# Quick pick for Murray jury

Lawyers will have half the usual time to question about 145 potential panelists in the trial of Michael Jackson's doctor.

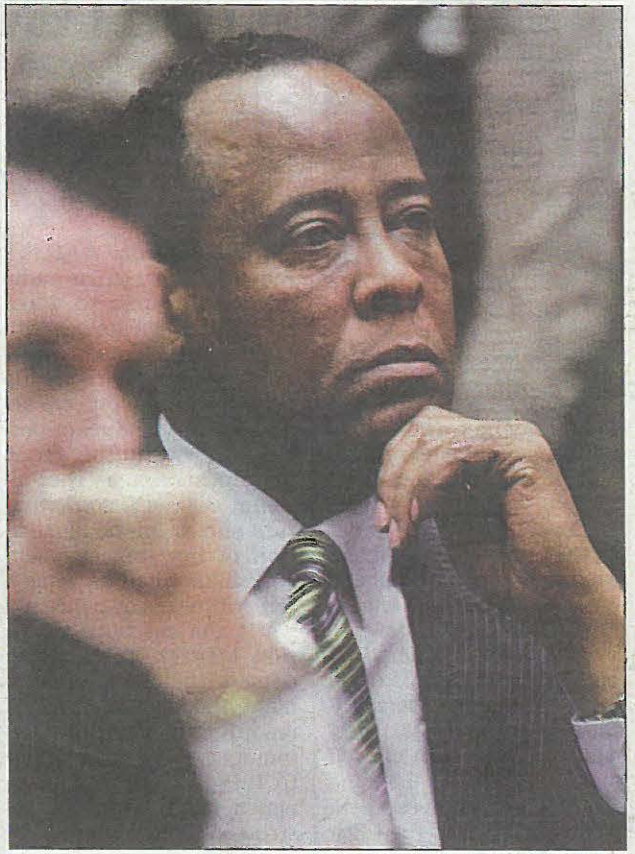
HARRIET RYAN

If, as is often said, trials are won or lost in the selection of jurors, the fate of Michael Jackson's doctor may be sealed Friday when a pool of prospective jurors is narrowed to a dozen.

That jury is expected to spend about five weeks hearing testimony about the music icon's final days and the culpability of Dr. Conrad Murray, Jackson's $150,000-a-month personal physician who gave him the surgical anesthetic propofol as a sleep aid.

The approximately 145 potential jurors are already well-known to both sides, thanks to what the judge in the case has called "the most complete questionnaire ever" — 32 pages of questions about their background, job history, views of Jackson and exposure to the media coverage of his 2009 overdose. In an initial screening earlier this month, every potential juror said they had some knowledge of the involuntary manslaughter case against Murray.

Because the questionnaire is so thorough, Superior Court Judge Michael Pastor has said he will allow attorneys only half the normally allotted time to question the would-be jurors as a group in court.



IRFAN KHAN Los Angeles Times

**ON TRIAL:** Dr. Conrad Murray, right, is charged with involuntary manslaughter. Prospective jurors have filled out an extensive questionnaire.

With less than a minute per potential juror, lawyers are likely to have decided beforehand "whether they want to keep them or get rid of them," said Richard Hirschorn, a veteran Texas jury consultant.

Murray's defense lawyers retained an unidentified consultant to help evaluate the questionnaires. The prosecutor's office has used such consultants in the past but elected not to this time.

"It's very lean times for public prosecutors' offices," said Sandi Gibbons, a spokeswoman for the district attorney's office.

> 'It's really a de-selection process: getting rid of the worst of the worst and hoping the ones that are left can be fair.'
>
> — RICHARD HIRSCHORN, veteran jury consultant

In evaluating the questionnaires, experts said, both sides are likely to home in on the questions they care about most. Hirschorn said prosecutors might focus on what jurors wrote about their experiences with doctors and prescription drugs. Particularly revealing, he said, was the question, "Has a physician ever refused to prescribe a medication that you specifically requested?"

"That's the prosecution case in one sentence — Murray should have said no" to his famous patient, Hirschorn said. People turned down by doctors may be more critical of Murray's acquiescence: "I'm putting them on the jury 99 out of 100 times," he said.

