

# ELIMINATION OF BIAS IN PEREMPTORY CHALLENGES

From Batson & Wheeler to CCP Section 231.7

Judge Matthew Guerrero

San Luis Obispo Superior Court



(a) All persons are eligible and qualified to be prospective trial jurors, except the following:

- (1) Persons who are not citizens of the United States.
  - (2) Persons who are less than 18 years of age.
  - (3) Persons who are not domiciliaries of the State of California, as determined pursuant to Article 2 (commencing with [Section 2020](#)) of [Chapter 1 of Division 2 of the Elections Code](#).
  - (4) Persons who are not residents of the jurisdiction wherein they are summoned to serve.
  - (5) Persons who have been convicted of malfeasance in office and whose civil rights have not been restored.
  - (6) Persons who are not possessed of sufficient knowledge of the English language, provided that no person shall be deemed incompetent solely because of the loss of sight or hearing in any degree or other disability which impedes the person's ability to communicate or which impairs or interferes with the person's mobility.
  - (7) Persons who are serving as grand or trial jurors in any court of this state.
  - (8) Persons who are the subject of conservatorship.
  - (9) Persons while they are incarcerated in any prison or jail.
  - (10) Persons who have been convicted of a felony and are currently on parole, postrelease community supervision, felony probation, or mandated supervision for the conviction of a felony.
  - (11) Persons who are currently required to register as a sex offender pursuant to [Section 290 of the Penal Code](#) based on a felony conviction.
- (b) No person shall be excluded from eligibility for jury service in the State of California, for any reason other than those reasons provided by this section.
- (c) The provisions of this section are severable. If any provision of this section or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.

