for establishing a prima facie case were that (1) four of the first five peremptory challenges exercised by the prosecution were" [members of the same cognizable class], and (2) a very small minority of jurors on the panel were [members of that class]"].) This is especially true where the prosecutor has passed on a panel containing one or more members of the cognizable class in issue. (**See *People* v. *Adanandus*** (2007) 157 Cal.App.4th 496, 503; ***People* v. *Cornwell*** (2005) 37 Cal.4th 50, 69-70.)

On the other hand, as pointed out in last week's P&A memo, "the unconstitutional exclusion of even a single juror on improper grounds of racial or group bias requires the commencement of jury selection anew[.]" (***People* v. *Reynoso*** (2003) 31 Cal.4th 903, 927, fn. 8.) And, to be sure, the ultimate issue to be addressed on a ***Wheeler-Batson*** motion "is not whether there is a pattern of systematic exclusion; rather, the issue is whether a particular prospective juror has been challenged because of group bias." (***People* v. *Bell*** (2007) 40 Cal.4th 582, 598, fn. 3; ***People* v. *Avila*** (2006) 38 Cal.4th 491, 549.)

Language from the California Supreme Court in ***People* v. *Bell*** (2007) 40 Cal.4th 582, however, provides a basis for explaining these two somewhat inconsistent perspectives. The general rule is that if the defense can show a prosecutor has challenged a single juror for a discriminatory purpose, there has been a ***Batson-Wheeler*** violation. However, if the court is being asked to "draw an inference of discrimination from the fact one party has excused 'most or all' members of the cognizable group," and that is the ***sole basis*** provided for the inference to be drawn, the court is "necessarily relying on an apparent pattern in the party's challenges" (***Bell***, at p. 598, fn. 3.) In ***that*** situation, while it is possible to imagine circumstances "in which a prima facie case could be shown on the basis of a single excusal, in the ordinary case . . . to make a prima face case after the excusal of only one or two members of a group is very difficult." (***Bell***, at p. 598, fn. 3; **accord *Wade* v. *Terhune*** (9th Cir. 2000) 202 F.3d 1190, 1198.) This is because, as a practical matter, "the challenge of one or two jurors can rarely suggest a *pattern* of impermissible exclusion." (***People* v. *Bell*** (2007) 40 Cal.4th 582, 598 [and noting that where there is a very small number of panelists falling into the cognizable class, it is impossible to draw an inference of discrimination from the fact that the prosecutor challenged a large percentage of the panelists falling into the class, i.e., two of a total of three].)

With those principles in mind, the burden on the defense of making out a prima facie case is relatively light. ADA Coleman believes that prosecutors can expect a trial court to find a prima facie case when two panelists of a cognizable class are challenged or even when only a single panelist of a cognizable class has been challenged but there has been no voir dire of that panelist or the panelist is the only member of the cognizable class at issue in the jury venire.

This does not mean, however, the prosecutor should simply concede the issue of whether a prima facie case has been made out. To the contrary, "[w]hen a ***Wheeler*** motion is made, the party opposing the motion should be given an opportunity to respond to the motion, i.e., to argue that no prima facie case has been made." (***People* v. *Fuentes*** (1990) 54 Cal.3d 707, 716, fn. 5.)
Thus, it is appropriate to hold the defense to its burden at this first step, especially in light of the

presumption that a prosecutor exercising a peremptory challenge is doing so on a constitutionally permissible ground. (***People v. Cleveland*** (2004) 32 Cal.4th 704, 732; ***People*** **v.** ***Farnam*** (2002) 28 Cal.4th 107, 134.)

This burden, as identified in ***People*** **v.** ***Wheeler*** (1978) 22 Cal.3d 258 is the following:

"First, as in the case at bar, he should make as complete a record of the circumstances as is feasible. Second, he must establish that the persons excluded are members of a cognizable group within the meaning of the representative cross-section rule. Third, from all the circumstances of the case he must show a [reasonable inference] that such persons are being challenged because of their group association rather than because of any specific bias." (***Wheeler***, at p. 280 [with bracketed modification by P&A to reflect the holding in ***Johnson*** **v.** ***California*** (2005) 545 U.S. 162].)

Per ***Wheeler***, certain types of evidence are relevant to this showing:

(i) the prosecutor "has struck most or all of the members of the identified group from the venire" (***Wheeler***, at p. 280; ***People*** **v.** ***Bell*** (2007) 40 Cal.4th 582, 597);

(ii) the prosecutor "has used a disproportionate number of his peremptories against the group" (***Wheeler***, at p. 280; ***People*** **v.** ***Bell*** (2007) 40 Cal.4th 582, 597-598 [and noting that a "more complete analysis of disproportionality compares the proportion of a party's peremptory challenges used against a group to the group's proportion in the pool of jurors subject to peremptory challenge" while noting that a small absolute sample size can render such an analysis uninformative];

(iii) "the jurors in question share only this one characteristic - their membership in the group - and that in all other respects they are as heterogeneous as the community as a whole" (***Wheeler***, at p. 280; ***People*** **v.** ***Bell*** (2007) 40 Cal.4th 582, 597 **see also** ***People*** **v.** ***Yeoman*** (2003) 31 Cal.4th 93, 115 [finding no prima facie showing because, inter alia, defense counsel made no effort to discuss prospective juror's individual characteristics]);

(iv) the prosecutor failed "to engage these same jurors in more than desultory voir dire, or indeed to ask them any questions at all" (***Wheeler***, at p. 281; ***People*** **v.** ***Bell*** (2007) 40 Cal.4th 582, 597 **see also** ***People*** **v.** ***Yeoman*** (2003) 31 Cal.4th 93, 115 [finding no prima facie showing because, inter alia, defense counsel made no effort to discuss nature of prosecutors' voir dire or juror's answers]); and

(v) the defendant is a member of the excluded group and "especially if in addition his alleged victim is a member of the group to which the majority of the remaining jurors belong" - although the court made it clear this is just a relevant factor and not a prerequisite to making the showing. (***Wheeler***, at p. 281; ***People*** **v.** ***Bell*** (2007) 40 Cal.4th 582, 597 [and, indicating at p. 599, that the fact the victim is in the same cognizable class as the

challenged juror tends to rebut an inference of discrimination].)

Other circumstances that should be placed on the record:

(i) the number of members of the identified group in the jury box and panel (**see *Miller-El* v. *Dretke*** (2005) 545 U.S. 231, 240-241 [court may consider the total number of members of a protected class who are in the jury panel in comparison to the number of members of the class who actually sit on the jury; a large disparity supports a finding of discriminatory use];

(ii) whether the challenged juror shares characteristics of one or more unchallenged panelists belonging to groups other than the cognizable group at issue (**see *Miller-El* v. *Dretke*** (2005) 545 U.S. 231, 244 and next week's 11/17/08 P&A memo discussing comparative analysis);

(iii) whether there has been disparate questioning of jurors, i.e., whether panelists belonging to the cognizable group were questioned in a different manner than panelists not belonging to the cognizable group (**see *Miller-El* v. *Dretke*** (2005) 545 U.S. 231, 255-257)

(iv) any evidence of the historical practice of the prosecutor or the prosecutor's office of discriminatory jury selection practice (***Miller-El* v. *Dretke*** (2005) 545 U.S. 231, 253, 264-266)

2. What should a prosecutor do if it is not clear that the challenged juror is actually a member of the cognizable class to which the defense claims the juror belongs?

Courts have long recognized the dilemma of trying to figure out whether a juror fits into a particular cognizable class. As pointed out in ***Wheeler*** itself, this dilemma arises because "veniremen are not required to announce their race, religion, or ethnic origin when they enter the box, and these matters are not ordinarily explored on voir dire. The reason, of course, is that the courts of California are or should be blind to all such distinctions among our citizens." (**Id.** at p. 263; **accord *People* v. *Trevino*** (1985) 39 Cal.3d 667, 687; ***People* v. *Motton*** (1985) 39 Cal.3d 596, 603.) Asking jurors to identify their race or ethnicity can be awkward or offensive. (**See *People* v. *Trevino*** (1985) 39 Cal.3d 667, 687 [noting counsel's decision to make the ***Wheeler*** motion on the basis of easily identifiable surnames, rather than risk juror animosity in quizzing selected individuals as to whether or not they are Mexican-American, was proper]; ***People* v. *Motton*** (1985) 39 Cal.3d 596, 603 [noting while "direct questions on racial identity would help to make a clear and undisputable record" such questions are not required because, inter alia," such questions may be offensive to some jurors and thus are not ordinarily asked on voir dire"].)

This dilemma arises not just in assessing whether the challenged juror belongs to a particular class but in assessing the cognizable class of **all** the other panelists and jurors. The latter assessment is

necessary, of course, in order to effectively utilize the mechanisms for determining whether discriminatory challenges are being made, i.e., disparate questioning analysis, comparative analysis, disproportionality analysis, etc.

Moreover, the dilemma of trying to figure out whether a juror fits into a particular cognizable class is only going to become more frequent as the various ethnic and racial groups that populate California intermarry. Indeed, it is questionable whether the current framework for analyzing ***Batson-Wheeler*** challenges can even rationally be applied when it comes to multiracial or multiethnic jurors.

Nevertheless, if the prosecutor has doubts about whether the challenged juror or other members of the panel belong to the cognizable class identified by the defense, the issue should be raised. The burden is clearly on the party making the ***Batson-Wheeler*** motion to establish the juror is a member of cognizable class at issue. (***Wheeler***, at p. 280.) And if the class membership of the other members of the venire is going to be relied on by the party making the motion to support a claim the other party is using challenges in a discriminatory fashion, the burden would remain on the party making to the motion to establish that class membership. (**See *People* v. *Bell*** (2007) 40 Cal.4th 582, 600.) Conversely, if the party who initially challenged the juror wants to rely on the class membership of the other members of the venire to defeat a ***Batson-Wheeler*** claim, then it would be incumbent on that party to establish the class membership of the jurors in the venire or on the eventual jury.

Sometimes, this burden can be met because, notwithstanding the implication in ***Wheeler*** that such questions might be inappropriate, the juror questionnaires ask individuals to identify their racial, ethnic, or religious background. Moreover, sometimes is unnecessary, at least in the context of alleged racial discrimination, to "establish the true racial identity of the challenged jurors" since discrimination is more often based on appearances than verified racial descent, and a showing that the party challenging the jurors was systematically excusing persons based on "appearances" could still establish a prima facie case. (***People* v. *Bell*** (2007) 40 Cal.4th 582, 599; ***People* v. *Motton*** (1985) 39 Cal.3d 596, 604.)

However, membership in some cognizable classes is difficult to ascertain. For example, in ***People* v. *Bell*** (2007) 40 Cal.4th 582, a case where the defense attempted to claim the prosecution was discriminating against lesbians, the court pointed out that "sexual orientation is usually not so easily discerned from appearance. Without any definite indication that the challenged prospective jurors either were lesbians or that the prosecutor believed them to be such, no prima facie case of discrimination against lesbians as a group can be made." (**Id.** at p. 599.) Similarly, in ***In re Freeman*** (2006) 38 Cal.4th 630, a case where the defense tried to claim the prosecution was discriminating against Jews, the ***Batson-Wheeler*** claim failed because there was an insufficient showing that challenged prospective jurors either were Jewish or were thought to be so by the prosecutor. (**Id.** at pp. 644-645.)
Unfortunately, the courts do not provide much guidance in how to ascertain membership in a cognizable class short of directly asking the juror. (**See *People* v. *Wheeler*** (1978) 22 Cal.3d 258,

263.) If such a question needs to be asked, it may be better to have the court make the inquiry.

3. Should the prosecutor make sure that the record includes facts that would undermine an inference of discrimination?

A prosecutor should point out the **absence** of evidence permitting an inference of discrimination if the trial court fails to note such an absence for the record.

a. Defendant Not a Member of the Cognizable Class

If the defendant is not a member of the cognizable class at issue, this fact should be reflected in the record. (**See *People* v. *Bell*** (2007) 40 Cal.4th 582, 599 [considering fact defendant was ***not*** a member of any of the cognizable classes at issue in finding the prosecutor's challenges created no inference of discrimination].

If the defense is claiming that the prosecutor has excluded members of a sub-group of a cognizable class (i.e., African-American women) but the prosecutor has not excluded members of the parallel sub-group (i.e., African-American men), this fact should be pointed out. (**See *People* v. *Bell*** (2007) 40 Cal.4th 582, 599 [considering fact prosecutor did not exercise peremptory challenges against most or all members of "parallel" group (African-American men) of the cognizable class at issue (African-American women) in finding the prosecutor's challenges created no inference of discrimination].)

b. Victim is a Member of the Cognizable Class

If the victim was a member of cognizable class at issue, this fact should be reflected in the record. (**See *People* v. *Bell*** (2007) 40 Cal.4th 582, 599 [considering fact victim was a member of the cognizable class at issue in finding the prosecutor's challenges created no inference of discrimination].)

c. Challenges Have Not Be Made in a Disproportionate Manner

The fact that a prosecutor has **not** used a disproportionate number of his or her challenges against members of the cognizable class is a factor that weighs against finding an inference of discrimination. (**See *People* v. *Bell*** (2007) 40 Cal.4th 582, 598 [considering fact prosecutor used only two of 16 peremptory challenges against members of the cognizable class at issue in finding the prosecutor's challenges created no inference of discrimination].)

d. No Desultory Questioning

The fact a prosecutor has not engaged in "desultory questioning" of members of the cognizable

class at issue is a factor that weighs against finding an inference of discrimination. (**See *People* v. *Bell*** (2007) 40 Cal.4th 582, 598 [considering fact prosecutor did not engage members of the cognizable class at issue in "desultory" questioning in finding no inference of discrimination].)

e. The Challenged Jurors Shared Not Only Membership in the Cognizable Class But Other Characteristics

A prosecutor should point out that the jurors who were removed shared more in common (when it came to characteristics relevant to the prosecutor's concerns about their "favorability" as jurors) than just membership in the cognizable class. (**See *People* v. *Bell*** (2007) 40 Cal.4th 582, 599 [considering fact that defense failed to show that in respects other than their ethnic background or national origin the challenged members of the cognizable class were especially heterogeneous in finding no inference of discrimination].)

f. The Prosecution Has Passed on a Panel That Includes Members of the Cognizable Class

If a prosecutor has passed on a panel that includes members of the cognizable class, this fact should be mentioned as it undercuts an inference of discrimination. (**See *People* v. *Carasi*** (2008) 44 Cal.4th 1263, 1294-1295 [no prima facie case of discrimination against females shown because, inter alia, the prosecutor repeatedly passed on panels containing numerous women].)

4. Should the prosecutor state his or her reasons for challenging a juror if the trial court finds the defense has failed to make a prima facie showing?

Unless the court finds there has been a prima facie case made out at the first step, there is no obligation for the prosecutor to disclose any reasons for challenging the panelists, and a trial court is not required to evaluate them. (***People* v. *Carasi*** (2008) 44 Cal.4th 1263, 1292; ***People* v. *Zambrano*** (2007) 41 Cal.4th 1082, 1104-1105 & fn. 3; ***People* v. *Bell*** (2007) 40 Cal.4th 582, 596.)

It is, however, not only permissible, but recommended for a prosecutor to put neutral reasons on the record *even before* the trial judge makes its determination that a prima facie case has not been made out by the defense. (***People* v. *Bonilla*** (2007) 41 Cal.4th 313, 343, fn. 13; ***People* v. *Adanandus*** (2007) 157 Cal.App.4th 496, 500.)

Indeed, even if a court makes a determination that no prima facie case has been made, it is still important for the prosecutor to put reasons on the record. (**See e.g., *People* v. *Farnam*** (2002) 28 Cal.4th 107, 135.) This is because it is possible that reviewing courts will find that the court erred in concluding no prima facie case was met (especially since the United States Supreme Court recently found that the standard California courts were using the wrong standard for prima face case -**see *Johnson* v. *California*** (2005) 545 U.S. 162), and the failure to put any reasons on the record ensures that the case will have to be sent back for a remand. On the other hand, if reasons were placed on the record, the appellate court may be able to consider them in finding the failure to find a prima facie showing was harmless error.

Moreover, putting the reasons on the records avoids the problem of having to remember what the reasons were for excusing a juror years later. (**See *Paulino* v. *Harrison*** (9th Cir. 2008) 542 F.3d 692, 700; ***Yee* v. *Duncan*** (9th Cir. 2006) 441 F.3d 851.)

B. Step Two: Stating the Grounds for the Challenges

1. Should the prosecutor ask to proffer his or her reasons for excluding a juror outside the presence of the defendant and defense counsel?

Prosecutors often are concerned that in responding to a ***Batson-Wheeler*** challenge, they will be forced to reveal jury-picking and/or trial strategies. Thus, there is an instinctual desire to want to explain the choices in an ex parte in camera proceeding.

In general, however, it is error for a trial court to allow a prosecutor to explain his or her reasons for excluding a particular juror outside the presence of defense counsel and defendant. (**See *People* v. *Ayala*** (2000) 24 Cal.4th 243, 259-269 [prosecutor's multiple ex parte hearings for justifications were error, albeit harmless] and dis. opn, J. George [hearings were prejudicial error]; ***United States* v. *Thompson*** (9th Cir. 1987) 827 F.2d 1254, 1260 [reversible error to hold ex parte hearing on prosecutor's explanations].)

The Ninth Circuit does recognize a limited exception to this rule in "those instances in which disclosing the reasons for excluding jurors would reveal the prosecutor's case strategy[.]" (***United States* v. *Alcantar*** (9th Cir. 1990) 897 F.2d 436, 438, fn. 2; ***United States* v. *Thompson*** (9th Cir. 1987) 827 F.2d 1254, 1259.)

And the California Supreme Court appears to recognize this very limited exception as well. In ***People* v. *Ayala*** (2000) 24 Cal.4th 243, for example, the court cited to ***Georgia* v. *McCollum*** (1992) 505 U.S. 42, 58 for the proposition that "[i]n the rare case in which the explanation for a challenge would entail confidential communications or reveal trial strategy, an in camera discussion can be arranged." (***Ayala*** at p. 262.) The ***Ayala*** court held, however, that the exception did not apply when all that was revealed, as in the case before it, were jury selection strategies. (**Ibid.**)

2. State <u>all</u> grounds for the challenge

While peremptory challenges are often based on instinct and it can sometimes be hard to articulate the reason for removing a juror, "a prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives." (***People* v. *Lenix*** (2008) 44 Cal.4th 602, 624.)

Prosecutors should "provide as complete an explanation for their peremptory challenges as possible." (***People* v. *Lenix*** (2008) 44 Cal.4th 602, 624.)

The fact a trial or reviewing court can think up reasons for why the prosecutor may have wanted to challenge a juror, "will not satisfy the prosecutors' burden of stating a racially neutral explanation." (***People*** **v.** ***Lenix*** (2008) 44 Cal.4th 602, 625.)