Questions about how closely they followed other high-profile legal cases, including the recent Casey Anthony murder trial in Florida, might draw close scrutiny also, said Richard Gabriel, a jury consultant who worked for music producer Phil Spector's murder defense. He said jurors interested in true crime stories covered obsessively by such cable news hosts as Nancy Grace "tend to be pretty pro-prosecution."

Justice, on such programs, "has become code for conviction," he said.

Attorneys might also zero in on potential jurors' experiences with drug and alcohol addiction, the subject of three questions. Hirschorn said people who have dealt with substance abuse would probably be more open to Murray's claim that Jackson begged for propofol and gave himself the fatal dose.

"If they know somebody who has been addicted, then they know that person will do whatever they have to to get drugs," Hirschorn said.

Legal teams typically rank jurors from one to five based on their answers and information turned up by Internet or public searches. In court Friday, experts said, both sides are likely to focus on the jurors they rank as ones — the worst for their case.

"It's not a matter of picking the people you want. It's really a de-selection process: getting rid of the worst of the worst and hoping the ones that are left can be fair," said Hirschorn, who worked for the defense in the William Kennedy Smith rape trial in the early 1990s.

Both sides can excuse 10 potential jurors without giving a reason. Additionally, they can ask the judge to remove anyone who shows bias.

But Howard Varinsky, the jury consultant for prosecutors in the trials of Scott Peterson and Martha Stewart, said the short time for questioning jurors in Murray's case will probably hurt lawyers' attempts to tease out bias.

"It usually takes about five, six ... minutes" of questioning, Varinsky said. "When you've got one minute, you can't do it. You're handcuffed."

The limited time also constrains follow-up questions, such as in the case of jurors who check a box identifying themselves as Jackson fans, Gabriel said.

"You don't know if that means 'I've seen every concert and own every album' or 'I just really liked "Thriller," ' " he said.

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Times staff writer Victoria Kim contributed to this report.

# Wheeler / Batson

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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 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 must explain adequately the challenge
   - Offer permissible race-neutral justification
3. Court then makes decision
   - Whether party objecting has proved purposeful racial 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 by defense. (*People v. Wheeler* (1978) 22 C3 258, 283)
- Whether jury includes members of group discriminated against. (*P v. Ward* (2005) 36 C4 186, 203.)
- DA did not know juror was member of cognizable group. (*P v. Barber* (1988) 200 CA3 378, 389.)
- Admit mistake (if challenge was made in 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)

## Justifications (2rd 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 the 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)
- Give your justifications even if prima facie showing is not made (necessary for appellate review).

## Factors in Court's Analysis (3rd Prong)

- Statistical evidence (percentage of jurors excused, remaining, etc.).
- Comparative analysis (see box).
- Disparate questioning (court looks at differences in the way questions were phrased to different groups).
- Historical evidence of discrimination (by individual prosecutor and office).

(*Miller-El v. Dretke* (2005) 545 US 231)

## Requirements / Rules

- Wheeler/Batson objection may be raised by the defense or prosecution. (*P v. Wheeler* (1978) 22 C3 258, 280-283, fn.29)
- Must raise the issue in a timely fashion (i.e., before jury is sworn). (*P v. Perez* (1996) 48 CA4 1310, 1314)
- A single discriminatory exclusion will be a violation. (*P v. Fuentes* (1991) 54 C3 707, 716, fn.4)

## Remedy

- Traditionally: 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 preempts. (*P v. Willis* (2002) 27 C4 811)

# JURY VOIR DIRE & WHEELER / BATSON

Robert Mestman
Deputy District Attorney
September 23, 2011

## Voir Dire

*"To speak the truth."*

- From Old French or Latin
- The preliminary examination of prospective jurors to determine their qualifications and suitability to serve on a jury, in order to ensure the selection of fair and impartial jury.

THE ORANGE COUNTY REGISTER

**Rash of hung juries expensive for courts**

By LARRY WELBORN
2011-08-04 12:33:33

SANTA ANA – Eleven jurors complained Wednesday that the 12th member of their panel was not listening to their arguments in an assault and kidnapping case, but the holdout juror insisted he was doing his civic duty and was properly participating in the deliberating process.

All 12 jurors eventually agreed on one thing: that further deliberations would not produce verdicts.