## Who can serve as a juror???

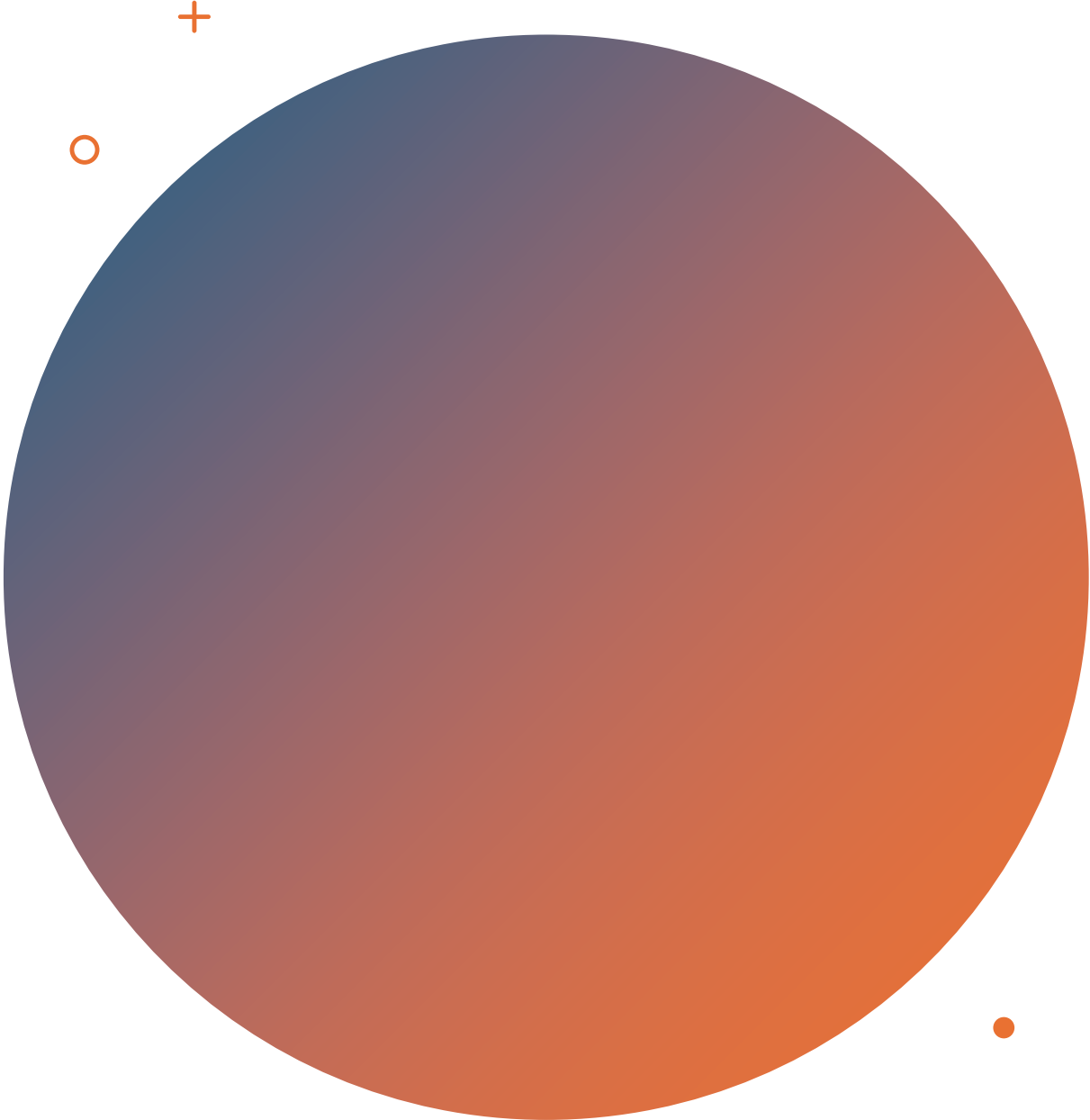
### CCP § 203

# Who is not qualified for jury service

Not qualified to serve as a juror

Implied Bias (CCP 229)

Actual Bias (CCP 225(b)(1)(C))



## • **BATSON & WHEELER REVIEW**

- Purpose was to eliminate racial discrimination in jury selection.
- “The use of peremptory challenges to remove prospective jurors on the sole ground of group bias violates the right to trial by a jury drawn from a representative cross-section of the community under article I, section 16, of the California Constitution.” (People vs. Wheeler (1978) 22 Cal.3d 258, 376-277. )
- The Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable to impartially consider the State’s case against a black defendant.” (Batson vs. Kentucky (1986) 476 U.S. 79, 89.)



- Three-step procedure:
  - The trial court must determine whether the defendant has made a prima facie showing that the prosecutor exercised a peremptory challenge based on race.
  - If the showing is made, the burden shifts to the prosecutor to demonstrate that the challenges were exercised for a race-neutral reason.
  - The Court determines whether the defendant has proven purposeful discrimination. The ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike.
  
- (People vs. Lomax (2010) 49 Cal.4<sup>th</sup> 530, 569; People vs. Lenix (2008) 44 Cal.4<sup>th</sup> 602, 612-613.)

Since we have a new statute, is Batson/Wheeler still the law?

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# Yes, under circumstances covered in CCP § 231.5

A party shall not use a peremptory challenge to remove a prospective juror on the basis of an assumption that the prospective juror is biased merely because of a characteristic listed or defined in [Section 11135 of the Government Code](#), or similar grounds.

GC 11135 - No person in the State of California shall, on the basis of sex, race, color, religion, ancestry, national origin, ethnic group identification, age, mental disability, physical disability, medical condition, genetic information, marital status, or sexual orientation,



+  
◦ · So, it's been illegal  
since 1978/1986  
to discriminate...





