BATSON / WHEELER

WHAT IT MEANS TO REPRESENT THE PEOPLE OF THE STATE OF CALIFORNIA?

It is suggested that no particular stigma or dishonor results if a prosecutor uses the raw fact of skin color to determine the objectivity or qualifications of a juror. We do not believe a victim of the classification would endorse this view; the assumption that no stigma or dishonor attaches contravenes accepted equal protection principles. Race cannot be a proxy for determining juror bias or competence. "A person's race simply 'is unrelated to his fitness as a juror.'"

Powers v. Ohio (1991) 499 U.S. 400, 410.

Business & Profession Code § 6068

It is the duty of an attorney to do all of the following:

(a) To support the Constitution and laws of the United States and of this state

THE SEMINAL CASES

- [illegible] v. Wheeler (1978) 22 Cal.3d 258
- Batson v. Kentucky (1986) 476 U.S. 79
- Johnson v. California (2005) 545 U.S. 162

RULE OF PROFESSIONAL CONDUCT
RULE 8.4.1

(a)In representing a client, or in terminating or refusing to accept the representation of any client, a lawyer shall not:

(1) unlawfully harass or unlawfully discriminate against persons* on the basis of any protected characteristic;

“PROTECTED CHARACTERISTIC” DEFINED

(c) For purposes of this rule:

(1) “protected characteristic” means race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, sexual orientation, age, military and veteran status, or other category of discrimination prohibited by applicable law, whether the category is actual or perceived;

POLICY AND PROCEDURE #1-04

ETHICAL DUTIES

POLICY

The San Mateo County District Attorney's Office requires that all of its members exercise their duties with the highest degree of ethics and integrity without regard to race, color, national or ethnic origin, age, religion, disability, sex, sexual orientation or gender identity and expression.

Public Policy Underpinnings

- Allows juries to reflect diverse beliefs to avoid tyranny of the majority.
- Combat governmental oppression.
- Promote the perception of courts as legitimate.
- Encourage citizen participation in government.
- Stem the tide of minority stigmatization.

People v. Cleveland (2004) 32 Cal.4th 704, 734

"[A] SINGLE RACE-BASED CHALLENGE IS IMPROPER."

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

Co-Δ Murder Case involving the killing of a white grocery store owner during the commission of a robbery.

Both Δs were black.

JURY SELECTION

[A] number of blacks were in the venire summoned to hear the case, were called to the jury box, were questioned on voir dire, and were passed for cause; yet the prosecutor proceeded to strike each and every black from the jury by means of his peremptory challenges, and the jury that finally tried and convicted these defendants was all white.

The Defense Claim

"[T]he prosecutor was utilizing his peremptory challenges in a systematic effort to exclude any and all otherwise qualified black jurors from serving on my client's petit jury."

The Prosecutor's Response

"The trial court asked the prosecutor if he desired to respond, but advised him that "you don't have to respond if you don't wish to." The prosecutor declined to explain his conduct . . ."

U.S. SUPREME COURT PRECEDENT
SMITH v. TEXAS (1940) 311 U.S. 128

A state conviction was reversed where a showing was made that blacks had been "systematically excluded from grand jury service."

Justice Black: "It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community. For racial discrimination to result in the exclusion from jury service of otherwise qualified groups not only violates our Constitution and the laws enacted under it but is at war with our basic concepts of a democratic society and a representative government."

Cal. Supremes: "We add that in such a war the courts cannot be pacifists."

HOLDING

We conclude that the use of peremptory challenges to remove prospective jurors on the sole ground of group bias violates the right to trial by a jury drawn from a representative cross-section of the community under article I, section 16, of the California Constitution.

WHICH GROUPS GENERATE CONSTITUTIONAL CONCERN?

- RACIAL
- RELIGIOUS
- ETHNIC
- OR SIMILAR GROUNDS

REMEDY

"The error is prejudicial per se: 'The right to a fair and impartial jury is one of the most sacred and important of the guaranties of the constitution. Where it has been infringed, no inquiry as to the sufficiency of the evidence to show guilt is indulged and a conviction by a jury so selected must be set aside.'"

IMPORTANT SIDENOTE IN WHEELER

"[W]HEN AN ISSUE OF THIS NATURE DOES ARISE IN ANY CASE IT IS INCUMBENT UPON COUNSEL, HOWEVER DELICATE THE MATTER, TO MAKE A RECORD SUFFICIENT TO PRESERVE THE POINT FOR REVIEW."

MAKE SURE THE COURT DOES ITS JOB!

"[W]hen a trial court fails to make explicit findings or to provide any on-the-record analysis of the prosecution's stated reasons for a strike, a reviewing court has no assurance that the trial court has properly examined "all of the circumstances that bear upon the issue" of purposeful discrimination."

