Equity & Inclusion : Part 1: Judge Trina Thompson © 2020
Criminal Justice Reform Statutes 2020-2021
AB3070/CCP 231.7

"ENDING RACIAL DISCRIMINATION IN JURY SELECTION CAN BE ACCOMPLISHED ONLY BY ELIMINATING PEREMPTORY CHALLENGES ENTIRELY." – THURGOOD MARSHALL

PP slides created by: Judge Trina Thompson & Judge Scott Patton

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Slides:

★Nuts and Bolts of Wheeler/Batson

★Background of Wheeler/Batson
Simple Checklist (current standard)

★Making your record
Easing into the New Standard
AB256

Justice Thurgood Marshall

1985

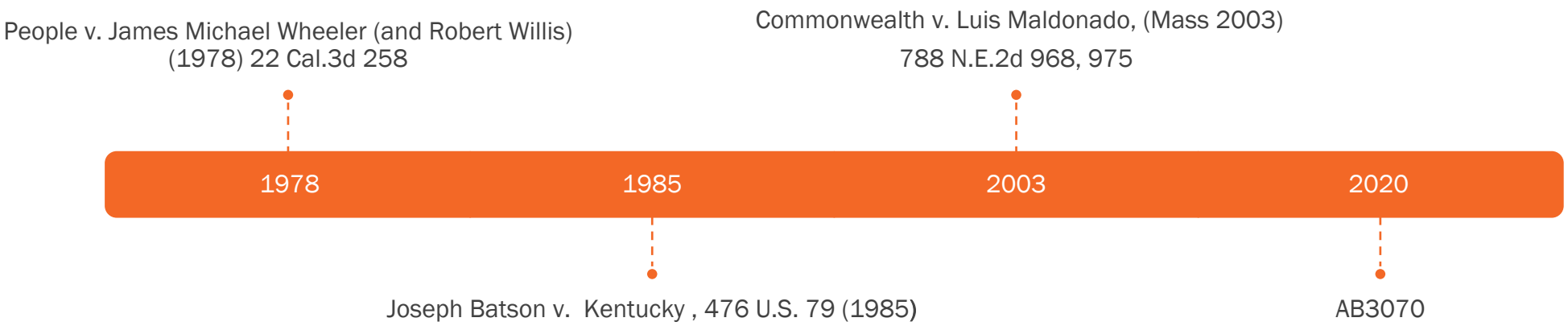
See Batson v. Kentucky, 476 **U.S. 79, 103 (1985)** (Marshall, **J.,** concurring) ("That goal [of ending racial discrimination in the jury-selection process] can be accomplished only **by** eliminating peremptory challenges entirely.

2003

Commonwealth v. Maldonado, **788 N.E.2d 968, 975** (Mass. **2003)** (Marshall, **C.J.,** concurring)

("[I]t is time either to abolish [peremptory challenges] entirely, or to restrict their use substantially."

Where California goes, the Nation follows……



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

Defendants James Michael Wheeler and Robert Willis appeal from judgments convicting them of murdering Amaury Cedeno, a grocery store owner, in the course of a robbery.

At trial the principal issue was identification.

It was the People's theory that the unseen driver of the getaway car was defendant Wheeler.

Defense counsel thereafter established that prospective jurors Louise Jones, Odessa Bragg, and Napoleon Howard were black. fn. 1 All three responded that racial considerations would not affect their impartiality and they would base their verdict solely on the facts; as Mr. Howard succinctly put it, "We are not trying color. We are trying a case." Both defense counsel passed these prospective jurors for cause, and the prosecutor did likewise after almost perfunctory questioning. fn. 2 Nevertheless the prosecutor exercised three of his next five peremptory challenges against these same three prospective jurors. (22 Cal.3d 258, 264.)

No more black prospective jurors were called to the box, and in due course 12 regular jurors and 2 alternates were sworn to try the case. They were all white.