**And we all took an oath  
to uphold the  
Constitution and follow  
the law  
And none of us consider  
ourselves  
\_\_\_\_\_ (racist, sexist,  
etc.)**



**WHY  
ARE WE  
HERE?**





# Legislative Action and the Court's Input

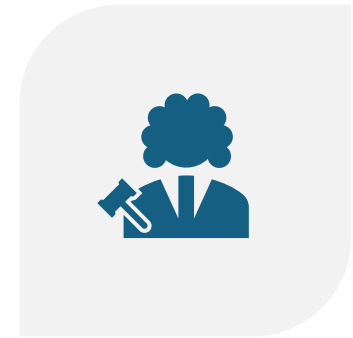
In 2016, California Supreme Court Chief Justice Tani Cantil-Sukuyae told a joint session of the legislature that “implicit bias is a factor in the national discussion about race and justice.” The Chief Justice highlighted “implicit bias education and training” for judges. Just last year (2015), the legislature enacted a law requiring mandatory trainings on implicit bias for lawyers and judges.



# California Supreme Court Batson Rulings



97.9 % FINDING OF NO ERROR



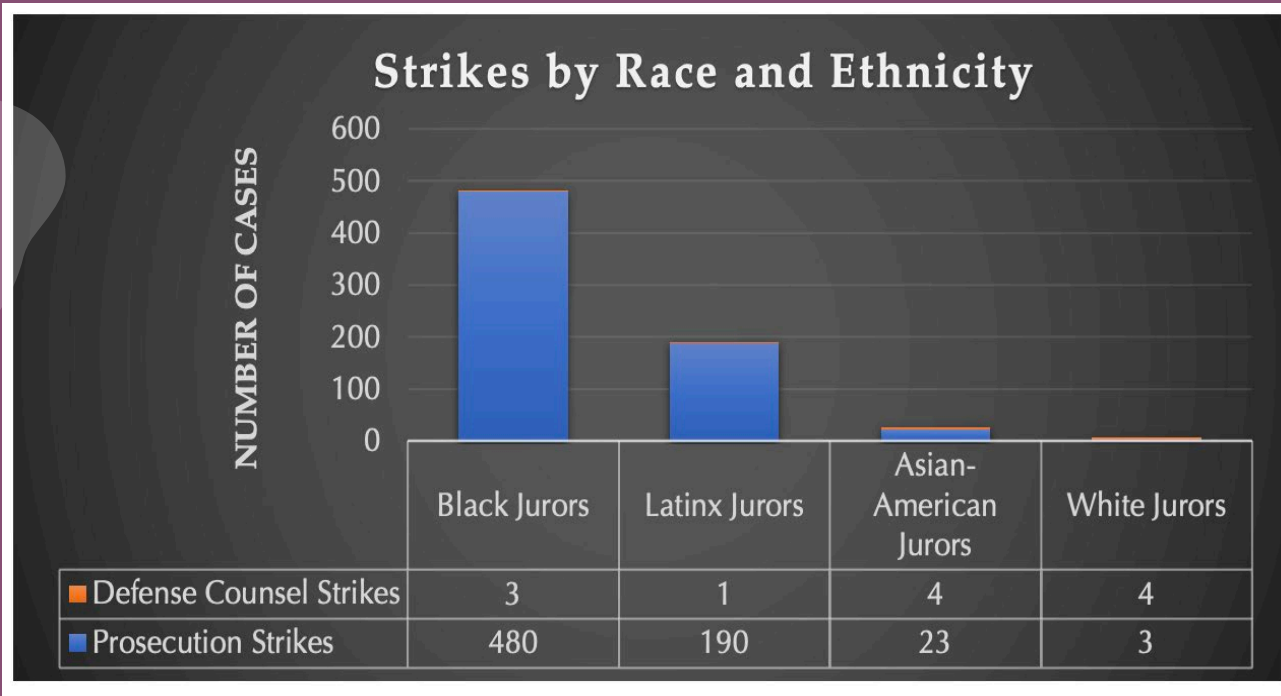
IN 2019, JUSTICE GOODWIN LIU OBSERVED THAT IT HAS BEEN “MORE THAN 30 YEARS SINCE THIS COURT HAS FOUND BATSON ERROR INVOLVING THE PEREMPTORY STRIKE OF A BLACK JUROR.” AS HE COMMENTED AND THE REPORT AND NUMEROUS STUDIES SHOW, “RACIAL DISCRIMINATION AGAINST BLACK JURORS HAS NOT DISAPPEARED HERE OR ELSEWHERE DURING THAT TIME.”