People v. Williams (2013) 56 Cal.4th 630, 717

BATSON V. KENTUCKY (1986) 476 U.S. 79

Charges: Second Degree Burglary and Receipt of Stolen Property

Defendant was black.

The prosecutor used his peremptory challenges "to strike all four black persons on the venire, and a jury composed only of white persons was selected."

Defense moved to discharge the jury before it was sworn asserting the prosecution's use of peremptory challenges violated the Defendant's Sixth and Fourteenth Amendment rights.

The trial court denied the Defendant's motion without argument.

The Court examined precedent and observed,

That decision laid the foundation for the Court's unceasing efforts to eradicate racial discrimination in the procedures used to select the venire from which individual jurors are drawn. In *Strauder*, the Court explained that the central concern of the recently ratified Fourteenth Amendment was to put an end to governmental discrimination on account of race. Exclusion of black citizens from service as jurors constitutes a primary example of the evil the Fourteenth Amendment was designed to cure.

3 PART INQUIRY

- Endorses a 3 part Inquiry by the Trial Court to examine a claim of racially motivated peremptory challenges:

1. Prima Facie showing that "all relevant circumstances" raises an inference of discrimination.
2. Person exercising the challenge is then given an opportunity to provide permissible justification for their use of a peremptory challenge.
3. Trial Court decides whether the moving party has proven a discriminatory purpose.

Prima Facie Showing

- Defendant must show that he is a member of a cognizable racial group

AND

- The Prosecutor exercised peremptory challenges to remove from the venire members of the Defendant's race.

JOHNSON V. CALIFORNIA (2005) 545 U.S. 162

- 2ND DEGREE MURDER CASE
- Δ WAS BLACK.
- PROSECUTOR USED 3 OF HIS 12 EXERCISED PEREMPTORY CHALLENGES TO REMOVE ALL BLACK PROSPECTIVE JURORS.
- THE COURT OF APPEAL REVERSED.
- THE CALIFORNIA SUPREME COURT REINSTATED THE CONVICTION.

PRIMA FACIE SHOWING UNDER *WHEELER*

- After using his second of three peremptory challenges to remove black prospective jurors, defense counsel objected.
- Court found utilizing the standard in Wheeler that defense counsel failed to make a *prima facie* showing.
- The prosecutor was not asked and did not provide his justification for the challenges.
- After striking 3rd juror defense renewed the motion.
- The Court was satisfied that the challenges could be justified by race neutral reasons.
- In finding there was no prima facie case made, the court stated that there was no showing of "a strong likelihood" that the challenges had been impermissibly based on race.

HOLDING

- Defendant meets their burden of making a prima facie showing if they **"raise an inference"** a party used challenges to exclude prospective jurors on account of race.
- The Batson framework is designed to produce actual answers to suspicions and inferences that discrimination may have infected the jury selection process.
- In other words, California's standard is too high.
- Case reversed and remanded.

WHO CAN MAKE THE MOTION?

- Either the prosecution or defense can bring a *Batson* motion.

Georgia v. McCollum (1992) 505 U.S. 42.

OUR BATSON/WHEELER REMEDIES

- "It seems more appropriate and, consistent with the ends of justice to permit the complaining party to waive the usual remedy of outright dismissal of the remaining venire."

- Reseating of improperly challenged jurors.

- Monetary sanctions.

- Granting the aggrieved party additional challenges.

People v. Willis (2002) 27 Cal. 4th 811

WHAT IF THE COURT MAKES NO MENTION OF WHETHER OR NOT IT HAS FOUND A *PRIMA FACIE* CASE?

- If a trial court denies a *Batson* challenge after hearing the prosecutor's reasons for exercise of the challenge without mentioning whether or not a *prima facie* showing has been made . . .

"Review of those rulings necessarily begin with the third stage."

- People v. Scott (2015) 61 Cal.3d 363, 392

WHAT IF COURT FINDS NO *PRIMA FACIE* SHOWING HAS BEEN MADE?

- "[I]t is the better practice to have the State respond, and then for the court to make a determination on whether the reasons are racially neutral," which "would eliminate remands for such a determination if the trial court is held to have erred in holding the defendant had failed to make the prima facie showing"]; State v. Joe (La.Ct.App. 1996) 678 So. 2d 586, 591 ["this is undoubtedly the better practice]"

Cited with approval by the California Supreme Court in:

People v. Scott (2015) 61 Cal.4th 363, 391 [188 Cal.Rptr.3d 328, 349 P.3d 1028].)

JUSTIFYING CHALLENGES DOES NOT ALWAYS WAIVE APPELLATE CONSIDERATION OF PRIMA FACIE SHOWING

[W]hen […] the trial court states that it does not believe a prima facie case has been made, and then invites the prosecution to justify its challenges for purposes of completing the record on appeal, the question whether a prima facie case has been made is not mooted, nor is a finding of a prima facie showing implied.

