

**Peremptory Challenges:
Group Bias and
Discrimination**
Wheeler/Batson/Johnson

Presented by SDDA Elaina Bentley

Challenges to Individual Jurors

1. Challenges For Cause:

- Unlimited number
- Within the Court's discretion

2. Peremptory Challenges:

- Limited number
- No reason need by given
- Subject to *Wheeler* motions

Challenges For Cause:

➤ **Implied Bias (CCP 229)**

- Family/business relationship w/ party, W, V
- Knowledge of the facts & opinion on merits
- Bias for or against either party

➤ **General Qualifications (CCP 203)**

- Citizen, over 18, no felony convictions, sufficient understanding of English language, resident of Riverside County, domiciled in Ca, not on the GJ, not under conservatorship, etc.

➤ **Actual Bias (CCP 225(b)):**

- Admitted bias for either side;
- Settled opinion about case;
- Can't assure court will decide solely on the law & evidence presented;
- Admits there is significant likelihood that extraneous matters will enter into decision-making process
- State of mind preventing impartiality to prejudice of either party's substantial rights
- Hard to keep open mind given nature of case (don't want to sit b/c too emotional not enuf)

Peremptory Challenges:

- Death or LWOP: 20 each side
- Otherwise: 10 each side
- Co-D's Jointly Tried: Challenges shared but each D gets 5 additional individual challenges; DA gets same # of additional challenges as all D's.
- Max Sentence 90 days or less: 6 each side; If Co-D's, then challenges shared but each D gets 4 additional; DA gets an equal # of additional allowed all D's

Peremptory Challenges

- People go first, alternating with D:
 1. Challenge for cause or pass for cause
 2. Exercise peremptory challenge by thanking and excusing Juror #1, or accept jury as presently constituted
 3. Party brings *Wheeler* motion v. opponent pursuant to procedure discussed pretrial with the court

Peremptory Challenges

- Peremptory challenges may not be used for a discriminatory purpose
- Can't use preempts to systematically exclude a constitutionally cognizable group by challenging individual jurors who are members of that group

U.S. CONSTITUTION

Sixth Amendment:

- “In all criminal prosecutions, the accused shall enjoy the right to a ... public trial, by an impartial jury of the State and district wherein the crime shall have been committed...”

14th Amendment:

- “nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

STATE CONSTITUTION

- CA Const. Art. I, sec. 16 includes the right to trial by a jury drawn from representative cross-section of the community.
- CCP 231.5 bars use of peremptories based on race, color, religion, sex, national origin, sexual orientation or similar grounds.

Wheeler & Batson

- *Wheeler*

- Excusing jurors based solely on membership in identifiable group is impermissible (6th Amendment grounds)

- *Batson*

- Excusing jurors based upon racial stereotypes is impermissible (14th Amendment grounds)

It Only Takes One...

- Excluding even 1 juror for reasons impermissible under *Batson* and *Wheeler* requires reversal.
 - P v. Silva (2001) 25 Cal.4th 345, 386
 - P v. Gray (2005) 37 Cal.4th 168

Cognizable Groups

- RACE
 - African-Americans/Hispanics/Asian-Americans/Native Americans
- GENDER
- RELIGION
- SEXUAL ORIENTATION

Non-Cognizable Groups

- Age
- Battered Women
- Blue Collar Workers
- Hearing-impaired
- Insufficient English
- Low-Income/Poor
- Less educated
- Death Penalty issues

Wheeler Procedure

- Party Objects
 - Pre-trial 402 re: *Wheeler* objections
 - Approach sidebar or go in-chambers
 - Court reporter is always present

Wheeler Procedure

- Presumption is that challenges are being exercised constitutionally
 - P v. Clair (1992) 2 C4th 629, 652

Wheeler Analysis Steps

- PRIMA FACIE CASE
- JUSTIFICATION
- TRIAL COURT'S DETERMINATION – whether peremptory challenges were *actually* motivated by race-neutral reasons

Prima Facie Showing

- Objecting party bears burden to establish a prima facie case of impropriety by showing:
 - “That the totality of circumstances give rise to an *inference* of discriminatory purpose.” (*Johnson v. CA* (2005) 125 S.Ct. 2410, 2416)

The “Prima Facie” Case

- Establish that the challenged juror is in a cognizable group
 - Might not be that easy
 - May require court inquiry

The “Prima Facie” Case

Statistical Disparity:

- Most or all of the identified group have been struck
- A disproportionate # of challenges have been exercised v. members of the excluded group
- How many members of the excluded group remain in the panel?
- Statistical disparity alone is enough to raise an inference of discriminatory purpose. (*Williams v. Runnel* (9th Cir. 2006) 432 F3d. 1102)

The “Prima Facie” Case

Comparative Analysis:

- Proffered explanation equally applicable to kept juror who is not a member of the cognizable group
- Challenged jurors share no traits in common other than the illegal basis for challenge
- Struck jurors have characteristics or gave answers similar or identical to kept jurors
- Kept Jurors are homogeneous with challenged jurors except for group membership
- Failure to conduct meaningful voir dire of jurors struck
- D is a member of the excluded group and, if applicable, V is not (visa versa for P’s motion)
- Counsel’s reputation or any historical evidence of past discriminatory conduct

JUSTIFICATION:

