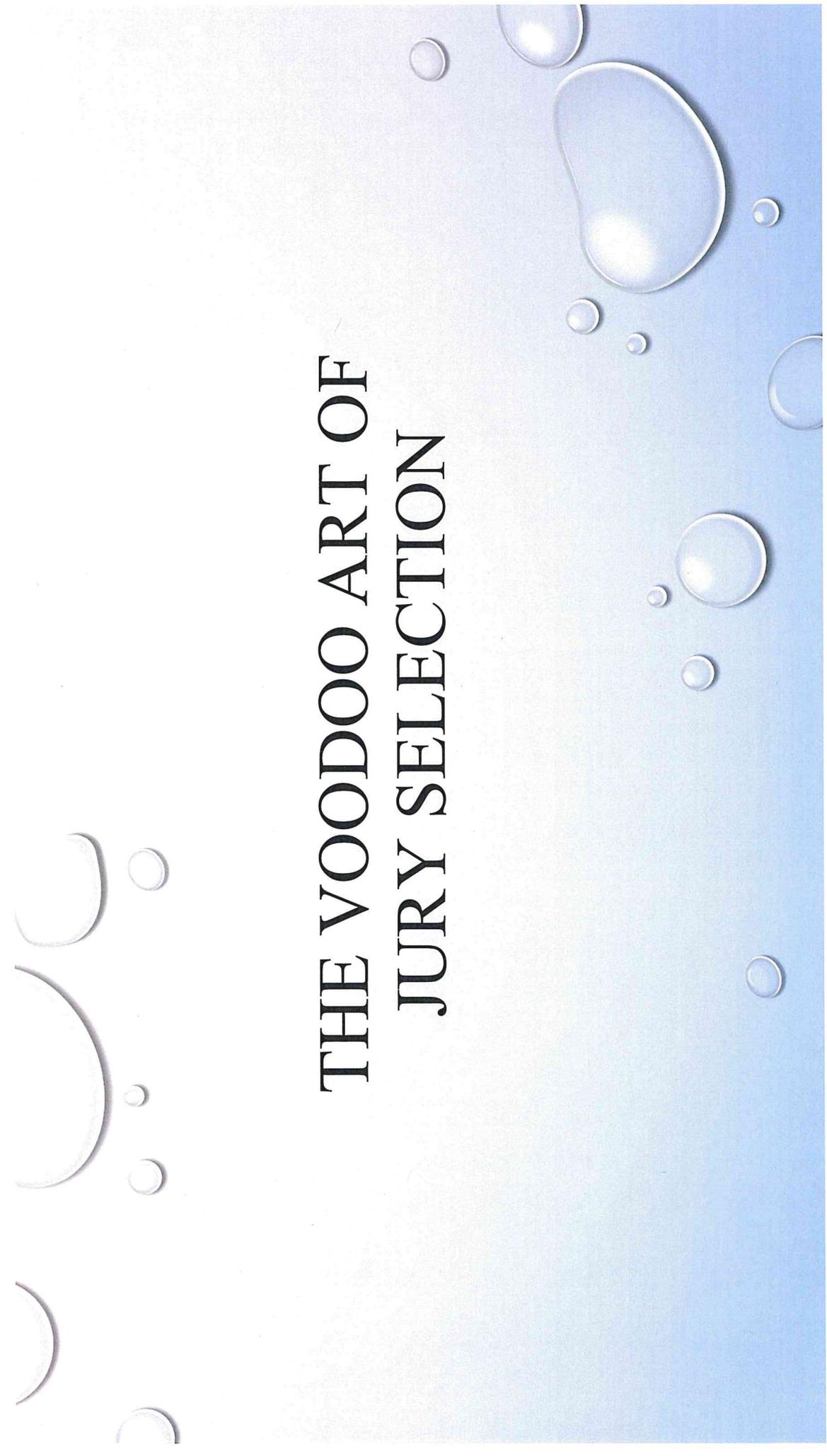
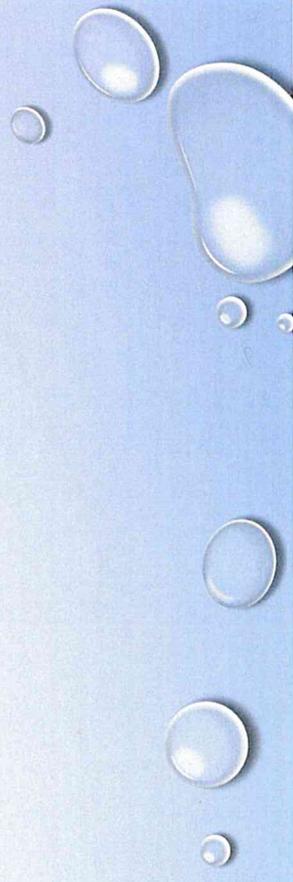


