



Wheeler / Batson Guide

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Seminal Cases

P v. Wheeler (1978) 22 C3 258; *Batson v. Kentucky* (1986) 476 US 79

3 Prong Test

1. Party objecting to challenge (defense) must make a prima facie case
 - Showing that the totality of facts gives rise to an inference of discriminatory purpose
2. If prima facie case shown, burden shifts and party (DA) must explain adequately the challenge
 - Offer permissible race-neutral justification
3. Court then makes decision
 - Whether party objecting (defense) has proved purposeful discrimination (*Johnson v. California* (2005) 545 US 162, 168)

Burden of Proof

- Defense has ultimate burden of proof. (*Gonzalez v. Brown* (9th Cir. 2009) 585 F3 1202, 1207; *Purkett v. Elem* (1995) 514 US 765, 768)
- Defense must show purposeful discrimination by a preponderance of the evidence. (*P v. Hutchins* (2007) 147 CA4 992; *Paulino v. Harrison* (9th Cir. 2008) 542 F3 692, 703)
- Consider totality of circumstances. (*P v. Lenix* (2008) 44 C4 602, 626)
- Presumption that challenge is proper. (*P v. Neuman* (2009) 176 CA4 571)

Rebut Prima Facie Case (1st Prong)

- DA passed with excused juror on panel. (*P v. Williams* (2013) 56 C4 630)
- Whether jury includes members of group discriminated against (*P v. Ward* (2005) 36 C4 186, 203)
- Did not know juror was member of cognizable group. (*P v. Barber* (1988) 200 CA3 378)
- Admit mistake (if error). (*P v. Williams* (1997) 16 C4 153, 188-190)
- Justify prospective challenges before you even make them. (*US v. Contreras* (9th Cir. 1988) 83 F3 1103)
- Challenge of 1 or 2 jurors rarely suggests a pattern of impermissible group bias. (*P v. Allen* (2015) 237 CA4 971, 978; *P v. Bell* (2007) 40 C4 582, 598.)

Justifications (2nd Prong)

- Justification need not support a challenge for cause. (*P v. Thomas* (2011) 51 C4 449, 474)
- "Trivial" reason (if genuine) will suffice. (*P v. Arias* (1996) 13 C4 92, 136)
- Reasons must be inherently plausible & supported by record. (*P v. Silva* (2001) 25 C4 345, 386)
- Must state reasons for each challenge. (*P v. Cervantes* (1991) 223 CA3 323 ["I don't recall" fatal]; but see *Gonzalez v. Brown* (9th Cir. 2009) 585 F3 1202 [based on totality of circumstances, "I don't recall" not fatal])
- Could be combination of factors (change in dynamic of jury, change in mix of jurors, number of preemptory challenges left, etc.). (*P v. Lenix* (2008) 44 C4 602, 623; *P v. Reynoso* (2003) 31 C4 903, 918.)
- For each excused juror, must identify characteristics in support of decision to excuse them. (*P v. Cisneros* (2015) 234 CA4 111, 121)

Factors in Court's Analysis (3rd Prong)

- Whether defendant, victim and/or witnesses are members of cognizable group. (*P v. Bell* (2007) 40 C4 582, 597-99.)
- Statistical evidence (raw numbers, percentage of jurors excused, remaining, proportionality, etc.). (*P v. Garcia* (2011) 52 C4 706, 744)
- Comparative analysis (see box below).
- Little, no or disparate questioning (differences in the way questions were phrased to different jurors). (*Miller-El v. Dretke* (2005) 545 US 231, 254)
- Historical evidence of discrimination (by individual prosecutor and/or office). (*Miller-El v. Dretke* (2005) 545 US 231)
- Credibility, demeanor of prosecutor. (*P v. Williams* (2013) 56 C4 630; *P v. Cox* (2010) 187 CA4 337, 343.)
- Whether prosecution passed on panel with members of group. (*P v. Sanchez* (2016) 63 C4 411, 439; *P v. Gutierrez* (2017) 2 C5 1150, 1170.)