3. Should a prosecutor asked the trial court to confirm the prosecutor's observations regarding a juror's demeanor?

Although it may be awkward, if a prosecutor is basing a challenge to a juror on the basis of the juror's demeanor, it is important to ask whether the judge made the same observations as the prosecutor. As pointed out in Justice Moreno's concurring opinion in ***People*** **v.** ***Lenix*** (2008) 44 Cal.4th 602, "[w]hen a trial judge validates a prosecutor's challenge based on the prospective juror's demeanor, and makes clear that such demeanor is the primary reason for validating the challenge, then it is difficult to imagine any circumstance under which an appellate court would second-guess that judgment." (***Lenix***, at p. 634, conc. opn., J. Moreno.) Conversely, if the trial judge is not asked to validate the observation, an appellate court will not presume that the trial judge credited the prosecutor's explanation. (**See** ***Snyder*** **v.** ***Louisiana*** (2008) 128 S.Ct. 1203, 1209; ***People*** **v.** ***Lenix*** (2008) 44 Cal.4th 602, 619; **cf.**, ***People*** **v.** ***Adanandus*** (2007) 157 Cal.App.4th 496, 510 [where neither trial court nor defense counsel contradicted prosecutor's account of challenged jurors' demeanor or manner of responding to his questions, this suggests the prosecutor's description is accurate].)

4. Should the prosecutor place on the record why he or she kept jurors who were, at least, superficially similarly situated to the challenged panelist?

If the defense has relied on a comparative analysis in attempting to establish a prima facie case, it will be necessary to explain why a juror who the defense is claiming is similarly situated is not similarly situated.

If the defense has not relied on comparative analysis but there is a concern that the judge may do so, it may be wise to anticipate this analysis and short circuit it by explaining the reasons why jurors who might appear to be similarly situated are not, in fact, similarly situated.

Conversely, a prosecutor may wish to point out the fact that other panelists, *regardless of* whether or not they were members of the cognizable class at issue, were *also* challenged on the same ground or grounds as the panelist whom the defense is claiming was improperly excused. (**See** ***People*** **v.** ***Watson*** (2008) 43 Cal.4th 652, 680 [noting prosecutor challenged both jurors who were similarly situated regarding their exposure to gangs].)

5. Should the prosecutor point out that the victims or prosecution witnesses are members of the cognizable class the defense is claiming is being discriminated against?

In *People* v. *Bell* (2007) 40 Cal.4th 582, the court held the fact the victims in a criminal case are members of the same cognizable class as the challenged juror can help show that defendant did not meet his burden of raising an inference of discrimination. However, the court also said it discussed this circumstance not because it affirmatively showed the absence of discrimination but only as an indication of why defendant did not make a prima facie showing at step on. (**Id.** at p. 600.)

Nevertheless, there is no harm in pointing out the fact the victims or witnesses are of the same cognizable class as the challenged juror as it provides some evidence that would tend to substantiate a lack of motive on the part of the prosecutor to exclude members of the cognizable class at issue.

6. Should the prosecutor point out the defendant is not a member of the cognizable class the defense is claiming is being discriminated against?

Although a defendant may properly bring a *Batson-Wheeler* motion based on a prosecutor's removal of members of a cognizable class to which the defendant does not belong, the fact the defendant is not a member of the cognizable class at issue "remains a subject of proper consideration by the court." (*People* v. *Farnam* (2002) 28 Cal.4th 107, 135.)

7. Should the prosecutor point out he or she is a member of the cognizable class the defense is claiming is being discriminated against?

The fact a prosecutor is a member of the same cognizable class as the challenged juror does not insulate a prosecutor from being found to have exercised his or her challenges in a discriminatory fashion. Although as a practical matter, a defense attorney is less likely to use a *Batson-Wheeler* challenge in an attempt to surreptitiously prejudice the jury against the prosecutor when the juror being challenged and the prosecutor are of the same cognizable class, P&A has found no case indicating that the fact the prosecutor is of the same or different cognizable class as the challenged juror is relevant. All prosecutors (regardless of the cognizable class to which they belong) are entitled to the presumption that they are exercising their challenges in a constitutional manner.

8. Should the prosecutor point out that he or she passed on the panel while it contained members of the cognizable class at issue?

If a prosecutor has passed on a panel that includes members of the cognizable class at issue, this should be pointed out. (**See** *People* v. *Carasi* (2008) 44 Cal.4th 1263, 1294-1295.). The fact a prosecutor has passed on a juror who is a member of the cognizable class in issue, while not conclusive on the issue of good faith, is "an indication of good faith in exercising peremptories, and an appropriate factor for the trial judge to consider in ruling on a *Wheeler* objection"].) (*People* v. *Turner* (1994) 8 Cal.4th 13, 168; *People* v. *Adanandus* (2007) 157 Cal.App.4th 496, 511; *People* v. *Irvin* (1996) 46 Cal.App.4th 1340, 1355.)

If a prosecutor has passed on a panel that includes members of a different sub-group of the same cognizable class, this should be pointed out as well. For example, in ***People* v. *Bell*** (2007) 40 Cal.4th 582, the court noted that the fact the prosecutor did not exercise peremptory challenges against African-American males tended to undermine a prima facie showing that the prosecutor was exercising challenges against African-American females with a discriminatory purpose. (**Id.** at p. 599.)

9. What other factors should prosecutors consider putting before the court?

a. Prior Nondiscriminatory History: If the prosecutor has a prior history of accepting jurors belonging to the cognizable class at issue, this should be brought to the attention of the court.

b. Prior Office Training: If the prosecutor has evidence that his office has condemned use of discriminatory challenges, this should be brought to the attention of the court. (**Cf.**, ***Miller-El* v. *Dretke*** (2005) 545 U.S. 231, 253, 264-266 [considering existence of office training *approving* use of discriminatory challenges].)

C. Step Three: Responding to the Judge's Concerns

1. Respond to any issues raised by the judge

If the defense has not supported a ***Batson-Wheeler*** claim with one or more of the relevant factors but the judge asks about the factors, the prosecutor should address those concerns.

2. Make sure the record reflects the necessary findings by the trial judge

The prosecutor should make sure the following is discernable from the record:

"1) the trial court considered the prosecutor's reasons for the peremptory challenges at issue and found them to be race-neutral; 2) those reasons were consistent with the court's 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." (***People* v. *Lenix*** (2008) 44 Cal.4th 602, 621.)

3. Should a prosecutor ask the trial judge to take note of the final composition of the jury?

As pointed out in ***People* v. *Lenix*** (2008) 44 Cal.4th 602, "[w]hen a ***Wheeler/Batson*** motion has been made, it is helpful for the record to reflect the ultimate composition of the jury." (**Id.** at p. 610., fn. 6.)

If the prosecutor passed on a final jury panel that includes a member of the cognizable class allegedly being improperly excluded, this "strongly suggests" that the prosecutor was not motivated in exercising challenges by the panelist's membership in the class. (***People*** **v.** ***Lenix*** (2008) 44 Cal.4th 602, 629; ***People*** **v.** ***Kelly*** (2007) 42 Cal.4th 763, 780; ***People*** **v.** ***Cornwell*** (2005) 37 Cal.4th 50, 69-70; ***People*** **v.** ***Reynoso*** (2003) 31 Cal.4th 903, 926; **but see** ***People*** **v.** ***Snow*** (1987) 44 Cal.3d 216, 226 ["although the passing of certain jurors may be an indication of the prosecutor's good faith in exercising his peremptories, and may be an appropriate factor for the trial judge to consider in ruling on a Wheeler objection, it is not a conclusive factor"]; ***Brinson*** **v.** ***Vaughn*** (3d Cir.2005) 398 F.3d 225, 233 ["a prosecutor may violate ***Batson*** even if the prosecutor passes up the opportunity to strike some African American jurors" and "a prosecutor's decision to refrain from discriminating against some African American jurors does not cure discrimination against others"].)

NEXT WEEK: THE FINAL PART OF OUR SERIES ON RESPONDING TO *BATSON-WHEELER* CHALLENGES WHEREIN ADA JERRY COLEMAN FOCUSES ON RECENT DEVELOPMENTS IN THE SUBSTANTIVE CASE LAW SURROUNDING SUCH CHALLENGES.

Suggestions for future shows, ideas on how to improve P&A, and other comments or criticisms should be directed to Jeff Rubin at (510) 272-6232. Technical questions should be addressed to Art Garrett at (510) 272-6327. Participatory students: MCLE Evaluation sheets are available on location and certificates of attendance are constructively maintained in your possession in the Ala. Co. Dist.Atty computer banks.

Week Of	Topic	Guest	Elim. of Bias
Nov. 17 2008	RESPONDING TO *BATSON-WHEELER* CHALLENGES (PART III OF III: AN OVERVIEW THE RULES IN LIGHT OF RECENT CASE LAW DEVELOPMENTS: 2005-2008	Jerry Coleman San Francisco Asst District Atty	30 min

Significant Developments in Batson-Wheeler Case Law: 2005-2008

The flow of this P&A memo *roughly* follows the order of topic discussion in the CDAA Prosecutor's Notebook Vol. XXXIII "Mr. Wheeler Goes to Washington (The Full Federalization of Jury Challenge Practice in California) written by San Francisco County Assistant District Attorney Jerry P. Coleman. The P&A memo also reflects the incipient development of a P&A outline. Pagination picks up where the 11/10/08 P&A memo left off.

I. The Basics

A. Who Can Make a *Batson-Wheeler* Motion?

A *Batson-Wheeler* objection may be raised by the defense or the prosecution. (***People*** **v.** ***Wheeler*** (1978) 22 Cal.3d 258, 280, 283, fn. 29; ***People*** **v.** ***Williams*** (1994) 26 Cal.App.4th Supp. 1, 9; *Georgia* v. *McCollum* (1992) 505 U.S. 42.)

The defendant need not be a member of the cognizable class the defendant is claiming has been discriminated against in order "to complain of a violation of the representative cross-section rule." (***People*** **v.** ***Wheeler*** (1978) 22 Cal.3d 258, 281; **see also** ***Powers*** **v.** ***Ohio*** (1991) 499 U.S. 400.)

B. What Groups are Cognizable Classes for Purposes of *Batson-Wheeler* Challenges?

1. In General

When a party claims a panelist has been struck based on the panelist's membership in a particular group, the key initial issue is whether the group identified is a cognizable class, i.e., does the group represent "an identifiable group distinguished on racial, religious, ethnic, or similar grounds[.]" (***People*** **v.** ***Wheeler*** (1978) 22 Cal.3d 258, 276.)

2. Sub-Groups Can Be Cognizable Classes

A cognizable class may contain sub-groups that might qualify as a cognizable class. (**See *People* v. *Bell*** (2007) 40 Cal.4th 582, 597-598 [African-American women constitute a cognizable class]; ***People* v. *Motton*** (1985) 39 Cal.3d 596, 605-606 [same]; ***People* v. *Gonzalez*** (2008) 165 Cal.App.4th 620, 631 [indicating Spanish-speaking/unassimilated Hispanics may constitute a cognizable class].)

3. What "Racial" or "Ethnic" Groups Have Been Identified as Cognizable Classes?

a. Asian-Americans

Asian-Americans have been identified as a cognizable class. (**See *Frazier* v. *New York*** (S.D.N.Y. 2002) 187 F.Supp.2d 102, 114-116; ***Rieber* v. *State*** (1994) 663 So.2d 985, 991.) **But see *People* v. *Johnson*** (1989) 47 Cal.3d 1194, where the court proceeded to analyze a defense claim the prosecution improperly excluded "Asian" jurors as if Asians were a cognizable class but nonetheless observed in a footnote that is at least questionable whether "the generic description Asian" could constitute a "cognizable group." (**Id.** at p. 1217 and fn. 3.)

b. African-Americans

African-Americans have been identified as a cognizable class. (**See e.g., *People* v. *Wheeler*** (1978) 22 Cal.3d 258.)

c. Chinese-Americans

In ***People* v. *Lopez*** (1991) 3 Cal.App.4th Supp. 11, the court treated two Chinese-Americans as belonging to a cognizable group. It is not clear whether the court distinguished between Chinese-Americans and Asian-Americans. (**Id.** at pp. 14-18.)

d. Filipino-Americans

Filipino-Americans may be a separate cognizable class that is distinct from Asian-Americans. (**See *People* v. *Bell*** (2007) 40 Cal.4th 582, 599 [assuming, but not deciding, whether Filipino-Americans are a distinct group from Asian-Americans]; **cf., *United States* v. *Canoy*** (7th Cir. 1994) 38 F.3d 893, 897 [characterizing Filipino-American as belonging to group of persons of "Asian descent"])

e. Hispanic-Americans

Hispanics have been identified as a cognizable class. (**See e.g. *People* v. *Perez*** (1996) 48 Cal.App.4th 1310, 1315.)

(i) **Can a Spanish-surname suffice to identify a juror as a Hispanic for *Batson-Wheeler* purposes?**

In ***People* v. *Gutierrez*** (2002) 28 Cal.4th 1083, the court held that "Spanish surnamed" jurors can essentially be deemed a surrogate stand-in for the cognizable class of Hispanics. However, this principle only applies "where no one knows at the time of the challenge whether the Spanish-surnamed juror is Hispanic." (**Id.** at p. 1123.) If a juror is not of Hispanic origin, but only acquires her Hispanic surname through marriage, and indicates on her juror questionnaire and in court that she is not Hispanic, the juror is not Hispanic for ***Batson-Wheeler*** purposes. (at p. 1123.)

In ***People* v. *Cruz*** (2008) 44 Cal.4th 636, the California Supreme Court declined to address whether the defense had made a prima facie showing of use of discriminatory challenges against Hispanics based on the prosecution's bumping of a juror with a Spanish surname because the juror identified as "white" and only had obtained a Hispanic surname through marriage. (**Id.** at pp. 656-657.)

The ***Cruz*** court acknowledged that that "Spanish surnamed" sufficiently describes a cognizable class "Hispanic" under ***Wheeler***. However, the court stated that is only true "where no one knows at the time of the challenge whether the Spanish-surnamed prospective juror is Hispanic." (**Cruz**, at pp 656-657.) Since, in ***Cruz***, the record reflected the challenged juror was "white" and not of Hispanic origin, it was not proper to even address whether the juror was bumped because she was Hispanic. (***Ibid.***)

(ii) **Are Spanish-speaking Hispanics a separately-recognized cognizable class sub-group?**

In ***People* v. *Gonzalez*** (2008) 165 Cal.App.4th 620, the prosecutor used his first four challenges to excuse Hispanic jurors, one of whom was identified as JC and the other as FR.* The prosecutor did not ask any question of JC, and no answers on the jury questionnaire stood out. When the prosecutor asked the panel if anyone who spoke Spanish would be able to accept the interpreter's translation, JC did not raise his hand. After a ***Batson-Wheeler*** challenge was brought, the prosecutor stated he excluded JC based on his youth, his lack of significant family ties, and the fact JC was Spanish-speaking, which, the prosecutor said might be a problem when listening to witnesses who were testifying through a Spanish-interpreter. The defense argued that "Spanish-speaking" (as opposed to Hispanic) jurors were a cognizable class and the prosecutor was improperly excluding them. (**Id.** at pp. 624-625.) ***Editor's note**: The court found it unnecessary to discuss the challenge to FR.

The ***Gonzalez*** court recognized that ***Hernandez* v. *New York*** (1991) 500 U.S. 352 held that the fact a bilingual juror might have difficulty in accepting the translator's rendition was a neutral reason for excluding a juror. (***Gonzalez***, at pp. 628-629 [and noting that this ground was held to be a valid reason for removing two jurors who expressed hesitancy in their ability to follow the interpreter's translation in ***People* v. *Cardenas*** (2007) 155 Cal.App.4th 1468].)
However, the ***Gonzalez*** court held that the prosecutor was not actually concerned with the ability

of the jurors to follow the rule about ignoring their own interpretation of what a Spanish speaker would say. Rather, the court concluded that the prosecutor had simply provided this reason (as well as the other reasons) to conceal an intent to essentially exclude unassimilated Hispanics (i.e., "those persons who may be perceived as more closely identifying with their national origin and or their Hispanic ethnicity"). (**Id.** at p. 631.) The court disregarded the fact there remained other Hispanics on the panel whom the court assumed were non-Spanish speakers "given the prosecutor's systematic elimination of all Hispanic Spanish speakers. (**Ibid.**)

The ***Gonzalez*** court came to this conclusion because only two panelists raised any question about the requirement of having to adopt the official translation of the testimony. One of them, who the prosecutor never challenged, was a Spanish-speaker but did not have a Hispanic surname (albeit she may have been Hispanic). The other *was* Hispanic and *was* challenged but the prosecutor did not justify his peremptory challenge on the ground the juror would have difficulty adopting the official translation. (**Id.** at p. 630.) Moreover, the court found the other grounds asserted by the prosecutor for excluding JC (i.e., his youth and lack of mature family ties) were pretextual. (**Id.** at pp .631-632.)

f. Native-Americans

Native-Americans have been identified as a cognizable class. (**See** ***Kesser*** **v.** ***Cambra*** (9th Cir. 2006) 465 F.3d 351, 357-358, 360.)

4. What "Religious" Groups Have Been Identified as Cognizable Classes?

The California Supreme Court has held that "religious membership constitutes an identifiable group under ***Wheeler***." (***People*** **v.** ***Richardson*** (2008) 43 Cal.4th 959, 984; ***In re Freeman*** (2006) 38 Cal.4th 630, 643.) "Such a practice [religious-based excusals] also violates the defendant's right to equal protection under the Fourteenth Amendment to the United States Constitution." (***People*** **v.** ***Richardson*** (2008) 43 Cal.4th 959, 984.) The United States Supreme Court has not yet applied ***Batson*** to forbid group exclusion based on religion, although a number of state and federal courts have done so. (***In re Freeman*** (2006) 38 Cal.4th 630, 643.)

Generally, courts have recognized that while excluding a juror on the basis of belonging to a particular religious group would be impermissible, it is proper to exclude jurors whose religious beliefs would interfere with the duties of a juror. (**See** ***People*** **v.** ***Martin*** (1998) 64 Cal.App.4th 378, 384-385 [challenge of juror who was Jehovah's Witness was upheld based on juror's answer regarding religious principles making it difficult to judge others]; ***People*** **v.** ***Richardson*** (2008) 43 Cal.4th 959, 985 [excusing prospective jurors who have a religious bent or bias that would make it difficult for them to impose the death penalty is a proper, nondiscriminatory ground for a peremptory challenge] ***People*** **v.** ***Watson*** (2008) 43 Cal.4th 652, 679 [same]; ***People*** **v.** ***Cash*** (2002) 28 Cal.4th 703, 725 [same]; **accord** ***People*** **v.** ***Catlin*** (2001) 26 Cal.4th 81, 118-119; ***People*** **v.** ***Ervin*** (2000) 22 Cal.4th 48, 76.)

a. Jewish

In *People* v. *Johnson* (1989) 47 Cal.3d 1194, the court proceeded to analyze a defense claim the prosecution improperly excluded Jewish jurors as if Jews were a cognizable class, albeit observing in a footnote that is at least questionable whether a religious group can constitute a "cognizable group." (**Id.** at p. 1217 and fn. 3.)