People v. Welch (1999) 20 Cal.4th 701, 746.

MAKE A COMPLETE RECORD OF YOUR REASONS

- Hostile looks from a prospective juror can themselves support a peremptory challenge. People v. Gutierrez (2002) 28 Cal. 4th 1083

- Having a Hispanic surname is not a cognizable class. People v. Gutierrez (2002) 28 Cal. 4th 1083
  - However, if the ethnicity of the juror is unknown it sufficiently describes a cognizable class. People v. Trevino (1985) 39 Cal.3d 667, 684.

- FILE A DECLARATION DESCRIBING OR EXPANDING UPON REASONS FOR A CHALLENGE (IF NECESSARY).

SINCERITY MATTERS

"The justification need not support a challenge for cause, and even a 'trivial' reason, if genuine and neutral, will suffice."

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

NON-VERBAL COMMUNICATION

A prospective juror may be excused based upon facial expressions, gestures, hunches, and even for arbitrary or idiosyncratic reasons.

"Experienced trial lawyers recognize what has been borne out by common experience over the centuries. 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, 613

WHAT IF YOU CANNOT REMEMBER THE REASON FOR THE CHALLENGE?

- Gonzalez v. Brown (2009) 585 F.3d 1202:

The trial court can still make a finding that a challenge was exercised in a constitutionally permisible manner if the totality of the circumstances supports a race neutral reason.

1. Were members of the cognizable group left on the jury.
2. Did the prosecutor accept the juror prior to exercising the challenge against them.
3. Non-Discriminatory reasons proffered as to other challenges.

THIRD PRONG – HAS A DISCRIMINATORY PURPOSE BEEN PROVEN?

- The 3rd Prong "demands of the trial judge a sincere and reasoned attempt to evaluate" the truthfulness of the race-neutral reason.

People v. Hall (1983) 35 Cal.3d 161.

Miller-El v. Cockrell (2003) 537 U.S. 322, 339

"The issue comes down to whether the trial court finds the prosecutor's race-neutral explanations to be credible."

Factors Considered

1. The prosecutor's demeanor;
2. [H]ow reasonable, or how improbable, the explanations are;
3. [W]hether the proffered rationale has some basis in accepted trial strategy."
4. In assessing credibility, the court draws upon its contemporaneous observations of the voir dire.
5. It may also rely on the court's own experiences as a lawyer and bench officer in the community, and even the common practices of the advocate and the office that employs him or her.

Powers v. Ohio (1991) 499 U.S. 400

- Aggravated Murder case.
- White Δ.
- Prosecutor removed 7 black potential jurors with peremptory challenges.

Held: Racial identity between the objecting defendant and the excluded jurors does not constitute a relevant precondition for a *Batson* challenge.

WHAT DOES "COGNIZABLE GROUP" MEAN?

"'A group to be "cognizable" . . . must have a definite composition . . . there must be some factor which defines and limits the group. A cognizable group is not one whose membership shifts from day to day or whose members can be arbitrarily selected. . . . There must be a common thread which runs through the group, a basic similarity in attitudes or ideas or experience. . . .'"

U.S. v. Guzman (S.D.N.Y. 1972) 337 F. Supp. 140, 143-144 cited by People v. Motton (1985) 39 Cal. 3d 596, 606.

WHICH GROUPS QUALIFY AS "COGNIZABLE?"

- Race: Batson v. Kentucky (1986) 476 U.S. 76, 84-89
- Gender: J. E. B. v. Alabama ex rel. T. B. (1994) 511 U.S. 127
- Ethnicity: People v. Wheeler (1978) 22 Cal.3d 258, 276
- Sexual Orientation: People v. Douglas (2018) 22 Cal. App. 5th 1162
- Race + Gender: People v. Motton (1985) 39 Cal.3d 596, 605
- Religion: People v. Schmeck (2005) 37 Cal. 4th 240

- National Origin: Likely, but not squarely decided. See Castaneda v. Partida (1977) 430 U.S. 482 – Exclusion of Mexican-American from selection of grand jury.
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CAL. CODE OF CIVIL PROCEDURE SEC. 231.5

A party shall not use a peremptory challenge to remove a prospective juror on the basis of an assumption that the prospective juror is biased merely because of a characteristic listed or defined in Section 11135 of the Government Code, or similar grounds.

Cited in People v. Trinh (2014) 59 Cal.4th 216, 241.

GOVERNMENT CODE SECTION 11135
SIMILAR GROUNDS

1. Sex
2. Race
3. Color
4. Religion
5. Ancestry
6. National Origin
7. Ethnic Group Identification
8. Age
9. Mental Disability
10. Physical Disability
11. Medical Condition
12. Genetic Information
13. Marital Status
14. Sexual Orientation

WHICH GROUPS DO NOT QUALIFY AS "COGNIZABLE?"

