Classroom Demonstration: Wheeler
2018 All-DDA Training

DDA
JUDGE
DEFENSE
DEFENDANT
BAILIFF
NARRATOR/TEACHER

BAILIFF: Goes to the back of the courtroom and opens the door, and calls the jurors to their seats.

Ladies and Gentlemen of the jury you may take your seats. (waits while they take seats)

The Presiding Department of the Superior Court of San Diego is back in session. The Honorable Judge, presiding.

JUDGE: Ladies and Gentlemen, welcome back from the break--you have already been asked questions by the attorneys and we are in the peremptory challenge phase and actually selecting the jury. It looks like the prosecution is on its 4th peremptory. Ms. DDA?

DDA: We would like the court to thank and excuse Juror #8, Mrs. Smith.

DEFENSE: We are making a WHEELER MOTION.

JUDGE: Ladies and Gentlemen, I am going to need to excuse you for a few minutes. There is a legal issue we need to take care of outside your presence. Please remember the admonition, and be back in 10 minutes. Thank you. (Judge pauses, as if giving time for the jury to leave the courtroom, and Bailiff acts like he is ushering them out).

BAILIFF: Ladies and Gentlemen, back to the comfortable benches.

JUDGE: Okay, counsel, you would like to make a motion?

DEENSE: This is a clear violation of group bias. They have now excused two women, who are members of a cognizable class, and this denies my

client's right to a fair trial. It is an equal protection violation plain and simple, and what she is doing is forbidden by the law. As you can see, my client is a woman, and it is our position that these kicks are completely gender-related, and unconstitutional.

NARRATOR: DDA just got *Wheelered*. What that means is that the defense is saying the prosecutor improperly kicked off a juror based on race or other class characteristic. This would then violate the defendant's right to a fair jury trial. For a DDA who has never been through this before, it can be unnerving. And the mind starts to spin. Let's play through a live demonstration of a Wheeler Motion, and interweave some points of law that sometimes need to be refreshed. First of all—what should the DDA be thinking? What is on her checklist to do right now????

(on powerpoint screen) THERE IS A THREE-STEP APPROACH: (*Johnson v. California* (2005) 545 U.S. 162, 168, *People v. Gutierrez* (2017) 2 Cal. 5th 1150.)

1) **The moving party (defense) must first show that the totality of facts gives rise to an "inference of discriminatory purpose"** (*Johnson* 545 U.S. 162) (meaning that there is a reasonable inference that the person is being kicked because of their group association, rather than because of any specific bias.) (*Johnson, Wheeler*). **This is called the "prima facie case" where movant must "produce evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred." (*Johnson,* at 170)**

    a. **If trial court finds there is NO prima facie case, prosecutor <u>should state their neutral justifications for each excusal</u> and the composition of the venire. This is not required, but done as a precaution should the reviewing court disagree with the original finding and determine that the prima facie case *was* shown.**

2) **If trial court finds prima facie case, burden shifts to you to explain by offering "clear and reasonably specific" race-neutral justification.**
    - Burden of Proof = preponderance. (*P v. Hutchins* (2007) 147 Cal.App.4th 992)
    - The presumption is that the challenge is proper. (*P v. Newman* (2009) 176 Cal.App.4th 571)
    - Think about Comparative Analysis—Why are you keeping one teacher and not the other? "if a prosecutor's proffered reason for striking a Black panelist applies just as well to an otherwise similar non-black who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at Batson's third step. (*Miller-El v. Dretke*) (2005) 545 U.S. 231)

- Think about your non-verbal reasons: "There is more to human communication than mere linguistic content. On appellate review, a voir dire answer sits on a page of transcript. In the trial court, however, advocates and trial judges watch and listen as the answer is delivered. Myriad subtle nuances may shape it, including attitude, attention, interest, body language, facial expression, and eye contact." (*People v. Lenix* (2008) 44 Cal.4th 602

3) Trial court must decide whether purposeful discrimination has been proven by preponderance of evidence standard. (*P v. Mai* (2013) 57 Cal.4th 986)

Let's go back to our demonstration and see how it plays out.

JUDGE: Ms. DDA, the defense is making a motion pursuant to *People v. Wheeler* (1978) 22 Cal.3d 258 and *Batson v. Kentucky* (1986) 476 U.S 79, whereby it is alleged that you have denied defendant to his right to a fair trial. Your response?