Comparative Analysis

- Side-by-side comparison of jurors who were struck vs. jurors serving.
- If DA's proffered reason for striking juror applies just as well to an otherwise-similar juror, that is evidence tending to prove purposeful discrimination. (*Miller-El v. Dretke* (2005) 545 US 231, 241)
- Is but one form of circumstantial evidence that is relevant, but not necessarily dispositive. (*P v. Lomax* (2010) 49 C4 530, 572)

Remedy

- Traditional: mistrial → draw different jury panel and start selection anew.
- Other alternatives (need consent of aggrieved party): disallow discriminatory challenge and reseal wrongfully excluded juror; monetary fines; allow aggrieved party additional preemptory challenges. (*P v. Willis* (2002) 27 C4 811; *P v. Mata* (2012) 203 CA4 898 [Def's personal waiver])

Cognizable Groups

- There must be an identifiable group distinguished on racial, religious, ethnic or similar grounds. (*P v. Wheeler* (1978) 22 C3 258, 276)
- Protected groups: “race, national origin, ethnic group identification, religion, **age**, sex, sexual orientation, color, genetic information, or disability.” (CCP § 231.5; Govt Code § 11135(a))
- Defendant need not be member of excluded group. (*Wheeler @ 281*)

Race

- African-Americans (*P v. Wheeler* (1978) 22 C3 258)
- Hispanics (*P v. Perez* (1996) 48 CA4 1310; but see *P v. Gutierrez* (2002) 28 C4 1083, 1123 [Hispanic-surnamed jurors not necessarily Hispanic])
- Asian-Americans (*P v. Lopez* (1991) 3 CA4 Supp. 11)

Ethnicity

- Native Americans (*US v. Bauer* (9th Cir. 1996) 84 F3 1549)
- Irish/Italian-Americans (See 20 ALR 5th 398 at § 6)

National origin

- Spanish surnamed jurors, if origin otherwise unknown (*P v. Gutierrez* (2017) 2 C5 1150, 1156, fn.2.)

Religion

- Jews (*P v. Johnson* (1989) 47 C3 1194, 1217)
- But see *P v. Martin* (1998) 64 CA4 378 [permissible if valid reason related to religion (e.g., Jehovah’s Witness); *US v. DeJesus* (3rd Cir. 2003) 347 F3d 500 [permissible for heightened religious involvement]]

Gender

- Women (*P v. Garcia* (2011) 52 C4 706; *P v. Crittenden* (1994) 9 C4 83, 115)

Sexual Orientation

- Gay & Lesbian (*P v. Garcia* (2000) 77 CA4 1269, 1272)

Disability

- *US v. Harris* (7th Cir. 1999) 197 F3 870 [but permissible if disability would affect jury service (e.g., medication that causes drowsiness would interfere)]

Non-Cognizable Groups (Examples)

- Poor people / low income (*P v. Johnson* (1989) 47 C3 1194, 1214)
- Less educated (*P v. Estrada* (1979) 93 CA3 76, 90-91)
- Blue collar workers (*P v. Estrada* (1979) 93 CA3 76, 92)
- Battered women (*P. Macioce* (1987) 197 CA3 262, 280)
- Death penalty skeptics (*P v. Johnson* (1989) 47 C3 1194, 1222)
- Ex-felons (*P v. Karis* (1988) 46 C3 612, 631-633)
- Resident aliens (*P v. Karis* (1988) 46 C3 612, 631-633)
- Naturalized citizens (*P v. Gonzalez* (1989) 211 CA3 1186, 1202 [but can’t be pretext for challenge based on race/national origin])
- Insufficient English spoken (*P v. Lesara* (1988) 206 CA3 1304, 1307)
- New community resident (*Adams v. Sup. Court* (1974) 12 C3 55, 60)
- Men who wear toupees (*P v. Motton* (1985) 39 C3 596, 606)
- Retired correctional officers (*P v. England* (2000) 83 CA4 772)
- Support jury nullification (*Merced v. McGrath* (9th Cir. 2005) 426 F3 1076)
- People of color (as a group) (*P v. Neuman* (2009) 176 CA4 571) [but see inclusion of “color” in Govt Code § 11135(a) eff. 1/1/16]
- Obese people (*US v. Santiago-Martinez* (9th Cir. 1995) 58 F3d 422)
- Non-Hispanic w/ Spanish surname (*P v. Gutierrez* (2002) 28 C4 1083, 1122)