5. Are Persons Sharing a Sexual Orientation a Cognizable Class?

In *People* v. *Garcia* (2000) 77 Cal.App.4th 1269, the court held that "gays and lesbians" are a cognizable class. (**Id.** at p. 1281.) The court lumped both gays and lesbians together into a single cognizable class without specifically stating whether each might be its own cognizable class. (**See also** Code of Civil Procedure section 231.5 [forbidding peremptory challenges based on sexual orientation].)

6. Are Males or Females a Cognizable Class?

In *J.E.B.* v. *Alabama ex rel. T. B.* (1994) 511 U.S. 127, the court held that equal protection prohibited the exclusion of women from juries on the basis of their gender. (**Id.** at p. 129; **see also** *People* v. *Bonilla* (2007) 41 Cal.4th 313, 343 [treating women as a cognizable class].)

II. What Will or Will Not Be Considered Adequate Justification for Exercising a Peremptory Challenge Against a Juror

A. In General

1. An Attorney Does Not Violate Equal Protection So Long as He or She Has a Genuine Non-Discriminatory Reason for Challenging a Juror - Even if the Reason "Makes No Sense."

In *People* v. *Cruz* (2008) 44 Cal.4th 636, the California Supreme Court reiterated some principles it had espoused in *People* v. *Guerra* (2006) 37 Cal.4th 1067, 1100 and *People* v. *Reynoso* (2003) 31 Cal.4th 903, 919 regarding what constitutes legitimate grounds for a prosecutor to peremptorily challenge a juror: "'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.' [Citation omitted by P&A].) A reason that makes no sense is nonetheless 'sincere and legitimate' as long as it does not deny equal protection." (*Cruz* at p. 655.)

B. Categories of Reasons for Valid Peremptory Challenges

1. Negative Experiences Jurors or Relatives of Jurors Have Had With Law

Enforcement or Hostile Attitude Toward Law Enforcement

There are many cases holding that prior negative contacts or experiences between a juror or a close relative of the juror and law enforcement or the criminal justice system is a neutral reason for a prosecutor to challenge a juror. This can include the juror or the juror's close relative being arrested, prosecuted, and/or convicted of a crime. (**See *People* v. *Cruz*** (2008) 44 Cal.4th 636, 656, fn. 3 [juror's son]; ***People* v. *Watson*** (2008) 43 Cal.4th 652, 677 [same]; ***People* v. *Davis*** (2008) 164 Cal.App.4th 305, 313 [same]; ***People* v. *Avila*** (2006) 38 Cal.4th 491, 554-555 [juror's brother]; ***People* v. *Adanandus*** (2007) 157 Cal.App.4th 496, 504, 509 [juror's brother; juror's son]; ***People* v. *Farnam*** (2002) 28 Cal.4th 107, 138 [juror's nephew]; ***People* v. *Morris*** (2003) 107 Cal.App.4th 402, 409 [same]; ***People* v. *Watson*** (2008) 43 Cal.4th 652, 678 [juror's ex-husband]; ***People* v. *Salcido*** (2008) 44 Cal.4th 93, 140 [juror's boyfriend]; **see also *People* v. *Watson*** (2008) 43 Cal.4th 652, 675 [juror was witness to fatal shooting but was never contacted by police who she felt did not take crime seriously].) "Prosecutors are understandably concerned about retaining such persons on criminal juries." (***People* v. *Calvin*** (2008) 159 Cal.App.4th 1377, 1386.) This reasons remains a neutral ground notwithstanding the juror's assurances that the prior experiences would not impact the juror. (***People* v. *Avila*** (2006) 38 Cal.4th 491, 554-555; ***People* v. *Farnam*** (2002) 28 Cal.4th 107, 138; ***People* v. *Adanandus*** (2007) 157 Cal.App.4th 496, 505.)

2. Juror Holds Belief That the Justice System is Unfair or Expressions of Hostility Toward the Criminal Justice System

a. <u>Belief criminal justice system in general is not fair</u>

"[S]kepticism about the fairness of the criminal justice system is a valid ground for excusing jurors." (***People* v. *Calvin*** (2008) 159 Cal.App.4th 1377, 1386.) In ***People* v. *Cruz*** (2008) 44 Cal.4th 636, the California Supreme Court described the following as two of the "ample nondiscriminatory bases on which to peremptorily excuse" a juror: the juror's feeling that sometimes that system is not fair; the juror's sense that the police were from time to time opinionated about situations and were not willing to consider other possibilities and listen to explanations. (**Id.** at p. 656, fn. 3.)

b. <u>Belief criminal justice system is not fair to certain groups</u>

Sometimes a juror will express a belief that the justice system treats a particular cognizable class unfairly. The belief that the system is biased against members of a certain cognizable class, especially when the defendant is a member of that same class and the juror indicates this belief might bias him or her, constitutes a legitimate reason for challenging that juror. (**See *People* v. *Calvin*** (2008) 159 Cal.App.4th 1377, 1381 [fact juror indicated that the criminal justice system was not fair for Black people, that if you can't pay for a good attorney, the criminal justice system is not fair, and that Blacks are accused wrongfully, get convicted because they don't know their rights or the system or have the means to hire an attorney" and he had concerns

about being fair and impartial" provided neutral grounds for challenging the juror]; ***People* v. *Adanandus*** (2007) 157 Cal.App.4th 496, 504, 507 [fact juror expressed the opinion there was "inherent bias in the criminal justice system against young African-American men" and that it would be difficult for her to "impartial" in the kind of case pending for trial provided neutral reason for challenging juror].)

In ***People* v. *Calvin*** (2008) 159 Cal.App.4th 1377, the court rejected the argument that skepticism toward the criminal justice system is so prevalent among African-Americans that it should be considered a proxy for race and that, as a result, peremptory challenges based on such an attitude should be deemed discriminatory. (**Id.** at p. 1379.) Ironically, if the prosecutor had challenged the juror based solely on the assumption that the defense adopted in ***Calvin***, it would probably **not** be considered a neutral reason. In other words, "[i]f the prosecutor . . . had dismissed the African-American jurors based on his ***assumptions*** about their attitudes, he would have demonstrated the type of group-based discrimination outlawed by both the equal protection clause and the California Constitution's guarantee of a trial by a jury drawn from a representative cross-section of the community." (***People* v. *Calvin*** (2008) 159 Cal.App.4th 1377, 1387.)

However, as long as the challenge is not made based on assumptions that members of the class would hold skeptical views towards the criminal justice system, but rather on actual views expressed by the challenged jurors, it is permissible to challenge the jurors on that basis. (***People* v. *Calvin*** (2008) 159 Cal.App.4th 1377, 1388.) The fact that similar attitudes are held by many other members of the class to which the juror belonged "does not convert the prosecutor's challenge into intentional race-based discrimination." (**Ibid; see also *People* v. *Avila*** (2006) 38 Cal.4th 491, 545 [prosecutor's challenge to juror proper where it was based on juror's *personal* experience that police officers lied, "not on a theoretical perception that she, a member of a minority group, might view the police with distrust"].)

3. Juror is Young, Immature, and/or Lacks Life Experience

Relative youth and immaturity are neutral grounds for excusing a juror. (**See *People* v. *Salcido*** (2008) 44 Cal.4th 93, 140 [19-year old juror].)

In ***People* v. *Cruz*** (2008) 44 Cal.4th 636, the court held that the fact the juror was only 20 years old and "one of youngest, or the youngest" prospective juror" was one of several reasons that did not reflect a "discriminatory intent. (**Id.** at pp. 657-659.)

In ***People* v. *Watson*** (2008) 43 Cal.4th 652, the court held that it was proper for a prosecutor to challenge a juror who, inter alia, was young, inexperienced, and who believed the reason for why the crime rates were increasing was because "Republicans [were] in the presidency" - a reason the prosecutor characterized as "immature." (**Id.** at p. 679.)

In ***People* v. *Salcido*** (2008) 44 Cal.4th 93, the court that it was proper for a prosecutor to challenge a juror who was "immature" as reflected by her "focus on the attention she had

received at work because of the possibility she would be selected as a juror in this case, and on the useful experience she might acquire as a result" and answers she gave indicating she did not appreciate the gravity of the responsibility in a death case. (**Id.** at p. 140; **see also** ***People*** **v.** ***Sims*** (1993) 5 Cal.4th 405, 429-430 [upholding peremptory challenge based upon juror's immaturity].)

Compare ***People*** **v.** ***Gonzalez*** (2008) 165 Cal.App.4th 620, a case where the appellate court *disbelieved* a prosecutor's claim a juror was excused for immaturity where the exact age of the juror was not disclosed by the record, the prosecutor claimed the occupation of the juror (clearing utility lines) indicated the juror was lacking maturity but the job could have been a "responsible, permanent, possibly career position", and the prosecutor asserted the juror was single and childless but this was not supported by the record as a fact. (**Id.** at pp. 631-632.)

4. Juror Holds Out of the Mainstream Views Regarding Criminal Laws

In ***People*** **v.** ***Adanandus*** (2007) 157 Cal.App.4th 496, the court held it was a legitimate ground to excuse a juror who stated that drugs, including crack cocaine, should be legalized, who was ambivalent about whether he would be able to hold defendant accountable if the offense stemmed from drug dealing, and who was equivocal about the effect his views on the drug laws might have if he was called on as a juror to decide the case. (**Id.** at pp. 505, 510.)

5. Juror is Soft of Crime or Likely Harbors Pro-Defense Bias

If the juror harbors a "generally prodefense partiality or bias," this, by itself, provides a legitimate ground to challenge a juror. (***People*** **v.** ***Adanandus*** (2007) 157 Cal.App.4th 496, 507, citing to ***People*** **v.** ***Farnam*** (2002) 28 Cal.4th 107, 138; **see also** ***People*** **v.** ***Semien*** (2008) 162 Cal.App.4th 701, 708 [noting prosecutor could rightly be concerned with juror who worked with the "underprivileged" where the term could encompass persons who are "on the defense side of a government prosecution"].)

6. Juror Appears Less Than Forthright or Unbelievable

If a juror gives answers that appear to be inconsistent, less than forthcoming, or provides some other reason for the prosecutor to distrust the juror or believe the juror's responses are not credible, this provides a legitimate ground to challenge a juror. (**See** ***People*** **v.** ***Adanandus*** (2007) 157 Cal.App.4th 496, 500; ***People*** **v.** ***Cardenas*** (2007) 155 Cal.App.4th 1468, 1475; **see also** ***People*** **v.** ***Salcido*** (2008) 44 Cal.4th 93, 140 [fact juror less than direct in answering questions relating to his views on the death penalty provided neutral grounds for excusing juror]; ***People*** **v.** ***Davis*** (2008) 164 Cal.App.4th 305, 313 [fact juror initially *mistakenly or intentionally* characterized her son as a victim of a DUI driver but later revealed her son had actually been arrested for DUI was, inter alia, a proper basis for challenging the juror].)

7. Juror Gives Answers Indicating Juror Would Have Sympathy for Persons in

Defendant's Situation

If a juror expresses attitudes reflecting a belief that a defendant's social environment or history might excuse or mitigate his or her criminal behavior, this can provide neutral grounds for challenging a juror. (**See *People* v. *Watson*** (2008) 43 Cal.4th 652, 673-675 [proper to excuse juror who said her childhood friend had committed murders but did not deserve the death penalty because of the neighborhood he grew up in and fact friend came from single parent home].)

8. Juror Has Life Experiences That Might Make the Juror Overly Sympathetic to, or Biased Towards, a Person in the Defendant's Position

If a juror has had experiences that might cause her to sympathize or empathize with the criminal defendant on trial, this can provide neutral grounds for excusing the juror. (**See *People* v. *Watson*** (2008) 43 Cal.4th 652, 676 [proper to challenge juror who, inter alia, had brother who worked in CYA and sometimes would tell her "a sad story from an inmate's point of view"]; ***People* v. *Salcido*** (2008) 44 Cal.4th 93, 140 [juror's own history of alcoholism resulting in a court martial and abusive behavior toward his family was proper ground for excusing juror because it could predispose him to bias in favor of a defendant who might use alcoholism as mitigation in a death penalty case].)

People* v. *Watson (2008) 43 Cal.4th 652, 673-674, 680 [fact juror has had substantial exposure to gang members such that it might make it more difficult for her to impose the death penalty in a gang-related drive-by shooting case was neutral reason to exercise a challenge against the juror].)

9. Juror Has Life Experiences That Might Cause the Juror to Question Some Aspect of the Prosecution Case

If a juror expresses sentiments or has prior experiences that might bear on how the prosecution's case is viewed (i.e., doubts about the validity of certain types of evidence or certain types of witnesses), this can provide neutral grounds for challenging the juror. (**See *People* v. *Watson*** (2008) 43 Cal.4th 652, 676 [fact juror had trouble describing her own assailant when she was a victim of purse snatching, inter alia, provided neutral grounds for challenging a juror in a case dependent on identification testimony].)

10. Juror Has Religious Beliefs That Might Affect His or Her Decision

If a person's religious beliefs would make it difficult for the juror to convict or impose a penalty, this can provide neutral grounds for challenging a juror. (**See** this P&A memo, I-B-4, at p. 24.)

11. Juror Expresses an Unwillingness or Reluctance to Follow the Law

a. Reluctance to Follow Law in General

In ***People*** **v.** ***Howard*** (2008) 42 Cal.4th 1000, the court held that it was proper to challenge a juror who indicated that he would "negotiate" with the judge if there was a law or instruction that differed from the juror's own opinion or belief. (**Id.** at p. 1017.)

b. Holding People to Higher Burden of Proof

In ***People*** **v.** ***Watson*** (2008) 43 Cal.4th 652, the court held the fact the juror indicated he might hold the prosecution to a higher burden of proof than beyond a reasonable doubt was a neutral reason for challenging a juror. (**Id.** at pp. 679-680.)

c. Accepting Interpreter's Translation Despite Coming to a Different Translation

The failure of a bilingual juror to accept a translator's rendition of what a witness has testified to, regardless of the juror's own interpretation is a neutral reason for challenging a juror. (**See** ***Hernandez*** **v.** ***New York*** (1991) 500 U.S. 353, 361; ***People*** **v.** ***Cardenas*** (2007) 155 Cal.App.4th 1468, 1476-1477.)

12. Juror's Attitude and Behavior During Court Proceedings

a. Late to Court

In ***People*** **v.** ***Watson*** (2008) 43 Cal.4th 652, the court held the fact a juror was twice late to court provided grounds for the prosecutor to believe the juror was irresponsible and that this was, inter alia, a legitimate ground for challenging the juror. (**Id.** at pp. 679-680.) Similarly, in ***People*** **v.** ***Davis*** (2008) 164 Cal.App.4th 305, the court found, inter alia, the fact the juror was not punctual provided neutral grounds for challenging the juror. (**Id.** at pp. 312-313.)

b. Inattention

In ***People*** **v.** ***Davis*** (2008) 164 Cal.App.4th 305, the court found, inter alia, the fact the juror was inattentive provided neutral grounds for challenging the juror. (**Id.** at pp. 315.)

c. Arrogant or Flippant Attitude

In ***People*** **v.** ***Howard*** (2008) 42 Cal.4th 1000, the court cited to a trial judge's observation that the juror was "arrogant, flippant" in finding the prosecutor was justified in challenging one juror and observed that another juror was properly challenged because, inter alia, the juror's responses revealed a flippant attitude toward the proceeding and suggested he was trying to avoid jury service. (**Id.** at pp. 1017, 1019 [and noting the latter juror had written prosecutors "are trickly

(sic) people," and that defense attorneys "will say anything"].)

d. Attempt to Avoid Jury Service

In ***People*** **v.** ***Howard*** (2008) 42 Cal.4th 1000, the court cited to a trial judge's observation that the juror was "trying to get off the panel" in upholding the trial court's finding the prosecutor had properly challenged the juror. (**Id.** at p. 1019.)

e. Reluctance to Answer Questions

In ***People*** **v.** ***Howard*** (2008) 42 Cal.4th 1000, the court stated "[a]n advocate may legitimately be concerned about a prospective juror who will not answer questions." (**Id.** at p. 1019 [and pointing out that there was no prima facie showing a juror was discriminated against where, inter alia, one of the challenged jurors declined to fill out substantial portions of the jury questionnaire, marking "confidential" on "almost all of his answers"].)

13. Juror Lacks Mental Ability to Understand the Issues or Proceedings

In ***People*** **v.** ***Watson*** (2008) 43 Cal.4th 652, the court held the fact a juror, inter alia, exhibited significant confusion about the death penalty determination provided a neutral ground for removing the juror. (**Id.** at p. 682.) In ***People*** **v.** ***Davis*** (2008) 164 Cal.App.4th 305, the court found that, inter alia, the fact a juror seemed very confused, sat in the wrong chair, did not seem to be able to follow the court's instructions, and appeared dazed and somewhat unresponsive provided neutral grounds for challenging the juror. (**Id.** at pp. 312-313.)

14. Juror Lacks Psychological Ability to Focus on the Trial

In ***People*** **v.** ***Gutierrez*** (2002) 28 Cal.4th 1083, the court held that "[f]actors indicating a difficulty or inability to focus on the evidence may serve to justify a peremptory challenge." (**Id.** at p. 1124; **see also** ***Mitchell*** **v.** ***Superior Court*** (1984) 155 Cal.App.3d 624, 628.)

In ***People*** **v.** ***Gutierrez*** (2002) 28 Cal.4th 1083, the court held prosecutor was justified in challenging a juror on grounds her ability concentrate or fairly deliberate on the evidence would be compromised where the juror appeared extremely emotional and overwhelmed by outside stresses, repeatedly referred to her "nerves" and to being under considerable stress, and cried twice during voir dire. (**Id.** at p. 1124.)

15. Juror Has Difficulty Making a Decision

In ***People*** **v.** ***Fiu*** (2008) 165 Cal.App.4th 360, the juror repeatedly expressed a concern that it might be difficult for her to make a decision regarding guilt if the defendant was present in the courtroom. This was found to be a neutral reason for removing the juror. (**Id.** at p. 395.)

16. Juror Has Previous Served on a Hung Jury

The fact a panelist has previously served on a jury that was unable to reach a verdict "constitutes a legitimate concern for the prosecution, which seeks a jury that can reach a unanimous verdict[.]" (***People*** **v.** ***Farnam*** (2002) 28 Cal.4th 107, 138; ***People*** **v.** ***Turner*** (1994) 7 Cal.4th 137, 170.)