When the prosecutor exercised 2 of 3 of his remaining peremptory challenges excusing the last 2 blacks in the venire, the prosecutor replied:

"I have no response, Your Honor, and I don't wish my silence to be construed as any tacit admission of the charges." The court agreed it was "not considering it as such," and ruled that "Attorneys have a right to select the jury and use all the peremptories available to them without stating the reason."

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

James Kirkland Batson was charged with burglary and receipt of stolen goods.

The prosecutor used his peremptory challenges to remove all four African Americans from the jury pool. Batson challenged the removal of these jurors as violating his Sixth Amendment right to an impartial jury and the Equal Protection Clause of the Fourteenth Amendment. The jury convicted petitioner on both counts.

Justice Powell wrote the 7-2 decision. However, we should take heed to Justice White's concurrence:

Justice White wrote that ***although the Court's prior precedent should have warned prosecutors*** that using peremptory challenges to exclude people based solely on race violates the Equal Protection Clause, the widespread practice of discriminatory elimination of jurors justifies the opportunity to inquire into the basis of the peremptory challenge.

Justice Thurgood Marshall

(Marshall, J.) Justice Thurgood Marshall agreed with the decision in the case, but asserted that the Court should eliminate the use of peremptory challenges in all criminal proceedings so that they could not be used as a front for impermissible racial considerations.

Justice Marshall asserted that under the current system, prosecutors are still free to discriminate so long as it is not blatant, and trial courts face a difficult burden of assessing a prosecutor's motive.

BATSON-WHEELER PROCEDURE [Before January 1, 2022]

1 The Court should discuss the Wheeler/Batson procedure during in limine motions. CRC 4.200

2. The motions are heard outside of the presence of the jury.

3. The Court should pay attention fo the cross section of the venire when it arrives.

4. During Jury Selection, the Court should also pay close attention to verbal responses, attitudes, body language, nonverbal behavior, and the content of hardship forms that have been denied.

5. The Court must give each side an opportunity to question prospective jurors and to make their record.

See, People v. Lenix (2008) 44 Cal 4th 602

The Prima Facie Case shown by the totality of the relevant facts that give rise to an inference of discriminatory purpose.

1. The prima facie case can be made from any information in the record available to the trial court.

2. There must be a showing that the prospective juror is a member of a cognizable group

3. A disproportionate number of peremptories were used against the cognizable group

4. In determining whether this burden has been met, courts must keep in mind that "[s]ubject to rebuttal, a presumption exists that a peremptory challenge is properly exercised, and the burden is upon the opposing party to demonstrate impermissible discrimination against a cognizable group."

["the unconstitutional exclusion of even a single juror on 11 improper grounds of racial or group bias requires the commencement of jury selection anew"].

SEE, PEOPLE V. REYNOSO (2003) 31 CAL.4TH 903, 927, FN. 8

Comparative Analysis

The court reviews the reasons given for the challenge as to the particular juror and then looks to see if those reasons would apply equally to other jurors (not belonging to the same cognizable class as the challenged juror) who were not challenged.

See, Cook v. LaMarque (9th Cir. 2010) 593 F.3d 810.

See comment

Justification for the Challenge

Once a prima facie case is shown, the burden shifts to the party that challenged the juror (used a peremptory challenge);

The party must proffer a neutral, specific and clear reasons for the exercise of the peremptory challenges;

The reasons must be made on the record, outside of the presence of the jury. The defense counsel and the defendant are present. It is reversible error to hold an ex parte hearing for the party to recite their reasons on the record.

Assessment by the Court, *See Lenix, supra.*

The Court must then decide whether the opponent of the strike has proved purposeful racial discrimination.

The proper focus is on the subjective genuine of the racial neutral reasons given for the peremptory challenges. In other words, does the court find the race neutral explanations credible. For example:

* The party's demeanor

* How reasonable or how improbable the explanations that are given

* Whether the proffered rationale has some basis in accepted trial strategy

* Is it plausible in light of all of the evidence bearing on the exercise of the strike.

