


THE ART AND SCIENCE OF JURY SELECTION



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THE BASICS

CCP §§ 223, 226, 231

- Voir dire should be conducted in open court with other prospective jurors present
- Judge conducts initial questioning
- Court may ask questions submitted by parties
- Defense usually has first turn to question and challenge for cause- Judge may limit time for questioning;
- DA then questions and challenges for cause;
- DA exercises first peremptory challenge, then alternate with defense
- Additional jurors are called as needed and the process continues
- When each side passes consecutively, the jury shall be sworn
- Cause challenges must be made prior to peremptory challenges
- Challenges must be made before jury is sworn

FOR CAUSE CHALLENGE

CCP § 225(B)(1)

- Unlimited number (each side)
- General disqualification
 - Lack of any qualification prescribed by law
 - Doesn't speak/understand English, convicted felon, non-resident, etc.
- Implied bias
 - Blood relation to any party, victim, witness, etc.
 - Involvement in prior case
 - Any interest in outcome
- Actual bias
 - State of mind preventing impartiality
 - Focus of voir dire questioning

PEREMPTORY CHALLENGE

CCP §§ 225(B)(2) / 231

- **Limited number**
 - Generally 10 per side
 - 6 if maximum punishment is 90 days (e.g., PC § 415)
 - 20 if life or DP case
- **Alternates**
 - Same number as alternative jurors called (CCP § 234)
- **Multiple defendant cases**
 - Defense gets 6, 10 or 20 challenges jointly (per above guidelines)
 - Each defendant gets 5 individual challenges
 - DA gets same amount as total defense challenges
 - E.g., 3 co-D non-life case [DA gets 25 challenges (10+5+5+5)]
- **Can be used for any reason**
 - Can be based on instinct or gut feeling
 - May not exclude members of a cognizable group based on group bias

YOUR GOAL IN JURY SELECTION

Build rapport

Establish credibility

Pick a jury that will convict

Establish a relationship:
Jury selection is nothing
more than forming
connections

RAPPORT

TRADITIONAL HUMAN CONNECTION IS GETTING LOST



WE ARE ALL GUILTY OF IT



(MOST) IMPORTANT PART OF YOUR TRIAL

- Jury selection is the time where you set the tone for **your** trial.
- Different styles determine the mood in the courtroom;
 - Judge's personality;
 - Attorney personality;
 - Formality of the courtroom;
- Your personal connection style is the first step in forming your relationship with the jurors.
 - your confidence;
 - your comfort in the space;
 - Your interest in this process.

WHY DO YOU NEED TO BUILD RAPPORT?

What makes people open up to you?

You have a short period of time and you want your jurors to tell you (or show you) if there is anything that will keep them from voting guilty in your case.

SHORT TIME TO GET TO KNOW SOMEONE

■ What are the common things you see/do in getting jurors to open up and talk to you?

- Small talk
- Soothing tone
- Analogies and Metaphors
- Stories
- Humor

If potential juror feel like it's abrupt or an interrogation, you will get one word answers that won't help you.

These are all subtle efforts to connect with other people, make them comfortable and encourage them to open up.

START A CONVERSATION

- This can be a difficult skill, once you master it, you can use it anywhere;
- Start by creating a friendly/approachable vibe;
- Engage the person your talking to by showing authentic curiosity; you want to ask open ended questions;
- Develop some "conversation starter" particular to your case; don't be tied to a memorized set of themes for jury selection;
- In order to effectively start a conversation with your jurors you need a combination of friendliness, curiosity, and authenticity.

WHAT **DO** YOU KNOW ABOUT THEM?

- You may not know much about these people, their background, their lives, but ...
- Everyone in your jury pool is human.
- Most humans share many emotional triggers.



COMMONALITY

- Meaningful commonalities connect people;
- You can connect with them in a general, "we are all part of the same community", rather than personal way;
- Use real life scenarios and examples when you begin to introduce legal concepts.
- "Oh Please" example- circumstantial evidence.

HOW DO YOU BUILD RAPPORT IN A SINCERE WAY?

- Prosecutors are presenters. We present a theory to an audience. We are public speakers.
- What is the most effective way to communicate with your jury pool?
- In terms of communicating feelings and attitudes, research studies have concluded:
 - 7% of message pertaining to feelings and attitudes is in the words that are spoken.
 - 38% of message pertaining to feelings and attitudes is paralinguistic (the way that the words are said).
 - 55% of message pertaining to feelings and attitudes is in facial expression.

