equal number of peremptory challenges, in place of the present 2:1 ratio in favor of the defendant. It would also require alternating strikes between the state and defense, rather than having the state exercise all of its challenges before the defense uses any of its strikes. H.B. 575, 80th Gen. Ass'y, 1st Sess. (1979). Senate Bill 18 is similar, except that in cases where multiple defendants are tried together, the state would receive the same number of peremptories as all defendants combined. S.B. 18, 80th Gen. Ass'y, 1st Sess. (1979). Each bill has been recommended for passage by committee and is awaiting perfection.