

Wheeler/Batson

January 2013



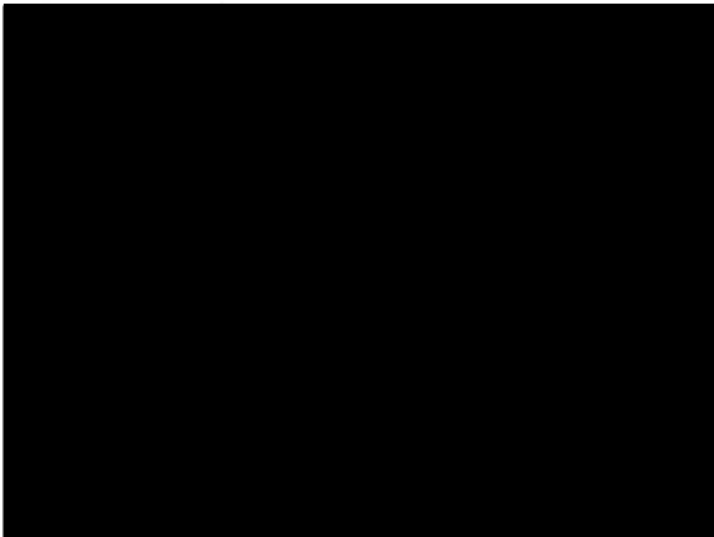
Riverside County District Attorney's Office
Training Division

Why Wheeler matters

- 6 Amendment Right to Fair Trial
- People v. Wheeler (1978) 22 Cal.3d 258
- Batson v. Kentucky (1986) 476 US 79

Why Wheeler matters...

- A finding that attorney engaged in misconduct under Wheeler/Batson requires self-reporting to the State Bar.
- Excluding even 1 juror for reasons impermissible under Batson and Wheeler requires reversal.
 - P v. Silva (2001) 25 Cal.4th 345, 386
 - P v. Reynoso (2003) 31 Cal. 4th 903, 927, fn. 8
 - P v. Gray (2005) 37 Cal. 4th 168 (uses inference)
 - Defense fails to make prima facie showing of inference
 - P v. Gonzales (2008) 165 Cal. App. 4th 620
 - Exclusion of juror with Hispanic surname impermissible



The Challenge is a 3 step process

Step one: Objecting party must make a prima facie showing that the offending party systematically excluded a cognizable class

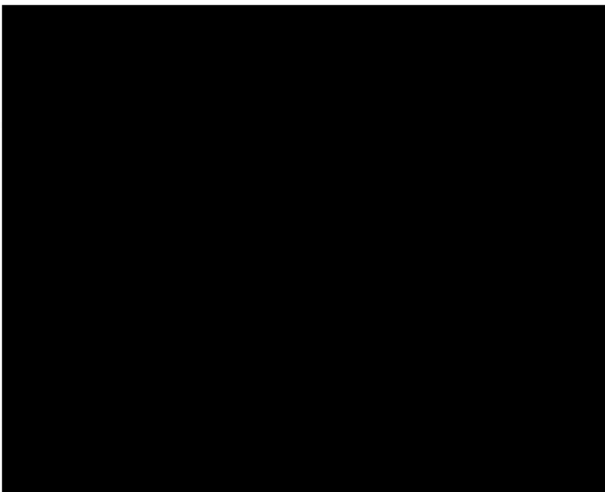
Step two: If the court finds a prima facie showing, the burden shifts to the offending party to justify the exclusion of jurors for a neutral reasons

Step three: The trial court determines if the reasons for exclusion are:

Neutral

Honest

True reasons for exclusion

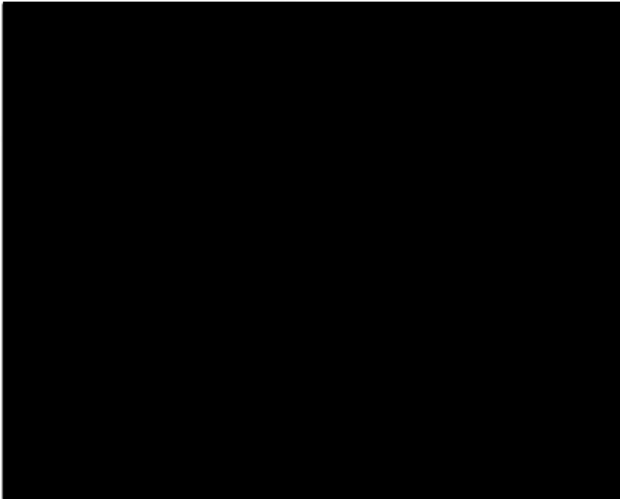


A PRIMA FACIE case

- of improper exclusion of a cognizable group – court determines whether “AN INFERENCE” of discrimination has been raised. This standard is lower than the standard of “strong likelihood” articulated in Wheeler. California is now bound by the “inference” standard.
- Johnson v. California (2005) 545 US 162.
 - People v. Gray (2005) 37 Cal.4th 168, 185-188 citing Johnson v. California.

Cognizable group

- "There must be an identifiable group distinguished on racial, religious, ethnic, or similar grounds."
– *Wheeler* at 276



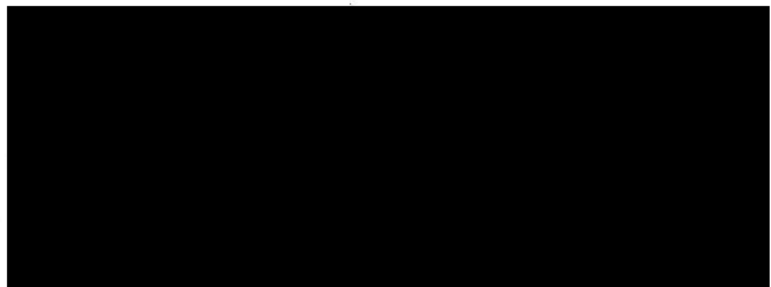
EVIDENCE RAISING AN INFERENCE OF DISCRIMINATORY PURPOSE

Statistical Disparity:

- Most or all group members were struck or a disproportionate number of peremptory challenges used against group

Negative Comparative Analysis:

- Motives for a challenge may be revealed as pretext where a given explanation is equally applicable to a juror of another race or gender who was not stricken
 - Challenged jurors share no traits in common other than their group association
 - Jurors struck have characteristics or gave answers similar or identical to jurors kept
 - Disparate or minimal questioning of group jurors struck
- Other Factors that may be considered.
- Defendant/victim is a member of the excluded group while defendant/victim is not
 - Historical evidence of past discriminatory conduct/ reputation



Using Comparative Analysis to Establish Prima Facie case

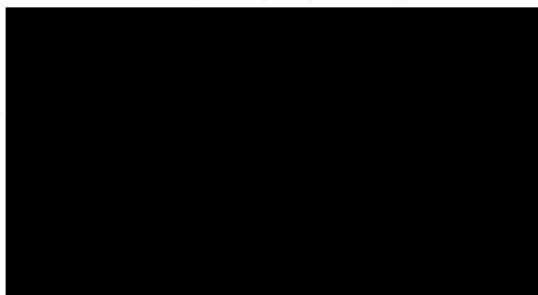
- People v. Walker (1998)64 Cal.App.4th 1062
- Johnson v. California (2005) 125 S. Ct. 2410
- Miller-El v. Drake (2005) 545 US 231
- Williams v. Runnels (2006) 432 F.3d 1102
- Need for follow up questions
 - Snyder v. Louisiana (2008) 552 US 472
 - People v. Lenix (2008)44 Cal.4th 602.

Use Lenix to extend Voir Dire

- "...if the trial court truncates the time available or otherwise overly limits voir dire, unfair conclusions might be drawn based on the advocate's perceived failure to follow up or ask questions.
 - Lenix at 625.

