

PICKING A MURDER MINDED JURY

POLICE LINE DO NOT CROSS



**BRITT IMES
CHIEF DEPUTY DA
SAN BERNARDINO COUNTY, CA**

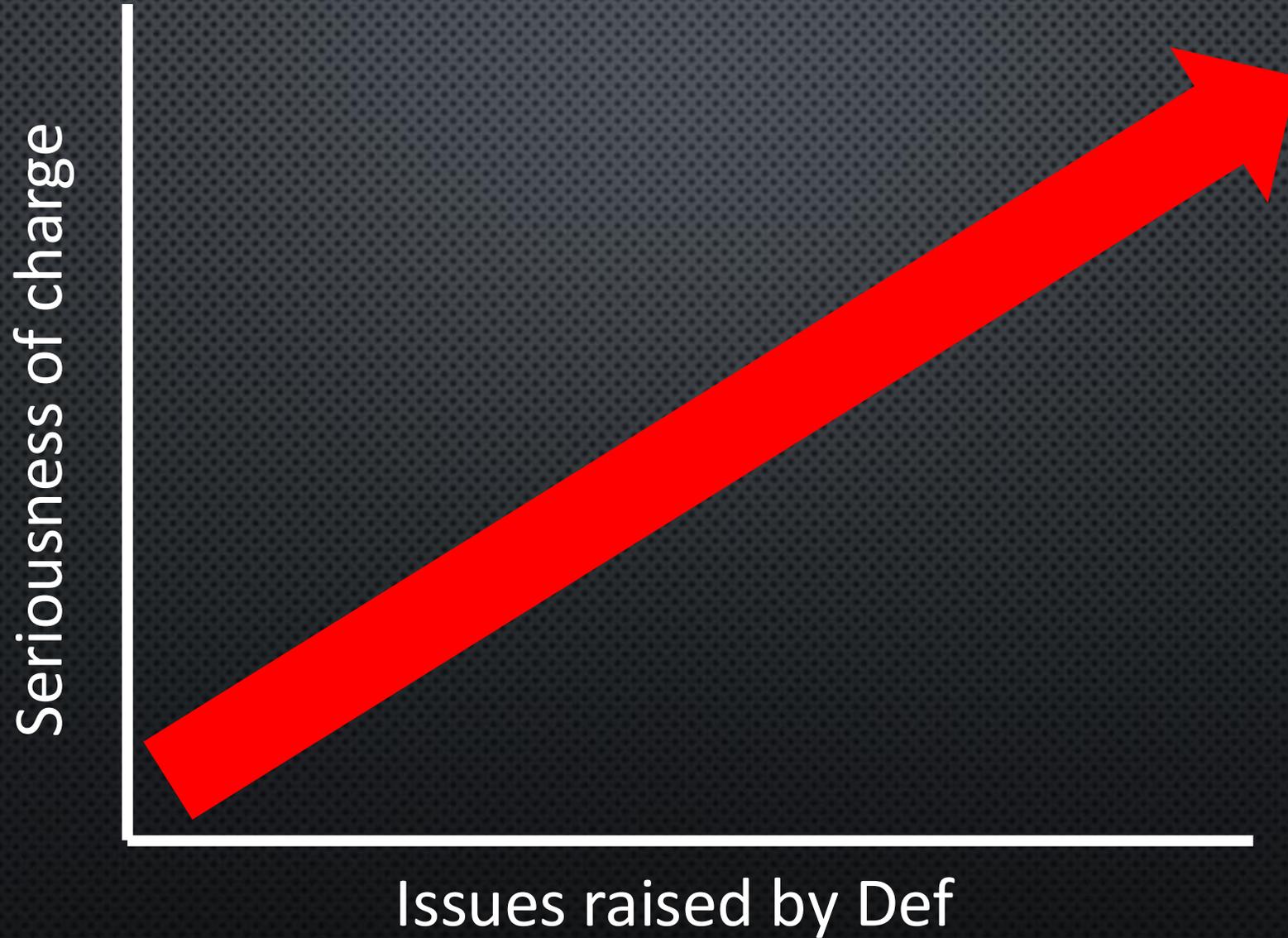
AGENDA

- A LITTLE BIT ON THE BASICS OF JURY SELECTION
- A LITTLE BIT ON *BATSON* ISSUES
- A LOT MORE ON PRACTICAL STRATEGIES AND IMPLEMENTATION

