



Wheeler/Batson

Cynthia Nakao
Deputy District Attorney
Professional Responsibility Advisor



"Certain materials contained in this presentation are included in the fair use copyright exemption of 17 U.S.C. 107. This presentation has been prepared according to the multimedia fair use guidelines. These materials are restricted from further duplication, distribution or use."

30 Rock, NBC Universal Television

BIAS



2 HUMANS

1 GOOD

1 BAD

3 REASONS

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



Examples of Group Bias



Identifiable Groups

Race/Ethnicity

Gender

Religion

Sexual Orientation

Age/Disability

CCP 231.5



Is that Wrong?



Equal Protection Clause:
14TH 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

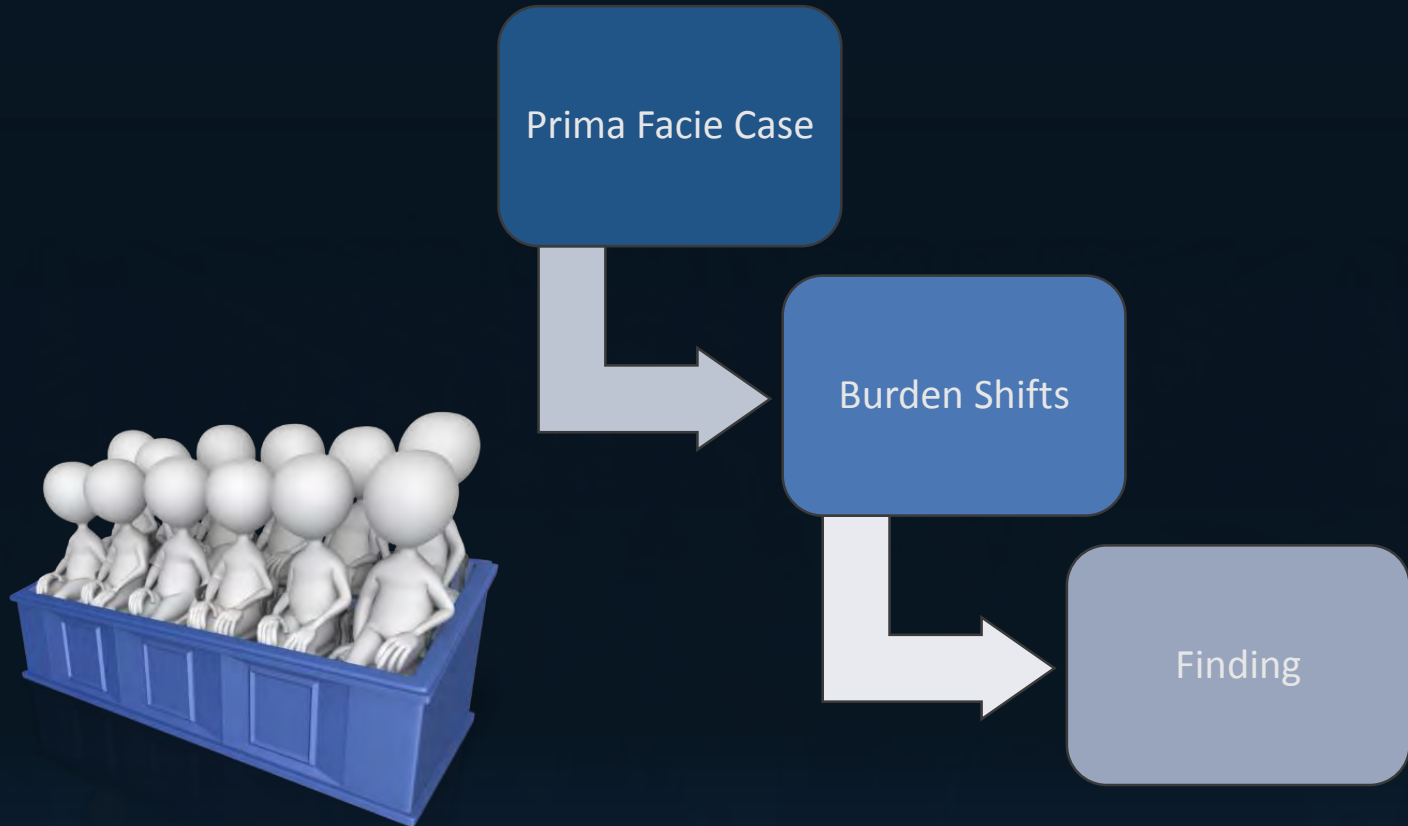
- DDA or defense can make a motion to challenge the exclusion of members of a protected class
- Judge may make challenge as well

