Ethical Jury Selection

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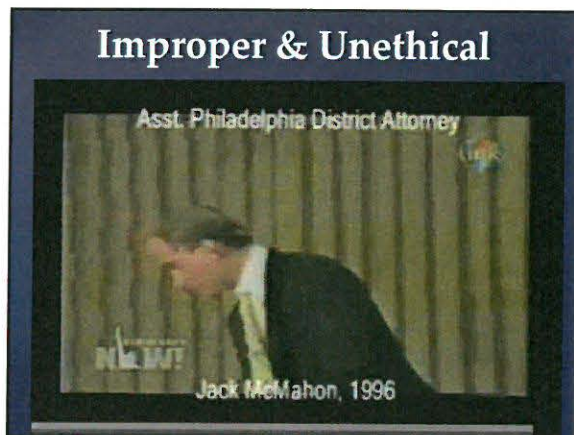
People v. Wheeler
(1978) 22 Cal.3d 258

"The use of peremptory challenges to remove prospective jurors on the sole ground of group bias violates the right to trial by a jury drawn from a representative cross-section of the community under article I, section 16, of the California Constitution"

Batson v. Kentucky
(1986) 476 U.S. 79

"The Equal Protection Clause forbids the prosecutor to challenger potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant."

The New York Times
August 16, 2015

U.S. JUSTICE SYSTEM

Exclusion of Blacks From Juries Raises Scrutiny

A study finds that prosecutors removed black potential jurors three times as often as others during the last decade.

They used peremptory challenges, which generally allow lawyers to dismiss potential jurors without explanation.

New York Times

VIA nytnow

Improper & Unethical

Asst. Philadelphia District Attorney

Jack McMahon, 1996

Wheeler/Baton Motion

- Party should make objection outside presence of jury
- 3 step process

Step 1

- Party objecting to challenge must make out *prima facie* case
  - Showing that the totality of facts gives rise to an <u>inference</u> of discriminatory purpose
  - Previously "strong likelihood"
  - It takes very little to raise an inference
  - Essentially a numbers game
    - Struck most or all members of group, or a disproportionate number

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Step 2

- If prima facie case shown, burden shifts and party must explain adequately the challenge
  - Offer permissible race-neutral justification
  - "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." *(Miller-El v. Dretke* (2005) 545 U.S. 231, 252.)

Step 3

- Court then makes decision
  - Whether party objecting has proved purposeful racial discrimination
  - Credibility determination

Requirements / Rules

- A Wheeler/Batson objection may be raised by the defense or prosecution
- Objection must be timely
  - Before jury selection is complete
  - But not necessarily immediately after objectionable challenge
- New prima facie showing must be made with each objection
- Make as complete a record as feasible

Burden of Proof

- Defense has ultimate burden of proof
  - *Gonzalez v. Brown* (9th Cir. 2009) 585 F3 1202, 1207; *Purkett v. Elem* (1995) 514 US 765, 768
- Must show purposeful discrimination by a <u>preponderance of the evidence</u>
  - *P v. Hutchins* (2007) 147 CA4 992; *Paulino v. Harrison* (9th Cir. 2008) 542 F3 692, 703
- Consider totality of circumstances
  - *P v. Lenix* (2008) 44 C4 602, 626
- Presumption that challenge is proper
  - *P v. Neuman* (2009) 176 CA4 571

Cognizable Class

- Persons excluded must be members of a *cognizable class*
- There must be an identifiable group distinguished on racial, religious, ethnic or similar grounds
- Defendant need <u>not</u> be a member of the excluded group
- Victim <u>can</u> also be a member of excluded group

Cognizable Groups

- Race
- National origin
- Ethnic group identification
- Religion
- Age (eff. 1/1/16)
- Sex
- Sexual orientation
- Color
- Genetic information
- Disability

Non-Cognizable Groups

- Poor people / low income
- Less educated
- Blue collar workers
- Battered women
- Young adults
- Older adults (70+)
- Death penalty skeptics
- Ex-felons
- Resident aliens
- Obese people
- Non-Hispanic with Spanish surname
- Naturalized citizens (but national origin is cognizable group)
- "Insufficient" English spoken
- New community resident (less than 1 year)
- Strong law-and-order believers
- Men who wear toupees
- Retired correctional officers
- People who believe in jury nullification
- People of color (as a group)