(Mehrabian, A. (1981) Silent messages: Implicit communication of emotions and attitudes. Belmont, CA: Wadsworth (currently distributed by Albert Mehrabian; email: am@kax.com))

EYE CONTACT

- The movements of your eyes, mouth, and facial muscles can build a connection with your jury. Alternatively, they can undermine your every word.
- Eye contact is the most important element in this process. No part of your facial expression is more important in communicating sincerity and credibility.
- Nothing else so directly connects you to your jury.

"Effective presenters engage one person at a time, focusing long enough to complete a natural phrase and watch it sink in for a moment. This level of focus can rivet the attention of a room by drawing the eyes of each member of the audience and creating natural pauses between phrases. The pauses not only boost attention, but also contribute significantly to comprehension and retention by allowing the listener time to process the message." Andrew Dugan, author and public speaking coach

WHAT DOES YOUR BODY LANGUAGE SAY ABOUT YOU?

- **Hands:** They don't belong in your pockets or folded across your chest either or held behind your back. Use them to help emphasize a point, to express emotion and to engage your jury.
- **Gestures:** Most people have a gesture at their disposal that supports common words. It's a universal way of connecting with other people;
- **Stance:** don't hide behind the podium.
- **Notes:** leave them on the podium, come back if you need to.
- **Comfort** in the courtroom, this is "your" case, feel comfortable in the space;
- Especially when you go up against someone who is more experienced. Example.
- Be natural.

AMY CUDDY VIDEO



IT'S SOMETHING YOU WILL WORK ON
FOR THE REST OF YOUR CAREER

"Tiny Tweaks = Big Changes"

Amy Cuddy TED Talk:
http://www.ted.com/talks/amy_cuddy_your_body_language_shapes_who_you_are.html

BE YOURSELF

YOU HAVE TO BE COMFORTABLE IN THE
SPACE



When your audience feels an emotion, they are motivated to act.

CREDIBILITY

WHY IS IT IMPORTANT TO BUILD CREDIBILITY FROM THE BEGINNING?

If they trust and respect you, they will follow you.

Your demeanor, your words and your relationship with them will carry through to the verdict and sometimes even after

DO YOU LOOK THE PART?

- What is the message you are conveying in your appearance?
 - Shine your shoes;
 - Wear a suit, doesn't have to be expensive to look put together;
- Clear your work space;
- Be on time;
- Professional;

If they like how you look, and how you present yourself, they will trust that you know what you are talking about.

You can begin to subtly introduce your theme in opening because this is the time that you are developing your relationship with them.

—

In closing, you can remind them of that

BRING YOUR JURY BACK

THINK ABOUT THE CALCRIMS THEY WILL BE GETTING

- Defenses
- Witness issues (uncooperative, discrepancy)
- Circumstantial evidence
- Group crimes
- DV
- Testimony of single witness
- Voluntary intoxication
- What other themes do you often see?

THEMES TO INTRODUCE IN VOIR DIRE

- Think about the weaker aspects of your case and touch on them in jury selection so that you can highlight in closing:
 - Single witness testimony, prep them for this instruction:
- When you introduce themes, how are they reacting to the concepts that you are introducing?
- victim and they can't get over it, that's a problem.
- Can you follow the law,
- TV shows- set the expectations by highlighting this is real life.
- Direct/circumstantial evidence. Example.

GROUP CRIMES CALCRIM 401 - AIDING AND ABETTING

- A person may be guilty of a crime in two ways. One, he or she may have directly committed the crime. I will call that person the perpetrator. Two, he or she may have aided and abetted a perpetrator, who directly committed the crime.
- A person is guilty of a crime whether he committed it personally or aided and abetted the perpetrator.

MOTIVE

- The People are not required to prove that the defendant had a motive to commit the crime charged. P. 31
- Having a motive may be a factor tending to show that the defendant is guilty. Not having a motive may be a factor tending to show the defendant is not guilty.
- The motive in this case is to steal and to kill a man who was insulting him.
- He may not have gone over there to steal, but at some point, he did.

COMMON DEFENSES/LESSERS HEAT OF PASSION

It is not enough that the defendant simply was provoked. The defendant is not allowed to set up his own standard of conduct. You must decide whether the defendant was provoked and whether the provocation was sufficient. In deciding whether the provocation was sufficient, consider whether a person of average disposition, in the same situation and knowing the same facts, would have reacted from passion rather than from judgment.

SELF DEFENSE

- The defendant is only allowed to use that amount of force that a **reasonable person** would believe is necessary in the same situation.
- The defendant used **more force than was reasonable**; the attempted killing is not justified. (Calcrim 505)
- At the time he acted, he knew his act was dangerous to human life; and
- Deliberately acted with conscious disregard for human life.

If the defendant used **more force than was reasonable**, the attempted killing is not justified. (Calcrim 505)

WITNESSES ISSUES

- You alone must judge the credibility or believability of a witness.

