

The California District Attorneys Association

Jury Selection,
Examination, and
Impeachment Seminar
June 1-3, 2016

CDA**A**



CALIFORNIA
DISTRICT
ATTORNEYS
ASSOCIATION

Mark Zahner
CDAA Chief Executive Officer

Patrick J. McGrath
CDAA President

CDAA's Mission

To promote justice by enhancing prosecutorial excellence

This project is supported by a grant awarded by the Office on Violence Against Women, U.S. Department of Justice, and through Grant Award Number LV15171059 from the California Governor's Office of Emergency Services (Cal OES). Points of view, opinions, findings and conclusions in this publication and at this seminar are those of the author and/or instructor and do not necessarily represent the official position or policies of the U.S. Department of Justice, Cal OES or CDAA. CDAA and Cal OES reserve a royalty-free nonexclusive, and irrevocable license to reproduce, publish, and use these materials and to authorize others to do so.

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Training Officers of prosecutors' offices and law enforcement agencies may request permission to make copies of this manual for in-house training. Permission to reprint any part of this manual is at the sole discretion of CDAA. All requests must be in writing and faxed to CDAA at 916/443-2886. Requests must state the number of copies to be made, the date of the in-house training, and the anticipated number of prosecutors and law enforcement personnel in attendance.



CALIFORNIA
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CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION
Welcome to the Jury Selection, Examination, and Impeachment Seminar
– at McGeorge School of Law (Mock Courtroom)

On behalf of the California District Attorneys Association, welcome to the Jury Selection, Examination, and Impeachment Seminar.

CDAA awards Minimum Continuing Legal Education (MCLE) for prosecutors under the auspices of the California District Attorneys Association, which is designated as an authorized provider of continuing education for prosecutors in the State of California. Strict adherence to attendee hours and participation is applied. Should you have any questions regarding this information please Erin J. Martinelli, Director of Training Project Development.

- Turn off (or turn to "vibrate") your pagers and cell phones while the seminar is in session.
- All attorneys: You must provide CDAA with your State Bar number. If your bar number is not printed on the sign-in roster or if your number is incorrect, please add/correct it. If you attend the entire seminar you will receive MCLE credit. Schedule and credits are subject to agenda changes.
- You are required to sign in each day in order to receive credit. Should you choose to leave earlier than the course schedule or miss time please note the time on your designated sign in space. Please be aware that by signing in indicates you attend the full day; the California State Bar does audit our courses.
- CDAA relies heavily on attendee feedback. Please plan to complete the emailed evaluation at the end of the seminar.
- In order to keep the program running on schedule, please make sure to return from breaks and lunches on time.
- You will receive an electronic Certificate of Attendance approximately two weeks after the seminar.
- CDAA purchases only enough food/beverages for registered attendees. Because of grant restrictions, CDAA is unable to purchase food/beverages in addition to those provided each day.
- Because meeting room temperatures are sometimes unpredictable, we strongly suggest you bring a sweater or light jacket with you to the program each day.
- The meeting room will remain unlocked during lunch hours and after hours. You should not leave personal items of value in the meeting room as CDAA is not responsible for them. You may leave your training materials overnight and at lunch.
- **There is no talking during the Mock Trial and Voir Dire process. Please respect this policy, or you will be asked to leave.**
- If you have any questions or concerns, please see me.

Thank you and enjoy the seminar,

Erin J. Martinelli
Director of Training Project Development
California District Attorneys Association
Phone: (916) 443-2017
Email: emartinelli@cdaa.org



CALIFORNIA
DISTRICT
ATTORNEYS
ASSOCIATION

Tentative Agenda

JURY SELECTION/EXAMINATION/IMPEACHMENT SEMINAR

June 1-3, 2016 :: Mock Courtroom at McGeorge School of Law – Sacramento, CA

Wednesday, June 1, 2016

8:00-8:30 **REGISTRATION**

8:30-8:45 **WELCOME**

Patrick McGrath, District Attorney, Yuba County, Technical Advisor

Angela C. Backers, Senior Deputy District Attorney, Alameda County, Technical Advisor

8:45-9:30
15

OPENING STATEMENTS: HOW TO CAPTURE A JURY

Kate Ebert, Assistant Director, Focused Decisions and Institute for Administrative Justice, UOP
McGeorge School of Law

Andrew Walker, Director at Focused Decisions and Institute for Administrative Justice, UOP
McGeorge School of Law

15-930
9:30-9:45

BREAK

30 1145
9:45-12:00

VOIR DIRE TECHNIQUES (includes breaks)

Angela C. Backers, Senior Deputy District Attorney, Alameda County, Technical Advisor

1145 1240
12:00-1:00

Lunch (on own)

1240-1:00 - jury instructed on tablets
1:00-4:00

LIVE DEMONSTRATION OF JURY SELECTION

(Judge) The Honorable Patrick McGrath, District Attorney, Yuba County, Technical Advisor

Angela C. Backers, Senior Deputy District Attorney, Alameda County, Technical Advisor

Paris Coleman, Deputy District Attorney, Sacramento County

4:00-4:30

PANEL DEBRIEF (Jury Dismissed)

Patrick McGrath, District Attorney, Yuba County, Technical Advisor

Angela C. Backers, Senior Deputy District Attorney, Alameda County, Technical Advisor

Paris Coleman, Deputy District Attorney, Sacramento County

Thursday, June 2, 2016

- 8:00-9:00 **WHEELER**
Cindy DeSilva, Deputy District Attorney, San Joaquin County
- 9:00-9:15 **BREAK**
- 9:15-10:45 **IMPEACHMENT**
Chuck Gillingham, Deputy District Attorney, Santa Clara County
- 10:45-11:00 **BREAK**
- 11:00-12:00 **EXPERT WITNESS EXAMINATION**
Robert Mestman, Senior Deputy District Attorney, Orange County
- 12:00-1:00 Lunch (on own)
- 1:00-4:30 **LIVE TRIAL DEMONSTRATION**
(Judge) The Honorable Patrick McGrath, District Attorney, Yuba County, Technical Advisor
Chuck Gillingham, Deputy District Attorney, Santa Clara County
Robert Mestman, Senior Deputy District Attorney, Orange County
Paris Coleman, Deputy District Attorney, Sacramento County

Friday, June 3, 2016

- 8:30-10:30 **LIVE TRIAL DEMONSTRATION, cont'd**
(Judge) The Honorable Patrick McGrath, District Attorney, Yuba County, Technical Advisor
Chuck Gillingham, Deputy District Attorney, Santa Clara County
Robert Mestman, Senior Deputy District Attorney, Orange County
Paris Coleman, Deputy District Attorney, Sacramento County
- 10:30-10:45 **BREAK**
- 10:45-11:45 **CLOSING ARGUMENTS TO JURY**
Chuck Gillingham, Deputy District Attorney, Santa Clara County
Robert Mestman, Senior Deputy District Attorney, Orange County
Paris Coleman, Deputy District Attorney, Sacramento County
- 11:45-2:00 **WATCH JURY DELIBERATIONS LIVE**
You may step out to grab lunch during this time. We encourage you to watch.
- (*2:00-3:00) **VERDICT READ/CLOSING ROUNDTABLE**
Angela C. Backers, Senior Deputy District Attorney, Alameda County, Technical Advisor
Patrick McGrath, District Attorney, Yuba County, Technical Advisor

*This time is subject to change depending on when the jury comes back with a verdict.

JURY SELECTION/EXAMINATION/IMPEACHMENT SEMINAR ROSTER – 2016

ANGELA C. BACKERS

(Technical Advisor)

Senior Deputy District Attorney

Co-Chair Capital Litigation Committee

Alameda County District Attorney's Office

Phone (510) 272-6222

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Angela C. Backers is a Senior Deputy District Attorney who has been a prosecutor for 30 years. On January 24, 2005, Angela was promoted to the Capital Litigation Coordinator in Alameda County. As the Capital Litigation Coordinator, Angela was responsible for not only trying capital cases, but also overseeing the prosecution of all capital cases in the county. Her duties include mentoring and assisting all prosecutors that are trying capital cases, as well as those prosecutors preparing capital preliminary hearings. Angela was also responsible for all post-conviction capital matters that are handled in the trial courts. Angela served on the Special Circumstance Committee in Alameda County that decided whether to seek the death penalty in a given case. Since 1998, Angela was assigned to the Capital Team and has prosecuted death penalty cases as well as other homicides. Prior to her assignment to the Capital Team, Angela was assigned to numerous felony trial teams, including the Sexual Assault Team and the Homicide Team. Angela has been trying felony jury trials since January, 1987. Angela assists prosecutors throughout the state and the nation in capital trials. In 2008, Angela was a supervisor of a felony team in a branch office until 2011. Angela is currently assigned to the Juvenile division in her county.

Angela is co-chair of the Capital Litigation Committee of the California District Attorneys Association [CDAA] and she teaches regularly for the Association of Government Attorneys in Capital Litigation [AGACL]. Angela is on the Board of Directors of AGACL, as well as being past-president. She has been an instructor for CDAA and AGACL in the areas of Demonstrative Evidence, Privileges, Opening Statements, Sexual Assault Prosecutions, Dealing with Problematic Victims, Jury Selection, Other Crimes Evidence, the Law Of Homicide, How to Avoid a Manslaughter Verdict, the Law of Special Circumstances, Penalty Phase Preparation in a Capital Case, Factors A through K, Victim Impact Testimony, Arguing for Death, Avoiding Prosecutorial Misconduct, The Top Ten Mistakes in Capital Cases.

In June 2014, Angela was awarded the Instructor of the Year Award from the California District Attorneys Association. In August 2014, Angela was awarded a lifetime achievement award, The William Schafer Award for excellence in Capital Litigation by the national organization Association of Attorneys in Capital Litigation.

PARIS COLEMAN

Deputy District Attorney

Sacramento County District Attorney's Office

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Paris Coleman began his career with the Alameda County District Attorney's Office in 1994. He left Alameda DA in 2007 to return home to Sacramento and start his criminal defense practice focusing on the defense of people charged with serious and violent felonies. He returned to prosecution when he joined the Sacramento County District Attorney's office in January 2015. Paris has conducted more than 65 felony trials involving violent offenses and is currently a Lead Attorney on a Felony Trial team.

CINDY DE SILVA

Deputy District Attorney
San Joaquin County District Attorney's Office
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Cindy has been a prosecutor since 2001, and spent the first five years of her prosecutorial career in Shasta County before she moved back home to her beloved Stockton, San Joaquin County, in 2006. She has prosecuted matters in the Juvenile Unit, General Felony Unit, Welfare Fraud Unit, Misdemeanor Unit, and Sexual Assault & Child Abuse Unit, and currently handles jury trials in Stockton's "Mainline Felony" unit.

Cindy is a trainer on a number of subjects for CDAA, POST, California Peace Officers Association, various District Attorney's Offices, and within her own county, including AB 109, Proposition 47, SB 178, Wheeler/Batson, Warrantless Searches and Seizures, Miranda and the Right to Counsel, Brady and Due Process Discovery Obligations, Introduction to Misdemeanor Prosecutions, Introduction to Felony Prosecutions, Preliminary Hearings, Report Writing & Testifying, Jury Selection, and Confidential Informants & the Evidence Code Section 1040-1041 Privileges.

Her goal is to get her audience as excited about her subject matters as she is, and to help prosecutors in their quest to be the most informed attorneys in the courtroom on any given case on any given date.

KATE EBERT

Assistant Director
Focused Decisions and Institute for Administrative Justice
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ANDREW WALKER

Director
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Focused Decisions is University of the Pacific, McGeorge School of Law's full-service litigation strategy, mock trial, jury research, and trial preparation firm. Focused Decisions has offices in Sacramento, Stockton and San Francisco.

Mr. Walker, Director, and Ms. Ebert, Assistant Director, have been part of Focused Decisions since its creation in 2011 and have consulted on multiple high stakes civil and criminal cases for plaintiffs and defendants. Focused Decisions has provided services to clients on cases covering many areas of law, including wrongful death, excessive force, contract disputes, personal injury, and FINRA arbitrations. Focused Decisions has an exceptionally high success rate and consistently delivers valuable information a trial team can utilize to make the best decisions about their case.

Mr. Walker received his Bachelor's in Business at Pennsylvania State University and his Juris Doctorate at the University of the Pacific, McGeorge School of Law. He has been a practicing attorney in California for over 10 years and has experience in working in civil, criminal and administrative law. Ms. Ebert received her Bachelor's in Communication at California State University-Fresno and her Juris Doctorate at the University of the Pacific, McGeorge School of Law. She has been a practicing attorney in California since 2012 and has experience in working in criminal and administrative law. Mr. Walker and Ms. Ebert have assembled an experienced team that provides exceptional service from the start of each client's case to the finish.

CHUCK GILLINGHAM

Deputy District Attorney
Santa Clara County
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Chuck Gillingham has been a Deputy District Attorney for Santa Clara County since 1994. Mr. Gillingham has handled the prosecution of three strike, attempted murder, robbery, sexual assault, child molest, homicide and death penalty cases among others. Mr. Gillingham was the lead prosecutor for the Internet Crimes Against Children grant in Northern California and handled the prosecution of over 150 exploitation cases.

Mr. Gillingham is a graduate of Stanford University and the Santa Clara University School of Law. Mr. Gillingham lectured as an adjunct professor of law at the Santa Clara University School of Law on evidence for five years. Mr. Gillingham is a sought after speaker in the area of child sexual exploitation. Mr. Gillingham instructs for the Internet Crimes Against Children Task Force in both legal issues and prosecution throughout the United States. Mr. Gillingham instructs for the National Center for Missing and Exploited Children in search and seizure and the prosecution of sexual exploitation cases. Mr. Gillingham has lectured in more than ten countries for the International Centre for Missing and Exploited Children. Mr. Gillingham authored two distance-learning courses for the Korean Institute of Criminology and the United Nations effort to combat child exploitation on the Internet. Mr. Gillingham has taught for the North Dakota and Idaho Prosecutor's Associations.

Mr. Gillingham is also an instructor for the California District Attorneys Association in evidence and trial skills. He sat on the board of directors for the CDAA from 2004-2006. Mr. Gillingham was named the CDAA Instructor of the Year for 2004. Mr. Gillingham authors regular legal updates for law enforcement and has taught at police academies and numerous law enforcement agencies on search and seizure.

PATRICK J. MCGRATH

(Technical Advisor)
Yuba County District Attorney
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Patrick McGrath has been a prosecutor in Yuba County for over 30 years. Over that time he has prosecuted every type and level of crime in both Juvenile and Adult courts, including extended assignments to sex crimes, child physical abuse, and major narcotics. He was elected District Attorney of Yuba County in June of 1998, and has been re-elected without opposition in 2002, 2006, 2010, and 2014.

