Forum

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Arthur Who?

By Elisabeth Semel

Last week's California Supreme Court opinion in *People v. Lenix* went unnoticed outside legal circles. In contrast to criminal defense attorneys and prosecutors, who were checking the court's Web site for the release date, most members of the civil trial bar were likely also unaware that a major ruling in the court's *Wheeler/Batson* jurisprudence was in the offing.

When review was granted in 2007, the court asked the parties in *Lenix* to address whether an appellate court must perform a comparative juror analysis — one of several methods of determining whether a peremptory challenge was exercised based on an impermissible factor such as race or gender — for the first time on appeal. The term — comparative juror analysis — is an unfortunate one. It makes a commonsense approach to ruling on a *Batson* challenge sound like an indecipherable mathematical equation. The process involves looking at whether a struck juror is similarly situated to a seated juror, and if so, determining whether those similarities lead to the conclusion that the reasons given for striking the juror belie a race-based motive.

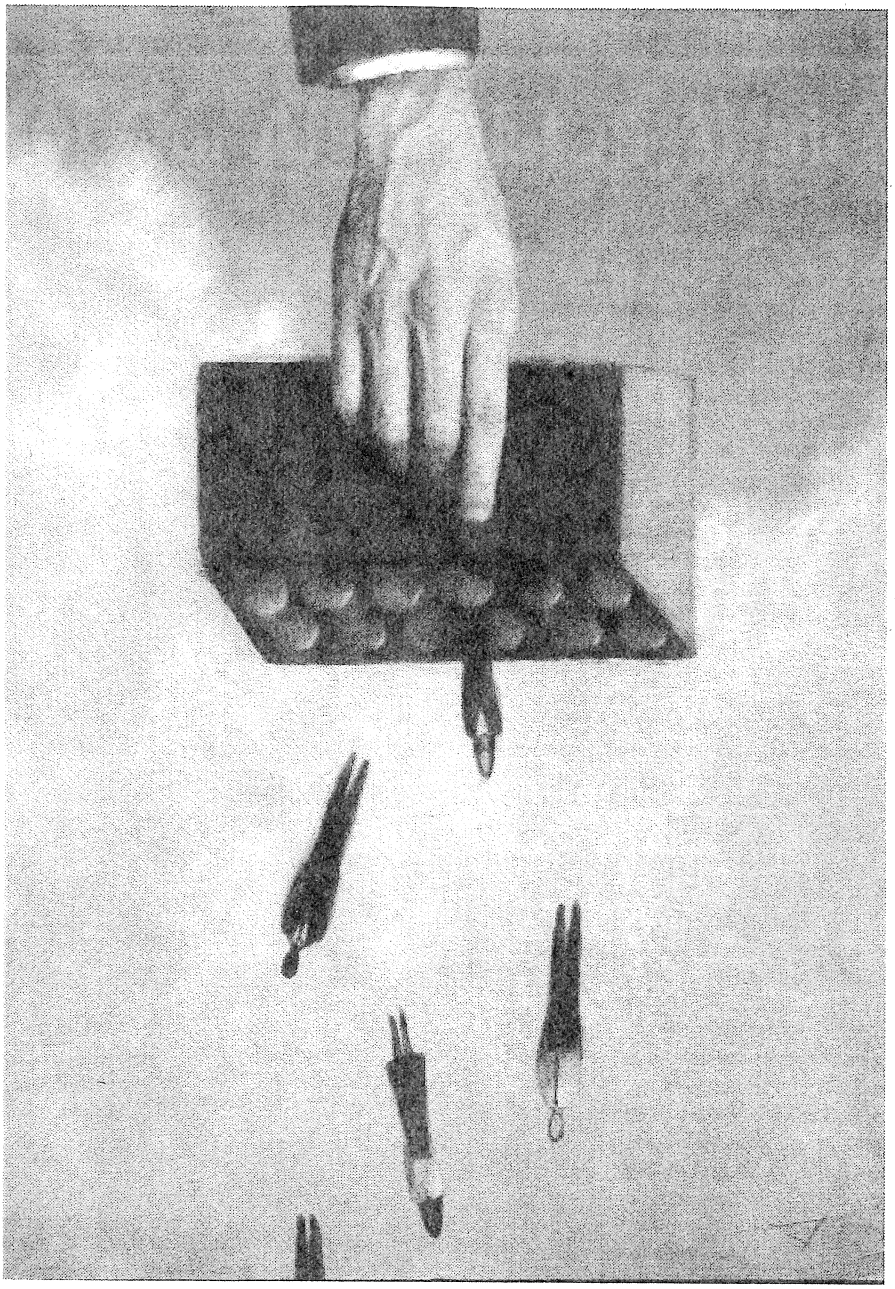
In March of this year, the court ordered additional briefing in *Lenix*, which ratcheted up the stakes in the case. The order was precipitated by a footnote in the recent U.S. Supreme Court opinion in *Snyder v. Louisiana*. Snyder's conviction and death judgment were reversed because of Batson error. The opinion was spare; comparing the circumstances of an African-American panel member, who had been struck by the prosecution, with those of two white male seated jurors, the court concluded that the prosecutor's race-neutral reasons were pretextual. Justice Samuel Alito, writing for the *Snyder* majority, mentioned in footnote two that the Louisiana Supreme Court did not procedurally default the comparative juror analysis, even though it had been presented for the first time on appeal, emphasizing, that "the State Supreme Court itself made such a comparison."A week later, the California Supreme Court directed the parties in *Lenix* to brief the "significance" of *Snyder.* Was the footnote merely an observation about the procedural history of the case or an invitation to lower courts to create a default rule, in other words, one that would preclude consideration of this type of analysis for the first time on appeal?