- Low Income: People v. Burgener (2003) 29 Cal.4th at p. 856
- Young People: People v. Stansbury (1993) 4 Cal.4th 1017, 1061
- Blue Collar: People v. Estrada (1979) 93 Cal.app.3d 76, 93

& Low Income

- Newly Residing in Community: Adams v. Superior Court (1974) 12 Cal. 3d 55, 60.
- People of color: People v. Davis (2009) 46 Cal.4th 539, 583; People v. Neuman (2009) 176 Cal.App.4th 571

BE AWARE OF THE BOUNDARIES

PEOPLE V. JONES (2011) 51 CAL.4TH 346

PROSPECTIVE BLACK JUROR WAS EXCUSED BECAUSE SHE ATTENDED THE 1ST AME CHURCH, WHICH THE PROSECUTOR BELIEVED TO BE A "CONSTANTLY CONTROVERSIAL" ORGANIZATION.

THE CALIFORNIA SUPREME COURT FOUND NO ERROR IN THE EXERCISE OF THIS CHALLENGE.

BILINGUAL JURORS

HERNANDEZ V. NEW YORK (1991) 500 U.S. 352
PLURALITY OPINION

- FOUND NO CLEAR ERROR IN STRIKING BILINGUAL JUROR BECAUSE FEAR THAT THEY WOULD REJECT THE INTERPRETERS'S VERSION IN FAVOR OF THEIR OWN.

- EXPRESSED CONCERNS ABOUT POTENTIAL PRETEXT FOR RACIAL DISCRIMINATION.

- IF FEAR IS NOT SUPPORTED BY THE RECORD, THIS GROUND MAY BE VIEWED AS A RUSE. SEE PEOPLE V. GONZALES (2008) 165 CAL.APP.4TH 620.

MILLER-EL I & II

- CAPITAL MURDER CASE IN TEXAS.
- 10 OF 11 BLACK JURORS WERE STRICKEN BY PROSECUTOR.
- THE CASE WAS REMANDED BY TEXAS COURT OF APPEALS TO ALLOW PROSECUTOR TO STATE THEIR REASONS.
- TRIAL COURT FOUND RACE NEUTRAL REASONS "COMPLETELY CREDIBLE"

UNITED STATES SUPREME COURT'S INVOLVEMENT

- FOUND TRIAL COURT'S FINDINGS UNSUPPORTED STATING THE REASONS PROVIDED BY THE PROSECUTOR "REEK[ED] OF AFTERTHOUGHT."

- THE UNITED STATES SUPREME COURT CONDUCTED A DEEP DIVE INTO THE RECORD AND PROVIDED STANDARDS BY WHICH A COURT SHOULD REVIEW "ALL RELEVANT CIRCUMSTANCES."

BARE STATISTICS

THE PROSECUTOR STRUCK 91% OF BLACK PROSPECTIVE JURORS, BUT ONLY 12% OF NON-BLACK PROSPECTIVE JURORS.

DISPARATE QUESTIONING

PROSECUTOR PRESSED BLACK PROSPECTIVE JURORS HARDER AND WORDED QUESTIONS TO THEM IN A WAY THAT COULD PRESUMED BIAS.

DID NOT EMPLOY THE SAME RHETORICAL TACTICS WITH OTHER JURORS.

CHARACTERIZED QUESTIONG AS “MANIPULATIVE” AND “TRICKERY.:

EVIDENCE OF FORMER DA'S POLICY OF JURY SELECTION DISCRIMINATION

- The Court reviewed testimony of former prosecutors regarding the office climate related to race-based voir dire.

- Considered a prosecutor written manual (the "Sparling manual") discussing types of people not to choose in voir dire. The manual outlined reasons for excluding minority panelists from jury service.

NOTATION OF RACE ON JURY SELECTION CARDS

PROSECUTORS ANNOTATED RACE OF PROSPECTIVE JURORS ON NOTE CARDS.

COMPARATIVE ANALYSIS

COMPARISON OF RESPONSES BETWEEN THOSE WHO WERE STRICKEN VERSUS THOSE WERE EMPANELED.

IF THE SAME QUALITY APPLIED TO NON-BLACK POTENTIAL JURORS WHOM THE PROSECUTION DID NOT STRIKE THAT COULD SERVE AS EVIDENCE OF RACE BASED DISCRIMINATION.

MAY BE CONSIDERED FOR THE FIRST TIME ON APPEAL.

REVERSAL

"[W]HEN THE EVIDENCE ON THE ISSUES RAISED IS VIEWED CUMULATIVELY ITS DIRECTION IS TOO POWERFUL TO CONCLUDE ANYTHING BUT DISCRIMINATION."