

# Wheeler Update 2015

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## 1) WHEELER BASICS

- a. Defined - A “Wheeler Motion” is a motion challenging the exercise or peremptory strikes alleging a discriminatory purpose (P v. Wheeler (1978) 22 Cal. 3d 258, 276-277; Baston v. Kentucky (1986) 476 U.S. 79; Johnson v. CA (05) 545 U.S. 162)
  - i. Basic Rule - the use of preemptory strikes to remove jurors on the sole ground of “group bias” violates a defendant’s right to trial by a jury or a representative cross section of the community (Article 1, section 6, CA Constitution; 14<sup>th</sup> Amendment Equal Protection Clause)
    1. “Group bias” defined – “the presumption that certain jurors are biased merely because they are members of an identifiable group distinguished on racial, religious, ethnic or similar grounds” P v. Wheeler, supra, 276.
  - ii. Purpose - “The purpose of a hearing on a Wheeler/Baston motion is not to test the prosecutor’s memory but to determine whether the reasons given are genuine and race neutral. “ P v. Jones (11) 51 Cal. 4<sup>th</sup> 346, 366.
  - iii. A single discriminatory exclusion can violate a defendant’s right to a representative jury (look at P v. Fuentes (91) 54 Cal. 3d 707, P v. Gonzalez (89) 211 Cal. App. 3d 1186; P v. Cleveland (04) 32 Cal. 4<sup>th</sup> 704, 734)). This means that is you can justify 5 out of 6 exclusions from a group, but can’t explain away the last one, the motion should be granted.
- b. Who Can Raise -
  - i. Either Side – Georgia v. McCollum (92) 505 U.S. 42
    1. Case law is almost exclusively the defense raising the motion
      - a. But see P v. Singh (15) 234 Cal. App. 4<sup>th</sup> 1319 [prosecution made Wheeler Motion which was granted. Defense later claimed erroneous granting kept him from challenging other questionable jurors. Conviction affirmed]
  - ii. Defendant does not need to be a member of the excluded group. Powers v. Ohio (91) 499 U.S. 400
- c. Timeliness -
  - i. Generally, “it is necessary that a Wheeler objection be made at the earliest opportunity during the voir dire process.” (P v. Thompson (1990) 50 Cal. 3d 134, 179, fn 19)
    1. Best practices –
      - a. Should be made immediately after the exclusion of a juror from the class/ or as soon as pattern emerges
        - i. If there is a delay, remedy of re-seating the juror unavailable
  - ii. A Wheeler motion is not timely if made after jury sworn (P v. Perez (96) 48 Cal. App. 4<sup>th</sup> 1310)
  - iii. What if made before selection of alternates? A Wheeler motion can still be considered timely if done before jury selection is completed, ie before alternates are sworn in [but with a preference for earlier] P v. Gore (93) 18 Cal. App. 4<sup>th</sup> 692

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- iv. A Wheeler motion is not timely if made for first time on appeal ( P v. Hayes (90) 52 Cal. 3d 577, P v. Howard (92) 1 Cal. 4<sup>th</sup> 1132))

## 2) CORRECT WHEELER PROCEDURE

- a. Judge should go over procedure you will use for Wheeler Motions at trial during motions in limine or pre-voir-dire conference (CA Rules of Court 4.200(a)(8)).
  - i. Request in limine :
    - 1. Any accusations of prosecutorial misconduct be made outside the presence of the jury with objection “I have a motion” then jury removed;
    - 2. If any accusations of prosecutorial misconduct are made, request in advance a hearing on if they are not made by the defense in good faith
      - a. note: defense deliberately violates the in limine ruling, object with basis “violation of court order”
- b. Reasons cannot be given ex-parte
- c. Best practices -
  - i. If you think a challenge may draw a Wheeler objection, challenge for cause first if a challenge cause may lie
  - ii. DO NOT Wheeler them just because they Wheeler’ed you – that is not constitutionally permissible
- d. There is a presumption that the party exercising the challenge does so on a constitutionally permissible ground
- e. 3 STEP PROCESS used if one side challenges the exercise of peremptory strikes by the other via Wheeler Motion (P v. DeHoyos (13) 57 Cal. 4<sup>th</sup> 79)
  - i. Prong 1 - Court must decide whether a prima facie case of discriminatory purpose has been established:
    - 1. The attorney making the Wheeler Motion has the burden of establishing the prima facie case. P v. Gonzalez (89) 211 Cal. App. 3d 1186, 1191.
      - a. Bare statistics are sufficient to establish a prima facie case Williams v. Runnels (9<sup>th</sup> Cir. 06) 432 F. 3d 1102
    - 2. Moving party must show:
      - a. “that the totality of the facts gives rise to an inference of discriminatory purpose.” Johnson v. CA, supra.
        - i. Note: Johnson v. CA held that original standard of “strong likelihood” of jurors being kicked due to group bias as outlined in Wheeler was too high of a standard.
      - b. that the persons excluded are members of a cognizable group;
        - i. Best practices – make the moving party identify the cognizable group
      - c. Show from all the circumstances of the case a reasonable inference that such persons are being challenged because of their group association rather than because of any specific bias;

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- ii. Prong 2 – If the court decides a prima facie case of discriminatory purpose has been established, the burden shifts to the party who made the challenge to explain adequately the exclusion by offering a permissible justification for the strike.
  1. Your reasons for use of the peremptory challenge must be articulated and must be bona fide reasons that would be equally applicable to any member of the venire, irrespective of whether or not that person was a member of an identifiable class. “ (Wheeler, supra., 282.)
    - a. Note: an ambiguous invitation from the judge to the attorney to be heard, or to give reasons for kicking jurors, will be treated as a finding of a prima facie case. Make the judge state whether he/she is finding a prima facie case has been made. P v. Ferro (93) 21 Cal. App. 4<sup>th</sup> 1
  2. Best Practices –
    - a. During the second prong, specifically ask the court to tell you whether he/she saw the same thing you did
      - i. “did the court also see that Juror A kept coming in late after the breaks?”
      - ii. “does the court agree with my observation that Juror A rolled his eyes when the bailiff asked him to take his hat off?”
    - b. If you did not even realize that the person was a member of a protected class, or you are not sure that they are, make a record of this (“for the record, although the defense is claiming that I excused Juror #1 because of her race, I am not even sure what Juror #1’s race is, and frankly it was not apparent to me that they were a member of the group asserted by the defense. Did the court observe that juror to be a member of that group?”)
    - c. During the second prong you can encourage the court to include facts of your case and prior cases in front of that judge to use as a basis to find that your reasons make sense (P v. DeHoyos (13) 57 Cal. 4<sup>th</sup> 79)
      - i. You tried the case before and kept that class of person on the jury
      - ii. You are a member of that class
      - iii. Everyone involved in the case is a member of that class (as in DeHoyos, supra. “the trial court noted that the victim, as well as the defendant in this case was Hispanic, so it was unlikely the prosecutor would be concerned about minorities unduly identifying with the defendant.”)
      - iv. You accepted the jury several times when people of the challenged class were in the jury box
- iii. Prong 3 – The court decides, in light of the race-neutral explanation, whether the “opponent of the strike has proved **purposeful ... discrimination.**”

