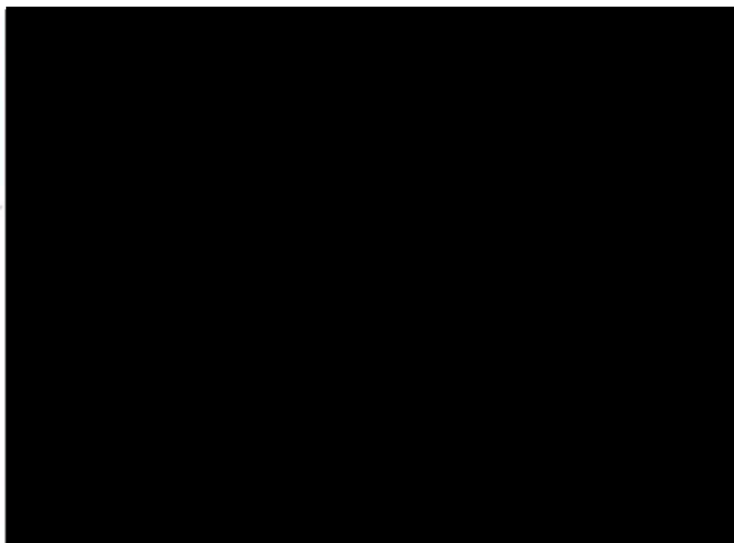


Batson/Wheeler

January 2019

District Attorney's Office Training Unit – Confidential – Not for Disclosure 01/09/2019



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 – 14th 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
[REDACTED]
- **Stage 2:** DA offers a non-discriminatory reason for exercising strike(s)
[REDACTED]
- **Stage 3:** Court determines whether the defendant proved purposeful discrimination
[REDACTED]

Stage 1 The Prima Facie Case

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

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.)

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	➢ Sexual Orientation
➢ Race	➢ Physical Disability
➢ Color	➢ Medical Condition
➢ Religion	➢ Mental Disability
➢ Ancestry	➢ Genetic Information
➢ National Origin	➢ Age
➢ Ethnic Group Identification	➢ Marital Status

Stage 1
What are cognizable groups?

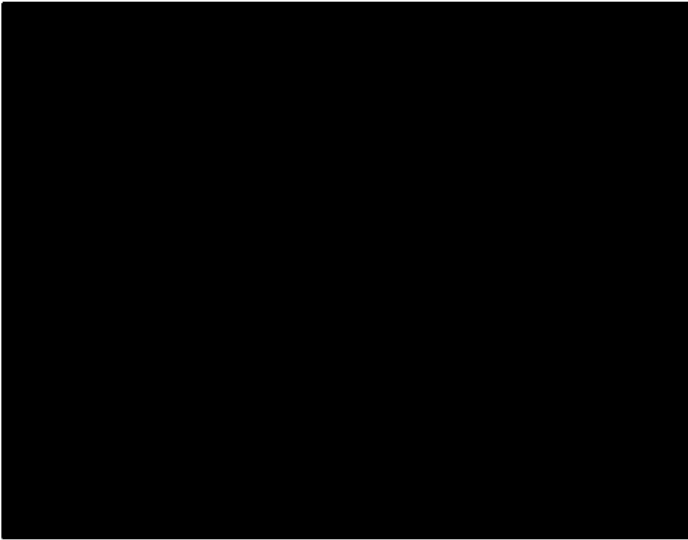
- Race includes "white" people
 - *People v. Willis* (2002) 27 Cal.4th 811
- Religion
- Hearing or Vision Impaired (?)
 - CCP § 203 (a)(6) no person shall be deemed incompetent solely because of the loss of sight or hearing in any degree or other disability which impedes the person's ability to communicate 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.]

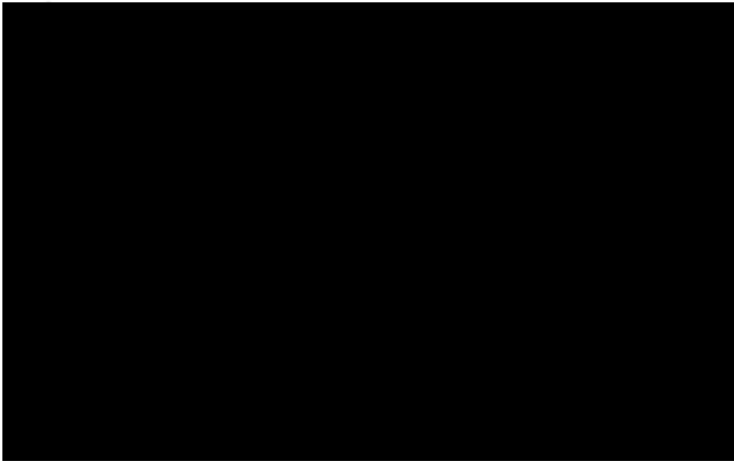
Stage 1
What are cognizable groups?

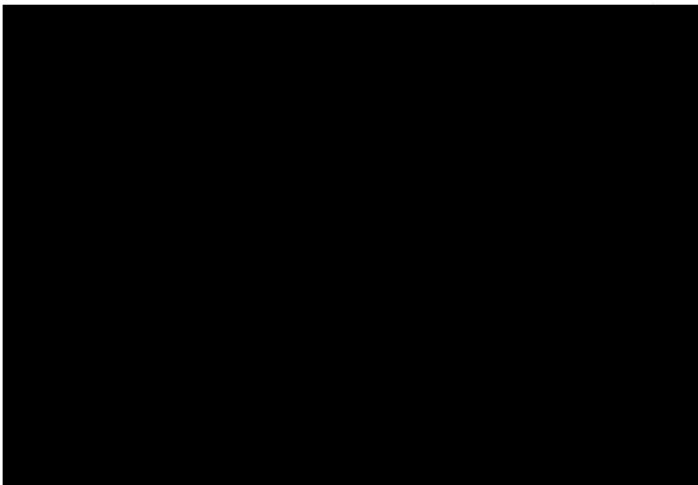
- Yes to black woman, black men . . . (*People v. Young* (2005) 34 Cal.4th 1149)
- No to "people of color" (*People v. Davis* (2009) 46 Cal.4th 539)