17. Juror Directly or Indirectly Expresses Reluctance to Impose the Death Penalty in a Death Penalty Case

Statements or attitudes of a juror that reflect a reluctance to impose the death penalty provide neutral reasons for excusing the juror. (**See** ***People*** **v.** ***Watson*** (2008) 43 Cal.4th 652, 673-675, 679-681 [juror did not believe friend deserved death penalty despite friend committing multiple murders; juror said she would vote against death penalty if on the ballot and her death penalty determination might be swayed by her religious views; juror was uncertain whether could impose death penalty; juror indicated he would not vote for the death penalty if it was on the ballot due to his religious beliefs].)

"A prosecutor may exercise peremptory challenges against prospective jurors who are not so intractably opposed to the death penalty that they are subject to challenge for cause under the *Witt-Wainwright* standard, but who nonetheless are substantially opposed to the death penalty." ***People*** **v.** ***Salcido*** (2008) 44 Cal.4th 93, 139-140; **see also** ***People*** **v.** ***Zambrano*** (2007) 41 Cal.4th 1082, 1104-1107; ***People*** **v.** ***Jurado*** (2006) 38 Cal.4th 72, 106.)

18. Juror (or Spouse of Juror) is Employed in a Job or Engages in Activities That Reflect an Orientation Toward Rehabilitation and Sympathy for Defendants

a. Counselors

In ***People*** **v.** ***Adanandus*** (2007) 157 Cal.App.4th 496, the court found a prosecutor could properly excuse a juror because, inter alia, the juror worked as a school counselor in the Americorps program (a program that focused primarily on rehabilitation) and this "might maker her more partial to the defense[.]" (**Id.** at p. 507.)

In ***People*** **v.** ***Ervin*** (2000) 22 Cal.4th 48, the court held it was proper to excuse a juvenile counselor who believed in rehabilitation on grounds this might cause her to reject the death penalty. (**Id.** at p. 75; **see also** ***People*** **v.** ***Adanandus*** (2007) 157 Cal.App.4th 496, 507.)

b. Attorneys and Employees of Attorneys and Their Spouses

In ***People*** **v.** ***Barber*** (1988) 200 Cal.App.3d 378, the court held it was proper to excuse a juror whose *spouse* worked for a "liberal attorney." (**Id.** at pp. 389-394; **see also** ***People*** **v.** ***Adanandus***

(2007) 157 Cal.App.4th 496, 507.)

c. Drug Treatment Affiliation

In ***People*** **v.** ***Landry*** (1996) 49 Cal.App.4th 785, the court held it was proper to excuse a juror who, inter alia, was on the board of a drug treatment program. (**Id.** at pp. 789-790; **see also** ***People*** **v.** ***Adanandus*** (2007) 157 Cal.App.4th 496, 508.)

d. Nursing Assistants

In ***People*** **v.** ***Davis*** (2008) 164 Cal.App.4th 305, the court held it was proper for a prosecutor to excuse a juror who was a certified nursing assistant based on the prosecutor's *own personal bad experiences , outside of court*, with nursing assistants. (**Id.** at p. 313.)

e. Psychologists/Psychiatrists

In ***People*** **v.** ***Landry*** (1996) 49 Cal.App.4th 785, the court held it was proper to excuse a juror who, inter alia, had a background in psychiatry or psychology. (**Id.** at pp. 789-790; **see also** ***People*** **v.** ***Adanandus*** (2007) 157 Cal.App.4th 496, 508.)

f. Religious Leaders

In ***People*** **v.** ***Semien*** (2008) 162 Cal.App.4th 701, the court held a prosecutor had legitimate grounds for challenging a pastor who dealt with homeless people since the pastor was "in the business of forgiveness," and the prosecutor was not required to accept the pastors' assurance that he could find someone guilty." (**Id.** at p. 708.)

g. Teachers

In ***People*** **v.** ***Landry*** (1996) 49 Cal.App.4th 785, the court held it was proper to excuse a juror who, inter alia, was a teacher. (**Id.** at pp. 789-790; **see also** ***People*** **v.** ***Adanandus*** (2007) 157 Cal.App.4th 496, 507.) In ***People*** **v.** ***Barber*** (1988) 200 Cal.App.3d 378, the court held it was proper to excuse a juror because the juror was a teacher and prosecutor believed teachers tended to be liberal and "less prosecution oriented." (**Id.** at pp. 389-394; **see also** ***People*** **v.** ***Adanandus*** (2007) 157 Cal.App.4th 496, 507.)

h. Social Service Type Work

If a juror has a background in, or is employed in, social service type work, this can provide neutral grounds for challenging the juror. (**See** ***People*** **v.** ***Watson*** (2008) 43 Cal.4th 652, 677 [proper to excuse a juror who, inter alia, was a social worker]; ***People*** **v.** ***Landry*** (1996) 49 Cal.App.4th 785, 789-790 [proper to excuse a juror who, inter alia, had worked in a youth services agency]; **accord** ***People*** **v.** ***Adanandus*** (2007) 157 Cal.App.4th 496, 508; ***People*** **v.** ***Turner*** (1994) 8 Cal.4th 137,

170[proper to excuse a juror who had trained with the Department of Social Services].) Indeed, even if someone close to the juror has a background or job in social work, this can provide neutral grounds for challenging the juror. (**See *People* v. *Semien*** (2008) 162 Cal.App.4th 701, 707-708 [proper to excuse a juror who, inter alia, had a wife working in the county welfare department].)

C. Can a prosecutor challenge a juror based on the prosecutor's own personal biases against members of a profession?

Although it is fairly well-established that a prosecutor can rely on stereotypical assumptions about persons involved in certain occupations tilting toward the defense (**see** this P&A memo, above, at pp. 31-33), can a prosecutor's idiosyncratic hostility towards members of a particular profession provide neutral grounds for challenging a juror?

In ***People* v. *Davis*** (2008) 164 Cal.App.4th 305, the prosecutor challenged a juror who was a certified nursing assistant (CNA) because of the prosecutor's own personal bias against CNAs stemming from the bad experiences the prosecutor had outside of court with CNAs who were working in her father's nursing home. This was found to be a neutral reason for challenging the juror, notwithstanding a lack of any assertion that CNAs lean toward the defense from an objective standpoint. (**Id.** at p. 313.)

D. Is a prosecutor required to assume a juror's responses are true?

The fact that a juror provides an answer that "contradicts" the basis for the prosecutor's challenge does not mean the prosecutor's reason will be held pretextual. (**See e.g., *Rice* v. *Collins*** (2006) 546 U.S. 333, 341 [notwithstanding young juror's oral response she could be impartial, prosecutor entitled to believe juror's youth and lack of ties to the community would make her a bad juror for the prosecution]; ***People* v. *Cardenas*** (2007) 155 Cal.App.4th 1468, 1477 [prosecutor had legitimate reasons for removing a bilingual juror on grounds the prosecutor believed the juror would refuse to accept an interpreter's translation over the juror's own translation even though juror ultimately agreed to abide by interpreter's translation]; ***People* v. *Gutierrez*** (2002) 28 Cal.4th 1083, 1124 [prosecutor justified in removing a juror on grounds the juror might harbor bad feelings toward the police despite the juror's claim otherwise; prosecutor was entitled to disregard a juror's claim that her emotional state and stressful circumstances would not interfere with her ability to consider the evidence where the juror repeatedly referred to her "nerves" and to being under considerable stress, cried twice during voir dire, and the unduly "emotional" state of the juror was confirmed by the judge].)

Numerous cases have held that a prosecutor is entitled to dismiss a juror who has had negative contacts with law enforcement the criminal justice system or have close relatives who had such negative contacts, notwithstanding the juror's assurances that the prior experiences would not impact the juror. (***People* v. *Avila*** (2006) 38 Cal.4th 491, 554-555; ***People* v. *Farnam*** (2002) 28 Cal.4th 107, 138; ***People* v. *Adanandus*** (2007) 157 Cal.App.4th 496, 505.)

III. The Use of Comparative Analysis to Assess the Existence of a Discriminatory Motive

Comparative analysis refers to a mechanism that courts use to try to "flush out" the actual motivation of the party accused of using his or her peremptory challenges in a discriminatory fashion. In doing a comparative analysis, the court reviews the reasons given for the challenge as to the particular juror and then looks to see if those reasons would apply equally to other jurors (not belonging to the same cognizable class as the challenged juror) who were not challenged. If there are two jurors who have given very similar responses, one of whom belongs to the cognizable class and one of whom does not, and the party has only challenged the juror in the cognizable class on the purported basis of a response given by *both* jurors, an inference can arise that the purported basis of the challenge is a pretext designed to conceal a discriminatory purpose.

Although courts applying comparative analysis sometimes engage in a very simplistic or superficial comparisons, "overlapping responses alone are not enough to demonstrate purposeful discrimination." (***People*** **v.** ***Calvin*** (2008) 159 Cal.App.4th 1377, 1389, citing to ***People*** **v.** ***Lewis and Oliver*** (2006) 39 Cal.4th 970, 1020.) "To prove such a claim, a defendant must engage in a careful side-by-side comparative analysis to demonstrate that the dismissed and retained jurors were "similarly situated." (***People*** **v.** ***Calvin*** (2008) 159 Cal.App.4th 1377, 1389, citing to ***People*** **v.** ***Lewis and Oliver*** (2006) 39 Cal.4th 970, 1016-1024; **see also** ***People*** **v.** ***Watson*** (2008) 43 Cal.4th 652, 672-682 [rejecting numerous claims that jurors were similarly situated for comparative analysis purposes where both booted and seated jurors were similar in some aspects but different in others].)

There were several significant decisions that came out of the United States Supreme Court and California Supreme Court in the past couple of years regarding the use of comparative analysis by both trial courts and appellate courts in order to assess the existence of a discriminatory motive. These cases are discussed in depth, below, to highlight "comparative analysis" in action.

A. *Snyder* v. *Louisiana* (2008) 128 S.Ct. 1203

Facts

In ***Snyder***, the prosecutor exercised peremptory challenges against all five black panelists. (**Id.** at p. 1207.) However the Supreme Court focused on the prosecutor's reasons for challenging just one of those panelists. In the first phase of jury selection, the court inquired of panelists whether jury service would result in extreme hardship. The panelist explained that he was a college senior who needed to complete his student-teaching requirement to graduate and expressed concern that jury service would cause him to miss classes. The trial court contacted the university dean, who gave assurances that he would work with the panelist to make up classes.

After receiving this information, the panelist expressed no further concern and the prosecutor did not question him further on the issue. (**Id.** at pp. 1209-1210.)

In explaining this peremptory challenge, the prosecutor offered two race-neutral reasons. First, he stated the panelist appeared nervous throughout the voir dire questioning. Second, the prosecutor claimed to be apprehensive that, in order to minimize the student-teaching hours missed during jury service, the panelist might have been motivated to find the defendant guilty of a lesser included offense, thus obviating the need for a penalty phase proceeding. (**Id.** at p. 1210.) Although defense counsel disputed both explanations, the trial court said it was "going to allow the challenge." The trial and penalty phases concluded two days after the panelist was struck. (**Id.** at p. 1210.)

Held:

1. While recognizing that deference to the trial judge "is especially appropriate where a trial judge has made a finding that an attorney credibly relied on demeanor in exercising a strike[,]" the court found no such deference was due in the instant case (i.e., the court would not presume that the trial judge credited the prosecutor's explanation of nervousness) because the trial court "responded to the prosecutor's two proffered reasons by simply allowing the challenge without explanation." (**Id.** at p. 1209.)

2. The court characterized the prosecutor's explanation that the juror might be motivated to convict of something less than a first degree murder in order to save time in the penalty phase as "highly speculative" and pointed out that the fact the actual trial and penalty phase only lasted two days indicated that serving on a jury would not have seriously interfered with panelist's ability to complete his required student teaching. (**Id.** at p. 1210.)

3. The court also found that the implausibility of the prosecutor's explanation was reinforced by the prosecutor's acceptance of white jurors who disclosed conflicting obligations that appear to have been at least as serious as that of the bumped panelist. The court observed, for example, the prosecutor did not express a similar concern about one white juror who offered substantially more pressing work and family reasons as to why jury service would cause him hardship or about another white juror who claimed that in order to serve he would have to cancel an urgent appointment at which his presence was essential. (**Id.** at pp. 1211-1212.)

4 The court recognized that "a retrospective comparison of jurors based on a cold appellate record may be very misleading when alleged similarities were not raised at trial. In that situation, an appellate court must be mindful that an exploration of the alleged similarities at the time of trial might have shown that the jurors in question were not really comparable." (**Id.** at p. 1211.)

Nevertheless, the court held, it was proper to do a comparative analysis in the instant case since "the shared characteristic, i.e., concern about serving on the jury due to conflicting obligations, was thoroughly explored by the trial court when the relevant jurors asked to be excused for

cause." (**Id.** at p. 1211.)

B. *Rice* v. *Collins* (2006) 546 U.S. 333

Facts

In ***Rice***, the issue before the court was whether the prosecutor had improperly challenged a young female African-American juror (identified as juror 16). The prosecutor provided the following explanations for striking Juror 16: she had rolled her eyes in response to a question from the court; she was young and might be too tolerant of a drug crime; she was single; and she lacked ties to the community. (**Id.** at pp. 336-337.) The prosecutor also referred to the fact the juror was female but the trial court did not rely on the last ground. The trial court stated it did not observe the demeanor of the juror the prosecutor complained about. Nonetheless, the trial court noted the prosecutor's rationale for removing the juror because she was youthful was supported by the prosecutor's challenge of other youthful jurors outside the cognizable class at issue. (**Id.** at p. 337.)

When the case got to the Ninth Circuit by way of habeas, the Ninth Circuit found that there was "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding" regarding the trial court's finding that the prosecutor's reason for removing the juror (i.e. her youth) was credible. The Ninth Circuit gave three reasons for finding the trial court's determination (and a subsequent state court of appeal's upholding of the determination) to be unreasonable. First, the prosecutor erroneously referred to another prospective African-American juror's age as being young when that other juror was a grandmother. Second, the prosecutor improperly attempted to use gender as a basis for exclusion. Third, the prosecutor's explanation that she struck the juror in part because of her youth and lack of ties to the community was belied by the fact the juror replied affirmatively when asked if she believed the crime with which defendant was charged should be illegal and disclaimed any other reason she could not be impartial. The Ninth Circuit believed the "eye rolling" claim was not credible in light of the aforementioned factors. (**Id.** at p. 349-341.)

Held

1. The ***Collins*** court overruled the Ninth Circuit, noting that the trial court "had the benefit of observing the prosecutor firsthand over the course of the proceedings," and took the Ninth Circuit to task for attempting "to use a set of debatable inferences to set aside the conclusion reached by the state court[.]" (**Id.** at p. 342.) In support of its finding that the Ninth Circuit should not have granted the defendant's writ of habeas corpus, the ***Collins*** court addressed each of the Ninth Circuit's reasons for finding the prosecutor's explanation for removing the juror was a pretext.

2. First, in response to the Ninth Circuit's claim the prosecutor could not be believed because she characterized one juror who was a grandmother as young, the ***Collins*** court stated that "it is quite plausible that the prosecutor simply misspoke with respect to a juror's numerical designation, an

error defense counsel may also have committed. It is a tenuous inference to say that an accidental reference with respect to one juror, Juror 19, undermines the prosecutor's credibility with respect to Juror 16. Seizing on what can plausibly be viewed as an innocent transposition makes little headway toward the conclusion that the prosecutor's explanation was clearly not credible." (**Id.** at p. 340.)

3. Second, in response to the Ninth Circuit's claim the trial court should have questioned the prosecutor's credibility because of her "attempt to use gender as a race-neutral basis for excluding Jurors 016 and 019," the ***Collins*** court said the Ninth Circuit "assigned the gender justification more weight than it can bear. The prosecutor provided a number of other permissible and plausible race-neutral reasons, and [defendant] provides no argument why this portion of the colloquy demonstrates that a reasonable factfinder must conclude the prosecutor lied about the eye rolling and struck Juror 16 based on her race." (**Id.** at p. 340.)

4. Third, as to the Ninth Circuit's skepticism (in light of the juror's oral response she thought the crime should be illegal and she could be impartial) regarding the prosecutor's stated concern regarding Juror 16's youth and lack of ties to the community, the ***Collins*** court stated: notwithstanding these oral averments of the juror, it was "not unreasonable to believe the prosecutor remained worried that a young person with few ties to the community might be less willing than an older, more permanent resident to impose a lengthy sentence for possessing a small amount of a controlled substance. [Citation omitted by P&A]. Even if the prosecutor was overly cautious in this regard, her wariness of the young and the rootless could be seen as race neutral, for she used a peremptory strike on a white male juror, Juror 6, with the same characteristics." (**Id.** at p. 341.)

C. *People* v. *Lenix* (2008) 44 Cal.4th 602

Facts:

In ***Lenix***, the defense claimed that the prosecution improperly exercised a peremptory challenge against a black female panelist (i.e., a member of the venire). During the course of questioning, the panelist stated that "murder aspect" of the case concerned her. When the prosecutor followed up by asking if there was something beyond what might trouble anybody about murder charges, the panelist said, "The fact someone lost a life." (**Id.** at p. 609.) The prosecutor asked if anyone close to the panelist had been involved in something like that. The panelist answered that her sister's husband, to whom she was close, had been murdered 10 or 11 years ago. When asked if the murder was gang related, the panelist said it was. The prosecutor asked which gang committed the offense, and the panelist replied no one had ever been arrested. In response to further questions from the prosecutor, the panelist said she did not have any trouble with law enforcement for failing to make an arrest and would not hold the experience against the defendant. The panelist said there was nothing else the parties needed to know about the murder or any "similar situations." (**Id.** at p. 609.)

Later, the prosecutor asked the entire venire: "Has anybody here had any contacts with law enforcement that were hostile, confrontational, adverse, however you want to describe it, that might carry over into what we're going to do here in this courtroom? Anybody at all? Traffic ticket you didn't feel you deserved?" The black female panelist was the sole juror to reply; she stated that she had gotten a traffic ticket. When asked whether the officer was impolite "or anything like that," the panelist answered, "No. Well, no one ever feels they deserve a ticket. That was all." The prosecutor asked, "You feel that maybe he was a little shading the truth a little bit in it?" The panelist answered, "Yeah." The prosecutor then asked, "Did you feel you deserved it?" The panelist replied, "I didn't know if I deserved it or not, so I just went along with it." (**Id.** at p. 609.)

