IMPORTANT UPDATE:
NUMBER OF PEREMPTORY CHALLENGES IN MISDEMEANOR CASES

EFFECTIVE JANUARY 1, 2017

Code of Civil Procedure 231(b) provides that when "the offense charged is punishable with a maximum term of imprisonment of one year or less, the defendant is entitled to six and the state to six peremptory challenges.

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When two or more defendants are jointly tried, their challenges shall be exercised jointly, but each defendant shall also be entitled to two additional challenges which may be exercised separately, and the state shall also be entitled to additional challenges equal to the number of all the additional separate challenges allowed the defendants."

I. *Batson-Wheeler*: A 5-Minute Summary

A. Constitutional Basis

"It is well settled that '[a] prosecutor's use of peremptory challenges to strike prospective jurors on the basis of group bias—that is, bias against members of an identifiable group distinguished on racial, religious, ethnic, or similar grounds—violates the right of a criminal defendant to trial by a jury drawn from a representative cross-section of the community under article I, section 16 of the California Constitution. [Citations.] Such a practice also violates the defendant's right to equal protection under the Fourteenth Amendment to the United States Constitution. [Citations.]' " (***People* v. *Hamilton*** (2009) 45 Cal.4th 863, 898, citing to ***People* v. *Wheeler*** (1978) 22 Cal.3d 258 and ***Batson* v. *Kentucky*** (1986) 476 U.S. 79.)

A motion claiming a prosecutor exercised his or her peremptory challenges on the basis of group bias is entitled a ***Wheeler*** motion or a ***Batson*** motion or a ***Batson/Wheeler*** motion. However the motion is entitled, the standards and procedures utilized are the same. (***People* v. *Cowan*** (2010) 50 Cal.4th 401, 446, 447; **accord** ***Crittenden* v. *Ayers*** (9th Cir. 2010) 624 F.3d 943, 951, fn. 2 [" ***Wheeler*** is considered the California procedural equivalent of ***Batson***" and "a ***Wheeler*** motion serves as an implicit ***Batson*** objection.) Until the jury is sworn, a ***Batson-Wheeler*** motion should be raised by motion to quash or dismiss the jury, not by a motion for mistrial. (***People* v. *Williams*** (1997) 16 C.4th 635, 662, fn. 9.)

B. Basic Procedure When a Claim is Made That an Attorney is Exercising His or Her Challenges in an Unconstitutionally Discriminatory Manner

For both federal and state constitutional claims, there is a three-step inquiry whenever a ***Batson-Wheeler*** challenge is made by either the defense or the prosecution. (***People* v. *Lenix*** (2008) 44 Cal.4th 602, 612-613.) The analysis begins, however, with a "presumption a party exercising a peremptory challenge is doing so on a constitutionally permissible ground." (***People* v. *Wheeler*** (1978) 22 Cal.3d 258, 278.)

1. First step

a. The party objecting to the challenge has the burden of making out a prima facie case "by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose." (***Johnson* v. *California*** (2005) 545 U.S. 162, 168; ***People* v. *Clark*** (2012) 52 Cal.4th 856, 906.)

b. Although the term "systematic exclusion" is sometimes used "to describe a discriminatory use of peremptory challenges, . . . [t]he term is not apposite in the ***Wheeler*** context, for a single discriminatory exclusion may violate a defendant's right to a representative jury." (***People* v. *Fuentes*** (1990) 54 Cal.3d 707, 716, fn. 4; **accord** ***People* v. *Montiel*** (1993) 5 Cal.4th 877, 909; **see also** ***People* v. *Reynoso*** (2003) 31 Cal.4th 903, 927, fn. 8 ["the unconstitutional exclusion of even a single juror on improper grounds of racial or group bias requires the commencement of jury selection anew"]; **but see** ***People* v. *Garcia*** (2011) 52 Cal.4th 706, 744-750 [discussing why it is very difficult, if not practically impossible to *draw an inference* of discrimination solely on the basis of a challenge to a single juror]; ***People* v. *Bell*** (2007) 40 Cal.4th 582, 598 [similar]; **this** outline, section V-B at pp. 30-32.

c. When a ***Batson-Wheeler*** motion is made, "the party opposing the motion should be given an opportunity to respond to the motion, i.e., to argue that no prima facie case has been made." (***People*** v. ***Fuentes*** (1990) 54 Cal.3d 707, 716, fn. 5.)