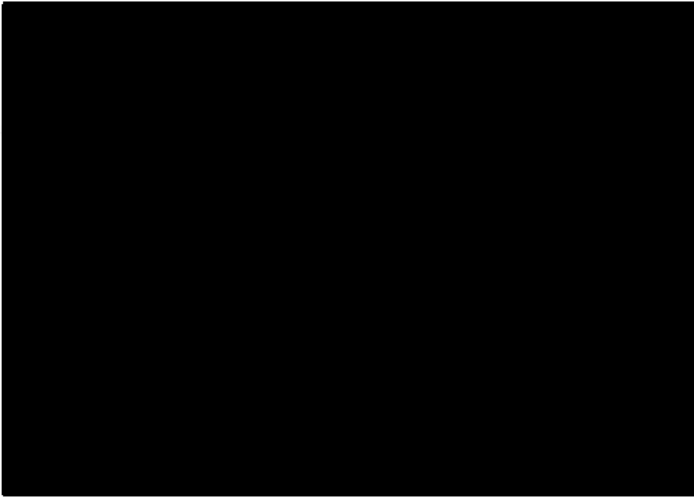
Stage 1
What is a prima facie case?

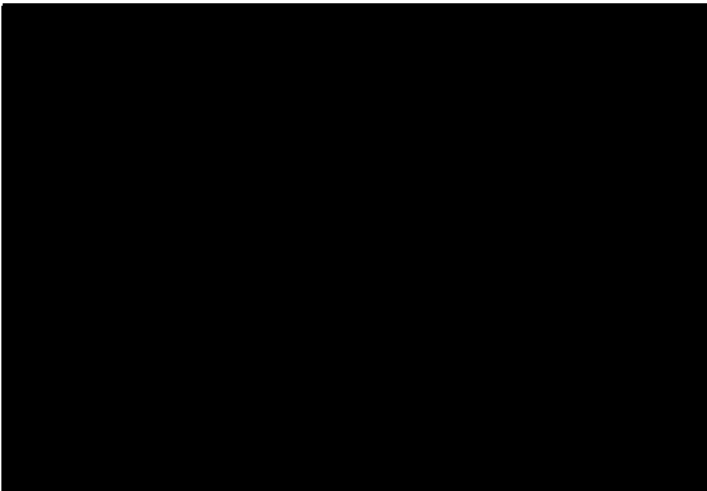
- *Johnson v. California* (2005) 545 U.S. 162
 - "the totality of the relevant facts gives rise to an inference of discriminatory purpose"
- **Not more likely than not**
- **Not "strong likelihood"**