## Court of Appeal Decisions

- From January 1, 2006, through December 31, 2018, the courts of appeal issued a total of 683 opinions involving Batson claims. The six appellate districts found Batson error in only 18 cases (2.6%) and remanded three cases (0.4%) for the trial court to rehear the Batson motion.

# Whitewashing the Jury – Berkeley School of Law



- Batson has failed and was destined to fail. Prosecutors across the state persist in disproportionately striking Black and Latinx jurors. They justify these strikes on the basis of “race-neutral” reasons that are often thinly veiled ethnic or racial stereotypes, which courts at every level tolerate. **The California Supreme Court has found Batson error only three times in the last three decades.** Batson is an ineffective judicial mechanism. We agree with Justice Goodwin Liu that it is “past time for a course correction.”

# LEGISLATIVE ACTION

- Proposed in 2020 to take effect after January 1, 2022:
  - **SECTION 1.**
  - (a) It is the intent of the Legislature to put into **place an effective procedure for eliminating the unfair exclusion of potential jurors based on race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or perceived membership in any of those groups, through the exercise of peremptory challenges.**
  - (b) **The Legislature finds that peremptory challenges are frequently used in criminal cases to exclude potential jurors from serving** based on their race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or perceived membership in any of those groups, and that exclusion from jury service **has disproportionately harmed African Americans, Latinos, and other people of color. The Legislature further finds that the existing procedure for determining whether a peremptory challenge was exercised on the basis of a legally impermissible reason has failed to eliminate that discrimination.** In particular, the Legislature finds that **requiring proof of intentional bias renders the procedure ineffective** and that many of the reasons routinely advanced to justify the exclusion of jurors from protected groups are in fact associated with stereotypes about those groups or otherwise based on unlawful discrimination. Therefore, **this legislation designates several justifications as presumptively invalid and provides a remedy for both conscious and unconscious bias in the use of peremptory challenges.**
  - (c) It is the intent of the Legislature that this **act be broadly construed** to further the purpose of eliminating the use of group stereotypes and discrimination, whether based on conscious or unconscious bias, in the exercise of peremptory challenges.
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The new  
statute



# CCP 231.7

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## RULE:

A party shall not use a peremptory challenge to remove a prospective juror on the basis of the prospective juror's race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or the perceived membership of the prospective juror in any of those groups. (CCP 231.7(a))

But there is  
more....

- (e) A peremptory challenge for any of the following reasons is presumed to be invalid unless the party exercising the peremptory challenge can show by **clear and convincing evidence** that an objectively reasonable person would view the rationale as unrelated to a prospective juror's race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or perceived membership in any of those groups, and that the reasons articulated bear on the prospective juror's ability to be fair and impartial in the case:
- (1) Expressing a distrust of or having a negative experience with law enforcement or the criminal legal system.
- (2) Expressing a belief that law enforcement officers engage in racial profiling or that criminal laws have been enforced in a discriminatory manner.
- (3) Having a 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 a field that is disproportionately occupied by members listed in subdivision (a) or that serves a population disproportionately comprised of members of a group or groups listed in subdivision (a).
- (11) Lack of employment or underemployment of the prospective juror or prospective juror's family member.
- (12) A prospective juror's apparent friendliness with another prospective juror of the same group as listed in subdivision (a).
- (13) Any justification that is similarly applicable to a questioned prospective juror or jurors, who are not members of the same cognizable group as the challenged prospective juror, but were not the subject of a peremptory challenge by that party. The unchallenged prospective juror or jurors need not share any other characteristics with the challenged prospective juror for peremptory challenge relying on this justification to be considered presumptively invalid.