Pat has been teaching for CDAA for thirteen years and is a past recipient of the CDAA "Instructor of the Year" award. He teaches on a variety of subjects including search warrants, felony sentencing, trial procedures, organizational management and leadership excellence. Pat is currently the co-chair of the CDAA Training and Publications Committee, and has served as the technical advisor for the Basic Felony Sentencing seminar, Felony Prosecutor Academy, Management Seminar, Search Warrants Seminar, CDAA Leadership Summit, and Small Counties Conference.

ROBERT MESTMAN

Senior Deputy District Attorney
Orange County District Attorney's Office
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Over the course of the last 13 years, Robert Mestman has had the privilege of working in three different DA offices throughout California, both big and small. He began his career in Santa Clara County and slowly worked his way down the state to his present position in Orange County, with a brief stop in Santa Barbara County. He has had a variety of assignments over the years, ranging from law & motions to vertical prosecution, including stints on the Sexual Assault, Gangs and DNA units. Robert has tried nearly 80 jury trial cases and is currently assigned to the Special Prosecutions Unit, where he focuses on public integrity cases. Robert is also a member of CDAA's Legislation Committee.

ERIN J. MARTINELLI

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CASE SUMMARY

On 12/1/2014 at 2347 hours (11:47 p.m.) Officer Polhemus arrived at 1234 A Street in response to a 911 call that occurred at 2332 hours (11:32 p.m.). Upon arrival Officer Polhemus made contact with Complaining Witness Victoria Valdez. Valdez was on the front porch of the residence at the time of the officer's arrival. Valdez appeared reluctant to speak with the officer and repeatedly inquired as to her safety, asking, "he can't hurt me now"? and "I can't take it any more." Officer Polhemus noted that Valdez appeared as if she had been crying. Her clothing appeared disheveled and she had a red mark on her right cheek. Valdez complained of pain to her head and her back.

When Officer Polhemus asked Valdez what happened she immediately stated "he raped me". When Officer Polhemus asked who she was referring to she stated, "David". When asked where David was now Valdez stated he was in the house passed out in the bedroom. Officer immediately went into the house and found a sole male occupant in the back bedroom. The male was either passed out or sleeping in the bed. The male was wearing a pair of jeans which were unbuttoned, unzipped, and pulled down slightly showing his underwear, which were twisted. The male was taken into custody and placed in the rear of Officer Polhemus' vehicle.

After securing the suspect Officer Polhemus obtained a statement from Valdez. In summary Valdez stated the following (for details complainant's complete statement): She and the suspect David Delaney have been living together for the last 3 months, since approximately Sept. 1st, and have been dating since approximately June. A week ago she found out she was pregnant. When she told Delaney he initially acted pleased and within a couple of days became moody. Today she arrived home from working late around 1900 hours (7:00 p.m.), as she had to work an hour overtime at the restaurant – she normally arrives home at 1730 hours (5:30 p.m.). When she got home it was evident that Delaney had been drinking. He immediately accused her of seeing someone else and then questioned Valdez as to whether or not the child was his. This made Valdez mad and she responded that he was a "prick" and of course the child was his. Delaney slapped Valdez across the face. When Valdez fell to the floor Delaney kicked her in the back. He then pulled Valdez by the hair into the bedroom and pushed her onto the bed. Delaney then pulled his pants half way down and then pulled her panties down. Delaney tried to put his penis in the complainant's vagina but he couldn't maintain an erection. He then put his finger in her vagina. Valdez repeatedly told him "no" and pushed his hand away. She doesn't recall how many times he put his finger in her vagina. Valdez stayed on the bed until Delaney passed out and then she got up, grabbed her phone and called her best friend Monica Sela and told her what happened. Monica convinced her to call the police. Valdez then called 911 and waited outside for the officer to arrive.

Officer Polhemus noticed the injury on her right cheek.

After obtaining Valdez's statement, Officer Polhemus questioned David Delaney and told him that Valdez said she was raped by Delaney, he spontaneously uttered "how can you rape a bitch that's giving it away."

Valdez was transported by Officer Polhemus to the medical center for an examination of her facial injury and sexual assault examination by Nurse Nancy Newhall.

The case was submitted to the District Attorney's Office. The intake deputy filed the following charges: 289(c) (forcible penetration with a foreign object), 220 (assault with intent to commit rape) and 273.5 (spouse/cohabitant abuse).

Defendant Delaney is in custody unable to make bail.

Booked evidence:

- ✓ Tape of 911 call
- ✓ police report
- ✓ Complainant's damaged clothing (blouse with missing button)
- ✓ photos showing injuries to complainant
- ✓ photos of scene
 - booking photo
- ✓ tape of jail call between defendant and complainant (call initiated by defendant) made on December 15th
- ✓ Cal OES 2-923 form from the SAFE examination
 - Hospital discharge paperwork
- ✓ X-Ray Victoria Valdez

Witnesses:

For the prosecution:

- Victoria Valdez (now recanting statement she gave to Officer Polhemus – she claims that she and the defendant argued, he was gesturing with his hands and she was accidentally struck by him and she bruises easily – she accused him of rape to retaliate for accusing her of infidelity and questioning the parentage of the child she's carrying)
- Monica Sela (process servers have been unable to locate)
- Officer Ed Polhemus
- Nancy Newhall (nurse practitioner who conducted 923 examination)

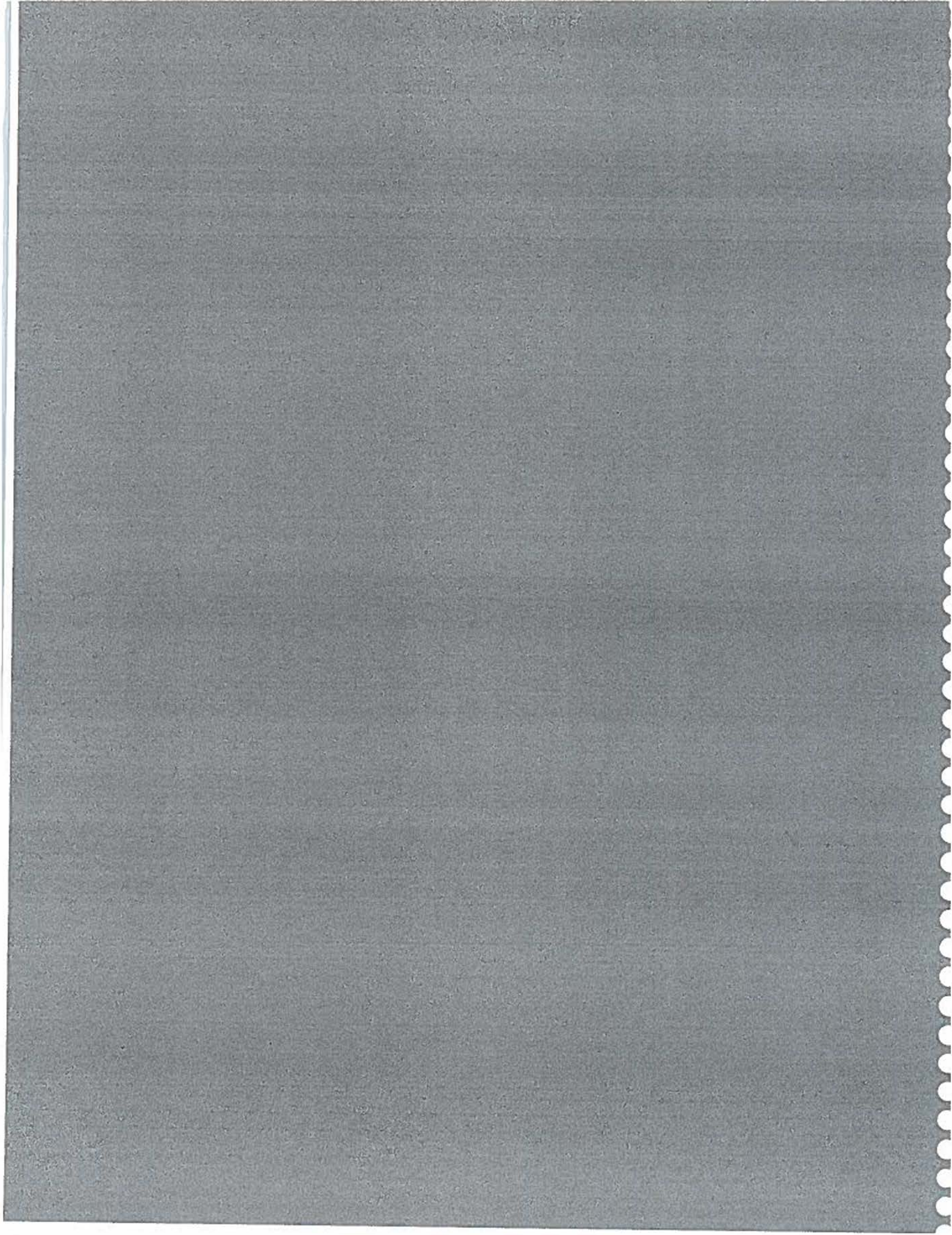
For the defense:

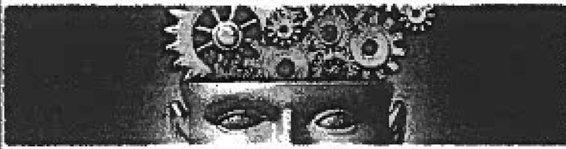
- David Delaney
- Dr. Vickers (expert contacted by the defense to testify re the 923 exam)

OPENING STATEMENTS: HOW TO CAPTURE A JURY

Kate Ebert, Assistant Director, Focused Decisions and Institute
for Administrative Justice, UOP McGeorge School of Law

Andrew Walker, Director at Focused Decisions and Institute
for Administrative Justice, UOP McGeorge School of Law






The Power of Visuals & Opening Statements

Presentation By: Andrew Walker and Kate Ebert

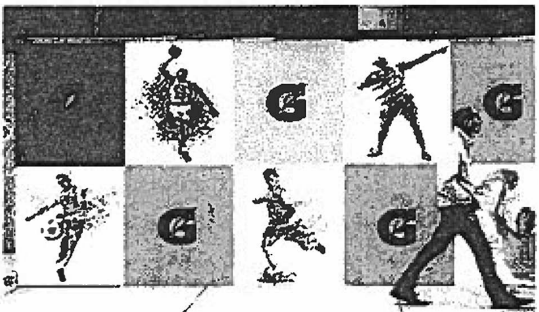
Introductions

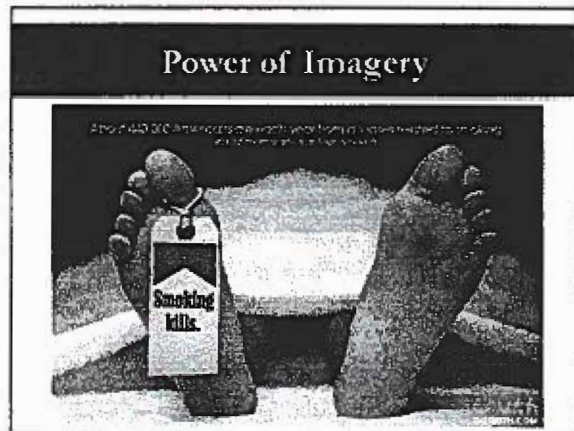


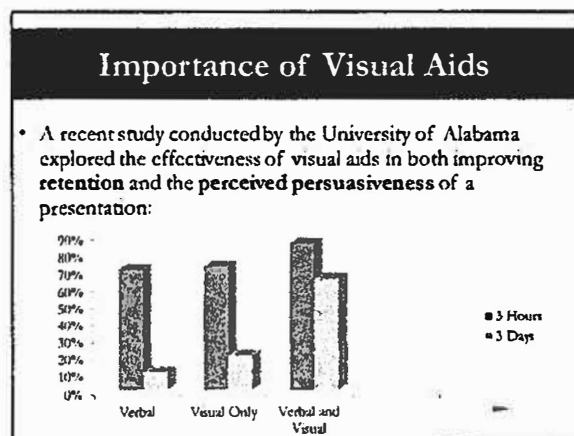
- **Andrew Walker**
 - Director,
Focused Decisions
- **Kate Ebert**
 - Assistant Director,
Focused Decisions

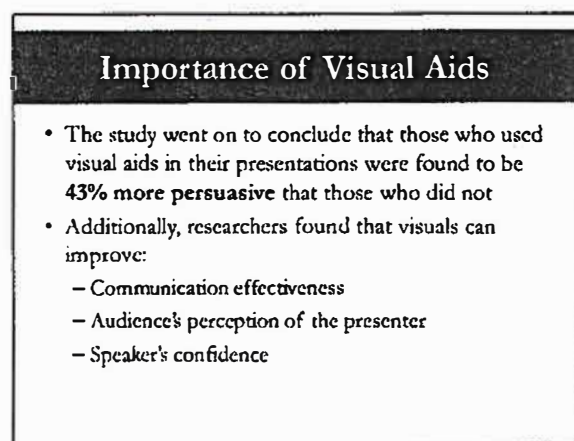
**McGEORGE
SCHOOL OF
LAW**

Power of Imagery









Importance of Visual Aids

Learning Recall Related to Type of Presentation

Presentation	after 3 hours	after 3 days
Spoken lecture	25%	10-20%
Written (reading)	72%	10%
Visual and verbal (illustrated lecture)	80%	65%
Participatory (role plays, case studies, practice)	90%	70%

Visualization works from a human perspective because we respond to and process visual data better than any other type of data.

