

CRIMINAL
LAW



presents

Annual Trial Skills Update Seminar

Voir Dire/ Elimination of Bias/ Implicit Bias

Saturday, April 6, 2024
8:30am - 9:30am

Speakers: Tamani Taylor

Conference Reference Materials

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CCP 231.7

CCP 231.7 PROCEDURE

NO PRIMA FACIE

- Peremptory challenge is used against a juror
- Counsel or **Judge** objects to the improper use of the challenge
- Jury is excused and all discussions occur outside their presence
- Party that exercised the pc offers explanation



CCP 231.7 PROCEDURE

- The court evaluates the explanation based on the “totality of the circumstances”
- The court shall evaluate the reason given and not speculate or assume the possibility of other justifications
 - Not to be confused with ulterior motives



List of
circumstances
the court can
consider

Obj. party a member of the same R/E as
challenged juror

CW is not a member of the same R/E as
challenged juror

Witnesses or parties are not members of same
R/E as the challenged juror

The number
and types of
questions
posed to a
prospective
juror

Did the challenging party fail to question the
challenge juror

Did the challenging party only engage in
cursory questioning of the challenged juror

Did the challenging party ask different
questions to the juror in contrast to those asked
of jurors from different R/E group

CCP 231.7 FACTORS: TOTALITY OF CIRCUMSTANCES EVALUATION



CCP 231.7 FACTORS: TOTALITY OF CIRCUMSTANCES EVALUATION CONT'D

Whether R/E or perceived membership in any of those groups bear on the facts of the case

Did jurors not of the same R/E background as challenged juror give similar answers but were not challenged-
Comparative juror analysis

The reason given might disproportionately impact a particular R/E group

Does the record support the reason given or does the reason given contradict the record

Is there a Hx of the lawyer or office of disproportionate use of p.c against a given race/ethnicity

- In the present case or *in past cases*
- Hx of Batson/Wheeler violations



CCP 231.7 STANDARDS

The court denies the challenge if:

- there is a **substantial likelihood** that an “objectively reasonable person” **would view** race/ethnicity as **a factor** in the use of the peremptory challenge
- Objectively reasonable person is aware that unconscious/institutional bias has resulted in unfair exclusion of jurors
- Substantial likelihood- more than “mere possibility” but less than the standard of “more likely than not.”
- Would view r/e as **a factor**



CCP 231.7

- The court need not find purposeful discrimination to sustain the objection
 - Both conscious (intentional) and unconscious (implicit) bias are basis for sustaining the objection



CCP 231.7

- An objection to the use of a peremptory challenge can be made at anytime before the jury is impaneled
- Exception: Can object after jury is impaneled
 - If information becomes known that could not reasonably be known before it was impaneled
 - Example: After jury is impaneled you find out that the DA only ran RAP sheets on black jurors
- Make the court keep all challenged jurors available for re-seating
 - Juror assembly
 - On standby





REMEDIES

JUROR IS RE-SEATED

JURY SELECTION STARTS AGAIN

A MISTRIAL IF THE JURY'S BEEN SWORN

OBJECTING PARTY GETS ADDITIONAL PERMEPTORY CHALLENGES

ANY REMEDY THE COURT DEEMS APPROPRIATE

CCP 231.7- PRESUMPTIVELY INVALID REASONS

- List of reasons that are presumptively invalid.
 - They are historically associated with racial/ethnic discrimination
 - Acknowledges the role demeanor-based reasons play in discriminatory strikes.
- The presumption of invalidity can only be overcome by “clear and convincing” evidence that an objectively reasonable person would view the rationale as unrelated to a prospective juror's race.



CCP 231.7 PRESUMPTIVELY INVALID REASONS

- Expressing distrust or negative experience w/ L.E or criminal legal system
- Expressing belief that L.E engages in racial profiling or that criminal laws have been enforced in a discriminatory manner
- Close relationship with people who have been stopped, arrested, or convicted of a crime
- A prospective juror's neighborhood
- Having a child outside of marriage
- Receiving state benefits
- ESL
- Ability to speak a different language
- Dress, attire, or personal appearance
- Employment in a field disproportionately occupied by members or comprised of members of R/E group
- Lack of employment or underemployment
- A prospective juror's friendliness with another prospective juror of the same R/E
- Any justification that is similarly applicable to a questioned prospective juror who are not of the same R/E background as the challenged juror but were not the subject of a peremptory challenge





**CCP 231.7 AND
NOT HISTORICALLY
EXCLUDED GROUPS**

- Legislative intent is to reverse history of exclusion of specific groups
- If person does not belong to a group that has been historically excluded, then the purpose of CCP 231.7 are not fulfilled
 - Example: White male juror whose first language is French
- Defense use of peremptory challenge is subject to CCP 231.7 objection

CCP 231.7-DISCOVERY

- CCP 231.7-allows for the court to consider whether the party or their office historically engaged in the use of peremptory challenges based on R/E (in present cases too)
 - Sustained Batson/Wheeler challenges based on appellate record or office data
 - Historically CA courts have not found Batson/Wheeler violations, so this data is not an accurate reflection of a particular DA or Offices practice of discriminatory use of peremptory challenges
 - Compilation of use of peremptory challenges both sustained and not by a particular DA or office against R/E group



