

A Roadmap

- I. Basic Mechanics**
- II. Challenges**
- III. Tips, Techniques, and Suggestions**
- IV. Objections & Batson/Wheeler**



Mechanics

Basic Mechanics of Jury Selection

1. Panel is brought to courtroom & sworn
2. Questionnaires handed out (if being used)
3. Judge hardships the entire panel
4. 12 potential jurors seated at random
5. These 12 are questioned by court
6. Defense counsel questions the 12
7. DDA questions the potential 12
8. Exercise of challenges
 - A. Cause
 - B. Peremptory
9. Panel is accepted by both sides
10. Selection of alternates
11. Jury and alternates are sworn

Challenges

Challenges for Cause

- 1. General Disqualifications [CCP §§ 228(a), 203]**
 - Not a U.S. citizen
 - Under 18
 - Does not live in CA
 - Not a resident of Ventura County
 - Does not speak English well enough to understand proceedings
 - Disability makes juror incapable of performing duties w/out prejudicing rights of either party [CCP § 228(b)]
 - Simultaneously serving as a grand juror
 - Subject of a conservatorship
 - Has a felony conviction and has not had civil rights restored
- 2. Implied Bias [CCP §§ 225(B)(1)(B), 229]**
 - Related to one of the parties or witnesses
 - Has had attorney-client relationship with attorney/party within one year of the filing of the complaint
 - Has an interest in the action, beyond that of a citizen or taxpayer
- 3. Actual Bias [CCP § 225(b)(1)(C)]**
 - Difficulty to keep an open mind w/ the nature of the case
 - Admits bias for or against a group involved in the case
 - Admits having settled opinions about issues in the case
 - Cannot assure the court that case would be decided by reference exclusively to the law and evidence, or admits that there is significant likelihood that extraneous matters will enter into the decision-making process
 - Juror has an opinion on the defendant's guilt or innocence

- **Disability** = loss of hearing or sight, impaired mobility, and inability to communicate
- **Language** - Court must provide interpreters for people who are not challenged [CCP § 224]

When **implied bias** is shown, no further proof of prejudice is required; it is inferred as a matter of law. *People v. Wheeler* (1978) 22 Cal.3d 258.

Actual bias is defined as “the existence of a state of mind on the part of the juror in reference to the case, or to any of the parties, which will prevent the juror from acting with entire impartiality, and without prejudice to the substantial rights of any party.”

Difficult to keep open mind = *People v. Compton* (1971) 6 Cal.3d 55

Admits bias = *People v. Buyle* (1937) 22 Cal.App.2d 143

Admits settled opinions about case = *People v. Williams* (1988) 199 Cal.App.3d 469

Settled opinions about case

• In a prosecution for criminal syndicalism, in which the character of the I. W. W. is the pivotal issue, the disqualification of a juror for actual bias, because of his opinion as to the illegal character of that organization, founded in part upon what persons had said, cannot be removed by his statement that he can and will set aside the opinion which he has formed and give the defendant a fair and impartial trial. *People v. Sullivan* 59 Cal.App. 633 (Cal.App.2.Dist.1922).

• It cannot be said that a juror is in a position to render an impartial and unbiased verdict, who at the beginning of the trial holds a settled opinion in relation to the truth of facts going to the very foundation of the case required to be made by the prosecution. *People v. Sullivan* 59 Cal.App. 633 (Cal.App.2.Dist.1922)

• Mere fact that juror does not wish to sit on case because it would be **too emotional** does not justify excusing juror for cause on grounds of actual bias. *People v. Sanchez* (1989) 208 Cal.App.3d 721.

Peremptory Challenges

◆ 6 Challenges

- If charged offense is punishable with max term of 90 days or less [CCP § 231(b)]

◆ 20 Challenges

- If charged offense is punishable by death or life in state prison [CCP § 231(a)]

◆ 10 Challenges

- In all other cases that do not fall into the categories described above or below

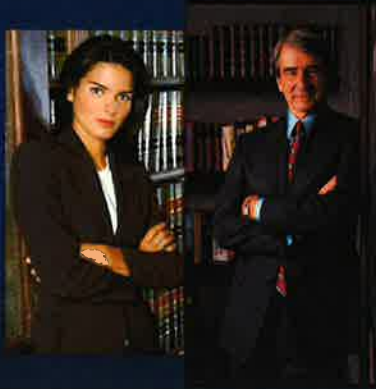
◆ **Multiple Defendants**

- If punishment is 90 days or less: 6 joint + 4 each
- If D's charged w/same offense:
 - Life/death case: 20 joint + 5 each
 - All other cases: 10 joint + 5 each
- DDA gets same number of peremptory challenges as defense