Initially, the prosecutor accepted (i.e., passed on) the jury panel that included the black female panelist as well as a black male panelist. After the defense challenged the black male panelist, the prosecutor against accepted the panel. Following another defense peremptory challenge, the prosecutor challenged a Hispanic panelist. The defense then made a ***Batson-Wheeler*** motion, which the trial judge reserved until the completion of voir dire. Only after the defense exercised another peremptory challenge, did the prosecutor challenge the black female panelist. Ultimately, the panel was composed of six Caucasians, four Hispanics, and two Filipinos. (**Id.** at p. 610.)

When the ***Batson-Wheeler*** motion was eventually heard, the defense pointed out that prosecutor had excluded three Hispanics and one Black, and claimed the prosecutor "was excluding minorities from the jury, particularly Hispanics." As to the three Hispanics, the prosecutor provided reasons that were not subsequently challenged on appeal. (**Id.** at p. 60.)

Regarding the black female panelist, the prosecutor stated he was concerned about her statement regarding the traffic ticket, noting she was the only juror who raised her hand when the prosecutor asked about uncomfortable run-ins with the police and while the panelist (somewhat inconsistently) indicated the encounter wasn't adversarial, that she didn't know whether the officer was lying, and didn't fight the ticket, the prosecutor believed there was "probably a lot more to it than that[.]" The prosecutor also expressed concerned that the juror's brother (sic) was involved in a gang-related homicide because, in the prosecutor's experience, people who are victims of gangs quite often are themselves gang members and that could have negative repercussions on the prosecutor's case - a case involving a gang-related murder. (**Id.** at pp. 610-611.)

The trial judge held the prosecutor did not exercise his challenges for improper motives. The court of appeal agreed. Relying on ***People* v. *Johnson*** (2003) 30 Cal.4th 1302, the court of appeal declined a defense request to conduct a comparative juror analysis in evaluating the credibility of the prosecutor's expressed reasons for excusing minority prospective jurors on the ground that such analysis for the first time on appeal was not compelled. (**Id.** at p. 611.)

Holding

1. A reviewing court should "presume that a prosecutor uses peremptory challenges in a constitutional manner and give great deference to the trial court's ability to distinguish bona fide reasons from sham excuses." (**Id.** at p. 613.) The trial court's determination regarding the sufficiency of a prosecutor's justifications for exercising peremptory challenges is reviewed "with great restraint." (**Ibid.**) "So long as the trial court makes a sincere and reasoned effort to evaluate the nondiscriminatory justifications offered, its conclusions are entitled to deference on appeal." (**Id.** at p. 614, [and noting the United States Supreme Court has also held that it will defer to a trial court's finding of no discriminatory intent "in the absence of exceptional circumstances"].)

2. "If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson*'s third step." (**Id.** at p. 621.)

3. In reviewing the plausibility of a prosecutor's reasons for striking a juror, an appellate court can consider various kinds of evidence, including a comparison of panelists' responses. (**Id.** at p. 622.)

4. Failing to engage in comparative juror analysis for the first time on appeal unduly restricts review based on the entire record." (**Id.** at p. 622.)

5. "Thus, evidence of comparative juror analysis must be considered in the trial court and even for the first time on appeal if relied upon by defendant and the record is adequate to permit the urged comparisons." (**Id.** at p. 622.)

6. The court did not address whether appellate comparative juror analysis is required "when the objector has failed to make a prima facie showing of discrimination" but noted that the High Court precedents definitely do **not** mandate the use of comparative juror analysis in a first-stage *Wheeler-Batson* case, where neither the trial court nor the reviewing court has been presented with the prosecutor's reasons or have hypothesized any possible reasons. (**Id.** at p. 622, fn. 15 citing to ***People* v. *Bell*** (2007) 40 Cal.4th 582, 600-601 [which noted that where no reasons are provided at the first stage, comparative analysis would make little sense since there is nothing to compare]; ***People* v. *Howard*** (2008) 42 Cal.4th 1000, 1020; and ***People* v. *Bonilla*** (2007) 41 Cal.4th 313, 350.) **Editor's note: See also *People* v. *Carasi*** (2008) 44 Cal.4th 1263, 1295 [declining to engage in the use of comparative analysis when reviewing a trial court's finding no prima facie case was made].

7. Nevertheless, comparative juror analysis has **inherent limitations** on a cold record for a number of reasons:

(i) There is "more to human communication than mere linguistic content." (**Id.** at p. 622.)

The manner of a juror is often "more indicative of the real character of his opinion that his

words." (**Id.** at p. 622.) A reviewing court cannot pick up on the "myriad of subtle nuances" that may shape an answer, including the inflection of the juror's voice, or the juror's "attitude, attention, interest, body language, facial expression and eye contact." (at p. 622.)

Even when two jurors give ostensibly similar answers, the way in which the answer is given may reveal that one juror is giving a genuine response and the other is not. The differences in the manner in how a juror answers a question "may legitimately impact the prosecutor's decision to strike or retain the prospective juror." (**Id.** at p. 623.)

(ii) How a particular answer or constellation of answers is weighed by a prosecutor may be difficult to calculate.

"While an advocate may be concerned about a particular answer, another answer may provide a reason to have greater confidence in the overall thinking and experience of the panelist. Advocates do not evaluate panelists based on a single answer." (**Id.** at p. 631.) When a comparative juror analysis is undertaken for the first time on appeal, "the prosecutor is never given the opportunity to explain the differences he perceived in jurors who seemingly gave similar answers." (**Id.** at p. 623.)

(iii) The fluidity and myriad of factors that go into selecting a jury make it difficult to obtain a truly accurate comparison in general and this becomes even more difficult on appeal.

Whether a juror is acceptable or not acceptable will change over the course of jury selection because a lawyer is not only seeking a particular kind of juror but a particular mix of jurors. "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 [by] 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." (**Id.** at p. 623.)

An "advocate is entitled to consider a panelist's willingness to consider competing views, openness to different opinions and experiences, and acceptance of responsibility for making weighty decisions." (**Id.** at p. 623.)

Two jurors may give similar answers on a given point but whether they are, in fact, comparable in the eyes of the attorneys will depend on "other answers, behavior, attitudes or experiences" make each more or less desirable. (**Id.** at p. 624.)

"These realities, and the complexity of human nature, make a formulaic comparison of isolated responses an exceptionally poor medium to overturn a trial court's factual finding." (**Id.** at p. 624.)

(iv) Unlike a reviewing court, "the trial judge's unique perspective of voir dire enables the judge to have first-hand knowledge and observation of critical events. [Citation.] The trial judge personally witnesses the totality of circumstances that comprises the 'factual inquiry,' including the jurors' demeanor and tone of voice as they answer questions and counsel's demeanor and tone of voice in posing the questions. [Citation.] The trial judge is able to observe a juror's attention span, alertness, and interest in the proceedings and thus will have a sense of whether the prosecutor's challenge can be readily explained by a legitimate reason...." (**Id.** at pp. 626-627.)

8. The court cautioned that there is a downside to advocates waiting until appeal to argue comparative juror analysis in light of the general rule that deference is given to the trial's court finding of no discriminatory intent. (**Id.** at p 624.)

9. On appeal, a reviewing court need not consider responses by stricken panelists or seated jurors other than those identified by the defendant in the claim of disparate treatment. (**Id.** at p. 624.)

10. The trial court's finding of no discriminatory intent is reviewed "on the record as it stands at the time the *Wheeler/ Batson* ruling is made. If the defendant believes that subsequent events should be considered by the trial court, a renewed objection is required to permit appellate consideration of these subsequent developments." (**Id.** at p. 624)

11. The fact a trial or reviewing court can think up reasons for why the prosecutor may have wanted to challenge a juror, "will not satisfy the prosecutors' burden of stating a racially neutral explanation." (**Id.** at p. 625.)

12. "Trial courts must give advocates the opportunity to inquire of panelists and make their record. If the trial court truncates the time available or otherwise overly limits voir dire, unfair conclusions might be drawn based on the advocate's perceived failure to follow up or ask sufficient questions. Undue limitations on jury selection also can deprive advocates of the information they need to make informed decisions rather than rely on less demonstrable intuition." (**Id.** at p. 625.)

The court recognized that, under Code of Civil Procedure section 223, a criminal trial court may limit counsel's questioning of prospective jurors and "may specify the maximum amount of time that counsel for each party may question an individual juror, or may specify an aggregate amount of time for each party, which can then be allocated among the prospective jurors by counsel." (at p. 625, fn. 16.) Moreover, the court recognized that "the exercise of discretion by trial judges in conducting voir dire is accorded considerable deference by appellate courts." (**Id.** at p. 625, fn. 16.) However, the ***Lenix*** court stated: "in exercising that discretion, trial courts should seek to

balance the need for effective trial management with the duty to create an adequate record and allow legitimate inquiry." (**Id.** at p. 625, fn. 16.)

13. The trial court has a duty to "assess the plausibility" of the prosecutor's proffered reasons for striking a potential juror, "in light of all evidence with a bearing on it." (**Id.** at p. 625.) Trial courts "must evaluate the demeanor of the prosecutor in determining the credibility of proffered explanations, and the demeanor of the panelist when that factor is a basis for the challenge." (**Id.** at p. 625.)

14. It should be discernible from the record that "1) the trial court considered the prosecutor's reasons for the peremptory challenges at issue and found them to be race-neutral; 2) those reasons were consistent with the court's 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. (**Id.** at pp. 625-626.)

15. "As to the second point, the court may not have observed every gesture, expression or interaction relied upon by the prosecutor. The judge has a different vantage point, and may have, for example, been looking at another panelist or making a note when the described behavior occurred. But the court must be satisfied that the specifics offered by the prosecutor are consistent with the answers it heard and the overall behavior of the panelist. The record must reflect the trial court's determination on this point (see *Snyder*, supra, 128 S.Ct. at p. 1209), which may be encompassed within the court's general conclusion that it considered the reasons proffered by the prosecution and found them credible." (**Id.** at pp. 625-626.)

16. The court observed that comparative juror analysis is a form of circumstantial evidence (**id.** at p. 622) and that a reviewing court must be careful not to accept one reasonable interpretation to the exclusion of other reasonable ones when reviewing the circumstantial evidence supporting the trial court's factual findings in a ***Wheeler/Batson*** holding. "If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also be reasonably reconciled with a contrary finding does not warrant a reversal of the judgment." (**Id.** at pp. 627-628.)

17. "[S]ubstantial evidence supports the trial court's finding that the prosecutor's proffered reasons were not pretextual." (**Id.** at p. 630 [and noting that using comparative juror analysis does not undermine this conclusion].)

18. The court **rejected** the notion that the removed panelist was similarly situated to another male juror who had a fairly hostile interaction with the police when they responded to a call from the juror's mother after the juror had taken away some keys from his mother to prevent her from driving while intoxicated. The juror stated the police threatened to mace his brother unless the keys were returned. The juror thought about sending a letter to the editor but chose not to because he "figured they're trying ... to handle that situation without getting hurt." (**Id.** at p.

630.) The court observed that the prosecutor's hesitation regarding the removed panelist was based on his sense of her possible lingering resentment, whereas the juror who was kept stated he realized that the police were acting out of concern for their safety and so he did not complain about their conduct. (**Ibid.**)

19. The court also **rejected** the defense argument that the removed panelist was similar to another juror who was kept. That other juror had a cousin who shot and killed someone when he was 16 years old. The cousin was convicted and sent to jail but was eventually released and was "doing great." The juror stated that his cousin was treated fairly by the police and courts, and "it was a bad situation, but it turned out to be a good situation for him." (**Id.** at p. 630.) That juror was a high school acquaintance of one of the police officers identified as a potential witness in defendant's case and the juror described the officer as "a really good guy." (**Ibid.**)

Although the defendant argued the prosecutor's concern about the gang affiliation of the brother of the removed panelist was pretextual because the prosecutor did not display similar concerns that the other juror's cousin might be a gang member (e.g., because he never asked about the gang status of the other juror's cousin), the court held, in light of the juror's comments about his cousin's past experience and present circumstances, the prosecutor could have found such question unnecessary. (**Id.** at pp. 630-631.) Moreover, the court stated the fact the juror held a high opinion of a prosecution witness " would likely have been significant in the prosecutor's decision to retain the juror and further distinguishes this juror from" the removed panelist. (**Id.** at p. 631.)

20. Finally, the court noted a lack of any additional evidence in the record that the prosecution's challenges were improperly based on race. For example, there was "no indication that the prosecutor or his office relied on racial factors" nor was there any "evidence of procedural manipulation, deceptive questioning, or any of the other signs of constitutional violation like those present in *Miller-El II.*" (*Lenix*, at p. 631.)

D. *People* v. *Cruz* (2008) 44 Cal.4th 636

Facts:

In ***People*** v. ***Cruz*** (2008) 44 Cal.4th 636, the defendant claimed the prosecutor improperly exercised a peremptory challenge against a Hispanic juror on the sole basis of group bias. (**Id.** at p. 654.) Among the many reasons given by the prosecutor for excusing the juror: he was only 20 years old, and perhaps "one of the youngest, or the youngest" prospective jurors under consideration, and "may not be in the mainstream and that experienced in life"; he had "long hair," "Fu Manchu type" facial hair; he had come to court in a long, unbuttoned flannel shirt, and thereafter arrived at the peremptory challenge hearing in a plain white T-shirt; he appeared to be one of the "most poorly dressed" individuals in the courtroom; his stated goal in life (to open up a small "comic book store") arguably showed a lack of life experiences; he repeatedly stated a belief that the evidence would have to be "strong" for him to impose death; he stated that "at times the death penalty was used too much," and "indicated some hesitation" about imposing the

death penalty for a "cop killer"; he failed to answer questions Nos. 95 and 96 on the written jury questionnaire pertaining to his feelings about criminal defense attorneys, prosecutors, and police; in responding to question No. 99, which asked, "Do you feel that a police officer's testimony is more truthful/accurate that of a civilian?," he wrote, "police officers are human, and they can lie too"; he gave the impression he "had some sympathy toward those individuals who became intoxicated"; and the prosecutor felt he did not establish a very good "rapport" with the young prospective juror. The prosecutor also pointed out that the juror was one of very individuals who felt the "justice system was getting good or better" and attributed this "out of the mainstream" view to the fact the juror did not have a tremendous amount of experience and contact in society and with this criminal justice system." (**Id** at pp. 657-658, 659.)

Holding:

1. After reiterating some of the principles of comparative analysis, the court engaged in a comparative analysis and found no discriminatory intent. (**Id**. at pp. 658-659.)

2. After observing that 8 or 9 other jurors had given similar responses to the challenged juror when it came to the justice system (and thus the juror's view in this regard was not outside the mainstream), the court found the prosecutor's view of the juror's response was not made in isolation but was made "while mindful of the prospective juror's very young age in relation to all the other prospective jurors on the panel." (**Id**. at p. 660.)

   The court stated the critical determination was not whether the prosecutor was entirely accurate that the juror's view was "outside the mainstream," but whether his given reasons were credible and sincere as opposed to a sham intended to mask his true intent to discriminate[.]" (**Id**. at p. 660.)

3. The court held that a juror (as the juror in the instant case) who fails to answer some of the question is differently situated than jurors who answer "no opinion" or "Don't know." (**Id**. at p. 660.)

4. The court held that an affirmative response such as the juror in the instant case gave (i.e., "police officers are human they can lie to (sic)") to the question of whether police officer testimony is more truthful/accurate than that of a civilian" is a qualitatively different response than simply responding "no" or "not necessarily." (**Id**. at pp. 660-661.)

5. In sum, the court approved a more nuanced approach to comparing answers that takes into account the whole picture and recognizes that subtle differences may be significant. (**Id**. at p. 661.)

IV. The Use of Disproportionality Analysis

Another mechanism that courts sometimes use to determine whether there has been a prima

facie showing of discriminatory use of peremptory challenges is to look to see whether the prosecutor has a used a "disproportionate number of peremptories" against jurors in the cognizable class. Thus, for example, if the prosecutor has used a high percentage of his challenges against members of the cognizable class, this can be viewed as evidence of a discriminatory purpose. (**See *People* v. *Hall*** (1989) 208 Cal.App.3d 34, 45 [citing cases using a disproportionality analysis to assess whether prima face case was made].)

"A more complete analysis of disproportionality compares the proportion of a party's peremptory challenges used against a group to the group's proportion in the pool of jurors subject to peremptory challenge." (***People* v. *Bell*** (2007) 40 Cal.4th 582, 598, fn. 3.)

However, where there is a small sample size, disparities carry "relatively little information." Thus, for example, in ***Bell***, the fact that the prosecutor had used two of his 16 peremptory challenges (12.5%) against members of the cognizable class in issue when only three of the 47 prospective jurors (6.4%) belonged to that class was of little use in establishing an inference of discrimination, notwithstanding the former figure was almost twice the latter figure. (***People* v. *Bell*** (2007) 40 Cal.4th 582, 598, fn. 3; **see also *Wade* v. *Terhune*** (9th Cir. 2000) 202 F.3d 1190, 1198 [significance "limited" where corresponding ratios were "four of sixty-four (or 6%)" (proportion of group in pool) and "one of three (or 33%)" (proportion of challenges exercised against group)].)

V. Other Procedural Issues

A. Timeliness of Motion

A ***Batson-Wheeler*** motion "is timely if made before jury impanelment is completed because 'the impanelment of the jury is not deemed complete until the alternates are selected and sworn.'" (***People* v. *McDermott*** (2002) 28 Cal.4th 946, 970; ***People* v. *Adanandus*** (2007) 157 Cal.App.4th 496, 500.)

VI. Appellate Review Rules

A. Deference to, But Not Abdication of, Responsibility to Review, Trial Court's Finding

As long as the court makes "a sincere and reasoned effort to evaluate the nondiscriminatory

justifications offered, its conclusions are entitled to deference on appeal." (***People*** **v.** ***Zambrano*** (2007) 41 Cal.4th 1082, 1104; ***People*** **v.** ***Lewis*** **and** ***Oliver*** (2006) 39 Cal.4th 970, 1009.)

"But deference is not abdication." (***People*** **v.** ***Gonzales*** (2008) 165 Cal.App.4th 620, 628.) "When the prosecutor's stated reasons are both inherently plausible and supported by the record, the trial court need not question the prosecutor or make detailed findings. But when the prosecutor's stated reasons are either unsupported by the record, inherently implausible, or both, more is required of the trial court than a global finding that the reasons appear sufficient." (***People*** **v.** ***Stevens*** (2007) 41 Cal.4th 182, 193; ***People*** **v.** ***Silva*** (2001) 25 Cal.4th 345, 386.)

B. Review Where No Prima Facie Finding

If a trial court denies a ***Batson-Wheeler*** motion without finding a prima facie case of group bias, the reviewing court considers the entire record of voir dire. (***People*** **v.** ***Adanandus*** (2007) 157 Cal.App.4th 496, 501.) This probably means that questioning of panelists who do not make it on the jury may be considered to determine if there was "disparate questioning."