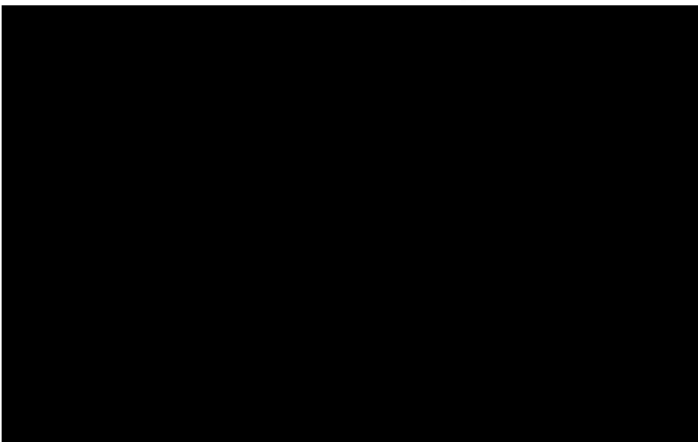


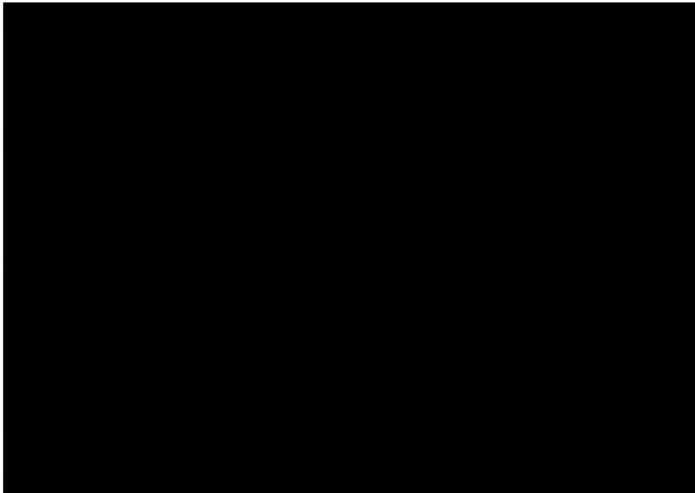


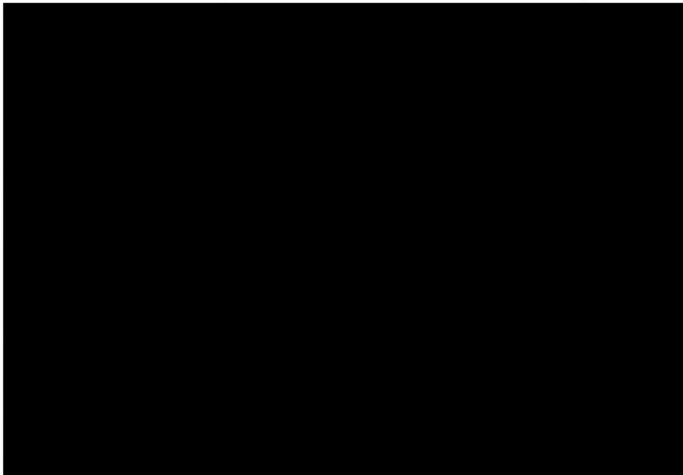


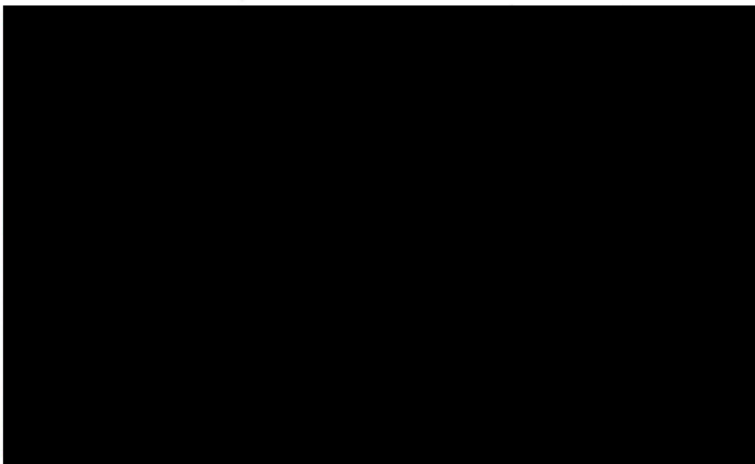












**Stage 1
Exception**

If you give a reason that is discriminatory on its face, the court is not going to ignore that at first stage review.

**Stage 2
Your Non-Discriminatory Reasons**

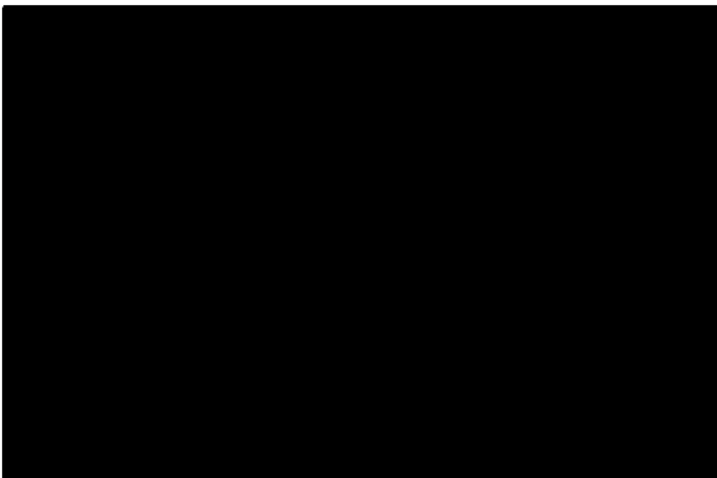
- You give non-discriminatory reasons for exercising the strike(s)
 - Actual reasons
 - No longer objective, this is subjective

"We emphasize that the prosecutor's explanation need not rise to the level justifying exercise of a challenge for cause"

➤ (*Batson v. Kentucky, supra*, 476 U.S. at p. 97.)

- "The party seeking to justify a suspect excusal need only offer a genuine, reasonably specific, race or group-neutral explanation related to the particular case being tried."

➤ (*People v. Arias* (1996) 13 Cal.4th 92, 136.)



Stage 2
Your Non-Discriminatory Reasons

[Redacted]

➤ On appeal, failure to provide adequate reasons even for one of a cognizable group requires reversal. (*People v. Silva* (2001) 25 Cal. 4th 345.)

[Redacted]

Stage 2
Your Non-Discriminatory Reasons

- Can be "trivial if genuine and neutral." (*People v. Lenix* (2008) 44 Cal.4th 602, 613)
- "A prospective juror may be excused based upon bare looks and gestures, hunches, and even arbitrary reasons." (*People v. Allen* (2004) 115 Cal. App. 4th 542, 547.)
- Can be "based upon facial expressions, gestures, hunches, and even for arbitrary or idiosyncratic reasons" (*People v. Lenix, supra*, 44 Cal.4th 602, 613)

[Redacted]

Stage 2
Your Non-Discriminatory Reasons

Demeanor

- "She was 'passive' in the way she answered questions leading him to believe she might reach a decision that was not well thought out." (*People v. Howard* (1992) 1 Cal.4th 1132, 1208.)
- "Her facial expressions and the manner in which she responded 'communicated a difficulty in being able to mentally grasp the process of a criminal trial involving the death penalty.'" (*ibid.*)
- Juror's body language seemed angry and hostile. (*People v. Turner* (1994) 8 Cal. 4th 137.)
- "She had a very defensive body position when the prosecutor questioned her and would not look at him when introduced. Her pulse seemed to race when the death penalty was mentioned. . . . She was very nervous about the death penalty and kept her hand over her mouth when talking about it. . . . She did not relate to the prosecutor and seemed not to trust him." (*People v. Johnson* (1989) 47 Cal.3d 1194, 1218, overruled on other grounds by *People v. Gutierrez* (2017) 2 Cal.5th 1150, 1174 [appellate court review must include comparative juror analysis].)

Stage 2
Your Non-Discriminatory Reasons

Occupation

- Juror's occupation (*People v. Arellano* (2016) 245 Cal. App. 4th 1139, 1165)
 - Teachers (*People v. Barber* (1988) 200 Cal.App.3d 378, 394.)
 - DPSS/Caregivers (*People v. Perez, supra*, 48 Cal.App.4th at p. 1315)
 - Health Care/Social Services (*People v. Trevino, supra*, 55 Cal.App.4th at p. 411.)
 - Unemployed (*People v. Hamilton* (2009) 45 Cal.4th 863, 904-905)
- Juror's spouse's occupation (*People v. Arellano*, 245 Cal. App. 4th 1139, 1165)
 - Or Ex-Spouse's Occupation (*People v. Johnson, supra*, 47 Cal.3d at p. 1218.)