Step Two:

- Justification of peremptory challenges



Cognizable Groups

- RACE/ ETHNICITY
 - African-Americans/Hispanics/Asian-Americans/Native Americans/Caucasians
 - Just being married to someone ethnic does not count. (*People v. Cruz* (2008) 44Cal.4th 636. (strike against Caucasian women with Hispanic surname is not a strike against a Hispanic for *Wheeler* purposes).
- GENDER
 - Women. *JEB v. Alabama* (1994) 511 US 127
 - Men. *People v. Cervantes* (1991) 233 Cal. App.3d 323

Cognizable Groups

- RELIGION
 - *People v. Gray* (2005) 37 Cal.4th 168
 - *People v. Cash* (2005) 28 Cal.4th 703.
 - Dismissal of juror due to fact that religious belief impaired ability to follow the law is okay.
 - *People v. Jones* (2011) 51 Cal.4th 346
 - Dismissal of juror on basis that her church was "controversial" was not impermissible.
- SEXUAL ORIENTATION
 - *People v. Garcia* (2000) 77 Cal. App. 4th 1269.

Non-Cognizable Groups

- AGE
 - *People v. Estrada* (1979)93 Cal.App.3d 76
 - *People v. Marbley* (1986) 181 Cal. App.3d 45
 - *People v. McCoy* (1995) 40 Cal. App.4th 778

Non-Cognizable Groups

- OCCUPATIONS/ ECONOMIC STATUS –

Blue Collar Workers/ Teachers/ Low-Income/ Poor
People v. DeSantis (1992) 2 Cal.4th 1198, resident non-citizens

Uneducated

People v. Estrada (1995) 83 Cal.App. 3d 76

- DISABILITIES

Hearing-impaired
People v. Fauber (1992) 2 Cal.4th 792

Insufficient English

– People v. Lesar (1988) 205 Cal.App. 3d 1304

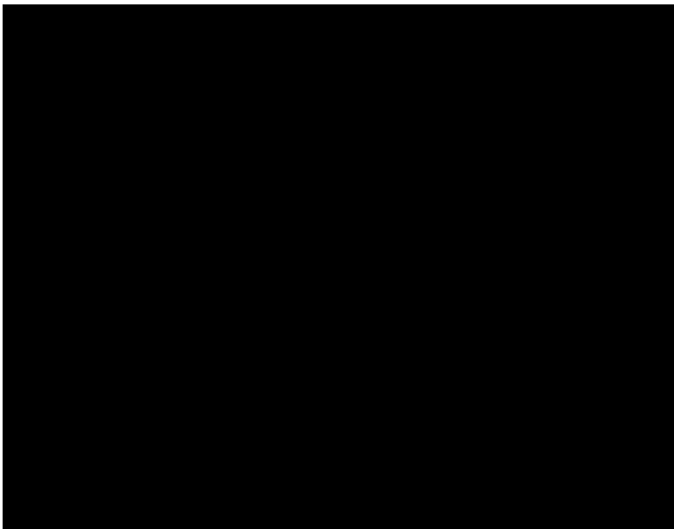
Non Cognizable Groups

- Death Penalty reservations

- People v. Morris (1991) 53 Cal.3d 152
- People v. Johnson (1989) 47 Cal.3d 1194
- People v. Davenport (1995) 11 Cal.4th 1171

- Battered Women

- People v. Macioce (1987) 197 Cal.App. 3d 262

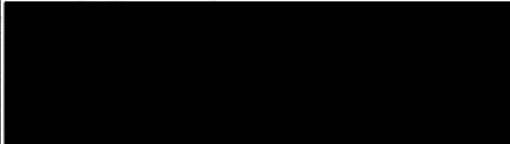


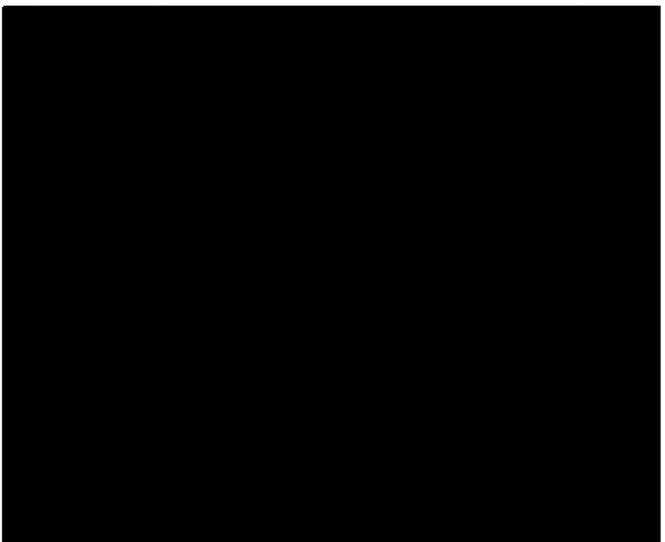
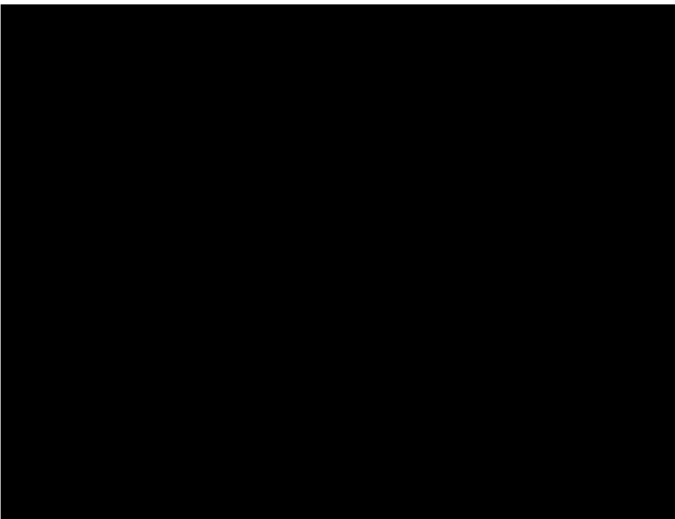
Justification

- If the court finds that a prima facie case of discrimination has been established, the burden shifts to the party who exercised the peremptory to satisfy the court that there were valid, non-discriminatory reasons for the peremptory challenges
- The reasons should rely on the totality of the circumstances and be relevant to the particular case, parties, or witnesses (i.e., show case specific bias.)
- Reasons must be credible, specific, neutral, and supported in the record
- Court can also consider credibility: demeanor, confidence, integrity of attorney making the justification.
- There is a presumption that a prosecutor uses his or her peremptory challenges in a constitutional manner." *People v. Turner* (1994) 8 Cal.4th 137.

Justification

- "A prosecutor may act freely on the basis of 'hunches', unless and until these acts create a prima facie case of group bias, and even then he may rebut the inference."
 - *People v. Garcia* (2008) 164 Cal.App.4th 305, 313 citing *People v. Hall* (1983) 35 Cal.3d 161, 170.





Tactical Justifications

- Case-specific reasons for excusing the juror in question
- Mistake *People v. Williams* (1997) 16 Cal.4th 153.
- Tactical reasons:
 - Changing ratio of strong-willed to passive jurors as composition of jury changes over course of voir dire
 - Decreasing use of challenges for minor factors as fewer challenges remain
 - Desire to seat more favorable members of panel

Green v. LaMarque (2008) 532 F.3d 1028, 1032

TRIAL COURT'S DETERMINATION

- The court must make a "sincere and reasoned attempt to evaluate each stated reason as to each challenged juror"¹
- to distinguish bona fide reasons for peremptory challenges from "sham excuses belatedly contrived to avoid admitting acts of group discrimination."²

¹*Silva* (2001) 25 Cal4th 345 ²*Wheeler* (1978) 22 Cal3d 258

CREDIBILITY

- Are the articulated justifications plausible?
- If so, did those reasons actually motivate the challenge in question?
- The court's focus is on the subjective genuineness of the race-neutral reasons given, not on the objective reasonableness of those reasons.¹
- Credibility can be measured by 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.²

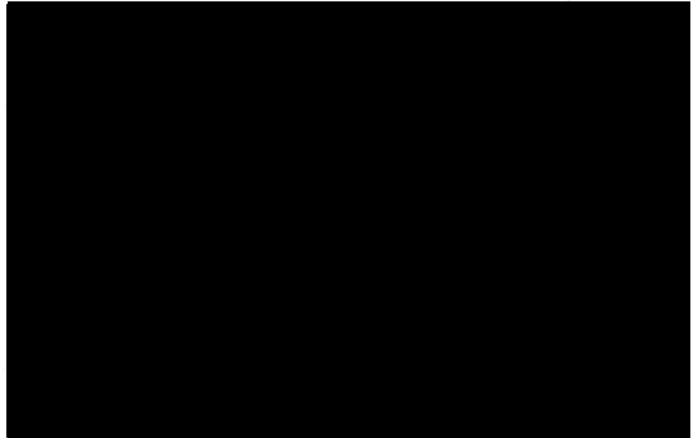
¹*Reynoso* (2003) 31 Cal4th 903, 923-924; *Cornwall* (2005) 37 Cal4th 50; *Johnson v. Co.* *supra*, 125 S Ct at p. 2416
²*Miller* (1998) 17 Cal4th 901, 917-918; *Miller* (2003) 537 US 322, 338.