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1. Comes down to whether the court finds the prosecutor's race-neutral explanations credible.
  - a. Best practices – emphasize the standard with the court – “so you are making a finding of intentional, purposeful discrimination on my part?”
2. Credibility can be measured by, among other things:
  - a. Prosecutor's demeanor
    - i. Court draws upon its contemporaneous observations of the voir dire
    - ii. Court may rely on the court's own experiences as a lawyer and bench officer in the community (P v. DeHoyos, supra.)
  - b. Courts can look to “disparate questioning” (= the ways the different groups of jurors were questioned) (see Miller-El v. Dretke (05) 545 US 231)
  - c. Courts can look to how reasonable or how improbable the explanations are
  - d. By whether the proffered rationale has some basis in accepted trial strategy
  - e. Court may look at the common practices of the advocate and the office that employs him/her DeHoyos, supra.
  - f. Court can make a “comparative analysis” into the reasons why a challenge was used. P v. Lenix (08) 44 Cal. 4<sup>th</sup> 602
    - i. Comparative juror analysis entails comparing the similarities and differences between jurors that were excused and jurors that were not.
      1. “The inherent limitations of comparative juror analysis can be tempered by creating an inclusive record....Counsel and the trial court bear responsibility for creating such a record.” Id.
  - g. Courts can look to “statistical evidence” (ie the DA challenged 3 out of 4 possible Hispanic jurors)
3. A MISTAKE by the challenging party even if honest can be problematic so be very careful
  - a. Castellanos v. Small (14) 766 F. 3d 1137 prosecutor said he excused Hispanic female because she had no children but record reflected that she did have children.
    - i. Court of Appeal deferred to trial court's determination that the prosecutor confused his notes between 2 jurors
    - ii. A magistrate appointed to conduct an evidentiary hearing on defendant's habeas petition found “the record indicates the prosecutor's stated reason was factually erroneous, and therefore, can be construed as pretextual.”
    - iii. Magistrate considered prosecutor's new reason provided in a declaration in opposition to habeas petition that the

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juror appeared “unable to follow directions” and didn’t initially respond when called to the jury box and he always excused jurors who appear to have difficulty following direction

- iv. Magistrate remanded to district court and suggested habeas be denied
- v. District court denied habeas but certified grant of appealability on Wheeler/Boston claim
- vi. Ninth Circuit reversed, refusing to consider “post-hoc” justifications offered by prosecutor that lacked support in the record

b. **BUT SEE:**

- i. Aleman v. Uribe (13) 723 F. 3d 976, Jamerson v. Runnels (13) 713 F. 3d 1218- A credible, honest, unintentional mistake in exercising a peremptory challenge to dismiss the wrong juror may not be a violation of Wheeler IF the court makes a finding of an honest mistake and there would have been a valid basis for the challenge had the mistake not been made.

- 4. Remember - Even when there is no doubt of the prosecutor’s good faith, the issue whether a given explanation constitutes a constitutionally permissible (i.e. nondiscriminatory) justification for the particular peremptory challenge remains a question of law. P v. Turner (86) 42 Cal. 3d 711

- a. Best practices – justify your own attitude but remember that your focus ultimately must be on who you excused, and that there was a protected-class neutral reason for doing so

f. What to Do If A Wheeler Motion is Brought Against You

- i. Don’t panic – STAY CALM
- ii. Make sure that the Court follows Correct Wheeler Procedure (see above)
- iii. Create a strong record for appeal:
  - 1. Explain on the record the perceived differences between jurors who seemingly gave similar answers (eg – maybe their demeanor attitude in how they gave their answers is telling and makes a difference)
  - 2. Explain on the record the overall assessment of the juror, including desirable factors that might outweigh undesirable ones (see Lenix, supra: “[t]wo panelists might give a similar answer on a given point, yet the risk posed by one panelist might be offset by other answers, behavior, attitudes or experiences that make one juror, on balance, more or less desirable.”)

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3. Follow up with questioning for different jurors to the same extent when similar viewpoints are expressed (See Miller-El, supra.)
  4. State all reasons for striking a juror up-front – if you wait and add information later, it appears disingenuous (See Miller-El, supra.)
  5. Use similar phrasing of questions for different jurors
- iv. Force the court to make the following findings on the record (Snyder v. Louisiana (08) 552 US 472):
1. That the trial court considered the prosecutor’s reasons for the peremptory challenges at issue and found them to be [protected class] neutral;
  2. Those reasons were consistent with the courts’ observations of what occurred, in terms of the panelist’s statements as well as any pertinent nonverbal behavior; and
  3. The court made a credibility finding that the prosecutor was truthful in giving race-neutral reasons for the peremptory challenges
- v. Keep all your jury notes
1. for retained jurors as well as kicked jurors (if remanded to do a Prong 2 analysis, you can’t rebut a prima facie case if you can’t remember your reasons)
- g. Best practice- if the court does not find a “prima facie case”
- i. without conceding the prima facie case, respectfully request an opportunity to make a record of your specific challenge justifications;
    1. P v. Ferro (93) 21 Cal. App. 4<sup>th</sup> 1 – if speak only to the prima facie case issue, not specific challenge justifications, prima facie finding will be implied, so if you give your reasons for excluding the jurors, be sure to emphasize that the People are NOT conceding a prima facie case and maintain that no prima facie case has been shown.
      - a. (on the other hand, however, if the Court of Appeals finds later that there was a prima facie case and you didn’t justify your reasons, on remand years later you may have to say them, and you may not remember or be able to make as good of a record after the passage of time).

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- h. Multiple Wheeler Motions during a single voir dire
  - i. Expect it
  - ii. “Keep Calm and Carry on”
  - iii. Do not be deterred – if you have a valid reason for the peremptory, it is valid no matter what group the challenged juror is in and you have a duty to the People of the State to ensure we select the best jury possible for this case.
  
- i. How to handle a Wheeler motion made against you that you truly believe is frivolous
  - i. Object – state “I believe that this motion is made in bad faith,” AND
  - ii. “I want a hearing to prove it,” AND
  - iii. “the People request sanctions to the defense if indeed this court finds that this motion was made in bad faith”
  - iv. Consider how to prevent this from happening in the first place:
  
- j. REMEDIES to a Wheeler violation
  - i. Dismiss the venire (see Wheeler, supra.)
    - 1. NOTE: In order for alternative sanctions to be imposed (other than dismissing the entire venire), the complaining party must give a waiver to the default remedy under Wheeler and consent to the alternative. In the absence of consent, trial courts lack the discretion to diverge from the Wheeler remedy. P v. Willis (02) 27 Cal. 4<sup>th</sup> 811.
    - 2. Defense counsel can consent for defendant (Mata, supra., p.659)
    - 3. Consent can be implied. P v. Mata (13) 57 Cal. 4<sup>th</sup> 178:
      - a. “by failing to object to the trial court’s proposed alternative remedy when the opportunity to do so arises, the complaining party impliedly waives the right to the default remedy of quashing the entire venire and impliedly consents to the court’s proposed alternative remedy.” This, of course, assumes that the trial court’s actions “did not effectively preclude a meaningful opportunity to object.”
  - ii. Sanction the attorney (monetary)
  - iii. Reseat the challenged juror with the assent of the complaining party. (P v. Willis, supra; P v. Mata, supra.)
    - 1. Best practices – because a juror may be re-seated, consider an in limine motion to have peremptory challenges initially made at sidebar so that any improperly challenged jurors can be retained without revealing to them which party had attempted their removal
    - 2. Allow additional peremptory challenges to innocent party
      - a. “In the event improperly challenged jurors have been discharged, some cases have suggested that the court might allow the innocent party additional peremptory challenges” (see Koo v. McBride (7<sup>th</sup> Cir 1997) 124 F.3d 869; McRory v. Henderson (2<sup>nd</sup> Cir, 1996) 82 F. 3d 1243).