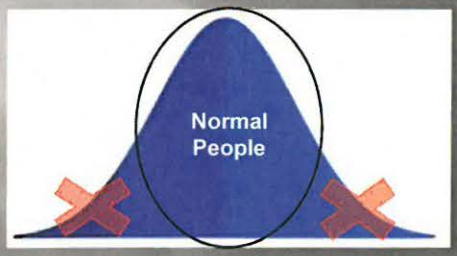
Superior Court Judge Frank F. Fasel reluctantly declared a mistrial in an assault and kidnap case against Ruthie Marshall, a 41-year-old Garden Grove woman with ties to white supremacy gangs. He ordered Marshall returned to court on Oct. 28 for a re-trial.

It was the eighth time this year that mistrials have been ordered in major trials in Orange County courtrooms because of deadlocked juries – in several cases the final votes were 11-1 in favor of guilt. Most cases, like Marshall's, have been re-scheduled for second trials. In one case, there will be a third trial.

## More Art Than Science

- Goal is to get a fair and unbiased jury
- Get the jurors talking
- The more they talk, the more they reveal
- You want normal, law-abiding people who get along with others
- Find the wing nuts
- Use your instinct / hunch

## Seek Out the Outliers




## Reasons Juries Acquit

### Address Weaknesses Head-On

- Sympathy for defendant
- Contributory fault of victim
- *De minimis* nature of offense
- Police conduct / tactics
- Confusion
- Nullification (personal beliefs about the law)

## Trial Prep

Submit written voir dire questions to court

1. Court may require it (Rule 4.200(b))
2. Helps you think through issues & questions
3. Shows the judge you are prepared
4. Requests judge to ask some of your questions
5. Counters possible defense objections

## Voir Dire Statutory Authority

- CCP §§ 223, et. seq.
  - Both sides have the right to examine jurors
  - Court has discretion to limit
  - Limited as an aid to exercise challenges for cause
  - Must be conducted orally
- Rule of Court 4.201
  - May also be conducted by written questionnaire

## Mechanics

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
- DA then questions and challenges for cause
- DA exercises first preemptory 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

## Do's and Don'ts

- Talk about the facts?
  - Can't educate the jury panel to particular facts of case, nor compel jurors to commit themselves to vote a particular way (*P v. Butler* (2009) 46 C4 847, 859; *P v. Mason* (1991) 52 C3 909, 940)
  - Court may limit voir dire to avoid the danger of indoctrinating the jury on a particular view of the facts (*P v. Pinholster* (1992) 1 C4 865, 915)
  - Court has discretion to prohibit hypotheticals (*P v. Sanders* (1995) 11 C4 475, 539)
- Okay to talk about the law
  - Permissible to question jurors' attitudes on relevant doctrines of law (*P v. Balderas* (1985) 41 Cal. 3d 144, 182-184)
  - But, can't instruct the jury in matters of law (*P v. Butler* (2009) 46 C4 847, 859)
- Don'ts
  - Can't instruct, educate, cajole, argue or otherwise prejudice the jury (*P v. Balderas* (1985) 41 Cal. 3d 144, 182-184)
- Court discretion
  - Trial court has "considerable discretion…to contain voir dire within reasonable limits." (*P v. Butler* (2009) 46 C4 847, 859)

## 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
    - Each side gets 25 challenges (10+5+5+5)
- Can be used for any reason
  - Can be based on instinct or gut feeling
- Well, sort of….Can't be used for an unlawful purpose
  - May not exclude members of a cognizable group based on group bias

## *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."

## Objection Requirements

- Must raise the issue in a timely fashion
  - Before jury is sworn
- Make as complete a record as feasible
- 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
  - African-Americans, Hispanics, Asian-Americans, etc.
- Ethnicity
  - Native Americans, Irish-Americans, Italian-Americans, etc.
- National origin
- Religion
  - Catholics, Jews, Mormon, etc.
  - But, permissible if a valid reason related to religion (e.g., Jehovah's Witness)
- Gender
- Sexual Orientation
  - Specifically included per CCP § 231.5
- Disability
  - But, permissible if disability would affect jury service (e.g., medication that causes drowsiness would interfere)

## Non-Cognizable Groups

- Poor people / low income
- Less educated
- Blue collar workers
- Battered women
- Young adults
- Older adults (i.e., people over 70)
- Death penalty skeptics
- Ex-felons
- Resident aliens
- 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. Newman* (2009) 176 CA4 571)