d. "The three-step ***Batson*** analysis, however, is not so mechanistic that the trial court must proceed through each discrete step in ritual fashion." (***People*** v. ***Battle*** (2011) 198 Cal.App.4th 50, 60; ***People*** v. ***Adanandus*** (2007) 157 Cal.App.4th 496, 500.)

e. A trial court may invite the prosecutor to state neutral reasons for the challenged strikes before announcing its finding on whether a defendant met the first step of the ***Batson*** test by making out a prima facie case of discrimination. (***People*** v. ***Bonilla*** (2007) 41 Cal.4th 313, 343, fn. 13; ***People*** v. ***Adanandus*** (2007) 157 Cal.App.4th 496, 500.) Indeed, the California Supreme Court has repeatedly recommended that the judge allow the prosecutor to place his reasons for excusing jurors belonging to the cognizable class on the record, *notwithstanding* the lack of any prima facie finding. (**See** ***People*** v. ***Lopez*** (2013) 56 Cal.4th 1028, 1049; ***People*** v. ***Taylor*** (2010) 48 Cal.4th 574, 616; ***People*** v. ***Bonilla*** (2007) 41 Cal.4th 313, 343, fn. 13; ***People*** v. ***Mayfield*** (1997) 14 Cal.4th 668, 723-724.) This can be done even before the trial judge makes its determination that a prima facie case has not been made out by the defense as doing so "may assist the trial court in evaluating the challenge and will certainly assist reviewing courts in fairly assessing whether any constitutional violation has been established." (***People*** v. ***Bonilla*** (2007) 41 Cal.4th 313, 343, fn. 13; ***People*** v. ***Adanandus*** (2007) 157 Cal.App.4th 496, 500.) Note though, that if a trial court asks for (*and accepts*) the reasons provided by the prosecution, a reviewing court will later view what occurred as a "first stage/third stage ***Batson*** hybrid," eschew the question of whether a prima facie case was made, skip to ***Batson***'s third stage and evaluate the prosecutor's reasons for dismissing the prospective jurors. (**See** ***People*** v. ***McKinzie*** (2012) 54 Cal.4th 1302, 1320; this outline, section XI-A-2.)

2. <u>Second step</u>

Once a prima facie case is made, the "'burden shifts to the [party who originally challenged the juror] to explain adequately the racial [or other cognizable class] exclusion' by offering permissible . . . neutral justifications for the strikes." (***Johnson*** v. ***California*** (2005) 545 U.S. 162, 168 [bracketed portions and other modifications added by author].) The burden in this second step is merely "the burden of production." (***Paulino*** v. ***Harrison*** (9th Cir. 2008) 542 F.3d 692, 699.)

The party who originally challenged the juror must then provide a "'clear and reasonably specific' explanation of his 'legitimate reasons' for exercising the challenges." (***People*** v. ***Lenix*** (2008) 44 Cal.4th 602, 613, citing to ***Batson*** v. ***Kentucky*** (1986) 476 U.S. 79, 98, fn. 20.) "Certainly a challenge based on racial prejudice would not be supported by a legitimate reason." (***People*** v. ***Lenix*** (2008) 44 Cal.4th 602, 613.)

On the other hand, a legitimate reason is simply "one that does not deny equal protection" and "a prosecutor may rely on any number of bases to select jurors[.]" (***People*** v. ***Lenix*** (2008) 44 Cal.4th 602, 613, citing to ***Purkett*** v. ***Elem*** (1995) 514 U.S. 765, 769.) Thus, "[t]he justification need not support a challenge for cause, and even a 'trivial' reason, if genuine and neutral, will suffice." (***People*** v. ***Jones*** (2011) 51 Cal.4th 346, 360; ***People*** v. ***Lenix*** (2008) 44 Cal.4th 602, 613.) "A prospective juror may be excused based upon facial expressions, gestures, hunches, and even for arbitrary or idiosyncratic reasons." (***People*** v. ***Jones*** (2011) 51 Cal.4th 346, 360; ***People*** v. ***Lenix*** (2008) 44 Cal.4th 602, 613.) The "'second step of this process does not demand an explanation that is persuasive, or even plausible'; so long as the reason is not inherently discriminatory, it suffices." (***Rice*** v. ***Collins*** (2006) 546 U.S. 333, 338.)

