

Skit #1: Basic Scenario, Done Poorly

(Skipping Prong 1, Prima

Facie Case)

NARRATOR (TBD): *This is a felony VC 10851 case wherein the defendant is black and the victim is white. The prospective panel includes 100 potential jurors, and both sides get 10 peremptories. The defense has kicked off 5 potential jurors, including 4 whites and 1 Asian-American. The prosecution has kicked off 3 potential jurors, including 1 Latina, 1 white, and 1 black. The black potential juror is the one upon whom the defense is objecting. The audience appears to contain 4 more black potential jurors, and 30 more potential jurors of backgrounds other than strictly white or black. The rest appear to be white.*

DEFENSE (TBD): Objection!

JUDGE (PAT): Juror #3, please don't leave yet; I'd like to have all potential jurors go out into the hallway while I handle a matter in here with counsel. [brief pause] Ok counsel; I presume this is a *Wheeler/Batson* objection?

DEFENSE (TBD): Yes.

JUDGE (PAT): Ms. De Silva, what do you have to say about this?

PROSECUTOR (Cindy): Judge, I did not kick Juror #3 because he's black. I kicked him because he didn't seem interested in this case; he looked to me like he was falling asleep!

Pat (as Technical Coordinator): *What was done well in this scene, and what was done poorly?*

- Done well: objection without saying "*Wheeler/Batson*"
- Done well: clearing the courtroom of jurors before proceeding
- Done poorly: defense not making a prima facie case
- Done poorly: judge not asking defense to make a prima facie case
- Done poorly: prosecutor not asking judge to make defense make prima facie case, jumping straight into her defense and therefore waiving Prong 1 for appellate purposes

Skit #2: Basic Scenario, Done Well

(Prosecutor Insisting on

Prong 1, Prima

Facie Case)

NARRATOR (TBD): *This is a felony VC 10851 case wherein the defendant is black and the victim is white. The prospective panel includes 100 potential jurors, and both sides get 10 peremptories. The defense has kicked off 5 potential jurors, including 4 whites and 1 Asian-American. The prosecution has kicked off 3 potential jurors, including 1 Latina, 1 white, and 1 black. The black potential juror is the one upon whom the defense is objecting. The audience appears to contain 4 more black potential jurors, and 30 more potential jurors of backgrounds other than strictly white or black. The rest appear to be white.*

DEFENSE (TBD): Objection!

JUDGE (PAT): Juror #3, please don't leave yet. All prospective jurors, we're going to have you go into the hallway while I handle a matter with the attorneys in here, ok? Thank you. [brief pause] Counsel, I take it this is a *Wheeler/Batson* objection?

DEFENSE (TBD): Yes.

JUDGE (PAT): Ms. De Silva? Your response?

PROSECUTOR (Cindy): Judge, I don't believe the defense has made a prima facie case.

JUDGE (PAT): Yes he has. Juror #3 is black.

PROSECUTOR (Cindy): Judge, that's not a prima facie case, and in any event the defense hasn't asserted that as their reason. According to both *Wheeler* and *Batson* as clarified by *Johnson*, the opponent of the strike *must* make a prima facie case that the totality of the circumstances raises an inference of a discriminatory purpose in challenging the juror. The defense has said literally nothing to support their assertion; they've simply said, "Objection."

Furthermore, I'd point out at least two cases that illustrate the types of things the defense should be pointing out to make their prima facie case: *People v. Fuentes* and *People v. Scott*. Those cases run through a number of things the defense should be showing or can show in support of their burden, none of which the defense here has even attempted to show.

In order for this Prong not to be deemed moot on appeal, I would like the defense to be put to their burden.

JUDGE (PAT): Ok, Mr. McGrath, why do you think Ms. De Silva challenged Juror #3 based on an improper reason?

DEFENSE (TBD): Well, Judge, my client is black, and Juror #3 is black. Juror #3 is only the third prospective juror she has kicked off, and the very first black person that came up, she kicked.

JUDGE (PAT): Well, Mr. McGrath, it's a judgment call, but I think I tend to agree...this isn't a prima facie case. I would note that Juror #3 is indeed the very first black person to come up, as no one else currently in the box is black, though there appear to be a few black people in the greater audience...but I just don't find a prima facie case based on these facts.

PROSECUTOR (Cindy): Thank you, Judge. In an abundance of caution, may I please put my reasons for kicking Juror #3 on the record, for appellate purposes?