However, the finding is still entitled to "considerable deference on appeal" and if the record "suggests grounds upon which the prosecutor might reasonably have challenged" the panelists in question, the conviction will be affirmed. (***People*** **v.** ***Crittenden*** (1994) 9 Cal.4th 83, 116-117; ***People*** **v.** ***Adanandus*** (2007) 157 Cal.App.4th 496, 501.) The only time deference will not be given is where the trial court may have applied the incorrect unnecessarily high standard of "more likely than not" instead of the mere "reasonable inference of discrimination" standard in assessing whether a prima facie case has been made out. (**See** ***Johnson*** **v.** ***California*** (2005) 545 U.S. 162.) In that situation, the record is reviewed independently to "apply the high court's standard and resolve the legal question whether the record supports an inference that the prosecutor excused a juror" on a prohibited discriminatory basis. (***People*** **v.** ***Adanandus*** (2007) 157 Cal.App.4th 496, 502 [and cases cited therein].

VII. *Batson-Wheeler* Remand Hearings

Sometimes an appellate court will find that the trial judge erred in determining that no prima facie case had been established. In such circumstances, appellate courts will often remand the case to the trial court with orders to conduct a ***Batson-Wheeler*** hearing as if the prima facie case had been made, i.e., the trial court is ordered to go through steps two and three. This allows the prosecutor to provide neutral reasons for excusing the jurors who the defense claimed were removed for discriminatory reasons and allows the trial court to decide whether those neutral reasons are credible. (**See e.g.,** ***People*** **v.** ***Kelly*** (2008) 162 Cal.App.4th 797; ***Paulino*** **v.** ***Harrison*** (9th Cir. 2008) 542 F.3d 692; ***Yee*** **v.** ***Duncan*** (9th Cir. 2006) 441 F.3d 851.)

A. Some General Principles

In ***People*** **v.** ***Kelly*** (2008) 162 Cal.App.4th 797, the court laid out several principles as to how those hearings may be conducted: (i) it is not necessary that the defendant have his original voir dire attorney at the remand hearing; (ii) the prosecutor does not have to be under oath when stating the reasons he or she challenged the juror; (iii) the prosecutor does not have turn over his or her original voir dire notes; and (iv) the defense does not get to cross-examine the prosecutor regarding his or her stated reasons. (**Id.** at pp. 802-805.)

B. Inability to Recall Reason for Exclusion Not Dispositive

In ***Yee*** **v.** ***Duncan*** (9th Cir. 2006) 441 F.3d 851, the defendant was a male dental assistant who had been convicted of sexual battery and lewd acts upon female juvenile patients under anesthesia. The prosecutor excused eight men from the jury, albeit leaving four men on the jury. When the time came for the prosecutor to explain the challenges, she offered gender-neutral reasons for seven of the eight men. However, the prosecutor "could not recall" the reason she excluded the eighth male juror. (**Id.** at pp. 895-896.) The trial judge nonetheless found held there had been "no systematic exclusion of the male gender" and said that it believed the prosecutor's representations to the court and found them unobjectionable. (**Id.** at p. 896.)

The Ninth Circuit upheld the conviction, noting that while failure to provide a reason for bumping a juror at the second step "becomes evidence that is added to the inference of discrimination raised by the prima facie showing," it is not an automatic violation of equal protection. (**Id.** at pp. 899, 900.) To the contrary, the ***Yee*** court held a trial court must still proceed to step three before it can determine that purposeful discrimination has occurred. At that point, the trial court "considers all the evidence to determine whether the ***actual*** reason for the strike violated the defendant's equal protection rights." (**Ibid**, emphasis added by P&A.) The court pointed out that if the rule were otherwise, the "prosecution would then bear the ultimate burden even though only an inference of discrimination had been made" and this would be contrary to the purpose of ***Batson***; namely, getting at "the real reason" why the jurors were stricken. (***Yee***, at p. 899.) "[I]nferences are simply not enough." (**Ibid.**)

Applying the proper standard, the Ninth Circuit found the California appellate court that affirmed the conviction did not act unreasonably since (i) the voir dire testimony suggested a gender-neutral reason why the prosecutor might have wanted to challenge the juror - the juror had served as a juror on a medical malpractice case and such service could well have brought the juror too close to the malpractice issues presented in the defendant's case which arose from acts committed in defendant's dental office; (ii) "the prosecutor twice accepted the jury; and (iii) the prosecutor had non-discriminatory, objectively verifiable reasons for excluding all of the other removed venire members. (**Id.** at p. 901.)

C. Speculation as to Reasons for Bumping a Juror May Be Insufficient

The holding in ***Yee*** should be contrasted to the very recent case of ***Paulino*** **v.** ***Harrison*** (9th Cir.

2008) 542 F.3d 692. In ***Paulino***, the prosecutor used challenges against five of six African-Americans; one African-American remained on the jury. After the prosecutor challenged the fifth African-American venire-member, defense counsel made a ***Wheeler*** objection. The parties conferred with the judge who, after speculating as to why the prosecutor removed the juror, declined to find any prima facie case had been made. The judge pontificated that while "the statistical improbability of five out of six is such [as] to give rise to an inference that these peremptory challenges were in part based upon race[,]" the judge could "see why[the prosecutor] would be uncomfortable with each one of them[.]" (**Id.** at p. 695.)

Defendant challenged this ruling in state courts to no avail and then filed a habeas petition in federal court. After the federal district court also denied the claim, the Ninth Circuit ordered the district court to conduct an evidentiary hearing to give the state an "opportunity to present evidence as to the prosecutor's race-neutral reasons for the apparently-biased pattern of peremptories[.]" (**Id.** at pp. 695-696.)

*Editor's note: When the case was first remanded to the district court, it did not require the prosecutor to state any reasons but simply relied on its own speculation as to the reasons for bumping the jurors. (**Id.** at p. 696.)

At the hearing, the prosecutor testified that she had absolutely no memory of jury selection, nor of her actual reasons for striking any of the venire-members in question; she could not find the notes she had taken during jury selection and reading the voir dire transcript did not refresh her recollection. Moreover, there was nothing in the state court record that reflected her contemporaneous thoughts on why she struck the African-American jurors because the trial court never required her to explain the reasons for the five strikes. Thus, "instead of explaining her actual non-discriminatory reasons for exercising her peremptory challenges, the prosecutor offered hypothetical race-neutral reasons for striking each potential African-American juror in question." (**Id.** at p. 696 [and noting the prosecutor acknowledged that the reasons she articulated were mere speculation drawn from her reading of the voir dire transcript].) The district court found that the prosecution failed to meet its "burden of production" at the second step. (**Id.** at p. 699.)

When the case got back to the Ninth Circuit, the State argued that the prosecutor's testimony, taken as a whole, constituted persuasive circumstantial evidence of her actual non-discriminatory reasons for striking the five African-American venire-members. (**Id.** at p. 699.) However, the Ninth Circuit disagreed. The Ninth Circuit recognized that "[e]vidence of a prosecutor's actual reasons may be direct or circumstantial," (**id.** at p. 700) but held that pure speculation does not qualify "as circumstantial evidence of the prosecutor's actual reasons, simply because it was the prosecutor herself who offered the speculation during the course of an evidentiary hearing." (**Id.** at pp. 701 [and rejecting the idea that it should put any stock in testimony from the prosecutor regarding her "general principles" of jury selection since prosecutor was not sure which principles she considered in selecting jury].)

The *Paulino* court agreed with ***Yee*** that even where the prosecutor does not produce neutral reasons for challenging a juror at the second step, the trial court must proceed to the third step. (*Paulino* at p. 702.) However, the court held that, at step three, "the prima facie showing plus the evidence of discrimination drawn from the state's failure to produce a reason-- will establish purposeful discrimination by a preponderance of the evidence in ***most*** cases." (**Id.** at p. 703, emphasis added by P&A.)

Ultimately, the *Paulino* court concluded that the defense had met its burden of showing impermissible use of peremptory strikes based on (i) the "stark" statistical disparities, i.e., the removal of 83% of the potential African-American jurors; (ii) the pattern in which the prosecutor exercised her peremptory challenges, i.e., the prosecutor never accepted the jury with a black juror other than one seated juror # 2 and " after using two of her first three peremptory challenges against the other two blacks in the jury box at the time, the prosecutor immediately excused each of the three subsequent black jurors called into the jury box;" and (iii) the lack of any evidence of race-neutral reasons to explain the prosecutor's pattern of strikes or the resulting statistical disparities. (**Id.** at p. 703.)

NEXT WEEK: NEW CASES ON

WHETHER A SUSPECT WHO IS ARRESTED AND TAKEN TO JAIL WITH A WEAPON ON HIS PERSON CAN BE CHARGED WITH "VOLUNTARILY" BRINGING THAT WEAPON INTO JAIL?

WHETHER A USE OF A FIREARM CLAUSE CAN BE FOUND WHERE THE FIREARM IS NEVER RECOVERED AND THE WITNESSES CAN'T SAY WHETHER THE FIREARM WAS A TOY?

WHETHER THE PROSECUTION CAN *ALWAYS* ADD AN OFFENSE PROVEN AT THE PX?

WHETHER PARTIES CAN AGREE TO TREAT A COMPLAINT AS AN INFORMATION?

AND WHETHER IT IS ERROR TO PERMIT THE PROSECUTION TO ARGUE A THEORY OF GUILT AT TRIAL BASED ON EVIDENCE NO PRESENTED AT THE PX?

Suggestions for future shows, ideas on how to improve P&A, and other comments or criticisms should be directed to Jeff Rubin at (510) 272-6232. Technical questions should be addressed to Art Garrett at (510) 272-6327. Participatory students: MCLE Evaluation sheets are available on location and certificates of attendance are constructively maintained in your possession in the Ala. Co. Dist.Atty computer banks.

Week Of	Topic	Guest	Elim. of Bias
Nov. 17 2008	RESPONDING TO *BATSON-WHEELER* CHALLENGES (PART III OF III: AN OVERVIEW THE RULES IN LIGHT OF RECENT CASE LAW DEVELOPMENTS: 2005-2008	Jerry Coleman San Francisco Asst District Atty	30 min

Significant Developments in Batson-Wheeler Case Law: 2005-2008

The flow of this P&A memo *roughly* follows the order of topic discussion in the CDAA Prosecutor's Notebook Vol. XXXIII "Mr. Wheeler Goes to Washington (The Full Federalization of Jury Challenge Practice in California) written by San Francisco County Assistant District Attorney Jerry P. Coleman. The P&A memo also reflects the incipient development of a P&A outline. Pagination picks up where the 11/10/08 P&A memo left off.

I. The Basics

A. Who Can Make a *Batson-Wheeler* Motion?

A ***Batson-Wheeler*** objection may be raised by the defense or the prosecution. (***People*** v. ***Wheeler*** (1978) 22 Cal.3d 258, 280, 283, fn. 29; ***People*** v. ***Williams*** (1994) 26 Cal.App.4th Supp. 1, 9; ***Georgia*** v. ***McCollum*** (1992) 505 U.S. 42.)

The defendant need not be a member of the cognizable class the defendant is claiming has been discriminated against in order "to complain of a violation of the representative cross-section rule." (***People*** v. ***Wheeler*** (1978) 22 Cal.3d 258, 281; **see also** ***Powers*** v. ***Ohio*** (1991) 499 U.S. 400.)

B. What Groups are Cognizable Classes for Purposes of *Batson-Wheeler* Challenges?

1. In General

When a party claims a panelist has been struck based on the panelist's membership in a particular group, the key initial issue is whether the group identified is a cognizable class, i.e., does the group represent "an identifiable group distinguished on racial, religious, ethnic, or similar grounds[.]" (***People*** v. ***Wheeler*** (1978) 22 Cal.3d 258, 276.)

2. Sub-Groups Can Be Cognizable Classes

A cognizable class may contain sub-groups that might qualify as a cognizable class. (**See *People* v. *Bell*** (2007) 40 Cal.4th 582, 597-598 [African-American women constitute a cognizable class]; ***People* v. *Motton*** (1985) 39 Cal.3d 596, 605-606 [same]; ***People* v. *Gonzalez*** (2008) 165 Cal.App.4th 620, 631 [indicating Spanish-speaking/unassimilated Hispanics may constitute a cognizable class].)

3. What "Racial" or "Ethnic" Groups Have Been Identified as Cognizable Classes?

a. Asian-Americans

Asian-Americans have been identified as a cognizable class. (**See *Frazier* v. *New York*** (S.D.N.Y. 2002) 187 F.Supp.2d 102, 114-116; ***Rieber* v. *State*** (1994) 663 So.2d 985, 991.) **But see *People* v. *Johnson*** (1989) 47 Cal.3d 1194, where the court proceeded to analyze a defense claim the prosecution improperly excluded "Asian" jurors as if Asians were a cognizable class but nonetheless observed in a footnote that is at least questionable whether "the generic description Asian" could constitute a "cognizable group" (**Id** at p. 1217 and fn. 3.)

b. African-Americans

African-Americans have been identified as a cognizable class. (**See e.g., *People* v. *Wheeler*** (1978) 22 Cal.3d 258.)

c. Chinese-Americans

In ***People* v. *Lopez*** (1991) 3 Cal.App.4th Supp. 11, the court treated two Chinese-Americans as belonging to a cognizable group. It is not clear whether the court distinguished between Chinese-Americans and Asian-Americans. (**Id.** at pp. 14-18.)

d. Filipino-Americans

Filipino-Americans may be a separate cognizable class that is distinct from Asian-Americans. (**See *People* v. *Bell*** (2007) 40 Cal.4th 582, 599 [assuming, but not deciding, whether Filipino-Americans are a distinct group from Asian-Americans]; **cf., *United States* v. *Canoy*** (7th Cir. 1994) 38 F.3d 893, 897 [characterizing Filipino-American as belonging to group of persons of "Asian descent"])

e. Hispanic-Americans

Hispanics have been identified as a cognizable class. (**See e.g. *People* v. *Perez*** (1996) 48 Cal.App.4th 1310, 1315.)

(i) **Can a Spanish-surname suffice to identify a juror as a Hispanic for *Batson-Wheeler* purposes?**

In ***People*** **v.** ***Gutierrez*** (2002) 28 Cal.4th 1083, the court held that "Spanish surnamed" jurors can essentially be deemed a surrogate stand-in for the cognizable class of Hispanics. However, this principle only applies "where no one knows at the time of the challenge whether the Spanish-surnamed juror is Hispanic." (**Id.** at p. 1123.) If a juror is not of Hispanic origin, but only acquires her Hispanic surname through marriage, and indicates on her juror questionnaire and in court that she is not Hispanic, the juror is not Hispanic for ***Batson-Wheeler*** purposes. (at p. 1123.)

In ***People*** **v.** ***Cruz*** (2008) 44 Cal.4th 636, the California Supreme Court declined to address whether the defense had made a prima facie showing of use of discriminatory challenges against Hispanics based on the prosecution's bumping of a juror with a Spanish surname because the juror identified as "white" and only had obtained a Hispanic surname through marriage. (**Id.** at pp. 656-657.)

The ***Cruz*** court acknowledged that that "Spanish surnamed" sufficiently describes a cognizable class "Hispanic" under ***Wheeler***. However, the court stated that is only true "where no one knows at the time of the challenge whether the Spanish-surnamed prospective juror is Hispanic." (**Cruz**, at pp 656-657.) Since, in ***Cruz***, the record reflected the challenged juror was "white" and not of Hispanic origin, it was not proper to even address whether the juror was bumped because she was Hispanic. (*Ibid.*)

(ii) **Are Spanish-speaking Hispanics a separately-recognized cognizable class sub-group?**

In ***People*** **v.** ***Gonzalez*** (2008) 165 Cal.App.4th 620, the prosecutor used his first four challenges to excuse Hispanic jurors, one of whom was identified as JC and the other as FR.* The prosecutor did not ask any question of JC, and no answers on the jury questionnaire stood out. When the prosecutor asked the panel if anyone who spoke Spanish would be able to accept the interpreter's translation, JC did not raise his hand. After a ***Batson-Wheeler*** challenge was brought, the prosecutor stated he excluded JC based on his youth, his lack of significant family ties, and the fact JC was Spanish-speaking, which, the prosecutor said might be a problem when listening to witnesses who were testifying through a Spanish-interpreter. The defense argued that "Spanish-speaking" (as opposed to Hispanic) jurors were a cognizable class and the prosecutor was improperly excluding them. (**Id.** at pp. 624-625.) ***Editor's note**: The court found it unnecessary to discuss the challenge to FR.

The ***Gonzalez*** court recognized that ***Hernandez*** **v.** ***New York*** (1991) 500 U.S. 352 held that the fact a bilingual juror might have difficulty in accepting the translator's rendition was a neutral reason for excluding a juror. (***Gonzalez***, at pp. 628-629 [and noting that this ground was held to be a valid reason for removing two jurors who expressed hesitancy in their ability to follow the interpreter's translation in ***People*** **v.** ***Cardenas*** (2007) 155 Cal.App.4th 1468].)
However, the ***Gonzalez*** court held that the prosecutor was not actually concerned with the ability

of the jurors to follow the rule about ignoring their own interpretation of what a Spanish speaker would say. Rather, the court concluded that the prosecutor had simply provided this reason (as well as the other reasons) to conceal an intent to essentially exclude unassimilated Hispanics (i.e., "those persons who may be perceived as more closely identifying with their national origin and or their Hispanic ethnicity"). (**Id.** at p. 631.) The court disregarded the fact there remained other Hispanics on the panel whom the court assumed were non-Spanish speakers "given the prosecutor's systematic elimination of all Hispanic Spanish speakers. (**Ibid.**)

The ***Gonzalez*** court came to this conclusion because only two panelists raised any question about the requirement of having to adopt the official translation of the testimony. One of them, who the prosecutor never challenged, was a Spanish-speaker but did not have a Hispanic surname (albeit she may have been Hispanic). The other *was* Hispanic and *was* challenged but the prosecutor did not justify his peremptory challenge on the ground the juror would have difficulty adopting the official translation. (**Id.** at p. 630.) Moreover, the court found the other grounds asserted by the prosecutor for excluding JC (i.e., his youth and lack of mature family ties) were pretextual. (**Id.** at pp 631-632.)

f. Native-Americans

Native-Americans have been identified as a cognizable class. (**See *Kesser* v. *Cambra*** (9th Cir. 2006) 465 F.3d 351, 357-358, 360.)

4. What "Religious" Groups Have Been Identified as Cognizable Classes?

The California Supreme Court has held that "religious membership constitutes an identifiable group under ***Wheeler***." (***People* v. *Richardson*** (2008) 43 Cal.4th 959, 984; ***In re Freeman*** (2006) 38 Cal.4th 630, 643.) "Such a practice [religious-based excusals] also violates the defendant's right to equal protection under the Fourteenth Amendment to the United States Constitution." (***People* v. *Richardson*** (2008) 43 Cal.4th 959, 984.) The United States Supreme Court has not yet applied ***Batson*** to forbid group exclusion based on religion, although a number of state and federal courts have done so. (***In re Freeman*** (2006) 38 Cal.4th 630, 643.)