New Factors To Consider

- Statistical Analysis - % of jurors of eligible group excluded
- Comparative Analysis – Comparison between jurors struck in group with other non-group jurors
 - *P v. Lenix* (2008) 44 Cal.4th 602 (if record is adequate, comparative juror analysis may be done on appeal, even if NOT done at trial stage)
- Disparate questioning of group jurors
- Historical evidence of discrimination
- Shuffling random order

Appellate Court Review

- *P v. Lenix*
- Comparative juror analysis will be done on appeal if trial record permits
 - It must be considered when reviewing claims of *Wheeler/Batson* error at third stage
 - It is a form of circumstantial evidence
 - This evidence must be reasonable and supported by the record



Appellate court review

- *Rice v. Collins* (2006) 546 US 333
- 9th Circuit overturned because they second guessed the trial court's determination of credibility.
- Also an example of comparative analysis to support prosecution's exclusion of black jurors.

Successive Motions

People v. Avila (2006) 38 Cal.4th 491, 449-550, disapproving *People v. McGee* (2002) 104 Cal.App.4th 559.)

Prosecutor is not required to justify challenges from previous *Wheeler* motions -
Each successive motion carries its own initial burden to establish a prima facie case -

Later motions may be based on evidence presented in earlier motions to show discriminatory pattern

Remedies for a violation

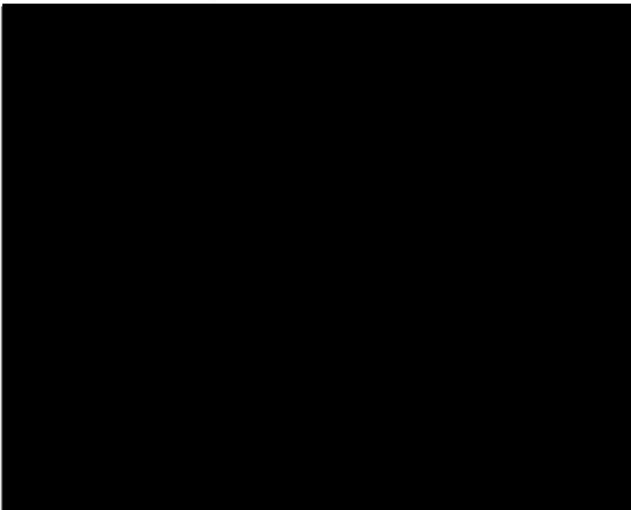
- Mistrial – Dismiss panel & start over
- Dismiss jurors selected thus far
- *Willis* (2002) 27 Cal.4th 811 - remedies
 - Avoid rewarding misconduct
 - Add peremptory challenges to aggrieved party
 - Reseat improperly excused jurors
 - Judicial oversight for every subsequent challenge
 - Sanctions under CCP 177.5
 - Using an alternative remedy requires waiver by objecting party of right to mistrial and new panel

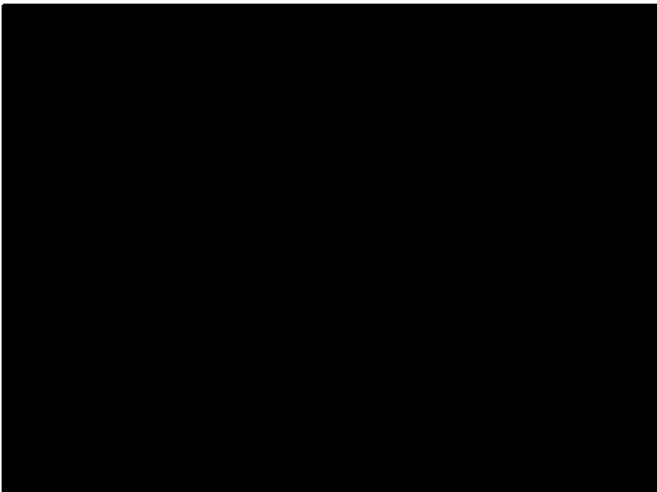
State Bar Consequences of a violation

- Must Self-Report To State Bar:
- Imposition of any judicial sanction (except discovery sanction or monetary sanction less than \$1,000)
 - Bus. & Prof. Code §6068(o)(3)
 - *Wheeler*, 22 Cal.3d at 282 and fn. 29
- If case reversed in whole or in part due to attorney misconduct
 - Bus. & Prof. Code §6068(o)(7); 6086.7(a)(2)

