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*30 Rock, NBC Universal Television*

# BIAS



## Jury Selection

Use of peremptory challenge  
to remove prospective juror on  
sole ground of group bias



## **Jury Selection**

Use of peremptory challenge to remove prospective juror on sole ground of group bias



## **Group Bias**

Attorney presumes juror bias merely because of membership of identifiable group



# Identifiable Groups

Race/Ethnicity

Gender

Religion

Sexual Orientation

Age/Disability

CCP 231.5



## Is that Wrong?



Equal Protection Clause:  
14<sup>TH</sup> Amendment

*Batson v. Kentucky* (1986) 476 U.S. 79,  
89



California Constitution,  
Article I, Section 16

*People v. Wheeler* (1978) 22 Cal.3d  
256, 276-77

## Wheeler/Batson Motion

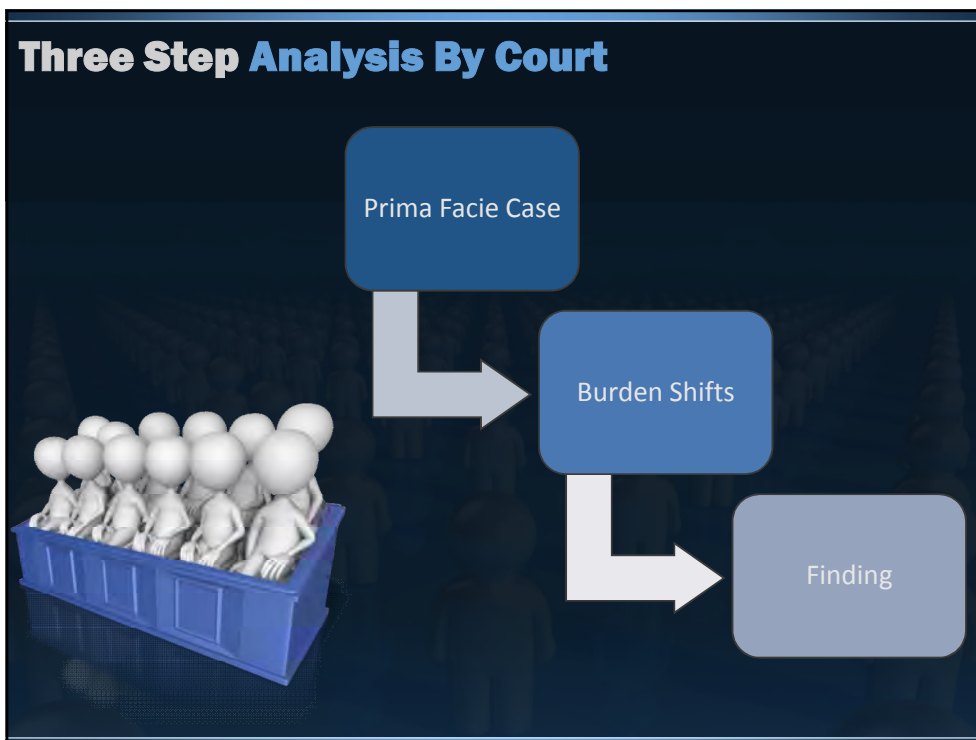
- DDA or defense can make a motion to challenge the exclusion of members of a protected class
- Judge may make challenge as well

• *People v. Lopez* (1991) 3 Cal.App.4th supp 11, 15

## Procedure for Wheeler Motion




- Objection
- Timeliness
  - Early
  - During Voir Dire
- Untimeliness



## Prima Facie Case

- Moving Party
  - Establishes record
    - Inference of discriminatory purpose
      - Person excluded = members of cognizable group



## Factors = Improper Dismissal



## Burden of Proof

Evidence sufficient to permit an **inference** that discrimination has occurred

*Johnson v. California* (2005) 545 U.S. 162, 168-173







## Best Practice Tips



Make a full record on the issue before court rules



You are not obligated to state reasons before court finds PF



Your voluntary decision to state reasons is not an admission or concession

People v. Zambrano (2007) 41 Cal.4<sup>th</sup> 1082, 1105, fn.3



## Burden Shift to You

- Offer race-neutral reasons
- Need not rise to challenge for cause
- Be genuine and neutral

• *People v. Arias* (1996) 13 Cal.4th 92, 136

Your reasons are even  
more important



***People v. Gutierrez,***  
***2017 Cal. Lexis 3975***

## People v. Gutierrez

- Attempted Premed Murder w/gun
- Gang related case
- City of Wasco



## Jury selection

☐ **10/16 kicks were Hispanic jurors**

**All about one peremptory**



## **Profile of the Juror**

Female Hispanic

Age unk

Teacher

Wasco

L/E family members

Unaware of gang activity in  
Wasco

## **Prosecutor said:**

She's unaware of gangs

My wit is a gang member

Unsatisfied with other answers

Never set forth those answers

**Court said:**

Excused for Wasco issue

Excused for lack of life experience

**BUT**

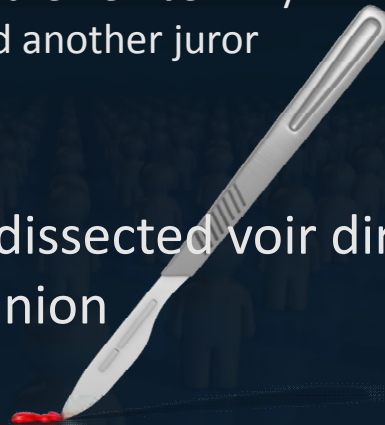
**DDA never said:**

Excused for lack  
of life experience

### DDA also said

Could not remember why  
he kicked another juror

The CSC dissected voir dire  
in its opinion



## Take Aways

- Court must conduct sincere and reasoned effort
- Is neutral rationale is pretextual