Generally, courts have recognized that while excluding a juror on the basis of belonging to a particular religious group would be impermissible, it is proper to exclude jurors whose religious beliefs would interfere with the duties of a juror. (**See *People* v. *Martin*** (1998) 64 Cal.App.4th 378, 384-385 [challenge of juror who was Jehovah's Witness was upheld based on juror's answer regarding religious principles making it difficult to judge others]; ***People* v. *Richardson*** (2008) 43 Cal.4th 959, 985 [excusing prospective jurors who have a religious bent or bias that would make it difficult for them to impose the death penalty is a proper, nondiscriminatory ground for a peremptory challenge] ***People* v. *Watson*** (2008) 43 Cal.4th 652, 679 [same]; ***People* v. *Cash*** (2002) 28 Cal.4th 703, 725 [same]; **accord *People* v. *Catlin*** (2001) 26 Cal.4th 81, 118-119; ***People* v. *Ervin*** (2000) 22 Cal.4th 48, 76.)

a. Jewish

In *People* v. *Johnson* (1989) 47 Cal.3d 1194, the court proceeded to analyze a defense claim the prosecution improperly excluded Jewish jurors as if Jews were a cognizable class, albeit observing in a footnote that is at least questionable whether a religious group can constitute a "cognizable group." (**Id.** at p. 1217 and fn. 3.)

5. Are Persons Sharing a Sexual Orientation a Cognizable Class?

In *People* v. *Garcia* (2000) 77 Cal.App.4th 1269, the court held that "gays and lesbians" are a cognizable class. (**Id.** at p. 1281.) The court lumped both gays and lesbians together into a single cognizable class without specifically stating whether each might be its own cognizable class. (**See also** Code of Civil Procedure section 231.5 [forbidding peremptory challenges based on sexual orientation].)

6. Are Males or Females a Cognizable Class?

In *J.E.B.* v. *Alabama ex rel. T. B.* (1994) 511 U.S. 127, the court held that equal protection prohibited the exclusion of women from juries on the basis of their gender. (**Id.** at p. 129; **see also** *People* v. *Bonilla* (2007) 41 Cal.4th 313, 343 [treating women as a cognizable class].)

II. What Will or Will Not Be Considered Adequate Justification for Exercising a Peremptory Challenge Against a Juror

A. In General

1. An Attorney Does Not Violate Equal Protection So Long as He or She Has a Genuine Non-Discriminatory Reason for Challenging a Juror - Even if the Reason "Makes No Sense."

In *People* v. *Cruz* (2008) 44 Cal.4th 636, the California Supreme Court reiterated some principles it had espoused in *People* v. *Guerra* (2006) 37 Cal.4th 1067, 1100 and *People* v. *Reynoso* (2003) 31 Cal.4th 903, 919 regarding what constitutes legitimate grounds for a prosecutor to peremptorily challenge a juror: "'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.' [Citation omitted by P&A].) A reason that makes no sense is nonetheless 'sincere and legitimate' as long as it does not deny equal protection." (*Cruz* at p. 655.)

B. Categories of Reasons for Valid Peremptory Challenges

1. Negative Experiences Jurors or Relatives of Jurors Have Had With Law

Enforcement or Hostile Attitude Toward Law Enforcement

There are many cases holding that prior negative contacts or experiences between a juror or a close relative of the juror and law enforcement or the criminal justice system is a neutral reason for a prosecutor to challenge a juror. This can include the juror or the juror's close relative being arrested, prosecuted, and/or convicted of a crime. (**See *People* v. *Cruz*** (2008) 44 Cal.4th 636, 656, fn. 3 [juror's son]; ***People* v. *Watson*** (2008) 43 Cal.4th 652, 677 [same]; ***People* v. *Davis*** (2008) 164 Cal.App.4th 305, 313 [same]; ***People* v. *Avila*** (2006) 38 Cal.4th 491, 554-555 [juror's brother]; ***People* v. *Adanandus*** (2007) 157 Cal.App.4th 496, 504, 509 [juror's brother; juror's son]; ***People* v. *Farnam*** (2002) 28 Cal.4th 107, 138 [juror's nephew]; ***People* v. *Morris*** (2003) 107 Cal.App.4th 402, 409 [same]; ***People* v. *Watson*** (2008) 43 Cal.4th 652, 678 [juror's ex-husband]; ***People* v. *Salcido*** (2008) 44 Cal.4th 93, 140 [juror's boyfriend]; **see also *People* v. *Watson*** (2008) 43 Cal.4th 652, 675 [juror was witness to fatal shooting but was never contacted by police who she felt did not take crime seriously].) "Prosecutors are understandably concerned about retaining such persons on criminal juries." (***People* v. *Calvin*** (2008) 159 Cal.App.4th 1377, 1386.) This reasons remains a neutral ground notwithstanding the juror's assurances that the prior experiences would not impact the juror. (***People* v. *Avila*** (2006) 38 Cal.4th 491, 554-555; ***People* v. *Farnam*** (2002) 28 Cal.4th 107, 138; ***People* v. *Adanandus*** (2007) 157 Cal.App.4th 496, 505.)

2. Juror Holds Belief That the Justice System is Unfair or Expressions of Hostility Toward the Criminal Justice System

a. <u>Belief criminal justice system in general is not fair</u>

"[S]kepticism about the fairness of the criminal justice system is a valid ground for excusing jurors." (***People* v. *Calvin*** (2008) 159 Cal.App.4th 1377, 1386.) In ***People* v. *Cruz*** (2008) 44 Cal.4th 636, the California Supreme Court described the following as two of the "ample nondiscriminatory bases on which to peremptorily excuse" a juror: the juror's feeling that sometimes that system is not fair; the juror's sense that the police were from time to time opinionated about situations and were not willing to consider other possibilities and listen to explanations. (**Id.** at p. 656, fn. 3.)

b. <u>Belief criminal justice system is not fair to certain groups</u>

Sometimes a juror will express a belief that the justice system treats a particular cognizable class unfairly. The belief that the system is biased against members of a certain cognizable class, especially when the defendant is a member of that same class and the juror indicates this belief might bias him or her, constitutes a legitimate reason for challenging that juror. (**See *People* v. *Calvin*** (2008) 159 Cal.App.4th 1377, 1381 [fact juror indicated that the criminal justice system was not fair for Black people, that if you can't pay for a good attorney, the criminal justice system is not fair, and that Blacks are accused wrongfully, get convicted because they don't know their rights or the system or have the means to hire an attorney" and he had concerns

about being fair and impartial" provided neutral grounds for challenging the juror]; ***People* v. *Adanandus*** (2007) 157 Cal.App.4th 496, 504, 507 [fact juror expressed the opinion there was "inherent bias in the criminal justice system against young African-American men" and that it would be difficult for her to "impartial" in the kind of case pending for trial provided neutral reason for challenging juror].)

In ***People* v. *Calvin*** (2008) 159 Cal.App.4th 1377, the court rejected the argument that skepticism toward the criminal justice system is so prevalent among African-Americans that it should be considered a proxy for race and that, as a result, peremptory challenges based on such an attitude should be deemed discriminatory. (**Id.** at p. 1379.) Ironically, if the prosecutor had challenged the juror based solely on the assumption that the defense adopted in ***Calvin***, it would probably **not** be considered a neutral reason. In other words, "[i]f the prosecutor . . . had dismissed the African-American jurors based on his ***assumptions*** about their attitudes, he would have demonstrated the type of group-based discrimination outlawed by both the equal protection clause and the California Constitution's guarantee of a trial by a jury drawn from a representative cross-section of the community." (***People* v. *Calvin*** (2008) 159 Cal.App.4th 1377, 1387.)

However, as long as the challenge is not made based on assumptions that members of the class would hold skeptical views towards the criminal justice system, but rather on actual views expressed by the challenged jurors, it is permissible to challenge the jurors on that basis. (***People* v. *Calvin*** (2008) 159 Cal.App.4th 1377, 1388.) The fact that similar attitudes are held by many other members of the class to which the juror belonged "does not convert the prosecutor's challenge into intentional race-based discrimination." (**Ibid; see also *People* v. *Avila*** (2006) 38 Cal.4th 491, 545 [prosecutor's challenge to juror proper where it was based on juror's *personal* experience that police officers lied, "not on a theoretical perception that she, a member of a minority group, might view the police with distrust"].)

3. Juror is Young, Immature, and/or Lacks Life Experience

Relative youth and immaturity are neutral grounds for excusing a juror. (**See *People* v. *Salcido*** (2008) 44 Cal.4th 93, 140 [19-year old juror].)

In ***People* v. *Cruz*** (2008) 44 Cal.4th 636, the court held that the fact the juror was only 20 years old and "one of youngest, or the youngest" prospective juror" was one of several reasons that did not reflect a "discriminatory intent. (**Id.** at pp. 657-659.)

In ***People* v. *Watson*** (2008) 43 Cal.4th 652, the court held that it was proper for a prosecutor to challenge a juror who, inter alia, was young, inexperienced, and who believed the reason for why the crime rates were increasing was because "Republicans [were] in the presidency" - a reason the prosecutor characterized as "immature." (**Id.** at p. 679.)

In ***People* v. *Salcido*** (2008) 44 Cal.4th 93, the court that it was proper for a prosecutor to challenge a juror who was "immature" as reflected by her "focus on the attention she had

received at work because of the possibility she would be selected as a juror in this case, and on the useful experience she might acquire as a result" and answers she gave indicating she did not appreciate the gravity of the responsibility in a death case. (**Id.** at p. 140; **see also *People* v. *Sims*** (1993) 5 Cal.4th 405, 429-430 [upholding peremptory challenge based upon juror's immaturity].)

Compare ***People* v. *Gonzalez*** (2008) 165 Cal.App.4th 620, a case where the appellate court *disbelieved* a prosecutor's claim a juror was excused for immaturity where the exact age of the juror was not disclosed by the record, the prosecutor claimed the occupation of the juror (clearing utility lines) indicated the juror was lacking maturity but the job could have been a "responsible, permanent, possibly career position", and the prosecutor asserted the juror was single and childless but this was not supported by the record as a fact. (**Id.** at pp. 631-632.)

4. Juror Holds Out of the Mainstream Views Regarding Criminal Laws

In ***People* v. *Adanandus*** (2007) 157 Cal.App.4th 496, the court held it was a legitimate ground to excuse a juror who stated that drugs, including crack cocaine, should be legalized, who was ambivalent about whether he would be able to hold defendant accountable if the offense stemmed from drug dealing, and who was equivocal about the effect his views on the drug laws might have if he was called on as a juror to decide the case. (**Id.** at pp. 505, 510.)

5. Juror is Soft of Crime or Likely Harbors Pro-Defense Bias

If the juror harbors a "generally prodefense partiality or bias," this, by itself, provides a legitimate ground to challenge a juror. (***People* v. *Adanandus*** (2007) 157 Cal.App.4th 496, 507, citing to ***People* v. *Farnam*** (2002) 28 Cal.4th 107, 138; **see also *People* v. *Semien*** (2008) 162 Cal.App.4th 701, 708 [noting prosecutor could rightly be concerned with juror who worked with the "underprivileged" where the term could encompass persons who are "on the defense side of a government prosecution"].)

6. Juror Appears Less Than Forthright or Unbelievable

If a juror gives answers that appear to be inconsistent, less than forthcoming, or provides some other reason for the prosecutor to distrust the juror or believe the juror's responses are not credible, this provides a legitimate ground to challenge a juror. (**See *People* v. *Adanandus*** (2007) 157 Cal.App.4th 496, 500; ***People* v. *Cardenas*** (2007) 155 Cal.App.4th 1468, 1475; **see also *People* v. *Salcido*** (2008) 44 Cal.4th 93, 140 [fact juror less than direct in answering questions relating to his views on the death penalty provided neutral grounds for excusing juror]; ***People* v. *Davis*** (2008) 164 Cal.App.4th 305, 313 [fact juror initially *mistakenly or intentionally* characterized her son as a victim of a DUI driver but later revealed her son had actually been arrested for DUI was, inter alia, a proper basis for challenging the juror].)

7. Juror Gives Answers Indicating Juror Would Have Sympathy for Persons in

Defendant's Situation

If a juror expresses attitudes reflecting a belief that a defendant's social environment or history might excuse or mitigate his or her criminal behavior, this can provide neutral grounds for challenging a juror. (**See *People* v. *Watson*** (2008) 43 Cal.4th 652, 673-675 [proper to excuse juror who said her childhood friend had committed murders but did not deserve the death penalty because of the neighborhood he grew up in and fact friend came from single parent home].)

8. Juror Has Life Experiences That Might Make the Juror Overly Sympathetic to, or Biased Towards, a Person in the Defendant's Position

If a juror has had experiences that might cause her to sympathize or empathize with the criminal defendant on trial, this can provide neutral grounds for excusing the juror. (**See *People* v. *Watson*** (2008) 43 Cal.4th 652, 676 [proper to challenge juror who, inter alia, had brother who worked in CYA and sometimes would tell her "a sad story from an inmate's point of view"]; ***People* v. *Salcido*** (2008) 44 Cal.4th 93, 140 [juror's own history of alcoholism resulting in a court martial and abusive behavior toward his family was proper ground for excusing juror because it could predispose him to bias in favor of a defendant who might use alcoholism as mitigation in a death penalty case].)

People* v. *Watson (2008) 43 Cal.4th 652, 673-674, 680 [fact juror has had substantial exposure to gang members such that it might make it more difficult for her to impose the death penalty in a gang-related drive-by shooting case was neutral reason to exercise a challenge against the juror].)

9. Juror Has Life Experiences That Might Cause the Juror to Question Some Aspect of the Prosecution Case

If a juror expresses sentiments or has prior experiences that might bear on how the prosecution's case is viewed (i.e., doubts about the validity of certain types of evidence or certain types of witnesses), this can provide neutral grounds for challenging the juror. (**See *People* v. *Watson*** (2008) 43 Cal.4th 652, 676 [fact juror had trouble describing her own assailant when she was a victim of purse snatching, inter alia, provided neutral grounds for challenging a juror in a case dependent on identification testimony].)

10. Juror Has Religious Beliefs That Might Affect His or Her Decision

If a person's religious beliefs would make it difficult for the juror to convict or impose a penalty, this can provide neutral grounds for challenging a juror. (**See** this P&A memo, I-B-4, at p. 24.)

11. Juror Expresses an Unwillingness or Reluctance to Follow the Law

a. Reluctance to Follow Law in General

In ***People*** **v.** ***Howard*** (2008) 42 Cal.4th 1000, the court held that it was proper to challenge a juror who indicated that he would "negotiate" with the judge if there was a law or instruction that differed from the juror's own opinion or belief. (**Id.** at p. 1017.)

b. Holding People to Higher Burden of Proof

In ***People*** **v.** ***Watson*** (2008) 43 Cal.4th 652, the court held the fact the juror indicated he might hold the prosecution to a higher burden of proof than beyond a reasonable doubt was a neutral reason for challenging a juror. (**Id.** at pp. 679-680.)

c. Accepting Interpreter's Translation Despite Coming to a Different Translation

The failure of a bilingual juror to accept a translator's rendition of what a witness has testified to, regardless of the juror's own interpretation is a neutral reason for challenging a juror. (**See** ***Hernandez*** **v.** ***New York*** (1991) 500 U.S. 353, 361, ***People*** **v.** ***Cardenas*** (2007) 155 Cal.App.4th 1468, 1476-1477.)

12. Juror's Attitude and Behavior During Court Proceedings

a. Late to Court

In ***People*** **v.** ***Watson*** (2008) 43 Cal.4th 652, the court held the fact a juror was twice late to court provided grounds for the prosecutor to believe the juror was irresponsible and that this was, inter alia, a legitimate ground for challenging the juror. (**Id.** at pp. 679-680.) Similarly, in ***People*** **v.** ***Davis*** (2008) 164 Cal.App.4th 305, the court found, inter alia, the fact the juror was not punctual provided neutral grounds for challenging the juror. (**Id.** at pp. 312-313.)

b. Inattention

In ***People*** **v.** ***Davis*** (2008) 164 Cal.App.4th 305, the court found, inter alia, the fact the juror was inattentive provided neutral grounds for challenging the juror. (**Id.** at pp. 315.)

c. Arrogant or Flippant Attitude

In ***People*** **v.** ***Howard*** (2008) 42 Cal.4th 1000, the court cited to a trial judge's observation that the juror was "arrogant, flippant" in finding the prosecutor was justified in challenging one juror and observed that another juror was properly challenged because, inter alia, the juror's responses revealed a flippant attitude toward the proceeding and suggested he was trying to avoid jury service. (**Id.** at pp. 1017, 1019 [and noting the latter juror had written prosecutors "are trickly

(sic) people," and that defense attorneys "will say anything"].)

d. Attempt to Avoid Jury Service

In ***People*** **v.** ***Howard*** (2008) 42 Cal.4th 1000, the court cited to a trial judge's observation that the juror was "trying to get off the panel" in upholding the trial court's finding the prosecutor had properly challenged the juror. (**Id.** at p. 1019.)

e. Reluctance to Answer Questions

In ***People*** **v.** ***Howard*** (2008) 42 Cal.4th 1000, the court stated "[a]n advocate may legitimately be concerned about a prospective juror who will not answer questions." (**Id.** at p. 1019 [and pointing out that there was no prima facie showing a juror was discriminated against where, inter alia, one of the challenged jurors declined to fill out substantial portions of the jury questionnaire, marking "confidential" on "almost all of his answers"].)

13. Juror Lacks Mental Ability to Understand the Issues or Proceedings

In ***People*** **v.** ***Watson*** (2008) 43 Cal.4th 652, the court held the fact a juror, inter alia, exhibited significant confusion about the death penalty determination provided a neutral ground for removing the juror. (**Id.** at p. 682.) In ***People*** **v.** ***Davis*** (2008) 164 Cal.App.4th 305, the court found that, inter alia, the fact a juror seemed very confused, sat in the wrong chair, did not seem to be able to follow the court's instructions, and appeared dazed and somewhat unresponsive provided neutral grounds for challenging the juror. (**Id.** at pp. 312-313.)

14. Juror Lacks Psychological Ability to Focus on the Trial

In ***People*** **v.** ***Gutierrez*** (2002) 28 Cal.4th 1083, the court held that "[f]actors indicating a difficulty or inability to focus on the evidence may serve to justify a peremptory challenge." (**Id.** at p. 1124; **see also** ***Mitchell*** **v.** ***Superior Court*** (1984) 155 Cal.App.3d 624, 628.)