## Correct Procedure

### 3 Stages

1. Party objecting to challenge must make our 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 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 is sworn
  - But not necessarily immediately after objectionable challenge
- 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. Lenix* (2008) 44 C4 602, 626
- Presumption that peremptory challenge is properly made
  - *P v. Neaman* (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)

## 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:
  - Inherently plausible
  - Supported by the 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
- Give your justifications even if prima facie showing is not made
  - Necessary for appellate review
  - Can be done at a break or even after trial
- DA must provide justifications, not court

## 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 preemptory challenges remaining

## 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
- Limited Life Experience
  - Young
  - Single
  - No children
  - Few ties to community

## Race Neutral Reasons
### Examples (con't)

- Prior Jury Experience
  - Previously sat on hung jury
  - No prior jury experience
- Appearance / Demeanor
  - Unconventional appearance
    - Long hair, "Fu Manchu type" facial hair
  - Blank look
  - Never read a book
  - Too eager
  - Soft spoken
  - Reluctant
  - 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
- Relativity
  - Next juror(s) looks better
  - Only works with 6 pack system or computerized draw list

## 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 preempts
  - 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
- Take & preserve notes!

## 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 did not follow up on possible reconsider finding in questioning
    - 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 (Batts, TX)
  - Disparate use of "trick" questions designed to illicit particular responses to create a "race-neutral" justification (69% of whites vs. 31% of Black jurors were posed such questions)
- Fact one Black did serve does not un-do prior improper challenges
  - Towards end of voir dire, DA had only a few challenges remaining and several "bad" jurors
  - DA basically had to accept the one Black juror who ended up serving

## 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 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:
  1. Daughter was victim of attempt molestation
  2. Expectation that attorneys would act professionally
  3. Reluctance to judge others based on Christian faith
- 9th Circuit went through very detailed analysis
  - "Each of the prosecutor's justifications is facially implausible, undermined by a comparative juror analysis, and otherwise unsupported by the record."
  - That first two reasons were pre-textual raises an inference that the final reason is also pre-textual, even if valid explanations are offered

## 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 and race-neutral reason for her peremptory strike of the first juror weighs against her
- But that is not all that was before the court and it had other good reasons to 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
- Cal Supreme's similarly affirmed conviction in another case where DA could not recall and "left her notes upstairs"
  - *P v. Green* (2011) 52 C4 706

## 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 other non-Blacks, 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, among other factors, the prosecutor's demeanor, by how reasonable, or how improbable, the explanations are, and by whether the proffered rationale has some basis in accepted trial strategy
  - May also rely on court's own experiences as a lawyer and the common practices of the DA and the office that employs him
- Comparative juror analysis is but one form of circumstantial evidence that is relevant, but not necessarily dispositive, on the issue of intentional discrimination
- 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
  1. Hispanic
  2. Black
  3. "Latino" based on accent, but really Southerner
  4. 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
- Defense failure to make a record hurts their appeal
  - Don't know how many of what group on panel, served on jury, excused, etc.

## 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 arose based on sheer number of challenges
  - Absolute size of the sample undergoing scrutiny is small
- 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)
- Ultimate composition of the predominately female jury, along with relatively modest number of prosecution strikes used against women, makes it difficult to infer purposeful discrimination

## 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
  - If you list certain characteristics, list them 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 (*Ali v. Hickman* (9th Cir. 2009) 584 F.3d 1174, 1192)
- Highlight things that serve to set two jurors apart
  - Ask questions to develop dissimilarities

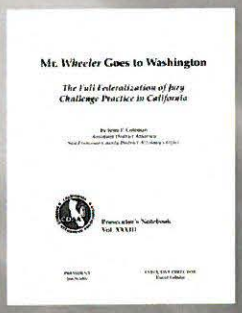
## Practical Tips (con't)

- Keep a member of a cognizable group if possible
- Ask court to make a record on the prima facie showing
  - Giving justifications before court has made a ruling will result in implied prima facie 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
    - Especially if juror is hostile towards you
    - But make sure you can re-file

## 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*

- Suggested Questions
- Jury Questionnaires
- Sample jury checklists
- Requests for court to ask questions

Available at G:/Training/Voir Dire