**Tips, Techniques,
& Suggestions**

Cat's Rules for an Effective Voir Dire

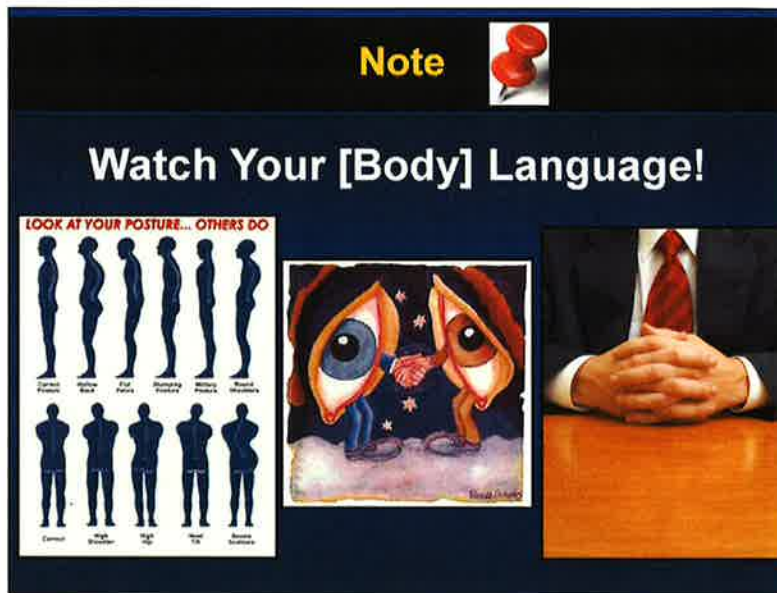
1. Make a Solid First Impression



Project to the jury at all times that you are confident in your case, are in control, and that your honesty and integrity are above reproach

First Impressions:

- People are judgmental & have a tendency to **judge a book by its cover**. Hard to take corrective measures when you're not allowed to talk to them anymore after jury selection.
- Manage Expectations** – Jurors are expecting Law & Order
- Imperative for the jury to have confidence in you as an attorney, as well as your integrity and honesty
- You want jury to look to you for guidance, and as the source of accurate information**
- Project to the jury at all times that you are confident in your case, are in control, and that your honesty and integrity are above reproach
- What do they see of you when they first walk into courtroom?**
 - Posture & hand placement - a projection of confidence & showing you have nothing to hide
 - Friendly – smile, nod and acknowledge jurors! Greet them if they greet you. You will not get in trouble for returning a simple “good morning.”
 - Conservative & well groomed (leave trendier items & funky ties for other days)
- They are sizing you up as they first walk into the courtroom & you should be looking at them, too
 - Who makes eye contact with you?
 - Who looks “receptive” to you?
 - Who looks crazy?
- Organized Table – don't ever let them see you sloppy/messy – you don't want to be guilty by association
- If given opportunity to stand & greet jurors, do so authoritatively



Body Language

- People communicate their true feelings not so much in what they say, but more in how they say it
- Voir Dire itself is a combination of two French verbs meaning “to see” and “to say”

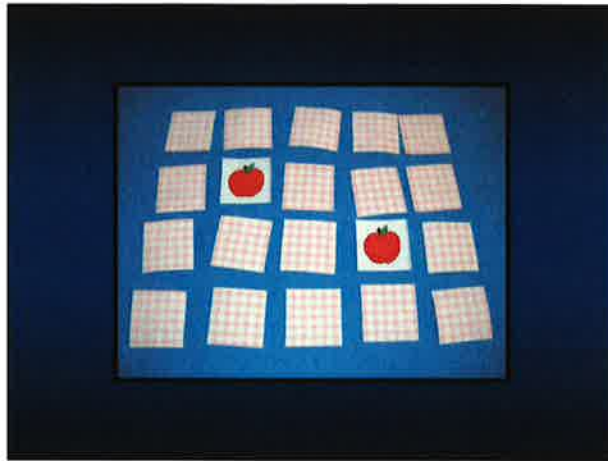
• **Stand** whenever you talk to jurors – gives you a commanding presence and shows respect. Write less and observe more. If you are sitting, you are going to be busy taking notes, and miss out on the subtleties in the response to your questions.