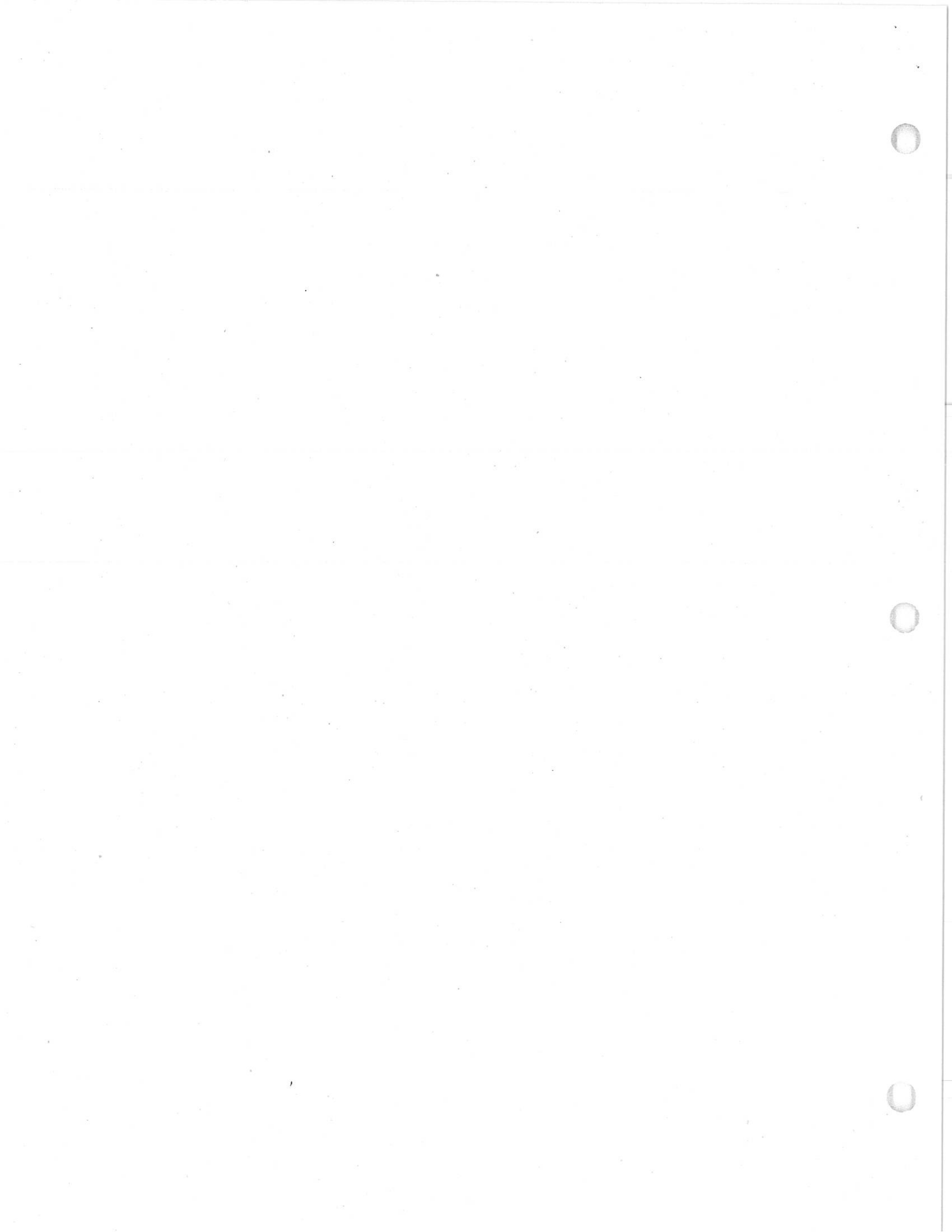
What if the court finds a violation

- Court Will Report To State Bar:
- Imposition of any judicial sanction (except discovery sanction or monetary sanction less than \$1,000).
 - Bus. & Prof. Code §6086.7(a)(3)
 - Wheeler, 22 Cal.3d at 282 and fn. 29
- If case reversed in whole or in part due to attorney misconduct
 - Bus. & Prof. Code §6086.7(a)(2)











OFFICE OF
THE DISTRICT ATTORNEY

WHEELER / BATSON

Procedure

- 1) Prima Facie Showing. The party objecting to a challenge must make out a prima facie case "by showing that the totality of the facts gives rise to an inference of discriminatory purpose." *Johnson v. California* (2005)545 US 162. This replaces the strong likelihood standard of Wheeler.
- 2) Justification. Once a prima facie case is made, "the burden shifts to the [party making the original, objected-to juror challenge] to explain adequately the racial [or other cognizable class] exclusion by offering permissible race-neutral justifications for the strikes. (*Id.*)
- 3) Evaluation by Court. If "a race-neutral explanation is tendered, the trial court must then decide ... whether the opponent of the strike has proved purposeful racial discrimination." (*Id.*)

Remedies

- 1) Dismissal of the panel and restarting the process.
- 2) Re-seating the wrongfully excluded juror.
- 3) Allowing the aggrieved party additional peremptory challenges.
- 4) Monetary fines against the violator.

Cognizable Groups:

- 1) Race
- 2) Ethnicity
- 3) Religion
- 4) Gender
- 5) Sexual Orientation
- 6) Disability

Non-Cognizable Groups:

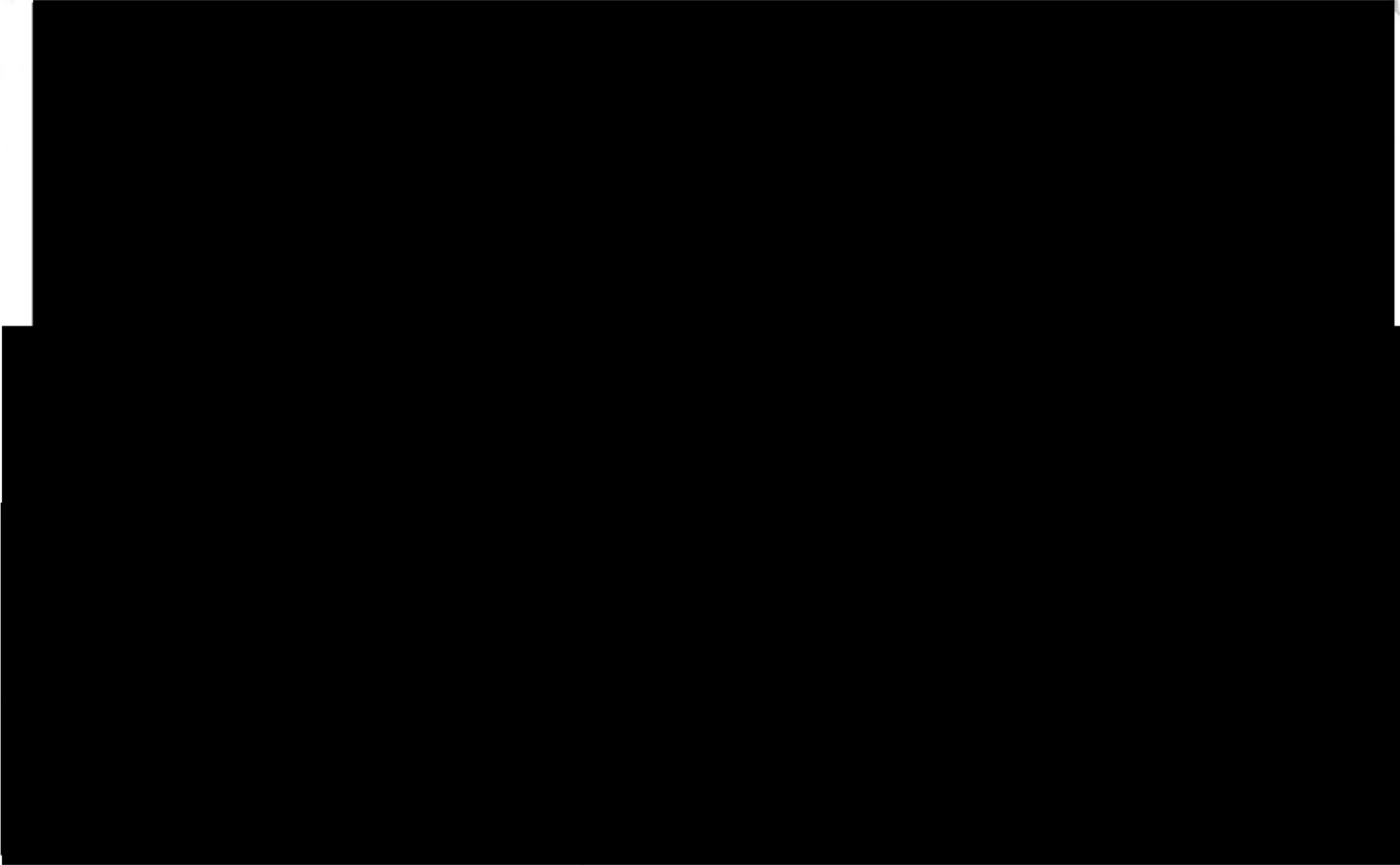
- 1) Low Income
- 2) Less Educated
- 3) Blue Collar Workers
- 4) Battered Women
- 5) Young Adults
- 6) People over the age of 70
- 7) Death Penalty Skeptics
- 8) Ex-Felons

- 9) Resident Aliens
- 10) Naturalized Citizens
- 11) "Insufficient" English Spoken
- 12) New Community Residents
- 13) Strong Law-and-Order Believers
- 14) Men who wear Toupees
- 15) Retired Correctional Officers

Valid Justifications

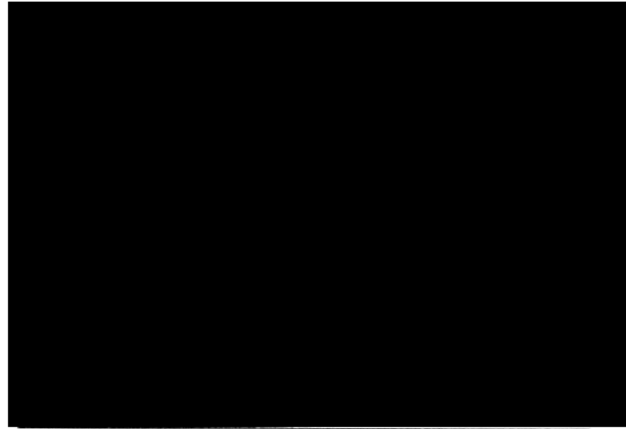
- 1) Negative experience with, or distrust of, law enforcement
- 2) Stupid / inattentive juror
- 3) Inconsistent Answers During voir dire
- 4) Juror's appearance / demeanor / body language: soft-spoken, longhair, unkempt / poorly groomed, frowning, tentative, inappropriate laughter, hostile, hesitant, cavalier, looked away from attorney, smiled at opponent, fidgety, nervous, upset, defensive, tired, overweight, weird.
- 5) Prior jury experience
- 6) Limited life experience

- 7) Juror's occupation
- 8) Next juror up looks better



Wheeler/Batson Update

- Reminder of basic principles and procedure
- Recent changes in *Wheeler* law



Wheeler/Batson Update

- Excluding even 1 juror for reasons impermissible under *Batson* and *Wheeler* requires reversal.