Caveats

- I am in crazy California
- Local rules and statutes may or will differ

VOIR DIRE BASICS



JURY SELECTION BASICS

QUALIFICATIONS

- RANDOMLY SELECTED PANEL
- ALL PERSONS ELIGIBLE
 - EXCEPT, NON-US CITIZENS, UNDER 18, NOT CA RESIDENTS, NOT RESIDENT OF COUNTY, FELONS, INSUFFICIENT LANGUAGE SKILLS, SERVING AS JURORS, SUBJECT OF CONSERVATORSHIP
 - UNDUE HARDSHIP



JURY SELECTION BASICS CNT'D. CHALLENGES

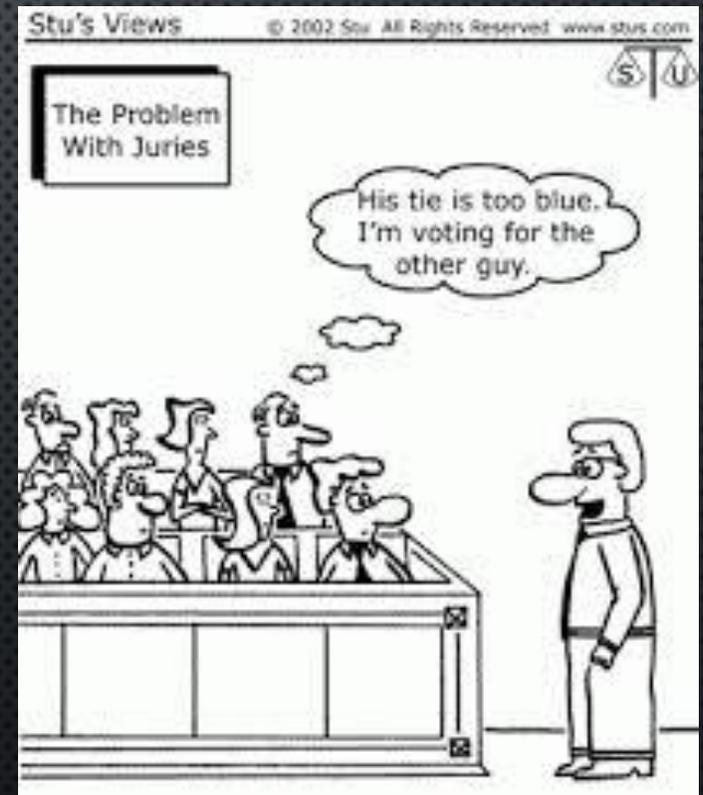
- TO ENTIRE PANEL FOR CAUSE
 - PRIOR TO SWEARING OF PANEL
 - IN WRITING WITH PLAIN AND DISTINCT GROUNDS
 - SERVE JURY COMMISSIONER
- CHALLENGE FOR CAUSE FOR:
 - GENERAL DISQUALIFICATION – LACKING ANY OF THE BASIC QUALIFICATIONS
 - ACTUAL BIAS – STATED INABILITY TO BE IMPARTIAL DUE TO NATURE OF CASE, PARTIES, RELATIONSHIPS, ETC.
 - IMPLIED BIAS – CIRCUMSTANTIAL INABILITY TO BE IMPARTIAL DUE TO NATURE OF CASE, PARTIES, RELATIONSHIPS, ETC. DESPITE CLAIMS TO THE CONTRARY.
- PEREMPTORY CHALLENGE

VOIR DIRE BASICS

- COURTS TYPICALLY HAVE BROAD DISCRETION TO CONTROL OR LIMIT VOIR DIRE
- USUALLY, TO DEVELOP ABILITY TO INTELLIGENTLY EXERCISE A CHALLENGE
 - Cf. CCP §223 AND CCP §222.5

VOIR DIRE BASICS CNT'D.

