

## 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 valid reason related to religion (e.g., Jehovah's Witness); *US v. Delesus* (3rd Cir. 2003) 347 F3d 500 [permissible for heightened religious involvement or beliefs vs. affiliation]]

### Gender

- Women (*P v. Garcia* (2011) 52 CA 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)]

### Distrust of law enforcement

- Negative experience<sup>1,6</sup>
- Relative in jail or prison<sup>2,6</sup>
- Refused employment by police<sup>3</sup>
- Ex-husband is cop<sup>15</sup>
- Divorce with police officer<sup>3</sup>
- Juror or friend/family arrested/prosecuted<sup>4,6,8</sup>
- Relative involved with drugs<sup>8,9</sup>

### Prior Jury Experience

- Previously sat on hung jury<sup>1,2</sup>
- No prior jury experience<sup>5</sup>

## Race-Neutral Justifications (Examples)

### Occupation

- Social worker<sup>1</sup>
- Teacher<sup>9</sup>
- Juvenile Counselor<sup>13</sup>
- Tractor Driver<sup>9</sup>
- Pastor<sup>18</sup>

### Other

- Views on death penalty<sup>6,7</sup>
- Rely too heavily on experts<sup>6</sup>
- Close-mindedness<sup>6</sup>

### Stupid

- Ability to comprehend<sup>1,4,9</sup>
- Answered only 2 of 10 questions<sup>5</sup>
- Inattentive<sup>10</sup>
- Inconsistent answers<sup>11</sup>

### Limited Life Experiences

- Young, single, no children<sup>5</sup>
- Few ties to community<sup>16</sup>

### Relativity

- Next juror(s) looks better<sup>17</sup>

## Appearance / Demeanor

- Unconventional appearance<sup>12</sup>

- Wearing "Coors" jacket<sup>9</sup>
- Long hair, facial hair<sup>14</sup>
- Weird<sup>15</sup>
- Too eager<sup>13</sup>
- Soft spoken, reluctant<sup>4</sup>
- Frowning, hostile looks<sup>5,8</sup>
- Emotional<sup>16</sup>
- Defensive body language<sup>15</sup>
- Overweight<sup>15</sup>

## 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 CA 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)
- 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)
- Must raise the issue in a timely fashion (i.e., before jury is sworn). (*P v. Perez* (1996) 48 CA4 1310, 1314)
- A single discriminatory exclusion will be a violation. (*P v. Fuentes* (1991) 54 C3 707, 716, fn.4)

1) *P v. Turner* (1994) 8 CA 137, 2) *P v. Farman* (2002) 28 CA 107, 3) *Hoyes v. Woodford* (9th Cir. 2002) 301 F3d 1054, 4) *P v. Arias* (1996) 13 CA 92, 5) *P v. Perez* (1994) 29 CA4 1313, 6) *P v. Gutierrez* (2002) 28 C4 1083, 7) *P v. Williams* (2013) 56 CA 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 CA 668, 12) *P v. Word* (2005) 36 CA 186, 13) *P v. Ervin* (2000) 22 CA 48, 14) *Purkett v. Elm* (1995) 514 US 765, 15) *P v. Johnson* (1989) 47 C3 1194, 16) *Rice v. Collins* (2006) 546 US 333, 17) *P v. Alvarez* (1996) 14 CA 155, 18) *P v. Semien* (2008) 162 CA4 701.



## 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

*no matter what cover all prongs.*

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. *what court articulate*
  - 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 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-EI v. Dretke* (2005) 545 US 231, 254)
- Historical evidence of discrimination (by individual prosecutor and/or office). (*Miller-EI 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-EI 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 reseal 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])