- *P v. Silva* (2001) 25 Cal.4th 345, 386
- *P v. Reynoso* (2003) 31 Cal.4th 903, 927, fn. 8
- *P v. Gray* (2005) 37 Cal.4th 168
- *P v. Gonzales* (2008) __ Cal.4th 14, 81 Cal.Rptr.3d 205, 211

PROCEDURE

OBJECTION then three-step process:

1. A PRIMA FACIE case of improper exclusion of a cognizable group – court determines whether “**AN INFERENCE**” of discrimination has been raised. MAJOR CHANGE IN LAW.
2. JUSTIFICATION – if prima facie showing has been made - opposition states neutral explanations for the peremptory challenge
3. TRIAL COURT’S DETERMINATION – are explanations neutral, honest, **and** the motivating reason for the questioned challenge?

PROCEDURE

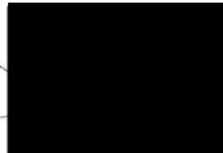
□ Party Objects

- Pre-trial 402 re: Wheeler objections
- Approach sidebar or go in-chambers
- Court reporter is always present!
 - Code of Civil Procedure section 269
 - (a) An official reporter or official reporter pro tempore of the superior court **shall take down** in shorthand all testimony, objections made, rulings of the court ...
 - (2) In a **felony case**, on the order of the court or at the request of the prosecution, the defendant, or the attorney for the defendant.
 - (3) In a **misdemeanor** or infraction case, on the order of the court.



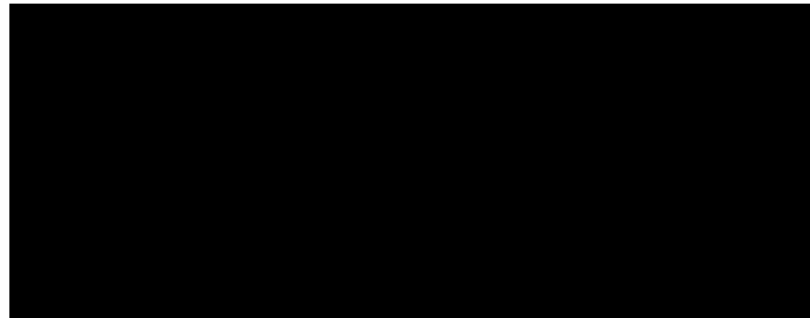
The "Prima Facie" Case

- It is moving party's burden to rebut presumption peremptory was exercised constitutionally
- By raising an "Inference" Of Discrimination
- CA's previous standards of "Strong Likelihood" or "More Likely Than Not" are unconstitutional



Making The Prima Facie Case

- Establish excluded persons are members of a cognizable group
- Make as complete a record of circumstances surrounding challenges as feasible
- Show peremptories are based on group association



Cognizable Groups

- RACE/ ETHNICITY
 - African-Americans/Hispanics/Asian-Americans/Native Americans/Caucasians
 - Just being married to someone ethnic does not count. (*People v. Cruz* (July 24, 2008) 44 Cal.4th 180 Cal.Rptr.3d 126, 147) (strike against Caucasian women with Hispanic surname is not a strike against a Hispanic for *Wheeler* purposes).
- GENDER
- RELIGION
- SEXUAL ORIENTATION

Non-Cognizable Groups

- AGE
- OCCUPATIONS/ ECONOMIC STATUS –
Blue Collar Workers/ Teachers/ Low Income/ Poor
- DISABILITIES
Hearing-impaired/ Obesity/ Battered Women/
Educationally impaired
- Death Penalty issues
- Insufficient English

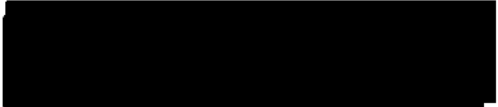
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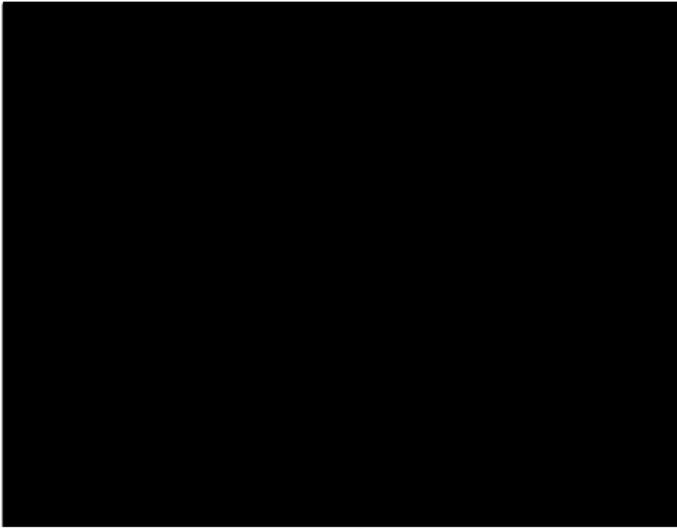
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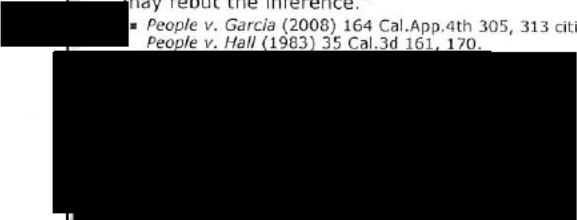
Justification

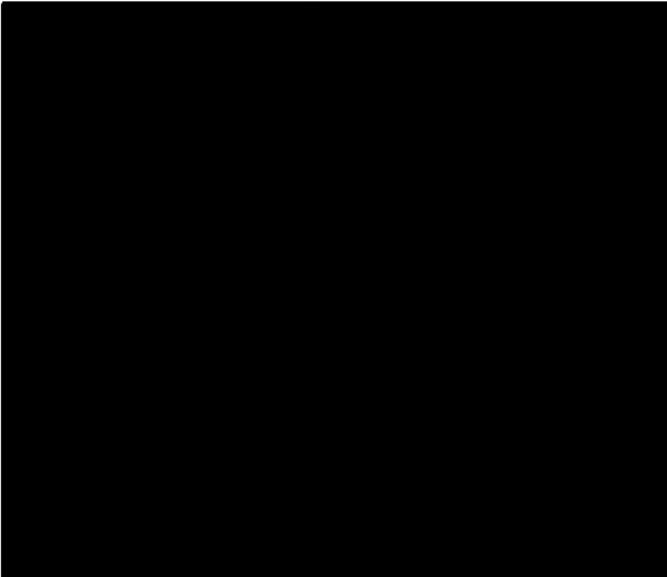
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- "A prosecutor may act freely on the basis of 'hunches', unless and until these acts create a prima facie case of group bias, and even then he may rebut the inference."
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Justifications and Tactical Reasons

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New Factors To Consider

- Statistical Analysis - % of jurors of eligible group excluded
- Comparative Analysis - Comparison between jurors struck in group with other non-group jurors
 - P v. Lenix (July 24, 2008) ^{AA} Cal.4th ⁶⁰² [80 Cal.Rptr.3d 98] (if record is adequate, comparative juror analysis will be done on appeal, even if NOT done at trial stage)
- Disparate questioning of group jurors
- Historical evidence of discrimination
- Shuffling random order

Comparative Juror Analysis

- P v. Lenix - Cal Supreme Ct. 7/24/08
 - Comparative juror analysis will be done on appeal if trial record permits
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Successive Motions