Procedure for Wheeler Motion

- Objection
- Timeliness
 - Early
 - During Voir Dire



Three Step Analysis By Court



Prima Facie Case

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



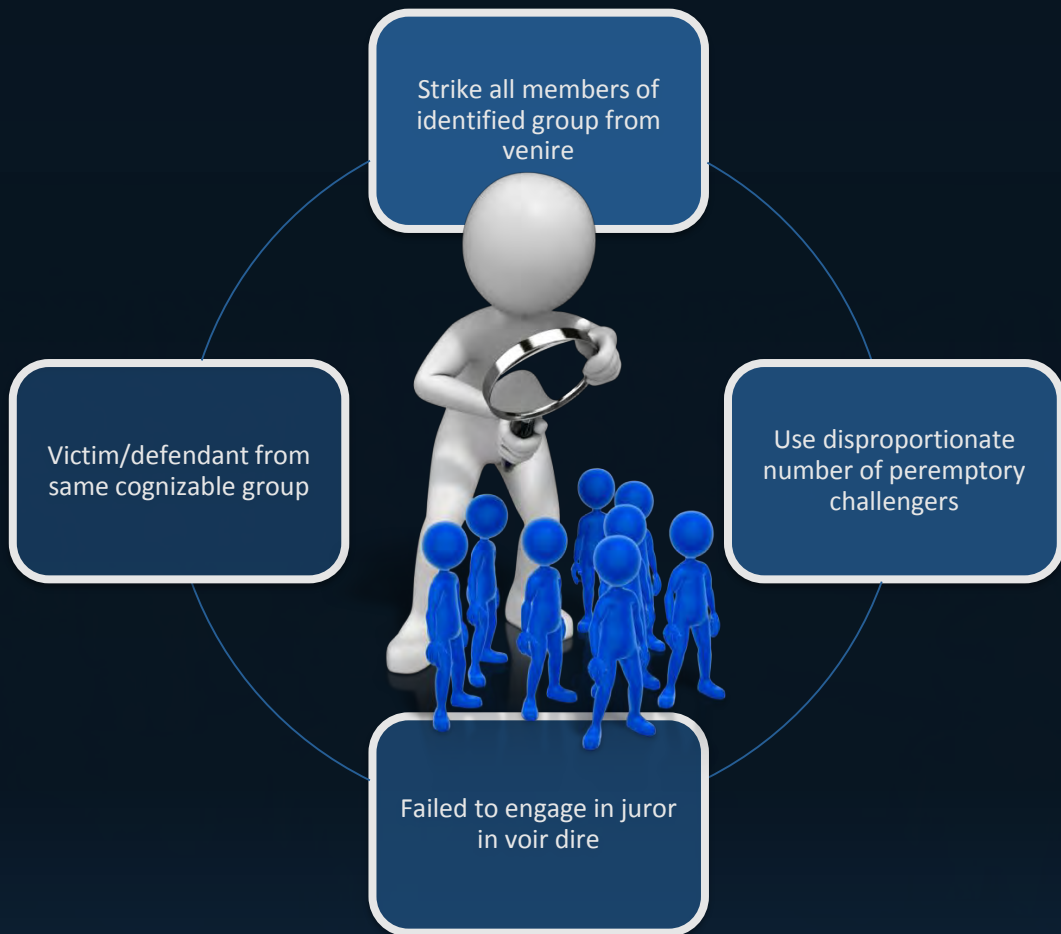
Burden of Proof

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

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



Factors = Improper Dismissal



Best Practice Tips



You are not obligated to state reasons before court finds PF



Make a full record on the issue before court rules



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



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

What other questions?

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

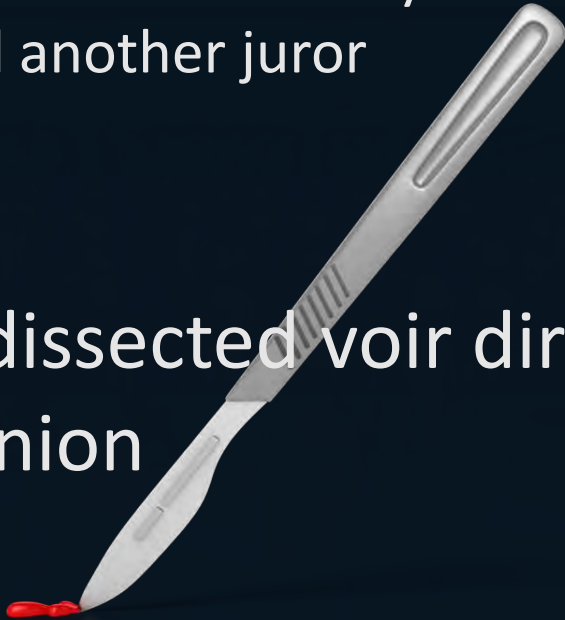
DDA never said:

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

- Trial court must conduct sincere and reasoned effort
- Is your neutral rationale a ruse/pretext

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

Factors

- Reasonable explanation
- Accepted trial strategy
- Your demeanor

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

Factors

- Passed on challenges before you struck juror
- Reason only applies to member of the cognizable group
- # strikes of the group
- Reasons supported by the record

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

Factors

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

• *People v. Gutierrez*,
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.”

