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Non-Cognizant

- Poor people/low income
- Less educated
- Blue collar workers
- Borned women
- Dutch penalty strikes
- Ex-Jews
- Resident aliens
- Older people
- Non-Hispanic with Sp.
- Naturalized citizens (w/ naturalization)
- "Immigrant" English
- New community residents
- Strongly and weakly
- Men who were tougher
- Related correctional off.
- People who believe in
- People of color

- Race
- National Origin
- Ethnic Group identification
- Religion
- **Age**
- Sex
- Sexual Orientation
- Color
- **Genetic Information**
- Disability

Non-Cognizable Groups

- Poor people/low income
- Less educated
- Blue collar workers
- Battered women
- Death penalty skeptics
- Ex-felons
- Resident aliens
- Obese people
- Non-Hispanic with Spanish surname
- Naturalized citizen (watch out for national origin)
- "insufficient" English
- New community resident
- Strong law and order believers
- Men who wear toupees
- Retired correctional officers
- People who believe in jury nullification
- People of color

Pop Quiz re Cognizable Class

Is a white male a member of a cognizable group?

Yes, it is improper to dismiss prospective white male jurors based solely on their gender and race. (People v. Williams (2000) 26 Cal App 4th 1118, 1125; People v. Wills (2002) 27 Cal 4th 811, 813-814.)

Transgender people are not a protected group for purposes of Wheeler/Batson, under California law. True/False

True, under the new CCP 231.5, "genetic information" is a cognizable group.

Pop Quiz re Cognizable Class

Can you excuse a juror due to religious affiliation?

No, but, a juror whose religious beliefs would prevent him or her from being able to deliberate fairly, such as opposition to the death penalty, may be dismissed without violating Wheeler/Batson. (People v. Egan (2000) 22 Cal 4th 48, 70.)

The party objecting must be in the same class/group as the jurors being excused. True/False.

False. There is no requirement that the party issuing the challenge be a member of the group he is alleging is being improperly dismissed. (People v. Cruz, supra, 400 U.S. 400 at p. 402 [upholding white defendant's challenge of prosecutor's exclusion of African Americans].)

THE PROCESS

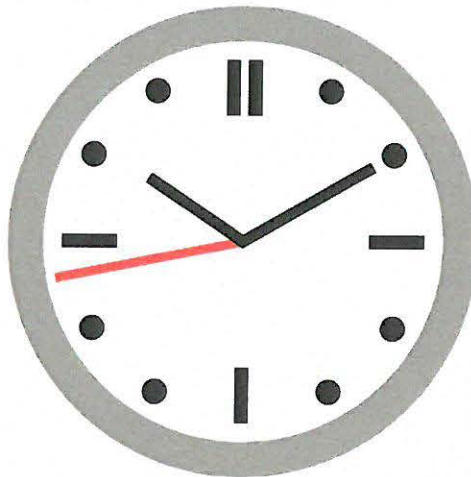
The process is triggered by either side objecting. The court can also initiate an inquiry, but this is very rare.

The procedure is as follows:



"It is necessary that a Wheeler objection be made at the earliest opportunity during the voir dire process, and an objection first raised after the jury or alternates have been sworn is untimely." (People v. Perez (1996) 48 Cal.App.4th 1310, 1314.) If the parties have accepted the jury panel, but while selecting alternates a Wheeler/Batson objection is made, the issue is reopened not only as to alternates but as to how the party exercised their peremptories for the seated panel members. (People v. Gore (1993) 18 Cal.App.4th 692, 703.)

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1. Party objecting must make a prima facie case (show that the totality of facts gives rise to an inference of discriminatory purpose)

Step 1- Prima Facie case

Based on Totality of
circs. Consider:

- Whether members of the group dismissed challenged by the defense.
- Whether Jury includes members of the group dismissed.
- Did you know the person was a member of the cognizable group?

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Pop Quiz re Prima Facie case

Is the dismissal of one juror
enough to qualify for Wheeler/
Batson challenge?

Yes. "If a single peremptory challenge of a prospective juror in the subject cognizable group is not justified, the presumption of systematic exclusion is not rebutted." (People v. Gonzalez (1989) 211 Cal.App.3d 1186, 1193.)

There is a presumption that a
peremptory challenge is
improperly made. True/False

False. There is a presumption that the peremptory challenge is properly made. People v. Newman (2009) 176 Cal.App.4th 571

2. If a prima facie case is shown, burden shifts and party must explain adequately the challenge (offer race neutral justification)

Step 2: Defending your peremptory challenges

Your credibility is the key. Credibility can be measured by prosecutor's demeanor, how reasonable the explanations are, common practices of the DDA or trial strategy. People v. Lomax (2010) 49 Cal. 4th 530

Even a trivial reason will suffice if it's genuine.