• Posture

Eye Contact

- Communicates that you care about juror’s answers, and enables you to pick up some subtle nonverbal act of communication that you would have totally missed otherwise
- To get info from people, they have to believe you are interested in what they have to say
- If you are staring at wall or floor, the juror will not only think you are discourteous but also that you aren’t really interested in what they have to say.
- Think about how you feel when someone doesn’t make eye contact with you when you’re speaking to them
- More important to make eye contact and connect with jurors than it is to write down every word that they are saying. You will be left with a strong sense of how they will respond to you and the facts if you’re interacting with them more, instead of taking random notes that are only marginally useful.

• **Hands** above table looks like you have nothing to hide & instills trust. While JA is taking role, good time to relax and be non-fussy. Defense attorney will be sorting through their papers and making noise.

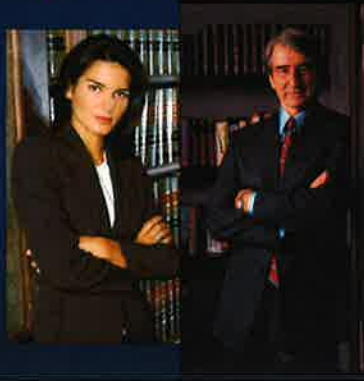


Memorize the names of jurors, and address them by name, unaided by your notes:

- Shows respect & you subtly demonstrate that you consider that person important (which they are!)
- Impresses the jury & reflects positively upon your professionalism, your control over the situation, and your organization.
- If you can memorize the material you need to make it through law school and pass the bar exam, you can certainly remember the names of 12 people
- That you took the time to remember who they are and treat them like individuals worthy of courtesy and consideration pays big dividends. It makes it *personal* for them.
- Your opponent usually won't have had time to memorize the names, so you'll look better than they do
- How to do it:
 - Write out names phonetically when called up by J.A.
 - You have time to memorize names during court's questioning and defense questioning
 - Associate name with their appearance
 - Bounce the names around
 - Easier to do with time and practice

Cat's Rules for an Effective Voir Dire

1. Make a Solid First Impression



Project to the jury at all times that you are confident in your case, are in control, and that your honesty and integrity are above reproach

Have a Strong, Reliable “Routine” for the Beginning & End of Voir Dire [more on this later]

In isolation, these things don't seem like that big of a deal. But when you put it all together, it creates a phenomenally powerful first impression.

You want jury to look to you for guidance, and as the source of accurate information – this is very rewarding when it comes to arguing your case in closing...you have subtly guided the jury into trusting you and giving you more credibility than the defense attorney, which makes them more likely to side with you and your case.

Talk with the jury, not at them.

- Pretend you're at the Pub or Starbucks.

No Hiding:

- Physically - Don't stand behind podium (seems more like a speech)
- Don't let quiet jurors hide from you or avoid answering your questions
- Don't hide the ball either: Jurors like to know *why* things are happening, and the reasons behind the questions. When you explain the rationale behind legal principals, and the reason various courtroom practices, the jury will look to you for guidance and as the source of accurate information. Compare jury selection to a hiring process in a company.

1. Make a Solid First Impression
2. Have a Discussion



Talk like a person, not a lawyer (No jargon or legalese):

- Real people say "Before" and "after," not "prior" and "subsequent"

Open ended questions are essential:

- Who, what, when, where, why
- Questions to which there is a "right" and "wrong" answer are less likely to reveal bias, etc.
- Open ended questions require jurors to use their own words to describe their experiences, opinions, and impressions – makes them think & keeps them engaged in the process!
- Open ended questions are less threatening and judgmental, and do not indicate a correct answer
- You can preface questions with, "some people think, say, feel..." and follow up with, "What do you think about that?"
- General questions about whether a juror will follow instructions have only one right answer – yes. One who wishes to seem fair-minded in the company of peers is unlikely to give a negative response.
- Failure to ask open-ended questions may result in obtaining a jury quickly, but does so at the expense of empanelling jurors who may be biased. The perceived savings of judicial time and economy fall by the wayside if the case has to be retried because the jury is unable to reach a verdict as a result of such undetected bias.