Rebut Prima Facie Case
Defend 1st Stage

- Identify the players (Def, Vic, Juror)
- Statistics (e.g., only exercised 2 of 9 against group)
- Whether members of group were challenged by defense
- Jury includes members of group
- Engaged in vigorous questioning of juror(s)
- Did not know a juror was group member
- Justify prospective challenges before
- Challenge of 1 or 2 jurors rarely suggests a pattern of impermissible group bias (even if sample size is small)

State Your Reasons
Defend 2nd Stage

- Justification need not support cause challenge
- Even "trivial" reason (if genuine) will suffice
- Reasons must be plausible & supported by record
- Must state reasons for <u>each</u> challenge
- "I don't recall" can be fatal
  - But see *Gonzalez v. Brown* (9th Cir. 2009) 585 F.3d 1202
- DA must provide justifications, not court
- Get court's concurrence
  - Important for demeanor, non-verbal attributes

Factors in Court's Analysis
The 3rd Stage

- Credibility determination
- Court cannot substitute their own reasoning
- Court can use:
  - Statistical evidence
  - Comparative analysis
  - Disparate questioning
  - Historical evidence of discrimination
    - By individual prosecutor or office

Statistical Evidence

- Court looks at the numbers
  - 10 of 11 black jurors are challenged (91%)
  - 5 of 12 sitting jurors are Hispanic
  - 4 of 49 jurors were black & DA excused 3 out of the 4

Comparative Analysis

- Can be raised for first time on appeal
- Proffered reason for striking panelist applies just as well to an otherwise-similar panelist from non-cognizable group who is permitted to serve
- Used as evidence tending to prove purposeful discrimination
- One form of circumstantial evidence
- Similarly situated ≠ identically situated
- Ask questions to develop dissimilarities
- Don't just state a single reason, but give all applicable reasons

Disparate Questioning

- Court looks at differences in the way questions were phrased to different groups
- Disparate questioning based on race may evidence discriminatory purpose
- Any "trick" questions designed to elicit certain responses?

Race Neutral Reasons

- Could be combination of factors
- Change in dynamics of jury
- Change in mix of jurors
- Number of peremptory challenges remaining
- But, for each excused juror must identify characteristics in support of decision
- *P v. Cisneros* (2015) 234 CA4 111, 121 [next juror looks better not enough by itself]

Examples

- Negative experience with law enforcement
  - Relative in jail or prison
  - Refused employment by police
  - Divorce with police officer
  - Juror or friend/family member prosecuted by DA
  - Relatives are drug addicts
- Stupid
  - Ability to comprehend / understand
  - Answered only 2 of 10 questions
  - Inattentive
  - Inconsistent answers

Examples (con't)

- Appearance / Demeanor
  - Unconventional appearance
    - Long hair, "Fu Manchu type" facial hair
  - Blank look
  - Never read a book
  - Too eager
  - Soft spoken
  - Reluctant, timid
  - Frowning
  - Weird looking
  - Defensive body language
  - Rolled eyes
  - Overweight

Examples (con't)

- Occupation
  - Juvenile counselor
  - Social worker
  - Teacher
  - Artist
  - Engineer
  - Postal worker
  - Pastor
- Relativity
  - Next juror(s) looks better
  - But, must still justify challenge based on something else!

Examples (con't)

- Limited Life Experience
  - ~~Young~~
  - Single
  - No children
  - Few ties to community
- Prior Jury Experience
  - Previously sat on hung jury
  - No prior jury experience
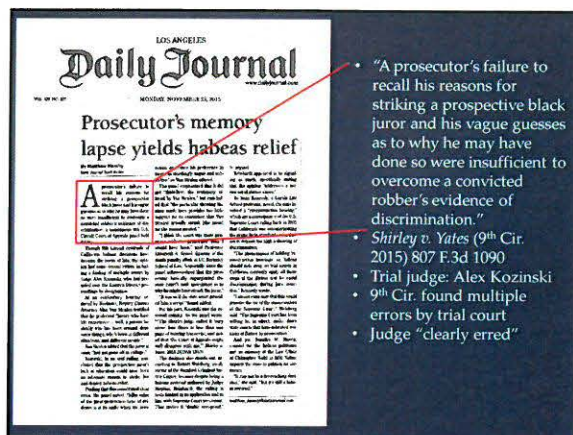
Improper Reasons
Caution!