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## k. What to do if a Wheeler motion is granted

### i. Bring a Motion for Reconsideration

1. In P v. Castello (1998) 65 Cal.App.4<sup>th</sup> 1242, at 1246-1248: “In criminal cases there are few limits on a court’s power to reconsider interim rulings. [citations] . . . The California Supreme Court has often recognized the ‘inherent powers of the court . . . to insure the orderly administration of justice.’ [citations] . . . Some of the court’s inherent powers are set out by statute, but the inherent powers of the courts are derived from the Constitution and are not confined by or dependent on statute. [citations]. . . A court’s inherent powers are wide. [citations] They include authority to rehear or reconsider rulings.”
2. Write a written brief on the issue

### ii. Bar Reporting May be Required

1. B&P 6086.7(a)(3) – court must report if monetary sanctions to you for \$1000 or more
2. B&P 6068(o)(3) – you must report self within 30 days if the court sanctions you monetarily for \$1000 or more
3. B&P 6086.7(a)(2) – the court must report you if judgment reversed in whole or in part because of attorney misconduct
4. B&P 6068(o)(7) – You must report yourself within 30 days of a judgment being reversed in whole *or in part* because of misconduct

### iii. What if Wheeler denied, erroneously, and case later reversed?

1. Bar reporting- this is a circumstance where reversal of judgment appears to be based upon professional misconduct, which requires self-reporting
  - a. A Wheeler motion being denied at trial and this finding later being overturned on appeal means the jury trial was unfair, so we probably do have a reporting duty in that circumstance
2. Granting of a Wheeler motion does not necessarily require recusal of same prosecutor on retrial.
  - a. See PC 1424 – disqualification of prosecuting attorneys – “the motion may not be granted unless the evidence shows that a conflict of interest exists that would render it unlikely that the defendant would receive a fair trial.”
    - i. “Conflict” within the meaning of this section exists whenever circumstances of case evidences a reasonable possibility that the DA;s office may not exercise its discretionary function in an even-handed manner; thus, there is no need to determine whether conflict is “actual”

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or only gives an “appearance” of conflict. P v. Conner (83) 34 Cal. 3d 141.

## 3) WHAT TO DO IF A COURT PROCEEDS WITH INCORRECT WHEELER PROCEDURE

- a. If the court asks the DA to justify without a defense objection, then do so. P v. Lopez 3 Cal. App. 4<sup>th</sup> Supp 11; Rivera v. Illinois (09) 556 US 148 (Wheeler revolves around the jurors’ third party standing with respect to their constitutional rights).
  - i. No plain error when court fails to sua sponte raise the issue Hidalgo v. Fagen (00) 206 F. 3d 1013.
- b. What if the court asks you to justify before finding a prima facie case or without finding a prima facie case?
  - i. If you just reply, and do not ask for clarification as to if a prima facie case has been established, this can be found to constitute an implied finding of bias. P v. Cervantes (91) 233 Cal. App. 3d 323. Answering a court inquiry about a challenge justification before a prima facie finding is a concession ( P v. Arias (96) 13 Cal. 4<sup>th</sup> 92), so
    1. Best practices –
      - a. ask the court to specify it if is finding that a prima facie case has been established
      - b. make it clear that no prima facie case has been found, and that your are not conceding that, then put your reasons on the record P v. Howard (07) 42 Cal. 4<sup>th</sup> 1000; P v. Gray (01) 87 Cal. 4<sup>th</sup> 781
- c. What if the court does not ask you to justify when you think it should have? (P v. Snow (87) 44 Cal. 3d 216)
  - i. Best practices – JUSTIFY!
    1. Cases have been reversed on appeal when the judge should have required an explanation. SCOTUS allows for remand to determine reasons, but CA Supreme Court doesn’t endorse this remedy.
  - ii. What if the court finds no prima facie case and won’t let you put your reasons on the record?
    1. File a written declaration
- d. What do you do if the court tries to substitute its judgment and determine whether your reason for kicking the juror was sufficient to justify excusing the juror?
  - i. Establish that your reason was protected-class neutral. Note that the court is not supposed to substitute its judgment for yours so as to “objectively” determine whether to excuse the juror.
    1. See P v. Reynoso (03) 31 Cal. 4<sup>th</sup> 903, 924: The proper focus of a Batson/Wheeler inquiry, of course, is on the subjective *genuineness* of the race-neutral reasons given for the peremptory challenge, *not* on the objective *reasonableness* of those reasons (citing Purkett v. Elm (95) 514 US 765 at 769). “it matters not that another prosecutor would have chosen

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to leave the prospective juror on the jury.... All that matters is that the prosecutor's reason for exercising the peremptory challenge is sincere and legitimate, legitimate in the sense of being nondiscriminatory. "[A] 'legitimate reason' is not a reason that makes sense, but a reason that does not deny equal protection. [Citations.]" (Purkett, supra., 514 U.S. at p. 769)

- ii. So, emphasize for the court that the standard is whether your reason for the challenge was:
  1. Sincere, and
  2. Non-discriminatory

#### 4) COGNIZABLE GROUP

- a. Under Wheeler, there is a presumption that a prosecutor who employs a peremptory challenge against a prospective juror who is a member of a cognizable group does so for a purpose other than to discriminate. P v. Wheeler, supra., 22 Cal. 3d at 278.
  - i. "[W]hen a party presumes that certain jurors are biased merely because they are members of an identifiable group distinguished on racial, religious, ethnic, or similar grounds, we may call this 'group bias'" P v. Perez (96) 48 Cal. App. 4<sup>th</sup> 1310, 1315).
  - ii. However, "a prosecutor, like any party, may exercise a peremptory challenge against anyone, including members of cognizable groups. All that is prohibited is challenging a person *because* the person is a member of that group." People v. Cleveland (04) 32 Cal. 4<sup>th</sup> 704, 733.
- b. Standard for Determining a Cognizable Group -If defense counsel seeks to have the court recognize a new classification as a cognizable group, see Rubio v. Superior Court (79) 24 Cal. 3d 93, at 98 for the two requirements for qualification as a cognizable or distinctive group:
  - i. Members of the group must share a common perspective arising from their life experience in the group (ie – a common social or psychological outlook or perspective on human events gained precisely because they are members of that group) Rubio, supra., 98, and
  - ii. The party seeking to demonstrate a violation of the rule also must show that no other members of the community are capable of adequately representing the perspective of the excluded group. Id.

NOTE – although Rubio is technically not binding precedent since a majority of the court did not join in the plurality opinion which set forth the test, the CA Supreme Court has repeatedly applied the Rubio test (see P v. Karis (88) 46 Cal. 3d 612; P v. Marbley (86) 181 Cal. App. 3d 45, 47-48).