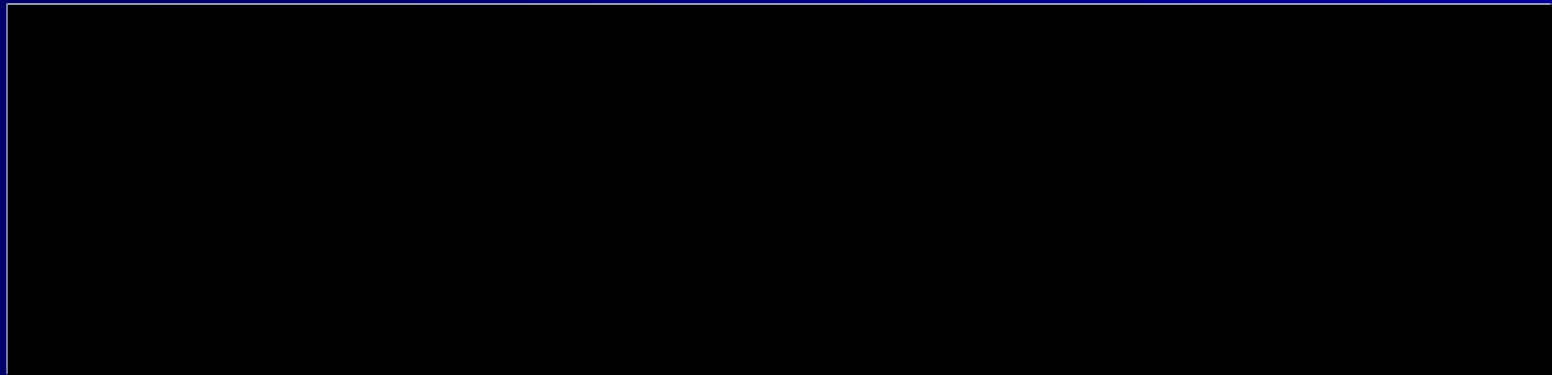
- If the court finds a PF case of discrimination was established, then:
 - the burden shifts to the party who exercised the perempt to justify its challenge

JUSTIFICATION:

- Challenger must satisfy the court that it was motivated by valid, nondiscriminatory reasons
- Reasons must be relevant, *genuine*, neutral, supported in the record
- Totality of Circumstances

TRIAL COURT'S DETERMINATION

- Court must make a “sincere and reasoned attempt to evaluate each stated reason as to each challenged juror”



TRIAL COURT'S DETERMINATION

- Are the proffered justifications plausible?
- If so, did they actually motivate the challenge in question?
- Focus on “subjective genuineness” of neutral reason, not its “objective reasonableness”

TRIAL COURT'S DETERMINATION

- Your credibility will be judged by your demeanor, how probable reasons are, & whether rationale has some basis in accepted trial strategy.

– *Reynoso* (2003) 31 C4th @ 923-924;
Johnson v. CA (2005) 125 SCt @ 2416;
Miller-El (2003) 537 US @ 339.

Successive *Wheeler* Motions

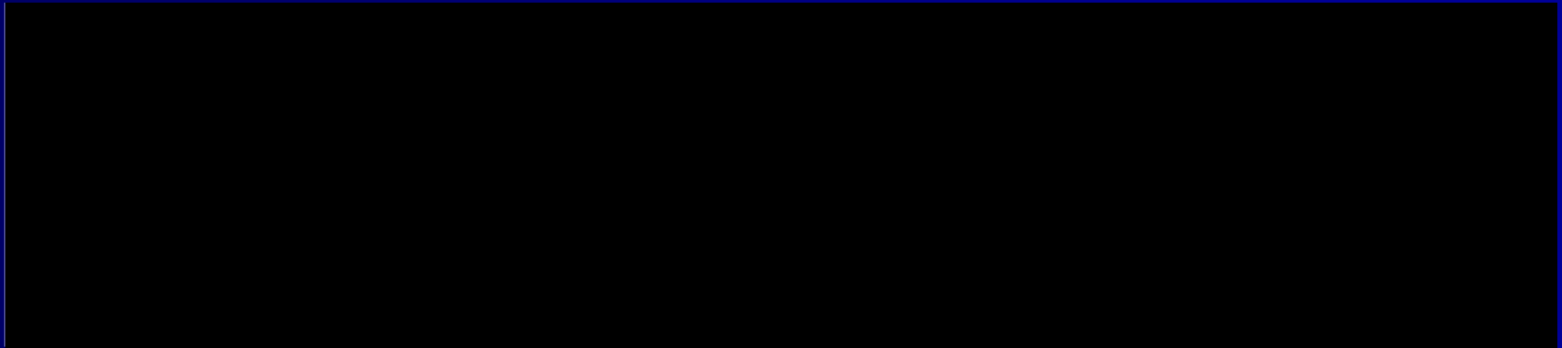
- [REDACTED]
- *People v. Avila* (2006) 38 C4th 491, 449-550, disapproving *P v. McGee* (2002) 104 CA4th 559.
- Prosecutor no longer required to justify challenges from previously denied *Wheeler* motions

Successive *Wheeler* Motions

- Each successive motion carries its own initial burden to establish a prima facie case
- Later motions *may* be based on evidence presented in earlier motions to show *discriminatory pattern*
- In *each* successive motion, court *may* reevaluate plausibility of earlier justifications in light of evidence of discriminatory pattern

Avoid Appellate Reversal

- What if court doesn't find D made a prima facie showing?



- Williams v. Runnels (9th Cir. 2006) 432 F3d 1102, didn't matter what Court of Appeal thought were valid reasons in the record to support the challenge, but rather what the DA's actual reasons were, which he didn't put on the record because the court found no PF showing.

Remedies

- Mistrial – Dismiss panel & start over
- Dismiss jurors selected thus far
- *Willis* (2002) 27 Cal.4th 811 remedies
 - Avoid rewarding misconduct
 - Add peremptory challenges to aggrieved party
 - Reseat improperly excused jurors
 - Judicial oversight for every subsequent challenge
 - Sanctions under CCP 177.5