**THE VOODOO ART OF  
JURY SELECTION**

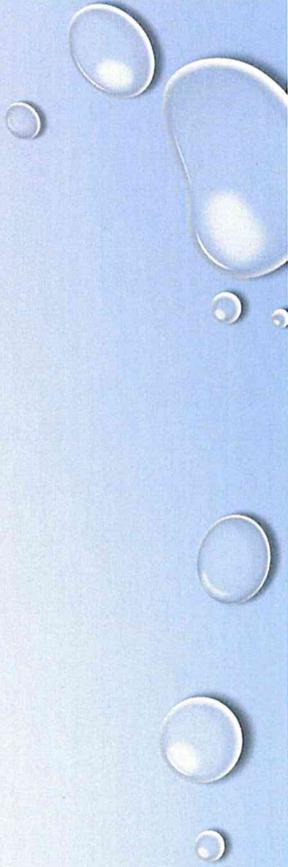


# BEFORE TRIAL





## IDENTIFY IDEAL JURY

- WHO DO I WANT ON MY JURY?
  - THINKERS V. FEELERS
  - TECHNICAL MINDED V. BIG PICTURE
  - LEADERS AND FOLLOWERS
- 

# NUTS AND BOLTS

Date:  
Plaintiff/People:  
Attorney:

Case No.:  
Defendant/Respondent:  
Attorney:

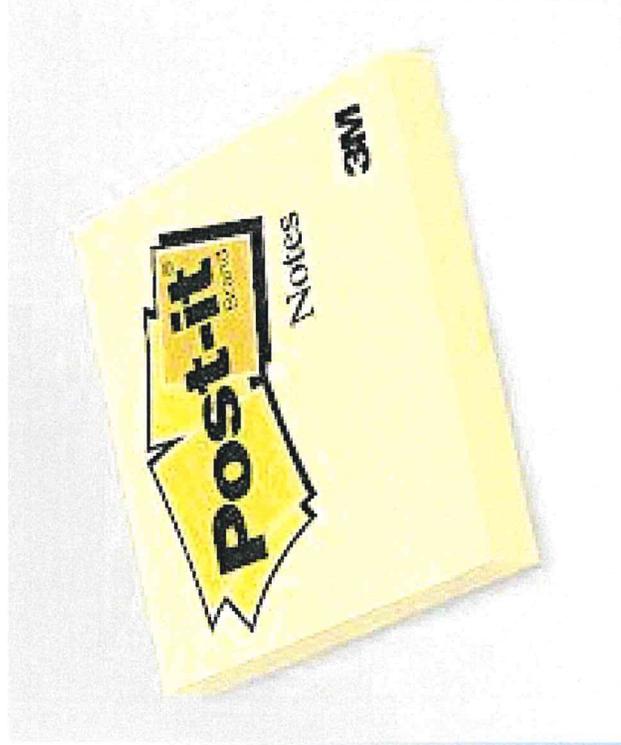
1	2	3	4	5	6	7	8	9	10
11	12	13	14	15	16	17	18	19	20
21	22	23	24	25	26	27	28	29	30
31	32	33	34	35	36	37	38	39	40