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## c. Groups Found to be Cognizable –

### i. Race –

1. P v. Perez, supra., (Hispanics); P v. Williams (94) 26 Cal. App. 4<sup>th</sup> Supp 1 (Asians);

### ii. Gender –

1. Both men and women are cognizable groups for purposes of Wheeler/Baston challenges. J.E.B. v. Alabama ex rel. T.B., (94) 511 U.S. 127, 130.
2. See also P v. Crittenden (94) 9 Cal. 4<sup>th</sup> 83, 115, P v. Motton (85) 39 Cal. 3d 596, P v. Cervantes (91) 233 Cal. App. 3d 323, 334, P v. Macioce (86) 197 Cal. App. 3d 262

### iii. Gender and Race “Intersections” –

1. P v. Willis (02) 27 Cal. 4<sup>th</sup> 811 (white males); P v. Morton (85) 39 Cal. 3d 596, 605-06 (African American women)

### iv. Ethnicity –

1. US v. Bauer (9<sup>th</sup> Cir 1996) 75 F. 3d 1366; see also P v. Trevino (85) 39 Cal. 3d 667, 686-87 (disapproved on other grounds in P v. Johnson (89) 47 Cal. 3d 1194)

#### a. Caveat - Surnames Associated with A Particular Ethnicity – BE CAREFUL WITH THIS!

- i. White jurors with Hispanic surnames are not members of a cognizable group. P v. Cruz (08) 44 Cal. 4<sup>th</sup> 636, 655-656, BUT:
- ii. Jurors with Hispanic surnames are members of a cognizable group if they are in fact Hispanic even if no one knows at the time of the challenge whether the prospective juror is Hispanic. P v. Trevino (85) 39 Cal. 3d 667, 685 (disapproved on other grounds in P. v. Johnson (89) 47 Cal. 3d 1194, 1219-1221)
- iii. P v. Baber (88) 200 Cal. App. 3d 378 [exclusion of jurors with Spanish surnames found not to violate Wheeler when prosecutor explained very detailed group-neutral justifications for excusing each juror]

### v. Religion –

1. Religious affiliation is among the cognizable classes referenced in Wheeler and is not an appropriate basis for exercising a peremptory strike, however:
  - a. Jurors may be challenged on the basis of religious *beliefs* that bear on their ability to be fair and impartial. P v. Martin (98) 64 Cal. App. 4<sup>th</sup> 378, 385
    - i. Best practices – there is a fine line between striking someone for particular religious beliefs (which can be

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permissible) and not for religious affiliation, so questions jurors extensively about concerns you may have regarding their particular beliefs (versus the beliefs of a group to which they belong)

vi. Sexual Orientation –

1. Lesbians and gays are a cognizable class. P v. Garcia (00) 77 Cal. App. 4<sup>th</sup> 1269

d. Groups Found to Be Non-Cognizable

i. Economic Status -

1. Thiel v. Southern Pacific Co. (46) 328 U.S. 217 [daily wage earners];
2. People v. White (54) 43 Cal. 2d 740 [working class people];
3. P v. Johnson (89) 47 Cal. 3d 1194 [persons with low income];
4. P v. Estrada (79) 93 Cal. App. 3d 76 [“less educated, young adults, blue collar workers, households with family incomes less than \$15,000 were not cognizable groups for purposes of grand jury exclusion]

ii. Less Educated People –

1. P v. Estrada, supra., 93 Cal. App. 3d 90-91 [‘Less educated persons’ with 12 years or less formal education]

iii. Battered Women -

1. P v. Macioce (86) 197 Cal. App. 3d 262, 280 [‘victims of crime’ are not a cognizable group whose representation is essential to a constitutional venire]

iv. People who oppose death penalty

1. P v. Howard (1992) 1 Cal. 4<sup>th</sup> 1132, 1157

v. Young adults -

1. P v. Estrada, supra., 93 Cal. App. 3d at 96 [‘young adults’]
2. P v. Marbley (86) 181 Cal. App. 3d 45 [‘young people’ not a cognizable class]

vi. People over 70

1. P v. McCoy (95) 40 Cal. App. 4<sup>th</sup> 778 [“California courts have not been receptive to the argument that age alone identifies a distinctive or cognizable group within the meaning of the [representative cross-section] rule.” Id., 78 ]
2. P v. Carrington (09) 47 Cal. 4<sup>th</sup> 145 [“defendant has failed to cite any California case holding that a category composed of older persons is a distinctive group because they experienced certain historical events in common” Id., 149-150]

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- vii. Ex-felons –
  - 1. Okay to exclude from jury duty (6<sup>th</sup> Amendment; Article I, Section 16 CA Constitution);
  - 2. P v. Karis (88) 46 Cal. 3d 612, 631-632;
  
- viii. Resident Aliens
  - 1. Okay to exclude from jury duty (6<sup>th</sup> Amendment; Article I, Section 16 CA Constitution);
  - 2. P v. Karis, supra. – although they are a cognizable group, you must be a citizen to serve on a jury. [Other members of the community, namely naturalized citizens, adequately represent the viewpoint of resident aliens because all naturalized citizens were resident aliens at one point and suffered similar educational, social and employment restrictions. Rubio v. Superior Court, supra., 24 Cal. 3d at 100).
  
- ix. Naturalized Citizens - MIXED BAG ANALYSIS – Beware!
  - 1. Although not a cognizable group, a juror’s status as a naturalized citizen was found to be a “patently invalid” reason for exercising a peremptory strike P v. Gonzalez (89) 211 Cal. App. 3d 1186, at 1201;
    - a. Prosecutor in Gonzalez tried to quote to the perceived general inability of “first generation Americans’ to understand the applicable law.” This did not fly.
    - b. SO, status as a naturalized citizen alone is *insufficient* to support a peremptory challenge even though court found Naturalized Citizens are not members of a cognizable group
  
- x. “Insufficient’ English speaking citizens
  - 1. Citizens who speak ‘insufficient’ English are not a cognizable group under Rubio -“personal interpreters for individual jurors too burdensome for rest of jury” P v. Lesara (88) 206 Cal. App. 3d 1304, 1309.
  
- e. The Court CANNOT bunch together multiple cognizable groups to find a Wheeler violation
  - i. The appellate cases on this point involve defendants’ attempts to group racial and ethnic minorities into a single cognizable group designated “people of color.” CA courts have rejected this approach. P v. Davis (09) 46 Cal. 4<sup>th</sup> 539, 582; P v. Neuman (09) 176 Cal. App. 4<sup>th</sup> 571.
    - 1. Caveat – since courts must consider all relevant circumstances during prong 1 and 3 above, the number of strikes directed at members of one cognizable group can be relevant to the court’s assessment of whether the movant has made out a prima facie case with respect to a juror belonging to a *different* cognizable group.
      - a. See Fernandez v. Roe (9<sup>th</sup> Cir. 02) 286 F. 3d 1073 where the court found that the prosecutor’s use of two strikes to excuse the only two African American venirepersons established a prima facie case because when the prosecutor made those strikes she had

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already struck four out of seven Hispanics from the jury and the judge had already warned the prosecutor against striking any more Hispanics. *Id.* at 1078-1080.