Source: <http://www11.soic.indiana.edu/~csl/visual-data-basics>

Importance of Visual Aids

The Power of Visuals in Learning



- 65% of the population are visual learners

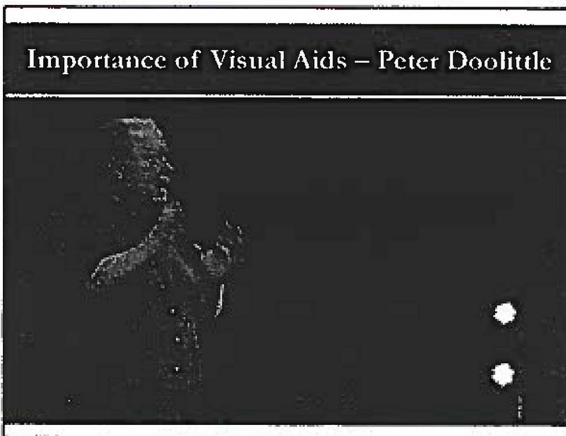
SHIFT

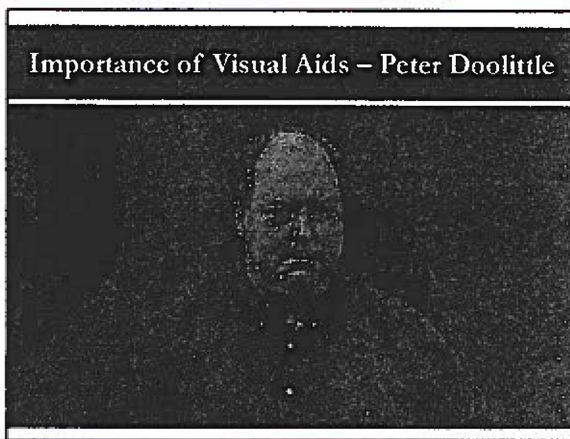
Source: <http://infoshiftlearning.com/blog/350326/Studies-Confirm-the-Power-of-Visuals-in-Learning>

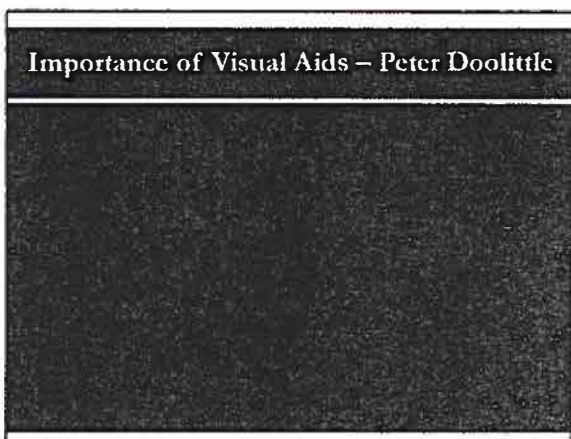
Importance of Visual Aids – Dr. Doolittle

EDDIE MURPHY









Importance of Visual Aids

Timeline of Events



91 Cd

On June 30, 2012 at approximately 9:13 a.m., after being held up at gunpoint, Ramona Higuera called 911:



Importance of Opening Statements

- **Research**

- In 1966, The American Jury
 - 80% of jurors decide after opening?
- Continues to be cited
 - Attorney Brian Panish, 2000

"The jury's decision is made long before the final phase of the decision process"


Zcisel, 1987



Midway Reprint

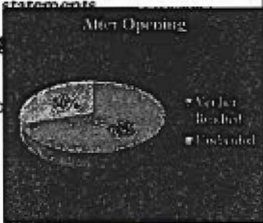
Importance of Opening Statements

- **Research**
 - The deliberation process might well be likened to what the developer does for an exposed film: It brings out the picture, but the outcome is predetermined.
 - Zuckel, 1987




Importance of Opening Statements

- **Research Study**
 - A 1996 study published in the *Journal of Criminal Law and Criminology* found that **70%** of jurors reached a verdict following opening statements.
- **An outstanding opening is crucial!**
 - Sets the tone for the rest of the trial




Importance of Opening Statements



FOCUSED DECISIONS 52

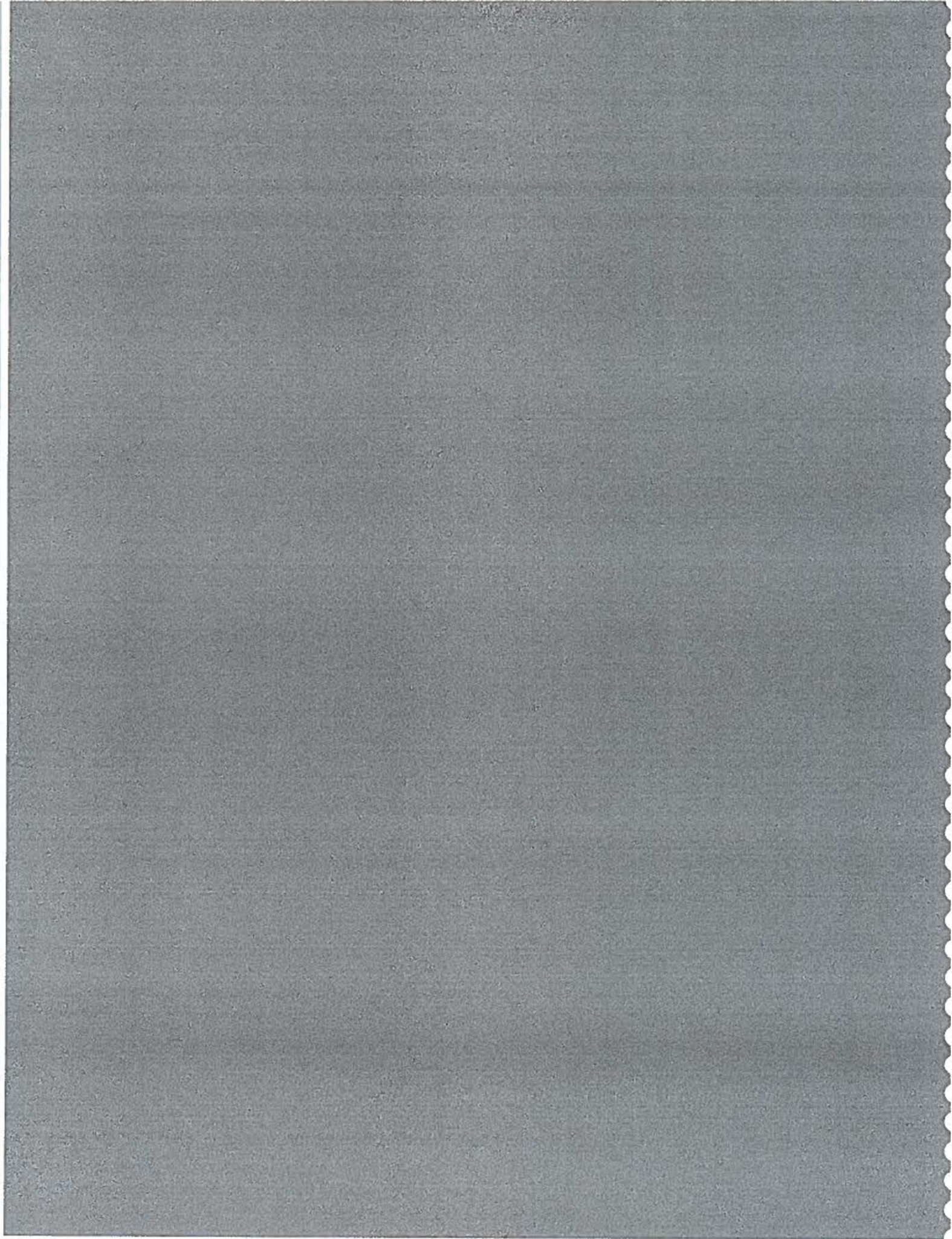
Conclusion

**McGEORGE
SCHOOL OF
LAW**

Thanks for listening!

VOIR DIRE TECHNIQUES

Angela C. Backers, Senior Deputy District Attorney,
Alameda County, Technical Advisor



***The Lost Art of
Jury Selection:
Picking A Jury That Will Do Justice©***

Angela C. Backers
Senior Deputy District Attorney
Co-Chair of Capital Litigation Committee
Alameda County District Attorney's Office
June 1, 2016
CDAA – Sacramento, CA

***The Lost Art of
Jury Selection:
Picking A Jury That Will Do Justice©***

Angela C. Backers
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Objective of this Presentation

- To enhance your skills in jury selection
- To provide you with new tools for making informed decisions about who you select to be on your jury
- To discuss the use of a juror questionnaire
- To enlighten you and your jurors about internal/unknown biases
- To demonstrate valuable techniques in questioning and educating your jurors

A Science or An Art?

- Jury selection is an art form
- Jury selection is an intuitive process
- Jury selection is a study in human behavior
- Jury selection varies with your evidence/witnesses
- Jury selection is not a task that can be delegated to another person
- ONE mistake in jury selection can deprive you, your victim and the community of a just verdict

Jury Selection Does NOT begin in the Courtroom

- Gather as much information as possible
 - Be hyper-vigilant
 - The Parking Garage and the Crosswalk
 - Metal detectors and Restrooms
 - Coffee Stand and Newspaper Stand
 - Elevators and Cell-Phone conversations
 - Outside the courtroom - (when panel first called)
- BE A TRAINED OBSERVER**
- Remember, you are ALWAYS making a "First Impression"

Swear the Potential Jurors

"Do you, and each of you, understand and agree that you will **accurately and truthfully answer, under penalty of perjury**, all questions propounded to you concerning your qualifications and competency to serve as a trial juror in the matter pending before this court; and that failure to do so may subject you to criminal prosecution?"
Potential Juror: "I do."

- Jurors should be sworn **BEFORE** filling out the questionnaire- **BE OBSERVANT DURING OATH!**
(2nd oath takes place after jury is selected* never swear until opening)
- The questionnaire should be **signed under penalty of perjury**

Attorney Voir Dire

"Upon completion of the court's initial examination, counsel for each party **SHALL** have the right to examine, by oral and direct questioning, any or all of the prospective jurors."

- The court may **limit the questioning** by counsel
- The court may **limit time** with each juror/party
- Voir Dire is **ONLY** to aid the exercise of **challenges for CAUSE**

List of Witnesses, Parties, Staff

- In the questionnaire, list names of the Judge, all court staff, attorneys and parties.
- In the questionnaire, list all potential witnesses (including penalty phase witnesses)
- In the questionnaire, ask whether the juror recognizes or knows any **other** potential juror
- If no questionnaire is used, make **a written list** of all these individuals and have **each** potential juror review it and circle names that sound familiar

know other potential jurors

Preventing Juror Misconduct

- During jury selection it is your duty both in oral voir dire and in the questionnaire to admonish the jury about what they are **NOT** allowed to do....
 - Do not investigate anything on the internet or a dictionary
 - Do not visit the crime scene
 - Do not talk about the case or the bible
 - Do not consult your pastor
 - Do not read articles about the case or defendant
- The defendant doesn't have to prove anything... he doesn't have to call witnesses, **he doesn't have to testify**, he doesn't have to produce any evidence... will you follow that law?
- Do you promise not to hold it against him if he doesn't prove his innocence? I am the only one who has a burden of proof, I am the only one who has to produce witnesses and evidence, will you follow that law? ("")



Removal for Cause

- **CCP 225 Challenge for Cause:** one of the following
- (A): **General Disqualification** (CCP 228)
- (B): **Implied Bias:** the existence of facts disqualify the juror (CCP 229 - READ IT!)
- (C): **Actual Bias:** the existence of a state of mind on the part of the juror in reference to the case or to any of the parties, **which will prevent the juror from acting with entire impartiality and without prejudice** to the substantial rights of any party.
- DA is a party and has a right to a fair trial!

A Juror who is Too Close to the Case - Implied Bias- Cause challenge

- Be sure to ask **EACH** juror whether they **know ANYONE in the courtroom**, including staff and other potential jurors
- Be sure to ask **EACH** juror whether they know any of the potential witnesses, including the victim or victim's family, defendant or defendant's family (**avert disaster – Juror #1 and surprise alibi W)
- These questions go to challenge for **CAUSE** and must be asked **regardless** of whether you use a questionnaire or have attorney voir dire

When Do You Exercise Your Challenges?

- **Code of Civil Procedure 226:**
- 226(d): All challenges to an individual juror, **except a peremptory challenge**, shall be taken **first** by the defendants, then by the People.
Defense goes first on challenges for CAUSE.
- **Code of Civil Procedure 231(d):**
- 231(d) Peremptory challenges are exercised or passed **alternately**, **People go first**. (10/20-L)
Must have jury box **FULL** before exercising.
Passing for Cause does not cost you the Peremptory.

Proper Excuse of Jurors

- Peremptory challenges are a historic right, provided "to insure that criminal trials are conducted before jurors who not only proclaim their impartiality, but whose ability to be evenhanded is not seriously questioned by the parties.
- Peremptory challenges excusing jurors MUST be for genuine, reasonably specific, race- or group-neutral explanation related to the particular case being tried *Hernandez v. New York* (1991) 500 U.S. 352
- Reasons need not amount to a challenge for cause

People v. Jennell Wright

242 Cal.App.4th 1461 - (modified) 6/2016

- Female defendant in a child custody battle
- Defendant claimed the victim threatened to take the child
- D. was lying in wait with a gun and a speed loader
- D. had previous suicide attempts
- Defendant testified in both trials
- First jury asked terrifying questions on manslaughter (page 2) – mistrial on 187
- Second jury – Lying in Wait LWOP (affirmed)
- Issue: Jury instructions on lessors – opinion discusses BOTH imperfect self-defense and heat of PASSION ROUSED OVER A LONG PERIOD of TIME — LESSON: GIVE ALL LESSORS + 3471

FOR CAUSE Qs

Safety Net - Bias Question 1

- Magic Question to ask of EVERY JUROR: "Have you ever been in a courtroom for any reason?"
- This question uncovers the juror who:
 - attended her boyfriend's murder trial,
 - attended his father's molestation trial,
 - testified as a character witness for defense
 - was prosecuted for welfare fraud years ago (oh, is fraud a crime?)
 - was wrongfully arrested & arraigned for murder
 - was in juvenile court with their "innocent" son



Safety Net -Bias Question 2

- Magic Question to ask of EVERY JUROR:
"Please describe any contact you have had with law enforcement?"
- This question uncovers the juror who:
 - was misidentified for a crime and later released,
 - was stopped and questioned at an anti-war protest,
 - had a juvenile child brought home by the police
 - was harassed by the police
 - who fought a traffic ticket
 - went with her boyfriend to register as sex-offender



Safety Net -Bias Question 3

- Magic Question to ask of EVERY JUROR:
"Have you or anyone you know ever been in custody?"
- This question uncovers the juror who:
 - Is furious with police because he/she was arrested and never charged,
 - Is a woman who becomes pen pals with death row inmates, (not her, not her family, just a friend)
 - Arrested for participating in an anti-war protest, but not charged
 - Brother doing time because he took a plea bargain, but he is not good for the crime



Proper to Excuse Jurors for Attitudes About Law Enforcement

- A peremptory challenge made on the basis of a prospective juror's **negative experience with law enforcement** (or DA) is **proper**.
People v. Scott (2015) 61 Cal.4th 363
People v. Riccardi (2012) 54 Cal.4th 758
- However, if you have a potential juror who has had a bad experience with police and you have a police witness, I would develop their bias against law enforcement during questioning and try to have them removed for implied bias or actual bias on a challenge for cause

The Jury Questionnaire and/or Topics for Voir Dire

Regardless of Whether You Use a Questionnaire:

•Introduction-

- Answers are under penalty of perjury (must have been sworn)
- Always offer to allow them to speak in "PRIVATE"

•Employment-

- Supervise others?
- Discipline or fire others?

•Mother and Father's Occupation

•Former Spouse's Employment

The Jury Questionnaire and/or Topics for Voir Dire

• What do you do in your spare time?

Hobbies, sports, interests, movies, books...