Stage 2
Your Non-Discriminatory Reasons

Attire/Appearance

- "She was very young and 'came into court wearing a T-shirt and somewhat sloppily attired.' Prosecutor explained that he generally preferred to have "older, more conservative people" on the jury... Likewise, a slovenly appearance can reveal characteristics that are legitimately undesirable to the prosecution." (*People v. Lomax* (2010) 49 Cal.4th 530, 575.)
- Juror "stood out from all the other jurors because [s]he dressed in a way which is extraordinary for somebody of her age. She's 33 years old but she dressed like a 15-year-old, with baggy clothes ... very unkempt and slovenly looking person." (*People v. Hamilton, supra*.)
- "[S]he was 'grossly overweight, appeared unclean and wore an excess of cheap jewelry,' factors he believed might prevent effective interaction with other jurors." (*People v. Howard* (1992) 1 Cal.4th 1132, 1208.)
- Metal-studded, leather motorcycle garb (*People v. Walker* (1988) 47 Cal.3d 605, 625.)

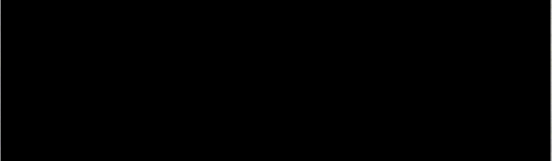
Stage 2
Your Non-Discriminatory Reasons

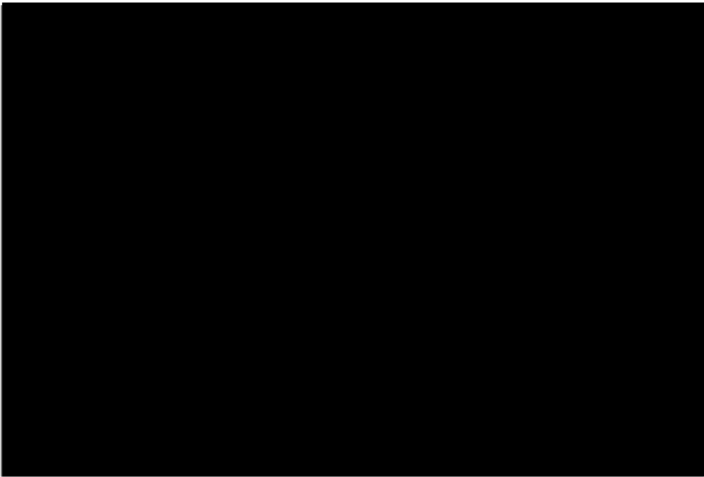
Negative experience with LE

- Prospective juror's negative experience with law enforcement. (*People v. Turner* (1994) 8 Cal.4th 137, 171; *People v. Walker* (1988) 47 Cal. 3d 605.)
- Relatives or family members in prison (*People v. Roldan* (2005) 35 Cal.4th 646, 703, disapproved on other grounds in *People v. Doanlin* (2009) 45 Cal.4th 390, 421, fn. 22; *People v. Morris* (2003) 107 Cal.App.4th 402, 409; *People v. Arellano, supra*.)
- Arrest/conviction of juror's family member (*People v. Turner, supra*.)

Stage 2
Your Non-Discriminatory Reasons

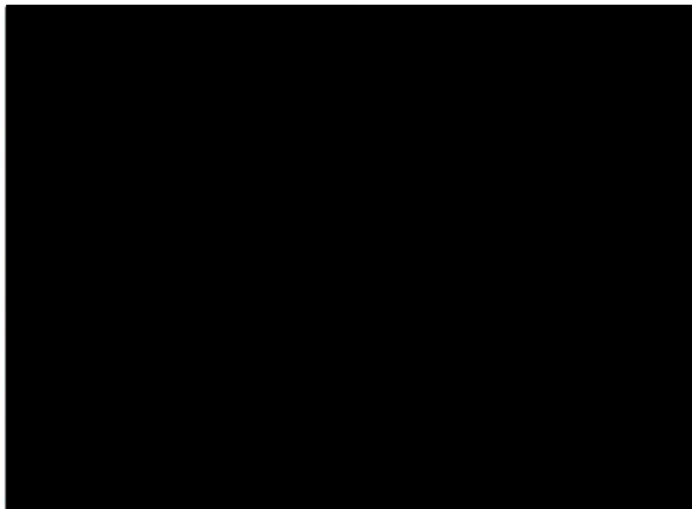
- Be careful not to be too vague:
 - “[H]er very response to your answers,” her “dress” and “how she took her seat” too vague. (*People v. Allen* (2004) 115 Cal.App.4th 542)

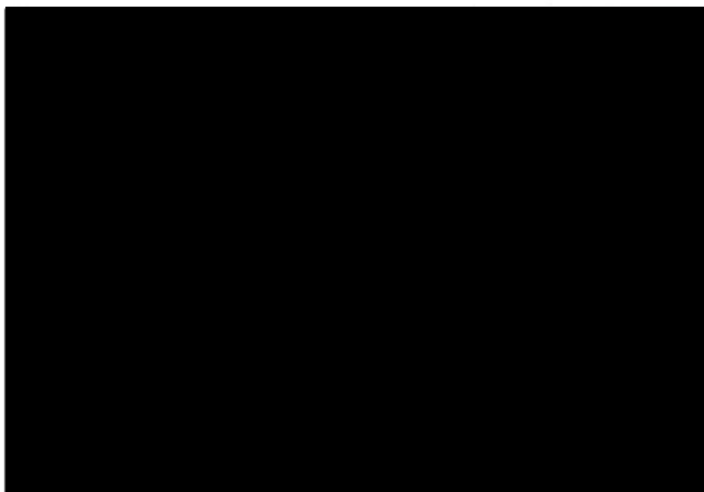




Stage 2
Your Non-Discriminatory Reasons

- When give your reasons, judge will be (should be) evaluating your demeanor and credibility (Stage 3)
- You can make an *honest* mistake
 - *Aleman v. Uribe* (2013) 723 F.3d 976 – prosecutor honestly thought excused juror had made a statement that was actually made by a different juror. No Batson error. Batson prohibits *purposeful* discrimination, not honest mistakes.