- GET THEM TALKING
- BE PERSONABLE
- ALWAYS LISTEN, WRITE, OBSERVE
- GET THEM COMFORTABLE WITH YOU
- GET YOURSELF COMFORTABLE WITH THEM
- MAINTAIN PROFESSIONALISM
- MAINTAIN SERIOUSNESS OF CASE



PROPER QUESTIONS

- ONLY IN AID OF THE EXERCISE OF CHALLENGES FOR CAUSE. CCP §223; *PEOPLE V. NOGUERA* (1992) 4 CAL.4TH 599
 - PRIOR TO PROP 115 IN 1990: ANY QUESTION “REASONABLY DESIGNED TO ASSIST IN THE INTELLIGENT EXERCISE OF PEREMPTORY CHALLENGES” *PEOPLE V. WILLIAMS* (1981) 29 CAL.3D 392
- “A REASONABLE INQUIRY INTO SPECIFIC LEGAL PREJUDICES” *PEOPLE V. BALDERAS* (1985) 41 CAL.3D 144

PROPER QUESTIONS

- DO YOU BELONG TO ANY RELIGIOUS SECT WHOSE TEACHINGS MIGHT INTERFERE WITH THE CONSIDERATION OF THE CASE? *PEOPLE V. DAILY* (1958) 157 CAL.APP.2D 649
- DO YOU HAVE ANY INHERENT BELIEF BASED UPON ANY CHURCH'S TEACHINGS THAT MIGHT INTERFERE WITH A FAIR CONSIDERATION OF THE CASE? *DAILY*
- DO YOU BELONG TO ANY POLITICAL, RELIGIOUS, SOCIAL , INDUSTRIAL, FRATERNAL, LAW ENFORCEMENT OR OTHER ORGANIZATION WHOSE BELIEFS OR TEACHINGS WOULD PREJUDICE YOU FOR OR AGAINST EITHER PARTY TO THE CASE? *PEOPLE V. BOYLE* (1937) 22 CAL.APP.2D 143

PROPER QUESTIONS

- WHAT IS YOUR OCCUPATION? *PEOPLE V. BOORMAN (1956) 142 CAL.APP.2D 85*
- MAY ASK ABOUT A JUROR'S WILLINGNESS TO APPLY LEGAL PRINCIPLES. *WILLIAMS*
- IF YOU WERE FACED WITH THIS CHARGE, WOULD YOU BE WILLING TO BE TRIED WITH JURORS WHO HAD THE SAME ATTITUDE TOWARD THE CHARGE AND THE DEFENDANT AS YOU DO NOW? *PEOPLE V. ESTORGA (1928) 206 CAL. 81*

PROPER QUESTIONS

- EXPLANATION OF THE LAW APPLICABLE TO THE CASE AS A BASIS FOR HYPOTHETICAL QUESTIONS TO DETERMINE WHETHER THE JURORS WOULD FOLLOW THE INSTRUCTIONS OF THE COURT, AND TO ASCERTAIN THEIR STATE OF MIND ON THE ISSUES PRESENTED. *PEOPLE V. WEIN* (1958) 50 CAL.2D 383
- ABILITY TO DRAW INFERENCES FROM CIRCUMSTANTIAL EVIDENCE. *PEOPLE V. MENDOZA* (2000) 24 CAL.4TH 130

PROPER QUESTIONS

- WILL YOU FOLLOW THE JUDGE'S INSTRUCTIONS? *PEOPLE V. MODELL (1956) 143 CAL.APP.2D 724*
- MAY ASK ABOUT A JUROR'S WILLINGNESS TO APPLY LEGAL PRINCIPLES. *WILLIAMS*
- WILLINGNESS TO CONSIDER DEATH AS A PENALTY. *PEOPLE V. FIELDS (1983) 35 CAL.3D 329; NOGEURA*

IMPROPER QUESTIONS

- WHAT RELIGION DO YOU BELONG TO? *PEOPLE V. DAILY* (1958) 157 CAL.APP.2D 649
- QUESTIONS THAT SEEK TO ASCERTAIN JUROR'S VIEWS ON DEATH PENALTY IN ACTUAL OR HYPOTHETICAL CASES NOT BEFORE HIM (I.E. HITLER) *PEOPLE V. FIELDS* (1983) 35 CAL.3D 329
- QUESTIONS THAT ATTEMPTS TO INDOCTRINATE THE JURY AS TO THE MEANING OR APPLICABILITY OF PARTICULAR RULES OF LAW
 - EXAMPLE: "DO YOU HAVE ANY PERSONAL OBJECTION TO A RULE OF CRIMINAL JURISPRUDENCE WHICH PROVIDES THAT THOSE JURORS ENTERTAINING A REASONABLE DOUBT OF THE DEFENDANT'S GUILT SHOULD VOTE FOR ACQUITTAL?" *PEOPLE V. PARKER* (1965) 235 CAL.APP.2D 86

