



Wheeler/Batson & AB 3070 Guide

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Seminal Cases & Important New Statute

- *P v. Wheeler* (1978) 22 C3 258
- *Batson v. Kentucky* (1986) 476 US 79
- CCP § 231.7 (AB 3070)

New 3 Step Procedure

1. Party objects. No *prima facie* showing required.
2. Party exercising the peremptory challenge shall state the reasons the peremptory challenge has been exercised.
 - Offer permissible cognizable group neutral justification.
3. Court then makes decision.

Burden of Proof & Definitions

- If **substantial likelihood** that an **objectively reasonable person** would view race, etc. as a factor in use of challenge, then the objection shall be sustained.
- A "substantial likelihood" means more than a mere possibility but less than a standard of more likely than not (i.e., less than preponderance of the evidence).
- An "objectively reasonable person" is aware that unconscious bias, in addition to purposeful discrimination, have resulted in unfair exclusion of jurors.
- "Unconscious bias" includes implicit and institutional biases.
- Court need not find purposeful discrimination.

[See CCP § 231.7(d)]

Justifications (2nd Step)

- Justification need not support cause challenge. (*P v. Thomas* (2011) 51 C4 449)
- "Trivial" reason (if genuine) will suffice. (*P v. Arias* (1996) 13 C4 92, 136)
- Reasons must be inherently plausible & supported by record. (*P v. Silva* (2001) 25 C4 345, 386; CCP § 231.7(d)(3)(F))
- Must state reasons for each challenge. (*P v. Cervantes* (1991) 223 CA3 323)
- Could be combination of factors (change in jury dynamic, number of challenges left, etc.). (*P v. Lenix* (2008) 44 C4 602, 623; *P v. Reynoso* (2003) 31 C4 903, 918.)

Factors in Court's Analysis (3rd Step)

- Court considers totality of circumstances.
- Consider only the reasons actually given and shall not speculate.
- Whether defendant, victim and/or witnesses are member of the same perceived cognizable group as the challenged juror.
- Whether race, etc. bear on the facts of the case to be tried.
- Little, no or disparate questioning (differences in the way questions were phrased to different jurors).
- Comparative analysis (see box below).
- Whether a reason might be disproportionately associated with a race, etc.
- Whether the reason was contrary to or unsupported by the record.
- Historical evidence of discrimination (by individual prosecutor and/or office).
- Credibility, demeanor of prosecutor. (*P v. Williams* (2013) 56 C4 630; *P v. Cox* (2010) 187 CA4 337, 343.)
- Whether prosecution passed on panel with members of group. (*P v. Sanchez* (2016) 63 C4 411, 439; *P v. Gutierrez* (2017) 2 C5 1150, 1170.)
- Statistical evidence (raw numbers, percentage of jurors excused, remaining, proportionality, etc.). (*P v. Garcia* (2011) 52 C4 706, 744)

[See CCP § 231.7(d)]

Comparative Analysis

- Side-by-side comparison of jurors who were struck vs. jurors serving.
- If DA's proffered reason for striking juror applies just as well to an otherwise-similar juror, that is evidence tending to prove purposeful discrimination. (*Miller-El v. Dretke* (2005) 545 US 231, 241)
- Is but one form of circumstantial evidence that is relevant, but not necessarily dispositive. (*P v. Lomax* (2010) 49 C4 530, 572)

Challenges for Cause

- CCP §§ 223 *et. seq.*; Rule of Court 4.201
- Unlimited number (each side)
- General disqualification: insufficient English, non-resident, felon on supervision, felon 290, etc.
- Implied bias: blood relation to any party, involvement in prior case, interest in outcome, opinion/knowledge about case, bias towards party
- Actual bias: state of mind preventing impartiality and prejudice
- Court can control time limits on counsel but cannot establish an inflexible time limit policy; shall permit liberal & probing examination
- Cause challenges burden: substantial evidence
- Abuse of discretion standard of review (*P v. Kaurish* (1990) 52 C3 648)