- ii. Best practices - be sure at the prima facie stage to force the defense to identify a judicially recognized cognizable group. If the challenged strikes concern jurors from multiple cognizable groups, insist that the Wheeler motions be addressed separately and that the court make an explicit finding with respect to the prima facie case for *each* cognizable group.
- f. What if you didn't know the juror you challenged was a member of a cognizable group?
- i. P. v. Barber (88) 200 Cal. App. 3d 378 – if the person is a member of a cognizable group, they cannot be kicked because of being a member of that group
    - 1. Just having a Hispanic surname alone does not mean you are necessarily a member of a cognizable group
      - a. Could get Hispanic surname from marriage without being Hispanic

## 5) PROPER PEREMPTORY CHALLENGES

- a. Good quotes regarding practical voir dire:
  - i. P. v. Wheeler, supra., at 275:

“For example, a prosecutor may fear bias on the part of one juror because he has a record of prior arrests or has complained of police harassment, and on the part of another simply because his clothes or hair length suggest an unconventional lifestyle. In turn, a defendant may suspect prejudice on the part of one juror because he has been the victim of a crime or has relatives in law enforcement and on the part of another merely because his answers on voir dire evince an excessive respect for authority. Indeed, even less tangible evidence of potential bias may bring forth a peremptory challenge: either party may feel a mistrust of a juror’s objectivity on no more than the ‘sudden impressions and unaccountable prejudices are apt to conceive upon the bare looks and gestures of another’ (4 Blackstone, Commentaries \*353) – upon entering the box the juror may have smiled at the defendant, for instance, or glared at him.”
  - ii. P. v. Jones (11) 51 Cal. 4<sup>th</sup> 346, 363:
    - 1. “A party is not required to examine a prospective juror about every aspect that might cause concern before it may exercise a peremptory challenge.”

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## b. JUSTIFIABLE CHALLENGES

### i. Negative experience with, or distrust of, law enforcement

1. People v. Arias (96) 13 Cal. 4<sup>th</sup> 92 [perspective juror's daughter being prosecuted by the same DA's office and juror was being called as character witness for defendant; court found logical to conclude juror may be unsympathetic to the prosecution]
  - a. See also P v. Dunn (95) 40 Cal. App. 4<sup>th</sup> 1039, P v. Douglas (95) 36 Cal. App. 4<sup>th</sup> 1681, P v. Barber, *supra*.
2. P v. Johnson (1989) 47 Cal. 3d 1194 [perspective juror's ex-husband was cop, juror had a family member recently arrested, had very poor rapport with prosecutor, negative body language]
3. P v. Mayfield (97) 14 Cal. 4<sup>th</sup> 668, 724-726 [of the many jurors challenged, one was because he "had expressed some suspicion of prosecutors in general, and because [he] appeared to lack confidence in the ability of the judicial system to 'convict the right people.'"]

### ii. Skepticism about the criminal justice system

1. P v. Calvin (08) 159 Cal. App. 4<sup>th</sup> 1377, 1386
2. P v. Douglas, *supra* [juror voiced negative perceptions of the criminal justice system]

### iii. Expressions of sympathy for the defendant

1. P v. Stanley (06) 39 Cal. 4<sup>th</sup> 913, 939

### iv. Lack of sympathy for Victim

1. P v. Dunn (95) 40 Cal. App. 4<sup>th</sup> 1039 [prosecutor announced individual factors that prosecutor believed rendered potential juror sympathetic to the defense]

### v. Stupid / inattentive/ comprehension problems

1. Juror's verbal difficulties in discussing death penalty caused prosecutor to note he "did not consider her... a very bright woman." Juror's body language and manner of answering questions was considered and she was unable to articulate her responses and opinions and had many difficulties answering which frustrated the prosecutor's attempts to effectively voir dire. P v. Arias, *supra*, at 137-139
2. Only answering two of 10 questions asked/awkward answers/ had to be prodded to orally answer skipped questions/ plus was in the process of suing her employers. P v. Perez (94) 29 Cal. App. 4<sup>th</sup> 1313, 1322-1325
3. Trouble understanding people questioning juror. P v. Johnson, *supra*.
4. "Unprofessional person who seemed unfamiliar with the legal principles being propounded," also one who does "not appear to gain a complete grasp of the questions that the Court and counsel were propounding to him" P v. Barber, *supra*, at 389-394
5. P v. Alvarez (96) 14 Cal. 4<sup>th</sup> 155 [Displaying "a certain confusion" on voir dire along with many other reasons including inclinations against the death penalty]

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## 6. CAVEAT – BEWARE!

- a. “In some cases the reviewing court may conclude that the explanation is inherently implausible in light of the whole record. P v. Gonzalez (89) 211 Cal. App. 3d 1186

## vi. Inconsistent answers

1. Shifting responses on voir dire - P v. Mayfield (97) 14 Cal. 4<sup>th</sup> 668
2. Note: On appeal, if the prospective juror's responses are equivocal, i.e., capable of multiple inferences, or conflicting, the trial court's determination of that juror's state of mind is binding. People v. Mason (91) 52 Cal. 3d 909, 953-954 [conflicting responses]
3. People v. Ghent (87) 43 Cal. 3d 739 [where equivocal or conflicting responses are elicited regarding prospective juror's ability to impose the death penalty, the trial court's determination as to his true state of mind is binding on an appellate court]

## vii. Appearance

1. P v. Perez (94) 29 Cal. App. 4<sup>th</sup> 1313, 1330 – “peremptory challenges based on counsel's personal observations are not improper.”
2. Purkett v. Elem (95) 514 U.S. 765 -
  - a. DA: “I struck [juror] number twenty-two because of his long hair. He had long curly hair. He had the longest hair of anybody on the panel by far. He appeared to not be a good juror for that fact, the fact that he had long hair hanging down shoulder length, curly, unkempt hair. Also, he had a mustache and a goatee type beard. And juror number twenty-four also has a mustache and goatee type beard. Those are the only two people on the jury... with facial hair... And I don't like the way they looked, with the way the hair is cut, both of them. And the mustaches and the beards look suspicious to me.”
  - b. No cognizable group found with respect to people with beards and unkempt hair
3. Wearing a Coors jacket P v. Barber (88) 200 Cal. App. 3d 378

## viii. Demeanor

1. **NOTE:** Appellate Courts DISLIKE demeanor strikes without support in the record (see P v. Silva (01) 25 Cal. 4<sup>th</sup> 345)
  - a. P v. Allen (04) 115 Cal. App. 4<sup>th</sup> 542 [reversed when prosecutor gave demeanor reason of “her very response to your answers, and her demeanor, and how she took her seat,” saying it was “indicative of an independent thinker”]
2. Soft and reluctant responses, considerable ambivalence about capital punishment, soft-spoken demeanor – P v. Arias (96) 13 Cal. 4<sup>th</sup> 92, 137
  - a. Decision highlights the importance of the lawyer's explanation being “sincere and reasoned” (citing P v. Montiel (93) 5 Cal. 4<sup>th</sup> 877, 909).

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- b. Examples from case:
  - i. One juror in this case answered “I had never thought about it” (re: death penalty), then continued to struggle in articulating any thoughts (although prosecutor’s hesitations bolstered with other reasons)
  - ii. Another juror was “soft-spoken”—prosecutor worried that his demeanor signaled an inability to discuss or maintain his views during deliberations
  - iii. 3<sup>rd</sup> juror—prosecutor connected her youth to certain responses which suggested her lack of involvement in society and apparent distrust of the system (never married, failure to register as voter, discussions of when the police should be called, etc.)
3. Frowning with an apparent “lack of any sort of interest in the proceedings” suggested juror could not be impartial. P v. Dunn (95) 40 Cal. App. 4<sup>th</sup> 1039
  - a. Bolstered by other reasons, juror in question had an uncle convicted of murder—same offense with which Defendant was charged
  - b. Level of deference is so high as to not undermine the trial court’s credibility determines—otherwise would discount “the variety of subjective factors and considerations,” “including prospective jurors’ body language or manner of answer questions, which legitimately inform a trial lawyer’s decision” (citing People v. Montiel, *supra*.)
  - c. Court does not have to undertake comparative analysis; in fact, decision questions the method for evaluating the prosecutor’s stated reasons for peremptories: “it’s a combination of factors rather than any single one which often leads to the exercise of a peremptory challenge. In addition, the particular combination or mix of jurors which a lawyer seeks may, and often does, change as certain jurors are removed or seated in the jury box.” (Ex: okay to have a juror with a particular point of view, but unacceptable to have more than one with that view, factors used to evaluate may differ depending on how many challenges you have left, etc.)
    - i. See also: People v. Johnson (89) 47 Cal.3d 1194, 1220; Burks v. Borg (94) 27 F 3d 1424, 1429 (both discuss how comparative juror analysis is unworkable on review)
    - ii. Although still appropriate to rely on the fact that government waived available strikes and permitted members of a racial minority to be seated on a jury to support the finding that the government did not act with discriminatory intent (just not dispositive)
4. But see Snyder v. Louisiana (2007) 552 U.S. 472
  - a. Trial court’s ruling on the issue of discriminatory intent must be sustained unless clearly erroneous—“the best evidence of