Listen to the juror's answer:

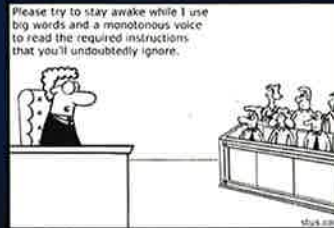
- Imperative to absorb tone of voice, manner of delivery, and the accompanying body language
- If you're too busy thinking of the next question, you're going to miss
- Be an active listener, and ask appropriate follow up questions

Carefully Observe the juror and jury:

- Body language and other forms of nonverbal communication are extremely important to evaluating a prospective juror
- How are other jurors reacting to this juror's question?
- Do you spot any leaders (make sure you don't have too many "leader" personalities)
- Okay to have some sheep, but don't weight the whole panel with sheep – they will just deadlock because no one is comfortable talking it out
- Before accepting the panel, make sure you consider the jurors as a whole, as a team/group...will they work well together?
- How was the juror and jury as a whole responding to the defense attorney?

Cat's Rules for an Effective Voir Dire

1. Make a Solid First Impression
2. Have a Discussion
3. Keep it Interesting



Vary your questions & don't ask each juror the same set of questions, or they will shut down on you, stop thinking, and provide canned answers.

Vocal inflection – avoid monotony

Movement: A moving speaker is a lot more interesting than one seated or standing in a static position.

Take a Topic and Jump Around:

- Don't start with juror 1, move to juror 2, then 3, then 4, and so on...BORING!!!!!! Plus, jurors start to learn the appropriate answers to your questions from the answers given by the first few jurors.
- Skip around so the jurors do not know who is going to be called upon next
 - This also allows you to show off that you have memorized their names
 - Keeps the jurors alert and on their toes because they don't know who is going to be called on to answer a question
- Select a topic, and ask a juror an open ended question. Then jump to another juror and ask how he/she feels about that topic, or about the previous juror's answer. Then go to another juror and slightly modify the question, keeping it on the same topic. Bounce through the jury this way, then switch to another topic and do the same thing.
 - This method is more interesting, keeps everyone awake and involved, and elicits far more information than the mundane approach of going one by one through the jury
 - This approach also take the pressure off the jurors – the spotlight comes and goes so fast that they loosen up and become more verbal. Because everyone is sharing the spotlight, they do not feel like they are being picked on or grilled.
- Group Discussion
- Vary it up between group questions, and follow-up questions that are specific to an individual juror

Don't ask the same exact questions throughout the entire day – figure out a way to change things up!

Cat's Rules for an Effective Voir Dire

1. Make a Solid First Impression
2. Have a Discussion
3. Keep it Interesting
4. Air Your Dirty Laundry



Identify the weaknesses in your case as soon as you lay hands on the file.

Reveal to the jury the negative aspects of your case as soon as possible so you can learn about their attitudes and how they feel

- Single witness testimony
- No bad driving DUI
- Children as witnesses
- Witnesses with rap sheets
- Self defense
- Informants
- Witnesses with rap sheets

If you know some negative aspect of your case is going to come in (and it usually does), discuss it in voir dire

You don't want the jury to find out from the defense attorney that your 13 year old child molest victim was sexually active and is the mother of a 2 year old, or that your battery victim has an ADW conviction.

Deal with problems: **You will feel a million times better about your jury knowing that you've already received assurance from them that your biggest concerns aren't going to be a problem with them after all.**

Cat's Rules for an Effective Voir Dire

1. Make a Solid First Impression
2. Have a Discussion
3. Keep it Interesting
4. Air Your Dirty Laundry
5. When in doubt, kick them out!

Do not let your intellect get in the way of your instincts!!!

- Don't be shy
- Pay attention to your intuition and feelings in the pit of your stomach
- Deciding who to keep is very intuitive and individualistic.

The jury has to react not only to the facts in the case, but to YOU the attorney trying the case

- Pick jurors with whom you can relate and communicate
- The ability to communicate facts of case is influenced by who is transmitting and receiving the information – i.e. YOU!

How to properly excuse a juror using a peremptory challenge:

- Don't be embarrassed or defensive when exercising a peremptory challenge – it will manifest itself in your body language and voice
 - When this happens, we want to get it over as quickly as possible and appear unobtrusive, which causes our voice to drop, and we fail to look at juror, jury, or judge.
 - What this behavior may convey to the jury is that you have a guilty conscience about something and you are doing something wrong or sneaky.
 - This is not the desirable image you want to project!
- Stand up and say in a clear, confident voice: "The People want to thank and excuse Mr. X, juror number 5." Look that juror in the eye, politely nod, and sit down.
- This is professional, polite, and accomplishes our goals.