The last words you really want to hear
during jury selection:

**OBJECTION YOUR HONOR, I
WOULD LIKE TO MAKE A
BATSON MOTION**





**KEEP
CALM
AND
DON'T
PANIC**





***BATSON V.
KENTUCKY
(1986) 476 US 79***



BATSON CHALLENGES KNOW THE PLAYING FIELD

- “THE USE OF PEREMPTORY CHALLENGES TO REMOVE PROSPECTIVE JURORS ON THE SOLE GROUND OF GROUP BIAS” *PEOPLE V. WHEELER (1978) 22 CAL.3D 258*
- “THE EQUAL PROTECTION CLAUSE FORBIDS THE PROSECUTOR TO CHALLENGE POTENTIAL JURORS SOLELY ON ACCOUNT OF THEIR RACE” *BATSON*
- MAY BE RAISED BY EITHER PARTY
- BASIC RULE: THERE MUST BE “AN IDENTIFIABLE GROUP DISTINGUISHED ON RACIAL, RELIGIOUS, ETHNIC, OR SIMILAR GROUNDS – WE MAY CALL THIS ‘GROUP BIAS’.”

BATSON CHALLENGES



COGNIZABLE	Possibles	NON-COGNIZABLE
<ul style="list-style-type: none">• RACE• ETHNICITY• RELIGION*• GENDER• SEXUAL ORIENTATION• DISABILITY*	<ul style="list-style-type: none">• Foreign language speakers• Resident aliens	<ul style="list-style-type: none">• INCOME• EDUCATION LEVEL• OCCUPATION• BATTERED WOMEN• EX-FELONS• AGE

* Except when it prevents a juror from applying the law or otherwise performing their duties

BATSON CHALLENGES

THREE PRONG TEST



- OBJECTING PARTY MUST ESTABLISH PRIMA FACIE SHOWING “THAT THE TOTALITY OF THE FACTS GIVES RISE TO AN INFERENCE OF DISCRIMINATORY PURPOSE.” *JOHNSON V. CALIFORNIA (2005) 545 US 162*
- IF ESTABLISHED, BURDEN SHIFTS TO OTHER PARTY TO PROVIDE NEUTRAL JUSTIFICATIONS FOR CHALLENGES
- COURT DECIDES IF OBJECTOR HAS ESTABLISHED PURPOSEFUL DISCRIMINATION

BATSON CHALLENGES

PRACTICAL TIPS FOR PRONG 1



- MAKE DEFENSE ARTICULATE CHALLENGE
 - WHICH JUROR(S)
 - WHICH COGNIZABLE GROUP
- MAKE CLEAR RECORD OF:
 - ALL PARTICIPANTS' CLASSIFICATION
 - PANEL COMPOSITION
 - FINAL JURY COMPOSITION

BATSON CHALLENGES

PRACTICAL TIPS FOR PRONG 2



- USE YOUR REPUTATION WITH COURT TO ADVANTAGE
- INVITE COMPARISONS TO OTHER KICKS OR DEFENSE KICKS
- INVITE COURT TO DOCUMENT ITS OBSERVATIONS
- SHOULD INSIST ON JUSTIFYING KICKS EVEN IF COURT DOESN'T THINK PRIMA FACIE SHOWN



BATSON CHALLENGES

PRACTICAL TIPS FOR PRONG 2

- “...ENCOURAGE PROSECUTORS TO STATE THEIR REASONS FOR PEREMPTORY STRIKES AT THE TIME OF A BATSON CHALLENGE...THE BURDEN OF EXPLAINING THE REASONS FOR A CHALLENGE...IS MINIMAL. JUDICIAL ECONOMY WOULD BE WELL SERVED....IN FACT, PROSECUTORS USUALLY HAVE GOOD AND PERMISSIBLE REASONS FOR THEIR CHALLENGES; REFUSING TO STATE THEM CAN CREATE UNNECESSARY SUSPICION, AS WELL AS UNNECESSARY LITIGATION.” *US V. COLLINS (2009) 551 F.3D 914 AT 927* (A CASE THAT WAS REVERSED DESPITE NO PATTERN WHEN DA REFUSED TO JUSTIFY)



BATSON CHALLENGES

PRACTICAL TIPS FOR PRONG 2

- “IF A PROSECUTOR’S PROFFERED REASON FOR STRIKING A BLACK PANELIST APPLIES JUST AS WELL TO AN OTHERWISE-SIMILAR NON-BLACK WHO IS PERMITTED TO SERVE, THAT IS EVIDENCE TENDING TO PROVE PURPOSEFUL DISCRIMINATION TO BE CONSIDERED AT BATSON’S THIRD STEP.” *MILLER-EL V. DRETKE* (2005) 545 U.S. 231
- THEN ISN’T EXCUSING A DISSIMILAR JUROR FOR THE SAME REASON INHERENTLY NEUTRAL?

