

## **Juror Non-Discrimination Act**

### **Background**

Currently, there is no federal prohibition on discriminating against jurors based on their sexual orientation or gender identity. The United States Code prohibits discrimination on the basis of race, color, religion, sex, national origin and economic status. The Department of Justice has taken no position on whether such discrimination is permissible. Federal cases have already presumed that sexual orientation constitutes a protected class and the state of California has a law including sexual orientation in its jury non-discrimination statement.

### **Jury Selection**

#### **Voir Dire**

Prior to the start of a trial, potential jurors come to the courtroom and the judge and attorneys begin the process of *voir dire* to select who will sit on the jury and determine the facts of a case. Attorneys submit their proposed questions to the judge, and judges are afforded significant discretion over what questions to permit during *voir dire*. The purpose is to arrive at a jury panel that will be fair and impartial. Part of this process involves asking the jurors questions about themselves and their experiences to discern whether they might harbor prejudices or hold strong opinions that would prevent them from evaluating the evidence objectively.

#### **Striking Jurors**

There are two ways jurors may be excluded or “stricken” during jury selection.

- (1) Striking for Cause: If an attorney believes that a potential juror cannot be fair and impartial based on their responses, the attorney may ask the judge to strike the juror for cause. If the judge agrees, the attorney may strike an unlimited number of jurors for cause.
- (2) Peremptory Strikes: These are strikes that may be used by either attorney during *voir dire*, and they do not have to offer an explanation for why they use their peremptory strikes. In federal court, the trial judge will determine how many strikes each side gets.

#### **Challenging the Use of Peremptory Strikes**

In 1986, attorneys for a defendant in a criminal case believed the prosecution was using their peremptory strikes to exclude all of the black jurors, thereby denying their client a fair trial. The U.S. Supreme Court ruled in *Batson v. Kentucky* that a defendant may challenge the use of peremptory strikes if he believes they are being used for a discriminatory purpose.

These are now referred to as *Batson* challenges, and are used in federal and state courts. When a *Batson* challenge is raised, the striking party must offer a race neutral reason for excluding that juror. If the judge does not believe the race neutral explanation, the judge may deny the use of a peremptory strike.

#### **Past Cases**

*People v. Garcia* 77 Cal.App.4th 1269 (2000) – During a trial in which Cano Garcia was charged with burglary, two lesbians were members of the jury venire. The prosecution exercised peremptory challenges

on both women. The defense counsel made a *Wheeler* motion, stating that the prosecution was excusing the women because of their sexual orientation. The Judge denied the motion, stating that sexual preference was not a cognizable group. The Judge's decision was appealed and the Court of Appeal in Santa Ana, led by Justice William Bedsworth, found that the "exclusion of lesbians and gay men on the basis of group bias violates the California Constitution." Further, the court ruled that gay men and lesbians constitute a cognizable group because they "share the common perspective of having spent their lives in a sexual minority, either exposed to or fearful of persecution and discrimination."

*Johnson v. Campbell* 92 F.3d 951 (1996) – Todd Johnson accused a police officer of using excessive force against him during an arrest. During *voir dire*, the judge questioned two jurors. He then asked both the prosecution and defense if they had any additional questions and allowed peremptory strikes. The defense exercised a peremptory challenge after which the prosecution requested a *Batson* sidebar conference. The prosecutor said that he believed the juror was gay and that sexual orientation was a protected class under *Batson*. Therefore, the prosecution requested that the defense's peremptory strike be disallowed. The court initially denied the objection and the prosecution appealed the decision. The court did not have to decide whether or not sexual orientation was a protected class, and thus assumed that it was. The decision to deny the appeal was based on the fact that the prosecution did not give enough evidence that the peremptory strike had been used for the sole reason that the juror was gay.

*United States v. Osazuwa* – Daniel Osazuwa was charged with assault in California. Federal prosecutors used one of their peremptory challenges to remove a lesbian juror. The government filed a brief stating that sexual orientation was not a cognizable group. A week after the brief was filed, Attorney General Eric Holder and the Department of Justice announced that sexual orientation was a classification invoking heightened scrutiny. In light of that development, the court directed the government to file a supplemental brief "addressing whether it adheres to the position that classifications on the basis of sexual orientation to not warrant heightened scrutiny under the Equal Protection Clause."

### **Effect of Legislation**

If the federal statute were amended to include "sexual orientation" and "gender identity," it would codify the scope of a *Batson* challenge so that these groups are protected. Striking jurors on that basis would be prohibited under federal law for the first time.