Remedy for a Batson/Wheeler Violation

The Court may dismiss all the jurors thus far selected and quash the remaining venire.

With the consent of the aggrieved party, the court has discretion to consider and impose remedies or sanctions short of dismissal of the entire jury venire:

- Reseating if the challenged juror has not been excused/discharged; People v. Willis (2002) 27 Cal 4th 811.
- If the aggrieved party consents and/or waives irregularities (mistrial), then continue with the remaining venire. This prevents rewarding improper voir dire challenges and/or resulting in postponement of the trial.
- Sidebar conferences outside of the presence of the other jurors and the juror of focus reduces the possibility of prejudicing the juror and/or the venire if the parties consent to continue.

Collateral Consequences of a Batson Wheeler Motion being Granted

- Monetary Sanctions per CCP 177.5 (after prior warning from the Court)
- If a fine/monetary sanction exceeds $1,000.00, the court shall report the offending attorney to the State Bar. Business and Professions Code 6086.7(a).
- If a case is reversed on appeal based upon a Batson/Wheeler violation, the appellate court must report the offending attorney to the State Bar. BP Code section 6086.6(b).
- The court may take other appropriate corrective measures:
  - Report the violation to the head of the agency (DDA, PD, CAAP)
  - Report the violation to the PJ, SJ, and/or EJ and other judges on the bench to determine whether the attorney has a track recode and whether future justification are genuine. See Canon 3D(2)

AB 3070: CCP 231.7 - Criminal Effective January 1, 2022

All jury trials in which jury selection begins on or about January 1, 2022, prohibit a party from using a peremptory challenge to remove a prospective juror on the basis of the prospective juror's race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or the perceived membership of the prospective juror in any of those groups.

This bill would allow a party, ***or the trial court on its own motion, to object to the use of a peremptory challenge based on these criteria.***

The party exercising the challenge would be required to state the reasons for the peremptory challenge.

The Court would be required to evaluate the reasons given. (credibility evaluation).

It is the intent of the legislature to put into place an effective procedure for eliminating unfair exclusion of jurors based upon [the impermissible] exercise of a peremptory challenge.

STATUTORY INTENT

If the Court grants the objection, the Court may take certain actions, including, but not limited to:

1. Start a new jury selection
2. Declare a mistrial
3. Seat the challenged juror
4. Provide the objecting party additional challenges
5. Provide another remedy *as the Court deems appropriate.*

   [discretion]

What is 'de novo' review?

De novo judicial review describes a review of a lower court ruling by an appellate court. (*usually seen exercised in federal appellate review cases*)

De novo judicial review is used in questions of how the law was applied or interpreted.

It is ***a non-deferential standard of review***, so it doesn't place any weight on the previous court's finding.

Denial of an objection is subject to de novo review:

- The legislature has designated several justifications as presumptively invalid.
- It is the intent of the legislature to further the purpose of eliminating the use of group ***stereotypes*** and ***discrimination***, whether based on ***conscious*** or ***unconscious bias***, in the exercise of peremptory challenges. See, CCP 231.7(3)(G)(e)(1)-(13), (G)(g)(1)(A)-(C).
- The Court's express factual findings will be reviewed for "substantial evidence" to determine whether there was a proper denial of the objection.
- The appellate court shall not impute to the trial court any findings that are not expressly stated on the record.
- If the appellate court terms the objection was erroneously denied, the judgment will be reversed and the case will be remanded for a new trial.

This provision shall remain in effect only until January 1, 2026 and of that date it is repealed. (Sunset)

CCP 231.7 (N)

AB3070: CCP 237.1 Civil Code of Procedure Effective January 1, 2026

Also see, CCP 226

Same standards

Operative January 1, 2026 (sunrise date). ** *but note language in the statute that refers to jury trials in which section begins on or after January 1, 2022.*

No sunset date.