- First Generation Americans
  - Trouble understanding the law
  - Bias against naturalized citizens vs. group bias against Hispanics
- Discriminatory racial proxy
  - E.g., lived in poorer, more violent neighborhood (South Central LA)
  - E.g., residence in Inglewood, where residents have a different attitude towards drugs

Remedy

- Traditionally
  - Mistrial
  - Draw an entirely different jury panel and start selection anew
- Other alternatives
  - Disallowing discriminatory challenge and reseating wrongfully excluded juror
  - Monetary fines
  - Allowing aggrieved party additional challenges
  - NOTE: need consent of aggrieved party for these alternative remedies!

Remedy on Appeal
Limited Remand

- Appellate court returns case to trail court for DA to state justifications on the record
- Allows DA to explain justification(s) during appeal process
- Could be years later
- "Prosecutorial approach" evidence gets little weight on review
- Take & preserve notes!

LOS ANGELES
Daily Journal
www.DailyJournal.com

MONDAY NOVEMBER 23, 2015

Prosecutor's memory lapse yields habeas relief

- "A prosecutor's failure to recall his reasons for striking a prospective black juror and his vague guesses as to why he may have done so were insufficient to overcome a convicted robber's evidence of discrimination."
- *Shirley v. Yates* (9th Cir. 2015) 807 F.3d 1090
- Trial judge: Alex Kozinski
- 9th Cir. found multiple errors by trial court
- Judge "clearly erred"

Case Examples

U.S. Supremes Speak (20 yrs later)
Miller-El v. Dretke (2005) 545 U.S. 231

- Sup Ct reverses murder conviction from 1985 (6-3 decision)
- The numbers
  - 20 of 108 potential jurors were Black; only 1 Black served
  - 9 Blacks excused for cause or by agreement
  - DA used peremptory strikes to excuse 91% of eligible Blacks (10 of 11)
- Comparative analysis
  - Juror 1 - DA came up with pretext (prior), but did not question about it
  - Juror 2 - Reasonable, but DA failed to object to others with similar answers
- Court also considered:
  - DA's historical policy of excluding Blacks (Dallas, TX)
  - Disparate use of "trick" questions (6% of Whites v. 54% of Blacks)
- Fact one (1) Black did serve does not un-do prior improper challenges

9th Circuit Reversal
Ali v. Hickman (9th Cir. 2009) 584 F.3d 1174

- Convicted in 2001 of first degree murder of his girlfriend
- DDA struck the only 2 Blacks in jury pool
- DCA affirmed & CA Supreme Court denied review in 2004
- Federal District Court denied habeas in 2007
- 9th Circuit granted habeas relief in 2009
  - DCA's "contrary conclusion was not only incorrect, but unreasonably so."
- DA had 3 reasons to excuse one juror:
  - Daughter was victim of attempt molestation
  - Expectation that attorneys would act professionally
  - Reluctance to judge others based on Christian faith
- 9th Circuit went through very detailed analysis
  - Reasons "logically implausible" & "unsupported by the record"
  - First two reasons were pre-textual; raises inference that final is also pre-textual

Comparative Analysis
People v. Lomax (2010) 49 Cal. 4th 530

- Defendant is Black
- 3 of 12 original prospective jurors were Black
- DA struck 1 Black and 3 others, then accepted panel 5 times, then struck 1 more Black juror
- More jurors were called and DA excused 3 of 6 Black jurors
- Trial court found a *prima facie* showing "based on the numbers"
- Court should focus on prosecutor credibility for race-neutral explanations (prosecutor's demeanor, how reasonable explanations are, common practices of DA, trial strategy)
- Comparative juror analysis is but one form of circumstantial evidence
- For each excused juror, there were reasons that distinguished that juror from others not excused

"People of Color" Not a Group
People v. Neuman (2009) 176 Cal.App.4th 571

- DA exercised 4 peremptory challenges
  - Hispanic, Black, "Latino" (based on accent), Southeast Asian
- Defense raised objection, claiming all 4 challenges had been used against "people of color"
- "People of color" is not a cognizable group
- Can't combine jurors to form one class or group
- No inference of discrimination from record
- Defendant is white and not a member of any group
- Excused jurors all shared common characteristics
  - Young college students; relatively inexperienced in life
- The 4 challenges not a complete record by itself
  - Ignores everything that happened