DDA: This motion should be denied. The first step in the analysis is that the defense must show that the totality of facts gives rise to an inference of discriminatory purpose. Sometimes called the "prima facie case" The defense has not made a prima facie case, your honor. *People v. Neuman* (2009) 176 Cal.app.4th 571 states it is their burden to do so. They have to show that the totality of facts gives rise to an "inference of discriminatory purpose." They simply have not met this burden, and several reasons are in support. First, the defense also challenged women, in their first and 3rd challenges. (*P v. Wheeler* (1978) 22 Cal.3d 258, 283) Additionally, we passed with juror #24, also a woman, who was the latest excused juror on our panel. (*P v. Williams* (2013) 56 Cal.4th 630).

JUDGE: Defense? Anything further?

DEFENSE: …Ms. DDA is showing her true spirit and discriminating against her very own gender…. This shocks my conscious…

JUDGE: Are you finished? (not really letting him finish) I find <u>no prima facie case</u> giving rise to a discriminatory purpose has been made based on the totality of the circumstances.

DDA: Your Honor, may I have permission to complete the record?

JUDGE: Go ahead, Ms. DDA.

DDA: At this point, I realize the law supports does not require me to do so, but at this time like to state my gender-neutral justifications for challenging the jurors so there is a complete record for a reviewing court.

As the law requires, I will state a reason for each challenge. (*P v. Cervantes* (1991) 223 Cal.App.3d 323. Here, your honor, I had several neutral reasons other than gender for Juror #1, the first woman we kicked:

- She was young, single, and had no children. (P v. Perez (1994) 29 Cal.App.4th 1313.
- She seemed like a follower. (People v. Duff (2014 58 Cal. 4th 527)
- Was a member of a hung jury in her past (P v. Turner (1994) 8 Cal.4th 137.
- Seemed too nervous talking in front of others, seemed reluctant. (P v. Arias (1996) 13 Cal.4th 92)
- She had few ties to the community. (Rice v. Collins (2006) 546 US 333)
- And the next juror, which was now juror #45, looked better to me (P v. Alvarez) (1996) 14 Cal.4th 155.

As for Juror #2, the second female we kicked:

- Her family members were arrested and she was "not sure" if treated well by the system (*P v. Gutierrez* (2002) 28 Cal.4th 1083
- She is a teacher, and used to be a social worker. (*P v. Barber* (1988) 200 Cal.App.3d 378)
- Her clothes and hair were distracting, wonder if would fit in a larger group (*P v. Ward* (2005) 36 Cal.4th 186)
- She seemed inattentive (*US v. Power*) (9th Cir. 1989) 881 F.2d 733
- She also seemed really emotional. (*P v. Gutierrez* (2002) 28 Cal.4th 1083)

JUDGE: Thank you, Ms. DDA. Deputy you may now bring the jurors back inside the courtroom.

BAILIFF: (Go stand back by the door) Back in, ladies and gentlemen.

JUDGE: Okay, ladies and gentlemen, we are going to resume jury selection. Defense, you're up.

DEFENSE: Defense passes, Your Honor.

DDA : The People thank and excuse juror #3, Mrs. Jones.

DEFENSE: Can we approach side bar?

JUDGE: Yes. Ladies and Gentlemen, talk among yourselves.

(DEFENSE AND DDA GO UP TO BENCH)

DEFENSE: I want to renew my *Wheeler* objection. The prosecution has now kicked 3 women—all of whom are in cognizable classes, and this denies my client a fair trial. There IS an inference of impermissible bias. There were many other men who also seemed inattentive and emotional, and were members of hung juries who the DA did not kick off. And there were not that many women in this panel to begin with. Nor are there much to choose from at this point. Now there is a third woman being excused. The reasons proffered by the prosecution seem trivial and we believe we have made a prima facie case. Unbelievable, Your Honor.

JUDGE: Ms. DDA?

DDA: Your honor has already made a determination that the defense failed to make a prima facie case and that should not be affected by the current challenge for all of the reasons previously stated.

JUDGE: Well, I think this last kick tips the scale and Ms. DDA, I am finding that based on the totality of the circumstances, there is an inference of discriminatory purpose and a prima facie case has been established. Ms. DDA, please state your reasons for excusing this most recent juror.

