



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 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 CA 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 CA 630)
- Whether jury includes members of group discriminated against (*P v. Ward* (2005) 36 CA 186, 203)
- DA did not know juror was member of cognizable group. (*P v. Barber* (1988) 200 CA3 378, 389)
- Admit mistake (if challenge was made in error). (*P v. Williams* (1997) 16 CA 153, 188-190)
- Justify prospective challenges before you even make them. (*US v. Contreras* (9th Cir. 1988) 83 F3 1103)

Justifications (2nd Prong)

- Justification need not support a challenge for cause. (*P v. Thomas* (2011) 51 CA 449, 474)
- "Trivial" reason (if genuine) will suffice. (*P v. Arias* (1996) 13 CA 92, 136)
- Reasons must be inherently plausible & supported by the record. (*P v. Silva* (2001) 25 CA 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)
- Give your justifications even if prima facie showing is not made (necessary for appellate review).

Factors in Court's Analysis (3rd Prong)

- Statistical evidence (percentage of jurors excused, remaining, etc.). (*P v. Garcia* (2011) 52 CA 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 CA 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 CA 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 reset wrongfully excluded juror; monetary fines; allow aggrieved party additional preemptory challenges. (*P v. Willis* (2002) 27 CA 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, color, religion, sex, national origin, sexual orientation, or similar grounds." (CCP § 231.5)
- 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 a valid reason related to religion (e.g., Jehovah's Witness)]

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)
- Young adults (*P v. Ayala* (2004) 24 C4 243, 277-278)
- Older adults (*P v. McCoy* (1995) 40 CA4 778, 783)
- 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)
- Prior jury service (i.e., hung jury). (*P v. Garcia* (2011) 52 C4 706)

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Race-Neutral Justifications (Examples)

- Negative experience with law enforcement
- Relative in jail or prison
- Refused employment by police
- Divorce with police officer
- Juror or friend/family arrested/prosecuted
- Stupid
- Ability to comprehend / understand
- Answered only 2 of 10 questions
- Inattentive
- Inconsistent answers
- Limited Life Experiences
- Young, Single
- No children
- Few ties to community
- Occupation
- Social worker
- Teacher
- Artist
- Engineer
- Postal Worker
- Appearance / Demeanor
- Unconventional appearance
- Long hair, facial hair
- Blank look, weird
- Too eager
- Soft spoken, reluctant
- Frowning, hostile looks
- Defensive body language
- Rolled eyes
- Overweight
- Prior Jury Experience
- Previously sat on hung jury
- No prior jury experience
- Relativity
- Next juror(s) looks better
- Other
- Views on death penalty
- Rely too heavily on expert opinion
- Close-mindedness
- Favors defense