Stage 2
Comparative Juror Analysis

Even if not raised in trial court, will conduct it on appeal

➤ *People v. Lenix* (2008) 44 Cal.4th 602

- E.g. *Miller-El v. Dretke* (2005) 545 U.S. 231

Stage 2
Comparative Juror Analysis
People v. Cisneros

People v. Cisneros (2015) 234 Cal.App.4th 111: DA's reason was I want the next juror in line.

- Court of Appeal found this is the same as giving *no reason at all*.
- Anytime you strike a juror, it necessarily means that you prefer the next prospective juror to the one being struck. There are 12 jurors available to reach that next prospective juror. You must explain why you chose to strike that particular juror in order to reach the next prospective juror.

Stage 3
Was Strike Purposefully Discriminatory?

- Court evaluates evidence and determines if defendant has met burden to prove purposeful discrimination
- Look totality of the evidence (direct and circumstantial)

Stage 3

- Are the given reasons genuine or is the given reason a pretext for discrimination
- "The focus at this point 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. Trinh* (2014) 59 Cal.4th 216, 241.)

**Stage 3
Credibility Determination**

Court is to consider:

- demeanor
- inherent reasonableness or improbability of proffered explanations
- plausible basis in accepted trial strategy
- the court's own observation of the relevant jurors' voir dire
- court's own experience as a trial lawyer and judge in the community
- **the common practices of the prosecutor's office and the individual prosecutor himself**

(*People v. Mai* (2013) 57 Cal.4th 986)

**Stage 3
Credibility Determination**

People v. Arellano, supra:

- Prosecutor excused black juror, claiming she had worked for a "liberal political organization" because she had worked as a field representative for the Department of Commerce.
- She had the same job for 22 years, which meant she worked throughout presidential administrations and congressional majorities from both political parties.
- Nothing in record that she was affiliated with a particular political party.
- When court and defense counsel express confusion over this response, DA then mentioned her prior experience with the police and jury service on a "police brutality" case:
- Trial court summarily denied defendant's *Batson/Wheeler* objection and simply said that the prosecutor had "provided a race-neutral explanation. Defense has not proved any purposeful racial discrimination.

**Stage 3
Credibility Determination**

People v. Arellano, supra (Continued)

Appellate court reversed:

➢ "Although we generally 'accord great deference to the trial court's ruling that a particular reason is genuine,' we do so only when the trial court has made a sincere and reasoned attempt to evaluate each stated reason as applied to each challenged juror. 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. Arellano, supra*, 245 Cal.App.4th at pp. 1165-1166, citing *People v. Silva, supra*, 25 Cal.4th at pp. 385-386.)

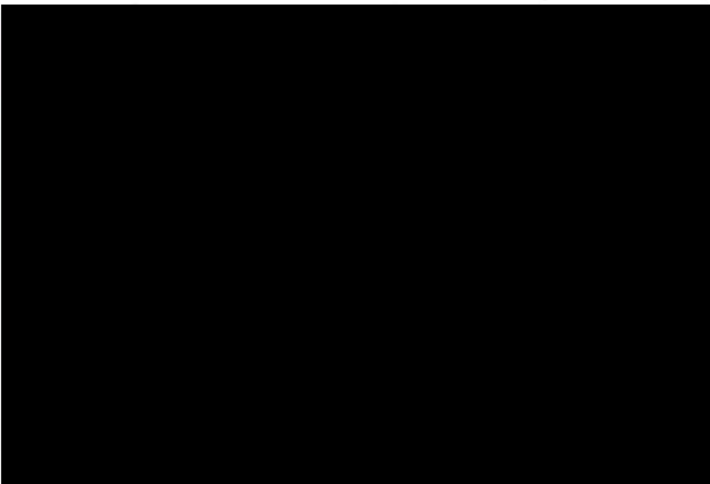
The Remedy

- Default remedy is quash whole venire and start over
- Alternative remedy is reseal the improperly excused juror

Prevailing party gets to pick, but forfeited if he fails to request a particular remedy. (*People v. Mata* (2013) 57 Cal.4th 178)

The Remedy

- *People v. Willis* (2002) 27 Cal.4th 811 – Def Atty tried to dismiss venire, then exercised peremptories against all white jurors. People did not want to give him the remedy he wanted so agreed to monetary sanctions.
- CSC approved of alternative remedies because had consent of the prevailing party.
- Courts have discretion to fashion appropriate alternative remedies, but prevailing party always has the choice



Appellate Review

• The law

- "Great deference" to trial court
- "Presume that a prosecutor uses peremptory challenges in a constitutional manner"

(People v. Montes (2014) 58 Cal.4th 809, 847)



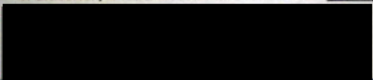
Appellate Review

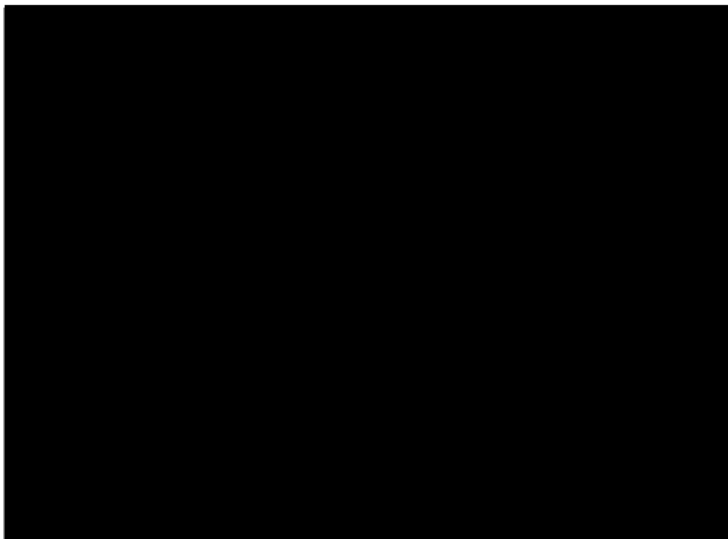
• *People v. Scott (June 8, 2015) 61 Cal.4th 363*

➤ Ideal Record: p. 349

- (1) Trial court finds no prima facie case;
- (2) Prosecutor states reasons for excusing the juror for the record
- (3) the prosecutor provides nondiscriminatory reasons, and
- (4) the trial court determines that the prosecutor's nondiscriminatory reasons are genuine

➤ If this is present, an appellate court should begin its analysis of the trial court's denial of the *Batson/Wheeler* motion with a review of the first-stage ruling.