BATSON CHALLENGES

PRACTICAL TIPS FOR PRONG 3



- MAKE COURT MAKE EXPRESS FINDING OF **NO** PURPOSEFUL DISCRIMINATION
- MAKE SURE RECORD IS CLEAR
- MAINTAIN ALL JURY LISTS AND NOTES

BATSON CHALLENGES NEUTRAL JUSTIFICATIONS



- LIFE EXPERIENCE
- INABILITY TO UNDERSTAND
- PRIOR HUNG JURY
- HOSTILE BODY LANGUAGE
- NERVOUS
- SMILED AT DEFENDANT
- GOOD RAPPORT W/ DEF ATTY.
- SYMPATHETIC LOOKS TO D
- FAMILY MEMBERS ARRESTED
- NO EYE CONTACT WITH YOU
- TEACHERS ARE LIBERAL
- POOR GROOMING
- NON-RESPONSIVE
- BETTER JURORS COMING

BATSON CHALLENGES NEUTRAL JUSTIFICATIONS



- DISTRUST LAW ENFORCEMENT
- AGE—YOUTH IS NOT A CLASS
- LACK OF SERIOUSNESS
- LAW STUDENT
- LACK OF ABILITY TO UNDERSTAND LEGAL CONCEPTS
- BATTERED WOMAN
- ANTI-DEATH PENALTY
- LIMITED EDUCATION / INTELLIGENCE
- TRANSLATION—WOULD NOT FOLLOW
- LIVES CLOSE TO CRIME SCENE
- HUNCH/GUT FEELING ARE VALID
- RESIDENT ALIEN

BATSON CHALLENGES CONSEQUENCES



- REMEDIES
 - EXCUSE PANEL
 - MISTRIAL
 - “SEVERE” MONETARY SANCTIONS AND/OR
 - WITH THE CONSENT OF MOVING PARTY, RESEAT THE CHALLENGED JUROR *PEOPLE V. WILLIS* (2002) 27 CAL.4TH 811.
- PENALTIES
 - POSSIBLE STATE BAR ISSUE
 - REVERSAL ON APPEAL FOR PROSECUTORIAL MISCONDUCT REQUIRES REPORT

BATSON CHALLENGES

PRACTICAL TIPS



- MAKE YOUR RECORD WITH VOIR DIRE
 - BE THOROUGH IN QUESTIONING
- TAKE GOOD NOTES ON EACH JUROR
 - BODY LANGUAGE
 - FACIAL EXPRESSIONS
 - ATTENTIVENESS
 - AGE
 - SPECIFIC ISSUES
 - INTERACTION WITH COURT, COUNSEL AND OTHER JURORS
 - DRESS AND READING MATERIAL

BATSON CHALLENGES

PRACTICAL TIPS



- BE AWARE OF COMPARATIVE ANALYSIS
 - SIDE-BY-SIDE COMPARISON OF JUSTIFICATIONS
 - NOTE UNIQUE FACTORS THAT DIFFERENTIATE
 - *SEE MILLER-EL V. DRETKE* (2005) 545 US 231
 - RELEVANT CIRCUMSTANTIAL EVIDENCE, BUT NOT DISPOSITIVE *PEOPLE V. LOMAX* (2010) 49 CAL.4TH 530

BATSON CHALLENGES

PRACTICAL TIPS



- NOTE RACIAL/GENDER MAKE UP OF PANEL?
 - SPECIFIC NUMBERS?
- MAKE RECORD OF NONVERBAL REASONS
 - “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