You can decide if they lied and what you want to do with that information. You can accept the part you think is true and ignore the rest or ignore the testimony all together.

LEGAL CONCEPTS: SECOND DEGREE MURDER: IMPLIED MALICE

Implied Malice:

1. The defendant intentionally committed an act;
2. The natural and probable consequences of the act were dangerous to human life;
3. At the time he acted, he knew his act was dangerous to human life; and
4. Deliberately acted with conscious disregard for human life.

- **No intent to kill is needed;**

CALCRIM 224

■ **Before you may rely on circumstantial**

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However, when considering circumstantial evidence, you must accept only reasonable conclusions and reject any that are unreasonable.

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You are not simply looking for twelve fair and impartial jurors.

SELECTION

PICK JURORS WHO WILL CONVICT

- Ultimately, you want jurors who have no hesitation rejecting the unreasonable and convicting;
- You want to make sure there are no biases, obvious or not, that will keep them from convicting.
- Do you rely on stereotypes? Do you trust your gut?
- Kick them if they are an obvious juror that you don't want; Don't waste time with questions;
- Can this juror get along with everyone else? Too "over-the-top" on issues, either side.
- Nonverbal cues.
- Normal, regular people?
- Don't play games with your challenges, you might get surprised and stuck with a jury you don't like.
- **Be tireless, you may be tired. Stay on your game;**

HOW DO YOU KNOW WHO WOULD BE A GOOD JUROR FOR YOUR CASE?

▪ Don't buy into the stereotypes

▪ Video:
http://www.youtube.com/watch?feature=player_detailpage&v=2enFC3Zm5tM



▪ Advocate (1-5) Movie CLIP - Jury Selection (199'

It all comes down to whether or not you "connect" with the person.

TRUST YOUR GUT

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 not 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 heightened 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])

Distrust of law enforcement

- Negative experience^{1, 6}
- Relative in jail or prison^{2, 6, 17}
- Refused employment by police³
- Ex-husband is cop¹⁵
- Divorce with police officer³
- 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 experience⁵

Race-Neutral Justifications (Examples)

Occupation

- Social worker¹
- Teacher⁹
- Juvenile Counselor¹³
- Tractor Driver⁹
- Pastor¹⁸

Limited Life Experiences

- Single, no children⁵
- Few ties to community¹⁶
- Follower¹⁷

Stupid

- Ability to comprehend^{1, 4, 9}
- Answered only 2 of 10 questions⁵
- Inattentive¹⁰
- Inconsistent answers¹¹

Other

- Views on death penalty^{6, 7}
- Rely too heavily on experts⁶
- Late/tardy¹⁷
- Close-mindedness⁶

Appearance / Demeanor

- Unconventional appearance¹²
- Wearing "Coors" jacket⁹
- Long hair, facial hair¹⁴
- Weird, unusual^{15, 17}
- Too eager^{13, 17}
- Soft spoken, reluctant, timid^{4, 17}
- Frowning, hostile looks^{6, 8}
- Emotionless⁶
- Defensive body language¹⁵
- Overweight¹⁵

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.



Wheeler / Batson Guide

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Seminal Cases

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

3 Prong Test

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 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, 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)

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. 1988) 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, 386)
- 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 preemptory 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 reseal wrongfully excluded juror; monetary fines; allow aggrieved party additional preemptory challenges. (*P v. Willis* (2002) 27 C4 811; *P v. Mata* (2012) 203 CA4 898 [Def's personal waiver])

WHEELER / BATSON

Ethical Jury Selection



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August 2015

**The
New York
Times**
August 16, 2015



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 nylt NOW

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



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 inference of discriminatory purpose
 - Previously “strong likelihood”
 - It take very little to raise an inference

Step 2

- If prima facie case shown, burden shifts and party must explain adequately the challenge
 - Offer permissible race-neutral justification

Step 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
- 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 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. Lenta* (2008) 44 CA4 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 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 (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 (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)

Rebut Prima Facie Case

Defend 1st Stage

- Identify the players
- Whether members of group were challenged by defense
- Jury includes members of group
- Did not know a juror was group member
- Justify prospective challenges before
- Admit mistake (if 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 cause challenge
- Even "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
- Get court's concurrence
 - Important for demeanor, non-verbal attributes

Factors in Court's Analysis

The 3rd Stage

- 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

- It's now the law in California
- 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 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!