1	2	3	4	5	6	7	8
9	10	11	12	13	14	15	16
17	18	19	20	21	22	23	24
25	26	27	28	29	30	31	32
33	34	35	36	37	38	39	40

# SEATING CHART GRID

## USING THE CHART

- PUT BLANK POST-IT ON EACH SQUARE. ALLOWS YOU TO MOVE THE NOTE AS JURORS MOVE IN THE BOX
- SPACE IS AT A PREMIUM – CONSIDER WHAT INFO YOU WANT TO PUT ON CHART
- ALSO KEEP A NOTEPAD FOR ADDITIONAL INFO



## MECHANICS OF JURY SELECTION

- THE COURT MAY ALLOW EACH SIDE TO MAKE A MINI-OPENING STATEMENT IN ITS DISCRETION
- THE COURT WILL ASK THE JURORS QUESTIONS THE JURORS REGARDING BIOGRAPHIC INFORMATION
- THE DEFENSE ATTORNEY VOIR DIRE'S THE JURY NEXT

## MECHANICS OF JURY SELECTION

- THE PROSECUTOR QUESTIONS THE JURY AFTER THE DEFENSE
- CHALLENGES FOR CAUSE ARE CONDUCTED BENCH SIDE OR OUT OF THE PRESENCE OF THE PANEL
- THE PROSECUTION MAKES THE FIRST PEREMPTORY CHALLENGE (UNLESS WE DECIDE NOT TO CHALLENGE ANY OF THE PROSPECTIVE JURORS IN THE BOX)
- TYPICALLY, CHALLENGES ARE MADE TO ANY OF THE TWELVE JURORS IN THE BOX, NOT FROM THE USUAL SIX SITTING IN SEATS 13 THROUGH 18

# VOIR DIRE

FRENCH TERM MEANING "TO SPEAK THE TRUTH"

# VOIR DIRE

OPPORTUNITY TO INTRODUCE  
YOURSELF

- TRY TO BE PERSONABLE BUT DON'T  
BE A STAND-UP COMEDIAN
- MAKE EYE CONTACT
- TRY TO TALK TO EACH JUROR, USING  
THEIR NAME WHEN YOU ADDRESS  
THEM



# VOIR DIRE



## OPPORTUNITY TO ACCLIMATE JURORS TO ISSUES IN THE CASE

- “IS IT EVER APPROPRIATE TO TAKE THE LAW INTO YOUR OWN HANDS?”
- DV - “HOW DO YOU FEEL ABOUT THE GOVERNMENT INTERVENING IN A RELATIONSHIP BETWEEN AN HUSBAND AND WIFE?”
- “CAN YOU THINK OF A REASON WHY A WITNESS MIGHT BE APPREHENSIVE TO TESTIFY IN A MURDER CASE?”

## VOIR DIRE

- SUBTLE WAYS TO IDENTIFY PRO-PROSECUTION JURORS
  - PRIOR JURY SERVICE – “WITHOUT SAYING WHAT THE VERDICT WAS, TELL ME WHAT THE CASE WAS ABOUT.”
- GET JURORS TALKING – THE JURORS SHOULD BE TALKING MORE THAN YOU, THE MORE THEY TALK, THE MORE THEY REVEAL
  - “MR. SMITH, WHAT DO YOU THINK ABOUT WHAT MS. JONES JUST SAID?”

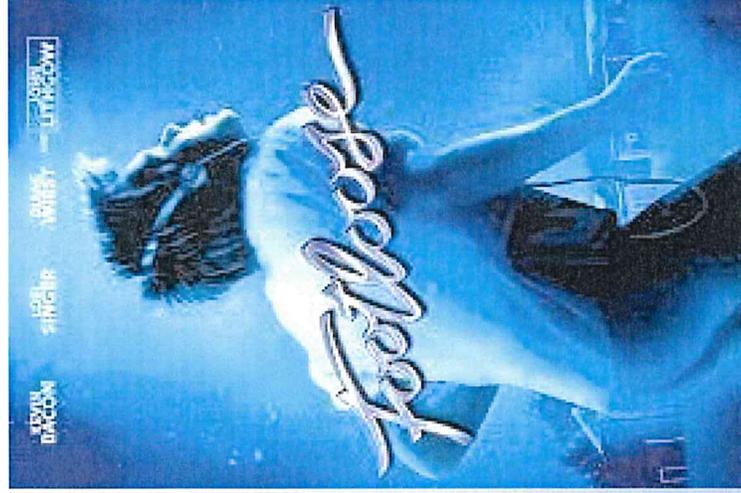
## GAUGE JURORS RESPONSES TO QUANTITY OF EVIDENCE PERTAINING TO REASONABLE DOUBT