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discriminatory intent will often be the *demeanor of the attorney* who exercises the challenge.” (italics added, citing Hernandez v. New York (91) 500 U.S. 352, 365)

- b. Deference is especially appropriate where a trial judge has made a finding that an attorney credibly relied on demeanor in exercising a strike.
- c. Be careful with pretextual explanations—here, record does not show that the prosecution would have challenged juror on nervousness alone, and his other stated reasons didn’t hold up.
  - i. \*importance of getting the trial judge to credit claims of nervousness/those factors not apparent on cold record

ix. Body language

- 1. look at P v. Johnson (89) 47 Cal. 3d 1194 – (numerous jurors challenged for demeanor reasons such as nervous, smiling at defendant, looked tired, weird, overweight, poorly groomed, defensive body position)
  - a. explanation doesn’t have to support a cause challenge— “bare looks or gestures of another”—same cues can be used by both sides (upon entering the box, smiles or glares at defendant)
  - b. “Nowhere does Wheeler or Batson say that trivial reasons are invalid” (pg 1218) Only thing required are reasonably specific and neutral explanations, again with great deference to trial court.
  - c. Examples:
    - i. nervous person, gave defendants a noticeable smile
    - ii. 71 year old man, looked tired, seemed to have great rapport with defense counsel, appeared more friendly to the defendant than the average juror)
    - iii. 61 year old women, “very tired appearing person,” gave defendant sympathetic look
    - iv. Prosecutor thought this person was “weird”, and that he would be totally unable to relate to him
    - v. Woman with very defensive body position when questioned (by prosecutor) and would not look at him when introduced
    - vi. Overweight woman, poorly groomed (indicative that she might not be in the mainstream of people’s thinking/unconventional; nervous about death penalty, kept hand over her mouth when talking about it
  - d. Note: court disapproves People v. Trevino (1985) 39 Cal.3d 667 extended Wheeler past its logical limits (again, criticizing comparative method—dynamics of jury selection hard to interpret with cold record) when it disallowed reliance on body language. We have to trust trial courts to do jobs fairly in conscientiously ruling on the adequacy of proffered explanations.

x. Lack of interest in the proceedings

- 1. Look at P v. Dunn (95) 40 Cal. App. 4<sup>th</sup> 1039 (see above)

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- xi. Responses are “tentative” and “low-keyed”
  - 1. P v. Douglas (95) 36 Cal. App. 4<sup>th</sup> 1681
  
- xii. Concern over juror having unemployed children
  - 1. See P v. Jones, supra., 51 Cal. 4<sup>th</sup> at 363.
    - a. Defendant claimed prosecutor’s concern regarding juror’s unemployed children was not sincere or legitimate because the prosecutor did not question the prospective juror about this concern (this was a case with lengthy juror questionnaires—not on perfunctory examination of all prospective jurors), especially when prosecutor took significant time questioning juror on defense theories. Court ruled that party is NOT required to examine a prospective juror about every aspect that might cause concern before it may exercise peremptory challenge. (Concern over unemployed children is also race neutral)
  
- xiii. Concern over Juror Not Following Translator
  - 1. P v. Cardenas (07) 155 Cal. App. 4<sup>th</sup> 1468, 1474 [prosecutor expressed distrust that two Hispanic prospective jurors would follow interpreter’s translation of testimony of Spanish-speaking witnesses, rather than their own, was valid race-neutral reason for excusing jurors]
  
- xiv. Expressed Unwillingness to Participate with Other Jurors in Deliberations
  - 1. P v. Cox (10) 187 Cal. App. 4<sup>th</sup> 337
  
- xv. “Unusual” answers
  - 1. P v. Duff (14) 58 Cal. 4<sup>th</sup> 529 [prosecutor’s contention that peremptory challenge was exercised because prospective juror’s questionnaire answers were “unusual” was fully supported by the record and was a plausible, nondiscriminatory basis for exercising a peremptory challenge; while prosecutor did not identify any particular answers he thought unusual, the trial court thought it was “quite clear” as to the reasons one might want to excuse the juror even before the prosecutor put justifications on the record, and juror had disclosed that he had been arrested for driving with a suspended license and was not happy about being fined and losing his car, that prosecutors and defense attorneys were necessary “but make way too much money.” Such that “not everyone is given the same access to the resource,” that victim impact evidence was in his mind irrelevant because the “crime wasn’t necessarily against the family,” and that he had been looking forward to jury duty for some time and that “the first time around I get a case where I get to really get involved.”]
  
- xvi. Other prior jury service
  - 1. Juror volunteering that he had been on jury before and voted not guilty- P v. Perez (94) 29 Cal. App. 4<sup>th</sup> 1313:
    - a. This was found to be a race-neutral reason. (In the opinion the same juror was also kicked because laughed at a weird time - court

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also found that to be OK, giving deference to the credibility determination of the trial judge.

- b. They also described this as an inability to follow directions (instructed to not reveal the verdict).
2. Juror sat on hung jury- P v. Turner (94) 8 Cal. 4<sup>th</sup> 137:
    - a. The juror had poor comprehension, had many no answers in questionnaire, and sat on a hung jury.
    - b. “Palmer’s experience of sitting on a hung jury constitutes a legitimate concern for the prosecution, which seeks a jury that can reach a unanimous verdict.” 170. Not an AOD to find this race-neutral reason sufficient.
      - i. caveat: this was one factor among many.
    - c. The same factors that are used in evaluating a juror may be given different weight depending on how many peremptory challenges lawyer has – so at beginning they may exercise challenges freely where later they would be more hesitant and weigh the potential cost (e.g. getting someone even worse). Turner, supra., at 170.

### xvii. lack of dependable transportation to court

1. P v. Crittenden (94) 9 Cal. 4<sup>th</sup> 83
  - a. The court held that the trial court did not err in denying defendant's motion for mistrial on the ground that the prosecutor exercised a peremptory challenge to excuse the sole African-American juror in the venire, and that the trial court did not err in denying defendant's challenges for cause to two prospective jurors, who he claimed did not unequivocally state they would not automatically vote for the death penalty.
  - b. The juror's apparent opposition to, uncertainty about, and repeatedly contradictory responses on voir dire pertaining to the death penalty, her indication that she might be unable to apply the law in that regard, her apparent general apprehension at serving on a jury for the first time and her concern over her transportation to the courthouse for trial indicated that there were legitimate, race-neutral grounds on which the prosecutor reasonably might have challenged her. Defendant's demonstration that the juror appeared to be an otherwise typical member of the community did not obviate these concerns, nor did his showing that 24 other prospective jurors had expressed opposition to the death penalty establish a prima facie case, since all but 1 were excused
  - c. Prosecutor tried to excuse Mrs. Casey for cause because she stated she didn't believe in death penalty (then waffled).