• Media:

• What newspapers, magazines, or periodicals do you subscribe to or regularly read?

• Follow news on current events? Source of news?

• What television and radio programs do you frequently watch or listen to?

Have you seen "Making a Murderer" on Netflix?

• Is there any subject matter or genre that you try to avoid?

- What type of books do you read?

The Jury Questionnaire and/or Topics for Voir Dire

• Media:

• What criminal cases have you followed in the media? ***

• What protests have you followed on the news?

• The Internet:

- Access to the Internet
- For what purpose do you use the internet?
- What type of Internet sites do you frequent?
- Will you follow the COURT'S ADMONITIONS?

- **Alcohol:** Has alcohol abuse touched your life or the life of anyone you know in any way?
- Did alcohol result in any arrests or court?
- Did alcohol result in any type of treatment?
- **Drugs:** Have drugs touched your life or the life of anyone you know in any way?
- Did drugs result in any arrests or court?
- Did drugs result in any type of treatment?
- Do you believe that drugs and alcohol make you do things that are *contrary to your nature*?

- **Alcohol:** Has alcohol abuse touched your life or the life of anyone you know in any way?
- Did alcohol result in any arrests or court?
- Did alcohol result in any type of treatment?
- **Drugs:** Have drugs touched your life or the life of anyone you know in any way?
- Did drugs result in any arrests or court?
- Did drugs result in any type of treatment?
- Do you believe that drugs and alcohol make you do things that are *contrary to your nature*?

The Jury Questionnaire and/or Topics for Voir Dire

- **Registered to Vote:**
- **Religious beliefs** that would prevent you from judging another person?
- **Civic, political, social or charitable organizations,** including, but not limited to, groups involved with
 - victim's rights
 - prisoner's rights
- Have you ever visited a jail or prison or juvenile hall?
- Have you ever put money on an inmate's books?
- Have you ever corresponded with an inmate?

- **The Criminal Justice System:**
- Have you, a family member or anyone you know ever been **accused of, arrested for, charged with or convicted of** a crime, including driving under the influence of drugs or alcohol?
- Have you ever known, **anyone**, (not already mentioned) who was investigated for a crime? (a suspect)
- What are your feelings about **the effectiveness of our criminal justice system?** (leave space to explain)

- **The Criminal Justice System:**
- Have you, a family member or anyone you know ever been **accused of, arrested for, charged with or convicted of** a crime, including driving under the influence of drugs or alcohol?
- Have you ever known, **anyone**, (not already mentioned) who was investigated for a crime? (a suspect)
- What are your feelings about **the effectiveness of our criminal justice system?** (leave space to explain)

The Jury Questionnaire and/or Topics for Voir Dire

- **The Criminal Justice Systemcon' t:**
- **In general, how would you rate the job the police in your city are doing in dealing with crime?**
 - ☐ Excellent job ☐ Good job ☐ Only a fair job ☐ Less than a fair job
- Please state your belief regarding the following 3 statements:
- **"I trust the criminal justice system in Alameda County."**
 - ☐ Strongly Agree ☐ Agree ☐ Uncertain ☐ Disagree ☐ Strongly Disagree
- **"Criminal laws treat criminal defendants too harshly."**
 - ☐ Strongly Agree ☐ Agree ☐ Uncertain ☐ Disagree ☐ Strongly Disagree
- **"Persons determine their destiny or fate by the choices they make in life."**
 - ☐ Strongly Agree ☐ Agree ☐ Uncertain ☐ Disagree ☐ Strongly Disagree

The Jury Questionnaire and/or Topics for Voir Dire

- **Judging Credibility of Witnesses/Evidence:**
- (This is the beginning of educating the jury about the *perceived* weaknesses in your case)
- "Is it possible for you to return a verdict of guilty in a...
- **Case with only one witness** (except an accomplice)
- Case with no fingerprints
- Case with no medical findings
- Case with delayed reporting
- Case with a recanting witness?"
- These questions all go to actual or implied bias – **CAUSE!**

The Jury Questionnaire and/or Topics for Voir Dire

- **Judging Credibility of Witnesses/Evidence:**
- (This is the beginning of educating the jury about the *perceived* weaknesses in your case – these go to CAUSE)
- Is it possible for you to believe the testimony of a witness if you knew that the witness was under the influence of drugs or alcohol at the time of the event about which he/she is testifying? Yes__ No__ Please explain:
- If you believed a person lied on a previous occasion, would you automatically disregard anything else they have to say? Yes__ No__ Please explain:

The Jury Questionnaire and/or Topics for Voir Dire

- **Judging Credibility of Witnesses/Evidence:**

(This is the beginning of educating the jury about the *perceived* weaknesses in your case – these go to cause)

- Is it possible for you to believe the testimony of an individual, if you thought he/she was somehow involved in the crime about which he/she is testifying? Yes__ No__
Please explain:
- Is it possible for you to return a verdict of murder, if there is no DNA evidence presented? Please explain:
- Is it possible for you to return a verdict of murder, if the murder weapon was never recovered? Please explain:

The Jury Questionnaire

- **Pro's:**

- Obtain more information
- Obtain more honest answers
- Spares juror of embarrassment in group setting
- Chance to educate the jurors about the law and the case
- Jurors don't "learn" "right" answers from other jurors
- Jurors aren't poisoned by other jurors comments

- **Con's:**

- Time
- Money
- Deprives you of "face-time" with the juror
- Can't read body language or hesitation when juror is writing answers on the questionnaire

The "Discount" Question

- You may find out that my victim...
 - Is married to the defendant...
 - Delayed in reporting...
 - Has a criminal record...
 - Is a prostitute...
 - Was drinking a lot that night...
 - Has previously lied about this incident...
 - Pretended that nothing happened afterward...
- If I prove the charges to you beyond a reasonable doubt, will you nonetheless "discount" the crime because the victim has issues? (... example)

The "Discount" Question

- ***Cause questions:***
- Will you automatically disregard the testimony of a witness who was intoxicated at the time of the crime?
- Will you automatically disregard the testimony of a witness who had previously lied about that happened that night?
- Will you automatically disregard the testimony of a witness who is a prostitute?
- Will you automatically disregard the testimony of a witness who did not disclose the assault right away?



Safety Net Question #4

(may be answered in private)

- Have you or anyone you know ever been the victim of sexual assault (or molestation)?
- Was it reported to anyone?
- (May follow up in private)
- =====
- Have you or anyone you know ever been accused of sexual assault (or molestation)?
- Was it reported to anyone?
- (May follow up in private)

Safety Net Question #5

- Have you ever followed any rape or sexual assault or domestic violence cases in the news?
- Which case?
- What was the outcome?
- Did you think it was a fair outcome?
- Do you know about Audrie Pott case at Saratoga H.S.?
- Do you know about the Richmond High Homecoming dance gang rape case?

Safety Net Question #6

- When you heard the charges, did you look over at the defendant and say to yourself, hmmm, he doesn't look like a rapist?
- What does a rapist look like?
- Do you have some preconceived idea of what a rapist would look like?
- What if I prove my case to you beyond a reasonable doubt, would you hesitate to convict because he doesn't look like your idea of a rapist?

A Single Witness

**The testimony of
a single witness
is sufficient
for the proof of any fact.**

Caveat: This must be discussed in person! CALCRIM 301
(Obviously does not apply in cases that require corroboration!)

Now, should we treat women as independent agents, responsible for themselves?

Of course.

But being responsible has nothing to do with being raped.

Women don't get raped because they were drinking or took drugs.

Women do not get raped because they weren't careful enough.

Women get raped

because someone raped them.

The Purity Myth - Jessica Valenti

Blame

- Stranger Rape
- Blame the rapist
vs.
- Non-Stranger Rape (85% of all rapes)
- Blame the victim

Robbery Victims: Lessons Learned

- When a robbery victim reports that someone took their belongings by force or fear, do we automatically disbelieve them, until they prove otherwise?
- Do we assume they did something to deserve getting robbed?
- Why do we have this double standard in NON-stranger sexual assault cases?

Child Molest Cases: Lessons Learned

- Parent or Fresh Complaint Witness
- We teach ALL parents and Fresh Complaint Witnesses that the first thing you do when a child says they were hurt/assaulted/something bad happened to them ----
is you tell them YOU BELIEVE THEM!!!!
- You tell them they are safe NOW and
- They did the right thing by telling an adult

Jane Doe No More | Duty Trumps Doubt

- When investigating rape cases, it is so important to always start out believing the victim
UNTIL
- *Every witness* has been interviewed and
- *All the available evidence* has been gathered
- And ONLY THEN decide if she is telling the truth

The Myth

- Do you have a feeling or preconceived idea about the frequency of false reporting in crimes of sexual assault or molest?
- In other words, do you have a notion on how common it is for victim's to make a FALSE claim of sexual assault or molest?
- Would you start out disbelieving a victim in a date rape or an acquaintance rape or spousal rape (as opposed to a stranger rape)?
- Would you require more proof in an acquaintance rape than a stranger rape?

Preconceived Notions

- Do you believe it is possible to consent to one act but not consent to another?
- Kissing...but not intercourse
- Fondling...but not sex
- One sex act...but not another
- Do you believe a person always has the right to withdraw consent?
To say "No" at any time?

Blame the Victim

- Why were you at a house party?
- What were you doing out at 2:30 a.m.?
- Why did you have so much to drink?
- Why did you accept a ride home from him afterward?

Blaming the Victim

- Do you have a boyfriend?
 - Are you a virgin?
 - Why did you ask him to use a condom?
 - He cried when I interviewed him...
 - It's only your word against his...
 - You will ruin his reputation if you follow through with this
- Would you say that to a robbery victim?*

If all I have is the word of my victim

BLAME in Non-stranger RAPE:

Have you ever thought...?

- Boy, she is looking for trouble!
- Why is she dressed like that, what message is she trying to send?
- She shouldn't be doing shots, she's asking for it?
- Why didn't she stay sober enough to drive home, if she crashed on his couch, she must have known this would happen.

Blame

- Non-Stranger Rape by family member or family friend
- Blame the victim
- Why would your trusted childhood friend suddenly rape you?
- Why would your beloved cousin rape you?
- Why would your brother-in-law molest you?

Blame

- Non-Stranger Rape of a Prostitute
- Blame the victim
- It goes with the territory (her job)
- Part of the game (working the streets)
- Part of the risk of her job
- She's out there giving it away anyway – it's not that big of a crime when it happens to "her"
- Would you automatically "discount" this crime?

We Need to Educate Ourselves

- A Prosecutor: a woman would fight to her death before letting a man rape her
- Reality: Most women who are sexually assaulted do not resist. The fear is overwhelming. They feel helpless. They make a conscious choice not to resist, because they are afraid that if they resist they will be hurt even worse. Many victims try to placate the rapist to avoid further harm...

Rape By Itself is Terror

- ...there doesn't have to be a gun or a knife...there doesn't have to be a verbalized threat for the ACT ITSELF to be enormously TERRIFYING AND THREATENING...
- Sexual violence is so intimate that it INDUCES a UNIQUELY POWERFUL KIND OF TERROR

Post Sexual Assault Behavior by the Victim

- It is common for the victim to have extensive interaction with the person who assaulted her "as an attempt to try to undo it"
- If I interact with this person normally, I can tell myself that it didn't really happen.
- It is common for a victim to give her perpetrator a ride home afterward...

Sexual Assault By Someone You Trust

- If you have been assaulted by someone you thought you could trust, how do you restore your sense of trust in the world or in people?
- After being betrayed and violated by a person you were sure would never harm you, "how do you then trust your own judgment thereafter?"

We Are The Voice

- Victims need social acknowledgement and support
- Victims need to establish power and control
- Victims need an opportunity to tell their stories in their own way, in a setting of their choice
- We are called to create this setting and be the vessel for their voice

Seeking Justice, Doing Justice

“There can be no justice
until those uninjured
by crime
become as indignant
as those who are.”

Solon, the lawmaker of Athens (died 559 B.C.)

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CF 225

West's Annotated California Codes

Code of Civil Procedure (Refs & Annos)

Part 1. Of Courts of Justice

§ 225. Challenges; definition; classes and types

West's Annotated California Codes Title 9. Persons Specially Invested with Powers of a Judicial Nature (Refs & Annos) Code of Civil Procedure (Approx. 2 pages)

Chapter 1. Trial Jury Selection and Management Act (Refs & Annos)

West's Ann. Cal. C.C.P. § 225

§ 225. Challenges; definition; classes and types

Currentness

A challenge is an objection made to the trial jurors that may be taken by any party to the action, and is of the following classes and types:

(a) A challenge to the trial jury panel for cause.

(1) A challenge to the panel may only be taken before a trial jury is sworn. The challenge shall be reduced to writing, and shall plainly and distinctly state the facts constituting the ground of challenge.

(2) Reasonable notice of the challenge to the jury panel shall be given to all parties and to the jury commissioner, by service of a copy thereof.

(3) The jury commissioner shall be permitted the services of legal counsel in connection with challenges to the jury panel.

(b) A challenge to a prospective juror by either:

(1) A challenge for cause, for one of the following reasons:

✕ (A) General disqualification—that the juror is disqualified from serving in the action on trial.

✕ (B) Implied bias—as, when the existence of the facts as ascertained, in judgment of law disqualifies the juror.

✕ (C) Actual bias—the existence of a state of mind on the part of the juror in reference to the case, or to any of the parties, which will prevent the juror from acting with entire impartiality, and without prejudice to the substantial rights of any party.

✕ (2) A peremptory challenge to a prospective juror.

Credits

(Added by Stats.1988, c. 1245, § 2.)

Notes of Decisions (118)

West's Ann. Cal. C.C.P. § 225, CA CIV PRO § 225

The statutes and Constitution are current with urgency legislation through Ch. 14 of 2016 Reg. Sess. and Ch. 3 of 2015-2016 2nd Ex. Sess.

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NOTES OF DECISIONS (118)

Constitutional issues
Construction and application
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Grounds for discharge
Death penalty
Exposure to publicity or news reports
Age of jurors
Burden of proof
Presumptions and burden of proof
Challenge to entire panel
Race
Gender
State of mind
Religious beliefs
Review
Preservation of issues, review
Abuse of discretion standard, review
Substantial evidence standard, review
Qualification of jurors, review
Record on review

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CCP 228

West's Annotated California Codes
Code of Civil Procedure (Refs & Annos)
Part 1. Of Courts of Justice

§ 228. Challenges for general disqualification; grounds
West's Annotated California Codes Title 3. Persons Specially Invested with Powers of a Judicial Nature (Refs & Annos) Code of Civil Procedure Effective: January 1, 2003 (Approx. 2 pages)

Chapter 1. Trial Jury Selection and Management Act (Refs & Annos)

Effective: January 1, 2003

West's Ann. Cal. C.C.P. § 228

§ 228. Challenges for general disqualification; grounds

Currentness

Challenges for general disqualification may be taken on one or both of the following grounds, and for no other:

(a) A want of any of the qualifications prescribed by this code to render a person competent as a juror.

