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# Surviving *Wheeler* A Live Demonstration

Cindy DeSilva

Deputy District Attorney  
San Joaquin County

# WHEELER/BATSON: A SUMMARY

By Cindy De Silva  
Deputy District Attorney  
County of San Joaquin  
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## What Is a “Wheeler/Batson” Objection Based On?

- **“Group Bias”:** The presumption “that certain jurors are biased merely because they are members of an identifiable group distinguished on racial, religious, ethnic, or similar grounds[.]”  
- (*People v. Wheeler* (1978) 22 Cal.3d 258, 276.)

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## The Tripod and the Three-Part Inquiry



- *People v. Wheeler* (1978) 22 Cal.3d 258
- *Batson v. Kentucky* (1986) 476 U.S. 79
- *Johnson v. California* (2005) 545 U.S. 162
- **Prong 1:** Opponent must make *prima facie* case that totality of circumstances raises an inference of discriminatory kick
- **Prong 2:** Burden shifts to proponent to give permissible reasons
- **Prong 3:** Trial Court decides whether opponent has proven discriminatory purpose

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### Prong 1: What Makes a Good "Prima Facie Case"?

- *People v. Scott* (2015) 61 Cal. 4<sup>th</sup> 363, 384, lists the following "particularly relevant" evidence:
  - That the "party has struck most or all of the members of the identified group";
  - The "party has used a disproportionate number of strikes against the group";
  - The party has not engaged in significant questioning of those jurors;
  - D is a member of the identified group; and
  - V is a member of the group of the majority of the remaining jurors
- See also *P v. Fuentes* (1991) 54 Cal.3d 707 (but overturned re: "strong likelihood" language)

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### Prong 1: Cognizable Groups

- **UPDATED 2016 CCP 231.5/GC 11135:** Race, color, ancestry, national origin, ethnic group identification, religion, sex, sexual orientation, medical condition, age, marital status, mental disability, physical disability, genetic information (GC 12926)
- **NOT People Newly Residing** in the community (*Adams v. Superior Court* (1974) 12 Cal.3d 55, 60)
- **NOT "People of Color"** as a combined group (*People v. Davis* (2009) 46 Cal.4<sup>th</sup> 539, *People v. Neuman* (2009) 176 Cal.App.4<sup>th</sup> 571)

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### Prong 2: Reasons, Comparative Analysis, Statistics, Etc.

- *Miller-EI v. Dretke* (2005) 545 U.S. 231:
  - Statistics
  - Disparate Questioning
  - Comparative Analysis
  - Notations on Post-Its
  - Past DA's Office Practice
  - Cumulative Weight of All-of-the-Above

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### Prong 3: "Sincere and Reasoned Attempt"

- *People v. Hall* (1983) 35 Cal.3d 161, 167
- Third Prong is a credibility determination
- It "demands of the trial judge a sincere and reasoned attempt to evaluate" the truthfulness of the proffered race-neutral reason (*id.* at 167)

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### Prong 3: "Demeanor" Reasons and How They Figure Into Credibility

- When otherwise belied by the record and demeanor not in record, we tend to lose. (See, e.g., *People v. Silva* (2001) 25 Cal.4th 345; *Snyder v. Louisiana* (2008) 552 U.S. 472)
- When demeanor reason vague & non-sensical, we lose. (See, e.g., *People v. Allen* (2004) 115 Cal.App.4th 542, 546)
- When demeanor not in record or not seen by judge but nothing belies us, we can win. (See, e.g., *People v. Reynoso* (2003) 31 Cal.4th 903; *Thaler v. Haynes* (2010) 559 U.S. 43)

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### Mechanics of the Motion



- Consider Limine/Trial Brief (see materials)
- Best Practice: "Objection, may we approach?"
- Hearing: outside jury's presence
- Either P or D can make motion (*Georgia v. McCollum* (1992) 505 U.S. 42)
- D need not share same classification as kicked juror(s) (*Powers v. Ohio* (1991) 499 U.S. 400)
- Reasons: NEVER ex parte! (See *United States v. Thompson* (9th Cir. 1987) 827 F.2d 1254; *Davis v. Ayala* (2015) 576 U.S. \_\_\_, 135 S.Ct. 2187)

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### Remedies at Voir Dire Level

- **Traditional Wheeler:** dismiss entire panel and start over fresh
- **Batson:** simply remanded for TC to conduct 3-Part inquiry, but specifically left open the possibility of:
  - Traditional Wheeler
  - Re-seating offended juror
- **People v. Willis (2002) 27 Cal.4th 811:** If opponent agrees...
  - Monetary sanctions
  - Re-seat offended juror (dicta)
  - Give opponent extra peremptories (dicta)

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### Potential State Bar Reporting

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| <p><b>At Trial</b></p> <ul style="list-style-type: none"><li>■ If monetarily sanctioned \$1000 or more:</li><li>■ BP 6086.7(a)(3): TC must report you</li><li>■ BP 6068(o)(3): You must report yourself within 30 days</li></ul> | <p><b>After Losing on Appeal</b></p> <ul style="list-style-type: none"><li>■ If judgment reversed "in whole or in part" b/c of attorney misconduct:</li><li>■ BP 6086.7(a)(2): TC must report you</li><li>■ BP 6068(o)(7): You must report yourself within 30 days</li></ul> |
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### But...is Wheeler/Batson violation "attorney misconduct"???

- Retired SFDDA Jerry Coleman thinks so!
- But...did a recent case in a different Wheeler context foreshadow something?
- "We use the term 'prosecutorial error' rather than the at times misleading term 'prosecutorial misconduct,' because we are not concerned with the prosecutor's culpable mental state, but with the lawfulness of the reasons given for exercising the peremptory challenges." (*People v. Douglas* (2018) 22 Cal.App.5th 1162, n.6 at 1176)
- Be on the safe side: report self until we know for sure.

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Thank you!

Cindy De Silva  
Deputy District Attorney  
County of San Joaquin  
cindy.desilva@sjcda.org



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