### xviii. Limited life experience

1. P v. Arias (96) 13 Cal. 4<sup>th</sup> 92
  - a. A neutral reason, but make a good record.
  - b. As to Nevarez, the prosecutor connected her youth (age 25) to certain of her responses which, in the prosecutor's view, suggested her lack of involvement in society and apparent distrust of the

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system. For example, he observed, Nevarez had a child though never married, was not registered to vote, and had agreed the police should not be called when her boyfriend suffered thefts and burglaries. Further, the prosecutor suggested, her questionnaire responses indicated confusion about concepts of forensic psychiatry. Finally, citing specific portions of Nevarez's voir dire examination, he noted that she considered the responsibilities of a penalty juror "unfair" and had agreed, at one point, that her feelings about the death penalty might substantially impair her ability to render a death verdict, regardless of the evidence. He indicated that, after reading Nevarez's questionnaire answers, he had rated her a "one," his lowest category.

2. P v. Perez (94) 29 Cal. App. 4<sup>th</sup> 1313, at 1322-5:

- a. "the reason why I exclude her: that she is young. She is single. She has no jury experience. She has no life experience in my opinion. And I believe that as to [a 2<sup>nd</sup> juror] that was one of the same reasons I kicked her in that she has no children. She is not married. She hasn't been around.... I'm kicking people who have no life experience. And if they haven't been around the block, I don't think that they can sit on a jury and participate with jury deliberations and listen to attorneys."

xix. Case specific reasons –

1. Defined – the party seeking to justify a peremptory challenge need only offer a genuine, reasonably specific, race-or group-neutral explanation related to the particular case being tried. P v. Johnson (89) 47 Cal. 3d 1194
  - a. Jurors have relationships with defense attorney or defendant P v. McGee (87) 193 Cal. App. 3d 1333

xx. Occupation

1. Whether a prosecutor's generalizations about a given occupation have any basis in reality or not, a prosecutor under Baston analysis surely can challenge a potential juror whose occupation, in the prosecutor's subjective estimation, would not render him or her the best type of juror to sit on the case for which the jury is being selected. P v. Trinh (14) 59 Cal. 4<sup>th</sup> 216
2. "Excluding jurors because of their profession, or because they acquitted in a prior case, or because of a poor attitude in answer to voir dire questions is wholly within the prosecutor's prerogative." P. v. Thompson (1987) 827 F.2d 1254
  - a. "We recognize peremptory challenges are often based on counsel's experience or hunch that some people are unsatisfactory as jurors. Many prosecutors believe various professional people are unacceptable because they may be too demanding or they look for certainty. Likewise, prospective jurors with unpleasant legal enforcement experience or contacts are often excused despite

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their assurances that they are unaffected by their treatment. When reasons of this kind are given, in a Wheeler hearing, for excusing jurors who also share a protected-class background, different questions about the prosecutor's motives arise." P v. Granillo (1987) 197 Cal.App.3d 110

- i. This is a footnote with no explanation...
- ii. The lesson? Take caution and be sincere.

### 3. Particular Occupations:

#### a. Teachers-

- i. P v. Barber (88) 200 Cal. App. 3d 378, 389-394 "it's been my experience as a prosecuting attorney that many teachers have somewhat of a liberal background and are less prosecution oriented." Court of Appeals added "Peremptory challenges are often exercised against teachers by prosecutors on the belief that they are deemed to be rather liberal."
  1. In this case the prosecutor kicked a woman with an allegedly Hispanic surname. The prosecutor put on the record that she appeared non-Hispanic to the prosecutor and that the prosecutor didn't necessarily recognize the surname to be Hispanic. The judge noted in this case that the juror's last name, "I think I'm familiar with Hispanic names being half-Mexican myself. So that lady could have been anything." (id at 392)
- ii. This juror identified herself as a Kindergarten teacher. The prosecutor noted that in her experience, teachers have a liberal background and are less prosecution oriented.
- iii. Further, this juror had a cousin that was pending trial for armed robbery or narcotics.
- iv. The Court of Appeal noted, "[the prosecutor] relied on her past experience that teachers tend to be 'liberal' and 'less prosecution oriented.' Furthermore, said rationale is coupled with the well-recognized concern that a personal experience such as the conviction of a crime by a close relative can give rise to a significant potential for bias against the prosecution." (id at 394)

#### b. Postal Workers-

- i. Jamerson v. Runnels (9<sup>th</sup> Cir 2013) 713 F. 3d 1218, 1234-1235 [prosecutor's explanation for removing a postal worker based on a past 'terrible experience with postal workers,' coupled with the jurors' facial expressions was a valid neutral basis for seeking to excuse the juror, although

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this explanation was found to be ‘not overwhelmingly persuasive.’]

c. Work with at Risk Youth -

i. P. v. Reynoso (01) 94 Cal.App.4<sup>th</sup> 86 Juror identified herself as a case manager for at risk youth. The prosecution stated that she dismissed the juror “based upon her being a counselor for at-risk youth. The People feel that [juror] would have an undue sympathy for both defendants in this case because they are young [and at risk]. The People feel that [juror] would associate with the people she works with and she would probably would [sic] have pity on them.”

1. Juror was Hispanic woman
2. Motion denied.

d. People Associated with Health Care-

i. P. v. Trevino (97) 55 Cal.App.4<sup>th</sup> 396- trial court and Court of Appeal found that no prima facie case was made, though the defense claimed the prosecutor struck people with Hispanic surnames. However, the Fifth District reviewed the case. There was little record to review, however, the Court noted that the challenged jurors shared an occupational characteristic, the jurors or their spouses were connected with organizations the provided either mental or physical health care. The Court stated, “It could be hypothesized the People were exercising their challenges based on a belief those members who had some connection with providing care or social services would not be sympathetic to their case.” And “[g]iven the fact this characteristic was present in six of the seven jurors peremptorily challenged by the People, this is a reasonable conclusion. This common characteristic may have been the basis for the People’s challenges. That is all that is required to sustain the trial court’s ruling on review.”

e. Social Services -

- i. P. v. Perez (96) 48 Cal.App.4<sup>th</sup> 1310- Defense claimed the prosecution kicked two women because of Hispanic surnames. The court noted that the two women were both single and worked in social services or caregiving fields. The Court went on to note that the prosecutor struck three elementary schoolteachers, a school librarian, and a person who worked with the developmentally disabled
- ii. P. v. Cox (10) 187 Cal. App. 4<sup>th</sup> 337 – upheld strike of retired psychiatric social worker due to prosecutor’s expressed

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concern that juror might be sympathetic toward young defendants charged with crimes, and that juror had profound disagreements on cases with his brother (who was a judge and former prosecutor)

f. Youth Services -

- i. P. v. Landry (96) 49 Cal.App.4<sup>th</sup> 785- Defense motion that prosecution was striking black jurors. One juror had an educational background in psychology or psychiatry and worked at a youth services agency. The prosecutor indicated he believed the juror's job indicated "a certain sympathy or do gooderness [sic] that might not make her a fair or impartial juror" and also that he had "very bad experiences" with jurors with a psychiatry or psychology background.

g. Engineers-

- i. P. v. Reynoso – (03) 31 Cal.4<sup>th</sup> 903, footnote 6: "Indeed, an attorney could peremptorily excuse a potential juror because he or she feels the potential juror's occupation reflects *too much education*, and that a juror with that particularly high a level of education would likely be specifically biased against their witnesses, or their client's position in the case. As long as such a peremptory challenge was nondiscriminatory and "legitimate" in the sense that it does not deny equal protection of the law (Purkett, supra, 514 U.S. at p. 769), it would be lawful and valid."

h. Delivery driver-

- i. P. v. Chism (14) 58 Cal. 4<sup>th</sup> 1266 [prosecutor explained that prospective juror's work experience as a delivery driver did not include supervisory responsibilities and indicated an inability to made decisions under stress, this found not to be a pretext reason. Exclusion of telephone circuit designer also upheld.]