DDA: As for Juror #3, the last female we kicked:

- She seemed too eager. (*P v. Ervin* (2000) 22 Cal.4th 48)
- Also, she had no previous jury experience (*P v. Perez* (1994) 29 Cal.App.4th 1313.
- She only answered 2 out of 10 questions that were posed to her. People v. Perez (1994) 29 Cal.App. 4th 1313)
- Her body language was defensive. (People v. Johnson (1989)) 47 Cal.3d 1194)

JUDGE: Defense, do you want to be heard?

DEFENSE: Yes, and No, Your Honor… You must grant my motion so we can all fight fairly in this important case…

JUDGE: First, I note that in my ruling, I must take into account the totality of the circumstances. It is the defense burden by a preponderance of the evidence to show that the District Attorney purposefully discriminated on the basis of here, gender in their challenges. I note that the presumption is that the challenge is proper. I also recognize that I am allowed to take into account the credibility of the prosecutor. I can look at body language and demeanor of both Ms. DDA, in her questioning, and the prospective jurors in their answering. Here, I find defense has not met their burden. Ms. DDA's reasons were not trivial, I find, but rather, each a gender-neutral, and legal basis for a challenge is this kind. I have had Ms. DDA in my courtroom several times, and always found her to be professional and never impermissible. I find the reasons are inherently plausible and supported by this record, and deny the motion. The defense also kicked women. The prosecution passed with keeping the latest challenged juror, a woman. The burden simply has not been met and defendant has not been denied a fair trial. Let's recall the jury.

BAILIFF: (steps to the back of the room to the door, opens door and yells, "Jurors for the Presiding Department please resume your seats.")

Jury Selection

Voir Dire Mechanics

Voir Dire should be conducted to assist you in making well-grounded challenges for cause and allow you to identify less suitable jurors subject to peremptory challenges. The rules regarding juror challenges can be found in the *Code of Civil Procedure §§ 225-231.*

In a criminal trial, "[e]xamination of prospective jurors shall be conducted only in aid of the exercise of challenges for cause." *CCP § 223.* Challenges for cause can be made by either side for either *implied bias* or *actual bias CCP §225(b).* The ultimate determination to excuse a juror for cause is made by the court. *CCP §230.* "The trial court's exercise of its discretion in the manner in which voir dire is conducted, including any limitation on the time which will be allowed for direct questioning of prospective jurors by counsel and any determination that a question is not in aid of the exercise of challenges for cause, shall not cause any conviction to be reversed unless the exercise of that discretion has resulted in a miscarriage of justice, as specified in Section 13 of Article VI of the California Constitution." *CCP § 223.*

There are eight categories of implied bias listed in *CCP §229*:

1) Consanguinity or affinity with party or victim;
2) Relationship;
3) Prior service in same matter;
4) Interest in the action;
5) Unqualified opinion or belief as to the merits of the action founded by knowledge of material facts or some of them;
6) Enmity or bias towards or against a party;
7) Party to an action before same jury; and
8) Opposition to death penalty in capital case.

Actual bias is defined as "*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 jurorfrom acting with entire impartiality, and without prejudice to the substantial rights of any party*." *CCP§225(b)(1)(C).*

No peace officer, as defined in Section 830.1, subdivision (a-c) of Section 830.2, and subdivisions (a) of Section 830.33, of the Penal Code, shall be selected for voir dire in a criminal matter. *CCP § 219.*

Number of Challenges

There is no limitation on the number of challenges for cause, however, the trial court does not have sua sponte duty to excuse biased jurors when counsel has failed to exercise a peremptory challenge for that purpose. *People v. Bolin* (1998) 18 Cal.4th 297.

The number of peremptory challenges depends upon the possible sentence of the offense charged and the number of defendants. If the offense is punishable with *maximum term of imprisonment of 90 days or less*, each side gets *6* peremptory challenges. *CCP §231*
If the offense is punishable with *death or with imprisonment in the state prison for life*, each side gets *20* peremptory challenges. *CCP §231(a)*. In *all other cases* each side gets *10* peremptory challenges.