3. Third step

If a "neutral explanation is tendered, the trial court must then decide . . . whether the opponent of the strike has proved purposeful racial [or other cognizable group] discrimination." (***Johnson*** **v.** ***California*** (2005) 545 U.S. 162, 168 [bracketed portion added by author].) The proper focus is on "the subjective genuineness of the race-neutral reasons given for the peremptory challenge, not on the objective reasonableness of those reasons." (***People*** **v.** ***Reynoso*** (2003) 31 Cal.4th 903, 924; ***People*** **v.** ***Adanandus*** (2007) 157 Cal.App.4th 496, 506.)

At the third step, "the issue comes down to whether the trial court finds the prosecutor's race-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." (***People*** **v.** ***Jones*** (2011) 51 Cal.4th 346, 360; ***People*** **v.** ***Lenix*** (2008) 44 Cal.4th 602, 613, citing to ***Miller-El*** **v.** ***Cockrell*** (2003) 537 U.S. 322, 339; **accord** ***Felkner*** **v.** ***Jackson*** (2011) 131 S.Ct. 1305, [issue of whether prosecutor improperly challenged juror "turns largely on an 'evaluation of credibility'"]; ***Snyder*** **v.** ***Louisiana*** (2008) 552 U.S. 472, 477 ["the best evidence [of discriminatory intent] often will be the demeanor of the attorney who exercises the challenge"]; ***People*** **v.** ***Cox*** (2010) 187 Cal.App.4th 337, 343 ["often, the best evidence of a prosecutor's intent in exercising a peremptory challenge is his or her demeanor when explaining why a prospective juror was excused"].) The trial court has a duty to "assess the plausibility" of the prosecutor's proffered reasons for striking a potential juror, "in light of all evidence with a bearing on it." (***People*** **v.** ***Lenix*** (2008) 44 Cal.4th 602, 625.)

In assessing credibility, the court draws upon its contemporaneous observations of the voir dire. "It may also rely on the court's own experiences as a lawyer and bench officer in the community, and even the common practices of the advocate and the office who employs him or her." (***People*** **v.** ***Lenix*** (2008) 44 Cal.4th 602, 613, citing to ***People*** **v.** ***Wheeler*** (1978) 22 Cal.3d 258, 282; ***People v. Lomax*** (2010) 49 Cal.4th 530, 571.)

"In addition, race-neutral reasons for peremptory challenges often invoke a juror's demeanor (e.g., nervousness, inattention), making the trial court's first-hand observations of even greater importance. In this situation, the trial court must evaluate not only whether the prosecutor's demeanor belies a discriminatory intent, but also whether the juror's demeanor can credibly be said to have exhibited the basis for the strike attributed to the juror by the prosecutor." (***Snyder*** **v.** ***Louisiana*** (2008) 552 U.S. 472, 477
128 S.Ct. 1203, 1208; ***People*** **v.** ***Jones*** (2011) 51 Cal.4th 346, 360; ***People*** **v.** ***Lenix*** (2008) 44 Cal.4th 602, 613.)

Although a judge may not be able to observe every gesture, expression or interaction relied upon by the prosecutor (i.e., the judge has a different vantage point, and may have, for example, been looking at another panelist or making a note when the described behavior occurred), the trial "court must be satisfied that the specifics offered by the prosecutor are consistent with the answers it heard and the overall behavior of the panelist." (***People*** **v.** ***Lenix*** (2008) 44 Cal.4th 602, 625.) "The record must reflect the trial court's determination on this point (see *Snyder, supra*, 128 S.Ct. at p. 1209), which may be encompassed within the court's general conclusion that it considered the reasons proffered by the prosecution and found them credible." (***People*** **v.** ***Lenix*** (2008) 44 Cal.4th 602, 625-626.)

"Both court and counsel bear responsibility for creating a record that allows for meaningful review." (***People*** **v.** ***Lenix*** (2008) 44 Cal.4th 602, 621.)

"When the prosecutor's stated reasons are both inherently plausible and supported by the record, the trial court need not question the prosecutor or make detailed findings. But when the prosecutor's stated reasons are either unsupported by the record, inherently implausible, or both, more is required of the trial court than a global finding that the reasons appear sufficient." (***People* v. *Stevens*** (2007) 41 Cal.4th 182, 193; ***People* v. *Silva*** (2001) 25 Cal.4th 345, 386; **see also *People v. Long*** (2010) 189 Cal.App.4th 826, 848 [finding unverified and generalized statements about a juror's body language or way of expressing himself are insufficient to support a finding of legitimacy - at least where there exist other reasons to question the judge's acceptance of the prosecutor's reasons].) **Ed. Note:** ***Long*** is discussed in greater depth in this outline, section VI-D-17 at p. 63].)

