

Wheeler/Batson

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Jurors

- ✓ Values
- ✓ Attitude
- ✓ Perceptions

Jury Selection

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

Is that Wrong?



Equal Protection Clause
14th Amendment

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



Constitution of California
Article I, Section 16

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



Bias

Lead Cases

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

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

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

Group Bias

Certain jurors are biased
merely because of membership
of identifiable group

People v. Wheeler (1978) 22 Cal. 258, 276

What is a cognizable/identifiable group?

Code of Civil Procedure § 231.5

Prohibits using peremptories on the basis of an assumptions that the juror is biased merely because of that characteristics in question

Code of Civil Procedure § 231.5

Classification of cognizable group

“[A] characteristic listed or defined in Section 11135 of the Government Code or similar grounds.”

Government Code § 11135 prohibits government discrimination for benefits

Government Code § 11135

- ✓ Race
- ✓ Ancestry
- ✓ National Origin
- ✓ Ethnic Group Identification
- ✓ Religion
- ✓ Sex
- ✓ Sexual Orientation
- ✓ Medical Condition
- ✓ Age
- ✓ Color
- ✓ Marital Status
- ✓ Mental Disability
- ✓ Physical Disability
- ✓ Genetic Information

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

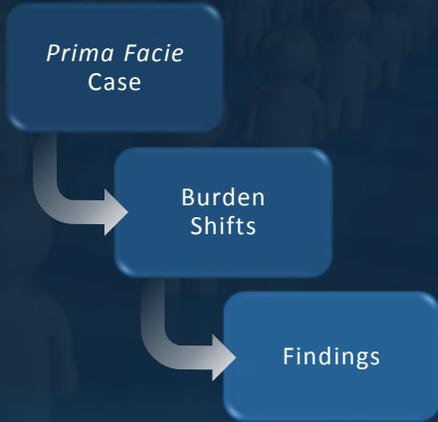
People v. Lopez (1991) 3 Cal.App.4th supp. 11, 15