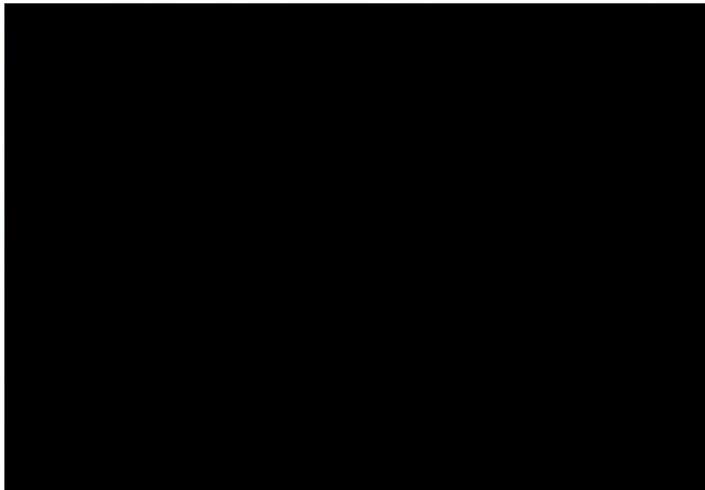


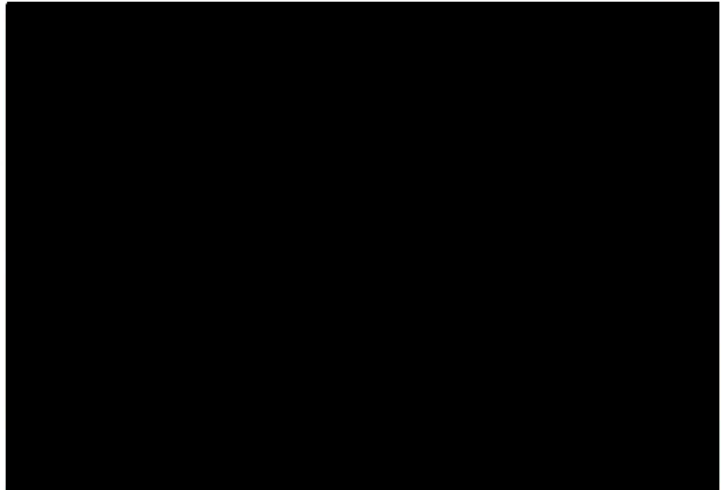


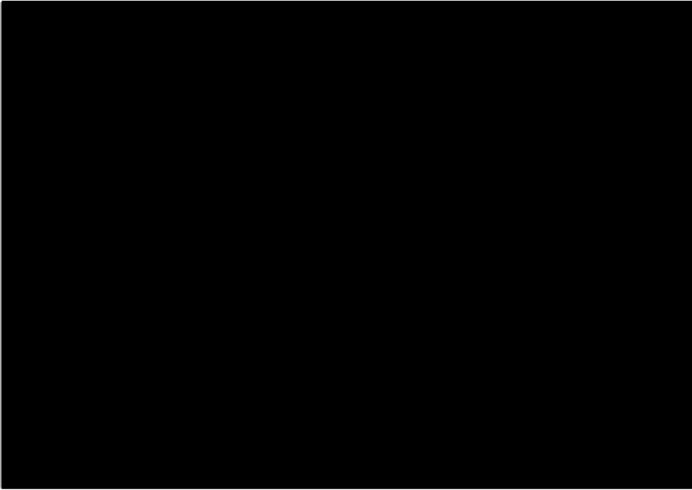
Should Your Notes Document Race?

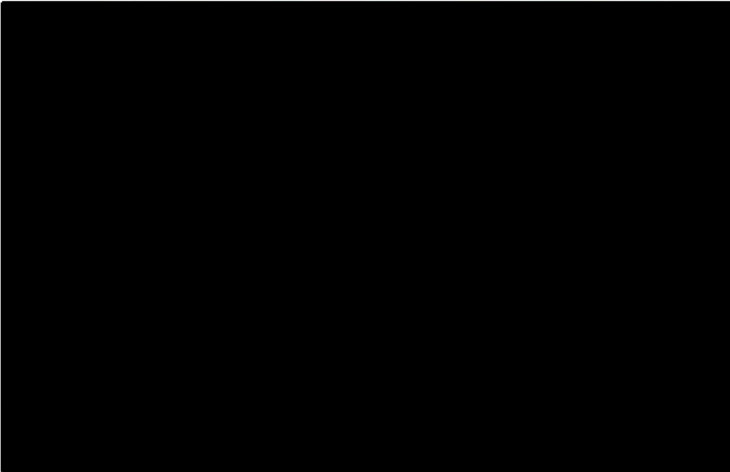
- *Miller-El v. Dretke* (2005) 545 U.S. 231: In a case tried pre-Batson, USSC found notes documenting race are evidence of discrimination.
- *People v. Lenix* (2008) 44 Cal.4th 602, 671, fn. 12: "We emphasize, however, that post *Batson*, recording the race of each juror is an important tool to be used by the court and counsel in mounting, refuting or analyzing a *Batson* challenge."
- *Green v. Lamarque* (9th Cir. 2008) 532 F.3d 1028: "[T]he prosecutor had noted the race of each venire member he struck from the jury pool; when the trial judge asked him who he struck and why, the prosecutor was able to read off a list, and he had noted the race of each venire member next to the member's name."