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, ethnicity, gender, gender identity, sexual orientation, national origin, religious affiliation, or the perceived membership of the prospective juror in any of those groups (CCP § 231.7(a))
- Also: age, color, disability. (CCP § 231.5; Govt Code § 11135(a))
- Defendant need not be member of excluded group. (*Wheeler @ 281*)

Presumptions

- Peremptory challenge for any of the following reasons is presumed invalid.
- Unless party exercising challenge can show by **clear and convincing evidence** that an objectively reasonable person would view the rationale as unrelated to prospective juror's race, etc. and that the reasons articulated bear on the juror's ability to be fair and impartial.
- "Clear and convincing" = highly probable that reasons given for exercise of challenge are unrelated to conscious or unconscious bias and are specific to juror and bear on juror's ability to be fair and impartial.
 1. Expressing distrust of or having a negative experience with law enforcement or criminal legal system.
 2. Expressing belief that law enforcement engages in racial profiling or that criminal laws have been enforced in discriminatory manner.
 3. Having close relationship with people who have been stopped, arrested, or convicted of a crime.
 4. A prospective juror's neighborhood.
 5. Having a child outside of marriage.
 6. Receiving state benefits.
 7. Not being a native English speaker.
 8. The ability to speak another language.
 9. Dress, attire, or personal appearance.
 10. Employment in field that is disproportionately occupied by group members or that serves a population disproportionately comprised of group members.
 11. Lack of employment or underemployment.
 12. Friendliness with another prospective juror of the same group.
 13. Any justification subject to comparative analysis.

† #14-16 presumptively invalid *unless* court or opposing counsel is able to confirm that asserted behavior occurred, and then must be relevant to case.

[CCP 231.7(e), (f), (g)]

Remedy

- Traditional: quash venire; draw different jury panel and start selection anew.
- AB 3070 allows for mistrial if jury already sworn.
- Other options: reseal juror, provide the objecting party additional challenges, other alternatives (e.g., monetary fines).
- Should obtain consent of aggrieved party for specific remedy. [CCP 231.7(h)]

Requirements / Rules

- Objection may be raised by the defense or prosecution. (*P v. Wheeler* (1978) 22 C3 258, 280-283, fn.29; see, e.g., *P v. Singh* (2015) 234 CA4 1319 [against defense attorney])
- Objection must be timely (i.e., before the jury is impaneled, *unless* information becomes known that could not have reasonably been known before the jury was impaneled). [PC 231.7(b)]
- Single discriminatory exclusion is violation. (*P v. Fuentes* (1991) 54 C3 707)

Race-Neutral Justifications (Examples)

Prior Jury Experience

- Previously sat on hung jury^{1, 2}
- No prior jury experience⁵

Experience w/ LE or System

- Refused employment by police³
- Ex-husband is cop¹³
- Divorce with police officer³
- Relative involved with drugs^{8, 9}

Demeanor †

- Weird, unusual^{13, 15}
- Too eager^{12, 15}
- Soft spoken, reluctant, timid^{4, 15}
- Emotional⁶
- Body language¹³

Limited Life Experiences (other than age alone)

- Single, no children⁵
- Few ties to community¹⁴
- Follower¹⁵

Stupid †

- Ability to comprehend^{1, 4, 9}
- Answered only 2 of 10 questions⁵
- Inattentive¹⁰
- Inconsistent answers¹¹

Other

- Views on death penalty^{6, 7}
- Rely too heavily on experts⁶
- Late/tardy¹⁵
- Close-mindedness⁶

1) *P v. Turner* (1994) 8 C4 137; 2) *P v. Farnam* (2002) 28 C4 107; 3) *Hayes v. Woodford* (9th Cir. 2002) 301 F3d 1054; 4) *P v. Arias* (1996) 13 C4 92; 5) *P v. Perez* (1994) 29 CA4 1313; 6) *P v. Gutierrez* (2002) 28 C4 1083; 7) *P v. Williams* (2013) 56 C4 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 C4 668; 12) *P v. Ervin* (2000) 22 C4 48; 13) *P v. Johnson* (1989) 47 C3 1194; 14) *Rice v. Collins* (2006) 546 US 333; 15) *P v. Duff* (2014) 58 C4 527.