



# **Batson/Wheeler**

**September 2018**

## Topics

- Law behind *Batson/Wheeler* challenges
- How to make a record

# Overview

## *Voir Dire* Procedure

- Swear prospective panel (venire)
- Get two copies of panel, in random order and alpha
- Random order is used to fill the box
- 18 pack/6-pack/12-pack/24-pack



## *Voir Dire* Procedure

- Court's voir dire (12 in box)
  - Juror name, occupation, know LE, etc.
- Defense
- You
- Cause challenges
- Peremptory challenges of 12 in box
- Alternates
- Swear jury (jeopardy attaches)







# Batson/Wheeler Generally

- *People v. Wheeler* (1978) 22 Cal.3d 258 – Federal and state constitutional right to fair/impartial cross section
  - p. 272 “[I]n this state the right to trial by a jury drawn from a representative cross-section of the community is guaranteed equally and independently by the **Sixth Amendment** to the federal Constitution and by **article I, section 16, of the California Constitution.**”
- *Batson v. Kentucky* (1986) 476 U.S. 79 – 14<sup>th</sup> Amendment right to equal protection, lays out the “stages”
  - Cannot exercise peremptory challenge to discriminate against “cognizable groups”
  - Applies to civil cases, and the **defense** use of peremptory challenges

# Timeliness

Timely if motion is made before jury impaneled

- (*People v. McDermott* (2002) 28 Cal.4th 946, 970.)
  - You have selected and sworn alternates

# Three Stages

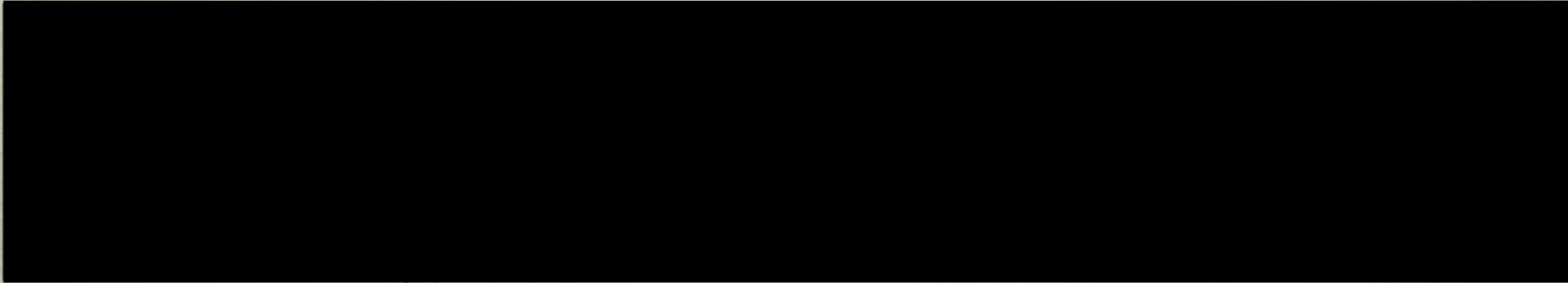
- **Stage 1:** Defendant makes prima facie showing of purposeful discrimination: totality of circumstances = inference of discriminatory intent
  - Burden of *production*
- **Stage 2:** DA offers a non-discriminatory reason for exercising strike(s)
  - Burden of *production* – *you cannot (should not) simply remain silent*
- **Stage 3:** Court determines whether the defendant proved purposeful discrimination
  - Burden of *persuasion*



# ***Details***

# Stage 1

## The Prima Facie Case

- Objecting party must identify juror(s) allegedly improperly struck
  - &
  - The discriminatory purpose
- 

## **Stage 1**

### **What are cognizable groups?**

#### **California Code of Civil Procedure 231.5**

“A party shall not use a peremptory challenge to remove a prospective juror on the basis of an assumption that the prospective juror is biased merely because of a characteristic listed or defined in Section 11135 of the Government Code, or similar grounds.”

# Stage 1

## What are cognizable groups?

- Govt Code 11135 was amended as of January 1, 2017, to include:

➤ Sex

➤ Race

➤ Color

➤ Religion

➤ Ancestry

➤ National Origin

➤ Ethnic Group

Identification

➤ Sexual Orientation

➤ Physical Disability

➤ Medical Condition

➤ Mental Disability

➤ Genetic Information

➤ Age

➤ Marital Status




# Stage 1

## What are cognizable groups?

- Race includes “white” people
  - (*People v. Willis* (2002) 27 Cal.4th 811)
- Religion
  - Different if juror says cannot judge others due to religion
- Hearing or Vision Impaired (?)
  - CCP § 203 (a)(6) no person shall be deemed incompetent solely because of the loss of sight or hearing in any degree or other disability which impedes the person’s ability to communicate or which impairs or interferes with the person’s mobility.
  - But see *People v. Fauber* (1992) 2 Cal.4th 792, 816 [hearing impaired not necessarily protected class, but this is pre-2016 amendment to CCP 231.5].)

## Stage 1

### What are cognizable groups?

- Yes to black woman, black men . . . (*People v. Young* (2005) 34 Cal.4th 1149)
  - No to “people of color” (*People v. Davis* (2009) 46 Cal.4th 539)
- 

# Stage 1

## What are cognizable groups?

- For prima facie violation of the fair cross-section requirement, defendant must show:
  - (1) the group allegedly excluded is a "distinctive" group in the community;
  - (2) the group's representation in jury venires is not fair and reasonable in relation to the number of such persons in the community; and
  - (3) the under-representation is due to the systematic exclusion of such persons in the jury selection process.

*(Duren v. Missouri (1979) 439 U.S. 357, 364; People v. Fauber, supra, 2 Cal.4th at p. 816.)*