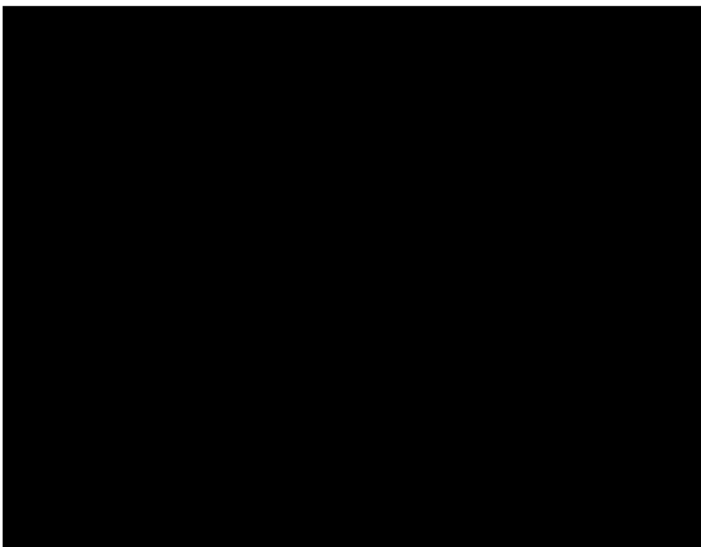
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Trial Remedies

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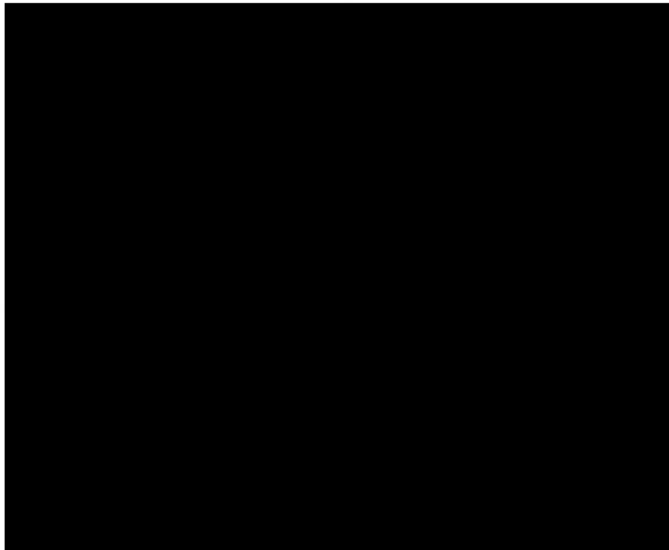


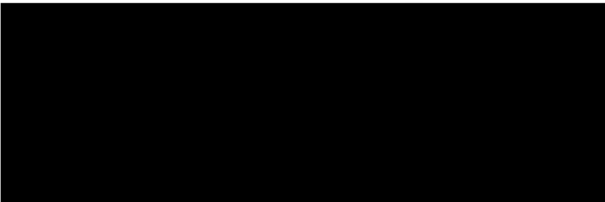
Consequences

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 - Bus. & Prof. Code §6068(o)(3)
 - *Wheeler*, 22 Cal.3d at 282 and fn. 29
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Consequences

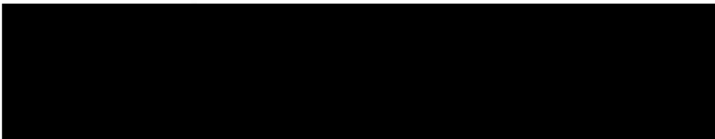
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■ CANON 3 of the Code of Judicial Ethics
 A JUDGE SHALL PERFORM THE DUTIES OF JUDICIAL
 OFFICE IMPARTIALLY AND DILIGENTLY

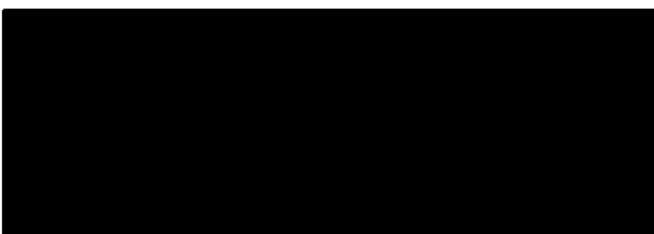
B. Adjudicative Responsibilities
 (3) A judge shall require order and decorum in proceedings before the judge.
 (4) A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity, and shall require similar conduct of lawyers and of all court staff and personnel under the judge's direction and control.



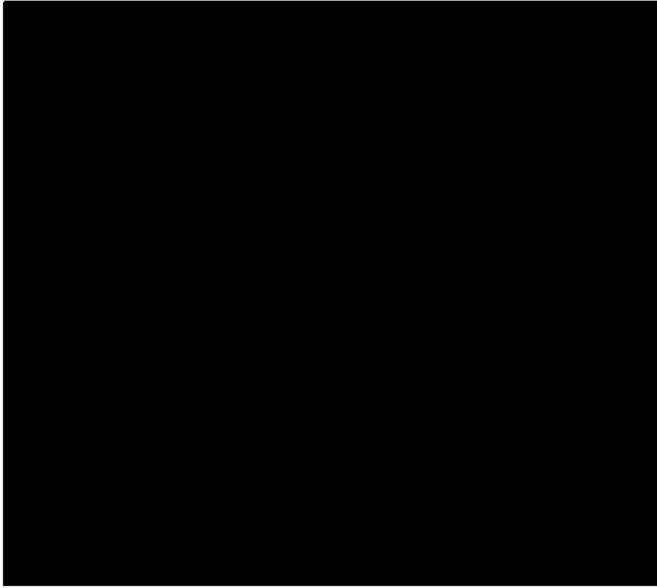
Riverside County Professional Courtesy and Civility Guidelines

o Section XI: Trials and Hearings
 A lawyer should conduct himself or herself in trial and hearings in a manner which promotes a positive image of the profession, assists the court in properly reviewing the case and displays appropriate respect for the justice system.
 Specifically, a lawyer who manifests professional courtesy and civility:

1. Is punctual and prepared for all court appearances.
2. Always deals with parties, counsel, witnesses, jurors, prospective jurors, court personnel and judicial officers with courtesy, civility and respect.
3. Makes objections during a trial or hearing for legitimate and good faith reasons and does not make such objections only for the purpose of harassment or delay, to coach witnesses, or for other improper purpose.
4. Honors requests made by opposing counsel during trial which do not prejudice his or her client's rights or sacrifice tactical advantage.



■ *Williams v. Runnels* (9th Cir. 2006) 432 F3d 1102 (didn't matter what Court of Appeal thought were valid reasons in the record to support the challenge, but rather what the DA's actual reasons were, which he didn't put on the record because the court found no PF showing.)



Peremptory Challenges: Group Bias and Discrimination

Wheeler/Batson/Johnson

August 2008

U.S. CONSTITUTION

6th Amendment: “In all criminal prosecutions, the accused shall enjoy the right to a ... public trial, by an impartial jury of the State and district wherein the crime shall have been committed...”

WHEELER and BATSON

In the context of a criminal trial, voir dire is the process by which the “impartial jury” guaranteed by the 6th Amendment is selected. During voir dire, individual jurors may be challenged for cause (bias that prohibits a juror from sitting on a jury) or may be challenged for reasons falling short of bias – peremptory challenges.

People v. Wheeler (1978) 22 Cal.3d 258

Peremptory challenges are ordinarily exercised without stating a reason. However, in *Wheeler*, the California Supreme Court determined that peremptory challenges may not be used to intentionally excuse prospective jurors because they are “members of an identifiable group distinguished on racial, religious, ethnic or similar grounds.” (*Id.* at 276 [The “*Wheeler*” rule].)

In *Wheeler*, the prosecutor excluded a number of African-American prospective jurors over the objection of the African-American defendant. The Court held that it is inappropriate for a party to presume that certain jurors are biased merely because they are members of a group distinguished on the previously mentioned grounds. The Court said it is still acceptable for members of such a group to be peremptorily challenged on grounds that do not rise to the level of a challenge for cause: however, those grounds must reasonably relate to the case, parties or witnesses.