- MR. WILSON, SUPPOSE I BRING YOU 2 BOXES OF EVIDENCE AND 3 WITNESSES. YOU DON'T BELIEVE ANY OF IT, WHAT'S YOUR VERDICT? - NOT GUILTY
- NOW SUPPOSE I BRING YOU 100 BOXES OF EVIDENCE AND A PARADE OF A THOUSAND WITNESSES. RELAX, I PROMISE THAT WON'T HAPPEN. BUT SUPPOSE YOU LOOK AT IT ALL AND YOU DON'T BELIEVE ANY OF IT. WHAT'S YOUR VERDICT? – NOT GUILTY
- NOW SUPPOSE I BRING ONLY ONE WITNESS. YOU BELIEVE THAT WITNESS BEYOND A REASONABLE DOUBT. COULD YOU CONVICT?
- NOW SUPPOSE THAT THERE WERE OTHER WITNESSES I COULD HAVE CALLED BUT DIDN'T? [MURDER AT THE KINGS GAME HYPO – WOULD YOU EXPECT ME TO CALL

# REASONABLE DOUBT IS NOT AUTOMATICALLY CREATED BY THE EXISTENCE OF 2 OR MORE VERSIONS OF THE SAME EVENT

- WEDDING HYPOTHETICAL: “ASSUME YOU GO TO A WEDDING, BUT YOU GET THERE LATE. YOU SIT AT YOUR TABLE AND ASK OTHER GUESTS HOW IT WENT AND THEY ALL TALK ABOUT HOW MANY TIMES THE BRIDE AND GROOM KISSED. ONE SAYS, “I SAW THEM KISS FIVE TIMES,” ANOTHER SAYS, “IT WAS THREE TIMES.” YET ANOTHER SAYS IT WAS TWO TIMES.
- BASED ON THEIR COMMENTS ALONE, COULD YOU DETERMINE HOW MANY TIMES THEY KISSED? OF COURSE NOT, BECAUSE THEY CANNOT AGREE. DOES THAT MAKE THEM ALL LIARS?
- NOW LET’S SAY THE ISSUE IS NOT HOW MANY TIMES THEY KISSED, BUT WHETHER THEY KISSED AT ALL. CAN YOU MAKE A DETERMINATION?