JUDGE (PAT): Of course.

PROSECUTOR (Cindy). Thank you. For the record, I did not challenge Juror #3 due to his apparent race; I challenged him because he appeared extremely disinterested in the case. I watched him as he walked in earlier, and he was chewing gum and appeared annoyed when the bailiff asked him to throw it away, and he even rolled his eyes when he threw it out. Then, he tried to get a hardship, as the court will recall, but it was denied, and he seemed disappointed; his shoulders hunched over and he kind of made a face, pursing his lips. Then when he got called up in the first batch to be part of the initial 18, he sat down and was closing his eyes through much of voir dire. Did the court notice that too?

JUDGE (PAT): Actually, I did detect a certain boredom from him, but I'm not sure I saw his eyes closed.

PROSECUTOR (Cindy): Ok, well I did, and I just don't want a juror who is going to display a bored attitude throughout the whole case, bringing the other jurors down and making people think the case isn't significant enough to pay attention to. Both sides deserve to be heard.

Pat (as Technical Adviser): *What was done better in this version of the scenario? What could still have been improved upon?*

- Could be improved upon: The prosecutor could have questioned Juror #3 on whether he was tired, or bored, so that his eyes-closing could be on the record, and so that she wouldn't be accused of lacking in follow-up questions to that juror

Skit #3: The People Lose

the Wheeler/Batson

Objection

NARRATOR (TBD): *This is a felony 11378 case, and the defense has already launched two unsuccessful Wheeler/Batson objections against the People—both pertaining to Hispanic potential jurors. The defendant appears to be Hispanic but has an Irish surname. 100 potential jurors were called up, and approximately 20 remain, besides the 18 in the box. The People have exercised 7 of their 10 peremptories, and the defense has used 8 of their 10. Now the People have attempted to peremptorily challenge a Hispanic potential juror, a female junior college student who lives at home with her parents and does not have a job.*

DEFENSE (TBD): Objection!

JUDGE (PAT): Juror #6, why don't you stick around while I send your fellow prospective jurors out of the courtroom; actually, it's almost lunch time, so we'll just have you all come back at 1:30, including Juror #6. None of you are excused yet; please remember my advisements not to discuss the case or form any conclusions. [brief pause] Alright counsel, Mr. McGrath, what's the basis for your objection?

DEFENSE (TBD): *Wheeler/Batson*, your honor. It appears to me that Juror #6 has no reason to be found objectionable by the People, other than the fact that she too is Hispanic. Ms. De Silva has tried to kick off multiple Hispanic jurors now, and although this Court has overruled my objection on this front, I think it's snowballing and it's becoming really obvious that she has an ulterior motive with regard to Hispanic jurors. My client is Hispanic, and I think all the Hispanic jurors she has kicked off, including Juror #6, were all just fine.

JUDGE (PAT): Well, Ms. De Silva, although I didn't find a prima facie case in either of the other two, I have to agree that based on the statistics at this point, I'm starting to wonder. I do find a prima facie case. Do you care to give me your reasons for challenging Juror #6?

PROSECUTOR (Cindy): Judge, I didn't kick her off because she was Hispanic. I kicked her off because she was young! I think young people these days have a more carefree attitude when it comes to drugs, so I want a more mature jury.

DEFENSE (TBD): Judge, that's a clear violation of the law.

PROSECUTOR (Cindy): No it's not. It's been the law since the 1979 *Estrada* case that we can kick off young people. We do it all the time!

DEFENSE (TBD): Until 2016 when the statute changed! It's not my fault Ms. De Silva hasn't read her Code of Civil Procedure in the past two years.

JUDGE (PAT): Counsel, counsel! Stop. Stop arguing. [brief pause] Unfortunately Ms. De Silva, Mr. McGrath is right; the statute changed a few years ago, so you've squarely admitted an idea of group bias emanating from young people, and I have no choice but to find that *Wheeler/Batson* has been violated.

Pat (as Technical Adviser): *Question #1: What could the prosecutor have done to have kept from violating Wheeler/Batson here, or how could she have defended herself better?*

- A. She should have kept up to date on the change in the law
- B. If she knew about the change in the law, but still wanted to kick this young juror, she could have better-questioned that juror and better-articulated WHY she kicked her—rather than saying “because she’s young and I have certain ideas about how young people think,” she could have asked that juror follow-up questions pertaining to her opinions on drug crimes, drug sellers, etc., and then used those answers to either dispel her concerns, or articulate to the judge how this specific juror’s views earned her an appropriate kick by the People

Question #2: Now that the judge has, likely appropriately, found a Wheeler/Batson objection, how should the Remedy portion be addressed?