A "trial court is not required to make specific or detailed comments for the record to justify every instance in which a prosecutor's race-neutral reason for exercising a peremptory challenge is being accepted by the court as genuine." (***People* v. *DeHoyos*** (2013) 57 Cal.4th 79 [158 Cal.Rptr.3d 797, 2013, 821]; ***People* v. *Vines*** (2011) 51 Cal.4th 830, 848.) If the court is going to deny the challenge, it "should be discernible from the record that "1) the trial court considered the prosecutor's reasons for the peremptory challenges at issue and found them to be race-neutral; 2) those reasons were consistent with the court's observations of what occurred, in terms of the panelist's statements as well as any pertinent nonverbal behavior; and 3) the court made a credibility finding that the prosecutor was truthful in giving race-neutral reasons for the peremptory challenges." (***People* v. *Lenix*** (2008) 44 Cal.4th 602, 621.)

"The ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike." (***People* v. *Lenix*** (2008) 44 Cal.4th 602, citing to ***Rice* v. *Collins*** (2006) 546 U.S. 333, 338; **see also *Yee* v. *Duncan*** (9th Cir. 2006) 463 F.3d 893, 895, citing ***Purkett* v. *Elem*** (1995) 514 U.S. 765, 768.) "The burden of proof at step three is a preponderance of the evidence." (***Crittenden* v. *Ayers*** (9th Cir. 2010) 624 F.3d 943, 954-955.)

C. Remedy for a *Batson-Wheeler* Violation

The traditional remedy/sanction for a ***Batson-Wheeler*** violation was laid out in ***People v. Wheeler*** (1978) 22 Cal.3d 258: "when either party in a criminal case succeeds in showing that the opposing party has improperly exercised peremptory challenges to exclude members of a cognizable group, the court must dismiss all the jurors thus far selected, and quash the remaining venire." (**Id.** at p. 282; ***People* v. *Willis*** (2002) 27 Cal.4th 811, 813; ***Batson v. Kentucky*** (1986) 476 U.S. 79, 99, fn. 23 [recognizing this remedy as one potential remedy].) In ***People v. Willis*** (2002) 27 Cal.4th 811, the California Supreme Court also approved of the use of other remedies for a ***Batson-Wheeler*** violation: A trial court, acting ***with the consent of the aggrieved party***, "has discretion to consider and impose remedies or sanctions short of outright dismissal of the entire jury venire." (***Willis***, at pp. 814, 821, emphasis added.) Consent may be obtained from defense counsel (rather than directly from defendant) and may be express or implied. (***People v. Mata*** (2013) 158 Cal.Rptr.3d 655, 656, 659.) Among the suggested alternative remedies: reseating of the juror, imposition of monetary sanction, and (in dicta) allowing the aggrieved party additional challenges. (**Id.** at p. 821 [albeit suggesting, at pp. 823-824, that imposing monetary sanctions may not effectively vindicate the interests impacted by the improper use of jury challenges and if the offended party requests the remedy of reseating, this request should ordinarily be honored unless the challenged juror has already been discharged.)

IMPORTANT UPDATE:

As a result of amendments effective on January 1, 2016, the list of prohibited characteristics for using a peremptory challenge has been expanded.

Code of Civil Procedure 231.5 *had* prohibited peremptory challenges "on the basis of an assumption that the prospective juror is biased merely because of his or her race, color, religion, sex, national origin, sexual orientation, or similar grounds."

The characteristics now prohibited are contained in Government Code section 11135, California's general non-discrimination statute, which includes the six characteristics listed above ***plus*** four more:

- ethnic group identification;
- age;
- genetic information;
- disability

Disability is defined as "any mental or physical disability, as defined in [Government Code] Section 12926." The definition of mental health in that statute is lengthy and complex.

Genetic information has the same definition as Civil Code section 51(e)(2), which is defined as information about an individual's genetic tests; the genetic tests of a family member, the manifestation of disease or disorder in a family member, or any request for, or receipt for, genetic serves or clinical research.