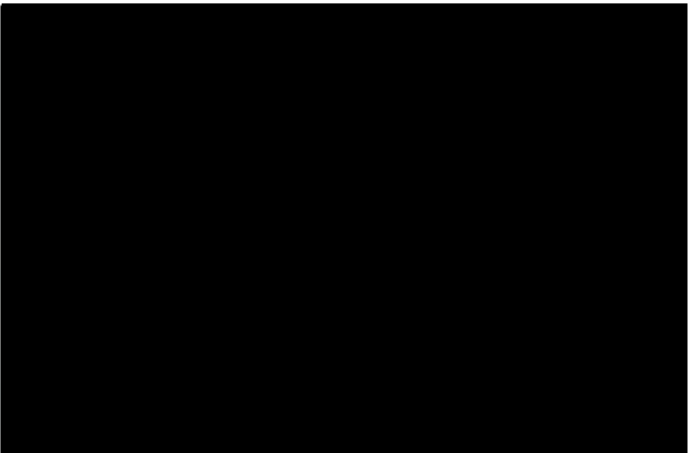




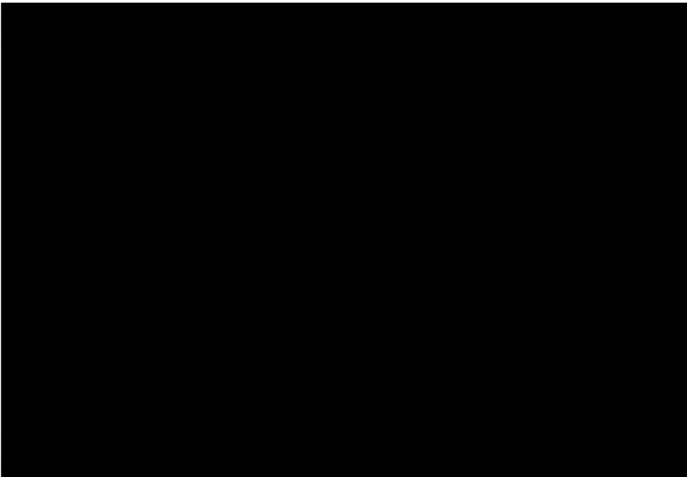


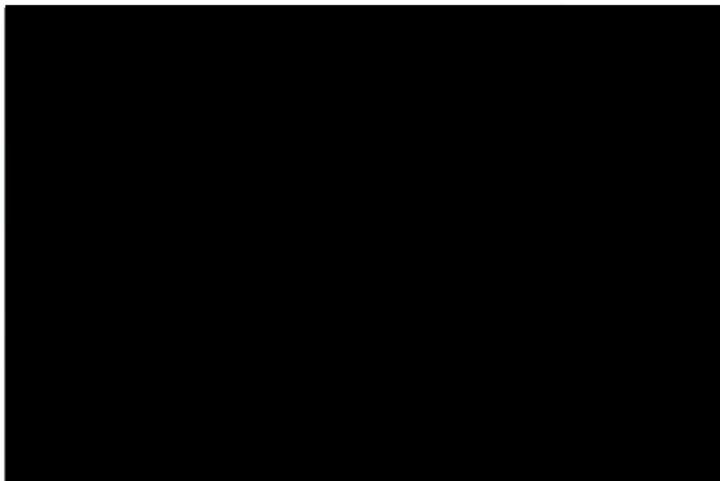


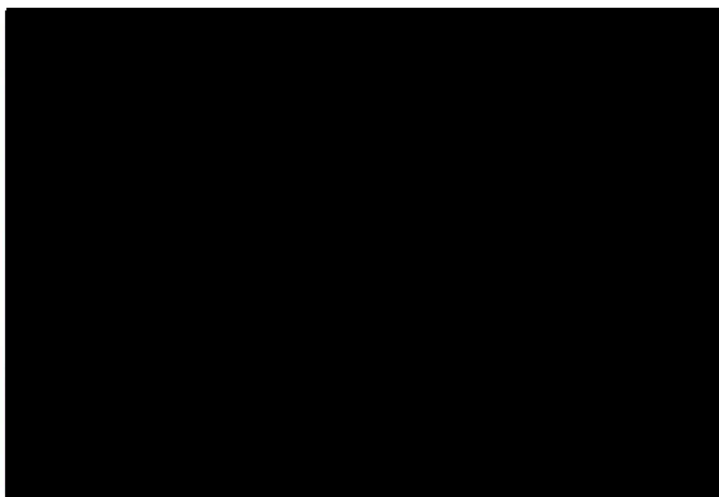




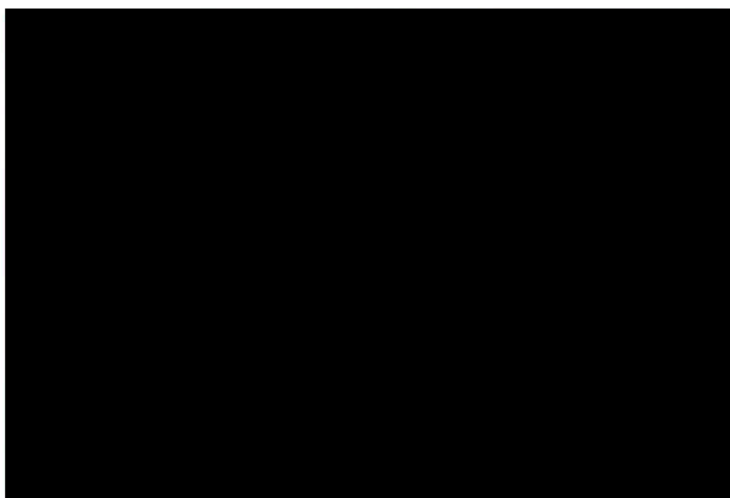




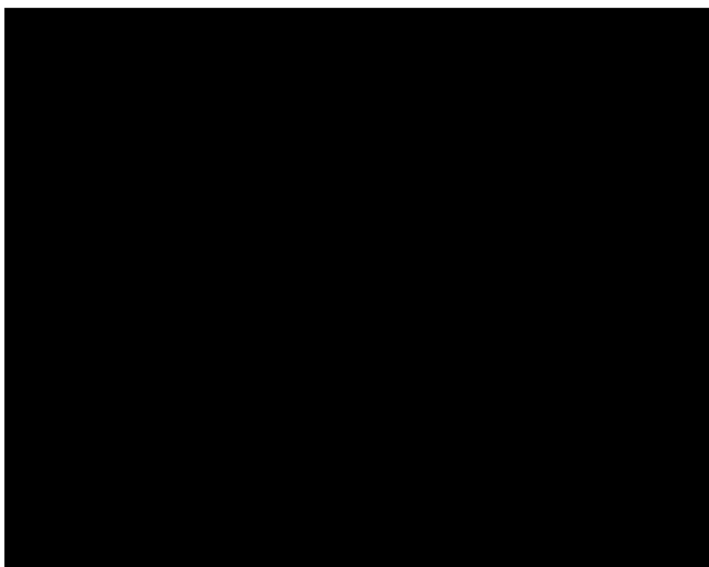




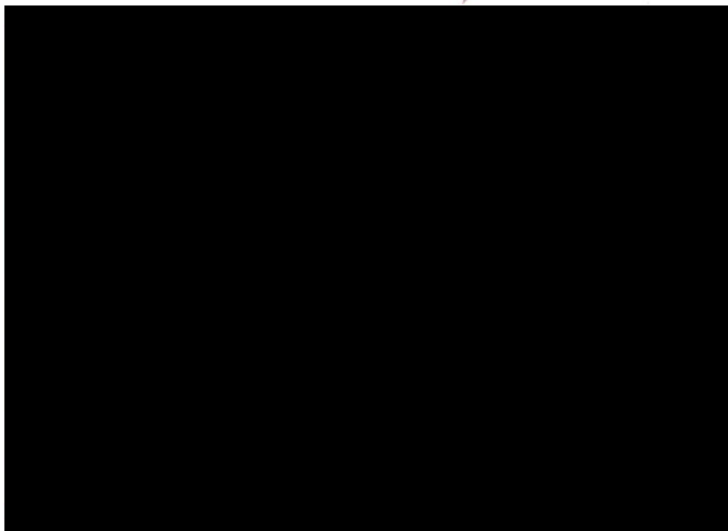
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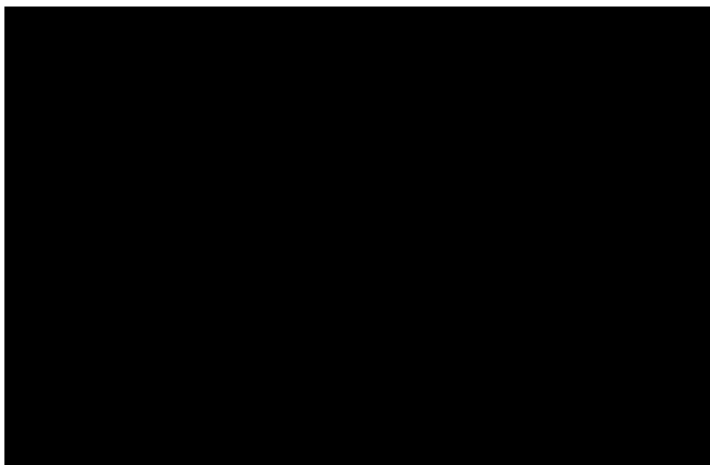
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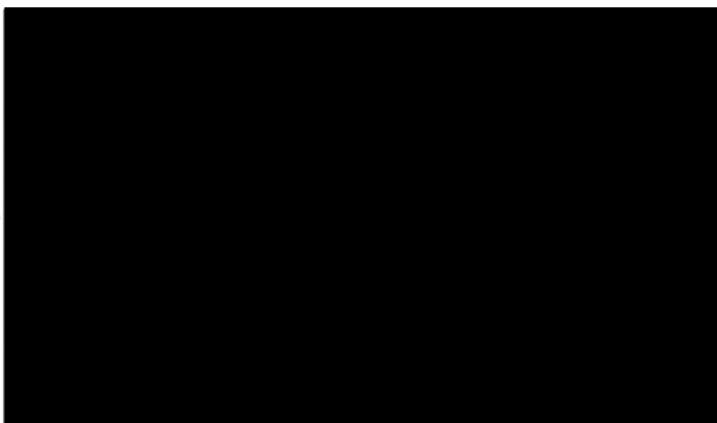
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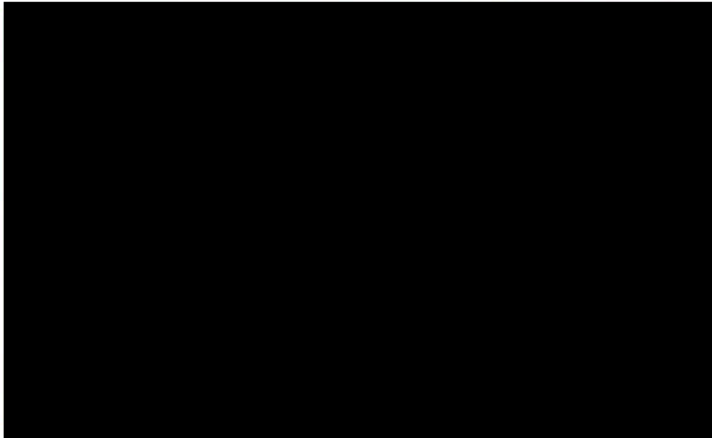
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Seven horizontal lines for writing, positioned to the right of the third redaction.



Example

An accused is "brought to trial" within the meaning of the speedy trial statute when a case has been called for trial by a judge who is normally available and ready to try the case to conclusion; the court must have committed its resources to the trial, and the parties must be ready to proceed and a panel of prospective jurors must be summoned and sworn.

People v. Giron-Chamul (2016) 245 Cal.App.4th 932

Example

CA PEN 1382 (a)(2): 60 days for trial after mistrial
Mistrial = Jeopardy attached + defendant consents and/or legal necessity requires discharge of the jury

➤ See e.g., *Carrillo v. Superior Court (2006) 145 Cal.App.4th 1511, 1524*