Frequently Asked Questions (FAQs)

1, Number of Challenges per side.

2. Size of venire needed for the length of the trial.

3. Alternates needed in addition to 12 in the jury box.

4. Hardships.

5. Challenges for Cause.

Other questions: from New Judges

- Side bar Cause and Wheeler challenges - make your record.
- Comparative Analysis if a challenge is made.
- Retention of Jury Questionnaires.
- Privacy of Jurors and the Press.
- Random List and Juror badge numbers/seating chart
- What happens if you need to order a new panel? Time constraints, due process rights, speedy trial rights?
- Does a judge have any collateral duties if a Wheeler/Batson motion is granted? If so, what? And what is the process?

Batson/Wheeler

Current status of the law

Subject Matter Experts

WHEELER/BATSON

1. JUSTICE WILLIAM MURRAY
2. JUDGE TRINA THOMPSON
3. [TBD]

IMPLICIT BIAS

1. JUDGE RANDA TRAPP
2. JUDGE MARLA ANDERSON
3. JUDGE NANCY SHAFFER
4. JUDGE TRINA THOMPSON
5. MICHAEL ROOSEVELT, CJER
6. PROFESSOR EBERHARDT
7. JUDGE BERNICE B. DONALD

The 14th Amendment was ratified in 1868

- All persons born or naturalized in the US …, are citizens of the US and the State wherein they reside.
- No state shall deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

- *Strauder v. West Virginia* (1880) 100 U.S. 303.
- The united States SC invalidated a Virginia statute that provided that only white men could serve as jurors.
- The court ruled that such a law violated the equal protection clause of the 14th Am.
- Central concern of the Am. was to end governmental discrimination based on race.

100 years of “Unceasing efforts to eradicate racial discrimination…”

- Quote from the SC in *Batson* – possibly an overstatement.
- The SC cases prior to Batson were concerned with how local jurisdictions composed their jury venires and grand juries.
- The question *is not* whether a colored man has a right to a grand or petite jury composed in whole or in part with members of his own race. (*Strauder p.* 305.)

Significant SC cases from *Strauder* to *Swain*

- *Martin v. Texas* (1906) “in organizing the grand jury as well as in the impaneling of a petite jury, there shall be no exclusion of his race, and no discrimination against them, because of their race or color.” (200 U.S. 316)
- *Smith v. Texas* (1940) The court overturned a conviction where although “the Texas statutory scheme is not in itself unfair, it is capable of being carried out with no racial discrimination” in practice so much discretion was given to local officials that no blacks ever actually served on grand juries. (311 U.S. 128)
- Avery v. Georgia (1953) The state may not have facially neutral selection procedures for selecting a jury panel but then resort to discrimination at “other stages of the selection process.” Trial judge pulls from a “box of tickets” where the tickets containing white names are on white paper and the black names are printed on yellow paper; of the 60 names selected all were white. (345 U.S. 559)

Swain v. Alabama (1965) 380 U.S. 202

- First time that the SC recognized that a defendant could bring a constitutional challenge to the racial composition of his petite jury based on a violation of the equal protection clause.
- Yet the violation could not be based on the selection process of his or her actual trial: "We have decided that it is permissible to insulate from inquiry the removal of Negroes from a particular jury on the assumption that the prosecutor is acting on acceptable considerations …"