# Clear and Convincing?

- (f) refers to the degree of certainty the factfinder must have in determining whether the reasons given for the exercise of a peremptory challenge are unrelated to the prospective juror's cognizable group membership, bearing in mind conscious and unconscious bias. To determine that a presumption of invalidity has been overcome, the factfinder shall determine that it is highly probable that the reasons given for the exercise of a peremptory challenge are unrelated to conscious or unconscious bias and are instead specific to the juror and bear on that juror's ability to be fair and impartial in the case

# The Court Process

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- **STEP ONE:**

**OBJECTION!  
*INVIDIDOUS  
DISCRIMINATION!***

- **or...the Court can impose an objection sua sponte...**



## STEP TWO

The proponent of the peremptory challenge must respond with the reason(s) for exercising the peremptory challenge.





# STEP 3

## Judge's duty:

- (d) (1) The court shall evaluate the reasons given to justify the peremptory challenge in light of the totality of the circumstances. The court shall consider only the reasons actually given and shall not speculate on, or assume the existence of, other possible justifications for the use of the peremptory challenge. If the court determines there is a substantial likelihood that an objectively reasonable person would view race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or perceived membership in any of those groups, as a factor in the use of the peremptory challenge, then the objection shall be sustained. The court **need not find purposeful discrimination to sustain the objection**. The court shall explain the reasons for its ruling on the record. A motion brought under this section shall also be deemed a sufficient presentation of claims asserting the discriminatory exclusion of jurors in violation of the United States and California Constitutions.





# DEFINITIONS 231.7(d)(2)

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(A) For purposes of this section, an objectively reasonable person is aware that unconscious bias, in addition to purposeful discrimination, have resulted in the unfair exclusion of potential jurors in the State of California.



(B) For purposes of this section, a “substantial likelihood” means more than a mere possibility but less than a standard of more likely than not.



(C) For purposes of this section, “unconscious bias” includes implicit and institutional biases.

# The Court may consider:

(i) The objecting party is a member of the same perceived cognizable group as the challenged juror.

(ii) The alleged victim is not a member of that perceived cognizable group.

(iii) Witnesses or the parties are not members of that perceived cognizable group.

(B) Whether race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or perceived membership in any of those groups, bear on the facts of the case to be tried.

(C) The number and types of questions posed to the prospective juror, including, but not limited to, any the following:

(i) Consideration of whether the party exercising the peremptory challenge failed to question the prospective juror about the concerns later stated by the party as the reason for the peremptory challenge pursuant to subdivision (c).

(ii) Whether the party exercising the peremptory challenge engaged in cursory questioning of the challenged potential juror.

(iii) Whether the party exercising the peremptory challenge asked different questions of the potential juror against whom the peremptory challenge was used in contrast to questions asked of other jurors from different perceived cognizable groups about the same topic or whether the party phrased those questions differently.

(D) Whether other prospective jurors, who are not members of the same cognizable group as the challenged prospective juror, provided similar, but not necessarily identical, answers but were not the subject of a peremptory challenge by that party.

(E) Whether a reason might be disproportionately associated with a race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or perceived membership in any of those groups.

(F) Whether the reason given by the party exercising the peremptory challenge was contrary to or unsupported by the record.

(G) Whether the counsel or counsel's office exercising the challenge has used peremptory challenges disproportionately against a given race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or perceived membership in any of those groups, in the present case or in past cases, including whether the counsel or counsel's office who made the challenge has a history of prior violations under *Batson v. Kentucky* (1986) 476 U.S. 79, *People v. Wheeler* (1978) 22 Cal.3d 258, Section 231.5, or this section.



- Definite composition
- Some fact that defines and limits the group
- Can't shift from day to day or whose members can be arbitrarily selected
- Common thread that enhances the likelihood that the jury will be representative of significant community attitudes.