CCP 231.7-DISCOVERY

- RJA-Establish the prima facie
 - Search (Appellate Court request/Westlaw) for Batson/Wheeler analysis
 - Info on unsustain Batson/Wheeler objections
 - Obtain Prosecution training materials on fraudulent race neutral reasons for peremptory challenge
- Then request data as to a specific DA or the office
- CPRA
 - Ask for data that could be considered public record and let them tell you they do not have it such as data on number of peremptory challenges made based on R/E



CCP 231.7-DISCOVERY

- Discovery request-Sub (G)

- Sub (G) language was in RJA until AB3070 passed so argue that it was intended as a discovery statute:

“In making its determination, the circumstances the court may consider include but are not limited to, any of the following:

...(G)Whether the counsel or counsel’s office exercising the challenge has used peremptory challenges disproportionately against a given race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or perceived membership in any of those groups, in the present case or in past cases, including whether the counsel or counsel’s office who made the challenge has a history of prior violations under [Batson/Wheeler]”



MAIN POINTS

- No Prima Facie- “I object pursuant to CCP 231.7”
- The judge is required to know that intentional and implicit bias has resulted in the unfair exclusion of jurors
- Court can find implicit bias was a factor in the use of the peremptory challenge
- Court cannot substitute it’s own reason why the juror could’ve been kicked
- Court must base it’s decision on the totality of the circumstances



MAIN POINTS CONT'D

- Presumptively invalid reason can only be overcome by clear and convincing evidence that the peremptory challenge was not based on race
- Court must make a clear record for appeal
- Standard of review is De Novo (not Abuse of Discretion)
- Make a record that refers to the legislative history and intent behind the statute
- Do not have to use all of your peremptory challenges to preserve the right on appeal
- Keep challenged jurors for re-seating



PRACTICAL TIPS

CCP 231.7:

- Is about making your record
- Requires strategizing your voir dire
 - Avoid violating the statute
 - Anticipate where the DA is likely to violate the statute
 - Assist the court in denying DA pc



PRACTICAL TIPS

Self check

- Think about what implicit bias you have going into trial
- Argue for more time to question jurors
- Request time/transcripts before exercising pc or if your exercise of pc is objected to
- Cause challenge a juror before exercising a peremptory challenge



PRACTICAL TIPS

Perceived race issues:

- Request a questionnaire
- Sidebar
- Who decides the race of an individual
 - Arguably it is the person who exercises the challenge



Procedure/Standards	Presumptively Invalid Reasons	Court Analysis	Remedies
PARTY CHALLENGES JUROR	DISTRUST/NEGATIVE L.E./CRIMINAL LEGAL EXPERIENCE	Witnesses or CW of different R/E or Obj party is same R/E as Juror	JURY SELECTION STARTS AGAIN
OBJECTION BY PARTY OR COURT	L.E ENGAGE IN RACIAL PROFILING /DISCRIMINTORY ENFORCE OF CRIM LAWS	DOES R/E BEAR ON FACTS OF CASE	RE-SEAT THE JUROR
JURY EXCUSED	CLOSE RELATIONSHIP W/ PEOPLE STOPPED, ARRESTED, OR CONVICTED	NUMBER AND TYPE OF QUEST POSED TO JUROR	MISTRIAL IF JURY HAS BEEN IMPANELED
EXPLANATION PROVIDED BY CHALLENGING PARTY	JUROR'S NEIGHBORHOOD	OTHER JURORS PROVIDE SIMILAR ANSWER BUT NOT CHALLENGED	OBJECTING PARTY GETS ADDITONAL P.C
COURT SITS AS OBJECTIVELY REASONABLE PERSON AWARE THAT CONSCOUS AND IMPLICIT BIAS EXISTS	CHILD OUTSIDE OF MARRIAGE	IS STATED REASON DISPROPRTIONATELY ASSOCIATED W. R/E	ANY REMEMDY THE COURT DEEMS APPROPRIATE
COURT ONLY CONSIDERS REASON GIVEN AND CANNOT SPECULATE OR ASSUME AS TO OTHER JUSTIFICATIONS	RECEIVE STATE BENEFITS	IS REASON FOR CHALLENGE UNSUPPORTED OR CONTRARY TO THE RECORD	
TOTALITY OF CIRCUMSTANCES MUST BE CONSIDERED	ESL OR ABILITY TO SPEAK ANOTHER LANGUAGE	HAS THE PARTY OR THE OFFICE ENGAGED IN A HX OF CHALLENGINGBASED ON R/E	
CHALLENGE IS DENIED IF SUBSTANTIAL LIKELIHOOD A REASONABLY OBJECTIVE PERSON WOUL D VIEW R/E A FACTOR IN P.C	DRESS, ATTIRE, OR PERSONAL APPEARANCE		
	EMPLOYED IN FIELD THAT IS OCCUPIED BY OR SERVES R/E GROUP/LACK OF OR UNDER EMPLOYMENT		
	DEMEANOR BASED:INNATTENTIVE, EYE CONTACT, UNINTELLIGENT ANSWERS, DEMANOR, BAD ATTITUDE		
	FRIENDLINESS W/ JURORS OF SAME R/E GROUP		
	REASON THAT IS APPLICABLE TO UNCHALLENGED JUROR OF DIFFERENT R/E		

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SOURCES

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2. *Batson v. Kentucky*, 476 U.S. 79 (1986)
3. *People v Wheeler*, 22 Cal.3d 258 (1978)
4. <https://www.law.Berkeley.edu/wp-content/uploads/2020/06/Whitewashing-the-Jury-Box.pdf>
5. <https://nccc.georgetown.edu/bias/module-3/3.php>
6. AB3070
7. CCP 231.7