Statistical Analysis
People v. Garcia (2011) 52 Cal.4th 706

- Gender bias alleged
- DA exercised first 3 peremptory challenges against women
- California Supreme Court affirmed
- No prima facie case based on sheer number of challenges
- Supreme Court used percentages to conduct analysis
  - Women comprised 56% of jury pool (42 of 75)
  - 72% of first panel called into jury box were women (13 of 18)
  - 68% of jurors remaining in box after challenges were women (11 of 16)
  - DA used only 50% of challenges against women (7 of 14)
  - Vast majority (83%) of final jury was female (10 of 12)
- Factors:
  - Ultimate composition of jury was predominately female
  - Relatively modest number of prosecution strikes used against women

Conclusion

Practical Tips

- Anticipate a *Wheeler* challenge
- Question jurors fully and carefully so as to elicit race-neutral justifications for every challenge
- Be consistent
- Develop dissimilarities
- Take good notes
- Ask court to make a record on the prima facie showing
  - Giving justifications first will result in implied finding
- State your reasons for challenges even if you win the prima facie case (at break or after trial)
- Invite defense to do comparative analysis
  - It's difficult to do first time on appeal based on a "cold" record

Practical Tips (con't)

- Give multiple reasons for each challenge
  - But be careful, if one reason is pre-textual, then inference that others are pre-textual as well
- Keep a member of a cognizable group if possible
- Consider kicking off most hostile jurors first
  - Before defense gains "evidence" for Wheeler objection
- Make a record
  - Not everything is in transcript
  - Note final composition of jury
- If Wheeler violation found and juror is reseated...
  - Try to get the peremptory challenge back
  - Consider dismiss & re-file before jury is sworn

Avoid *Wheeler* Objections

- Might look bad to jury
- Throws you off
- If sustained, you're in trouble
- If not sustained, need to worry about appeal
- May be reported to State Bar

References / Citations

Mr. *Wheeler* Goes to Washington

*The Full Federalization of Jury
Challenge Practice in California*

by Jerry P. Coleman
*Assistant District Attorney
San Francisco County District Attorney's Office*

Prosecutor's Notebook
Vol. XXXIII

PRESIDENT
Jon Reilly

EXECUTIVE DIRECTOR
David LaBahn

Cheat Sheet

Wheeler / Batson Guide
SrDDA Robert Mestman
Orange County District Attorney's Office
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Seminal Cases

P v. Wheeler (1978) 22 C3 258; *Batson v. Kentucky* (1986) 476 US 79

3 Prong Test

1. Party objecting to challenge (defense) must make a prima facie case
   - Showing that the totality of facts gives rise to an inference of discriminatory purpose
2. If prima facie case shown, burden shifts and party (DA) must explain adequately the challenge
   - Offer permissible race-neutral justification
3. Court then makes decision
   - Whether the party objecting (defense) has proved purposeful discrimination

Johnson v. California (2005) 545 US 162, 168)

Burden of Proof

- Defense has ultimate burden of proof. (*Gonzalez v. Brown* (9th Cir. 2009) 585 F3 1202, 1207; *Purkett v. Elem* (1995) 514 US 765, 768)
- Defense must show purposeful discrimination by a *preponderance of the evidence*. (*P v. Hutchins* (2007) 147 CA4 992; *Paulino v. Harrison* (9th Cir. 2008) 542 F3 692, 705)
- Consider totality of circumstances. (*P v. Lenix* (2008) 44 C4 607, 626)
- Presumption that challenge is proper. (*P v. Newman* (2008) 176 CA4 571)

Rebut Prima Facie Case (1st Prong)

- Whether members of group discriminated against were challenged/excused by defense. (*People v. Wheeler* (1978) 22 C3 258, 283)
- DA passed with excused juror on panel. (*P v. Williams* (2013) 56 C4 630)
- Whether jury includes members of group discriminated against (*P v. Ward* (2005) 36 C4 186, 203)
- Did not know juror was member of group. (*P v. Barber* (1988) 200 CA3 378)
- Admit mistake (if error). (*P v. Williams* (1997) 16 C4 153, 188-190)
- Justify prospective challenges before you even make them. *US v. Contreras* (9th Cir. 1986) 83 F3 1103)
- Challenge of 1 or 2 jurors rarely suggests a pattern of impermissible group bias. (*P v. Allen* (2015) 237 CA4 971, 978)

Justifications (2nd Prong)