- A. The judge can get rid of the entire jury panel and start all over again, as is the traditional *Wheeler* remedy
- B. Or, the judge can ask the defense, as the opponent of the strike, what the defense would prefer, pursuant to the *Willis* case...to start over, to re-seat the offended juror, monetary sanctions, or extra peremptories

Question #3: Does the Prosecutor need to report herself to the State Bar?

- A. Likely, no. We see no authority requiring a self-report or a report by the judge when the *Wheeler/Batson* objection is sustained at the trial court level. It’s not until a case gets overturned on appeal based on *Wheeler/Batson* that the attorney MIGHT have a duty to report herself.

Skit #4: The People Make the Motion!

NARRATOR (TBD): *This case is a felony 29800 case, and the defendant is white. There are 100 prospective jurors, and the defense has peremptorily challenged two so far—both white. The People have peremptorily challenged two as well—also, both white. It's now the defense's turn to peremptorily challenge again, and the defense attempts to kick an Asian juror—the only Asian juror in the box, and the only apparent Asian juror in the entire panel.*

DEFENSE (TBD): The Defense would like to thank and excuse Juror #11.

PROSECUTOR (Cindy): Objection!

JUDGE (PAT): What?

PROSECUTOR (Cindy): Objection, Judge.

JUDGE (PAT): Oh. Ok. Juror #11, don't go anywhere yet—ladies and gentlemen of the jury, I'm going to let you take a brief break to stretch your legs...don't go too far, but please wait out in the hallway until the bailiff tells you to come back in. [brief pause] Ok counsel, what's the nature of your objection?

PROSECUTOR (Cindy): Judge, Mr. McGrath just attempted to thank and excuse Juror #11, an Asian-American whose conduct and answers raised literally zero red flags—he appeared to me to be a fine juror for either side. He expressed no bias either way, had no weird temperament issues, and is just one of those people that naturally kind of gets chosen because they seem normal and fair. For the life of me, I can't think of why Mr. McGrath kicked him...other than his race. It is an idea held by some that Asian-Americans are somehow more pro-prosecution and law-abiding than other community members, so under these circumstances, I have no choice but to conclude, under a totality of the circumstances, that this is the reason Mr. McGrath kicked him. The juror did not say anything particularly pro-prosecution, nor did Mr. McGrath question him regarding his views in that regard. Simply put, the only reason I can see here is race.

DEFENSE (TBD): That's offensive!

JUDGE (PAT): Counsel, stop. Well, I agree that Juror #11 seemed pretty plain; I can't really figure out why you kicked him either. So I'm going to find a prima facie case. Would you like to explain your reasons?

DEFENSE (TBD): Umm, uh, Judge, let me look at my notes. I mean, confer with my client. Hang on. Umm...I kicked that potential juror because he didn't seem like he was paying attention, and my client deserves someone who's paying attention!

JUDGE (PAT): Mr. McGrath, he answered your questions in full and there were no pauses in his ability to answer; he didn't ask you to repeat yourself; how did you come to the conclusion that he wasn't paying attention?

DEFENSE (TBD): Just...uh, just that he seemed to be kind of bored with the whole thing.

JUDGE (PAT): Well, why didn't you ask him if he was bored? Or engage in any questioning on that subject at all?

DEFENSE (TBD): I don't know. I didn't think about it.

JUDGE (PAT): Ok. I'm going to find a *Wheeler/Batson* violation at this point.

Pat (as Technical Adviser): *how should Ms. De Silva handle this, now that the judge has ruled against the defense?*

A: If she also doesn't like Juror #11 for her own reasons that aren't unlawful, she should request, pursuant to *People v. Willis*, for a whole new panel, monetary sanctions against the defense, or, perhaps most reasonably, an additional peremptory challenge.

B. If the judge instead says that since Juror #11 is still present in the hallway, he should simply be re-seated, but Ms. De Silva doesn't want him re-seated, she should remind the court that *Willis* allows the opponent of the strike to agree to the departure from the traditional *Wheeler* remedy, and in this case, she is requesting something other than re-seating.

C. If Ms. De Silva is fine with Juror #11, she can request re-seating pursuant to *Willis*, or any of the other remedies available.