What's Good for the Goose



Is Good for the Gander

BATSON CHALLENGES

OFFENSIVE USE



- DON'T BE AFRAID TO CHALLENGE DEFENSE TACTICS
 - PRINCIPLES APPLY REGARDLESS OF WHICH PARTY USES. *P. V. WILLIS* (2002) 27 CAL.4TH 811
- ESTABLISH SOLID PRIMA FACIE SHOWING
 - SPECIFIC NUMBERS CHALLENGED, IN BOX, IN VENIR
 - INCONSISTENT QUESTIONING
 - UNEQUAL QUESTIONING
 - HISTORICAL FACTS
 - OFFICE
 - DEFENSE ATTORNEY
- USE COMPARATIVE ANALYSIS
- USE *MILLER-EL V. DRETKE* (2005) 545 US 231 ANALYSIS TO YOUR ADVANTAGE

OBJECTIONS TO VOIR DIRE

- DOES NOT GO TO CAUSE OR THE USE OF A PEREMPTORY CHALLENGE
- ATTEMPTS TO INDOCTRINATE JURORS ON THE LAW
- ASKS JURORS TO PREJUDGE THE EVIDENCE
- TESTS JURORS UNDERSTANDING OF THE LAW
- INCORRECT STATEMENTS OF LAW
- ATTEMPT TO PREJUDICE JUROR FOR OR AGAINST A PARTICULAR PARTY OR WITNESS

DANGER

ATTACK GEESE

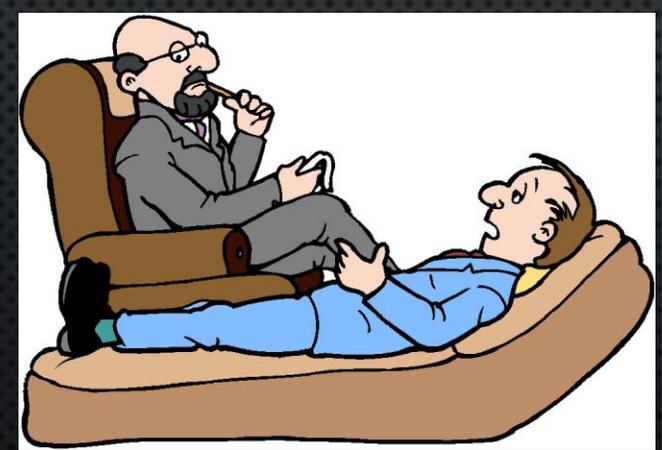
PROCEED AT OWN RISK

PICKING A MURDER MINDED JURY

- USE A QUESTIONNAIRE?
- LARGER GROUPS (12, 18, 24)?
- CASE INTRODUCTION? BY WHOM?
- SHOW PHOTOS?
- HAVE OTHERS OBSERVE (CASE AGENT!)



IS THERE AN IDEAL MURDER MINDED JUROR?



HOT TOPICS

- MURDER IS DIFFERENT!
- DISPEL THE CSI / LAW & ORDER EFFECT
- CIRCUMSTANTIAL EVIDENCE
- RAT OUT THE HANGERS
- MENTAL DEFENSES
- STANDARD OF PROOF
- KNOWLEDGE OF THE SYSTEM
- VICTIM, WITNESS OR DEFENDANT SPECIFIC ISSUES
- MONEY QUESTION

MURDER IS DIFFERENT!

- DEAL WITH EMOTIONS
 - WITNESSES
 - SPECTATOR FAMILY MEMBERS
 - THEIR OWN
- DEAL WITH GRAPHIC PICTURES
- DEAL WITH GRAPHIC TESTIMONY
- FEELING JOB IS HARDER ONLY BECAUSE OF CHARGE
- GREATER CONSEQUENCES



DISPEL THE CSI / LAW & ORDER EFFECT



- FICTIONAL TV STANDARDS
- SCIENCE OR PROCEDURE DOESN'T EXIST
- EVIDENCE DOESN'T EXIST IN EVERY CASE
- ALL QUESTIONS NOT ANSWERED 24 MINUTES
 - COURTROOM THEATRICALS
- EXPECTATION WILL HAPPEN/BE IN THIS CASE
- OUR VICTIM WON'T BE IN NEXT WEEK'S EPISODE



DISPEL MYSTERY OF CIRCUMSTANTIAL EVIDENCE

- MORE POWERFUL THAN DIRECT EVIDENCE
- REPLACES THOUGHT BUBBLES
- ACTIONS SPEAK LOUDER THAN WORDS
- RELIES ON COMMON SENSE
- ABILITY TO DRAW REASONABLE CONCLUSIONS
- USE OF ANALOGY (HEART BEAT, RAIN, COOKIE JAR)
- WILL THEY WANT MORE?