# ABILITY TO FOLLOW THE LAW

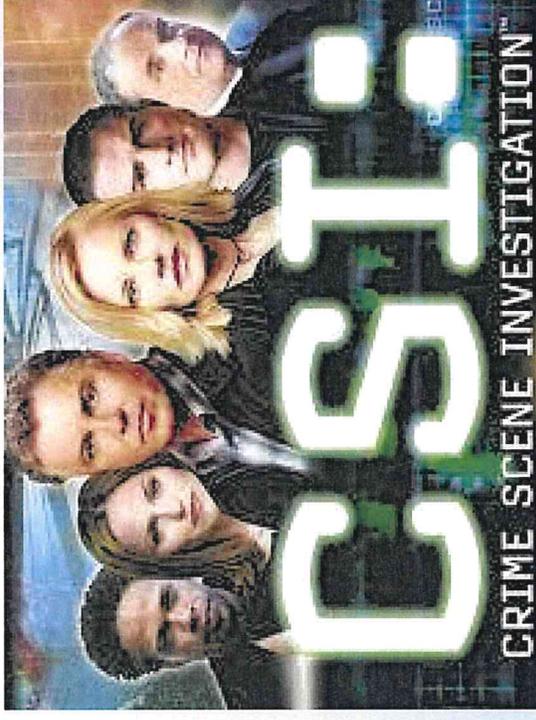


- 66 MPH IN A 65 MPH ZONE HYPO

- KASSIE'S "FOOTLOOSE" HYPO

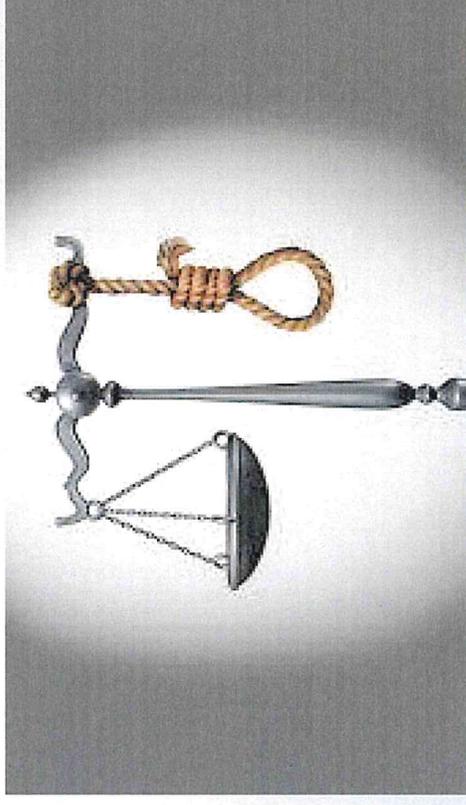
## “CSI” EFFECT

- USED TO BE A POPULAR TV SHOW
- MAKE SURE PROSPECTIVE JURORS UNDERSTAND THAT ITS JUST FICTION
- DETERMINE IF A JUROR WILL BE ABLE TO CONVICT A PERSON WITHOUT FINGERPRINTS, DNA OR OTHER FORENSIC EVIDENCE WHICH MAY NOT EXIST IN YOUR CASE



# PENALTY OR PUNISHMENT

- EVERY ONE HAS A JOB TO DO. THE BAILIFF KEEPS SECURITY, THE COURT REPORTER TAKES DOWN EVERYTHING THAT IS SAID, THE DEFENSE ATTORNEY AND I PRESENT EVIDENCE. YOUR JOB IS ONLY TO DETERMINE WHETHER OR NOT A CRIME WAS COMMITTED BY THE DEFENDANT. SHOULD THERE BE A CONVICTION, IT IS THE JUDGE'S JOB TO DETERMINE WHAT IF ANY PENALTY THERE SHOULD BE. YOU AS THE FINDER OF FACT CANNOT DISCUSS THE ISSUE OF PENALTY OR PUNISHMENT IN YOUR DELIBERATIONS. CAN YOU DO THAT?



## FINAL CATCH-ALL

- IS THERE ANYTHING YOU CAN THINK OF THAT NEITHER THE COURT, DEFENSE ATTORNEY, NOR I HAVE ASKED YOU THAT YOU FEEL WE NEED TO KNOW ABOUT YOUR ABILITY TO BE A JUROR?

# CAUSE AND PEREMPTORY CHALLENGES

## CHALLENGES FOR CAUSE

- CCP §225(B)(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.

## CHALLENGES FOR CAUSE

- CCP§ 228: 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. [CCP 203 – NON-U.S. CITIZEN, MINOR, NON-RESIDENT OF STATE OR COUNTY, CANNOT SPEAK ENGLISH, SUBJECT TO CONSERVATORSHIP, ON PAROLE/PRCS/MCS/PROBATION, 290S]
  - (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

## CHALLENGES FOR CAUSE

CCP §229: A CHALLENGE FOR IMPLIED BIAS MAY BE TAKEN FOR ONE OR MORE OF THE FOLLOWING REASONS:

- (A) **CONSANGUINITY** OR AFFINITY W/IN THE 4<sup>TH</sup> DEGREE OF ANY PARTY/WITNESS/VICTIM/
- (B) **STANDING IN THE RELATION** OF, OR BEING THE PARENT, SPOUSE, OR CHILD OF ONE WHO STANDS IN 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.
- (C) HAVING SERVED AS A **TRIAL OR GRAND JUROR... OR BEEN A WITNESS** INVOLVING THE SAME SPECIFIC OFFENSE
- (D) **INTEREST ON THE PART OF THE JUROR** IN THE EVENT OF THE ACTION (OTHER THAN AS A TAXPAYER)
- (E) HAVING AN **UNQUALIFIED OPINION OR BELIEF** AS TO THE MERITS OF THE ACTION FOUNDED ON **KNOWLEDGE OF ITS MATERIAL FACTS**
- (F) THE EXISTENCE OF A STATE OF MIND IN THE JUROR EVINCING **ENMITY AGAINST, OR BIAS TOWARDS EITHER PARTY**

## PEREMPTORY CHALLENGES

- CCP §231
  - IN CRIMINAL CASES, IF THE OFFENSE CHARGED IS PUNISHABLE WITH DEATH OR IMPRISONMENT IN STATE PRISON FOR LIFE, EACH SIDE GETS (20) PEREMPTORY CHALLENGES.
  - IN ANY OTHER CASE, UNLESS THE MAXIMUM TERM OF IMPRISONMENT IS 90 DAYS OR LESS, EACH SIDE GETS (10) PEREMPTORY CHALLENGES. IF 90D OR LESS, THEN (6) CHALLENGES EACH.
  - WHEN THERE ARE CO-DEFENDANTS, THE DEFENDANTS' CHALLENGES SHALL BE EXERCISED JOINTLY, BUT EACH DEFENDANT GETS (5) ADDITIONAL INDIVIDUAL CHALLENGES, AND WE GET AND EQUAL NUMBER.

# PITFALLS

BATSON/WHEELER AND AB3070 (CCP 231.7)

## *BATSON / WHEELER*

- KNOWN IN CALIFORNIA AS THE *BATSON-WHEELER* RULE, “[B]OTH THE STATE AND FEDERAL CONSTITUTIONS PROHIBIT THE USE OF PEREMPTORY CHALLENGES TO REMOVE PROSPECTIVE JURORS BASED ON GROUP BIAS, SUCH AS RACE OR ETHNICITY. (SEE *BATSON V. KENTUCKY* (1986) 476 U.S. 79, 97; *PEOPLE V. WHEELER* (1978) 22 CAL.3D 258, 276-277.)”

## *BATSON / WHEELER*

- STEP ONE: COURT MUST FIND A PRIMA FACIE CASE OF IMPERMISSIBLE DISCRIMINATION
- STEP TWO: THE ACCUSED PARTY “MUST PROVIDE A “CLEAR AND REASONABLY SPECIFIC” EXPLANATION OF HIS/HER “LEGITIMATE REASONS: FOR EXERCISING THE CHALLENGES.” THE JUSTIFICATION NEED NOT SUPPORT A CHALLENGE FOR CAUSE, AND EVEN A TRIVIAL REASON, IF GENUINE AND NEUTRAL WILL SUFFICE. A PROSPECTIVE JUROR MAY BE EXCUSED BASED UPON FACIAL EXPRESSIONS, GESTURES, HUNCHES, AND EVEN FOR ARBITRARY OR IDIOSYNCRATIC REASONS.” *P. V WINBUSH* (2017) 2 CAL.5<sup>TH</sup> 402

## BATSON / WHEELER

- STEP THREE: WHETHER THE TRIAL JUDGE FINDS THE RACE-NEUTRAL EXPLANATIONS TO BE CREDIBLE.
  - COMPARATIVE JUROR ANALYSIS IS BUT ONE FORM OF CIRCUMSTANTIAL EVIDENCE THAT IS RELEVANT, BUT NOT NECESSARILY DISPOSITIVE, ON THE ISSUE OF INTENTIONAL DISCRIMINATION.
  - WHEN THE PROSECUTOR'S EXPLANATION FOR THE CHALLENGE IS 'BOTH INHERENTLY PLAUSIBLE AND SUPPORTED BY THE RECORD,' THE TRIAL COURT NEED NOT MAKE DETAILED FINDINGS. (*PEOPLE V. SILVA* (2001) 25 CAL.4TH 345, 385-386.)” (*PEOPLE V. ROBERTS* (2021) 65 CAL.APP.5TH 469, 476.)