In ***People*** **v.** ***Gutierrez*** (2002) 28 Cal.4th 1083, the court held prosecutor was justified in challenging a juror on grounds her ability concentrate or fairly deliberate on the evidence would be compromised where the juror appeared extremely emotional and overwhelmed by outside stresses, repeatedly referred to her "nerves" and to being under considerable stress, and cried twice during voir dire. (**Id.** at p. 1124.)

15. Juror Has Difficulty Making a Decision

In ***People*** **v.** ***Fiu*** (2008) 165 Cal.App.4th 360, the juror repeatedly expressed a concern that it might be difficult for her to make a decision regarding guilt if the defendant was present in the courtroom. This was found to be a neutral reason for removing the juror. (**Id.** at p. 395.)

16. Juror Has Previous Served on a Hung Jury

The fact a panelist has previously served on a jury that was unable to reach a verdict "constitutes a legitimate concern for the prosecution, which seeks a jury that can reach a unanimous verdict[.]" (***People*** **v.** ***Farnam*** (2002) 28 Cal.4th 107, 138; ***People*** **v.** ***Turner*** (1994) 7 Cal.4th 137, 170.)

17. Juror Directly or Indirectly Expresses Reluctance to Impose the Death Penalty in a Death Penalty Case

Statements or attitudes of a juror that reflect a reluctance to impose the death penalty provide neutral reasons for excusing the juror. (**See** ***People*** **v.** ***Watson*** (2008) 43 Cal.4th 652, 673-675, 679-681 [juror did not believe friend deserved death penalty despite friend committing multiple murders; juror said she would vote against death penalty if on the ballot and her death penalty determination might be swayed by her religious views; juror was uncertain whether could impose death penalty; juror indicated he would not vote for the death penalty if it was on the ballot due to his religious beliefs].)

"A prosecutor may exercise peremptory challenges against prospective jurors who are not so intractably opposed to the death penalty that they are subject to challenge for cause under the ***Witt-Wainwright*** standard, but who nonetheless are substantially opposed to the death penalty." ***People*** **v.** ***Salcido*** (2008) 44 Cal.4th 93, 139-140; **see also** ***People*** **v.** ***Zambrano*** (2007) 41 Cal.4th 1082, 1104-1107; ***People*** **v.** ***Jurado*** (2006) 38 Cal.4th 72, 106.)

18. Juror (or Spouse of Juror) is Employed in a Job or Engages in Activities That Reflect an Orientation Toward Rehabilitation and Sympathy for Defendants

a. Counselors

In ***People*** **v.** ***Adanandus*** (2007) 157 Cal.App.4th 496, the court found a prosecutor could properly excuse a juror because, inter alia, the juror worked as a school counselor in the Americorps program (a program that focused primarily on rehabilitation) and this "might maker her more partial to the defense[.]" (**Id.** at p. 507.)

In ***People*** **v.** ***Ervin*** (2000) 22 Cal.4th 48, the court held it was proper to excuse a juvenile counselor who believed in rehabilitation on grounds this might cause her to reject the death penalty. (**Id.** at p. 75; **see also** ***People*** **v.** ***Adanandus*** (2007) 157 Cal.App.4th 496, 507.)

b. Attorneys and Employees of Attorneys and Their Spouses

In ***People*** **v.** ***Barber*** (1988) 200 Cal.App.3d 378, the court held it was proper to excuse a juror whose *spouse* worked for a "liberal attorney." (**Id.** at pp. 389-394; **see also** ***People*** **v.** ***Adanandus***

(2007) 157 Cal.App.4th 496, 507.)

c. Drug Treatment Affiliation

In ***People*** **v.** ***Landry*** (1996) 49 Cal.App.4th 785, the court held it was proper to excuse a juror who, inter alia, was on the board of a drug treatment program. (**Id.** at pp. 789-790; **see also** ***People*** **v.** ***Adanandus*** (2007) 157 Cal.App.4th 496, 508.)

d. Nursing Assistants

In ***People*** **v.** ***Davis*** (2008) 164 Cal.App.4th 305, the court held it was proper for a prosecutor to excuse a juror who was a certified nursing assistant based on the prosecutor's *own personal bad experiences , outside of court*, with nursing assistants. (**Id.** at p. 313.)

e. Psychologists/Psychiatrists

In ***People*** **v.** ***Landry*** (1996) 49 Cal.App.4th 785, the court held it was proper to excuse a juror who, inter alia, had a background in psychiatry or psychology. (**Id.** at pp. 789-790. **see also** ***People*** **v.** ***Adanandus*** (2007) 157 Cal.App.4th 496, 508.)

f. Religious Leaders

In ***People*** **v.** ***Semien*** (2008) 162 Cal.App.4th 701, the court held a prosecutor had legitimate grounds for challenging a pastor who dealt with homeless people since the pastor was "in the business of forgiveness," and the prosecutor was not required to accept the pastors' assurance that he could find someone guilty." (**Id.** at p. 708.)

g. Teachers

In ***People*** **v.** ***Landry*** (1996) 49 Cal.App.4th 785, the court held it was proper to excuse a juror who, inter alia, was a teacher. (**Id.** at pp. 789-790; **see also** ***People*** **v.** ***Adanandus*** (2007) 157 Cal.App.4th 496, 507.) In ***People*** **v.** ***Barber*** (1988) 200 Cal.App.3d 378, the court held it was proper to excuse a juror because the juror was a teacher and prosecutor believed teachers tended to be liberal and "less prosecution oriented." (**Id.** at pp. 389-394; **see also** ***People*** **v.** ***Adanandus*** (2007) 157 Cal.App.4th 496, 507.)

h. Social Service Type Work

If a juror has a background in, or is employed in, social service type work, this can provide neutral grounds for challenging the juror. (**See** ***People*** **v.** ***Watson*** (2008) 43 Cal.4th 652, 677 [proper to excuse a juror who, inter alia, was a social worker]; ***People*** **v.** ***Landry*** (1996) 49 Cal.App.4th 785, 789-790 [proper to excuse a juror who, inter alia, had worked in a youth services agency]; **accord** ***People*** **v.** ***Adanandus*** (2007) 157 Cal.App.4th 496, 508; ***People*** **v.** ***Turner*** (1994) 8 Cal.4th 137,

170[proper to excuse a juror who had trained with the Department of Social Services].) Indeed, even if someone close to the juror has a background or job in social work, this can provide neutral grounds for challenging the juror. (**See *People* v. *Semien*** (2008) 162 Cal.App.4th 701, 707-708 [proper to excuse a juror who, inter alia, had a wife working in the county welfare department].)

C. Can a prosecutor challenge a juror based on the prosecutor's own personal biases against members of a profession?

Although it is fairly well-established that a prosecutor can rely on stereotypical assumptions about persons involved in certain occupations tilting toward the defense (**see** this P&A memo, above, at pp. 31-33), can a prosecutor's idiosyncratic hostility towards members of a particular profession provide neutral grounds for challenging a juror?

In ***People* v. *Davis*** (2008) 164 Cal.App.4th 305, the prosecutor challenged a juror who was a certified nursing assistant (CNA) because of the prosecutor's own personal bias against CNAs stemming from the bad experiences the prosecutor had outside of court with CNAs who were working in her father's nursing home. This was found to be a neutral reason for challenging the juror, notwithstanding a lack of any assertion that CNAs lean toward the defense from an objective standpoint. (**Id.** at p. 313.)

D. Is a prosecutor required to assume a juror's responses are true?

The fact that a juror provides an answer that "contradicts" the basis for the prosecutor's challenge does not mean the prosecutor's reason will be held pretextual. (**See e.g.,*Rice* v. *Collins*** (2006) 546 U.S. 333, 341 [notwithstanding young juror's oral response she could be impartial, prosecutor entitled to believe juror's youth and lack of ties to the community would make her a bad juror for the prosecution]; ***People* v. *Cardenas*** (2007) 155 Cal.App.4th 1468, 1477 [prosecutor had legitimate reasons for removing a bilingual juror on grounds the prosecutor believed the juror would refuse to accept an interpreter's translation over the juror's own translation even though juror ultimately agreed to abide by interpreter's translation]; ***People* v. *Gutierrez*** (2002) 28 Cal.4th 1083, 1124 [prosecutor justified in removing a juror on grounds the juror might harbor bad feelings toward the police despite the juror's claim otherwise; prosecutor was entitled to disregard a juror's claim that her emotional state and stressful circumstances would not interfere with her ability to consider the evidence where the juror repeatedly referred to her "nerves" and to being under considerable stress, cried twice during voir dire, and the unduly "emotional" state of the juror was confirmed by the judge].)

Numerous cases have held that a prosecutor is entitled to dismiss a juror who has had negative contacts with law enforcement the criminal justice system or have close relatives who had such negative contacts, notwithstanding the juror's assurances that the prior experiences would not impact the juror. (***People* v. *Avila*** (2006) 38 Cal.4th 491, 554-555; ***People* v. *Farnam*** (2002) 28 Cal.4th 107, 138; ***People* v. *Adanandus*** (2007) 157 Cal.App.4th 496, 505.)

III. The Use of Comparative Analysis to Assess the Existence of a Discriminatory Motive

Comparative analysis refers to a mechanism that courts use to try to "flush out" the actual motivation of the party accused of using his or her peremptory challenges in a discriminatory fashion. In doing a comparative analysis, the court reviews the reasons given for the challenge as to the particular juror and then looks to see if those reasons would apply equally to other jurors (not belonging to the same cognizable class as the challenged juror) who were not challenged. If there are two jurors who have given very similar responses, one of whom belongs to the cognizable class and one of whom does not, and the party has only challenged the juror in the cognizable class on the purported basis of a response given by *both* jurors, an inference can arise that the purported basis of the challenge is a pretext designed to conceal a discriminatory purpose.

Although courts applying comparative analysis sometimes engage in a very simplistic or superficial comparisons, "overlapping responses alone are not enough to demonstrate purposeful discrimination." (***People*** **v.** ***Calvin*** (2008) 159 Cal.App.4th 1377, 1389, citing to ***People*** **v.** ***Lewis and Oliver*** (2006) 39 Cal.4th 970, 1020.) "To prove such a claim, a defendant must engage in a careful side-by-side comparative analysis to demonstrate that the dismissed and retained jurors were "similarly situated." (***People*** **v.** ***Calvin*** (2008) 159 Cal.App.4th 1377, 1389, citing to ***People*** **v.** ***Lewis and Oliver*** (2006) 39 Cal.4th 970, 1016-1024; **see also** ***People*** **v.** ***Watson*** (2008) 43 Cal.4th 652, 672-682 [rejecting numerous claims that jurors were similarly situated for comparative analysis purposes where both booted and seated jurors were similar in some aspects but different in others].)

There were several significant decisions that came out of the United States Supreme Court and California Supreme Court in the past couple of years regarding the use of comparative analysis by both trial courts and appellate courts in order to assess the existence of a discriminatory motive. These cases are discussed in depth, below, to highlight "comparative analysis" in action.

A. ***Snyder*** **v.** ***Louisiana*** (2008) 128 S.Ct. 1203

Facts

In ***Snyder***, the prosecutor exercised peremptory challenges against all five black panelists. (**Id.** at p. 1207.) However the Supreme Court focused on the prosecutor's reasons for challenging just one of those panelists. In the first phase of jury selection, the court inquired of panelists whether jury service would result in extreme hardship. The panelist explained that he was a college senior who needed to complete his student-teaching requirement to graduate and expressed concern that jury service would cause him to miss classes. The trial court contacted the university dean, who gave assurances that he would work with the panelist to make up classes.

After receiving this information, the panelist expressed no further concern and the prosecutor did not question him further on the issue. (**Id.** at pp. 1209-1210.)

In explaining this peremptory challenge, the prosecutor offered two race-neutral reasons. First, he stated the panelist appeared nervous throughout the voir dire questioning. Second, the prosecutor claimed to be apprehensive that, in order to minimize the student-teaching hours missed during jury service, the panelist might have been motivated to find the defendant guilty of a lesser included offense, thus obviating the need for a penalty phase proceeding. (**Id.** at p. 1210.) Although defense counsel disputed both explanations, the trial court said it was "going to allow the challenge." The trial and penalty phases concluded two days after the panelist was struck. (**Id.** at p. 1210.)

Held:

1. While recognizing that deference to the trial judge "is especially appropriate where a trial judge has made a finding that an attorney credibly relied on demeanor in exercising a strike[,]" the court found no such deference was due in the instant case (i.e., the court would not presume that the trial judge credited the prosecutor's explanation of nervousness) because the trial court "responded to the prosecutor's two proffered reasons by simply allowing the challenge without explanation." (**Id.** at p. 1209.)

2. The court characterized the prosecutor's explanation that the juror might be motivated to convict of something less than a first degree murder in order to save time in the penalty phase as "highly speculative" and pointed out that the fact the actual trial and penalty phase only lasted two days indicated that serving on a jury would not have seriously interfered with panelist's ability to complete his required student teaching. (**Id.** at p. 1210.)

3. The court also found that the implausibility of the prosecutor's explanation was reinforced by the prosecutor's acceptance of white jurors who disclosed conflicting obligations that appear to have been at least as serious as that of the bumped panelist. The court observed, for example, the prosecutor did not express a similar concern about one white juror who offered substantially more pressing work and family reasons as to why jury service would cause him hardship or about another white juror who claimed that in order to serve he would have to cancel an urgent appointment at which his presence was essential. (**Id.** at pp. 1211-1212.)

4 The court recognized that "a retrospective comparison of jurors based on a cold appellate record may be very misleading when alleged similarities were not raised at trial. In that situation, an appellate court must be mindful that an exploration of the alleged similarities at the time of trial might have shown that the jurors in question were not really comparable." (**Id.** at p. 1211.)

Nevertheless, the court held, it was proper to do a comparative analysis in the instant case since "the shared characteristic, i.e., concern about serving on the jury due to conflicting obligations, was thoroughly explored by the trial court when the relevant jurors asked to be excused for

cause." (**Id.** at p. 1211.)

B. *Rice* v. *Collins* (2006) 546 U.S. 333

Facts

In ***Rice***, the issue before the court was whether the prosecutor had improperly challenged a young female African-American juror (identified as juror 16). The prosecutor provided the following explanations for striking Juror 16: she had rolled her eyes in response to a question from the court; she was young and might be too tolerant of a drug crime; she was single; and she lacked ties to the community. (**Id.** at pp. 336-337.) The prosecutor also referred to the fact the juror was female but the trial court did not rely on the last ground. The trial court stated it did not observe the demeanor of the juror the prosecutor complained about. Nonetheless, the trial court noted the prosecutor's rationale for removing the juror because she was youthful was supported by the prosecutor's challenge of other youthful jurors outside the cognizable class at issue. (**Id.** at p. 337.)

When the case got to the Ninth Circuit by way of habeas, the Ninth Circuit found that there was "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding" regarding the trial court's finding that the prosecutor's reason for removing the juror (i.e. her youth) was credible. The Ninth Circuit gave three reasons for finding the trial court's determination (and a subsequent state court of appeal's upholding of the determination) to be unreasonable. First, the prosecutor erroneously referred to another prospective African-American juror's age as being young when that other juror was a grandmother. Second, the prosecutor improperly attempted to use gender as a basis for exclusion. Third, the prosecutor's explanation that she struck the juror in part because of her youth and lack of ties to the community was belied by the fact the juror replied affirmatively when asked if she believed the crime with which defendant was charged should be illegal and disclaimed any other reason she could not be impartial. The Ninth Circuit believed the "eye rolling" claim was not credible in light of the aforementioned factors. (**Id.** at p. 349-341.)

Held

1. The ***Collins*** court overruled the Ninth Circuit, noting that the trial court "had the benefit of observing the prosecutor firsthand over the course of the proceedings," and took the Ninth Circuit to task for attempting "to use a set of debatable inferences to set aside the conclusion reached by the state court[.]" (**Id.** at p. 342.) In support of its finding that the Ninth Circuit should not have granted the defendant's writ of habeas corpus, the ***Collins*** court addressed each of the Ninth Circuit's reasons for finding the prosecutor's explanation for removing the juror was a pretext.

2. First, in response to the Ninth Circuit's claim the prosecutor could not be believed because she characterized one juror who was a grandmother as young, the ***Collins*** court stated that "it is quite plausible that the prosecutor simply misspoke with respect to a juror's numerical designation, an

error defense counsel may also have committed. It is a tenuous inference to say that an accidental reference with respect to one juror, Juror 19, undermines the prosecutor's credibility with respect to Juror 16. Seizing on what can plausibly be viewed as an innocent transposition makes little headway toward the conclusion that the prosecutor's explanation was clearly not credible." (**Id.** at p. 340.)

3. Second, in response to the Ninth Circuit's claim the trial court should have questioned the prosecutor's credibility because of her "attempt to use gender as a race-neutral basis for excluding Jurors 016 and 019," the ***Collins*** court said the Ninth Circuit "assigned the gender justification more weight than it can bear. The prosecutor provided a number of other permissible and plausible race-neutral reasons, and [defendant] provides no argument why this portion of the colloquy demonstrates that a reasonable factfinder must conclude the prosecutor lied about the eye rolling and struck Juror 16 based on her race." (**Id.** at p. 340.)

4. Third, as to the Ninth Circuit's skepticism (in light of the juror's oral response she thought the crime should be illegal and she could be impartial) regarding the prosecutor's stated concern regarding Juror 16's youth and lack of ties to the community, the ***Collins*** court stated: notwithstanding these oral averments of the juror, it was "not unreasonable to believe the prosecutor remained worried that a young person with few ties to the community might be less willing than an older, more permanent resident to impose a lengthy sentence for possessing a small amount of a controlled substance. [Citation omitted by P&A]. Even if the prosecutor was overly cautious in this regard, her wariness of the young and the rootless could be seen as race neutral, for she used a peremptory strike on a white male juror, Juror 6, with the same characteristics." (**Id.** at p. 341.)

C. *People* v. *Lenix* (2008) 44 Cal.4th 602

Facts:

In ***Lenix***, the defense claimed that the prosecution improperly exercised a peremptory challenge against a black female panelist (i.e., a member of the venire). During the course of questioning, the panelist stated that "murder aspect" of the case concerned her. When the prosecutor followed up by asking if there was something beyond what might trouble anybody about murder charges, the panelist said, "The fact someone lost a life." (**Id.** at p. 609.) The prosecutor asked if anyone close to the panelist had been involved in something like that. The panelist answered that her sister's husband, to whom she was close, had been murdered 10 or 11 years ago. When asked if the murder was gang related, the panelist said it was. The prosecutor asked which gang committed the offense, and the panelist replied no one had ever been arrested. In response to further questions from the prosecutor, the panelist said she did not have any trouble with law enforcement for failing to make an arrest and would not hold the experience against the defendant. The panelist said there was nothing else the parties needed to know about the murder or any "similar situations." (**Id.** at p. 609.)