# Recognized Cognizable Groups

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- Race
- Ethnicity
- Ethnic Group
- Ethnic Origin
- Blacks and African Americans
  - African-American Women
  - African-American Men
- Latinos, Hispanics
  - Spanish or Hispanic Surnames
  - Hispanic women or Hispanic-surnamed women
- Native Americans
- Filipino-Americans
- Vietnamese-Americans
- Chinese-Americans
- Gender (Men or Women)
- Sexual Orientation: Lesbians and gay men
- White males
- Religious groups or affiliation
  - Jewish jurors
  - Catholic jurors



# Non- Cognizable Groups

- Resident Aliens
- Non-English speakers
- Low income
- Less educated people or blue-collar workers
- Minority jurors or generic racial groups
  - People of color
  - Non-whites
  - Asian Americans
- Age
  - Youth; young adults
- Disabled or hearing impaired
- Group associations
- Obese persons
- Victims of crime, including battered women
- Ex-felons or persons previously arrested
- Believers in law and order
- Persons automatically opposed to or having reservations about the death penalty





## PRESUMPTIVELY INVALID REASONS

(g) (1) The following reasons for peremptory challenges have historically been associated with improper discrimination in jury selection:

(A) The prospective juror was inattentive, or staring or failing to make eye contact.

(B) The prospective juror exhibited either a lack of rapport or problematic attitude, body language, or demeanor.

(C) The prospective juror provided unintelligent or confused answers.



**OVERRULED**

quickmeme.com



It was overruled, can we move on now???



# Judge's Statutory Obligation When Overruling An Objection



The trial court “shall” also find that presumptively invalid reasons “bear on [the] juror’s ability to be fair and impartial in the case.” (§ 231.7, subd. (f).)



But in the absence of express factual findings, including those regarding a prospective juror’s demeanor, we cannot impute any findings to the trial court. (§ 231.7, subd. (j).)



Under section 231.7, a trial court may overrule an objection to the exercise of a peremptory challenge based on presumptively invalid reasons only if it explicitly makes specific findings. (P vs Uriostegui)

And .....

- To allow a party to bury presumptively invalid reasons under an overarching facially neutral reason, such as “**lack of life experience**,” without the required findings under section 231.7, subdivision (f), would render section 231.7, subdivision (e) ineffective.
  - P vs. Uriostegui (Santa Barbara County). Filed April 5, 2024



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But what happens if the objection is sustained?

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# The Court shall do one or more of the following: (h)

## Quash

- Quash the jury venire and start jury selection anew. This remedy shall be provided if requested by the objecting party.

## Declare

- If the motion is granted after the jury has been impaneled, declare a mistrial and select a new jury if requested by the defendant.

## Seat

- Seat the challenged juror.

## Provide

- Provide the objecting party additional challenges.

## Provide

- Provide another remedy as the court deems appropriate.