A PEREMPTORY CHALLENGE FOR ANY OF THE FOLLOWING REASONS IS **PRESUMED TO BE INVALID** UNLESS THE PARTY EXERCISING THE PEREMPTORY CAN SHOW BY **C&C EVIDENCE** THAT AN OBJECTIVELY REASONABLE PERSON WOULD VIEW THE RATIONALE AS UNRELATED TO A PROSPECTIVE JUROR'S **RACE/ETHNICITY, GENDER/GENDER IDENTITY, SEXUAL ORIENTATION, NATIONAL ORIGIN, OR RELIGION, OR PERCEIVED MEMBERSHIP IN THESE GROUPS, & THE REASONS ARTICULATED BEAR ON THE PROSPECTIVE JUROR'S ABILITY TO BE FAIR AND IMPARTIAL:**

- (1) EXPRESSING A DISTRUST OF OR HAVING A NEGATIVE EXPERIENCE WITH LAW ENFORCEMENT OR THE CRIMINAL LEGAL SYSTEM.
- (2) EXPRESSING A BELIEF THAT LEO ENGAGE IN RACIAL PROFILING OR THAT CRIMINAL LAWS HAVE BEEN ENFORCED IN A DISCRIMINATORY MANNER.
- (3) HAVING A CLOSE RELATIONSHIP WITH PEOPLE WHO HAVE BEEN STOPPED, ARRESTED, OR CONVICTED OF A CRIME.
- (4) A PROSPECTIVE JUROR'S NEIGHBORHOOD.
- (5) HAVING A CHILD OUTSIDE OF MARRIAGE.
- (6) RECEIVING STATE BENEFITS.
- (7) NOT BEING A NATIVE ENGLISH SPEAKER.
- (8) THE ABILITY TO SPEAK ANOTHER LANGUAGE.
- (9) DRESS, ATTIRE, OR PERSONAL APPEARANCE.
- (10) EMPLOYMENT IN A FIELD THAT IS DISPROPORTIONATELY OCCUPIED BY MEMBERS LISTED IN SUBDIVISION (A) OR THAT SERVES A POPULATION DISPROPORTIONATELY COMPRISED OF MEMBERS OF A GROUP OR GROUPS LISTED IN SUBDIVISION (A).
- (11) LACK OF EMPLOYMENT OR UNDEREMPLOYMENT OF THE PROSPECTIVE JUROR OR PROSPECTIVE JUROR'S FAMILY MEMBER.
- (12) A PROSPECTIVE JUROR'S APPARENT FRIENDLINESS WITH ANOTHER PROSPECTIVE JUROR OF THE SAME GROUP AS LISTED IN SUBDIVISION (A).
- (13) ANY JUSTIFICATION THAT IS SIMILARLY APPLICABLE TO A QUESTIONED PROSPECTIVE JUROR OR JURORS, WHO ARE NOT MEMBERS OF THE SAME COGNIZABLE GROUP AS THE CHALLENGED PROSPECTIVE JUROR, BUT WERE NOT THE SUBJECT OF A PEREMPTORY CHALLENGE BY THAT PARTY. THE UNCHALLENGED PROSPECTIVE JUROR OR JURORS NEED NOT SHARE ANY OTHER CHARACTERISTICS WITH THE CHALLENGED PROSPECTIVE JUROR FOR PEREMPTORY CHALLENGE RELYING ON THIS JUSTIFICATION TO BE CONSIDERED PRESUMPTIVELY INVALID.