Reason must be plausible and supported by the record; make sure you ask questions to justify your basis for the challenge.

You must state reasons for each challenge. It's important to take good notes.

Must have race neutral reasons for the challenge.



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- Usually will have a combination of factors, which is okay.
- Change in dynamics of the jury.



Negative experience with law enforcement:

- Relative in jail/prison
- Prior arrest/conviction
- Divorce with police officer
- Family/friend prosecuted by the DA's office

Intelligence:

- Ability to comprehend the instructions/questions
- Inattentive

Appearance/Demeanor:

- Unconventional appearance, long hair, unusual facial hair
- too eager
- soft spoken
- frowning
- weird looking
- rolling eyes
- overweight
- reluctant/timid
- frowning
- defensive body language/posture

- Occupation
- Limited life experience
- single/no children
- Few ties to the community
- Prior jury experience/hung jury

3. Court then makes a decision.

Step 3: Court's Analysis

Comparative analysis: If the reason for kicking a member of a cognizable group could apply just as well to any other juror, and that other juror is permitted to stay, that could be evidence tending to prove purposeful discrimination.

*No two people are exactly alike.
Ask questions to develop dissimilarities.*

Statistical Analysis: What percentage of those challenges are of that group, how many sitting jurors are of that group, what percentage of the panel is of that group?

Disparate questioning: Were questions posed differently to the different groups?

Remedies

1. Dismiss the entire panel and begin anew;
2. If the moving party agrees, the court may reseal the dismissed juror;
3. If the court warned the attorneys about Wheeler/Batson before jury selection, the court may impose monetary sanctions;
4. The court may grant the moving party additional peremptory challenges.

Practice Tips

- Ask many questions to find race neutral justification.
- Be consistent
- Take notes and keep them in your file

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GG
postal worker
M- therapist
4 - 4, 6, 9, 12
brother in prison
Doesn't trust the police
no eye contact

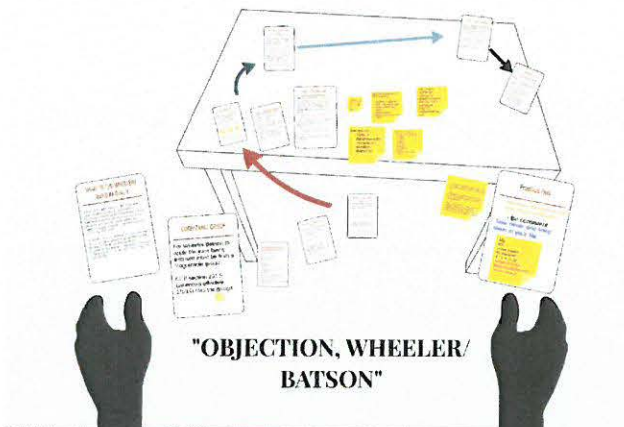
If challenged, don't panic. Allow the moving party to make a prima facie case.
Don't set out your justification until the court has made a record on the prima facie showing.
If the court rules there was no prima facie showing, ask to state your justification at a later time in order to preserve your justification for appeal.

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If you get challenged, don't panic. Allow the moving party to make a prima facie case.

Don't set out your justification until the court has made a record on the prima facie showing.

If the court rules there was no prima facie showing, ask to state your justification at a later time in order to preserve your justification for appeal.





Wheeler / Batson Guide

SrDDA Robert Mestman
Orange County District Attorney's Office
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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)

- Whether members of group discriminated against were challenged/excused by defense. (*People v. Wheeler* (1978) 22 C3 258, 283)
- 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 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)

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. Johnson* (1989) 47 C3 1194, 1220-1221)
- 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)

- Statistical evidence (percentage of jurors excused, remaining, etc.). (*P v. Garcia* (2011) 52 C4 706, 744)
- Comparative analysis (see box below).
- Disparate questioning (court looks at 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 of prosecutor. (*P v. Williams* (2013) 56 C4 630)

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)
- Comparative juror analysis 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 an entirely 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 peremptory 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 (*P v. Trevino* (1985) 39 C3 667)

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 or beliefs vs. affiliation]]

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 with 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 a violation. (*P v. Fuentes* (1991) 54 C3 707)
- Give your justifications even if prima facie showing is not made. (*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
- Teacher⁹
- Juvenile Counselor¹³
- Tractor Driver⁹
- Pastor¹⁸

Limited Life Experiences

- 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}
- Emmotional⁶
- Defensive 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.