(b) The existence of any incapacity which satisfies the court that the challenged person is incapable of performing the duties of a juror in the particular action without prejudice to the substantial rights of the challenging party.

Credits

(Added by Stats.1988, c. 1245, § 2. Amended by Stats.2002, c. 1008 (A.B.3028), § 1.)

Notes of Decisions (107)

West's Ann. Cal. C.C.P. § 228, CA CIV PRO § 228

The statutes and Constitution are current with urgency legislation through Ch. 14 of 2016 Reg.Sess. and Ch. 3 of 2015-2016 2nd Ex.Sess.

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NOTES OF DECISIONS (107)

Court, discretion of
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Right to unbiased jury
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Jurors, examination of
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Grounds for disqualification
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Death penalty
Insanity
Prejudice
Racial prejudice
Membership in organizations
Newspaper reports and rumor
Rumor and newspaper reports
Opinion as to guilt or innocence
Opinions yielding to evidence, opinion as to guilt or innocence
Unqualified or fixed opinion, opinion as to guilt or innocence
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Diminished capacity opinion
Actual bias, determination of
Determination of actual bias
Questions of law and fact
Waiver
Review

WESTLAW

UP 229
Implied bias

West's Annotated California Codes
Code of Civil Procedure (Refs & Annos)
Part 1. Of Courts of Justice

§ 229. Challenges for implied bias; causes
West's Annotated California Codes Code of Civil Procedure (Approx. 2 pages)
Annos)

Chapter 1. Trial Jury Selection and Management Act (Refs & Annos)

West's Ann. Cal. C. P. § 229

§ 229. Challenges for implied bias; causes

Currentness

A challenge for implied bias may be taken for one or more of the following causes, and for no other:

(a) Consanguinity or affinity within the fourth degree to any party, to an officer of a corporation which is a party, or to any alleged witness or victim in the case at bar.

(b) Standing in the relation of, or being the parent, spouse, or child of one who stands in the relation of, guardian and ward, conservator and conservatee, master and servant, employer and clerk, landlord and tenant, principal and agent, or debtor and creditor, to either party or to an officer of a corporation which is a party, or being a member of the family of either party; or a partner in business with either party; or surety on any bond or obligation for either party, or being the holder of bonds or shares of capital stock of a corporation which is a party; or having stood within one year previous to the filing of the complaint in the action in the relation of attorney and client with either party or with the attorney for either party. A depositor of a bank or a holder of a savings account in a savings and loan association shall not be deemed a creditor of that bank or savings and loan association for the purpose of this paragraph solely by reason of his or her being a depositor or account holder.

(c) Having served as a trial or grand juror or on a jury of inquest in a civil or criminal action or been a witness on a previous or pending trial between the same parties, or involving the same specific offense or cause of action; or having served as a trial or grand juror or on a jury within one year previously in any criminal or civil action or proceeding in which either party was the plaintiff or defendant or in a criminal action where either party was the defendant.

(d) Interest on the part of the juror in the event of the action, or in the main question involved in the action, except his or her interest as a member or citizen or taxpayer of a county, city and county, incorporated city or town, or other political subdivision of a county, or municipal water district.

(e) Having an unqualified opinion or belief as to the merits of the action founded upon knowledge of its material facts or of some of them.

(f) The existence of a state of mind in the juror evincing enmity against, or bias towards, either party.

(g) That the juror is party to an action pending in the court for which he or she is drawn and which action is set for trial before the panel of which the juror is a member.

(h) If the offense charged is punishable with death, the entertaining of such conscientious opinions as would preclude the juror finding the defendant guilty; in which case the juror may neither be permitted nor compelled to serve.

Credits

(Added by Stats. 1988, c. 1245, § 2)

NOTES OF DECISIONS (317)

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Consanguinity or affinity
Employees
Landlord and tenant
Coroner's jury
Grand jury
Former trial
Examination of jurors
Jurors, examination of
Prejudice
Public rumor and newspaper reports

Good relation or kin

affinity = relationship

* → opposed or hostile

Special Circs

caveat: bnd questionnaire question!!

CCP 231

WESTLAW

West's Annotated California Codes
Code of Civil Procedure (Refs & Annos)
Part 1. Of Courts of Justice

§ 231. Peremptory challenges; number; joint defendants; passing challenges
West's Annotated California Codes Code of Civil Procedure (Approx. 2 pages)
Annos)

Chapter 1. Trial Jury Selection and Management Act (Refs & Annos)

Proposed Legislation

West's Ann.Cal.C.C.P. § 231

§ 231. Peremptory challenges; number; joint defendants; passing
challenges

Currentness

(a) In criminal cases, if the offense charged is punishable with death, or with imprisonment in the state prison or life, the defendant is entitled to 20 and the people to 20 peremptory challenges. Except as provided in subdivision (b), in a trial for any other offense, the defendant is entitled to 10 and the state to 10 peremptory challenges. When two or more defendants are jointly tried, their challenges shall be exercised jointly, but each defendant shall also be entitled to five additional challenges which may be exercised separately, and the people shall also be entitled to additional challenges equal to the number of all the additional separate challenges allowed the defendants.

(b) If the offense charged is punishable with a maximum term of imprisonment of 90 days or less, the defendant is entitled to six and the state to six peremptory challenges. When two or more defendants are jointly tried, their challenges shall be exercised jointly, but each defendant shall also be entitled to four additional challenges which may be exercised separately, and the state shall also be entitled to additional challenges equal to the number of all the additional separate challenges allowed the defendants.

(c) In civil cases, each party shall be entitled to six peremptory challenges. If there are more than two parties, the court shall, for the purpose of allotting peremptory challenges, divide the parties into two or more sides according to their respective interests in the issues. Each side shall be entitled to eight peremptory challenges. If there are several parties on a side, the court shall divide the challenges among them as nearly equally as possible. If there are more than two sides, the court shall grant such additional peremptory challenges to a side as the interests of justice may require; provided that the peremptory challenges of one side shall not exceed the aggregate number of peremptory challenges of all other sides. If any party on a side does not use his or her full share of peremptory challenges, the unused challenges may be used by the other party or parties on the same side.

(d) Peremptory challenges shall be taken or passed by the sides alternately, commencing with the plaintiff or people; and each party shall be entitled to have the panel full before exercising any peremptory challenge. When each side passes consecutively, the jury shall then be sworn, unless the court, for good cause, shall otherwise order. The number of peremptory challenges remaining with a side shall not be diminished by any passing of a peremptory challenge.

(e) If all the parties on both sides pass consecutively, the jury shall then be sworn, unless the court, for good cause, shall otherwise order. The number of peremptory challenges remaining with a side shall not be diminished by any passing of a peremptory challenge.

Credits

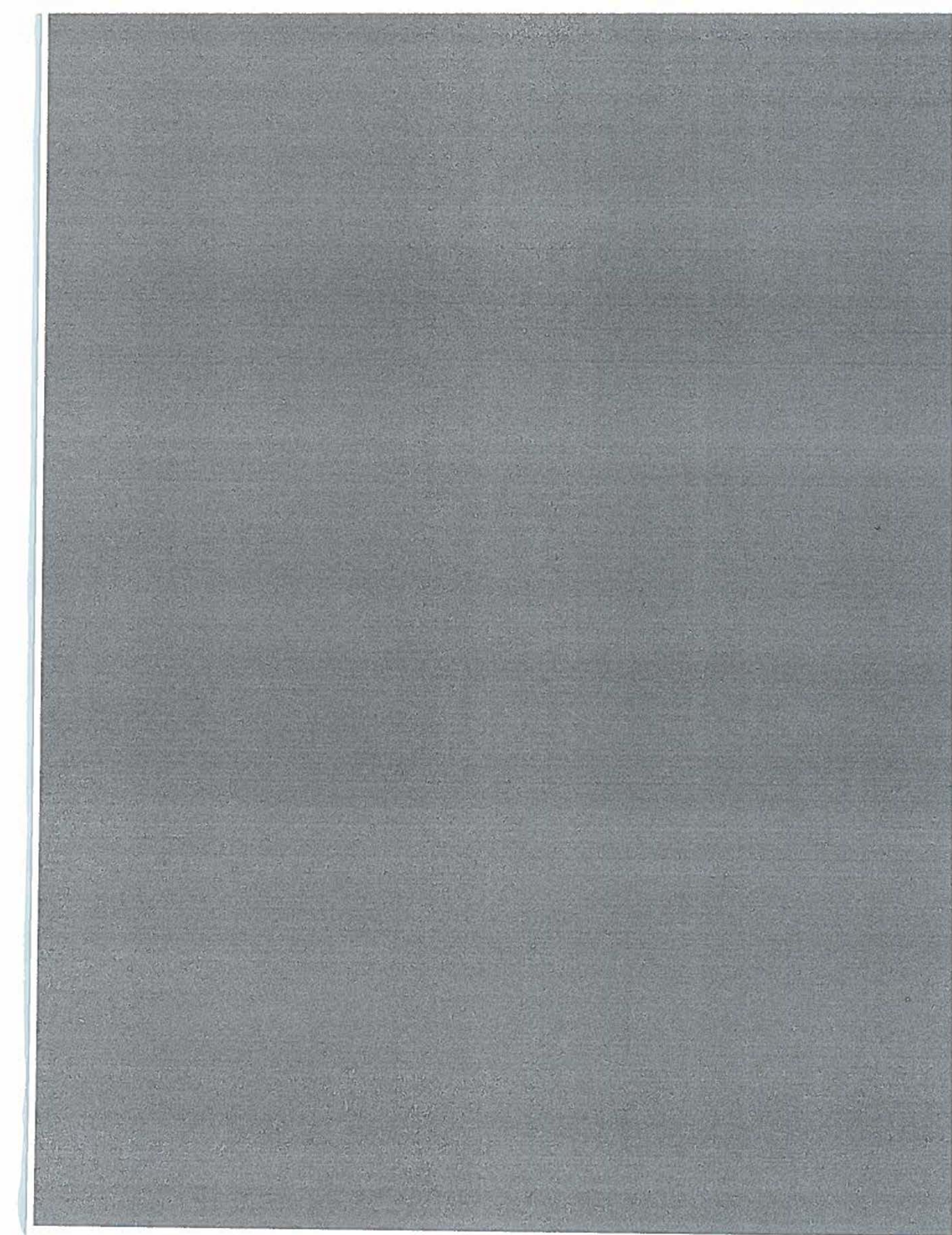
(Added by Stats.1988, c. 1245, § 2. Amended by Stats.1989, c. 1416, § 9.)

NOTES OF DECISIONS (708)

Validity
Due process
Equal protection
Constitutional issues
Construction and application
Construction with other laws
Counsel, right to
Right to counsel
Court, discretion of
Discretion of court
Court, duty of
Duty of court
Death penalty
Purpose of voir dire, death penalty
Challenge for cause, death penalty
Proper grounds for challenge, death penalty
Exclusion of jurors opposed to death penalty
Representative jury, death penalty
Basis for challenge
Challenge, basis for
Challenge, time of
Time of challenge
Number of challenges
Joint trial, number of challenges
Multiple counts, number of challenges
Challenges, number of
Challenges, reopening for
Reopening for challenges
Additional challenges
Challenges, additional
Loss of challenge
Challenges, exhaustion of
Exhaustion of challenges
Challenges, failure to exhaust
Failure to exhaust challenges
Challenges, failure to justify
Failure to justify challenges
Determination by court
Batson challenge, determination by court
Wheeler motion, determination by court
Specific bias
Group bias
Cognizable group, group bias
Similarly situated, group bias
Race
Defendant, race
Age
Gender
Demeanor
Marital status
Occupation
Childhood sexual victimization
Sympathy
Personal values
Full panel
Alternate jurors
Jurors, alternate
Necessity of objection

WHEELER

Cindy DeSilva, Deputy District Attorney, San Joaquin County



Responding to a *Wheeler/Batson* Motion



by Cindy De Silva
Deputy District Attorney, San Joaquin County
(Rev. Ed. June 2016)

The Framework

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

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

- *Johnson v. California* (2005) 545 U.S. 162



Public Policy Underpinnings

- Allow juries to reflect diverse beliefs to avoid tyranny of the majority
- Combat governmental oppression
- Promote perception of courts as legitimate
- Encourage citizen participation in gov't
- Stem the tide of minority stigmatization

People v. Wheeler

- Article 1, Section 16 of the California Constitution contains a "right to trial by jury drawn from a representative cross-section of the community" (*Id.* at 276-77.)
- Using peremptory challenges to kick jurors based solely on "group bias" violates that right. (*Id.*)

What is "Group Bias?"

- "Group Bias": The presumption "that certain jurors are biased merely because they are members of an identifiable group distinguished on racial, religious, ethnic, or similar grounds" (*Id.* at 276)

Batson v. Kentucky

- 14th Amendment's Equal Protection Clause requires that jurors not be peremptorily challenged solely based on race (or protected classification)
- Promulgated Three-Part Inquiry for Trial Court to use in monitoring a *Batson*-type challenge

Three-Part Inquiry

- PRONG 1: Opponent must make prima facie case that *totality of circumstances* raises an inference of discriminatory kick
- PRONG 2: Burden shifts to proponent to give permissible reasons
- PRONG 3: Trial Court decides whether opponent has proven discriminatory purpose

Prong 1: *Johnson v. California* (2005) 545 U.S. 162

- Prong 1 of the original *Wheeler* test required opponent to show "strong likelihood" that jurors being kicked due to group bias
- *Johnson* held that standard too high; CA should be using mere "inference" language of *Batson* (totality of the circumstances)



Prong 1: Tips & Strategies for Making the Prima Facie Case

- Make TC put on record whether finding PF case
 - If doesn't expressly so find, and you jump to giving your reasons, Prong 1 will be deemed MOOT on appeal (but see below)
- If TC finds no prima facie case, ask to put your classification-neutral reasons on record for purposes of appeal
 - If says no, file them in a written declaration
 - P. v. Scott* (2015) 61 Cal. 4th 363 (if TC expressly finds no PF case, but allows P to give reasons just in case, NOT moot; app ct to first consider whether PF case made)

Prong 2: Enunciation of Neutral Reasons

- Calmly remember and state your reasons
- Put your evidence on the record (see *infra* re: Comparative Analysis, etc.)
- And if you absolutely can't remember your reasons...see *Gonzalez v. Brown* (9th Cir. 2009) 585 F.3d 1202

(finding that while not forgetting is preferable, a TC can still credit as neutral a reason not stated b/c attorney can't remember the reason for the kick when other factors showed the attorney to be non-discriminatory, such as (a) remembering neutral reasons for kicking others in the class, (b) not kicking many in the class, and (c) having others in the class remain on the panel)

Prong 3: Weighing the Scales



- Third prong is a credibility determination
- It "demands of the trial judge a sincere and reasoned attempt to evaluate" the truthfulness of the proffered race-neutral reason

(*People v. Hall* (1983) 35 Cal. 3d 161, 167)

Who Can Make the Motion?