Wheeler took cases discussing the 6th Amendment guarantee of a jury venire drawn from the community and extended the rationale to the use of preemptory challenges. It found that the right to trial by a jury drawn from a representative cross-section of the community is guaranteed by the 6th Amendment and by Article I, section 16, of the California Constitution. It determined that this right is violated when a “cognizable group” within the community is systematically excluded from jury service. (See, *Rubio v. Superior Court* (1979) 24 Cal. 3d 93, 97.)

Wheeler held: “[T]he use of peremptory challenges to remove prospective jurors on the ground of group bias violates the right to trial by a jury drawn from a representative cross-section of the community under article I, section 16 of the California Constitution.” (*People v. Wheeler, supra*, 22 Cal. 3d 258, 276-77.)

***Batson v. Kentucky* (1986) 476 U.S. 79.**

In 1986, some eight years after the California Supreme Court’s *Wheeler* case, the United States Supreme Court held that the Equal Protection Clause of the United States Constitution prohibits jury selection based upon racial stereotyping. Specifically, the exclusion of black jurors on the basis of their race violated the Fourteenth Amendment’s guarantee of equal protection of the laws. It based its decision on earlier cases in which it had held that equal protection and due process required that a criminal jury be drawn from the community and selected by non-discriminatory criteria. *Batson* provided that to establish a case of impermissible exclusion for equal protection purposes, the defendant must show that he was a member of a “cognizable racial group,” and that the prosecution had systematically excluded members of that group from the jury venire. (*Id.* at 96.) The Court’s idea of what would qualify a group as “cognizable” is indicated by its citation to an earlier decision in which it defined a cognizable group as “one that is a recognizable, distinct class, singled out for different treatment under the laws as written or applied.”

COGNIZABLE GROUPS:

What Classifications Are Constitutionally Protected From Challenge Based Solely on Group Membership?

Basic Rule: There must be “an identifiable group distinguished on racial, religious, ethnic, or similar grounds.... – we call this ‘group bias.’” (*Wheeler* at 276.)

The defendant need not be a member of the excluded group in order to complain of a violation of the representative cross-section rule.” (*Wheeler* at 281; see also, *Powers v. Ohio* (1991) 499 U.S. 400.)

Cognizable Groups: How are they defined? A group cannot qualify as a cognizable group for representative cross-section challenge unless two requirements are met:

- 1) members share a common perspective arising from life experience in the group and,
- 2) no other members of the community are capable of adequately representing the group perspective.

“It is not enough to find a characteristic possessed by some persons in the community but not by others; the characteristic must also impart to its possessors a common social or psychological outlook on human events.” (*Rubio v. Superior Court* (1979) 24 Cal. 3d 93, 98 [plurality opinion].)

Defendant **need not be** of the same cognizable group as the challenged juror in order to raise the issue. (*Powers v. Ohio* (1991) 499 U.S. 400; *People v. Dunn* (1995) 40 Cal.App.4th 1039, 1045 fn. 2.)

1. **Race/Ethnicity:**

African-Americans: *People v. Wheeler, supra*, 22 Cal.3d at p. 280, fn. 26; *People v. Alvarez* (1996) 14 Cal.4th 155, 193; *Batson v. Kentucky* (1986) 476 U.S. 79, 84-89

Hispanics: *People v. Perez* (1996) 48 Cal. App. 4th 1310, 1315; *Hernandez v. New York* (1991) 500 U.S. 352, 355; *People v. Alvarez* (1996) 14 Cal.4th 155, 193; *People v. Trevino* (1985) 39 Cal.3d 667, 686.

● **“Spanish-surnamed” individuals:** *People v. Sanders* (1990) 51 Cal.3d 471.

● But see *People v. Cruz* (July 24, 2008) __ Cal.4th __ [80 Cal.Rptr.3d 126, 147] (strike against Caucasian women with Hispanic surname is not a strike against a Hispanic for Wheeler purposes)

Asian-Americans: cf. *People v. Lopez* (1991) 3 Cal. App.4th Supp. 11; *People v. Williams* (1994) 26 Cal.App.4th Supp.1.

Native Americans: *U.S. v. Bauer* (9th Cir. 1996) 84 F.3d.1549.

Chinese-Americans. (*Ho By Ho v. San Francisco Unified School Dist.* (9th Cir. 1998) 147 F.3d 854, 863.)

2. **Gender:** *JEB v. Alabama ex rel TB* (1994) 511 U.S. 127; *People v. Crittenden* (1994) 9 Cal.4th 83, 115: “Group bias is ... distinguished on grounds such as race, religion, ethnicity, or gender.” Case involved dismissal of African-American woman.

Males constitute a cognizable class. Domestic violence case where defense attorney for male defendant alleged “the People have excluded ... members of the male race [sic]” (p. 328). DA responded that *Wheeler* did not apply to white males as a minority group; the AG’s office conceded on appeal that “both men and women constitute cognizable groups.” *People v. Cervantes* (1991) 233 Cal. App.3d 323, 334; see also, *People v. Williams* (2000) 78 Cal. App.4th 1118, 1125 [“Peremptory challenges may not be used to exclude male jurors solely because of a presumed group bias.”].)

3. **Religion:** *U.S. v. Gelb* (2nd Cir. 1989) 881 F.2d 1155; *People v. Gray* (2005) 37 Cal.4th 168, 190 fn. 4. (Catholics); *People v. Johnson* (1989) 47 Cal.3d 1194, 1217 (Jews);

● but challenge permissible if religious belief of individual impairs ability to follow the law, not based simply on membership in particular religion. (*People v. Cash* (2005) 28 Cal.4th 703, 723.)

4. **Sexual Orientation:** *Todd Johnson v. Arb Campbell, et al.* (9th Cir. 1996) 92 F.3d 951; *People v. Garcia* (2000) 77 Cal. App.4th 1269 (4th DCA case). Lesbians (and presumably gay males) constitute a cognizable class. Here, DCA remanded case back to trial court. Below, the trial court had not found them to be a cognizable class and thus DA had never been given the chance to defend the preemptory challenges of two lesbians.

NON- COGNIZABLE GROUPS:

1. **Age:**
 - Young Adults: *People v. Estrada* (1979) 93 Cal. App.3d 76, 91 [grand jury challenge] and *People v. Marbley* (1986) 181 Cal.App.3d 45, 48.
 - People over 70: *People v. McCoy* (1995) 40 Cal.App.4th 778, 783 [grand jury].
 2. **Battered Women:** *People v. Macioce* (1987) 197 Cal.App.3d 262, 280
 3. **Blue color workers:** *People v. Estrada* (1979) 93 Cal. App. 3d 76, 91 [grand jury challenge]
 4. **Hearing-impaired:** *People v. Fauber* (1992) 2 Cal.4th 792, 817.
 5. **“Insufficient” English spoken:** *People v. Lesara* (1988) 206 Cal. App.3d 1304, 1309;
 6. **Low Income/Poor:** *People v. DeSantis* (1992) 2 Cal.4th 1198, 1216; *People v. Johnson* (1989) 47 Cal. 3d 1194, 1214 [hardship challenge].
- Note:** In *United States v. Bishop* (9th Cir. 1992) 959 F. 2d 820, the Ninth Circuit reversed a conviction because the prosecutor provided no race-neutral reason for excluding a prospective African-American juror who lived in a predominately low income, black neighborhood. In doing so, the court examined the intertwined factors of race and economic status.
7. **Less educated:** *People v. Estrada* (1979) 93 Cal.App.3d 76, 90-91 [grand jury challenge]
 8. **Persons with reservations about the death penalty:** *People v. Morris* (1991) 53 Cal.3d 152, 186; *People v. Johnson* (1989) 47 Cal. 3d 1194, 1222; *People v. Davenport* (1995) 11 Cal.4th 1171, 1202-1203.