• *People v. Gutierrez*,  
2017 Cal. Lexis 3975

## Take Aways

- Does your reason apply equally to unchallenged jurors not from protected group
  - Social workers

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## Factors/Not Pretext

- Your demeanor
- Reasonable explanation
- Accepted trial strategy

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## Factors/Not Pretext

- Passed on challenges
- Reason applies to other juror
- # used
- Supported by the record

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2017 Cal. Lexis 3975

## Factors/Not Pretext/Pretext

- Juror kicked had attributes you favored
- D & Juror = same race
- Consistent in your kicks

• *People v. Gutierrez*,  
2017 Cal. Lexis 3975





## No Generalities

“The first woman, her very response to your answers, and her demeanor, and not only dress but how she took her seat. I don’t know if anyone else noticed anything but it’s my experience, given the number of trials I’ve done, that type of juror, whether it’s a personality conflict with me or what have you, but they tend to, in my opinion, disregard their duty as a juror and kind of have more of an independent thinking.”

People v. Allen (2005) 115 Cal.App.4th 542, 546

## Best Practice

Disclaimer on your notes:

“Any notations of race, gender, etc. are for purposes of addressing issues of comparative analysis and disparate questions in *Wheeler/Batson litigation*.”

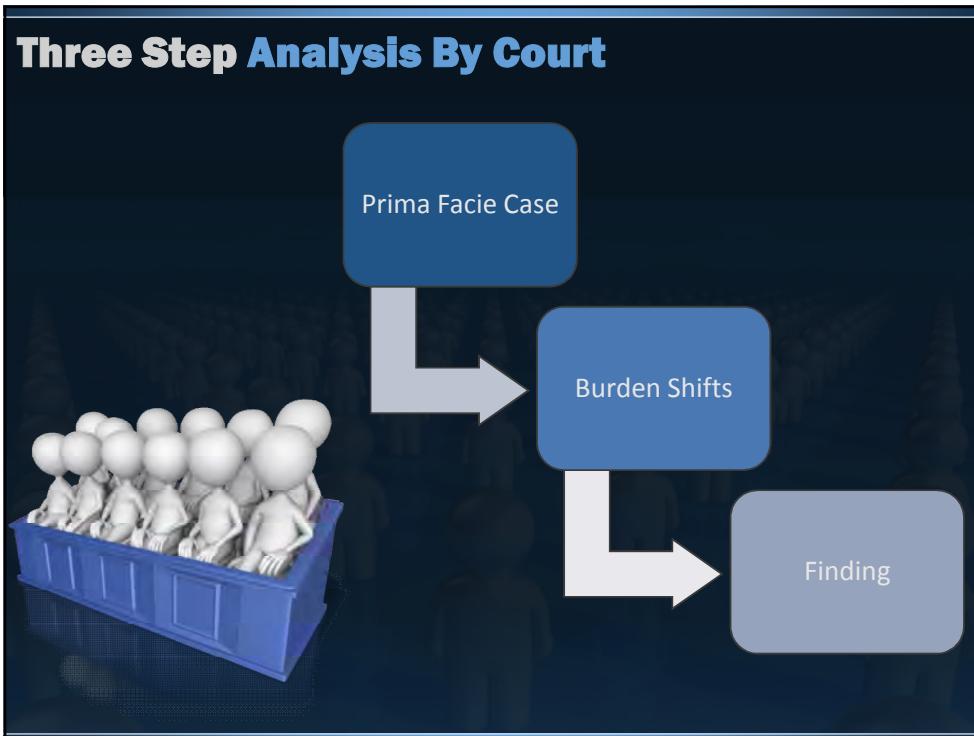
*People v. Lenix* (2008) 44 Cal.4th 602, 610, fn.3



## Keep Your Notes



FOREVER



## Court's Decision

- Finds Prima Facie
- Decides by preponderance of evidence whether neutral reasons are genuine or pretextual

• *People v. Hutchins* (2007) 147 Cal.4th 992, 998

## Comparative Analysis



- Statistical Evidence in your challenges
- Side-by-side Comparison
- Disparate Questioning
- Past Practice

*Miller-El v. Dretke* (2005) 545 U.S. 23;  
*People v. Bell* (2007) 40 Cal.4th 582, 601

## Other Factors



- Similar juror still present
- Accepted Panel with Cognizable Group
- Mistake about Reason

## **Wheeler Granted**

- Dismiss panel
- Keep juror on panel\*
- Sanctions (need pretrial ruling)
- Additional challenges for other side\*

\* Moving party must agree

## **Ethical Consequences**

- Sanction more than \$1,000
- Appellate Court reversal of judgment, based on granting of Wheeler/Batson motion

## Self Report to State Bar

- 30 days
- Call me



## **BOTTOM LINE**

- Credibility Determination
- State your reasons for strikes

**Questions?  
More Information?**



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*Patches Production*