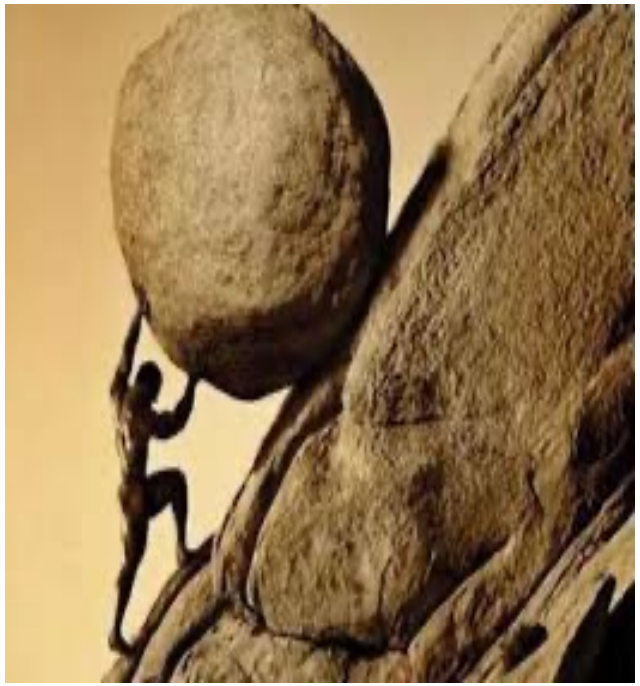
- If on the other hand "in case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim may be, (the prosecutor) is responsible for the removal of Negroes who have been selected as qualified jurors by the jury commissioners and who have survived challenges for cause, with the result that no Negroes ever serve on petit juries, the Fourteenth Amendment claim takes on added significance.
- "In these circumstances, giving even the widest leeway to the operation of irrational but trial-related suspicions and antagonisms, it would appear that the purpose of the peremptory challenge are being perverted. If the State has not seen fit to leave a single Negro on any jury in a criminal case, the presumption protecting the prosecutor may well be overcome.
- The court held that Swain had not met this burden even though the "evidence was that while Negro males over 21 constitute 26% of all males in the county … Although there has been an average of six to seven Negroes on petit jury venires in criminal cases, no Negro has actually served on a petit jury since about 1950. In this case there were eight Negroes on the petit jury venire but none actually served, two being exempt and six being struck by the prosecutor in the process of selecting the jury.

Swain to Batson (1965 – 1986)

Lower court's interpretation of Swain made equal protection claims impractical and unworkable.

- The defendant would have to investigate multiple past cases, determine the race of persons tried, the racial composition of the jury venire and petite jury and the way in which the prosecution exercised challenges.
- In most jurisdictions Defendants would be unlikely to have access to the information required from past cases to even mount a challenge based on Swain.
- According to one federal appellate court only one defendant had prevailed on an equal protection claim based on the Swain decision and that was because the prosecutor admitting always striking black prospective jurors.

This insurmountable Burden created a right without a remedy.



Batson v. Kentucky (1986) 106 S.Ct. 1712

- James Batson, an A-A man, was convicted of 2nd degree burglary and receiving stolen property by an all-white jury.
- The prosecutor struck all 4 prospective black jurors from the venire.
- Defense counsel moved to discharge the jury based on violations of the 6th and 14th Amendment.
- The Supreme court held that a defendant may make a prima facie showing of purposeful racial discrimination in the use peremptory challenges relying solely on the facts of jury selection in his specific trial.
- Rejected Swain's requirement that a defendant must show a historical pattern of racial discrimination.

Batson's three step prima facie test

- Frist, defendant must show membership in a cognizable group;
- Second, defendant must prove that the prosecutor exercised peremptory challenges to remove members of defendant's race from the venire and;
- Three, from all the circumstances of the case, defendant must show a strong likelihood that such persons were challenged solely based on race.

If a prima facie case is made burden then shifts to prosecutor to provide race neutral explanations.

- Prosecutor is required to give a clear and reasonable explanations of his actions.
- Justifications do not need to rise to the level of a cause challenge.
- The trial court then must evaluate the justification and determine whether the objecting party has carried their burden.
- Issue is whether the trial court finds the opposing counsel's group neutral explanations to be credible.

Justice Thurgood Marshall

- Marshall's dissent argued for the elimination of peremptory challenges.
- In Marshall's view the history of the last 100 years and the experience of California and Massachusetts suggested that the Batson procedure for bringing an equal protection claim to protect the right to a jury selected on non-racial grounds may be illusory.