In multiple defendant cases with sentences under 90 days, the People get *6* challenges and the defendants get *6 challenges jointly*. Each defendant is additionally entitled to *4 separate challenges*. The People get as many challenges as are allowed all defendants. *CCP§231(b)*
In life in prison and death cases – The People get *20* challenges and the defendants get *20 challenges jointly*. Each defendant is additionally entitled to *5 separate challenges*. The People get as many challenges as are allowed all defendants. *CCP §231(a)*

In all other cases, the People get *10* challenges and the defendants get *10 challenges jointly*. Each defendant is additionally entitled to *5 separate challenges*. The People get as many challenges as are allowed all defendants. *CCP§231(a)*

The selection of Alternate jurors is governed by *CCP§234*. Challenges are allotted as follows: In a single defendant case, there is one challenge for each side per the number of alternates. In a multiple defendant case, each defendant gets one challenge per number of alternates and the People get the same total number as the defense team.

Proper Subject Matter For Attorney Inquiry

It is improper to ask questions intended solely to educate the jury, compel the jurors to commit to vote a certain way, prejudice the jury, argue the case, indoctrinate the jury, instruct the jury on the law, or test the juror's knowledge of the law. *People v. Edwards* (1912) 163 Cal. 752; *People v. Willams* (1981) 29 Cal.3d 392, 408; *People v. Ashmus* (1991) 54 Cal.3d 932, 959.

It is permissible to ask a juror about his attitude about a particular rule of law only if (1) the rule is relevant or material to the case, and (2) the rule appears to be controversial; e.g., the juror has indicated some hostility toward the rule, or it is commonly known the community harbors strong feelings about it. *People v. Balderas* (1985) 41 Cal.3d 144, 185; *People v. Williams* (1981) 29 Cal.3d 392, 408.

It is improper to use voir dire questions for the sole purpose of argument by counsel. *People*

v. Mitchell, 61 Cal 2d 353, 366.

A trial judge's refusal to permit any voir dire questions concerning racial bias or prejudice may require reversal. *People v. Wilborn* (1999) 70 Cal.App.4th 339. In a case involving an interracial killing, a trial court during general voir dire is required to question prospective jurors about racial bias on request. *People v. Bolden* (2002) 29 Cal.4th 515. Expect to see broadening of this area of inquiry in response to current events and opposing views on race and policing.

"Any question whose sole purpose is '… to attempt to precondition the prospective jurors to a particular result' should be excluded." Similarly, "any question whose sole purpose is "… to attempt to precondition the prospective jurors to a particular result" should be excluded. [CRC Standards of Jud. Admin., Standard 3.25(f)] *Scope of Permissible Voir Dire—Proper vs. Improper Questions*, Cal. Prac. Guide Civ. Trials & Ev. Ch. 5-G

Examples of Permissible Questions

Asking jurors whether they would be able to vote guilty if, after deliberations, they were persuaded that the changes had been proved beyond a reasonable doubt. *People v. Fierro* (1991) 1 Cal.4th 173, 209)

"[I]f I prove beyond a reasonable doubt each and every element of each of the offenses charged . . . can you assure me that you would be willing to return a verdict of guilty even though you have unanswered questions?" *People v. Riel* (2000) 22 Cal.4th 1153, 1178 fn. 4.

In order to avoid a hung jury the prosecutor observed that each juror must "come to your own conclusion," but also stressed the value of "work[ing] together to try to discover the truth." *People v. Fierro* (1991) 1 Cal.4th 173, 210, fn 8.

Prosecutor's "hypothetical" voir dire illustrations of aggravating and mitigating factors were permissible in capital murder prosecution, even though the prosecutor used examples of aggravating factors closely resembling the facts of the case and used examples of mitigating factors unlike the defendant's mitigating evidence. *People v. Seaton* (2001) 26 Cal.4th 598.

In questioning a juror, the prosecutor asked her if she believed a person charged with committing a crime such as defendant's must be insane. The prosecutor also asked: Do you feel there could be such a thing as a person who is legally insane? *People v. Fields* (1983) 35 Cal.3rd 329, 358.

Whether a juror would view a person's possession of recently stolen property as circumstantial evidence that the person stole the property. (*People v. Mendoza* (2000) 24 Cal.4th 130, 167.)