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

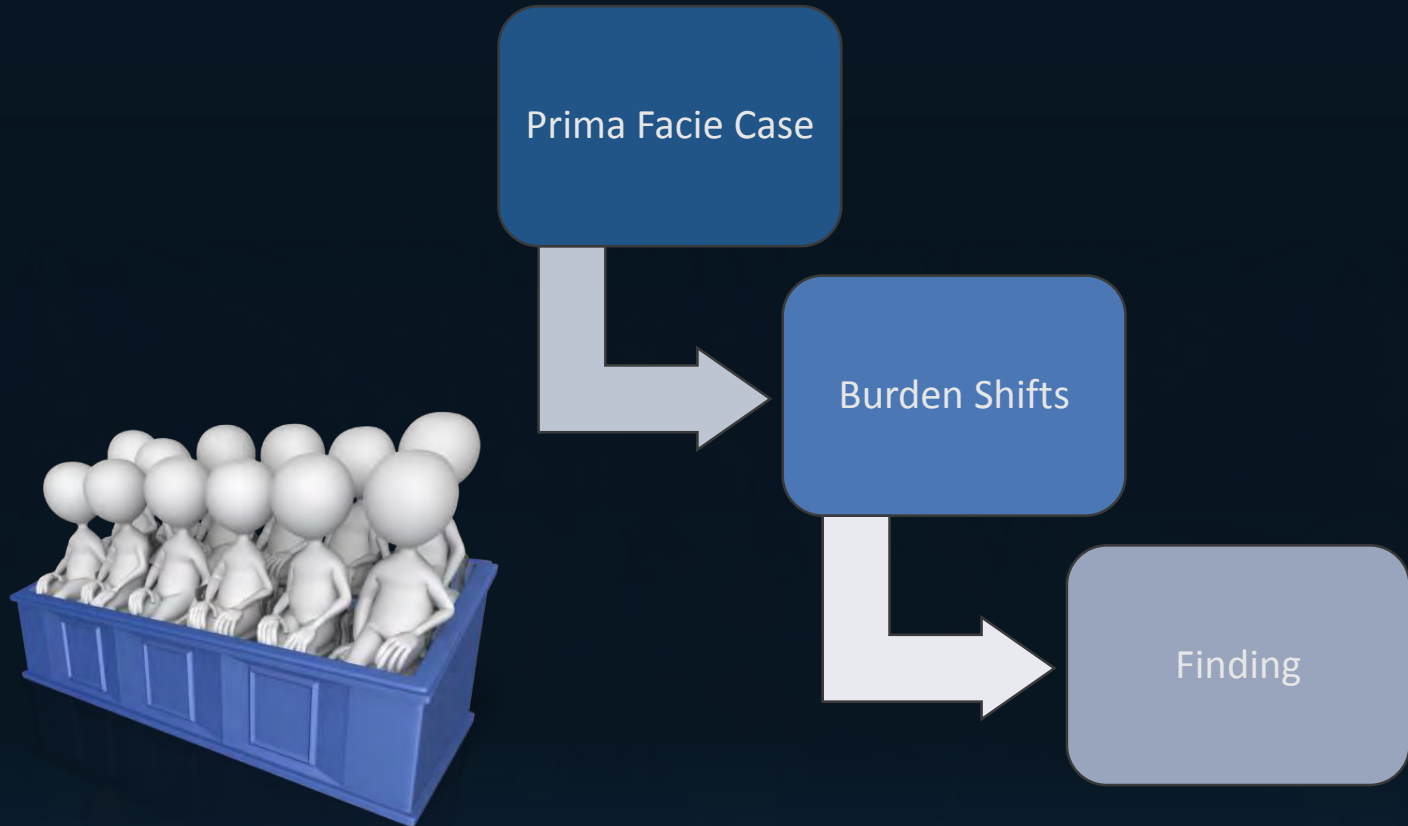


Keep Your Notes



FOREVER

Three Step Analysis By Court



Court's Decision

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

• *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

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 Wheeler/Batson error

Self Report to State Bar

- 30 days



BOTTOM LINE

- “Your” credibility determination
- May have to engage the juror to get the reason for the strike



Questions? More Information?

Cynthia Nakao

cnakao@da.lacounty.gov

Hall of Justice

12th floor

(213) 257-2941



Patches Production