Marshall's Concurring Opinion was prescient.

- The opinion discussed the fact that although 100 years had passed since the Strauder decision, there continued to be the systemic exclusion of blacks from serving on juries.
- Reported cases in states with Batson like procedures suggested that prosecutors could easily offer "acceptable" race neutral justifications.
- Marshall listed several examples of seemingly innocuous justifications proffered that were accepted by trial and appellate courts.

1. Juror had a son close in age to defendant;
2. Juror was uncommunicative;
3. Juror never cracked a smile indicating he did not possess sufficient sensitivity to realistically look at the facts of the case. (p. 1728.)

Implicit Bias

- Marshall noted that he was not just concerned with overt racism.
- “Nor is outright prevarication by prosecutors the only danger here. … A prosecutor’s own conscious or unconscious racism may lead him too easily to the conclusion that a prospective juror is sullen, or distant, a characterization” that might not occur to him in evaluating a white juror. (Id.)

- Marshall also knew that trial courts were not immune from implicit bias as well, “A Judge’s own conscious or unconscious racism may lead him to accept such explanations as well supported.”
- Even if all parties operate “with the best of conscious intentions, that mandate requires them to confront and overcame their own racism on all levels a challenge I doubt all of them can meet.” (Id.)

Curtis Flowers v. Mississippi (2019) 139 S.Ct. 2228

- Justice Kavanaugh wrote the opinion overturning the conviction and imposition of the death penalty based on *Batson*.
- The case is chronicled in an outstanding podcast “In the Dark.”

This was the 6th trial of Mr. Flowers for the murder of 4 people in Winnona Miss., in 1996.

- Same elected prosecutor had tired Mr. Flowers in each case.
- 3 previous convictions had been overturned by the Miss. SC for either prosecutorial misconduct or *Batson* error.
- 2 trials involving multi-racial juries had resulted in mistrials.
- Evidence was either weak, circumstantial, tainted or contradictory.
- S.C. opinion is an excellent summation of the *Batson* decision and the trial court's responsibility in insuring race neutral jury selection procedures.
- Court emphasizes that it is breaking no new ground.
- Finds that historical history of prosecutors use of challenges and specific facts of case warrant reversal based on *Batson* error.

Stay Tuned: AB 256

RETROACTIVE?

The goal of AB 256 is to make the Racial Justice Act applicable to people who have already been convicted in cases where racism was a factor.

Equity & Inclusion Series Part II -California Racial Justice Act of 2020 (Assembly Bill 2542)

CALIFORNIA RACIAL JUSTICE ACT OF 2020

ASSEMBLY BILL 2542 (STATS. 2020, CH. 317). THIS LEGISLATION AIMS TO ELIMINATE RACIAL BIAS FROM CALIFORNIA'S CRIMINAL JUSTICE SYSTEM AND TO PROVIDE REMEDIES THAT WILL ELIMINATE RACIALLY DISCRIMINATORY PRACTICES. IT ALSO SEEKS TO ENSURE THAT INDIVIDUALS HAVE ACCESS TO ALL RELEVANT EVIDENCE, INCLUDING STATISTICAL EVIDENCE, REGARDING POTENTIAL DISCRIMINATION RELATED TO CONVICTIONS OR SENTENCES. (STATS. 2020, CH. 317, § 1.) THE LEGISLATION ADDS PENAL CODE SECTION 745 AND AMENDS PENAL CODE SECTIONS 1437 AND 1437.7.

Additional New Laws Include:

Court initiated misdemeanor diversion (Assembly Bill 3234)

Criminal fees (Assembly Bill 1869)

Juries: peremptory challenges (Assembly Bill 3070)

Probation: length of terms (Assembly Bill 1950)

Death penalty: person with an intellectual disability (Assembly Bill 2512)

Conviction: expungement: incarcerated individual hand crews (Assembly Bill 2147)