

WHEELER / BATSON
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 challenge 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."

Improper & Unethical



Correct Procedure

3 Stages

1. Party objecting to challenge must make out *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 must explain adequately the challenge
 - Offer permissible race-neutral justification
3. Court then makes decision
 - Whether party objecting has proved purposeful racial discrimination

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
- Make as complete a record as feasible
- New *prima facie* showing must be made with each objection
- It take very little to raise an inference
 - As a practical matter, the first prong (the *prima facie* case) is almost always going to be made

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, 703
- Consider totality of circumstances
 - *P v. Lemix* (2008) 44 C4 602, 626
- Presumption that peremptory challenge is properly made
 - *P v. Neuman* (2009) 176 CA4 571

Cognizable Class

- Objector must establish that the persons excluded are members of a *cognizable class*
 - There must be an identifiable group distinguished on racial, religious, ethnic or similar grounds
 - Defendant need not be a member of the excluded group
 - Victim can also be a member of excluded group

Cognizable Groups

- Race
- National origin
- Ethnic group identification
- Religion
- Age
- Sex
- Sexual orientation
- Color
- Genetic information
- Disability

CCP § 231.5 amended eff. 1/1/16 to reference Govt Code § 11135 (added age)

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 (CAUTION: 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) (*P. v. Neuman* (2009) 176 CA4 571)

Rebut Prima Facie Case

Defend 1st Stage

- Whether members of group discriminated against were challenged by defense
- Jury includes members of group discriminated against
- Did not know a juror was member of cognizable group
- Justify your prospective challenges before you even make them
- Admit mistake (if challenge was made in error)
- Challenge of 1 or 2 jurors rarely suggests a pattern of impermissible group bias

State Your Reasons

Defend 2nd Stage

- Justification need not support a challenge for cause
- Even a "trivial" reason (if genuine) will suffice
- Reasons must be plausible & supported by record
- Must state reasons for each 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
- For each excused juror, must identify characteristics in support of decision to excuse them

Factors in Court's Analysis

The 3rd Stage

- Statistical evidence
 - 10 of 11 black jurors are challenged (91%)
 - 5 of 12 sitting jurors are Hispanic
 - 4 of 49 jurors were black and DA excused 3 of 4
- Comparative analysis
- Disparate questioning
 - Court looks at differences in the way questions were phrased to different groups
- Historical evidence of discrimination
 - By individual prosecutor and office

Comparative Analysis

- It's now the law in California
- "If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination."
- Similarly situated does not mean identically situated
- Ask questions to develop dissimilarities
- Don't just state a single reason, but give all applicable reasons
- Comparative juror analysis is but one form of circumstantial evidence that is relevant, but not necessarily dispositive, on the issue of intentional discrimination. (*P v. Lomax* (2010) 49 C4 530, 572.)

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 to excuse them
 - *P v. Cisneros* (2015) 234 CA4 111, 121 [next juror looks better not enough by itself]

Race Neutral Reasons
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

Race Neutral Reasons
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

Race Neutral Reasons
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!

Race Neutral Reasons
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 did not rebut a group bias against Hispanics
- Discriminatory racial proxy
 - E.g., lived in poorer, more violent neighborhood (South Central LA)
- Live in Certain Neighborhood
 - 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 trial court for DA to state justifications on the record
- Allows DA to explain justification(s) during appeal process
- Could be years later
- Take & preserve notes!
- TIP: Give your justifications even if prima facie showing is not made
 - Encouraged for appellate review
 - Can be done at a break or even after trial

U.S. Supremes Speak (20 yrs later)

Miller-El v. Dretke (2005) 545 U.S. 231

- Supreme Court 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
 - Expressed unwavering support for death penalty
 - DA came up with another reason (brother's prior), but DA did not question juror about that
 - Juror 2
 - On the face of it, reasonable, but DA failed to object to other panel jurors with similar answers
- Court also considered:
 - DA's historical policy of excluding Blacks (Dallas, TX)
 - Disparate use of "trick" questions (6% of whites vs. 54% of Black jurors)
- Fact one 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
 - "Each of the prosecutor's justifications is logically implausible, undermined by a comparative juror analysis, and otherwise unsupported by the record."
 - First two reasons were pre-textual; raises inference that final is also pre-textual

9th Circuit Affirms
Gonzalez v. Brown (9th Cir. 2009) 585 F.3d 1202

- DA used 4 of 10 peremptory challenges
 - 3 were used against Black jurors
- DA could not recall reason for first challenge
- Prosecutor's failure to give a valid race-neutral reason for her peremptory strike of the first juror weighs against her
- But based on everything conclude there was not purposeful discrimination
- Factors:
 - Relatively low number of peremptory challenges exercised against Black jurors
 - DA accepted panel with Blacks on it....twice
 - Two Blacks remained on jury

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
- Defense makes a *Wheeler* objection
- Trial court found a prima facie showing "based on the numbers"
- Court should focus on prosecutor credibility for race-neutral explanations
 - Credibility can be measured by prosecutor's demeanor, how reasonable explanations are, common practices of DA, trial strategy
- Comparative juror analysis is but one form of circumstantial evidence
 - But not necessarily dispositive
- 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 *Wheeler/Batson* 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
- Can't draw an 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 thereafter
- But, CCP § 231.5 amended eff. 1/1/16 to reference Govt Code § 11135 ["color"]

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

Practical Tips

- Anticipate a *Wheeler* challenge
- Need to question jurors fully and carefully so as to elicit race-neutral justifications for every challenge
- Be consistent
 - Question all jurors, list characteristics for all jurors
- Take notes
 - Especially helpful for demeanor attributes (stuff that won't necessarily be on the record)
 - Preserve your notes (necessary for appellate review)
- Give multiple reasons for each challenge
 - Be ready to articulate all characteristics based on specific bias factors unrelated to group membership
 - But be careful, if one reason is pre-textual, then inference that others are pre-textual as well
- Highlight things that serve to set two jurors apart
 - Ask questions to develop dissimilarities

Practical Tips (con't)

- Keep a member of a cognizable group if possible
- 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
 - Necessary for appellate review
- Consider kicking off most hostile jurors first
 - Before defense gains "evidence" for Wheeler objection
 - And possible reseating of challenged (hostile) juror
- If you are found in violation of Wheeler and court reseats challenged juror...
 - Try to get the peremptory challenge back
 - Consider dismissing case before jury is sworn and jeopardy attaches
 - But make sure you can re-file