Suggested Voir Dire Format

Three Steps:

- ◊ Clarify Who You Are
- ◊ Discuss Legal Principles & "Dirty Laundry"
- ◊ Burden of Proof: BRD

Make Sure the Jury Knows Who You Are

- ❖ Good morning. As you can see, the defense attorney has a client sitting next to her at counsel table. You can also see that I don't have anyone sitting next to me at my table, but that doesn't mean I don't have a client.
- ❖ Who do I represent? Ok, I represent the People, but who are these People? When do I represent them? Why is there representation for the People? Do you agree that the People have a right to a fair trial too? What does that mean to you?

•You will get a variety of different responses when you ask everyone who you represent, such as: us, victims of crime, the people, the state, our community. Whatever the answer, roll with it, and ask the appropriate follow up question.

•Everyone will start to understand that you are THEIR lawyer, and that you represent them! Without this explanation, you are just the vague face of the government. Once they realize that you are on their side, they will want to believe in you, trust you, side with you, and convict for you.

•You better represent them well – they want to be proud of THEIR lawyer. They are watching their taxpayer dollars at work.

Legal Principles & Dirty Laundry

- ♦ Following the law, even if they don't like it
- ♦ Conflicts in the evidence
- ♦ Personal experiences of jurors that may affect case
- ♦ Single witness testimony
- ♦ Children as witnesses
- ♦ The "CSI Effect"
- ♦ Sympathy / Punishment
- ♦ Negative experiences with law enforcement
- ♦ Case specific issues: DNA, Alcohol, Drugs, Experts

•Not enough to just ask if the juror cannot follow the law as judge instructs. *People v. Balderas* (1985) 41 Cal.3d 144. Even if a juror has proclaimed his general willingness to follow the law and instructions, the court should allow further reasonable questioning calculated to elicit a juror's admission of actual unwillingness to apply a particular rule of law pertinent to the impending trial (such as rule re single witness testimony). Any overt resistance of that kind and degree would form the basis for a challenge for cause on grounds of "actual bias."

•Speed limit on Hwy 101 is 65 mph. Let's suppose a police officer cites someone for going 90 mph, which is over the posted speed limit. The case is brought to court and you are the judge. Assume that the police officer testified and convinced you of the driver's guilt beyond a reasonable doubt. What would your verdict be? Why?

•Now assume that the same police officer issued someone a citation for going 70 mph, which is 5 miles over the posted speed limit. The case is brought to court and you are the judge. Assume that the police officer testified and convinced you of the driver's guilt beyond a reasonable doubt. What would your verdict be? Why?

•Some people would hesitate to convicted the driver going 70 mph, because it's only 5 miles over the speed limit. How do you feel about that? What are your thoughts about that?

•Realize that we are here to follow the law, not change it? If you don't like the law, talk to the folks in Sacramento.

•Lady Justice is blindfolded for a reason. Laws are applied equally to everyone. We don't give some people breaks or freebies just because their conduct wasn't as egregious as someone else's. They might get a break in the sentence in terms of fines/fees, but it shouldn't affect the decision of guilt.

Burden of Proof: BRD

- ❖ Proof BRD – have you heard that phrase before? Where? What does that phrase mean to you?
- ❖ Make sure they know what BOP is not
- ❖ Explain legislative intent for setting BOP BRD.

•Some people believe that the standard of proof is beyond all doubt, beyond a shadow of a doubt, or 100% proof. Have you heard those expressions before? Where? Do you see that there is a difference between 100% proof and proof beyond a *reasonable* doubt?

•Legislature set BOP at BRD for a very specific reason. The law recognizes that everything we do as humans is open to some possible or imaginary doubt or speculation, and unless you were present on scene and witnesses the event for yourself, there is no way I will ever be able to prove anything to you beyond all doubt, or to the 100% proof standard. And since witnesses are not allowed to serve as jurors in a case, the law sets the criminal standard of proof as “BRD.” You can have doubts, and we can speculate about what coulda/woulda/shoulda/might have been until the end of time....but that is not the standard. The question to ask yourself at the end of the day is whether or not the doubt is reasonable considering all the facts and circumstances of the case.

Burden of Proof: BRD

- ✦ If I prove, BRD, that the defendant committed the crimes he's charged with, what will your verdict be Mr. Juror?
- ✦ This is the only time you should start with Juror #1 and work your way through juror #12. Get each juror to say the word "Guilty."
- ✦ If they waiver, are apprehensive, overly condition their response, or ask you questions instead, kick them!!!

After you have heard the word "guilty" from each juror, say thank you and sit down.