The unanimous decision in *Lenix*, authored by Justice Carol A. Corrigan is, in the vernacular, a big deal. With a few caveats, the court ruled that "[c]omparative juror analysis is evidence that ... must be considered when reviewing claims of error at *Wheeler/Batson's* third stage" even when it was not undertaken at trial. The opinion realigns the state Supreme Court's *Batson* jurisprudence with recent decisions of the U.S. Supreme Court, not to mention the almost-universal practice in other state courts.

In *Lenix*, Corrigan pointed out that "[n]early a decade before *Batson*, California [in *Wheeler*] took affirmative steps to ensure that race played no part in jury selection." Until last week, it is arguable that *Wheeler* was the California Supreme Court's high-water mark. Its *Batson* track record in the last two decades has not lived up to *Wheeler's* promise. For example, it was not until 2005, when the U.S. Supreme Court decided *Johnson v. California*, that our court — after years of internal debate and criticism by the 9th Circuit — was obliged to relinquish its use of the "strong likelihood" test for the prima facie showing of discrimination because it was "at odds" with the lower threshold established by *Batson*.

The California Supreme Court's approach to comparative juror analysis has vacillated from warm embrace to firm disapproval to a reluctant handshake. During the first post-*Wheeler* decade, the court undertook a comparative juror analysis in order to assess the credibility of the prosecutor's stated reasons, even when the analysis had not been performed at trial. Several years after *Batson*, in an about-face, it held that reviewing courts would no longer conduct a comparative juror analysis. The state Supreme Court clung like a magnet to this position until the first of two U.S. Supreme Court opinions involving Thomas Miller-El, who had been convicted of capital murder and sentenced to death in Texas.

In 2003, in *Miller-El v. Cockrell*, the Supreme Court relied on a comparative



juror analysis that had not been part of the *Batson* claim until the case was in federal habeas corpus review. Two years, later, in *Miller-El v. Dretke*, comparative juror analysis was the lynchpin of the court's decision to grant relief. Justice David Souter wrote: "More powerful than these bare statistics [showing that the prosecution struck 91 percent of black potential jurors], however, are side-by-side comparisons of some black venire panelists who were struck and white panelists allowed to serve." Although the California Supreme Court could hear the sound of *Miller-El* knocking, it was still not ready to concede that comparative juror analysis was an essential component of the *Batson* inquiry on appeal. As Corrigan noted, following *Miller-El II*, the court had "assumed without deciding that a comparative juror analysis should be conducted for the first time on appeal" in reviewing Batson claims.

During oral argument in *Lenix*, the attorney general insisted that the second footnote in *Snyder* gave the court carte blanche to create a procedural default rule. Several justices expressed doubt that the meaning of the footnote was discernable, inquiring whether it might be prudent to wait for clarification from the Supreme Court. Ultimately, the state Supreme Court not only rejected the course advocated by the prosecution, it embraced *Miller-El* and *Snyder*, conceding that its "former practice of declining to engage in comparative juror analysis for the first time on appeal unduly restricts review based on the entire record."

As for Arthur Lenix, he did not benefit from the court's acknowledgement that comparative juror analysis fits squarely within a consideration of "all of the circumstances that bear upon the issue of racial animosity." It remains to be seen whether the formal acceptance of this method of analysis on appeal will reinvigorate the court's use of *Batson* as the constitutionally approved mechanism to eradicate race discrimination in the selection of jurors.

More than 20 years after it was decided, the National District Attorneys Association has yet to adopt Batson as a standard of practice, and simply encourages prosecutors to "be familiar" with the relevant case law. In a provocative concurring opinion in *Miller-El II*, Justice Stephen Breyer argued that "the use of race- and gender-based stereotypes" in voir dire is increasingly "systematized." He proposed that the time has come to confront Justice Thurgood Marshall's view that peremptories "inject" race discrimination into the jury-selection process, which will not be eliminated until we end the use of peremptory challenges.

I know few defense attorneys who are ready to let go of peremptory challenges. I, for one, still believe that peremptory strikes give us the best opportunity to ensure that our clients are tried by jurors who will adhere to the presumption of innocence and hold the prosecution to its burden of proof. However, from the perspective of citizens who continue to be excluded from jury service based on their race, it is well past midnight. Like *Wheeler*, the *Lenix* decision is another one of those "affirmative steps to ensure that race play[s] no part in jury selection." The question remains whether California courts are watching the clock.

Elisabeth Semel is a clinical professor of law and director of the Death Penalty Clinic at the UC Berkeley School of Law. She was co-counsel with Cliff Gardner and Lawrence Gibbs in an amicus brief for the California State Conference of the NAACP, et al., filed on behalf of Mr. Lenix.