## CCP 231.7

- A PARTY OR TRIAL COURT MAY OBJECT TO THE IMPROPER USE OF A PEREMPTORY CHALLENGE
- AFTER THE OBJECTION IS MADE, ANY FURTHER DISCUSSION SHALL BE CONDUCTED OUTSIDE THE PRESENCE OF THE PANEL
- UPON OBJECTION TO THE EXERCISE OF A PEREMPTORY CHALLENGE, THE PARTY EXERCISING THE PEREMPTORY CHALLENGE SHALL STATE THE REASONS THE PEREMPTORY CHALLENGE HAS BEEN EXERCISED

## CCP 231.7(D)(1)

THE COURT SHALL EVALUATE THE REASONS GIVEN TO JUSTIFY THE PEREMPTORY CHALLENGE IN LIGHT OF THE TOTALITY OF THE CIRCUMSTANCES. **THE COURT SHALL CONSIDER ONLY THE REASONS ACTUALLY GIVEN** AND SHALL NOT SPECULATE ON, OR ASSUME THE EXISTENCE OF OTHER POSSIBLE JUSTIFICATIONS FOR THE USE OF THE PEREMPTORY CHALLENGE.

## CCP 231.7(D)(1)

IF THE COURT DETERMINES THERE IS A ***SUBSTANTIAL LIKELIHOOD*** (MEANING MORE THAN A MERE POSSIBILITY BUT LESS THAN A STANDARD OF MORE LIKELY THAN NOT) ***THAT AN OBJECTIVELY REASONABLE PERSON WOULD (NOT COULD) VIEW*** RACE, ETHNICITY, GENDER, GENDER IDENTITY, SEXUAL ORIENTATION, NATIONAL ORIGIN, OR RELIGIOUS AFFILIATION, OR PERCEIVED MEMBERSHIP IN ANY OF THOSE GROUPS, ***AS A FACTOR IN THE USE OF THE PEREMPTORY CHALLENGE***, THEN THE OBJECTION ***SHALL BE SUSTAINED***.

THE COURT ***NEED NOT FIND PURPOSEFUL DISCRIMINATION*** TO SUSTAIN THE OBJECTION.

## CCP 231.7(G)

THE FOLLOWING REASONS FOR PEREMPTORY CHALLENGES HAVE HISTORICALLY BEEN ASSOCIATED WITH IMPROPER DISCRIMINATION IN JURY SELECTION:

- (A) THE PROSPECTIVE JUROR WAS INATTENTIVE, OR STARING OR FAILING TO MAKE EYE CONTACT
- (B) THE PROSPECTIVE JUROR EXHIBITED EITHER A LACK OF RAPPORT OR PROBLEMATIC ATTITUDE, BODY LANGUAGE, OR DEMEANOR
- (C) THE PROSPECTIVE JUROR PROVIDED UNINTELLIGENT OR CONFUSED ANSWERS

THE REASONS SET FORTH ABOVE ARE PRESUMPTIVELY INVALID UNLESS THE TRIAL COURT IS ABLE TO CONFIRM THAT THE ASSERTED BEHAVIOR OCCURRED, BASED ON THE COURT'S OWN OBSERVATIONS... EVEN WITH CONFIRMATION, THE COUNSEL OFFERING THE REASON **SHALL EXPLAIN WHY THE ASSERTED DEMEANOR, BEHAVIOR, OR MANNER IN WHICH THE PROSPECTIVE JUROR ANSWERED THE QUESTIONS MATTER TO THE CASE TO BE TRIED.**

CCP 231.7 (H)  
REMEDIES IF OBJECTION SUSTAINED

- QUASH THE JURY VENIRE AND START JURY SELECTION ANEW. **THIS REMEDY SHALL BE PROVIDED IF REQUESTED BY THE OBJECTING PARTY.**
- IF THE MOTION IS GRANTED AFTER THE JURY HAS BEEN IMPANELED, DECLARE A MISTRIAL AND SELECT A NEW JURY IF REQUESTED BY THE DEFENDANT.
- SEAT THE CHALLENGED JUROR
- PROVIDE THE OBJECTING PARTY ADDITIONAL CHALLENGES

# DISCUSS