Objections

Improper Voir Dire Questions [CCP §§ 223(d), 223(e)]

- ✦ Educate the jury as to the particular facts of the case
- ✦ Compel jurors to vote in a particular way
- ✦ Prejudice jury for or against any party
- ✦ Argue the case
- ✦ Indoctrinate the jury
- ✦ Instruct the jury in a matter of law
- ✦ Attempt to accomplish an unlawful purpose
- ✦ Not reasonably calculated to lead to a challenge for cause

- If you follow the Discussion format, you won't receive many objections because the jurors are doing all the talking and the defense does not want to ever interrupt the jury, lest they look bad.
- Magic Phrase that Saves the Day: How do you think that would affect you as a juror in this case?
- When objecting because the question is not reasonably calculated to lead to a challenge for cause, you should say that it is:
 1. Not calculated to show actual bias preventing juror from acting impartially,
 2. Not calculated to show prospective juror incapable of performing duties without prejudice to the rights of the party,
 3. Not calculated to show an unqualified opinion or belief as to the merits of the case based on knowledge of a material fact, or
 4. Not calculated to show a state of mind evincing enmity against, or bias towards, either party.
- Just because you can object to questions as irrelevant to a Challenge for Cause does not necessarily mean that you should.
 - You may have as much, or even more, interest in learning information about a potential juror that might make them problematic
 - Remember, we need all 12 jurors to agree, while the defense only needs one wing-nut to block a conviction.

Batson / Wheeler

- ♦ Protected groups:
 - Race
 - Religion
 - Ethnicity
 - Gender
 - Sexual orientation
- ♦ Not recognized as a protected group:
 - “People of color”
 - Caucasians with Spanish surnames
 - People with “low incomes”
 - Age (“young” people, people over 70)

- You CANNOT excuse a juror simply because they are a member of a “cognizable group” (i.e. a protected class)
- Both sides can raise an objection (not just the defense)!

Batson / Wheeler – Step 1

- ✦ Object
- ✦ Objection must be timely
 - During jury selection
 - Before panel is sworn

Batson / Wheeler – Step 2

Peremptory Challenges Are Presumed Constitutional

- ♦ Objecting party must make a prima facie case of systematic exclusion
 1. Must establish that excused jurors are members of a cognizable group
 2. Must point to circumstances supporting reasonable inference that the jurors were excused because of membership in the group instead of any specific bias

Peremptory Challenges Are Presumed Constitutional – *People v. Alvarez* (1996) 14 Cal.4th 155 at 193

Batson / Wheeler – Step 2 - Cont'd

Evidence in Support of a Prima Facie Case:

- ♦ The excused jurors share only one characteristic: membership in the protected group
- ♦ The party who excused the jurors asked them very few questions
- ♦ The party making the Batson/Wheeler objection is a member of the same cognizable group as the excused jurors
- ♦ The party who excused the jurors is of the same group as the remaining jurors
- ♦ Abuse of peremptory challenges by the same attorney in other cases (watch your reputation)

Just pointing out the fact that the lawyer excused jurors who are members of a cognizable group, by itself, is not enough.

Batson / Wheeler – Step 3

- ♦ Trial Court decides whether purposeful discrimination has been shown - did the objecting party make a prima facie case?
- ♦ Yes?
 - Party that excused jurors is allowed to rebut the inference
 - Articulate neutral reasons for excusing jurors
 - Reasons may be subjective
- ♦ No?
 - No need for a response
 - Court often wants a response anyway, before ruling (make a record)
- ♦ Burden of proof
 - Is on the party making the objection
 - Preponderance of the evidence standard

Burden of proof: People v. Hutchins (2007) 147 Cal.App.4th 992 at 998

How to rebut inference?

- Point out remaining jurors of the same cognizable class
- Neutral reasons why the jurors were excused (subjective reasons are okay, too)
 - Body language
 - Mode of answering questions
 - Lack of life experience
 - Manner of dress

Batson / Wheeler – Step 4

- ♦ If a prima facie case was made, **AND**
- ♦ the party who excused the jurors cannot establish that the jurors were excused for nondiscriminatory reasons,
- ♦ Judge determines the remedy.
 - Dismiss the panel, excuse remaining jurors, and start all over with a new panel
 - Dismissal is not required if it would reward the party who exercised biased peremptory challenges, but waiver/consent of objecting party is required. What are the alternatives?
 - Sanctions
 - Reseating excused jurors
 - Allowing the aggrieved party additional peremptory challenges