- Either the prosecution or the defense can bring a *Batson* motion. (*Georgia v. McCollum* (1992) 505 U.S. 42.)
- Doesn't matter if D and the challenged juror share the same classification or not. (*Powers v. Ohio* (1991) 499 U.S. 400.)



Mechanics and Timing

- Best: make motion at bench (consider limine)
- Too late to *Wheeler* if jury AND alternates sworn
- Hrg: out of jury presence
- But can still *Wheeler* as to entire panel if alternates not yet sworn
- Reasons: not ex parte
- See *United States v. Thompson* (9th Cir. 1987) 827 F.2d 1254; but see *Devis v. Ayala* (2015) 578 U.S. ___, 135 S. Ct. 2187 (assumed true Cal Sup's holding that it was error, but agreeing that it was harmless in that case)



What is a "Cognizable Group"?



ALERT: **New Law Change!**

- CCP 231.5 has for years defined in CA the classifications for which peremptory challenges may not be used due to a "group bias" stereotype.
- A 2015 amendment changed it (fairly radically in three instances) in 2016.

CCP 231.5: Pre-2016 Version

- Race, Color, National Origin
- Religion (note that this is different from kicking someone who, due to religious views, can't sit in judgment)
- Sex (and, per case law, sex in combination with race/ethnicity/etc.)
- Sexual Orientation
- "Similar Grounds"

Pre-2016 Non-Cognizable Group Examples

- The Young (see, e.g., *People v. Estrada* (1979) 93 Cal.App.3d 76, 93)
- The Old (see, e.g., *People v. McCoy* (1995) 40 Cal.App. 4th 778, 783)

CCP 231.5: 2016 Version (The 2015 Amendment)

- Took away the "simple" laundry list and gave us...
- "[A] characteristic listed or defined in Section 11135 of the Government Code, or similar grounds."
- (GC § 11135 outlaws govt discrim./equal access re: benefits)

Gov't Code § 11135

- Race
- Color
- National Origin
- Ethnic Group Identification
- Religion
- Sexual Orientation
- Age
- Mental Disability
- Physical Disability
- Genetic Information, per Civil Code § 51(e)(2)
 - [genetic test info of the person or their family, a disease/disorder manifesting within the person/family, or genetic services info]

Point to Consider re: Mental/Physical Disability (etc.)

- CCP § 231.5 (emph. added) prohibits using peremptories "on the basis of an assumption that the...juror is *biased merely because of* the characteristic in question"
- If kicking because disability will prevent effective service (e.g., blind and can't see important details in crime photos), perhaps ok.
 - (see, e.g., *United States v. Harris* (7th Cir. 1999) 197 F.3d 870 (rational basis test applied; kick of MS patient ok'd b/c med's cause drowsiness))

Still-Valid Case Law Examples of Non-Cognizable Groups

- People newly residing in the community (see *Adams v. Superior Court* (1974) 12 Cal.3d 55, 60)
- "People of Color" as a combined group (see *People v. Davis* (2009) 46 Cal.4th 539; *People v. Newman* (2009) 176 Cal.App.4th 571)
- Less-educated (only 12th grade or less) people and "blue collar workers" (see *People v. Estrada* (1979) 93 Cal.App.3d 76 (grand jury exclusion))

Moving on...What are "similar grounds"?

- Hard to find a case law definition that's cited with regularity

(see *People v. Garcia* (2000) 77 Cal. App. 4th 1269, 1275-76 (drawing upon a Cal. Sup. plurality opinion's definition in the absence of something with more authority))

"Similar Grounds": Federal

- Here's a pre-*Batson* definition in grand jury context: whether "the group is one that is a recognizable, distinct class, singled out for different treatment under the laws, as written or as applied."

(*Castaneda v. Partida* (1977) 430 U.S. 482, 494; see *Garcia, supra*, at 1273 (noting that this is likely the US Supreme's standard b/c they cited this case in *Batson*))

"Similar Grounds": State

- CCP 231.5 was meant "to codify the decision in" *Garcia*. (CAL. CODE CIV. PROC. 231.5(2000 Note).)
- *Garcia* recites plurality language in *Rubio v. Superior Court*, (1979) 24 Cal. 3d 93, suggesting the following as the first prong of a two-prong definition:
- Groups whose members "share a common perspective arising from their life experience in the group, i.e., a perspective gained precisely because they are members of that group."

(*Garcia, supra*, at 1276 (quoting *Rubio* (lead op.), *supra*, at 98).)

"Similar Grounds": State

(cont'd)



- *Garcia* notes the *Rubio* court gave a two-prong test, but only the first part seemed to have majority support
- Still, *Garcia* also used the second prong in its analysis ("that no other members of the community are capable of adequately representing the perspective of the group" in question) (*Id.* at 1278 (quoting *Rubio, supra*, at 98))

Religion: *People v. Jones* (2011) 51 Cal. 4th 346

- Where P excused black juror partly b/c she attended the 1st A.M.E. Church, which P called a "controversial" organization, and said he didn't want anyone "controversial"...
- Cal Sup's said P "did not excuse her because of her religious views but because he believed she belonged to a controversial organization." (*Id.* at 368.)

Bilinguals #1: *Hernandez v. New York* (1991) 500 U.S. 352

****PLURALITY OPINION****

- 4-justice opinion stated the Trial Court did not commit clear error in believing DA's claim that he kicked the Spanish-speaking jurors because they gave him reason to think they would reject the interpreter's version in favor of their own, and not because he wanted Latinos off the jury
- BUT: "[A] policy of striking all who speak a given language, without regard to the particular circumstances of the trial or the individual responses of the jurors, may be found by the trial judge to be a pretext for racial discrimination. But that case is not before us." (*Id.* at 371-72.)

Bilinguals #2: *People v. Cardenas*
(2007) 155 Cal. App. 4th 1468

- Recognized the U.S. Supreme Court's plurality in *Hernandez*
- Upheld the TC's decision that "the prosecutor had put forth a valid, race-neutral reason for excluding" the Spanish-speaking jurors on grounds DA thought they'd reject the official translation, and not as a pretext for racial kick

Bilinguals #3: *P. v. Gonzales*
(2008) 165 Cal. App. 4th 620

- BUT SEE *People v. Gonzales*, where DDA stated several reasons to kick the juror, including his fear the juror would reject the official interpreter's version...
- But the record did not support that fear and also didn't support the other stated reasons, so appellate court found TC erred in accepting DDA's stated reasons
- As the appellate court said, "the stated basis is strongly suspicious of being a ruse for excusing those persons who may be perceived as more closely identifying with their national origin and/or their Hispanic ethnicity, i.e., those who still speak Spanish." (*Id.* at 631.)



**Statistics,
Comparative Analysis,
and Disparate
Questioning**

New Forms of Evidence to Prove
or Disprove Discriminatory Intent

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

The Majority Used the Following
Methods to Find the Stated Race-
Neutral Reasons to be Pretextual

Miller-EI (cont'd)

Statistics

P struck 91% of black potential jurors, but
only 12% of non-black potential jurors



Miller-EI (cont'd)

Disparate Questioning

P pressed black potential jurors harder in
questioning



Also, asked trick questions of them more
often

**Miller-EI
(cont'd)**



**Evidence of Past DA's Office
Policy of Jury Selection
Discrimination**

Testimony of former prosecutors of office
climate of race-based voir dire

Prosecutor-written manual discussing
types of people not to choose

Miller-EI (cont'd)

**Notation of Race on Jury
Selection Cards**

P annotated race on cards; but trial was
before *Batson*, so Ct. not impressed with
excuse of annotating to avoid *Batson* error

Miller-EI (cont'd)

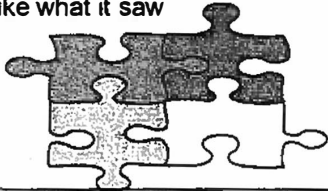
Comparative Analysis

Compared P's stated reasons for striking black
potential jurors

If same quality applied to non-black potential jurors
whom P didn't strike, evidence of discrimination

Miller-EI (cont'd)
Cumulative Weight of
All-of-the-Above

Court put all the puzzle pieces together and
didn't like what it saw





Miller-EI's Progeny

Fleshing Out the New
Evidence Rules

Williams v. Runnels (9th Cir. 2006)
432 F.3d 1102

Bare Statistics OK to
Establish Prong 1's Prima
Facie Case

Williams v. Runnels: Make Your Record!

- TC found no Prima Facie case
- P tried to put reasons on record, just in case, for appeal
- TC said no thanks
- 9th Circuit said it was P's responsibility to make record, b/c prima facie case was shown
- Guess what? P no longer remembered why.

Snyder v. Louisiana (2008) 552 U.S. 472: Ask Follow-Up Q's

- Court suggests P should have followed up with more Q's when black potential juror's hardship request was denied after school said service ok
- P said kicked b/c thought juror would still worry: but no follow-up Q's, so Ct. disbelieved P
- Further, others whose hardships were denied were not stricken by P...and they were white



People v. Lenix (2008) 44 Cal. 4th 602

- Cal Sup's Recognize Comparative Analysis Required for First Time on Appeal
- So long as record contains enough information to so engage

Lenix: Make Your Record

- Cal Sup's prefer we make our own record and do our own Comparative Analysis at trial
- So that "defendant can make an inclusive record, [and] the prosecutor can respond to the alleged similarities"

(*Id.* at 624.)



Lenix: Don't Cut Off Voir Dire Time

Lenix recognizes TC's CCP 223 power to limit voir dire time, but said this:

"If the trial court truncates the time available or otherwise overly limits voir dire, unfair conclusions might be drawn based on the advocate's perceived failure to follow up or ask questions."

(*Id.* at 625.)



Lenix and Green v. Lamarque: Notations on Juror Cards

- *Lenix*: Dicta re: *Miller-El's* disapproval of race notations on juror cards.
- "We emphasize, however, that post-*Batson*, recording the race of each juror is an important tool to be used by the court and counsel in mounting, refuting or analyzing a *Batson* challenge." (*Id.* at 617 n. 12.)
- BUT SEE *Green v. Lamarque* (9th Cir. 2008) 532 F.3d 1028, 1033, finding a *Batson* violation because, inter alia, P "had noted the race of each venire member he struck from the jury pool, when the trial judge asked him who he struck and why, the prosecutor was able to read off a list," then cited *Miller-El's* note of that.

****New Case Alert: *Foster v. Chatman* 5/23/16 __ S.Ct. __**

- 1986 facts and 1987 trial
- D, a black man in Georgia, confessed to beating, raping, strangling & killing a 79-year-old widow
- Convicted & death penalty imposed
- 29 years later, U.S. Sup's remanded to Georgia's Sup. Ct. their decision not to let D continue to appeal his *Batson* claim

***Foster*: "New Evidence" of Notes on Jury Cards**

- Trial occurred just months after *Batson* decided; *Batson* objection denied after 4 black jurors removed by P
- During appeals process, D filed Georgia Open Records Act Request for P's file
- Found notations seeming to suggest jurors were kicked b/c black, and not b/c of the race-neutral reasons given by P

Foster* and "New Evidence": An Extension of *Miller-EI

- Holding based on:
 - Comparative Analysis of similarly situated white jurors who were kept
 - Record Belied some of P's stated reasons
 - New Evidence of Notes in P's File indicated race consciousness ("B" by black jurors' names, "No Black Church," etc.)

Notations to "Help" with *Batson* Objections?

- Noted P's argument that they notated the juror cards b/c "*Batson*, after all, had come down only months before Foster's trial. The prosecutors, according to the State, were uncertain what sort of showing might be demanded of them and wanted to be prepared."
- Rejected argument b/c the notes showed preoccupation w/keeping blacks off jury

Justice Thomas's Lone Dissent in *Foster*

- "The notion that this 'newly discovered evidence' [of P's file notes] could warrant relitigation of a *Batson* claim is flabbergasting." (Thomas, J., dissenting.)
- The issue should be whether TC had good reason to credit P's stated reasons, which often rests on a credibility determination. (*Id.*)

Thomas's Dissent: A Warning Shot

- "[T]he Court today invites state prisoners to go searching for new 'evidence' by demanding the files of the prosecutors who long ago convicted them. If those prisoners succeed, then apparently this Court's doors are open to conduct the credibility determination anew."
- "New evidence should not justify the relitigation of *Batson* claims."

Comparative Analysis Shield: *Rice v. Collins* (2006) 546 U.S. 333

- US Supremes *unanimously* overturned 9th Circuit for going too far in second-guessing TC's 3rd prong credibility determination
- US Sup's Used Comp. Analysis as a Shield rather than a Sword
- Noted P struck similarly situated white potential juror (challenge on appeal was to strike of black potential juror)



Comparative Analysis Tips & Strategies



- Keep a list of the attributes leading you to kick
- If you saved someone with that attribute, have a list of why you kept them

Comparative Analysis Tips & Strategies

- Don't wait for D; make your own Comp. Analysis argument, or App. Ct. will draw judgment on an artificially short record
- Shield rather than a Sword—point out when you kicked others w/same attribute



Other New Evidence Forms Tips & Strategies

- Ask follow-up Q's—or point out that Trial Court kept strict timetable and you didn't have time



- Bring a calculator to do statistics

Demeanor Strikes and the Cold Appellate Record

So what happens when you kick because of the juror's demeanor, but that demeanor is not reflected in the record?



App. Ct.'s Dislike Demeanor Strikes w/o Record Support

- *People v. Silva* (2001) 25 Cal. 4th 345
(reversed death penalty when P's non-demeanor reasons belied by record, and demeanor reason not supported by it)
- *Snyder v. Louisiana, supra*
(reversed where P gave 2 reasons, 1 of which belied by Comp. Analysis and 1 was demeanor not in record; TC didn't state which it credited)



Vague Demeanor Reasons Unsupported by Record

- *People v. Allen* (2004) 115 Cal. App. 4th 542
(reversed where P gave demeanor reason of "her very response to your answers, and her demeanor, and . . . how she took her seat" being indicative of an independent thinker; App. Ct. had no idea what P was talking about)





A Ray of Hope... But Don't Forget *Habeas*

- *People v. Reynoso* (2003) 31 Cal. 4th 903
(accepted TC's non-detailed credibility ruling when P's demeanor reason not in record but P's other reason not belied by it)
- NOTE: *Reynoso* can be a helpful decision, but the better practice is to make a demeanor record and have TC give a detailed ruling. Leave no stone unturned.