Procedure for Wheeler Motion



- Objection
- Timeliness
 - Early
 - During *voir dire*

Three-Step Analysis By Court



Prima Facie Case

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



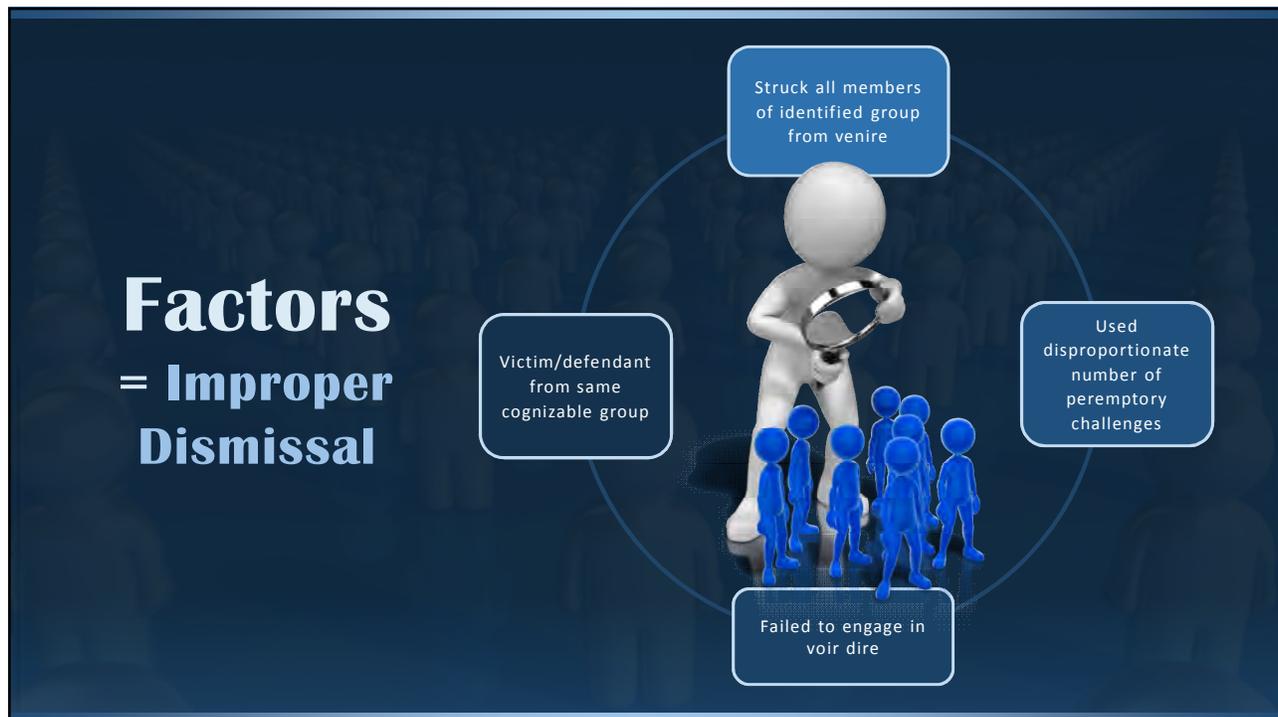
To Find Prima Facie

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

Totality of Circumstances

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





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

Best Practice Tips



You are not obligated to state reasons before court finds prima facie



Make a full record on the issue before court rules



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

People v. Scott (2015) 61 Cal.4th 363

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



Your reasons are important

People v. Gutierrez (2017) 2 Cal.5th 1150

People v. Gutierrez

- Attempted premeditated murder with 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 unknown
 - ✓ Teacher
 - ✓ Wasco
- ✓ Law enforcement family members
- ✓ Unaware of gang activity in Wasco

Prosecutor said

- Juror unaware of gangs
 - My witness is a gang member
 - Unsatisfied with other answers
 - But never set forth those answers

Trial Court said

- Juror excused for Wasco issue and
- Excused for lack of life experience

BUT...

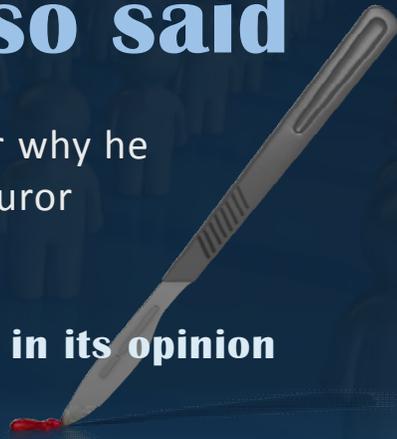
Prosecutor never said

- Excused for lack of life experience

Prosecutor also said

- Could not remember why he kicked another juror

The CSC dissected voir dire in its opinion



Takeaways

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

People v. Gutierrez (2017) 2 Cal.5th 1150

Factors

- Reasonable explanation
- Accepted trial strategy
- Your demeanor

People v. Gutierrez (2017) 2 Cal.5th 1150

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) 2 Cal.5th 1150

Factors

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

People v. Gutierrez (2017) 2 Cal.5th 1150

Factors/Pretext/Not Pretext

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

People v. Gutierrez (2017) 2 Cal.5th 1150

Code of Civil Procedure 223(b)(1)

Court may permit

- Liberal and probing examination
- To discover bias and prejudices
- Relates to circumstances of case and parties

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

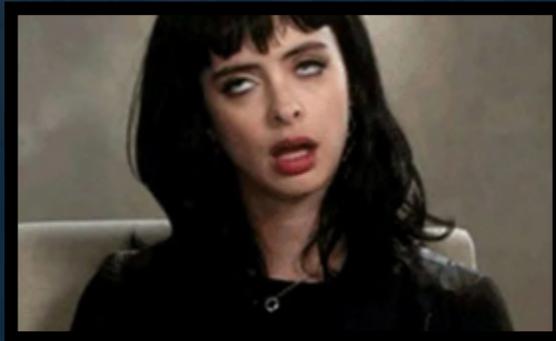


FOREVER

Now

- Post conviction habeas discovery of prosecutor's jury selection notes
- *People v. Superior Court (Jones)* (2019) 34 Cal.App.5th 75

Demeanor Strikes



Demeanor Not on the Record

Reversible?

Demeanor reason not supported by record and other reasons belied by the record

See *People v. Silva* (2001) 25 Cal.4th 34;
Snyder v. Louisiana (2008) 552 U.S. 472

Demeanor Reasons Unsupported by Record

“her very response to [the court’s] answers, and her demeanor, and not only dress but how she took her seat, being indicative of an independent thinker.”