- "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, a unanimous 9th U.S. Circuit Court of Appeals panel held."
- *Shirley v. Yates*, 2015 WL 7422606
- Trial judge: Alex Kozinski
- 9th Cir. found multiple errors by trial court
- Judge "clearly erred"

Tip

- Give your justifications even if *prima facie* showing is not found
- Encouraged for appellate review
- Can be done at a break or even after trial
- Take good notes

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

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 notes
- Ask court to make a record on the prima facie showing first
 - Giving justifications first will result in implied finding
- State your reasons for challenges even if you win the prima facie case
- 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 re-seated...
 - 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

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Cheat Sheet



Wheeler / Batson Guide

SRIDA Robert Mestman
Orange County District Attorney's Office
On 8/12/2019

Summit Cases

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

2. Proving Trust

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 (OA) must explain adequately the challenge
 - Offer permissible race-neutral justification
 3. Court then makes decision
 - Whether party objecting (defendant) has proved purposeful discrimination
- Jackson v. California (2005) 545 US 162, 168

Burden of Proof

- Defense has ultimate burden of proof: *Grain Processing v. Brown* (9th Cir. 2009) 545 F.3d 1202, 1207; *Auerst v. Film* (1995) 514 U.S. 705, 769)
- Defense must show purposeful discrimination by a preponderance of the evidence: *P v. Hutchins* (2007) 347 CA4 992; *Paulino v. Harrison* (9th Cir. 2008) 542 F.3d 692, 703)
- Consider totality of circumstances: *P v. Lewis* (2008) 44 CA 602, 620)
- Presumption that challenge is proper: *P v. Newman* (2009) 176 CA 571)

Reborn Primeira fase: Casa (1ª Etapa)

- Whether members of group discriminated against you were challenged/ignored by defense. (*People v. Wilkerson* (1978) 22 Cr.2d 283.)
- DA pursued with or without jury on ground. (P. v. Wilkerson (2013) 56 Cr.630)
- Whether jury instructed members of group discriminated against (P. v. Wink (2005) 36 Cr.288, 291)
- Did not know juror was member of group. (P. v. Barber (1988) 200 Cr.378)
- Abuse: mistake [1 error]. (P. v. Williams (1997) 16 Cr.153, 188-190.)
- Juror's prospective challenges before you even make them. (US v. Contreras (9-Cr. 1988) 89-3 1103)
- Challenge of 1 or 2 jurors rarely supports a motion of impermissible group bias. (P. v. Afari (2015) 237 Cr.972, 978)

Justifications (2nd Prong)

- * Justification need not support a challenge for cause. (P v. Thomsen (2011) 51 C 448, 424)
- * "Initial" reason (if genuine) will suffice. (P v. Ariss (1998) 13 C 492, 182)
- * Reasons must be inherently plausible & supported by evidence. (P v. Sles (2001) 25 C 445, 384)
- * Most state reasons for each challenge. (P v. Cervones (2011) 222 C 242, 213)
- * "I don't meet legal" test, but see Gonzalez v. Brown (P v. 2009) 585 F 3 1205
- * Focus on totality of circumstances, "I don't meet legal" test
- * Conflicting evidence of factors change in dynamics of jur. challenge in mid-60s of juror, number of preservation challenges left, v. c. 1. (P v. Ariss (1998) 13 C 492, 182)
- * For each accused juror, must identify characteristics in support of decision to remove them. (P v. Chovons (2013) 234 C 411, 371)

Esters In Contact's Anniversary 13rd Print

- Statistical evidence (percentage of jurors who saw, remembered, etc.) (*P v. Garcia* (2011) 52 CA 706, 744)
- Comparative analysis (see box below)
- Disparate questioning (court looks at differences in the way questions were phrased to different jurors) (*Miller-E v. Droke* (2005) 545 US 281, 284)
- Historical evidence of discrimination (by individual prosecutor and/or office) (*Miller-E v. Droke* (2005) 545 US 231)
- Credibility of prosecutor. (*P v. Williams* (2013) 58 CA 890)

Compassionate Atonement

- Side-by-side comparison of jurors who were struck vs. jurors serving
- If a juror offered reason for striking juror applies just as well to an otherwise-similar juror, that is evidence tending to prove purposeful discrimination (Miller-Esk. Decree (2005) 545 U.S. 231, 241)
- Comparative juror analysis is but one form of circumstantial evidence that is relevant, but not necessarily dispositive. (P v. Somers (2010) 49 CA 530, 572)

Kennedy

- Traditional: mistrial → draw an entirely different jury panel and start selection anew.
- Other alternatives (need consent of Aggrieved party): disallow discriminatory challenge and reset wrongfully excluded juror, monetary fines, allow aggrieved party additional peremptory challenges. (P v. Wells (2002) 27 CA 411; P v. Aloia (2011) 203 CA 496 (Def's personal warrant))



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