Another Ray of Hope—From the Supremes! *Thaler v. Haynes*

- Sup's upheld TC's crediting of P's race-neutral demeanor reason even when the TC wasn't the judge who was present for voir dire, and therefore couldn't have seen the complained-of demeanor.
- "[T]he best evidence of the intent of the attorney exercising a strike is often that attorney's demeanor." (*Id.* (2010) 559 U.S. 43, 49.)

Thaler v. Haynes (cont'd)

- While "the trial judge's 'first hand observations' are of great importance," *Batson* does not "hold that a demeanor-based explanation must be rejected if the judge did not observe or cannot recall the juror's demeanor." *Id.* at 48-49.
- But Note: *Haynes* involved no evidence in the record that would have undermined the prosecutor's stated reasons.



Demeanor-Based Tips & Strategies

- Weave your observations into voir dire record
 - "I realized you were smiling at D. I'm curious as to why?"*
 - "You seem a little upset with me. Have we met before?"*
 - "So I noticed you looking around during questioning. Is there something else on your mind besides these proceedings?"*

Demeanor-Based Tips & Strategies



- During 2nd Prong, specifically ask TC to tell you whether she/he saw the same thing you did
 - "Did the Court also see that Juror A kept coming in late after the breaks?"*
 - "Does the Court agree with my observation that Juror A rolled his eyes when the bailiff asked him to take his hat off?"*

Demeanor-Based Tips & Strategies

- App. Ct.'s won't consider a reason that you didn't give (and TC can't, either)
(*Paulino v. Castro* (9th Cir. 2004) 371 F.3d 1083)
- So make sure you give all your reasons
- Make TC specify its findings—which reasons accepting, and which rejecting



Demeanor-Based Tips & Strategies

- Consider turning chair around and watching panel from minute they walk in until the first 12 are seated in the box
 - It might look weird, but panel will think you're conscientious and care who is selected
 - You won't miss anything—who is snoozing, who won't let others squeeze past them, who didn't take hat off until admonished, etc.

Demeanor-Based Tips & Strategies

- Keep ALL your jury notes—for retained jurors as well as kicked jurors
- If remanded to do Prong 2, you can't rebut prima facie case if you can't remember your reasons
(*Paulino v. Harrison* (9th Cir. 2008) 542 F.3d 692)



Remedies

(Yes, we're almost done!)





The Good, Old-Fashioned Remedies

- *Wheeler*: Dismiss entire panel and start over with new panel
- *Batson*: US Supremes remanded to allow TC to engage in 3-Part Inquiry
- Because opponent "is entitled to a random draw from an entire venire—not one that has been partially or totally stripped of members of a cognizable group" (*Wheeler, supra*, at 282.)
- EXPLICITLY LEFT OPEN possible remedies of:
 - Discharging entire panel and starting over
 - Re-seating the offended juror

Wheeler Gone Wild:
People v. Willis (2002)
27 Cal. 4th 811



But what if the opponent doesn't
want to dismiss the panel?
Opponent holds all the cards...

Willis: *Wheeler* Gone Wild

- Defense attorney purposely violated *Wheeler* b/c didn't like mostly white panel
- Rather than reward defense w/ new panel, TC fined defense attorney \$1500 as an alternate remedy
- (To the chagrin of the higher courts, TC later vacated the sanction order)



Willis: Cal Sup's Expand *Wheeler's* Remedies

- Cal Sup's affirmed use of \$\$ sanctions
- Gave nod to re-seating offended juror
- Hinted ok to give opponent extra peremptories instead of re-seating, if offended juror already gone (dicta)
- THE CATCH: the opponent has to AGREE to the alternative remedy. OPPONENT HOLDS THE CARDS.



Potential State Bar Reporting Requirements



State Bar Reporting: At Trial

- BP 6086.7(a)(3): TC must report if monetarily sanctions you for \$1000 or more
- BP 6068(o)(3): You must report self w/in 30 days if TC monetarily sanctions you for \$1000 or more

State Bar Reporting: On Appeal

- BP 6086.7(a)(2): TC must report if judgment reversed "in whole or in part" b/c of attorney misconduct
- BP 6068(o)(7): You must report self w/in 30 days if judgment reversed "in whole or in part" b/c of misconduct

State Bar Reporting: On Appeal cont'd

- Coleman thinks *Wheeler* error means attorney made Jury Trial unfair--and if pretext finding, deceptive; thinks reporting duty.
(JERRY P. COLEMAN, MR. *WHEELER* GOES TO WASHINGTON--THE FULL FEDERALIZATION OF JURY CHALLENGE PRACTICE IN CALIFORNIA 43 (2006))

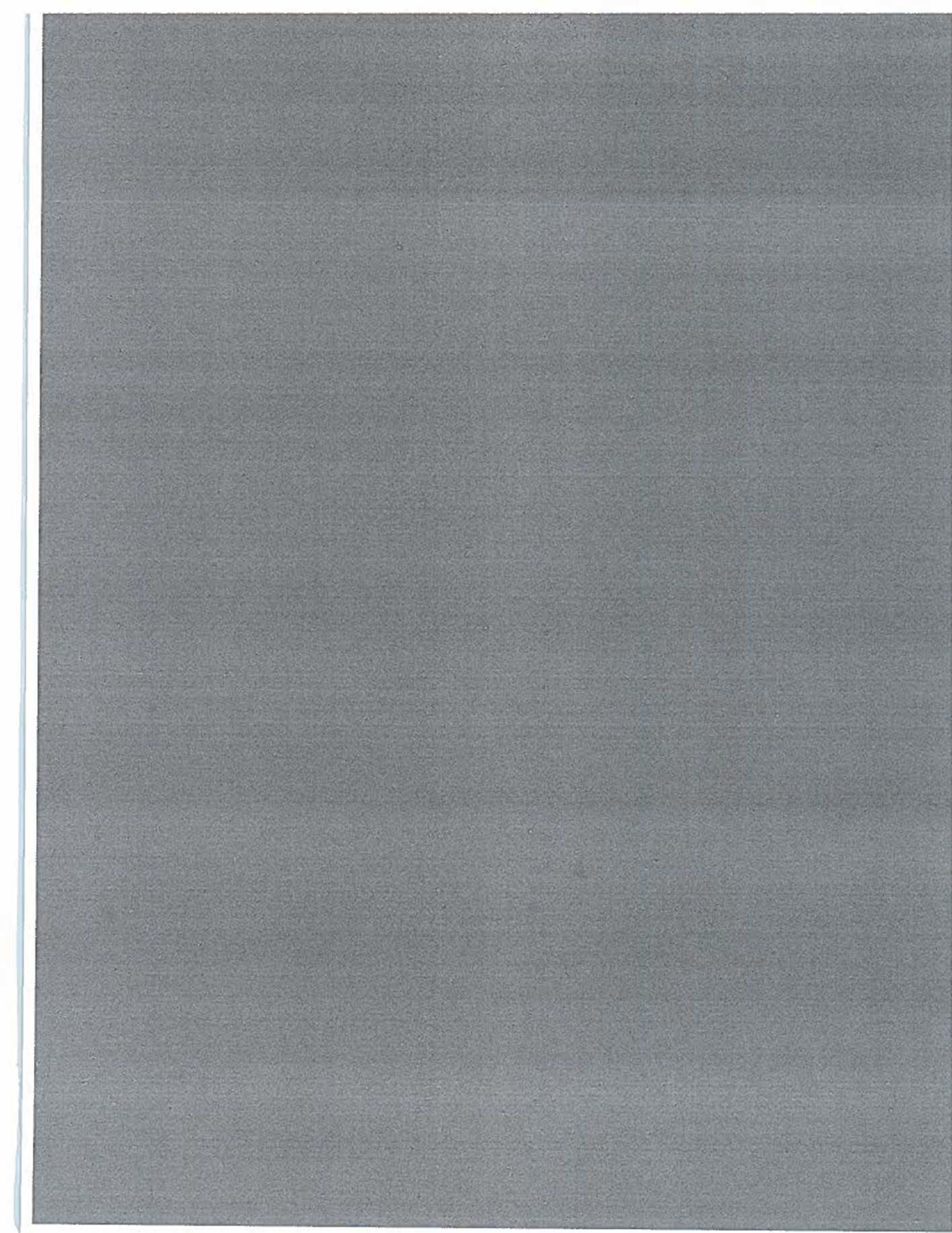
THE END

- DDA Cindy De Silva, San Joaquin County,
cindy.desilva@sicda.org, (209) 468-2404



IMPEACHMENT

Chuck Gillingham, Deputy District Attorney,
Santa Clara County



IMPEACHMENT FUNDAMENTALS

Prove your case with Prior Inconsistent
Statements

Think DV, Gangs, Sex

Your Toolbox

*Violence
code*

My witness went sideways*&#!!



SIDEWAYS WITNESS

- ANTICIPATE
- BE PREPARED
- MOTIONS IN LIMINE 765(a); 767; 1044
- VOIR DIRE
- OPENING
- CALCRIM
- 780-----NEVER GO TO JUDGE, NEVER
NEVER NEVER NEVER NEVER
- CLOSING

US v Owens

EC 780

EC 1226

Motions in Limine to lead on direct

- P v. Williams 56 Cal.4th 165
- P v. Collins 49 Cal.4th 175
- P v. Harris 43 Cal.4th 1269
- P v. Williams 43 Cal.4th 584
- P v. Augustin 112 Cal.App4th 444-special
needs witness
- 765 (b) child witnesses

1235 PIS

- Not just to impeach—also for TRUTH
- MAY PROVE CASE WITH PIS ALONE
- Statement is the one at trial.
- Impeaching statement is PRIOR to trial

1235

- Procedure 770
- Witness is either:
- Confronted on the stand and given opportunity to explain or deny statement, or
- Subject to recall
 - DOES NOT APPLY TO THE DEFENDANT
- Always subject to recall

Evidence Code Section 769

You don't have to educate witness about prior statement before using it to impeach

Tactics – sometimes you don't want to

EC 1202

PREPARATION

Fail to Prepare. Prepare
To Fail.

Preparation

Your outline of questions for the witness should include citations to all impeachment material

I like four sided folders

Preparation

"Husband slapped me." PX recant

Def slapped her in face

911 (tape 00:48 - TX 2:4)

Written (Atkins p2)

ER (RN Lang - meds 98)

Det 01-04-08 (Krup - tape 05:24 - TX 6:8)

TRO dec (2:26)

Me & Insp. Tejada (02-22-08)

ECB40 -

* US v Salinas
- adoptive admissions
no @ to remain
silent until he does

EC221
EC782

Mechanics

Jump in - start asking questions

Maybe witness will tell the whole truth

But then again . . .

Mechanics

Let the witness talk

Get a feel for what you are in for

Don't start impeaching at the first sign of inconsistency

Let them get the whole BS story out

Take notes – your guide to what topics will require impeachment

BUT YOU SHOULD KNOW WHAT YOU HAVE TO DO

Mechanics

You only get to impeach on the inconsistent parts

Easy – “I wasn’t there. I have no idea what you are talking about”

Typical – Select inconsistencies all over the map

*

1235

- Refusal to answer---no prior inconsistent statement (*People v. Rios* 163 Cal.App.3d 852.)
- Even if W says prior statements are lies, may come in for truth. (*People v. Brown* 35 Cal.App.4th 1585.)
- Multiple levels of hearsay okay, if exception at every level. (*People v. Zapien*)

Asking the Right Questions

Be direct

Be precise

Impeach with the actual prior inconsistent statements

Wrong

Q: Do you recall telling Officer Jones that you saw the defendant with a gun?

Wrong

Q: Do you recall telling Officer Jones that you saw the defendant with a gun?

Wrong

Q: Do you recall telling Officer Jones that you saw the defendant with a gun?

Assumes facts not in evidence

Wrong

Q: Do you recall telling Officer Jones that you saw the defendant with a gun?

Invites "I don't remember"

Asking the Right Questions

You are not refreshing recollection!

You are impeaching with a prior inconsistent statement

The witness does not have difficulty remembering . . . He has difficulty telling the truth

Asking the Right Questions

Q: On 01-02-08, did you tell Officer Jones the following, quote, I saw Darrell with a gun in his hand, end quote?

Wrong

A: I never saw no gun.

Q: Let me show you a copy of your statement, and let's see if it refreshes your recollection of whether you saw a gun.

Ask Question Again

Right

A: I never saw no gun.

Q: On 01-02-08, did Sgt. Jones ask you this question and did you give this answer?

Question: Who did you see with a gun?

Answer: I saw Darrell with a gun in his hand.

Asking the Right Questions

Do not accept equivocal answers

"I was high"

"I was confused"

"I may have"

Asking the Right Questions

Do not accept equivocal answers

Follow up with other questions

Did you or did you not make that statement?

Do you deny making that statement?

Pretty it up

- All the reasons prior statement is better
- You called 911, Why?
- You needed help?
- You wanted the police to come because you were in danger?
- They came pretty quickly?
- They separated you and let you tell them what happened?
- They were writing it all down?

Pretty it up

- You felt safe with the officers there?
- The ambulance came?
- They paramedics asked you what happened?
- What did you tell them?
- Why would you lie to a paramedic?

Asking the Right Questions

If witness does not unequivocally admit making prior statement, don't forget to finish the job

Prove it up

If prior testimony – use judicial notice 452

Cooperative Witnesses

Impeach when necessary

Try to take care of this in pre-trial interviews

Everyone makes mistakes

Offer explanation

Was your memory of these events better when you talked to the police?
Get them to admit they told the truth



I don't remember
SURE YOU DON'T!

771 Refresh

- ANYTHING
- W says does not remember
- Show to D—do not mark
- Give to W
- Direct W to portion
- Read it, see it etc.
- Ask if that refreshes



"I DON'T REMEMBER"

- MUST ATTEMPT TO REFRESH 771
- Court must make determination in a 405 whether genuine or a ploy.
- Preponderance of Evidence Ev. 115
- CALCRIM

I don't remember

- If genuine---past recollection recorded, if at all
- If a ploy---Then may use PIS to get in prior statement as truth.
- If W is evasive, but ultimately gives consistent statement, may not impeach.

1237 Past Recollection Recorded

- Written statement admissible if:
 - Statement admissible if W testifying
 - W had inadequate recollection and
- Writing was:
 - Made when fresh in W's recollection
 - Made by W, at W's direction, or someone while W made statement
 - Offered after W testifies that this statement was true
 - W says exhibit is accurate

1237

- Refreshing will not work
- Written statement moved into evidence, read to jury
- EC 250
- Admissible for truth
- W MUST say they were telling truth

1237

- W says does not remember
- Refresh—if ineffective
 - Court determines real or fake
- If real
- W id's prior statement Mark as exhibit
- Authentication—Make statement while incident fresh
 - Right it down soon
 - Honest at time of statement
 - Is this statement a truthful account
- Confirm need for prior statement
- READ IT.