People v. Allen (2004) 115 Cal.App.4th 542, 546

Reversed.

***Thaler v. Haynes* (2010) 559 U.S. 43, 48-49**

USSC upheld trial court's acceptance of race-neutral demeanor reason

1. Trial court was not the judge for voir dire
2. Firsthand observations by the court are of great importance
3. 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

“[T]he best evidence of the intent of the attorney exercising a strike is often that attorney's demeanor.”

Thaler, supra at 49

Best Practices

Record observations during voir dire

“I noticed you were smiling at D. I am curious as to why.”

“You seem a little upset with me. I noticed you rolled your eyes as I was questioning Juror #3. Is there a reason?”

Best Practices

If you are at side bar:

Ask court if he/she observed the same demeanor

Did the court also see that Juror #4 was late again?

Does the court agree with my observation that Juror #6 had his eyes closed when the court was asking questions of the panel?

Best Practices

Give all your reasons

Courts cannot consider a reason that you did not give

Have trial court specify its findings

- ✓ The reasons for accepting
- ✓ The reasons for rejecting

Best Practices

Observe

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 Bar

30 Days

“Similar Grounds”

CCP 231.5 codified *People v. Garcia* (2000) 77 Cal.App.4th 1269, 1275-76

Garcia offers two-pronged test for cognizable group:

1. Group whose members share a common perspective arising from their life experience in the group
2. No other member of the community are capable of adequately representing the perspective of the group in question

Garcia, supra at 1276, quoting *Rubio v. Superior Court* (1979) 24 Cal.3d 93, 98

Hair

Government Code 12926:

“Race” includes traits historically associated with race:

Hair texture

Protective hairstyles: braids, locks and twists

Approved July 3, 2019

Mental or Physical Disability



Age



Bottom Line

- “Your” credibility determination
- Engage all jurors



Flowers v. Mississippi (2019)

- Curtis Flowers was tried six times for the murder of four employees of a furniture store



- Flowers is black
- Three of the four victims were white

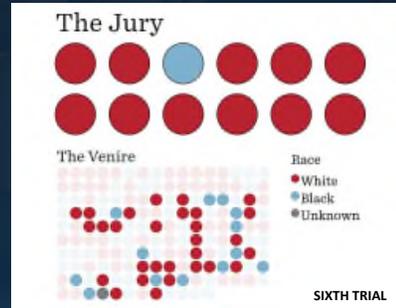
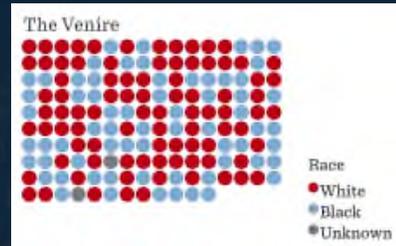
Flowers v. Mississippi (2019)

- First trial: convicted and sentenced to death → reversed (prosecutorial misconduct)
 - Second trial: convicted and sentenced to death → reversed (prosecutorial misconduct)
 - Third trial: Convicted and sentenced to death → reversed (Batson violation)
 - Fourth trial: Hung jury
 - Fifth trial: Hung jury
 - Sixth trial: Convicted → affirmed



Peremptory challenges in the six trials:

1. Strikes on **all** qualified black prospective jurors
2. Strikes on **all** qualified black prospective jurors
3. **All 15** strikes used against black prospective jurors
4. **All 11** strikes used against black prospective jurors
5. No available racial information
6. **Five of the six** strikes used against black prospective jurors

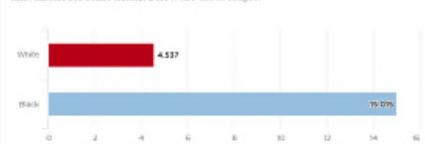


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Questions in jury selection, by race

APM Reports counted every question that District Attorney Doug Evans posed to white and black prospective jurors in five of Curtis Flowers' six trials (juror data was unavailable for some trials). Below are the averages.



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Four categories of evidence:

1. Struck 41 of the 42 black prospective jurors in the six trials combined
2. Struck five of the six black prospective jurors in the sixth trial
3. Engaged in dramatically disparate questioning of black and white prospective jurors
4. Struck at least one black prospective juror who was similarly situated to white prospective jurors who were not struck by the State



Patches Production