IN MOST CASES, A MISTAKE IN JURY SELECTION WILL NOT LOSE YOUR CASE FOR YOU, UNLESS YOU PICKED THIS SCHMUCK:



IT WILL, HOWEVER, ALMOST CERTAINLY HANG IT.



RAT OUT THE HANGER

- OBLIGATION OF EACH JUROR TO OPENLY DISCUSS THE EVIDENCE AND THE INSTRUCTIONS
- TALK ABOUT DUTY TO FOLLOW LAW
- WILLING AND ABLE TO LISTEN TO EACH OTHER, DISCUSS THE EVIDENCE RECEIVED DURING THE TRIAL, AND WORK TOGETHER TO REACH A DECISION?
- IF AT SOME POINT YOU REALIZE EITHER YOURSELF OR ONE OF YOUR FELLOW JURORS REFUSES TO FOLLOW LAW, HAS A BIAS, JUST CAN'T BE FAIR, WILLING TO NOTIFY THE COURT.
 - CAUTION: *PEOPLE V. ENGELMAN* (2002) 28 CAL.4TH 436 INVALIDATING SNITCH JURY INSTRUCTION CALJIC 17.41.1

MENTAL DEFENSES

- EXPOSURE TO MENTAL HEALTH OR SUBSTANCE ABUSE ISSUES
- BELIEVE IT IS AN INFALLIBLE SCIENCE?
- WILLINGNESS TO ACCEPT CONCEPT OF MALINGERING
- CAN BE CRAZY AND STILL HAVE INTENT TO KILL

• KNOW



USE



KNOWLEDGE OF THE SYSTEM

- FROM TV OR REAL LIFE
- FRIENDS OR FAMILY INVOLVED IN:
 - LAW ENFORCEMENT
 - CORRECTIONS
 - LEGAL FIELD
 - VICTIM, WITNESS
 - CHARGED, CONVICTED
- EMPLOYED IN CORRECTIONS SYSTEM
 - COUNSELOR, NURSE, FOOD SERVICE, VOCATIONAL TRAINING, RELIGIOUS SERVICES

STANDARD OF PROOF

- SAME FOR ALL CRIMES
- DO THEY THINK SHOULD BE HIGHER
- SHOULD 187 BE DIFFERENT?
- AVOID TALK ABOUT WHAT STANDARD IS, EXAMPLES, METAPHORS, ETC.

VICTIM / WITNESS ISSUES

- THE UNDESIRABLE VICTIM
 - DRUG DEALER/USER
 - GANG MEMBER
 - PEDOPHILE
- GANG CASES
 - RECANTATION
- CREDIBILITY ISSUES
 - PRIORS
 - DRUG/ALCOHOL USE

**Not automatically
unbelievable.
Focus back on following
the law dealing with
evaluating evidence and
testimony**

DEFENDANT SPECIFIC

- SYMPATHY FACTORS
 - AGE
 - APPEARANCE
 - GENDER
 - RELATIONSHIP TO VICTIM
 - STATUS
- FEAR FACTORS
 - GANG MEMBER
 - KILLER
- DEFENSES



Focus back on duty to be fair and impartial; not to be influenced by sympathy for or bias against

DISCOUNTING

- STATUS OF VICTIM
- CONDUCT NOT AMOUNTING TO A DEFENSE
- INTANGIBLE FACTORS
 - CREDIBILITY OF WITS/VICS
 - LIKEABILITY OF PARTIES/ATTYS.
 - "SOCIAL JUSTICE"



MONEY QUESTIONS

- WRAP UP VOIR DIRE WITH A POWERFUL QUESTION
- GET THEM TO COMMIT TO BEING A GOOD MURDER MINDED JUROR
- PURPOSE IS TO SEEK THE TRUTH
- IS THERE ANYTHING ABOUT YOU [PERSONAL PHILOSOPHY, POLITICAL BELIEFS, RELIGIOUS CONVICTIONS, ETC] THAT WOULD PREVENT YOU FROM [FOLLOWING THE LAW, FINDING A DEFENDANT GUILTY]?

WARNING SIGNS



Bonding



Indifference



Loathing

NO MATTER WHAT...



LAUNCH 'EM

HOW TO TELL YOUR TRIAL
IS GOING TO BE SHORT