6) PROBLEMATIC REASONS FOR EXCUSAL

- a. "Something in her work" – P. v. Turner (1986) 42 Cal.3d 711, 725 "as for excusing the [black] woman, I don't remember exactly, but I think it was something in her work as to that she was doing that from our standpoint, that background was not – would not be good for the People's case. And I excused her, along with quite a few other people, too, for the same reason."
  - i. The SCO California was not amused by the prosecutor's blatantly lazy and unjustified response. "To begin with, the assertion that 'something in her work' would 'not be good for the People's case' is so lacking in content as to amount to

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virtually no explanation. If such vague remarks were held to satisfy the prosecution's burden of rebutting a prima facie case of group discrimination, the defendant's constitutional right to trial by a jury drawn from a representative cross-section of the community could be violated with impunity."

- ii. The Court found that the proffered explanation was not bona fide. Further, the Court found the explanation vague. And in practice, the kicked juror worked as a hospital administrator, but the prosecution only kicked two other health workers, and one was kicked for negative feelings about the death penalty.
  1. The lesson: be sincere and articulate something about why the occupation is problematic.

b. Next at Bat looks better –

i. P v. Cisneros (15) 234 Cal. App. 4<sup>th</sup> 111

1. Prosecutor excused 4 men with detailed reasons, Wheeler denied, then excused another, stating her reason as "I'm kicking Juror 6 because I believe the [next]person...that is slated in his position, in my view, is a better fit for what I like..." *Id.*, p. 118. Prosecutor then stated "I'm replacing him with a male. And I think he's a better fit," also explaining that she didn't get much information from the excused juror. Wheeler was denied, and then prosecutor excused another male. Wheeler denied. Then prosecutor challenges another male. By time of fourth Wheeler motion court finds a prima facie case.
2. On fourth Wheeler, prosecutor explains "I'm kicking this juror not for a gender based reason, but because I believe the next juror in line...is a better fit." Prosecutor then explains all the good things about the next in line, saying "He was very involved in the voir dire process. He's the country club manager. He is very conservative in his appearance and very conservative in his answers that he shared."
3. Trial court accepts this reasoning finding that replacing one potential make juror with another who appeared more favorable towards the prosecution was a genuine, gender-neutral reason that did not deny equal protection. Trial court accepts the genuineness of the prosecutor's stated reasons (prong 3).
4. Court of appeals looked at the second prong of the Wheeler analysis – the issue of the facial validity of the prosecutor's explanation, stating the prosecutor must offer a gender-neutral explanation for the peremptory (based on something other than the gender of the challenged juror).
5. Problem here was the prosecutor failed to identify any characteristics whatsoever about the jurors kicked at the second and fourth Wheeler challenges; she did not proffer a gender-neutral explanation for dismissing them.
6. Although Court of Appeal did not question trial court's acceptance of the genuineness of the prosecutor's reasoning, it found that the prosecutor's explanation that she preferred the next prospective juror coming into the box is *not an adequate, nondiscriminatory explanation*:
  - a. "[W]henver counsel exercises a peremptory challenge, it necessarily means that he or she prefers the next prospective juror

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to the one being challenged (whether the individual qualities of the next person are known or unknown). It is, in effect, no reason at all.” Id., 121.

- b. Moral – it is not enough to tell the trial court why the next juror is better; you must articulate why the one being excused is poorer by comparison. Be sure to explain why the replacement is better, but also give the reasons why the juror you are striking is worse.
- ii. P v. Alvarez (96) 14 Cal. 4<sup>th</sup> 155 [Stated reason + that there were more favorable prospective jurors about to be called into the box for multiple dismissals ]
- iii. P v. Johnson (89) 47 Cal. 3d 1194, 1220-1221
  1. CA Supreme Court warned against using a comparative analysis (comparing stated reasons for excusals for similar characteristics who weren’t challenged)
    - a. The dissent's use of a comparison analysis to evaluate the bona fides of the prosecutor's stated reasons for peremptory challenges does not properly take into account the variety of factors and considerations that go into a lawyer's decision to select certain jurors while challenging others that appear to be similar. Trial lawyers recognize that it is a combination of factors rather than any single one which often leads to the exercise of a peremptory challenge. In addition, the particular combination or mix of jurors which a lawyer seeks may, and often does, change as certain jurors are removed or seated in the jury box. It may be acceptable, for example, to have one juror with a particular point of view but unacceptable to have more than one with that view. If the panel as seated appears to contain a sufficient number of jurors who appear strong-willed and favorable to a lawyer's position, the lawyer might be satisfied with a jury that includes one or more passive or timid appearing jurors. However, if one or more of the supposed favorable or strong jurors is excused either for cause or peremptory challenge and the replacement jurors appear to be passive or timid types, it would not be unusual or unreasonable for the lawyer to peremptorily challenge one of these apparently less favorable jurors even though other similar types remain. These same considerations apply when considering the age, education, training, employment, prior jury service, and experience of the prospective jurors.
      - i. It is also common knowledge among trial lawyers that the same factors used in evaluating a juror may be given different weight depending on the number of peremptory challenges the lawyer has at the time of the exercise of the particular challenge and the number of challenges remaining with the other side. Near the end of the voir dire process a lawyer will naturally be more cautious about “spending” his increasingly precious peremptory challenges. Thus at the beginning of voir dire the lawyer may exercise his challenges freely against a person who

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has had a minor adverse police contact and later be more hesitant with his challenges on that ground for fear that if he exhausts them too soon, he may be forced to go to trial with a juror who exhibits an even stronger bias. Moreover, as the number of challenges decreases, a lawyer necessarily evaluates whether the prospective jurors remaining in the courtroom appear to be better or worse than those who are seated. If they appear better, he may elect to excuse a previously passed juror hoping to draw an even better juror from the remaining panel.

- [REDACTED]
- [REDACTED]
- [REDACTED]
  - [REDACTED]
  - [REDACTED]
  - [REDACTED]
  - [REDACTED]
  - [REDACTED]
  - [REDACTED]
- [REDACTED]
  - [REDACTED]
  - [REDACTED]
  - [REDACTED]
  - [REDACTED]
  - [REDACTED]
  - [REDACTED]
  - [REDACTED]
  - [REDACTED]
  - [REDACTED]
- [REDACTED]
  - [REDACTED]
  - [REDACTED]
  - [REDACTED]
  - [REDACTED]
  - [REDACTED]
  - [REDACTED]
  - [REDACTED]
  - [REDACTED]
  - [REDACTED]
  - [REDACTED]



Good Luck!