FIRST DISTRICT APPELLATE PROJECT
TRAINING SEMINAR
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BATSON V. KENTUCKY - QUICKIE OUTLINE

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Wheeler/Batson Quickie

I. The Claim

A claim under *Batson v. Kentucky*, (1986) 476 U.S. 79 and *People v Wheeler* (1978) 22 Cal.3d 258 exists where the prosecutor used one or more peremptory challenges to strike venire members because of the jurors' race or gender, a practice which violates the Equal Protection Clause of the Fourteenth Amendment.

II. Elements & Procedure

A. Challenge Must Be Against Member of a Cognizable Group

B. **Step One**: The defendant must establish a prima facie case by raising an inference of purposeful discrimination in the prosecutor's use of peremptory strikes.

C. **Step Two**: After the defendant makes a prima facie showing, the burden shifts to the State to come forward with a neutral (non-discriminatory) explanation for the peremptory strikes at issue.

D. **Step Three**: The court then has the duty to determine if the defendant has established purposeful discrimination – that is, whether the prosecutor's "neutral" explanation is actually a pretext for strikes that were, in fact, based on the race or gender of the juror.

E. **Remedy**: If the defendant is successful in establishing purposeful discrimination on habeas review, the remedy is automatic reversal – a Batson equal protection violation is not subject to harmless error analysis.

III. Cognizable Group

Yes:	race (*Batson*), gender (*J.E.B. v. Alabama*, 511 U.S. 127 (94).)
Yes, but only in California:	religion, sexual orientation (see *P. v. Bell*, 40 Cal.4th 582, 599 (2007) ("Like the trial court, we assume lesbians are a cognizable group for Wheeler-Batson purposes.")

No, not even
in California: young adults, older adults, disabled persons, obese persons, and persons with drug histories or experience

Maybe: ethnic groups (but not by marriage)

IV. Step One Rules

A. The burden at step one is to to "show that the totality of the relevant facts gives rise to an inference of discriminatory purpose."

B. Evidence that may establish prima facie case:
– pattern of strikes / statistical analysis
– disparate questioning
– CJA, but not in California
– history of discrimination in prosecution's office

1. The statistics must take into account the entire statistical picture.
– Thus, one strike is probably not enough; but see *U.S. v. Collins*
– Thus, even removing all members of a cognizable group may not be enough.

2. California does **not** permit CJA at Step One (*P. v. Carasi*, 44 Cal.4th 1263, 190 P.3d 616 (2008), but the Feds do, so consider doing it for federal habeas purposes.

C. Std of review is deferential unless it was unclear whether the trial court applied the correct standard. Then it's de novo.

V. Step Two Rules

A. The prosecution must come forth with the actual reason.
– Claim that juror wd be biased b/c of group affiliation, not sufficient
– Professions of good faith are not enough.
– Speculation is not enough. Potential reasons are not sufficient.

B. If trial court asks prosecutor for explanation, the question whether def made a prima facie case is moot. (*Hernandez v. N.Y.)*

But if trial court expressly says "no prima facie case" but asks for justification "for the record," then existence of prima facie case is not moot. (*P. v. Howard*)

C. Standard of Review: Whether the justification offered is an adequate race-neutral reason is a question of law reviewed de novo. (Tolbert v. Page, 182 F.3d 677, 680 (9th Cir. 1999).

VI. Step Three Rules

A. Question is whether the prosecution justification is persuasive.

"The issue comes down to whether the trial court finds the prosecutor's race [or gender] neutral explanations to be credible. Credibility can be measured by, among other factors, the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy." *Miller-El v. Cockrell*, 537 U.S. 322, 339, 123 S.Ct. 1029 (2003).

B. Standard of review: because finding of intent to discriminate is a question of fact, it is entitled to deference. (*Hernandez v. N.Y.)*

C. Court must evaluate all the circumstances, including those establishing the prima facie case. This includes statistical disparities, CJA, disparate questioning, and historical factors.

D. One bad justification may undermine others.

E. Mixed motive – The Big Issue

– not settled in California (*P. v. Schmeck* (2005) 37 Cal.4th 240
– most circuits follow Eq. Prot. mixed motive analysis (e.g., *Gattis v. Snyder* 278 F.3d 222 (3d Cir. 2002); *Howard v. Senkowski*, 986 F.2d 24 (2d Cir.1993) *Jones v. Plaster*, 57 F.3d 417, 421-22 (4th Cir.1995).)

– Kesser v. Cambra (dissent), 465 F.3d 351 (9th Cir. 2006)
"where both race-based and race-neutral reasons have motivated a challenged decision, a supplementary analysis applies. In these situations, the Court allows those accused of unlawful discrimination to prevail, despite clear evidence of racially discriminatory motivation, if they can show that the

challenged decision would have been made even absent the impermissible motivation, or, put another way, that the discriminatory motivation was not a "but for" cause of the challenged decision."

F. Defense challenges to members of the cognizable group = irrelevant