- Justification need not support a challenge for cause. (*P v. Thomas* (2011) 51 C4 449, 474)
- "Trivial" reason (if genuine) will suffice. (*P v. Arias* (1996) 13 C4 92, 136)
- Reasons must be inherently plausible & supported by record. (*P v. Silva* (2001) 25 C4 345, 366)
- Must state reasons for *each* challenge. (*P v. Cervantes* (1991) 223 CA3 323 ("I don't recall" fatal); but see *Gonzalez v. Brown* (9th Cir. 2009) 585 F3 1202 (based on totality of circumstances, "I don't recall" not fatal))
- Could be combination of factors (change in dynamic of jury, change in mix of jurors, number of peremptory challenges left, etc.). (*P v. Johnson* (1989) 47 C3 1194, 1220-1221)
- For each excused juror, must identify characteristics in support of decision to excuse them. (*P v. Cisneros* (2015) 234 CA4 111, 121)

Factors in Court's Analysis (3rd Prong)

- Statistical evidence (percentage of jurors excused, remaining, etc.). (*P v. Garcia* (2011) 52 C4 706, 744)
- Comparative analysis (see box below).
- Disparate questioning (court looks at differences in the way questions were phrased to different jurors). (*Miller-El v. Dretke* (2005) 545 US 231, 254)
- Historical evidence of discrimination (by individual prosecutor and/or office). (*Miller-El v. Dretke* (2005) 545 US 231)
- Credibility of prosecutor. (*P v. Williams* (2013) 56 C4 630)

Comparative Analysis

- Side-by-side comparison of jurors who were struck vs. jurors serving.
- If DA's proffered reason for striking juror applies just as well to an otherwise similar juror, that is evidence tending to prove purposeful discrimination. (*Miller-El v. Dretke* (2005) 545 US 231, 241)
- Comparative juror analysis is but one form of circumstantial evidence that is relevant, but not necessarily dispositive. (*P v. Lomax* (2010) 49 C4 530, 572)

Remedy

- Traditional: mistrial → draw an entirely different jury panel and start selection anew.
- Other alternatives (need consent of aggrieved party): disallow discriminatory challenge and reseat wrongfully excluded juror, monetary fines; allow aggrieved party additional peremptory challenges. (*P v. Willis* (2002) 27 C4 811; *P v. Mata* (2013) 203 CA4 898 (Def's personal waiver))

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Wheeler / Batson Guide

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- Credibility of prosecutor. (*P v. Williams* (2013) 56 C4 630)

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Cognizable Groups

- There must be an identifiable group distinguished on racial, religious, ethnic or similar grounds. (*P v. Wheeler* (1978) 22 C3 258, 276)
- Protected groups: "race, national origin, ethnic group identification, religion, age, sex, sexual orientation, color, genetic information, or disability." (CCP § 231.5; Govt Code § 11135(a))
- Defendant need <u>not</u> be member of excluded group. (*Wheeler* @ 281)

Race
- African-Americans (*P v. Wheeler* (1978) 22 C3 258)
- Hispanics (*P v. Perez* (1996) 48 CA4 1310; but see *P v. Gutierrez* (2002) 28 C4 1083, 1123 [Hispanic-surnamed jurors not necessarily Hispanic])
- Asian-Americans (*P v. Lopez* (1991) 3 CA4 Supp. 11)

Ethnicity
- Native Americans (*US v. Bauer* (9th Cir. 1996) 84 F3 1549)
- Irish/Italian-Americans (See 20 ALR 5th 398 at § 6)

National origin
- Spanish surnamed jurors (*P v. Trevino* (1985) 39 C3 667)

Religion
- Jews (*P v. Johnson* (1989) 47 C3 1194, 1217)
- But see *P v. Martin* (1998) 64 CA4 378 [permissible if valid reason related to religion (e.g., Jehovah's Witness); *US v. DeJesus* (3rd Cir. 2003) 347 F3d 500 [permissible for heighted religious involvement or beliefs vs. affiliation]

Gender
- Women (*P v. Garcia* (2011) 52 C4 706; *P v. Crittenden* (1994) 9 C4 83, 115)

Sexual Orientation
- Gay & Lesbian (*P v. Garcia* (2000) 77 CA4 1269, 1272)

Disability
- *US v. Harris* (7th Cir. 1999) 197 F3 870 [but permissible if disability would affect jury service (e.g., medication that causes drowsiness would interfere)]

Non-Cognizable Groups (Examples)