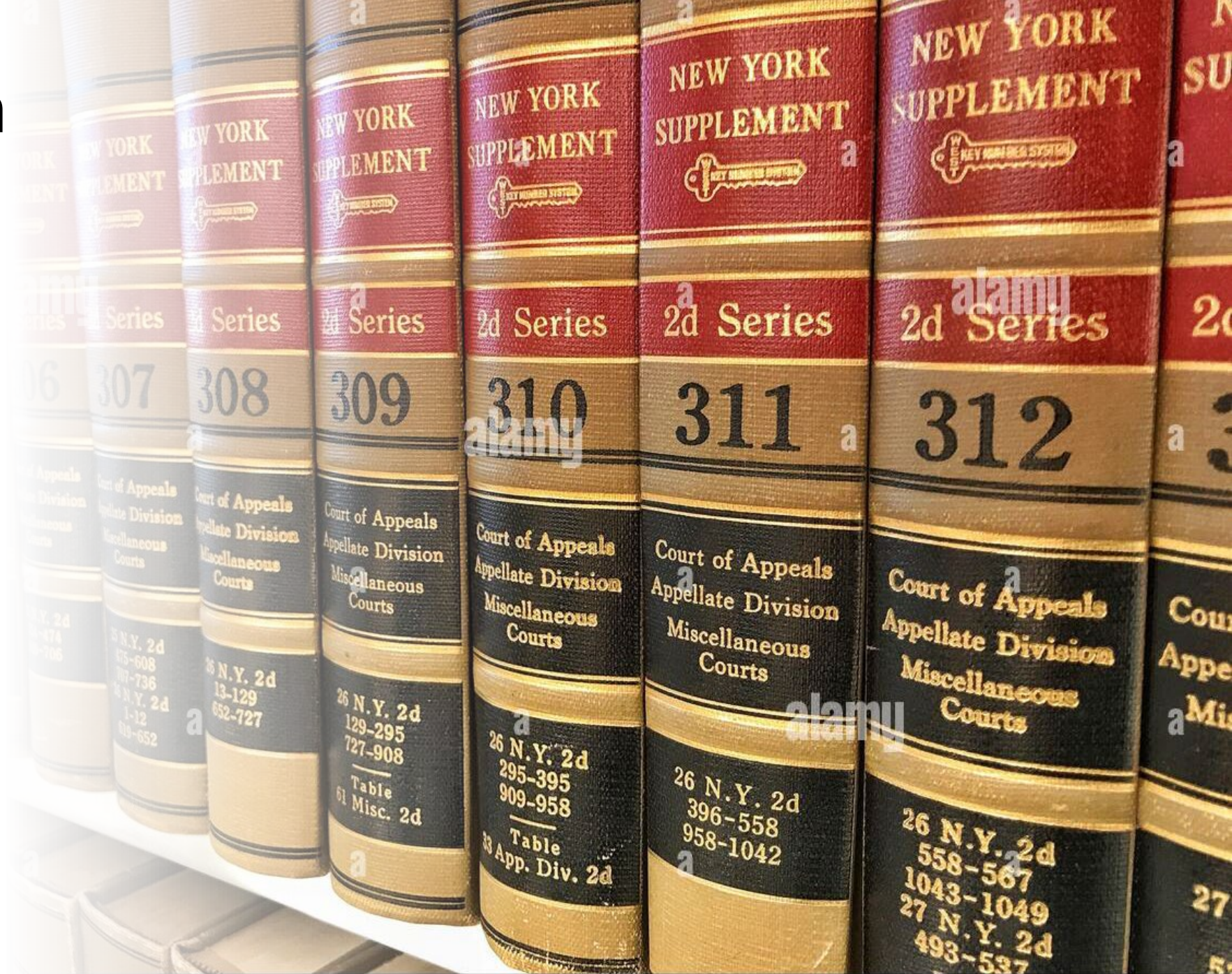
Applies only to criminal  
trials....

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That is, until January 1, 2026, when it will  
apply to all civil and criminal trials.



# 59 cases from the Court of Appeal





# 19 Published Cases

2 Cases overturn conviction for 231.7 violation

2 Cases uphold the peremptory challenge

13 cases find that 231.7 does not apply

231.7 does not apply to challenges for cause

231.7 does not apply before January 1, 2022.

Batson/Wheeler was in effect at the time, but the Court comments anyway.