WHEELER IN PRACTICE

There are three steps that occur during a *Wheeler* motion in the trial court:

1. **Prima Facie Case:** the defendant must make out a prima facie case “by showing that the totality of the relevant facts gives rise to an *inference* of discriminatory purpose.”
[REDACTED]
2. **Justification:** once the defendant has established made out a prima facie case, the “burden shifts to the State to explain adequately the racial exclusion by offering permissible race-neutral justifications for the strikes.”
[REDACTED]
3. **Trial Court’s Analysis:** “[i]f a race-neutral explanation is tendered, the trial court must then decide ... whether the opponent of the strike has proved purposeful racial discrimination.” (*Johnson v. California* (2005) 545 U.S. 162; see *People v. Cornwell* (2005) 37 Cal.4th 50.)

PRIMA FACIE CASE: JOHNSON v. CALIFORNIA

The objecting party has the burden of establishing a prima facie case of discrimination.

Must make as complete a record of circumstances as feasible.

Must establish excluded persons as members of cognizable group.

Johnson and the Correct “Inference” Standard

***Batson* requires only that the challenger “raise an inference” of discrimination.** In order to make a prima facie case, *Wheeler* requires a showing of a “strong likelihood” that challenges were based on group association rather than specific bias, in light of all the circumstances. (*Wheeler* at 280.) Factors include:

Opponent challenged most or all members of identified group.

Opponent used disproportionate number of peremptories against this group.

Challenged jurors show only single characteristic of group membership; in other respects are heterogeneous;

Opponent asked no questions of challenged jurors or engaged in merely desultory voir dire

Though defendant need not be a member of the excluded group to complain, if he is a member, and if the victim is a member of a group to which the majority of remaining jurors belong, such factors are relevant.

NOTE: In *Wade v. Terhune* (9th Cir., 2000) 202 F.3d 1190, the Ninth Circuit Court of Appeals held that *Wheeler*'s "strong likelihood" standard in determining whether the moving party has made a prima facie case violates the 6th and 14th Amendments as protected under the Batson line of cases. *Wade* was followed by the case of *People v. Johnson* (2003) 30 Cal.4th 1302. *Johnson* case found the terms "strong likelihood" used in *Wheeler* and "reasonable inference" to be identical. (See also, *People v. Box* (2000) 23 Cal.4th 1153, 1188, fn. 7.) *Johnson* stated that "to state a prima facie case, the objector must show that it is more likely than not the other party's peremptory challenges, if unexplained, were based on impermissible group bias." (*Johnson, supra* at 1318.)

The U.S. Supreme Court visited this same issue in *Johnson v. California* (2005) 545 U.S. 162. *Johnson* rejected the decision in *People v. Johnson*. The US Supreme Court's *Johnson* case deemed the "more likely than not standard" to be an "inappropriate yardstick by which to measure the sufficiency of a prima facie case." Rather, according to the U.S. Supreme Court, "an objector need only present facts that give 'rise to an inference of discriminatory purpose.'" (*People v. Gray* (2005) 37 Cal.4th 168, 185-188, citing *Johnson v. California*.)

Of the post-*Johnson* Supreme Court cases, none have thoroughly analyzed what the new standard is and whether *Johnson* has conclusively sounded the death-knell on *Wheeler*. Both *Gray* and *People v. Ward* (2005) 36 Cal.4th 186 have discussed *Johnson*, with *Ward* appearing to continue to uphold the vitality of *Wheeler*. Nevertheless, the standard post-*Johnson* appears to be lower than the "substantial likelihood" showing used in *Wheeler*.

Additional note: *Wade* acknowledged that excluding the sole cognizable group member of a jury venire does not, in itself, raise an inference of discrimination.

PEOPLE V. WALKER – OUR DCA ON WAYS IN WHICH A PARTY MAY SEEK TO MAKE A PRIMA FACIE SHOWING OF GROUP BIAS

In *People v. Walker* (1998) 64 Cal.App.4th 1062, 1067-68, the Fourth District Court of Appeal, Division 2, quoted language in *Wheeler* that set forth certain types of evidence that is relevant in making a prima facie case of group bias.

[T]he party may show that his opponent has struck most or all of the members of the identified group from the venire, or has used a disproportionate number of his peremptories against the group. He may also demonstrate that the jurors in question share only this one characteristic – their membership in the group – and that in all other respects they are as heterogeneous as the community as a whole. Next the showing may be supplemented when appropriate by such circumstances

as the failure of his opponent to engage these same jurors in more than desultory voir dire....

The *Walker* court went on to review recent cases that did not find a “strong likelihood” that potential jurors had been challenged because of group bias.

- *People v. Mayfield* (1997) 14 Cal.4th 668 [Three of five jurors excused by the prosecutor were African-American. No prima facie case.]
- *People v. Davenport* (1995) 11 Cal.4th 1171 [Three of six jurors excused by the prosecutor were Hispanic. No prima facie case.]
- *People v. Turner* (1994) 8 Cal.4th 137 [Defendant was Black, victims White. Four of six jurors excused by the prosecutor were Black. No prima facie case.]
- *People v. Allen* (1989) 212 Cal.App.3d 306 [Six of 14 jurors excused by the prosecutor were Black. No prima facie case.]
- *People v. Rousseau* (1982) 129 Cal.App.3d 526 [There were two Blacks on the jury panel. The prosecutor excused both. No prima facie case.]

NOTE: Even though the *Walker* court found no prima facie case made [one Black juror excused by prosecutor in case where one Black juror sworn], the court still went on to comb record for race-neutral reasons for exercising the peremptory challenge. (See also, *People v. Howard* (1992) 1 Cal.4th 1132, 1154-5.)

JUSTIFICATION

If the court finds that a prima facie case had been established, the burden shifts to the party who challenged the juror to justify the challenges on non-group bias grounds.

- Must satisfy court that challenges were relevant to the particular case, parties or witness (i.e., show specific bias.)
- Justifying party should rely on totality of circumstances to make showing.
- The justification need not support a challenge for cause, and even a trivial reason, if genuine, neutral and supported in the record, will suffice.
- “The proper focus of a *Batson/Wheeler* inquiry, of course, 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.) “[T]he issue comes down to whether the trial court finds the prosecutor’s race-neutral explanations to be credible.” (*Miller-El v. Cockrell* (2003) 537 U.S. 322, 339.)

- The court must use good judgment to distinguish bona fide reasons for peremptories from “sham excuses belatedly contrived to avoid admitting acts of group discrimination.” (*Lenix; Wheeler* at 282.)

If the court finds the burden of justification was not sustained as to any of the questioned challenges, the presumption of their validity is rebutted.

***TRIAL COURT’S DETERMINATION
PEOPLE V. LENIX AND “COMPARATIVE ANALYSIS”***
(July 24, 2008) __ Cal.4th __ [80 Cal.Rptr.3d 98]

Lenix held that if the trial record is adequate, an appellate court should engage in a comparative juror analysis when reviewing a *Batson/Wheeler* allegation. This is true even if such an analysis was NOT done at the trial stage. It is circumstantial evidence of the intent the attorney [REDACTED] had when challenging the juror in question and their real reasons for doing so.

The appellate court reviews the record to determine whether substantial evidence supports the trial court’s conclusions that the juror was struck for neutral and honest reasons and not for a discriminatory purpose. This is done in relation to step number three: “Trial Court’s Determination.”

[REDACTED]

REMEDIES FOR WHEELER VIOLATIONS

Dismiss jurors selected so far.

Draw entirely new venire and restart jury selection.

Other Remedies – *People v. Willis* (2002) 27 Cal.4th 811 found that if the aggrieved party wanted a different sanction for *Wheeler* error, other than a new jury panel, then the trial court had the authority to so order. Among the alternative remedies are:

- Seat challenged juror
- Fine responsible party (e.g. the DDA)
- Add peremptory challenges to aggrieved party

[REDACTED]

A *Wheeler/Batson* objection may be raised by defense or prosecution. (*Wheeler* at 280, 282, fn. 29; *People v. Williams* (1994) 26 Cal. App.4th Supp. 1, 9; *Georgia v. McCollum* (1992) 505 U.S. 42.)

The objecting party must timely raise a *Wheeler/Batson* challenge.