Do not say evf imp in report
just Fx + to chg / not
really evf needed for trial
If say evf, then stuck,
(Evf. One to Fx/Chg
@ r x)

1235 if not genuine

- Q: A is the truth right
- A: if yes—you win
 - If no—continue
- Q: Did you speak to someone
 - Get out the circumstances
 - Especially all the reasons it is better than trial testimony
- Identify the prior statement

1235

- Re-ask about A
- Q: The truth is A, right?
- A: If yes—you win
 - If maybe, or I don't know, you probably won
 - If no—continue
- Then read the Prior statement
 - Follow along while I read this
 - Did I read that correctly?

Ploy

People v. Green (1971) 3 Cal.3d 981

Witness gave evasive answers and claimed some memory lapses

In context, the witness' answers amounted to an implied denial

Court found sufficient inconsistency to allow impeachment with prior statement

Prove the Ploy

How do you prove that the lack of recall is more likely feigned than truthful?

Witness has a relationship with, or bias towards, the defendant.

Family member, friend, fellow gang member, etc.

Prove the Ploy

How do you prove that the lack of recall is more likely feigned than truthful?

Evidence that witness is reluctant to testify against defendant.

Admissions of reluctance, failure to appear in past hearings, etc.

Prove the Ploy

Witness given an opportunity to read or listen to his prior statement—won't or says it doesn't help

Implausible explanation—shocking event, recent, inconsistent explanation, has details surrounding incident

Prove the Ploy

Get witness talking

Elicit everything the witness won't fight you on before and after the event

Bias, fear, whom she has talked to about case

Proving the Ploy

In re Deon D. (1989) 208 Cal.App.3d 953, 958-962.
Witness refused to answer most questions asked by DA –
"I'm no snitch"

People v. Homick (2012) 55 Cal.4th 816.
Witness claimed that his prior statements admitting his participation in the murders were lies he had been coerced into making by police and prosecutors—
acted like a jerk on the stand

The witness, having been duly sworn, testified as follows:

DA: Good morning.

Witness: (No response)

DA: You know the defendant here, Mr. Jones, isn't that true?

Witness: (No response)

Witness Stands Mute

You cannot impeach with prior inconsistent statements where the witness simply refuses to answer questions

People v. Rios (1985) 163 Cal.App.3d 852

Witness Stands Mute

Preparation

Witness tells you he won't talk.
Put him up there anyway.
Tell the witness to complain to the judge.
Do NOT tell the wit what may happen if he doesn't speak. Not our job.

Witness Stands Mute

In court

Find topics witness is willing to talk about

- Custody status
- Dislike of police
- Witness not here willingly
- Humor?

Witness Stands Mute

In court

Insist that judge order the witness to answer the question.

Judge can hold witness in contempt for failure to answer questions.

The witness, having been duly sworn, testified as follows:

DA: me Good morning. Would you state your name and spell it for the record.

Witness: F%&* you! FAT ASS, YOU KNOW MY NAME. You know the cops made me lie. I ain't saying nothing.

1294

- MUST PUT IN PRIOR INCONSISTENT STATEMENT AT PX
- IF YOU CONFRONT THE WITNESS AT AN EARLIER HEARING THEN YOU MAY USE THEIR PIS AT TRIAL
- IF YOU DO NOT—MAY NOT USE AT TRIAL
- P v. Martinez 113 Cal.App.4th 400

1523

- Must play the tape unless it results in a great loss of time
- Or testimony would gather the result of the whole.

Impeachment

Watch it

Practice it

Do it, whenever you get a chance

Confidence = credibility

EC 1202

Thanks

John Brouhard

Assistant District Attorney, Alameda County

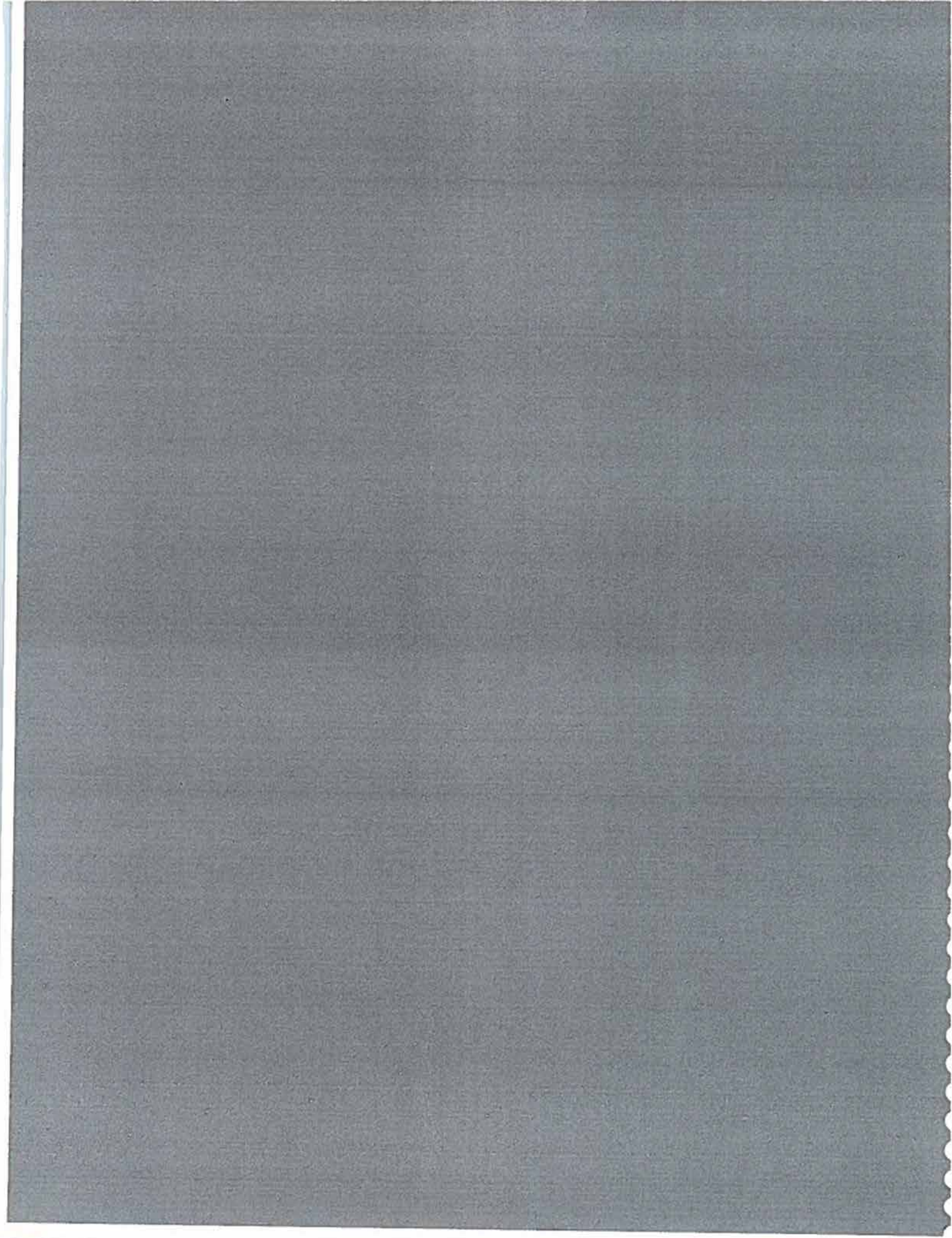
Jim Sibley, DDA, Santa Clara

EC 356

whole / entire sent D/U & to
2 in

EXPERT WITNESS EXAMINATION

Robert Mestman, Senior Deputy District Attorney,
Orange County



EXPERT WITNESS EXAMINATION

Robert Mestman
Senior Deputy District Attorney
Orange County District Attorney's Office
June 2016

Types of Experts

- Testifying experts (vs. consulting)
- Reporting expert witness
 - Collecting evidence
 - Conducting tests
 - Doing experiments
 - Mostly prosecution witness
- Educating expert witness
 - Stating opinion
 - Expressing conclusions
 - Both prosecution & defense witness
- Combination of above

Preparation is Key

"If I had 8 hours to chop down a tree, I would spend 6 hours sharpening my axe."

Direct Examination

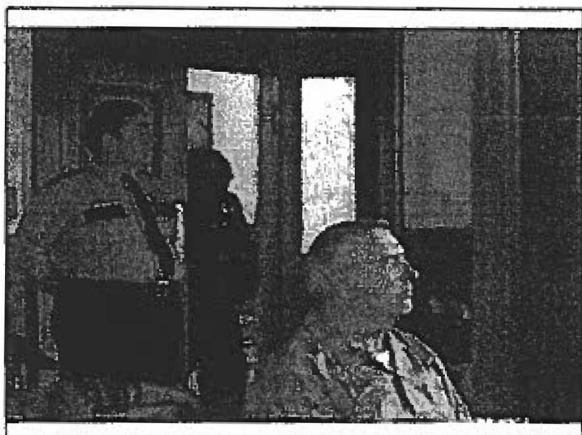
- Determine what your goal is
- Pick the right expert
- Many times you don't have a choice
- If you don't understand, the jury won't either
- Vocabulary is important
- Preparation is important
 - But be careful of coaching and rehearsing
- Don't portray expert as advocate
 - Just a neutral witness with expertise
- Teacher to the jurors

4 Stages of Direct

1. Qualifying witness as expert
2. Establishing basis for opinion
3. Eliciting opinion
4. Explaining opinion

Qualifying Expert

- Competency & knowledge in profession/field
- Education, skill and/or training
- Review CV/resume
 - Mark CV/resume as exhibit?
- Don't over sell
- Use a script
- Prior judicial recognition
- Sometimes courts use separate *voir dire* of expert
- Must witness be designated expert by court?



20 720 - 723

Direct Questioning

- Set a goal and reach it
- Use an outline or written questions
- Open-ended questions okay (generally)
- Use demonstrative exhibits
 - Helps jurors understand
 - Easier to remember
 - Breaks the monotony
- Have witness get down and write on easel, use projector, etc.
- Okay to use hypothetical questions
 - But evidence must prove the facts assumed in the question

Questioning – Example

- "What happened next?" example
- From John Grisham's *The Runaway Jury*
- Lawsuit against Big Tobacco
- Q: And what was said in the next paragraph?
- A: The writer suggested that the company take a serious look at increasing the nicotine levels in its cigarettes. More nicotine meant more smokers, which meant more sales, and more profits.

Questioning – Better Alternative

- Did you read the next paragraph?
- What was the subject of the paragraph?
- Did the writer suggest that the company do something about nicotine levels?
- Did the writer suggest that the nicotine levels be increased?
- Do increased nicotine levels affect the number of people who smoke?
- Would increased nicotine levels mean more smokers?
- Would this mean more or fewer sales?
- Would this mean more or less profit?
- Would the increased profit be substantial?

Cross Examination

- Set a goal
- Develop a strategy
- Use your own style (but adapt if needed)
- Highlight your case
- Expose the defense weaknesses
- Control the witness
- Determine the appropriate length
- Listen to the answers
- Save argument for closing

Strategy

- Very hard to "out expert" an expert
- What's your goal?
 - Is cross designed to highlight your case, undermine defense case, or both?
- Your demeanor – your approach, control it
- Short, simple questions
- Only ask questions that help you
- Avoid open-ended questions
- Use leading questions!!!
- Be flexible

Types of Questions

- Concession-based
 - Use the expert to aid or bolster your case
 - New facts, alternative facts or deleted facts
 - Mistakes
 - "Garbage in, garbage out"
- Impeaching
 - Information that is not correct or inconsistent
 - Bias
 - Prior inconsistent statements/testimony
 - Lock-in witness first (before impeaching)

chg of Fx = chg of opinion

Preparation

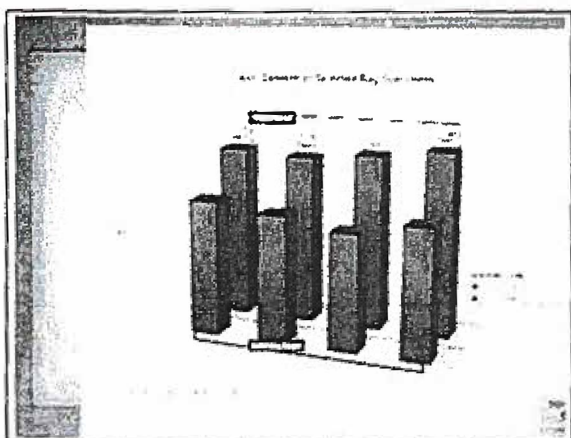
- Get discovery in advance
 - CV, reports, tests, etc.
- Investigate every aspect of expert witness
 - Background, CV, prior testimony, licenses, etc.
- Attempt to contact defense expert
 - It's a win-win
- Don't re-invent the wheel
 - Expert witness databases
 - Internet searches
 - Westlaw/Lexis searches
- Consult with your own expert

Preparation (con't)

- Prepare a cross outline before you begin jury selection
- Prior testimony reports
 - You can safely ask questions
 - Even if answer is different, you can then impeach
- Use of technology
 - Immediate access
 - Organization
 - Streamline the process - economy is critical
 - Divide documents between necessary and "maybe"

Pre-Trial Strategy

- Challenge their being proffered as an expert
- Limit their testimony
- Motions in limine
- Pre-trial rulings
- 402 hearings
 - Gives you a "sneak peak" into testimony
- Voir dire



Evasive Expert

- Two choices:
 - Object to non-responsive answers; or
 - Ask question again until it is answered
- TIP: Avoid asking judge to help
- Confront witness directly
 - Sir, did you understand my question?
 - Would you like me to again repeat my question?
 - Are you finished with your thought?
 - Now, would you please answer the question I ask you?

More Questions for Evasive Expert

- Would you now answer the question that I asked you, that is ____.
- I see you still have not chosen to answer the question that I asked you. The question I asked was ____.
- Are you having trouble understanding my question? Perhaps the court reporter can read it back with the Court's permission?
- It really is very simple, "yes I did ____ no I didn't"

Be Careful

"In cross-examination, as in fishing, nothing is more ungainly than a fisherman pulled into the water by his catch."

--Louis Nizer
(famous trial lawyer)



Know When To Quit

- Length is an important strategic consideration of an effective cross
- Don't lose the impact of your cross in minutiae
- With highly skilled expert, make your point and get out
- End on a high note
- Never end on a sustained objection
- Leave the argument for closing – don't ask that one question too many



NURSE ACCUSED OF KILLING HUSBAND
Sally Ginter
Plastics expert

General Points To Remember

- Early and thorough preparation is the key
- Plan your direct & cross to achieve a clear goal
- Don't lose focus
- Listen!
- Make sure witness is married to statement prior to impeaching
- Know when to stop

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