Whether a juror considered rape more of an assaultive than a sexually motivated offense, and whether they thought it was possible for a young man to rape an elderly woman and not be mentally ill. (*People v. Mendoza* (2000) 24 Cal.4th 130, 167.)

While counsel may ask prospective jurors if they are able to return a verdict in if supported by the evidence, it is not proper to ask for their commitment to do so. *Scope of Permissible Voir Dire—Proper vs. Improper Questions*, Cal. Prac. Guide Civ. Trials & Ev. Ch. 5-G.

Examples of Impermissible Questions

"I had a case a few years ago where three teenage girls were killed in Huntington Beach and [it was a] very emotional case. It was about a three week long trial, very strong evidence against the defendant. At the end of the trial the jury went out and the families were there every single day, the families of [the] three girls and they sat there. The jury didn't come back the first day and the families started getting very upset and crying, you know. They would [ask] me what is wrong, why, how come they didn't make a decision. I don't know. Next day came back same thing, the families are all upset—[¶] ... [¶] ... The jurors came back and we asked them why—what took so long. Oh, we knew he was guilty the first day, but we wanted to figure out this one other issue.... [¶] ... [¶] ... My question is would any of—if you had other questions but they didn't go to the elements, the actual like 1, 2, 3 elements, if you were convinced beyond a reasonable doubt of the elements, even though you might have some question very interesting, but didn't go to that element [,] would you be able to convict?" *People v. Castillo* (2008) 168 Cal.App.4th 364, 380. This contextual question inserted information clearly designed to evoke sympathy for the victims in the case.

"If any of you (prospective jurors) find a question particularly embarrassing, and you would prefer to answer in the judge's chambers rather than here in open court, please let me know and I will be glad to ask the judge to allow you to do so." *Scope of Permissible Voir Dire—Proper vs. Improper Questions*, Cal. Prac. Guide Civ. Trials & Ev. Ch. 5-G. This is an impermissible form of questioning because it is used to "curry favor" since you are the hero. The admonition may be proper if the directive is simply to advise the court if you wish to answer in private.

"Do you agree then that a killing done intentionally should be treated more strongly or more severely than a killing that is accidentally done or unintentionally done?" *People v. Mitchell*, 61 Cal 2d 353, 366.

"Are you sure you haven't seen my client's picture in the paper as coach of the championship Little League baseball team from St. Luke's Church?" *Scope of Permissible Voir Dire—Proper vs. Improper Questions*, Cal. Prac. Guide Civ. Trials & Ev. Ch. 5-G.

Do you believe in self-defense in the home? (Not controversial; *People v. Williams* (1981)

29 Cal.3d 392, 411.)

"Whether, if they believed that a witness was an informant and was testifying 'in exchange for some lesser sentence,' then that 'would have some bearing on the weight or credibility that that witness may have in your mind?' " *People v. Mason* (1991) 52 Cal.3d 909, 940.

In a death penalty case, the court did not "allow either party to discuss the law – such as the meaning of diminished capacity – or ask questions that required the prospective jurors to pre-try the facts of the case." *People v. Rich* (1988) 45 Cal.3rd 1036, 1104.

Defense counsel was not permitted to question prospective jurors regarding their ability to view accomplice testimony with suspicion and distrust. *People v. Johnson* (1989) 47 Cal.3rd 1194, 1224.

In an eyewitness case where the defense expected to call an ID expert, the defense was prohibited from eliciting opinions of potential jurors concerning the effects of stress on perception. *People v. Sanders* (1990) 51 Cal.3rd 471, 506.

Defense counsel stated, "It's clear a girlfriend has an interest to lie. I just want to make sure that the jurors don't automatically, before they hear her testimony, say she's lying because she's the girlfriend." The trial court barred this line of questioning on the ground that the defendant was trying to educate the jurors and induce them to prejudge the evidence. We cannot say that the court abused its discretion in doing so. *People v. Helton* (1984) 162 Cal.App.3rd 1141, 1145.

"What do you feel is a proper punishment for someone who has committed a rape or other serious sexually related crime?" *People v. Ochoa* (1998) 19 Cal.4th 353, 444.

Many detailed questions regarding personal experience with sexual molestation in a child molestation-murder case. *People v. Earp* (1999) 20 Cal.4th 826, 851, fn 1.