- Poor people / low income (*P v. Johnson* (1989) 47 C3 1194, 1214)
- Less educated (*P v. Estrada* (1979) 93 CA3 76, 90-91)
- Blue collar workers (*P v. Estrada* (1979) 93 CA3 76, 92)
- Battered women (*P. Macioce* (1987) 197 CA3 262, 280)
- Death penalty skeptics (*P v. Johnson* (1989) 47 C3 1194, 1222)
- Ex-felons (*P v. Karis* (1988) 46 C3 612, 631-633)
- Resident aliens (*P v. Karis* (1988) 46 C3 612, 631-633)
- Naturalized citizens (*P v. Gonzalez* (1989) 211 CA3 1186, 1202 [but can't be pretext for challenge based on race/national origin])
- Insufficient English spoken (*P v. Lesara* (1988) 206 CA3 1304, 1307)
- New community resident (*Adams v. Sup. Court* (1974) 12 C3 55, 60)
- Men who wear toupees (*P v. Motton* (1985) 39 C3 596, 606)
- Retired correctional officers (*P v. England* (2000) 83 CA4 772)
- Support jury nullification (*Merced v. McGrath* (9th Cir. 2005) 426 F3 1076)
- People of color (as a group) (*P v. Neuman* (2009) 176 CA4 571) [but see inclusion of "color" in Govt Code § 11135(a) eff. 1/1/16]
- Obese people (*US v. Santiago-Martinez* (9th Cir. 1995) 58 F3d 422)
- Non-Hispanic with Spanish surname (*P v. Gutierrez* (2002) 28 C4 1083, 1122)

Requirements / Rules

- Wheeler/Batson objection may be raised by the defense or prosecution. (*P v. Wheeler* (1978) 22 C3 258, 280-283, fn.29; see, e.g., *P v. Singh* (2015) 234 CA4 1319 [against defense attorney])
- Objection must be timely (i.e., before jury selection completed). (*P v. Perez* (1996) 48 CA4 1310; *P v. Scott* (2015) 61 C4 363, 383)
- Single discriminatory exclusion is a violation. (*P v. Fuentes* (1991) 54 C3 707)
- Give your justifications even if prima facie showing is not made. (*P v. Scott* (2015) 61 C4 363, 388 [encouraged for appellate review])

Race-Neutral Justifications (Examples)

Distrust of law enforcement
- Negative experience[1, 6]
- Relative in jail or prison[2, 6, 17]
- Refused employment by police[3]
- Ex-husband is cop[15]
- Divorce with police officer[3]
- Juror or friend/family arrested/prosecuted[4, 6, 8]
- Relative involved with drugs[8, 9]

Prior Jury Experience
- Previously sat on hung jury[1, 2]
- No prior jury experience[5]

Occupation
- Social worker[1]
- Teacher[9]
- Juvenile Counselor[13]
- Tractor Driver[9]
- Pastor[18]

Limited Life Experiences
- Single, no children[5]
- Few ties to community[16]
- Follower[17]

Stupid
- Ability to comprehend[1, 4, 9]
- Answered only 2 of 10 questions[5]
- Inattentive[10]
- Inconsistent answers[11]

Other
- Views on death penalty[6, 7]
- Rely too heavily on experts[6]
- Late/tardy[17]
- Close-mindedness[6]

Appearance / Demeanor
- Unconventional appearance[12]
- Wearing "Coors" jacket[9]
- Long hair, facial hair[14]
- Weird, unusual[15, 17]
- Too eager[13, 17]
- Soft spoken, reluctant, timid[4, 17]
- Frowning, hostile looks[6, 8]
- Emmotional[6]
- Defensive body language[15]
- Overweight[15]

1) *P v. Turner* (1994) 8 C4 137; 2) *P v. Farnam* (2002) 28 C4 107; 3) *Hayes v. Woodford* (9th Cir. 2002) 301 F3d 1054; 4) *P v. Arias* (1996) 13 C4 92; 5) *P v. Perez* (1994) 29 CA4 1313; 6) *P v. Gutierrez* (2002) 28 C4 1083; 7) *P v. Williams* (2013) 56 C4 630; 8) *P v. Dunn* (1995) 40 CA4 1039; 9) *P v. Barber* (1988) 200 CA3 378; 10) *US v. Power* (9th Cir. 1989) 881 F2d 733; 11) *P v. Mayfield* (1997) 14 C4 668; 12) *P v. Ward* (2005) 36 C4 186; 13) *P v. Ervin* (2000) 22 C4 48; 14) *Purkett v. Elem* (1995) 514 US 765; 15) *P v. Johnson* (1989) 47 C3 1194; 16) *Rice v. Collins* (2006) 546 US 333; 17) *P v. Duff* (2014) 58 C4 527; 18) *P v. Semien* (2008) 162 CA4 701.