Three foreign jurisdictions make note of CCP 231.7

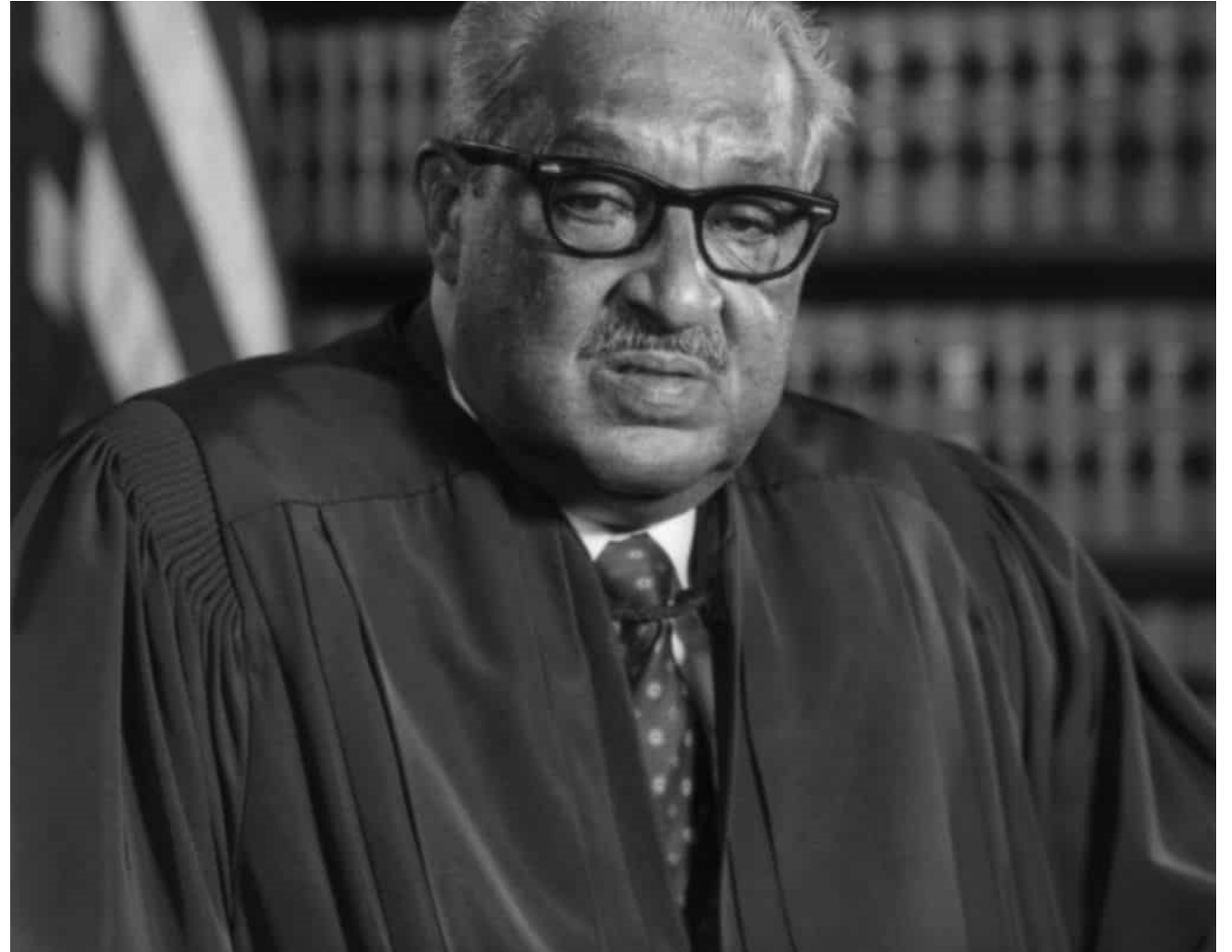


# 40 Unpublished Cases

- 1 case remanded for further proceedings;
- 1 case remanded for new trial;
- 4 cases affirmed the peremptory challenge;
- 34 cases find that the statute did not apply;
  - 1 case holds that a MIL cannot get around statute
  - 33 cases hold that the statute does not apply prior to January 1, 2022;



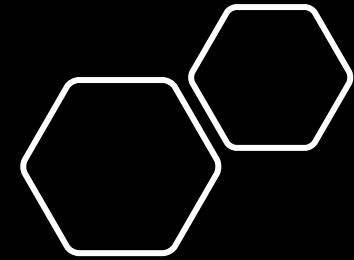
Justice Thurgood Marshall agreed with the decision in the case, but asserted that the Court should eliminate the use of peremptory challenges in all criminal proceedings so that they could not be used as a front for impermissible racial considerations. Justice Marshall asserted that under the current system, prosecutors are still free to discriminate so long as it is not blatant, and trial courts face a difficult burden of assessing a prosecutor's motive.



**PRESENTATION OVER**



**ANY QUESTIONS?**



**YOU'RE AWESOME!  
THANK YOU!**