Requirements / Rules

- Wheeler/Batson objection may be raised by the defense or prosecution. (*P v. Wheeler* (1978) 22 C3 258, 280-283, fn.29; see, e.g., *P v. Singh* (2015) 234 CA4 1319 [against defense attorney])
- Objection must be timely (i.e., before jury selection completed). (*P v. Perez* (1996) 48 CA4 1310; *P v. Scott* (2015) 61 C4 363, 383)
- Single discriminatory exclusion is violation. (*P v. Fuentes* (1991) 54 C3 707)
- Give your justifications even if prima facie showing is not made, but only after court ruling. (*P v. Scott* (2015) 61 C4 363, 388 [encouraged for appellate review])

Distrust of law enforcement

- Negative experience^{1, 6}
- Relative in jail or prison^{2, 6, 17}
- Refused employment by police³
- Ex-husband is cop¹⁵
- Divorce with police officer³
- Juror or friend/family arrested/prosecuted^{4, 6, 8}
- Relative involved with drugs^{8, 9}

Prior Jury Experience

- Previously sat on hung jury^{1, 2}
- No prior jury experience⁵

Race-Neutral Justifications (Examples)

Occupation

- Social worker¹
- Teacher,⁹ Pastor¹⁸
- Juvenile Counselor¹³
- Tractor Driver⁹

Limited Life Experiences (other than age alone)

- Single, no children⁵
- Few ties to community¹⁶
- Follower¹⁷

Stupid

- Ability to comprehend^{1, 4, 9}
- Answered only 2 of 10 questions⁵
- Inattentive¹⁰
- Inconsistent answers¹¹

Other

- Views on death penalty^{6, 7}
- Rely too heavily on experts⁶
- Late/tardy¹⁷
- Close-mindedness⁶

Appearance / Demeanor

- Unconventional appearance¹²
- Wearing “Coors” jacket⁹
- Long hair, facial hair¹⁴
- Weird, unusual^{15, 17}
- Too eager^{13, 17}
- Soft spoken, reluctant, timid^{4, 17}
- Frowning, hostile looks^{6, 8}
- Emotional⁶
- Body language¹⁵
- Overweight¹⁵

1) *P v. Turner* (1994) 8 C4 137; 2) *P v. Farnam* (2002) 28 C4 107; 3) *Hayes v. Woodford* (9th Cir. 2002) 301 F3d 1054; 4) *P v. Arias* (1996) 13 C4 92; 5) *P v. Perez* (1994) 29 CA4 1313; 6) *P v. Gutierrez* (2002) 28 C4 1083; 7) *P v. Williams* (2013) 56 C4 630; 8) *P v. Dunn* (1995) 40 CA4 1039; 9) *P v. Barber* (1988) 200 CA3 378; 10) *US v. Power* (9th Cir. 1989) 881 F2d 733; 11) *P v. Mayfield* (1997) 14 C4 668; 12) *P v. Ward* (2005) 36 C4 186; 13) *P v. Ervin* (2000) 22 C4 48; 14) *Purkett v. Elem* (1995) 514 US 765; 15) *P v. Johnson* (1989) 47 C3 1194; 16) *Rice v. Collins* (2006) 546 US 333; 17) *P v. Duff* (2014) 58 C4 527; 18) *P v. Semien* (2008) 162 CA4 701.