JURY SELECTION: Why It Can Be The Most Important and Difficult Part of The Trial

FIRST IMPRESSION COUNTS

- **PROFESSIONAL ATTIRE**
- **OBSERVE FORMAL/PROPER COURTROOM PROTOCOL**
  - Stand when addressing Court
  - Refer to Court "Your Honor"
  - Stand when addressing Jury
  - Stand tall; sit straight; no nail biting; no fidgeting
  - No eating; gum chewing
  - No cell phone use

JURY SELECTION

- JURY POOL “VENIRE” COMPRISED OF VOTERS AND THE DMV’S LIST OF LICENSED DRIVERS
- ALL ELIGIBLE TO SERVE EXCEPT:
  - Non Citizens
  - Less Than 18 Years of age
  - Not residents of California or Alameda County
  - Convicted of a felony and whose civil rights have not been restored
  - Peace Officers
- HARDSHIPS
- PROSPECTIVE JURORS LIST – RANDOM ORDER & ALPHA: RUN RAP SHEET
- 12 or 6-Pack

VOIR DIRE

- French phrase essentially means "to speak the truth." This is the opportunity for the prosecutor and defense attorney to ask prospective jurors a series of questions to determine whether or not they are fit to serve on the jury.
- Questionnaires?
- Court may begin voir dire with open court questioning
- Juror Privacy – Do not use name
- DA goes first.

WHAT QUESTIONS TO ASK?

1. **Uncovering bias or incompetence;**
2. **Determine any prejudices or particular points of view that the juror may have that could impact on how they might hear the evidence in a case.**
3. **Know your case; know defense case**
4. **Any relevant juror information revealed from Court's/counsel's questioning; or questionnaire.**
5. **Observe body language/ Listen for cues, especially during defense counsel's questioning.**

WHAT NOT TO DO?

1. DO NOT INJECT ARGUMENT IN YOUR QUESTIONING.
2. DO NOT INCLUDE FACTS ABOUT YOUR CASE IN THE QUESTIONS.
3. AVOID GIVING EXTENSIVE PERSONAL INFORMATION ABOUT YOURSELF
4. BE ENGAGING; NOT INGRATIATING.
5. DO NOT DISPARAGE THE DEFENDANT OR DEFENSE COUNSEL.

CHALLENGES

- DA goes first
- Both sides alternate; if one passes, then the other side can excuse
- Jury is sworn once both sides pass; do NOT pass unless you are prepared to accept the jury

CHALLENGES

1. CAUSE

- Basic grounds clearly established by law: fairness/impartiality; bias; ability to serve
- No limit in number
- Recorded reasons for each grant or denial

2. PEREMPTORY

- Quantity limited
- Alternating between the parties
- Pass only if you can accept the jury (jury is selected once both sides pass)
- Race/gender/ethnicity reasons are forbidden under Batson/Wheeler

BATSON/WHEELER: Three-Part Inquiry

1. **Objecting party has burden of making out a prima facie case by showing the totality of circumstances lead to the "inference" of a discriminatory purpose.**
2. **Once a prima facie case is made, the burden is shifted and the responder must provide "clear and reasonably specific" and non-discriminatory reasons for the peremptory strike(s).**
3. **The trial court must evaluate the sufficiency and credibility of the explanation.**

Note: Court can raise Batson challenge on its own.

BATSON-WHEELER (cont)

1. Defense or Prosecution can raise a *Batson-Wheeler* objection.
2. Prima Facie Case requires:
   - Complete record of circumstances
   - Establish challenged prospective juror member of cognizable/identifiable class (race/ethnicity, gender, sexual orientation)
   - Code Civ. Procedure section 231.5 precludes use of peremptory challenges based on assumption juror is biased merely because of characteristic listed or defined in Section 11135 of the Government Code (i.e. race, national origin, ethnic group, religion, age, sex, sexual orientation, color, genetic information, or disability or similar grounds).
   - Show reasonable inference challenge made because of membership in cognizable class rather than any specific bias.
3. Prosecutor should respond and make a record of non-discriminatory purpose, even where Court does not find a prima facie case.
4. Remedy

ANTICIPATE BATSON-WHEELER

1. Defense tactic ; Request motion be made outside of jury's presence (In-limine)
2. Comparative Analysis
   - Courts use it to "flush out" actual motivation of the party accused of using peremptory challenge discriminatorily
   - May be used to affirmatively support race-neutral
3. Take Notes
   - Gut Instinct may not be sufficient
   - Demeanor, attitude, and other intangibles
   - The more concrete the explanation, the better the record.
   - Study/bring to court cases upholding race-neutral explanations.

*DO NOT BE AFRAID TO EXERCISE CHALLENGE

WHAT IS A GOOD JUROR?

- Not exact science – trust instinct
- Relatable to prosecutor
- Leader vs. follower
- Maxims: