prima facie case of discrimination. This is done "by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose." (***Johnson v. California*** (2005) 545 U.S. 162, 168.)

In determining whether this burden has been met, courts must keep in mind that "[s]ubject to rebuttal, a ***presumption exists that a peremptory challenge is properly exercised***, and the burden is upon the opposing party to demonstrate impermissible discrimination against a cognizable group." (***People* v. *Salcido*** (2008) 44 Cal.4th 93, 136; ***People* v. *Neuman*** (2009) 176 Cal.App.4th 571, 579, emphasis added.)

The California Supreme Court has identified what a trial court may consider in assessing whether a prima facie case has been made:

> Though proof of a prima facie case may be made from any information in the record available to the trial court, we have mentioned "certain types of evidence that will be relevant for this purpose. Thus the party may show that his opponent has struck most or all of the members of the identified group from the venire, or has used a disproportionate number of his peremptories against the group. He may also demonstrate that 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. Next, the showing may be supplemented when appropriate by such circumstances as the failure of his opponent to engage these same jurors in more than desultory voir dire, or indeed to ask them any questions at all. Lastly, ... the defendant need not be a member of the excluded group in order to complain of a violation of the representative cross-section rule; yet if he is, and especially if in addition his alleged victim is a member of the group to which the majority of the remaining jurors belong, these facts may also be called to the court's attention." (***People* v. *Bell*** (2007) 40 Cal.4th 582, 597.)

In addition, a court may consider whether the prosecutor has passed on panel containing jurors who are members of the cognizable class at issue (see ***People* v. *Streeter*** (2012) 54 Cal.4th 205, 224; ***People* v. *Dement*** (2011) 53 Cal.4th 1, 20; ***People* v. *Clark*** (2012) 52 Cal.4th 856, 903-908; ***People* v. *Carasi*** (2008) 44 Cal.4th 1263, 1294-1295) and/ or fought to keep such jurors over a defense challenge for cause (**see *People* v. *Streeter*** (2012) 54 Cal.4th 205, 224;

People* v. *Jones (2011) 51 Cal.4th 346, 362). Whether there is evidence of the historical practice of the prosecutor or the prosecutor's office of discriminatory jury selection practice is also relevant in assessing whether an inference of discriminatory purpose can arise. (**See *Miller-El v. Dretke*** (2005) 545 U.S. 231, 253, 264-266.)

Finally, a court may consider whether its *own* observations of the jurors suggested neutral grounds for the challenges made by the prosecutor. (***People* v. *Neuman*** (2009) 176 Cal.App.4th 571, 580.)

Some common issues that arise at the first stage of the ***Batson-Wheeler*** motion are discussed below:

Can a challenge to a single member of a cognizable class establish a prima facie case?

Although the term "systematic exclusion" is sometimes used "to describe a discriminatory use of peremptory challenges. . . . [t]he term is not apposite in the ***Wheeler*** context, for a single discriminatory exclusion may violate a defendant's right to a representative jury." (***People* v. *Fuentes*** (1990) 54 Cal.3d 707, 716, fn. 4; **accord *People* v. *Taylor*** (2010) 48 Cal.4th 574, 642; ***People* v. *Montiel*** (1993) 5 Cal.4th 877, 909; **see also *People* v. *Reynoso*** (2003) 31 Cal.4th 903, 927, fn. 8 ["the unconstitutional exclusion of even a single juror on improper grounds of racial or group bias requires the commencement of jury selection anew"].)

It is **not** necessary that the party making a ***Batson-Wheeler*** challenge show a "pattern of systematic exclusion." Rather, one way of making a showing of a prima facie case is by showing a pattern of systematic exclusion. (**See *People* v. *Avila*** (2006) 38 Cal.4th 491, 549.) That being said, it important to understand why challenging one or two members of a cognizable group will rarely, if ever, ***by itself***, establish a prima facie case of purposeful discrimination ***in the absence of*** any additional evidence of purposeful discrimination.

This is because when the party making the ***Batson-Wheeler*** motion can point to no evidence ***other than*** the fact a party has challenged one or two members of cognizable group, the party is essentially asking the court to draw an inference of discrimination from the fact one party has excused 'most or all' members of the cognizable group," and thus is "necessarily relying on an apparent pattern in the party's challenges" (***People v. Bell*** (2007) 40 Cal.4th 582, 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** ***People* v. *Bonilla*** (2007) 41 Cal.4th 313, 343; ***People* v. *Hamilton*** (2009) 45 Cal.4th 863, 899 [agreeing with trial judge that the challenge of the only [African-American] subject to challenge was insufficient *in and of itself* to suggest a pattern].) Simply put, 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], **see also** ***People* v. *Garcia*** (2011) 52 Cal.4th 706, 744-750 [noting it is "'impossible,' as a practical matter, to draw the requisite inference where only a few members of a cognizable group have been excused and no indelible pattern of discrimination appears"]; ***People* v. *Christopher*** (1991) 1 C.A.4th 666, 672, 673 [challenge of one or two prospective jurors of same racial or ethnic group as defendant, even when panel contains no other members of group, does not establish prima facie case unless there is significant supporting evidence].)

Obviously, the greater the number of members of the cognizable group at issue challenged by the party accused of violating ***Batson-Wheeler***, the greater the likelihood an inference of impermissible exclusion will arise. (**See e.g.,** ***Miller-El* v. *Dretke*** (2005) 545 U.S. 231, 240-241 [fact nine of ten African-Americans struck considered in finding discriminatory use].) However, in the absence of any evidence ***other than*** sheer numbers, courts routinely reject the argument that the burden of making a prima facie case has been met just because multiple members of a cognizable group have been challenged. (**See** ***People* v. *Taylor*** (2010) 48 Cal.4th 574, 643 [fact prosecutor exercised three of ten peremptory challenges to excuse two African-American prospective jurors and one Hispanic prospective juror "without more, is insufficient to create an inference of discrimination, especially where, as here, the number of peremptory challenges at issue is so small"]; ***People v. Hawthorne*** (2009) 46 Cal.4th 67, 79-80, [no prima facie showing where the defendant's motion was based solely on the assertion that the prosecutor used three of 11 peremptories to excuse African-American prospective jurors]; ***People* v. *Bonilla*** (2007) 41 Cal.4th 313, 343-344 [excusal of three out of four Hispanics, in a case where defendant was also Hispanic, did not create a prima facie case];

People v. Bell (2007) 40 Cal.4th 582, 598 [excusal of two out of three African-Americans did not create prima facie showing]; ***People v. Box*** (2000) 23 C.4th 1153, 1185 [no prima facie case where basis for claim was that two prospective jurors were both African-American and so was the defendant]; ***People* v. *Jones*** (1998) 17 C.4th 279, 293 [evidence supported ruling that there was no prima facie case of group bias in peremptory challenges of four African-Americans even though challenges left no African-American jurors on panel]; ***People* v. *Crittenden*** (1994) 9 C.4th 83, 119, 120, fn. 3 [excusal of all members of defendant's race does not automatically establish prima facie case; declining to follow contrary holdings of lower federal courts]; ***People v. Adanandus*** (2007) 157 Cal.App.4th 496, 503-504 [no prima facie case despite fact three African-American jurors challenged by prosecution where, inter alia, African-American juror remained on panel]; ***People* v. *Allen*** (1989) 212 Cal.App.3d 306, 312-313 [exclusion of disproportionate number of minority jurors does not by itself establish prima facie case; ***Wheeler*** motion properly denied where record showed specific bias as ground for each of nine peremptory challenges against Blacks and Hispanics]; cf. ***Williams* v. *Runnels*** (9th Cir.2006) 432 F.3d 1102, 1103-1107 [use of three of first four peremptories against African-American jurors where only four of the first 49 prospective jurors were African-American was a statistical disparity that alone could create a prima facie showing albeit recognizing other facts could dispel the presumption].)1

Moreover, while a prosecutor's excusal of ***all*** members of a cognizable group may establish a prima facie case, this fact alone is not conclusive to such a showing. (***People* v. *Hoyos*** (2007) 41 Cal.4th 872, 901; ***People* v. *Neuman*** (2009) 176 Cal.App.4th 571, 575.)

Should the trial court engage in a "comparative analysis" at the prima facie level?

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

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1. California cases finding no prima facie case prior to the holding in ***Johnson* v. *California*** (2005) 545 U.S. 162 are less persuasive insofar as what constitutes a prima facie showing than post-***Johnson*** cases in light of ***Johnson***'s holding that a prima facie case only requires a defendant challenging a peremptory excusal to show an "inference" the challenge was for an impermissible group bias, rather than the "more likely than not" standard used in California before ***Johnson***. (**Id.** at 168-173.)

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. (**See *Miller El v. Dretke*** (2005) 545 U.S. 231, 241; ***Cook* v. *LaMarque*** (9th Cir. 2010) 593 F.3d 810, 815.)

If the trial court reserves ruling on the ***Batson-Wheeler*** motion until after the parties have completed their jury selection, then a properly conducted comparative analysis may be helpful in supporting or dispelling a claim an attorney is exercising a challenge for impermissible reasons.

However, if the trial court decides to rule upon a ***Batson-Wheeler*** motion before jury selection is completed, then comparative analysis is less helpful as a means of supporting an inference the challenges are being exercised for a permissible purpose. This is because the removed jurors may only be compared to other removed jurors. The removed jurors cannot be compared to jurors who have not been removed because it is unknown which jurors still sitting will not later be removed. (**See *People v. Riccardi*** (2012) 54 Cal.4th 758, 796 [declining to consider prospective jurors who were removed by defense peremptory challenges in conducting a comparative analysis because it was "impossible to conclude that the prosecutor had no concerns about [these jurors]" considering that the prosecutor, for tactical reasons, sometimes passed on jurors the prosecution would thereafter challenge"].)

Comparative analysis is generally useless for purposes of determining whether a first stage prima facie case has been established unless the prosecutor proffers reasons for challenging jurors. "Whatever use comparative juror analysis might have in a third-stage case for determining whether a prosecutor's proffered justifications for his [or her] strikes are pretextual, it has little or no use where the analysis does not hinge on the prosecution's actual proffered rationales." (***People* v. *Taylor*** (2010) 48 Cal.4th 574, 617.)

Comparative analysis may also be used to affirmatively support an inference that a prosecutor is not using his or her challenges in an impermissible manner (aka "reverse

comparative analysis"). If there are two jurors who have given very similar responses, one who belongs to the cognizable class and one who does not, and the party has challenged both jurors for the same reason, then an inference can arise that the purported basis of the challenge is not a pretext designed to conceal a discriminatory purpose. (See ***People v. Jackson*** (1996) 13 Cal.4th 1164, 1254.) This form of comparative analysis may potentially be conducted even at the prima facie level if some of the jurors who have been challenged are not from the same cognizable class as the juror who was purportedly improperly struck.

This bench memo discusses "comparative analysis" in greater detail under its discussion of the third stage of a ***Batson-Wheeler*** motion, at pp. 16-17.

Should a court allow the party to state reasons for use of the challenge if the court finds no prima case is made?

If the trial court does not find a prima facie of discrimination, it is not necessary to proceed to the second 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.)

However, the California Supreme Court has repeatedly ***recommended*** that the judge allow the prosecutor to place his reasons for excusing jurors belonging to the cognizable class on the record, notwithstanding the lack of any prima facie finding. (See ***People* v. *Taylor*** (2010) 48 Cal.4th 574, 616; ***People* v. *Bonilla*** (2007) 41 Cal.4th 313, 343, fn. 13; ***People* v. *Mayfield*** (1997) 14 Cal.4th 668, 723-724.) Indeed, it is recommended that this be done *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.) This is because doing so "may assist the trial court in evaluating the challenge and will certainly assist reviewing courts in fairly assessing whether any constitutional violation has been established." (***People* v. *Bonilla*** (2007) 41 Cal.4th 313, 343, fn. 13; ***People* v. *Adanandus*** (2007) 157 Cal.App.4th 496, 500.)

Second Step: Justifications for Challenge

The second step occurs after a finding that the totality of the relevant facts creates an

inference of discriminatory purpose. Once a prima facie case is made, the "'burden shifts to the [party who originally challenged the juror] to explain adequately the racial [or other cognizable class] exclusion' by offering permissible . . . neutral justifications for the strikes." (***Johnson* v. *California*** (2005) 545 U.S. 162, 168 [bracketed portions and other modifications added by author].) The burden in this second step is merely "the burden of production." (***Paulino* v. *Harrison*** (9th Cir. 2008) 542 F.3d 692, 699.)

The party who originally challenged the juror must then provide a "'clear and reasonably specific' explanation of his 'legitimate reasons' for exercising the challenges." (***People* v. *Lenix*** (2008) 44 Cal.4th 602, 613, citing to ***Batson* v. *Kentucky*** (1986) 476 U.S. 79, 98, fn. 20.)

"Certainly a challenge based on racial prejudice would not be supported by a legitimate reason." (***People* v. *Lenix*** (2008) 44 Cal.4th 602, 613.) On the other hand, a legitimate reason is simply "one that does not deny equal protection" and "a prosecutor may rely on any number of bases to select jurors[.]" (***People* v. *Lenix*** (2008) 44 Cal.4th 602, 613, citing to ***Purkett* v. *Elem*** (1995) 514 U.S. 765, 769.)

"The justification need not support a challenge for cause, and even a 'trivial' reason, if genuine and neutral, will suffice." (***People* v. *Lenix*** (2008) 44 Cal.4th 602, 613.) "A prospective juror may be excused based upon facial expressions, gestures, hunches, and even for arbitrary or idiosyncratic reasons." (**Ibid**; ***People* v. *Mills*** (2010) 48 Cal.4th 158, 176; **see also *Williams v. Rhoades*** (9th Cir. 2004) 354 F.3d 1101, 1109 [noting "demeanor, tone, and facial expressions" may lead to a "hunch" or "suspicion" that the juror might be biased.) The "'second step of this process does not demand an explanation that is persuasive, or even plausible'; so long as the reason is not inherently discriminatory, it suffices." (***Rice* v. *Collins*** (2006) 546 U.S. 333, 338.)

The types of neutral reasons for excusing a juror are too innumerable to list. However, some typical grounds include:

(i) a juror's relative youth and immaturity (**see *Rice* v. *Collins*** (2006) 546 U.S. 333, 341; ***People* v. *Salcido*** (2008) 44 Cal.4th 93, 140; ***People* v. *Cruz*** (2008) 44 Cal.4th 636, 657-659);

(ii) a juror's flippant or informal attitude is similarly a legitimate reason for excusing a

juror (see ***Thaler*** **v.** ***Haynes*** (2010) 130 S.Ct. 1171, 1172; ***People*** **v.** ***Howard*** (2008) 42 Cal.4th 1000, 1017, 1019);

(iii) a juror's reluctance to follow the law (**see** ***People*** **v.** ***Howard*** (2008) 42 Cal.4th 1000, 1017; ***People v. Watson*** (2008) 43 Cal.4th 652, 679-680; ***Gonzalez v. Brown*** (9th Cir. 2009) 585 F.3d 1202, 1205, 1209-1210);

(iv) the juror or close relative of the juror has a criminal background or has had a negative experience with the criminal justice system (see ***People*** **v.** ***Cruz*** (2008) 44 Cal.4th 636, 656, fn. 3; ***People*** **v.** ***Avila*** (2006) 38 Cal.4th 491, 554-555; ***People*** **v.** ***Farnam*** (2002) 28 Cal.4th 107, 138);

(v) the juror is skeptical about the fairness of the criminal justice (see ***People v. Elliott*** (2012) 53 Cal.4th 535, 569; ***People*** **v.** ***Clark*** (2012) 52 Cal.4th 856, 907; ***People v. Calvin*** (2008) 159 Cal.App.4th 1377, 1386);

(vi) the juror has life experiences that might make the juror overly sympathetic to, or biased towards, a person in the defendant's position (**see** ***People*** **v.** ***Watson*** (2008) 43 Cal.4th 652, 676; ***People*** **v.** ***Salcido*** (2008) 44 Cal.4th 93, 140);

(vii) the juror (or close relative of juror) is employed in a job or engages in activities that reflect an orientation toward rehabilitation and sympathy for defendants (**see** ***People v. Ervin*** (2000) 22 Cal.4th 48, 75; ***People*** **v.** ***Neuman*** (2009) 176 Cal.App.4th 571, 586; ***People*** **v.** ***Adanandus*** (2007) 157 Cal.App.4th 496, 507; ***People*** **v.** ***Barber*** (1988) 200 Cal.App.3d 378, 389-394.)

(viii) the juror is, or appears to be, lying or evasive, and/or gives less than forthright or unbelievable answers (see ***People v. Thomas*** (2011) 51 Cal.4th 449, 472, 475; ***People*** **v.** ***Booker*** (2011) 51 Cal.4th 141, 166-167; ***People v. Welch*** (1999) 20 Cal.4th 701, 746);

(ix) the juror has religious beliefs or biases that might affect his or her decision (**see** ***People*** **v.** ***Mills*** (2010) 48 Cal.4th 158, 184; ***People*** **v.** ***Richardson*** (2008) 43 Cal.4th 959, 985; ***People*** **v.** ***Martin*** (1998) 64 Cal.App.4th 378, 384);

(x) the "juror's attitude, attention, interest, body language, facial expression and eye contact" (***People*** **v.** ***Elliott*** (2012) 53 Cal.4th 535, 569; ***People*** **v.** ***Lenix*** (2008) 44 Cal.4th 602, 622-623);

(xi) the juror's appearance, including clothing, hairstyle, or other accoutrements (**see** ***People*** **v.** ***Elliott*** (2012) 53 Cal.4th 535, 568-570; ***People*** **v.** ***Wheeler*** (1978) 22 Cal.3d 258,

275; ***People* v. *Rushing*** (2011) 197 Cal.App.4th 801, 808.)

(xii) the juror lacks the mental or psychological ability to understand or focus on the issues at trial (**see *People* v. *Davis*** (2008) 164 Cal.App.4th 305, 312-313 ***People* v. *Gutierrez*** (2002) 28 Cal.4th 1083, 1124; ***People* v. *Welch*** (1999) 20 Cal.4th 701, 746);

(xii) the juror previously served on a deadlocked jury (**see *People* v. *Garcia*** (2011) 52 Cal.4th 706, 749; ***People* v. *Farnam*** (2002) 28 Cal.4th 107, 138; ***People* v. *Turner*** (1994) 7 Cal.4th 137, 170);

(xiii) the juror may experience hardship or difficulties in serving that may distract the juror from focusing (**see *People* v. *Clark*** (2012) 52 Cal.4th 856, 907; ***People* v. *Jenkins*** (2000) 22 Cal.4th 900, 994, 1044, ***People* v. *Neuman*** (2009) 176 Cal.App.4th 571, 585-586).

(xiv) the juror or a family member of the juror is unemployed or underemployed (***People v. Thomas*** (2011) 51 Cal.4th 449, 472-473, 475; ***People v. Jones*** (2011) 51 Cal.4th 346, 363 ; ***Stubbs v. Gomez*** (9th Cir.1999) 189 F.3d 1099, 1106).

Some common issues that arise at the second stage of the ***Batson-Wheeler*** motion are discussed below:

Should the court allow a prosecutor to explain his or her reasons for excluding a juror outside the presence of defense counsel?

In general, 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]; ***Ayala v. Wong*** (9th Cir. 2012) 693 F.3d 945 [finding error in ***People* v. *Ayala*** (2000) 24 Cal.4th 243 was prejudicial]; ***United States* v. *Thompson*** (9th Cir. 1987) 827 F.2d 1254, 1260 [reversible error to hold ex parte hearing on prosecutor's explanations]; **but see *United States v. Alcantar*** (9th Cir. 1990) 897 F.2d 436, 438, fn. 2[recognizing 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. Thompson*** (9th Cir. 1987) 827 F.2d 1254, 125 [same].)

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

A prosecutor may challenge a juror based on the prosecutor's personal bad luck with members of a particular profession. (**See *People* v. *Rushing*** (2011) 197 Cal.App.4th 801, 812 [citing with approval ***Johnson v. State*** (1996) 266 Ga. 775, 470 S.E.2d 637, 639, a case from Georgia that upheld the challenge to a juror who was a postal worker on the ground that "postal workers, in the prosecutor's experience, do not make good jurors"]; ***People v. Davis*** (2008) 164 Cal.App.4th 305, 313 [upholding prosecutor's challenging 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, notwithstanding a lack of any assertion that CNAs lean toward the defense from an objective standpoint].)

Third Step: Assessment of Credibility

At the third step, if a "neutral explanation is tendered, the trial court must then decide . . . whether the opponent of the strike has proved purposeful racial discrimination." (***Johnson* v. *California*** (2005) 545 U.S. 162, 168.) The proper focus is on "the ***subjective genuineness*** of the race-neutral reasons given for the peremptory challenge, not on the objective reasonableness of those reasons." (***People* v. *Reynoso*** (2003) 31 Cal.4th 903, 924; ***People* v. *Adanandus*** (2007) 157 Cal.App.4th 496, 506, emphasis added.)

"[T]he issue comes down to whether the trial court finds the prosecutor's race-neutral explanations to be credible. Credibility can be measured by, among other factors, the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy." (***People* v. *Lenix*** (2008) 44 Cal.4th 602, 613, citing to ***Miller-El* v. *Cockrell*** (2003) 537 U.S. 322, 339; **see also *Lewis v. Lewis*** (9th Cir. 2003) 321 F.3d 824, 830 ["A finding of discriminatory intent turns largely on the court's evaluation of the prosecutor's credibility"].) 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." (***People* v. *Lenix*** (2008) 44 Cal.4th 602, 625.)

In assessing credibility, the court draws upon its contemporaneous observations of the

voir dire. It may also rely on the court's own experiences as a lawyer and bench officer in the community, and even the common practices of the advocate and the office who employs him or her." (***People* v. *Lenix*** (2008) 44 Cal.4th 602, 613, citing to ***People* v. *Wheeler*** (1978) 22 Cal.3d 258, 282.)2

Significantly, this case law makes it clear that when a court finds that a prosecutor has committed a ***Batson-Wheeler*** violation, notwithstanding the fact the prosecutor has presented race-neutral reasons for excusing a juror, the court is finding the prosecutor has lied to the court. The serious nature of this finding helps explain why "[a] presumption exists that a prosecutor has exercised his or her peremptory challenges in a constitutional manner." (***People* v. *Cleveland*** (2004) 32 Cal.4th 704, 732, ***People* v. *Crittenden*** (1994) 9 Cal.4th 83, 114.)

As noted before, "[t]he ultimate burden of persuasion regarding racial motivation rests with, ***and never shifts from, the opponent of the strike***." (***People* v. *Lenix*** (2008) 44 Cal.4th 602, citing to ***Rice* v. *Collins*** (2006) 546 U.S. 333, 338; **see also *Yee* v. *Duncan*** (9th Cir. 2006) 463 F.3d 893, 895, citing ***Purkett* v. *Elem*** (1995) 514 U.S. 765, 768, emphasis added.) This necessarily means that if a court is unsure whether a juror has been removed for discriminatory purposes, or if the reasons for believing a challenge was exercised in a discriminatory fashion do not outweigh the reasons for believing the challenge was made for a non-discriminatory purpose, no finding of a discriminatory purpose should be made.

In making the determination of whether the defendant has proven purposeful discrimination at the third step, the court may take into consideration all the factors it can take

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2. The training provided by Alameda County District Attorney's office on ***Batson-Wheeler*** issues over the past decade has **unequivocally** condemned the discriminatory use of peremptory challenges. New prosecutors are informed that using peremptory challenges in a discriminatory manner in selecting jurors is not only immoral and unethical; it is self-defeating to remove an otherwise favorable juror for the prosecution based on racial or ethnic stereotypes. On the other hand, prosecutors are also cautioned that if they are properly motivated, they must not be dissuaded from exercising a challenge out of fear that they will be subjected to a ***Batson-Wheeler*** challenge (and the attendant possibility that it will be erroneously granted). ***Batson-Wheeler*** motions may arise based on a genuine difference in perspective: a juror who appears to the prosecutor to obviously be a "bad juror" for the prosecution may appear to the defense counsel as a juror who the prosecutor should, but for the juror's membership in a cognizable group, want to keep on the jury and vice versa. However, occasionally attorneys use challenges improperly as a strategic weapon in order to distract the opposing attorney or render the opposing attorney "gun shy" in exercising peremptory challenges against jurors who are unfavorably disposed to the opposing attorney but belong to the cognizable class at issue.

into consideration at the prima facie level. (See this bench memo at p. 4; ***People* v. *Wheeler*** (1978) 22 Cal.3d 258, 282.)

"Both court and counsel bear responsibility for creating a record that allows for meaningful review." (***People* v. *Lenix*** (2008) 44 Cal.4th 602, 621.) "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.)

Although a judge may not be able to observe every gesture, expression or interaction relied upon by the prosecutor (i.e. 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), the trial "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." (***People* v. *Lenix*** (2008) 44 Cal.4th 602, 625.)

"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." (***People* v. *Lenix*** (2008) 44 Cal.4th 602, 625-626.)

In sum, if the court is going to deny the challenge, 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." (***People* v. *Lenix*** (2008) 44 Cal.4th 602, 621.)

Some common issues that arise at the third stage of the ***Batson-Wheeler*** motion are discussed below:

In stating grounds for removing a juror, is the court or the prosecutor required to assume the 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. "[T]he prosecution is not required to accept at face value a prospective juror's assurance that, despite an answer indicating the contrary, she would have no problem being neutral." (***People* v. *Rushing*** (2011) 197 Cal.App.4th 801, 812; **see also *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, for example, 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. (**See e.g., *People* v. *McKinzie*** (2012) 54 Cal.4th 1302, 1321-1322; ***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.)

In conducting a comparative analysis (see this bench memo, at p. 7), how "similarly situated" do the jurors used for comparison purposes have to be?

At the third stage of a ***Batson-Wheeler*** motion a trial court may a conduct a comparative analysis in deciding whether purposeful discrimination has been shown. A comparative juror analysis involves comparing "panelists who were struck with those who were allowed to serve or were passed by the prosecution before being ultimately struck by the defense." (***People v. Lomax*** (2010) 49 Cal.4th 530, 572, fn. 14.) If the proffered reason for striking a member of the cognizable class at issue applies just as well to an otherwise-similar

juror who is not a member of the cognizable class and that only the latter is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at the third step. (See ***People v. Lomax*** (2010) 49 Cal.4th 530, 572.)

However, courts must avoid 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 jurors were similarly situated for comparative analysis purposes where jurors compared were similar in some aspects but different in others].)

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. (***People v. Lenix*** (2008) 44 Cal.4th 602, 624.) "'Myriad subtle nuances' not reflected on the record may shape an attorney's jury selection strategy, 'including attitude, attention, interest, body language, facial expression and eye contact.'" (***People v. Hartsch*** (2010) 49 Cal.4th 472 [110 Cal.Rptr.3d 673, 695, fn. 16].)

The manner of a juror is often "more indicative of the real character of his opinion that his words." (***People v. Lenix*** (2008) 44 Cal.4th 602, 622.) 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.) Moreover, "[w]hile 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.)

Finally, 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.)

V.
REMEDY FOR A *BATSON-WHEELER* VIOALATION

The traditional remedy sanction for a ***Batson-Wheeler*** violation was laid out in ***People v. Wheeler*** (1978) 22 Cal.3d 258: "when either party in a criminal case succeeds in showing that the opposing party has improperly exercised peremptory challenges to exclude members of a cognizable group, the court must dismiss all the jurors thus far selected, and quash the remaining venire." (**Id.** at p. 282, ***People v. Willis*** (2002) 27 Cal.4th 811, 813.) This remedy was also recognized as one means of responding to an attorney's discriminatory use of a peremptory challenge in ***Batson v. Kentucky*** (1986) 476 U.S. 79, although the High Court expressed "no view on whether it is more appropriate in a particular case, upon a finding of discrimination against black jurors, for the trial court to discharge the venire and select a new jury from a panel not previously associated with the case . . . or to disallow the discriminatory challenges and resume selection with the improperly challenged jurors reinstated on the venire[.]" (**Id.** at p. 99, fn. 24.)

In ***People v. Willis*** (2002) 27 Cal.4th 811, the California Supreme Court noted that the sanction of dismissal for a ***Batson-Wheeler*** violation was not mandated by the federal Constitution and expressly approved of the use of other remedies for a ***Batson-Wheeler*** violation than simply dismissing the panel and restarting jury selection: A trial court, acting ***with the consent of the aggrieved party***, "has discretion to consider and impose remedies or sanctions short of outright dismissal of the entire jury venire." (***Willis***, at pp. 814, 821, emphasis added.) Among the suggested alternative remedies: reseating of the juror, imposition of monetary sanction, and (in dicta) allowing the aggrieved party additional challenges. (**Id.** at p. 821 [albeit suggesting, at p. 824, that imposing monetary sanctions may not effectively vindicate the interests impacted by the improper use of jury challenges].)

However, the remedy of reseating should not be imposed if the challenged juror has already been discharged. (**See *People v. Willis*** (2002) 27 Cal.4th 811, 823; ***People v. Muhammed*** (2003) 108 Cal.App.4th 313, 323 [noting trial court could not use the sanction of reseating bumped jurors because the prospective jurors had already been excused].) This remedy should only be imposed with the consent or assent of the aggrieved party. (***Willis***, at p. 823.) Although the defense may be deemed to have implicitly, rather than expressly consented to the remedy of reseating a juror by submitting to the trial judge's announcement of that remedy (the defendant himself has no personal right to express waiver of dismissal of the jury panel), it is preferable for a trial judge to seek express consent of the aggrieved party. (***People v. Overby*** (2004) 124 Cal.App.4th 1237, 1245-1246.) "[I]f the complaining party does effectively waive its right to mistrial, preferring to take its chances with the remaining venire, ordinarily the court should honor that waiver rather than dismiss the venire and subject the parties to additional delay." (***Willis***, at p. 824.) The *Willis* court seemed to suggest that alternative sanctions are most appropriately imposed in situations "in which the remedy of mistrial and dismissal of the venire accomplish nothing more than to reward improper voir dire challenges and postpone trial." (**Id.** at pp. 821, 824.)

There is a concern that if a challenged juror is kept on the jury after the juror has become aware he or she has been challenged, the juror might hold it against the attorney who exercised the challeng – a concern magnified if the juror figures out the challenge was disallowed because the attorney purportedly challenged the juror for improper reasons.

Accordingly, the *Willis* court approved the use of having peremptory challenges made at sidebar outside the jury's presence, followed by appropriate disclosure in open court as to successful challenges, so that any successful ***Wheeler*** objection could be ruled on, and any improperly challenged jurors retained, without revealing to them which party had attempted their removal. (***Willis*** at pp. 819, 821.)

DATED:

Respectfully submitted,
NANCY E. O'MALLEY
DISTRICT ATTORNEY

BATSON-WHEELER OUTLINE
TABLE OF CONTENTS

Part II
Jan 14
2013

I. *Batson-Wheeler*: A 5-Minute Summary

A. Constitutional Basis

"It is well settled that '[a] prosecutor's use of peremptory challenges to strike prospective jurors on the basis of group bias—that is, bias against members of an identifiable group distinguished on racial, religious, ethnic, or similar grounds—violates the right of a criminal defendant to trial by a jury drawn from a representative cross-section of the community under article I, section 16 of the California Constitution. [Citations.] Such a practice also violates the defendant's right to equal protection under the Fourteenth Amendment to the United States Constitution. [Citations.]' " (***People* v. *Hamilton*** (2009) 45 Cal.4th 863, 898, citing to ***People* v. *Wheeler*** (1978) 22 Cal.3d 258 and ***Batson* v. *Kentucky*** (1986) 476 U.S. 79.)

A motion claiming a prosecutor exercised his or her peremptory challenges on the basis of group bias is entitled a ***Wheeler*** motion or a ***Batson*** motion or a ***Batson/Wheeler*** motion. However the motion is entitled, the standards and procedures utilized are the same. (***People* v. *Cowan*** (2010) 50 Cal.4th 401, 446, 447; **accord *Crittenden* v. *Ayers*** (9th Cir. 2010) 624 F.3d 943, 951, fn. 2 ["***Wheeler*** is considered the California procedural equivalent of ***Batson***" and "a ***Wheeler*** motion serves as an implicit ***Batson*** objection.) Until the jury is sworn, a ***Batson-Wheeler*** motion should be raised by motion to quash or dismiss the jury, not by a motion for mistrial. (***People* v. *Williams*** (1997) 16 C.4th 635, 662, fn. 9.)

B. Basic Procedure When a Claim is Made That an Attorney is Exercising His or Her Challenges in an Unconstitutionally Discriminatory Manner

For both federal and state constitutional claims, there is a three-step inquiry whenever a ***Batson-Wheeler*** challenge is made by either the defense or the prosecution. (***People* v. *Lenix*** (2008) 44 Cal.4th 602, 612-613.) The analysis begins, however, with a "presumption a party exercising a peremptory challenge is doing so on a constitutionally permissible ground." (***People* v. *Wheeler*** (1978) 22 Cal.3d 258, 278.)

1. First step

a. The party objecting to the challenge has the burden of making out a prima facie case "by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose." (***Johnson* v. *California*** (2005) 545 U.S. 162, 168; ***People* v. *Clark*** (2012) 52 Cal.4th 856, 906.)

b. Although the term "systematic exclusion" is sometimes used "to describe a discriminatory use of peremptory challenges, . . . [t]he term is not apposite in the ***Wheeler*** context, for a single discriminatory exclusion may violate a defendant's right to a representative jury." (***People* v. *Fuentes*** (1990) 54 Cal.3d 707, 716, fn. 4; **accord *People* v. *Montiel*** (1993) 5 Cal.4th 877, 909; **see also *People* v. *Reynoso*** (2003) 31 Cal.4th 903, 927, fn. 8 ["the unconstitutional exclusion of even a single juror on improper grounds of racial or group bias requires the commencement of jury selection anew"]; **but see *People* v. *Garcia*** (2011) 52 Cal.4th 706, 744-750 [discussing why it is very difficult, if not practically impossible to *draw an inference* of discrimination solely on the basis of a challenge to a single juror]; ***People* v. *Bell*** (2007) 40 Cal.4th 582, 598 [similar]; **this** outline, section V-B at pp. 30-32.

c. When a ***Batson-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.)

d. "The three-step ***Batson*** analysis, however, is not so mechanistic that the trial court must proceed through each discrete step in ritual fashion." (***People*** **v.** ***Battle*** (2011) 198 Cal.App.4th 50, 60; ***People*** **v.** ***Adanandus*** (2007) 157 Cal.App.4th 496, 500.)

e. A trial court may invite the prosecutor to state neutral reasons for the challenged strikes before announcing its finding on whether a defendant met the first step of the ***Batson*** test by making out a prima facie case of discrimination. (***People*** **v.** ***Bonilla*** (2007) 41 Cal.4th 313, 343, fn. 13; ***People*** **v.** ***Adanandus*** (2007) 157 Cal.App.4th 496, 500.) Indeed, the California Supreme Court has repeatedly recommended that the judge allow the prosecutor to place his reasons for excusing jurors belonging to the cognizable class on the record, *notwithstanding* the lack of any prima facie finding. (**See** ***People*** **v.** ***Taylor*** (2010) 48 Cal.4th 574, 616; ***People*** **v.** ***Bonilla*** (2007) 41 Cal.4th 313, 343, fn. 13; ***People*** **v.** ***Mayfield*** (1997) 14 Cal.4th 668, 723-724.) This can be done even before the trial judge makes its determination that a prima facie case has not been made out by the defense as doing so "may assist the trial court in evaluating the challenge and will certainly assist reviewing courts in fairly assessing whether any constitutional violation has been established." (***People*** **v.** ***Bonilla*** (2007) 41 Cal.4th 313, 343, fn. 13; ***People*** **v.** ***Adanandus*** (2007) 157 Cal.App.4th 496, 500.) Note though, that if a trial court asks for (*and accepts*) the reasons provided by the prosecution, a reviewing court will later view what occurred as a "first stage/third stage ***Batson*** hybrid," eschew the question of whether a prima facie case was made, skip to ***Batson***'s third stage and evaluate the prosecutor's reasons for dismissing the prospective jurors. (**See** ***People*** **v.** ***McKinzie*** (2012) 54 Cal.4th 1302, 1320; this outline, section XI-A-2.)

2. Second step

Once a prima facie case is made, the "'burden shifts to the [party who originally challenged the juror] to explain adequately the racial [or other cognizable class] exclusion' by offering permissible . . . neutral justifications for the strikes." (***Johnson*** **v.** ***California*** (2005) 545 U.S. 162, 168 [bracketed portions and other modifications added by author].) The burden in this second step is merely "the burden of production." (***Paulino*** **v.** ***Harrison*** (9th Cir. 2008) 542 F.3d 692, 699.)

The party who originally challenged the juror must then provide a "'clear and reasonably specific' explanation of his 'legitimate reasons' for exercising the challenges." (***People*** **v.** ***Lenix*** (2008) 44 Cal.4th 602, 613, citing to ***Batson*** **v.** ***Kentucky*** (1986) 476 U.S. 79, 98, fn. 20.) "Certainly a challenge based on racial prejudice would not be supported by a legitimate reason." (***People*** **v.** ***Lenix*** (2008) 44 Cal.4th 602, 613.)

On the other hand, a legitimate reason is simply "one that does not deny equal protection" and "a prosecutor may rely on any number of bases to select jurors[.]" (***People*** **v.** ***Lenix*** (2008) 44 Cal.4th 602, 613, citing to ***Purkett*** **v.** ***Elem*** (1995) 514 U.S. 765, 769.)

Thus, "[t]he justification need not support a challenge for cause, and even a 'trivial' reason, if genuine and neutral, will suffice." (***People*** **v.** ***Jones*** (2011) 51 Cal.4th 346, 360; ***People*** **v.** ***Lenix*** (2008) 44 Cal.4th 602, 613.) "A prospective juror may be excused based upon facial expressions, gestures, hunches, and even for arbitrary or idiosyncratic reasons." (***People*** **v.** ***Jones*** (2011) 51 Cal.4th 346, 360; ***People*** **v.** ***Lenix*** (2008) 44 Cal.4th 602, 613.) The "'second step of this process does not demand an explanation that is persuasive, or even plausible'; so long as the reason is not inherently discriminatory, it suffices." (***Rice*** **v.** ***Collins*** (2006) 546 U.S. 333, 338.)

Editor's note: For a more thorough discussion of what reasons are, or are not, legitimate, **see** this outline, section VI-C at pp 47-70.

3. Third step

If a "neutral explanation is tendered, the trial court must then decide . . . whether the opponent of the strike has proved purposeful racial [or other cognizable group] discrimination." (***Johnson* v. *California*** (2005) 545 U.S. 162, 168 [bracketed portion added by author].) The proper focus is on "the subjective genuineness of the race-neutral reasons given for the peremptory challenge, not on the objective reasonableness of those reasons." (***People* v. *Reynoso*** (2003) 31 Cal.4th 903, 924; ***People* v. *Adanandus*** (2007) 157 Cal.App.4th 496, 506.)

At the third step, "the issue comes down to whether the trial court finds the prosecutor's race-neutral explanations to be credible. Credibility can be measured by, among other factors, the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy." (***People* v. *Jones*** (2011) 51 Cal.4th 346, 360; ***People* v. *Lenix*** (2008) 44 Cal.4th 602, 613, citing to ***Miller-El* v. *Cockrell*** (2003) 537 U.S. 322, 339; **accord *Felkner* v. *Jackson*** (2011) 131 S.Ct. 1305, [issue of whether prosecutor improperly challenged juror "turns largely on an 'evaluation of credibility'"]; ***Snyder* v. *Louisiana*** (2008) 552 U.S. 472, 477 ["the best evidence [of discriminatory intent] often will be the demeanor of the attorney who exercises the challenge"]; ***People* v. *Cox*** (2010) 187 Cal.App.4th 337, 343 ["often, the best evidence of a prosecutor's intent in exercising a peremptory challenge is his or her demeanor when explaining why a prospective juror was excused"].) 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." (***People* v. *Lenix*** (2008) 44 Cal.4th 602, 625.)

In assessing credibility, the court draws upon its contemporaneous observations of the voir dire. "It may also rely on the court's own experiences as a lawyer and bench officer in the community, and even the common practices of the advocate and the office who employs him or her." (***People* v. *Lenix*** (2008) 44 Cal.4th 602, 613, citing to ***People* v. *Wheeler*** (1978) 22 Cal.3d 258, 282; ***People v. Lomax*** (2010) 49 Cal.4th 530, 571.)

"In addition, race-neutral reasons for peremptory challenges often invoke a juror's demeanor (e.g., nervousness, inattention), making the trial court's first-hand observations of even greater importance. In this situation, the trial court must evaluate not only whether the prosecutor's demeanor belies a discriminatory intent, but also whether the juror's demeanor can credibly be said to have exhibited the basis for the strike attributed to the juror by the prosecutor." (***Snyder* v. *Louisiana*** (2008) 552 U.S. 472, 477 128 S.Ct. 1203, 1208; ***People* v. *Jones*** (2011) 51 Cal.4th 346, 360; ***People* v. *Lenix*** (2008) 44 Cal.4th 602, 613.)

Although a judge may not be able to observe every gesture, expression or interaction relied upon by the prosecutor (i.e., 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), the trial "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." (***People* v. *Lenix*** (2008) 44 Cal.4th 602, 625.) "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." (***People* v. *Lenix*** (2008) 44 Cal.4th 602, 625-626.)

"Both court and counsel bear responsibility for creating a record that allows for meaningful review." (***People* v. *Lenix*** (2008) 44 Cal.4th 602, 621.)

"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; **see also *People v. Long*** (2010) 189 Cal.App.4th 826, 848 [finding unverified and generalized statements about a juror's body language or way of expressing himself are insufficient to support a finding of legitimacy – at least where there exist other reasons to question the judge's acceptance of the prosecutor's reasons].) **Ed. Note**: ***Long*** is discussed in greater depth in this outline, section VI-C-16 at p. 61].)

While a "trial court is not required to make specific or detailed comments for the record to justify every instance in which a prosecutor's race-neutral reason for exercising a peremptory challenge is being accepted by the court as genuine" (***People* v. *Vines*** (2011) 51 Cal.4th 830, 848), if the court is going to deny the challenge, 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." (***People* v. *Lenix*** (2008) 44 Cal.4th 602, 621.)

"The ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike." (***People* v. *Lenix*** (2008) 44 Cal.4th 602, citing to ***Rice* v. *Collins*** (2006) 546 U.S. 333, 338; **see also *Yee* v. *Duncan*** (9th Cir. 2006) 463 F.3d 893, 895, citing ***Purkett* v. *Elem*** (1995) 514 U.S. 765, 768.) "The burden of proof at step three is a preponderance of the evidence." (***Crittenden* v. *Ayers*** (9th Cir. 2010) 624 F.3d 943, 954-955.)

C. Remedy for a *Batson-Wheeler* Violation

The traditional remedy/sanction for a ***Batson-Wheeler*** violation was laid out in ***People v. Wheeler*** (1978) 22 Cal.3d 258: "when either party in a criminal case succeeds in showing that the opposing party has improperly exercised peremptory challenges to exclude members of a cognizable group, the court must dismiss all the jurors thus far selected, and quash the remaining venire." (**Id.** at p. 282; ***People* v. *Willis*** (2002) 27 Cal.4th 811, 813; ***Batson v. Kentucky*** (1986) 476 U.S. 79, 99, fn. 23 [recognizing this remedy as one potential remedy].) In ***People v. Willis*** (2002) 27 Cal.4th 811, the California Supreme Court also approved of the use of other remedies for a ***Batson-Wheeler*** violation: A trial court, acting ***with the consent of the aggrieved party***, "has discretion to consider and impose remedies or sanctions short of outright dismissal of the entire jury venire." (***Willis***, at pp. 814, 821, emphasis added.) Among the suggested alternative remedies: reseating of the juror, imposition of monetary sanction, and (in dicta) allowing the aggrieved party additional challenges. (**Id.** at p. 821 [albeit suggesting, at pp. 823-824, that imposing monetary sanctions may not effectively vindicate the interests impacted by the improper use of jury challenges and if the offended party requests the remedy of reseating, this request should ordinarily be honored unless the challenged juror has already been discharged.)

II. Anticipating the *Batson-Wheeler* Challenge

A. Request *Batson-Wheeler* Claims Be Made Outside Jury's Presence

It is a commonly held belief among prosecutors that some defense attorneys do not act in good faith when making a claim the prosecutor is exercising his or her peremptory challenges in a discriminatory fashion. Prosecutors often assume, especially when neutral reasons for removing a particular juror are obvious, that the defense attorney is actually making the ***Batson-Wheeler*** claim not because of an honest belief the prosecutor has improperly exercised a peremptory challenge but as a tactic to render the prosecutor "gun shy" in exercising peremptory challenges against members of a cognizable class. The tactic is premised on the idea that the fear of being subjected to a ***Batson-Wheeler*** challenge (and the attendant possibility that it will be erroneously granted) will dissuade the prosecutor from exercising a future challenge against any panelist belonging to the cognizable class at issue even though those other panelists might be unfavorably disposed toward the prosecution. An even more nefarious reason that is sometimes given to explain why the defense is making an apparently disingenuous ***Batson-Wheeler*** claim is that it is done in an attempt to prejudice the jury against the prosecutor by implying the prosecutor is a bigot or racist. Finally, it is sometimes speculated that the disingenuous ***Batson-Wheeler*** claim is made in order to discover the prosecutor's strategy in selecting jurors and, indirectly, the prosecutor's trial strategy.

Certainly, the belief that defense attorneys sometimes use ***Batson-Wheeler*** claims for tactical purposes may arise simply from a difference in perspective. A juror who appears to the prosecutor to be a "bad juror" may appear to the defense counsel as a juror who the prosecutor should, but for the juror's membership in a cognizable group, want to keep on the jury (although from a purely tactical standpoint, if, in fact the prosecutor is removing jurors who would be predisposed to the prosecution for reasons of irrational prejudice, the defense should want to encourage such challenges). On the other hand, some defense attorneys appear to be much more prone than others to making ***Batson-Wheeler*** challenges, either in general or at least when appearing in front of a judge who has a reputation for giving such challenges a generous reception. If a prosecutor is aware that a particular defense attorney has a history of making apparently tactical ***Batson-Wheeler*** challenges and/or making the challenges before the jury in a manner calculated to prejudice the jury against the prosecution, is there anything a prosecutor can do?

As a matter of course (not just when there is a belief the defense attorney may attempt to use ***Batson-Wheeler*** challenges in an improper fashion), the prosecutor should ask that any ***Batson-Wheeler*** claim made by either party be done at sidebar or otherwise outside the presence of the jury. (**See e.g.**, ***People*** **v.** ***Willis***

(2002) 27 Cal.4th 811, 822 [noting the ABA recommends that "[a]ll challenges, whether for cause or peremptory, should be addressed to the court outside the presence of the jury, in a manner so that the jury panel is not aware of the nature of the challenge, the party making the challenge, or the basis of the court's ruling on the challenge," but recognizing that this procedure may be cumbersome and alternative procedures may be used to help avoid any prejudice to counsel making the challenge].) Requiring that ***Batson-Wheeler*** motions be made at sidebar helps ensure that (i) the jury in general will not be "poisoned" against the attorney accused of improperly exercising a juror challenge; and (ii) helps keep viable the option of reseating a juror by minimizing the possibility the reseated juror will hold his or her initial removal against the attorney who asked that the juror be removed. (**See *People* v. *Willis*** (2002) 27 Cal.4th 811, 822.)

If the defense attorney has a particularly egregious habit of abusing ***Batson-Wheeler***, a prosecutor may want to be ready with evidence (i.e., transcripts) of such past abuse to bring to the attention of the court in support of a request that ***Batson-Wheeler*** motions be made outside the presence of the jury.

B. Ask Court to Use Juror Questionnaires

For entirely plausible reasons, prosecutors do not typically ask the exact same questions of every single juror. Because of time constraints, a prosecutor has to pick and choose which questions will be most likely to elicit information from a particular juror or address the prosecutor's concerns raised by the court's questioning of the juror. A prosecutor may choose not to waste time asking questions of jurors the prosecutor knows he or she will definitely keep or bump. A prosecutor may not want to ask questions of a juror the prosecutor likes for fear that too much questioning might elicit answers highlighting the juror's pro-prosecution bent to the defense. A prosecutor may want to ask additional questions of a juror who is difficult to read or who gives answers that demand follow-up questions.

That being said, trial courts are empowered to consider disparate questioning (i.e., asking different types of questions of the jurors depending on whether they fall into the cognizable class at issue) or perfunctory questioning (i.e., asking fewer or no questions of jurors in the cognizable class) in assessing a prosecutor's motive when a ***Batson-Wheeler*** motion is made. With that in mind, prosecutors should consider asking for the use of juror questionnaires that ask identical questions of each juror. Questionnaires also can provide support to help show that a panelist was removed because the remainder of the pool of panelists looked better or because the next juror in the box was a significantly better juror for the prosecution. Finally, questionnaires can help avoid a claim that questioning was perfunctory. (**See *People* v. *Bell*** (2007) 40 Cal.4th 582, 598, fn. 5 [quoting the trial court for the proposition that when an extensive questionnaire is used with every juror, "it can never be a perfunctory examination"]; this outline, at section V-C-4 at p. 37.)

If a trial court is not inclined to use questionnaires, be cognizant that disparate questioning of jurors (especially in the absence of any explanation for disparate questioning) may be seized upon (fairly or unfairly)

by the trial court or the reviewing court as evidence of a discriminatory purpose. "The State's failure to engage in any meaningful voir dire examination on a subject the State alleges it is concerned about is evidence suggesting that the explanation is a sham and a pretext for discrimination." (***Green* v. *LaMarque*** (9th Cir. 2008) 532 F.3d 1028, 1033, citing ***Miller-El* v. *Dretke*** (2005) 545 U.S. 231, 246; **see also *Ali* v. *Hickman*** (9th Cir. 2009) 584 F.3d 1174, 1188 [failure to ask follow-up questions of juror to clarify ambiguity concerning juror's objectivity was evidence that concern with objectivity was sham].)

Note regarding retaining questionnaires: If questionnaires are used, the court will provide copies of the completed questionnaires to counsel. Sometimes the court will ask that those questionnaires be returned at the end of the trial. A prosecutor should make sure that, at least, the court retains those questionnaires since if the questionnaires are later lost by the trial court, a reviewing court may find the state's loss of the questionnaires deprived the defendant of the ability to meaningfully appeal the denial of his ***Batson*** claim and thus deprive the defendant of due process. (**See *Ayala* v. *Wong*** (9th Cir. 2012) 693 F.3d 945. 958-959.)

C. Ask the Court for Sufficient Time to Conduct Voir Dire -Have *Lenix* at Hand

The less opportunity the attorneys have to question the juror, the more difficult it will be for the judge to assess the real reason a juror has been challenged. A prosecutor might want to have a bench memorandum ready with the following information derived from ***People* v. *Lenix*** (2008) 44 Cal.4th 602 when appearing in front of judges who are reluctant to allow a significant amount of time on voir dire:

"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." (***People* v. *Lenix*** (2008) 44 Cal.4th 602, 625, emphasis added.)

In ***Lenix,*** the California Supreme 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." (**Id.** at p. 625, fn. 16.) Moreover, the ***Lenix*** 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.)

D. Think About and Be Prepared to Explain the Reasons for Challenging a Juror

Gut instinct may be the best indicator of whether a panelist will make a good juror and that is a genuinely neutral reason for removing a juror. Be aware, however, that the less concrete the grounds provided for removing a juror, the more likely it is that those grounds will be scrutinized with a skeptical eye by a judge or reviewing court.

Make notes of the demeanor, attitude, and other intangibles of all jurors, not just those who seem like they might be adverse to the prosecution. This is especially important when the judge allows limited or no voir dire and the notes will help the judge see beneath superficial similarities between jurors who were kept and those whom the prosecutor challenged. As mentioned in ***Gonzalez* v. *Brown*** (9th Cir. 2009) 585 F.3d 1202, "[i]t is obviously a desirable and correct practice for a prosecutor to have notes of reasons for a peremptory strike if a challenge is raised requiring a race-neutral explanation at step two of ***Batson***." (***Brown*** at p. 1209, fn. 5.)

E. Taking Notes on the Race, Ethnicity, or Gender of the Jurors

In the case of ***Miller-El* v. *Dretke*** (2005) 545 U.S. 231, the fact a prosecutor had taken notes regarding the juror's race was used as evidence of a racially motivated intent. (**Id.** at p. 266.) And in ***Green* v. *LaMarque*** (9th Cir. 2008) 532 F.3d 1028, the Ninth Circuit, citing to ***Miller-El***, held that the fact the prosecutor had noted the race of each venire member next to the member's name provided additional evidence of racial discrimination.

However, the ***Green*** court completely missed the significance of the note-taking regarding the juror's race in ***Miller-El***. In ***Miller-El***, the prosecutor's own notes identifying every potential juror by race were used to show the prosecutor was following an office policy of emphasis on race. The notes were significant because, at the time of the trial in ***Miller-El***, there was no reason to note the juror's race; ***Batson*** was only decided after the defendant in ***Miller-El*** was tried. (***Miller-El*** at p. 264, fn. 38.) In ***Green***, of course, the ***Batson-Wheeler*** principles were well-established and there was every reason ***to*** note a juror's membership in a cognizable class.

As pointed out in ***People* v. *Lenix*** (2008) 44 Cal.4th 602, a case where the court *did* understand the significance of the race-identifying notes in ***Miller-El***, the court emphasized that "post-***Batson***, recording the race of each juror is an important tool to be used by the court and counsel in mounting, refuting or

analyzing a ***Batson*** challenge." (***Lenix*** at p. 617, fn. 12.)

Although prosecutors should strive for a color-blind approach to jury selection, in light of the fact a prosecutor's jury selection decisions may be reviewed years later, purposefully omitting to note the membership of a juror in a cognizable class because of the analysis in ***Green*** is like teaching a child to smoke based on claims made in a 1950's cigarette ad. (**See *United States* v. *Philip Morris USA, Inc.*** (D.D.C. 2006) 449 F.Supp.2d 1, 154 [in 1953, L&M cigarettes were advertised as "just what the doctor ordered"].)

ADA Coleman's note: The Los Angeles District Attorney's Office provides a form to prosecutors for writing down observations of panelists during jury selection that has a pre-printed notation on it essentially stating that the identification the juror's race, gender, or ethnicity is done solely for the purpose of responding to a ***Batson-Wheeler*** motion. In the absence of such a form, prosecutors can convey the same intent by simply making a notation in the file of the purpose for identifying the cognizable class to which a panelist belongs or putting the reason for such notation on the record.

F. Have Ready Access to Notes From Other Trials and/or Office Manuals

In ***People* v. *Lenix*** (2008) 44 Cal.4th 602, the court stated that in assessing credibility of the prosecutor, a trial court may "rely on the court's own experiences as a lawyer and bench officer in the community, and ***even the common practices of the advocate and the office who employs him or her.***" (**Id.** at p. 613, citing to ***People* v. *Wheeler*** (1978) 22 Cal.3d 258, 282; **accord *People* v. *Jones*** (2011) 51 Cal.4th 346, 360; **cf.**, ***Miller-El* v. *Dretke*** (2005) 545 U.S. 231, 253 [appearance of discriminatory intent supported by "widely known evidence of the general policy of the Dallas County District Attorney's Office to exclude black venire members from juries at the time ***Miller-El's*** jury was selected"].)

A prosecutor's past history of non-discriminatory practices should be compelling evidence of continuing non-discriminatory practices. It may be useful for a prosecutor to keep records of the composition of previous juries so that they are available to show the prosecutor has previously accepted jurors of the same cognizable class as the jurors the prosecutor is presently being accused of having improperly excluded.

It may also be worthwhile to keep notes of any office training class or copies of training publications (i.e., this very memo) establishing the office unequivocally condemns the exercise of peremptory challenges for discriminatory purposes.

III. Handling Unjustified *Batson-Wheeler* Claims in the Trial Court

It goes without saying that, for legal, ethical, and tactical reasons, no prosecutor should exercise a

peremptory challenge against a juror based solely on that juror's gender, sexual orientation, or membership in a racial, ethnic, or religious group. Prosecutors* who engage in discriminatory jury selection will receive condemnation, not support, from fellow prosecutors. On the other hand, a prosecutor should not refrain from

challenging a juror for *permissible* reasons out of a concern that the defense will raise a disingenuous or frivolous ***Batson-Wheeler*** claim.

Note**: While this outline is geared to how a prosecutor should respond to a ***Batson-Wheeler claim, the principles, procedures and obligations imposed by the federal and state constitution when it comes to juror challenges "apply equally to all advocates." (***People*** **v.** ***Lenix*** (2008) 44 Cal.4th 602, 612.)

The remainder of this section of the outline will focus on the various steps (and issues arising) at each step in greater detail

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

A ***Batson-Wheeler*** objection may be raised by the defense or the prosecution. (***Georgia*** **v.** ***McCollum*** (1992) 505 U.S. 42, 59; ***People*** **v.** ***Wheeler*** (1978) 22 Cal.3d 258, 280, 283, fn. 29; ***People*** **v.** ***Williams*** (1994) 26 Cal.App.4th Supp. 1, 9.)

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, 416.)

V. Step One: The Prima Facie Case

As noted earlier, the party objecting to the challenge has the burden of making out a prima facie case "by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose." (***Johnson*** **v.** ***California*** (2005) 545 U.S. 162, 168.) The burden on the attorney seeking to establish a prima facie case of discriminatory purpose, 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 author to reflect the holding in ***Johnson*** **v.** ***California*** (2005) 545 U.S. 162*]; **see also** ***United States v. Collins*** (9th Cir. 2009) 551 F.3d 914, 919 [laying out functionally identical federal test].)

*Editor's note: California cases finding no prima facie case prior to the holding in ***Johnson*** v. ***California*** (2005) 545 U.S. 162 are less persuasive insofar as what constitutes a prima facie case than post-***Johnson*** case in light of ***Johnson***'s holding that a prima facie case only requires a defendant challenging a peremptory excusal to show a reasonable inference the challenge was for an impermissible group bias rather than the more likely than not standard used in California before ***Johnson***. (**See** this outline, section XI-A-1 at p. 104.)

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

1. Definition of "cognizable class"

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.) Although we use the term "cognizable class" throughout this outline (**see *People*** v. ***Fields*** (1983) 35 Cal.3d 329, 347 [noting this is how such a group is usually described], courts have also referred to such groups as, inter alia, "distinctive" groups (***People*** v. ***Fields*** (1983) 35 Cal.3d 329, 347), "cognizable racial groups" (***Batson v. Kentucky*** (1986) 476 U.S. 79, 96), or "cognizable groups" (***People*** v. ***Lewis*** (2008) 43 Cal.4th 415, 482).

As Justice Brown observed in her concurring opinion in ***People*** v. ***Young*** (2005) 34 Cal.4th 1149, neither ***Batson*** nor ***Wheeler*** actually defined the term "cognizable group" and while the California Supreme made some effort to define in the term in ***Rubio*** v. ***Superior Court*** (1979) 24 Cal.3d 93, 97-98 and ***People*** v. ***Fields*** (1983) 35 Cal.3d 329, 348-349, neither of those cases had a majority opinion. (***Young***, conc. opn, J. Brown, at p. 1235.) Nevertheless, the following definition from ***People v. England*** (2000) 83 Cal.App.4th 772 is not a bad one:

"'[T]here must be a common thread' shared by the group, 'a basic similarity of attitude, ideas or experience among its members so that the exclusion prevents juries from reflecting a cross-section of the community.'" (**Id.** at p. 782, citing to ***People*** v. ***Henderson*** (1990) 225 Cal.App.3d 1129, 1152-1153.) These groups are generally distinguished by race, gender, religion, or ethnicity. (***England*** at p. 782, citing to ***People*** v. ***Henderson*** (1990) 225 Cal.App.3d 1129, 1153 and ***People v. Cervantes*** (1991) 233 Cal.App.3d 323, 332].) "It is clear that the groups recognized as cognizable classes are generally relatively large and well defined groups in the community whose members may, because of common background or experience, share a distinctive viewpoint on matters of current concern. Generally speaking, the courts have not recognized an otherwise heterogeneous group as cognizable merely because its members agree on one particular matter." (***England*** at p. 782, citing to ***People v. Fields*** (1983) 35 Cal.3d 329, 349.)

This definition should be read in conjunction with Justice Mosk's plurality opinion in ***Rubio*** v. ***Superior Court***

(1979) 24 Cal.3d 93, which discusses what constitutes a cognizable class and states that two requirements must thus be met in order to qualify an asserted group as "cognizable" for purposes of the representative cross-section rule. "First, its members must share a common perspective arising from their life experience in the group, i.e., a perspective gained precisely because they are members of that group. It is not enough to find a characteristic possessed by some persons in the community but not by others." (**Id.** at p. 98.) Second, it must be shown "that no other members of the community are capable of adequately representing the perspective of the group assertedly excluded." (**Ibid.**)

The term "cognizable class" generally means the same thing whether the term is used in the context of a ***Batson-Wheeler*** challenge, a challenge to the underrepresentation of groups in the venire (aka ***Duren*** **v.** ***Missouri*** (1979) 439 U.S. 357 challenges), a challenge to the way "hardship" is evaluated, or a challenge to underrepresentation of groups on grand jury panels. (**See *People v. Burney*** (2009) 47 Cal.4th 203, 227 [relying on cases discussing "cognizable class" in most of these contexts interchangeably]; ***People*** **v.** ***Johnson*** (1989) 47 Cal.3d 1194, 1214 [same]; ***People*** **v.** ***Fields*** (1983) 35 Cal.3d 329, 346-348 [same]; **but see *People*** **v.** ***Young*** (2005) 34 Cal.4th 1149, 1235, conc. opn. J. Brown, [depending on whether the exclusion is challenged as a violation of equal protection rights (***Batson***) or the defendant's right to an impartial jury drawn from a representative cross-section of the community (***Wheeler***), or both, the question of what constitutes a cognizable group may be answered in different ways].)

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.** ***Willis*** (2002) 27 Cal.4th 811, 814 [white males]; ***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. African-Americans/Blacks

African-Americans (Blacks) are a cognizable class. (**See *Batson*** **v.** ***Kentucky*** (1986) 476 U.S. 79, 84-89; ***People*** **v.** ***Wheeler*** (1978) 22 Cal.3d 258, 280, fn. 6.)

b. Asian-Americans

In ***People*** **v.** ***Burney*** (2009) 47 Cal.4th 203, a case involving the question of alleged underrepresentation of members of a cognizable class on the grand jury, the California Supreme Court stated: "Whether 'Asians' can

or do constitute a cognizable group is an unsettled issue. We previously have observed, however, that 'it is at least questionable whether the generic description Asian ... can constitute a "cognizable group."' (**Id.** at p. 227, citing to ***People* v. *Johnson*** (1989) 47 Cal.3d 1184, 1217, fn. 3.)

Asian-Americans have been identified as a cognizable class in other jurisdictions. (**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.)

c. Caucasian-Americans/Whites

In ***People* v. *Willis*** (2002) 27 Cal.4th 811, the court recognized "white males" as a cognizable class. (**Id.** at p. 814; **see also *Roman* v. *Abrams*** (2nd Cir. 1987) 822 F.2d 214, 227-228 [Caucasians are a cognizable group]; ***State* v. *Chambers*** (Mo.App. E.D. 2007) 234 S.W.3d 501, 514 [same]; ***State v. Daniels*** (Haw. 2005) 122 P.3d 796, 802, fn. 11 [Caucasian males are a cognizable class].)

d. 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; **see also *People* v. *Brown*** (1999) 75 Cal.App.4th 916, 924 [recognizing Chinese-Americans as cognizable class in context of challenge to underrepresentation on grand jury].)

e. 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"].)

f. Hispanic-Americans/Latinos

Hispanics/Latinos have been identified as a cognizable class. (**See *People* v. *Alvarez*** (1996) 14 Cal.4th 155, 193; ***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. (***Gutierrez*** 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. 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.)

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; **see also *Ayala* v. *Wong*** (9th Cir. 2012) 693 F.3d 945, 967 [indicating that prosecutor's claim he removed juror because he was illiterate was itself indicative of the prosecution's discriminatory intent as the record revealed that the juror was not, in fact, illiterate, but simply had difficulty writing in English and thus the reason "was directly related to his status as someone who spoke Spanish as his first language"].)

g. Native-Americans

Native-Americans have been identified as a cognizable class. (**See *United States* v. *Mitchell*** (9th Cir. 2007)
502 F.3d 931, 956; ***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.)

In many cases, it will be difficult to establish a juror was removed on the basis of religion because a "prospective juror's religious affiliation, if it is not stated on a jury questionnaire or revealed during voir dire, is not ascertained as readily as is his or her race or gender" and inquiry into a juror's religious affiliation is usually not made or relevant. (**See *People* v. *Schmeck*** (2005) 37 Cal.4th 240, 273 [citing to the concurring opinion of Justice Ginsburg in ***Davis* v. *Minnesota*** (1994) 511 U.S. 1115, which noted the Minnesota high court's observation that ordinarily "inquiry into a juror's religious affiliation and beliefs is irrelevant and prejudicial"].)

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. *Cowan*** (2010) 50 Cal.4th 401, 446, 450 [prosecutor could properly challenge juror who, inter alia, claimed on her questionnaire "she's Islamic, that she does not sit in judgment" even though the juror later stated she could sit in judgment]; ***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]; ***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 indicating religious principles would make it difficult to judge others]; ***People* v. *Jenkins*** (2000) 22 Cal.4th 900, 988-989 [quoting ***United States* v. *Stafford*** (7th Cir.1998) 136 F.3d 1109, 1114 wherein the court stated, [i]t would be improper and perhaps unconstitutional to strike a juror on the basis of his being a Catholic, a Jew, a Muslim, etc. It would be proper to strike him on the basis of a belief that would prevent him from basing his decision on the evidence and instructions, even if the belief had a religious backing...."].)

Indeed, even where the asserted ground given by the prosecutor is that the juror belonged to a particular church, this does not mean the prosecutor is acting in a discriminatory manner. For example, in ***People v. Jones*** (2011) 51 Cal.4th 346, the defendant argued the prosecutor's concern that the juror was a member of the African Methodist Episcopal Church was itself discriminatory. But the argument was rejected as the prosecutor did not excuse the juror just because she belonged to a largely African-American church, but because this particular church was, in his view, "constantly controversial," and he did not "particularly want anybody that's controversial on my jury panel." (**Id.** at p. 367.)

a. <u>Jewish</u>

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 it is at least questionable whether a religious group can constitute a "cognizable group." (**Id.** at p. 1217 and fn. 3.)

In ***People* v. *Schmeck*** (2005) 37 Cal.4th 240, the court raised the possibility that a Jewish background may constitute a racial or ethnic classification for the purposes of an equal protection analysis under Batson, but declined to explore the question since the defendant's claim rested solely on an assertion of discrimination on the basis of religion. (**Id.** at p. 266, fn. 5.)

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?

"The use of peremptory challenges to exclude prospective jurors based on gender violates both the federal and state Constitutions." (***People v. Dement*** (2011) 53 Cal.4th 1, 19, citing to ***J.E.B.* v. *Alabama ex rel. T.***

B. (1994) 511 U.S. 127 [which 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].)

7. Is geographical location a cognizable class?

No case has held that simply because persons live in a particular geographical location, they may be treated as a cognizable class. However, the claim is sometimes made that where a juror lives is serving as a "proxy" for race.

For example, in ***United States v. Bishop*** (9th Cir. 1992) 959 F.2d 82, the prosecutor claimed he struck an African-American juror who lived in Compton because Compton was a poor and violent community whose residents were likely to be "anesthetized to such violence," "more likely to think that the police probably used excessive force," and likely to believe the police "pick on black people." (**Id.** at pp. 821, 825.) The defendant argued that, in view of the fact that approximately three quarters of Compton's population was black, the juror's residence served as a mere surrogate for race. (**Id.** at p. 822.) After noting that there was no evidence that the particular juror had witnessed or heard of incidents of violence or police behavior in Compton, and as a result, would have found it difficult to assess the credibility of a particular witness fairly and impartially, the Ninth Circuit found that the prosecutor's reasons for removing the juror was improper. Specifically, the ***Bishop*** court pointed out that the prosecutor's justification "referred to collective experiences and feelings that he just as easily could have ascribed to vast portions of the African-American community. Implicitly equating low-income, black neighborhoods with violence, and the experience of violence with its acceptance, it referred to assumptions that African-Americans face, and from which they suffer, on a daily basis. Ultimately, the invocation of residence both reflected and conveyed deeply ingrained and pernicious stereotypes." (**Id.** at p. 825.) The court stated such "[g]overnment acts based on such prejudice and stereotypical thinking are precisely the type of acts prohibited by the equal protection clause of the Constitution." (**Id.** at p. 826; **see also** ***People*** **v.** ***Turner*** (2001) 90 Cal.App.4th 413, 418 [finding prosecutor improperly excluded juror for improper reason - one based on racial stereotyping - where juror lived in Inglewood (a community that was almost 50% African-American) and prosecutor stated her "experience with Inglewood jurors has not been good" and "[i]t seems to me that people in that location ... may or may not consider drugs the problem that people in other locations do"].)

However, even in ***United States*** **v.** ***Bishop*** (9th Cir. 1992) 959 F.2d 820, the court did not state that all jurors living in a particular geographical location constituted a cognizable class, and even recognized that residence could constitute a legitimate reason for excluding a juror where residence was "utilized as a link connecting a specific juror to the facts of the case." (**Id.** at p. 826.)

8. What groups have been held ***not*** to be cognizable classes?

The courts have **rejected** arguments that the following "groups" are cognizable classes for purposes of ***Batson-Wheeler*** challenges:

a. Age Cohorts

Age groups are not cognizable classes. (**See *People v. Lewis*** (2008) 43 Cal.4th 415, 472 ["young persons are not a cognizable group"]; ***People* v. *McCoy*** (1995) 40 Cal.App.4th 778, 785 [persons 70 years or older not cognizable class]; ***People* v. *Ayala*** (2000) 23 Cal.4th 225, 257 ["California courts have not been receptive to the argument that age alone identifies a distinctive or cognizable group within the meaning of [the representative cross-section] rule"].)

b. Arrestees

Persons previously arrested do not constitute a cognizable class. In ***People* v. *Fields*** (1983) 35 Cal.3d 329, the court listed "person previously arrested" as an example of a non-identifiable group. (**Id.** at p. 348; **accord *People v. Macioce*** (1987) 197 Cal.App.3d 262, 279-280.)

c. Citizenship Status

In ***Rubio* v. *Superior Court*** (1979) 24 Cal.3d 93, a case involving the question of whether it was proper to maintain a blanket exclusion of resident aliens from jury service, the court held that resident aliens are not a cognizable class. (**Id.** at p. 100; **see also *People* v. *Gonzalez*** (1989) 211 Cal.App.3d 1186, 1190 [indicating, in dicta, that naturalized citizens are not a cognizable class].)

d. Composite Minority Groups: "People of Color"

In ***People* v. *Davis*** (2009) 46 Cal.4th 539, the California Supreme rejected defendant's contention that the trial court erred by ruling that "people of color" is not a cognizable group for ***Wheeler*** analysis. (**Id.** at p. 583.) In ***People* v. *Neuman*** (2009) 176 Cal.App.4th 571, the court specifically rejected the defense claim that "people of color" is a cognizable group under ***Batson*** or ***Wheeler***. (**Id.** at p. 579 [and pointing out, at p. 580 fn. 14 that in portions of California, "combining all members of minority groups may obliterate their status as members of a group that is in the minority"]; **but see *Fernandez* v. *Roe*** (9th Cir.2002) 286 F.3d 1073, 1079 [holding prior strike of an *Hispanic* prospective juror supported an inference of general discriminatory intent germane to strike of two *African Americans*].)

Editor's note**: Whether a group is in the majority or minority is not really legally significant since ***Batson-Wheeler challenges are not dependent on the cognizable group being in the minority. However, the absurdity of the defense position in ***Neuman*** is highlighted when you consider that ***every*** juror belongs to *at least* two cognizable groups (male or female, plus an ethnic or racial group). Under the defense logic, you could have a cognizable "supergroup" that encompasses 100% of the jurors! (But see

e. Crime Victims

Crime victims do not constitute a cognizable class. In ***People*** **v.** ***Fields*** (1983) 35 Cal.3d 329, the court listed "crime victims" as an example of an identifiable group "whose representation is essential to a constitutional venire." (**Id.** at p. 348; **accord** ***People v. Macioce*** (1987) 197 Cal.App.3d 262, 279-280 [and finding "battered women" do not constitute a cognizable class].)

f. Death-Penalty Opponents or Proponents

Persons opposed to the death penalty are not a cognizable group, neither are death penalty proponents. That was the holding ***People*** **v.** ***Fields*** (1983) 35 Cal.3d 329, a case which dealt with permitting exclusion of persons opposed to the death penalty at the guilt phase rendered a jury unrepresentative of a cross-section of the community. (**Id.** at pp. 349, 353.) In ***People*** **v.** ***Anderson*** (1987) 43 Cal.3d 1104, the court held that persons with reservations about capital punishment are not a cognizable group. (**Id.** at p. 1115.)

g. Education-Related Groups

Groups sharing similar levels of education (or lack of education) are not cognizable classes. For example, in ***People*** **v.** ***Estrada*** (1979) 93 Cal.App.3d 76, a case involving a challenge to alleged underrepresentation on the grand jury, the court rejected the idea that the "less-educated" are a cognizable class. (**Id.** at pp. 90-91.)

h. Employment-Related Groups

Groups sharing similar jobs are not cognizable classes. For example, in ***People*** **v.** ***Estrada*** (1979) 93 Cal.App.3d 76, a case involving a challenge to alleged underrepresentation on the grand jury, the court rejected the claim "blue-collar workers" are a cognizable class. (**Id.** at p. 92.) In ***People*** **v.** ***England*** (2000) 83 Cal.App.4th 772, the court held "retired [people] with an aversion or inability to return to [their] former place[s] of employment," e.g., retired correctional workers, were not a cognizable class. (**Id.** at p. 780.)

i. Ex-Felons

In ***Rubio*** **v.** ***Superior Court*** (1979) 24 Cal.3d 93, a case involving the question of whether it was proper to maintain a blanket exclusion of ex-felons from jury service, the court held that ex-felon are not a cognizable class. (**Id.** at p. 99.)

j. Income or Wealth-Based Groups

Groups sharing similar income or wealth levels are not cognizable classes. For example, in ***People*** **v.** ***Estrada*** (1979) 93 Cal.App.3d 76, a case involving a challenge to alleged underrepresentation on the grand jury, the court rejected the idea that individuals with "low incomes" or "households with family incomes of less than $15,000" can constitute a cognizable class. (**Id.** at pp. 91-92.) In ***People*** **v.** ***Johnson*** (1989) 47 Cal.3d 1194,

the court held that persons of low income or "poor people" are not a cognizable class for purposes of assessing whether the way hardship challenges excluded poor persons in a disproportionate manner. (**Id.** at p. 1214; **accord** ***People*** **v.** ***Tafoya*** (2007) 42 Cal.4th 147, 169 [same]; **see also** ***People v. Cooper*** (1991) 53 Cal.3d 771, 808 [same, except in context of whether juror fees improperly excluded class of jurors from venire].)

k. Issue-Viewpoint Groups

Groups sharing a similar viewpoint on particular issue, including similar viewpoints on the criminal justice system are not cognizable groups. For example, it was suggested in ***People*** **v.** ***Wheeler*** (1978) 22 Cal.3d 258, by way of dicta, that persons who favor "law and order" are not a cognizable class. (**Id.** at p. 276; **accord** ***People v. Fields*** (1983) 35 Cal.3d 329, 349; **see also** this outline, section V-A-8-f at p. 27 [opponents or proponents of the death penalty are not a cognizable class].)

9. 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; ***People* v. *Riccardi*** (2012) 54 Cal.4th 758, 796, fn. 17 [declining to use juror in comparative analysis who defense claimed on appeal was Caucasian but who did not state her race in the questionnaire].) 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. *Neuman*** (2009) 176 Cal.App.4th 571, the defense initially thought a prospective juror was Hispanic based on counsel's belief the juror had a Latino accent even though the juror did not have a Hispanic last name, did not appear to have an identifiable ethnicity, and counsel later appeared to agree with the judge the juror's accent was "Southern" not Latino. In that same case, the trial judge guessed a different juror was Southeast Asian based on her last name but defense counsel thought of the juror as Middle-Eastern). (**Id.** at p. 573.) In ***United States* v. *Guerrero*** (9th Cir. 2010) 595 F.3d 1059, neither of the attorneys nor the judge knew the race/ethnicity of a juror who was subject to a challenge. The juror questionnaires were redacted to remove the race/ethnicity of jurors before they were provided to counsel. The defense thought the juror might have been Native American or Latina but the juror self-identified as a Hawaiian/Pacific Islander. (**Id.** at p. 1063.) 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.

If the prosecutor making the challenge genuinely did not realize the juror was a member of the cognizable class at issue at the time of making the challenge, the prosecutor should state this on the record. This cuts against a finding of impermissible bias. (**See *People* v. *Barber*** (1988) 200 Cal.App.3d 378, 394 ["a bona fide showing by the prosecutor, reasonably accepted by the trial court, that he or she did not believe or recognize a prospective juror as being a member of a particular cognizable class . . . effectively resolves the issue in favor of the prosecution"].)

10. Is the fact the venire panel does not contain any members of the cognizable group at issue relevant to a *Batson-Wheeler* motion?

The fact that a venire panel does not contain jurors of a cognizable class is irrelevant to the issues raised in a ***Batson-Wheeler*** motion. When it comes to ***Batson-Wheeler*** motions, courts "do not hold against the government the fact that the panel lacked African-American members." (***Briggs* v. *Grounds*** (9th Cir. 2012) 682 F.3d 1165, 1168, fn. 1; ***United States* v. *Collins*** (9th Cir. 2009) 551 F.3d 914, 920.)

11. Does the fact there has been a prima facie case made out as to one cognizable class bear on whether a prima facie case has been made out as to another cognizable class?

In ***United States* v. *Mitchell*** (9th Cir. 2007) 502 F.3d 931, the court recognized that the relevant circumstances surrounding strikes include a prima facie case of discrimination as to another cognizable group. (**Id.** at p. 957; **see also *Fernandez* v. *Roe*** (9th Cir.2002) 286 F.3d 1073, 1079 [where defense was claiming there was prima facie case made regarding both African-American and Hispanic jurors, court considered fact prosecutor had engaged in acts creating inference of discrimination involving Hispanics and been warned by trial judge not to strike any more Hispanics in finding inference prosecutor also improperly challenged African-Americans].)

B. How Many Jurors in a Cognizable Class Must be Challenged Before the Burden of Making out a Prima Facie Case Will be Met?

1. Can the removal of a single juror establish a prima facie case?

Whether the removal of a single juror can establish a prima facie case of discrimination has been the subject of some confusion.

On the one hand, it has often been stated that simply pointing out that the prosecutor has challenged one or more members of a particular cognizable class is insufficient to show a prima facie case of discrimination. (**See *People* v. *Clark*** (2011) 52 Cal.4th 856, 905 [no prima facie case where prosecutor challenged four of five African-American prospective jurors]; ***People* v. *Taylor*** (2010) 48 Cal.4th 574, 643 [fact prosecutor exercised three of ten peremptory challenges to excuse two African-American prospective jurors and one Hispanic prospective juror "without more, is insufficient to create an inference of discrimination, especially where, as here, the number of peremptory challenges at issue is so small"]; ***People v. Hawthorne*** (2009) 46 Cal.4th 67, 79-80, [no prima facie showing where the defendant's motion was based solely on the assertion that the prosecutor used three of 11 peremptories to excuse African-American prospective jurors]; ***People* v. *Bonilla*** (2007) 41 Cal.4th 313, 343-344 [excusal of three out of four Hispanics, in a case where defendant was also Hispanic, did not create a prima facie case]; ***People v. Bell*** (2007) 40 Cal.4th 582, 598 [excusal of two out of three African-Americans did not create prima facie showing]; ***People* v. *Box*** (2000) 23 Cal.4th 1153, 1188-1189 [insufficient showing where the "only basis for establishing a prima facie case cited by defense counsel was that the [three] prospective jurors-like defendant-were" of the same cognizable class]; ***People* v. *Yeoman*** (2003) 31 Cal.4th 93, 115, [prima facie case not established by cursory reference to prosecutor's strike of three prospective jurors by name, number, occupation and race]; ***People* v. *Farnam*** (2002) 28 Cal.4th 107, 136-137[insufficient showing where defendant's only "stated bases 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]"]; ***People* v. *Buckley*** (1997) 53 Cal.App.4th 658, 665 [no prima facie case just because two defendants and two challenged jurors were all African-American even though nothing in jurors' questionnaires or oral responses indicated particular reason that they would be unsuitable].) 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. Streeter*** (2012) 54 Cal.4th 205, 223 [fact three out five African-American jurors bumped by prosecution insufficient to establish prima facie case – even though 28% of the jurors called into the box were African American but the prosecutors used 60% of his challenges against such jurors]; ***People* v. *Dement*** (2011) 53 Cal.4th 1, 19-21 [no prima facie case where prosecutor challenged 10 out of 13 peremptories against females]; ***People* v. *Cornwell*** (2005) 37 Cal.4th 50, 70 [no prima facie case where prosecutor challenged one out of two African-American prospective jurors]; ***People* v. *Adanandus*** (2007) 157 Cal.App.4th 496, 503[no prima facie case established by simply asserting prosecutor challenged three Black prospective jurors].)

On the other hand, it has been said "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; **see also *Snyder v. Louisiana*** (2008) 552 U.S. 472, 478 ["[T]he Constitution forbids striking even a single prospective juror for a discriminatory purpose]".) 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. Bonilla*** (2007) 41 Cal.4th 313, 343; ***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; **accord *People v. Bonilla*** (2007) 41 Cal.4th 313, 343.) 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 *People v. Bonilla*** (2007) 41 Cal.4th 313, 343 ["[s]uch a pattern will be difficult to discern when the number of challenges is extremely small"]; **see also *People v. Hamilton*** (2009) 45 Cal.4th 863, 899 [agreeing with trial judge that the challenge of the only African-American subject to challenge was insufficient *in and of itself* to suggest a pattern]; **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]; **accord *People* v. *Garcia*** (2011) 52 Cal.4th 706, 744-750 [noting it is "'impossible,' as a practical matter, to draw the requisite inference where only a few members of a cognizable group have been excused and no indelible pattern of discrimination appears" and declining to do so based simply on fact prosecutor excused three women]; **but see *Johnson v. Finn*** (9th Cir. 2012) 665 F.3d 1063, 1070 [the fact that three of the prosecution's peremptory challenges were exercised against the only three African-Americans in the jury pool is enough to establish a prima facie case of racial discrimination].)

2. Should prosecutors concede a prima facie case where multiple jurors belonging to a cognizable class have been challenged by the prosecutor?

ADA Coleman believes, as a practical matter, 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, that in those circumstances, 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.) And courts routinely find that, in the absence of any evidence ***other than*** sheer numbers, the fact multiple members of a cognizable group have been challenged does not meet the burden of making a prima facie case. (**See** ***People*** **v.** ***Bonilla*** (2007) 41 Cal.4th 313, 343-344 [excusal of three out of four Hispanics, in a case where the defendant was also Hispanic, did not create a prima facie case]; ***People v. Box*** (2000) 23 C.4th 1153, 1185 [no prima facie case where basis for claim was that two prospective jurors were both African-American and so was the defendant]; ***People*** **v.** ***Jones*** (1998) 17 Cal.4th 279, 293 [evidence supported ruling that there was no prima facie case of group bias in peremptory challenges of four African-Americans even though challenges left no African-American jurors on panel]; ***People*** **v.** ***Crittenden*** (1994) 9 Cal.4th 83, 119, 120, fn. 3 [excusal of all members of defendant's race does not automatically establish prima facie case; declining to follow contrary holdings of lower federal courts]; ***People*** **v.** ***Buckley*** (1997) 53 Cal.App.4th 658, 665 [although two defendants and two challenged jurors were African-American, and nothing in jurors' questionnaires or oral responses indicated particular reason that they would be unsuitable, trial court finding of no prima facie case nevertheless upheld]; ***People*** **v.** ***Christopher*** (1991) 1 Cal.App.4th 666, 672, 673 [challenge of one or two prospective jurors of same racial or ethnic group as defendant, even when panel contains no other members of group, does not establish prima facie case unless there is significant supporting evidence]; ***People*** **v.** ***Allen*** (1989) 212 Cal.App.3d 306, 312, 313 [exclusion of disproportionate number of minority jurors does not by itself establish prima facie case; ***Wheeler*** motion properly denied where record showed specific bias as ground for each of nine peremptory challenges against Blacks and Hispanics].)

Moreover, in light of the presumption that a prosecutor exercising a peremptory challenge is doing so on a constitutionally permissible ground (***People v. Salcido*** (2008) 44 Cal.4th 93, 136; ***People v. Cleveland*** (2004) 32 Cal.4th 704, 732), and the fact that a prosecutor's excusal of ***all*** members of a cognizable group is not ***conclusive*** to such a showing (***People*** **v.** ***Hoyos*** (2007) 41 Cal.4th 872, 901; ***People*** **v.** ***Neuman*** (2009) 176 Cal.App.4th 571, 575), it is appropriate to hold the defense to its burden at this first step.

C. What Kind of Evidence is Relevant to Whether a Prima Facie Showing has Been Made?

Much of the same evidence or analysis that is relevant to deciding whether a prima facie case at the first

stage has been established is also relevant in determining whether a prosecutor has properly exercised his challenges at the third stage. (**See *People* v. *Jones*** (2011) 51 Cal.4th 346, 362.) Some types of evidence or analysis, while mentioned in this section, will be discussed in greater depth in the portion of the outline dealing with the third stage of a ***Batson-Wheeler*** motion. (**See** this outline, section VI at pp. 79-97.)

1. Whether the prosecutor has struck most or all members of the identified group from the venire

In deciding whether a prima facie case has been made, it is proper to consider whether the prosecutor "has struck most or all of the members of the identified group from the venire[.]" (***People* v. *Wheeler*** (1978) 22 Cal.3d 258, 280; **accord *People* v. *Clark*** (2012) 52 Cal.4th 856, 905; ***People* v. *Bell*** (2007) 40 Cal.4th 582, 597.)

For example, in ***Snyder v. Louisiana*** (2008) 552 U.S. 472, the court took into consideration that the prosecutor had challenged all five prospective African-American jurors, resulting in none on the actual jury in finding the prosecutor had improperly challenged one of those jurors. (**Id.** at p. 476.) In ***Miller-El* v. *Dretke*** (2005) 545 U.S. 231, the court took into consideration the fact the prosecutor challenged nine of 10 prospective African-American jurors, resulting in only one on the actual jury, in finding the prosecutor had engaged in purposeful discrimination. (**Id.** at pp. 240-241.) And in ***Johnson v. California*** (2005) 545 U.S. 162, an inference of discrimination, sufficient to satisfy prima facie standard, arose where prosecutor in interracial murder case used three of 12 peremptory challenges to remove all eligible African-American prospective jurors from a pool of 43. (**Id.** at p. 173.)

On the other hand, in ***People* v. *Welch*** (1999) 20 Cal.4th 701, the court held the "fact that there were three Black jurors and two Black alternates seated at the time the trial court ruled on the motion, while not conclusive, weigh[ed] in favor of finding no prima facie showing." (**Id.** at p. 746.) Similarly, in ***People* v. *Blacksher*** (2011) 52 Cal.4th 769, the court held that the challenge to two African-American jurors did not establish a prima facie case where, inter alia, the prosecutor did not challenge several other African-American jurors, and six ultimately served on the jury. (**Id.** at p. 802.)

Editor's note: Many of the long list of cases cited in support of the proposition that simply challenging multiple members of a cognizable class does not create a prima facie showing simultaneously involved challenges to most or all members of the cognizable class in the venire. (**See** this outline, section V-B-1, at p. 30.)

The Ninth Circuit is more likely to rely on the exclusion of most or all members of a cognizable class as establishing a prima facie case of discriminatory intent than are California courts. (**See *Ayala* v. *Wong*** (9th Cir. 2012) 693 F.3d 945, 964 [the fact "the prosecution struck each of the seven black or Hispanic jurors available for challenge establishes a basis for significant doubt of its motives" as "[h]appenstance is unlikely to produce this disparity"]; ***Johnson v. Finn*** (9th Cir. 2012) 665 F.3d 1063, 1070 [the fact that three of the

prosecution's peremptory challenges were exercised against the only three African-Americans in the jury pool is enough to establish a prima facie case of racial discrimination]; ***Paulino* v. *Castro*** (9th Cir. 2004) 371 F.3d 1083, 1091 [finding a prima facie showing where "the prosecution had struck five out of six possible black jurors"]; ***Williams* v. *Runnels*** (9th Cir.2006) 432 F.3d 1102, 1103-1107 [prosecutor's use of three of his first four peremptories against African-American jurors where only four of the first 49 prospective jurors were African-American was a statistical disparity that alone could create a prima facie showing albeit recognizing other facts could dispel the presumption].)

It is important to remember that in calculating whether a prosecutor has struck some or all the members of a particular cognizable class, it is proper for a court to take into consideration whether a prosecutor would have kept a member of the cognizable class at issue had they not been challenged for cause or for hardship. (**See *People* v. *Jones*** (2011) 51 Cal.4th 346, 362 [noting this is a factor at both the first and third stage of analysis].) **Editor's note**: For a lengthier explanation of this factor, see this outline V-C-7 at p. 40.

Prosecutors should make sure not only to place on the record whether members of the cognizable class at issue end up sitting on the jury, but whether they would have kept members of the class who were removed by a cause challenge or for hardship purposes.

2. Whether the prosecutor has used a disproportionate number of peremptory challenges against the identified group

In deciding whether a prima facie case has been made, it is proper to consider whether the prosecutor "has used disproportionate number of his peremptories against the group[.]" (***People* v. *Wheeler*** (1978) 22 Cal.3d 258, 280; **see also *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].) 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].) On the other hand, if the prosecutor has ***not*** used a high percentage of his or her challenges against members of the cognizable class, this can be viewed as evidence of ***non***-discriminatory use. (**See e.g., *People* v. *Welch*** (1999) 20 Cal.4th 701, 746 ["the fact that the prosecution exercised only three of its eleven peremptory challenges on Black prospective jurors," while not conclusive, weighed in favor of finding no prima facie showing].)

The disparity must be relatively large in order to allow an inference of discrimination to be made. (**See *People* v. *Thomas*** (2012) 53 Cal.4th 771, 796 [where African-Americans constituted 26 percent of the prospective jurors who had been called into the jury box (15 out of 61) and the prosecutor had exercised 37 percent of his challenges (6 out of 16) against African-Americans, disparity was not significant enough, in

itself, to suggest discrimination]; ***People v. Dement*** (2011) 53 Cal.4th 1, 19-21 [no prima facie case of gender discrimination where 20 of the 40 prospective jurors subject to peremptory challenge were female, and prosecutor used 10 of 13 challenges against females]; ***People*** **v.** ***Carasi*** (2008) 44 Cal.4th 1263, 1291, 1295 [no prima facie case of gender discrimination even though prosecutor used 20 out of 23 peremptory challenges against female prospective jurors]; ***People*** **v.** ***Bonilla*** (2007) 41 Cal.4th 313, 345 [no prima facie case of gender discrimination even though women represented 38 percent of the jury pool and the prosecutor used 67 percent of his strikes against women].)

Moreover, where there is a small sample size, disparities carry "relatively little information" and a small absolute sample size can render such an analysis uninformative. Thus, for example, in ***People*** **v.** ***Bell*** (2007) 40 Cal.4th 582, 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, 597-598; **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)].)

In addition, the California Supreme Court in ***People*** **v.** ***Bell*** (2007) 40 Cal.4th 582 cautioned 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." (**Id.** at p. 598, fn. 4.) Courts will not find "disproportionate use" where a relatively small percentage of a prosecutor's overall challenges are used against the cognizable group and/or where the percentage of jurors in the cognizable group who are challenged is roughly comparable to the percentage of jurors in the cognizable group who eventually sit on the jury. For example, in ***People*** **v.** ***Jones*** (2011) 51 Cal.4th 346, the court discounted any inference of discriminatory purpose where prosecutor challenged 60% (3 of 5) of the African-American prospective jurors, but the prosecutor only used three of his total 22 peremptory challenges against African-Americans before accepting a jury, including alternates, that contained two African-Americans out of 18 – i.e., where the prosecutor challenged African-Americans at a rate only slightly higher than their percentage on the jury. (**Id.** at pp. 362.) In ***People*** **v.** ***Clark*** (2012) 52 Cal.4th 856, the defense argued that a prima facie case had been made out because the prosecution had struck four of the five African-American jurors on the panel and because the prosecutor had used 20 percent of his total peremptory challenges (four of 20) to excuse 80 percent of the eligible African-Americans (four of five), even though African-Americans comprised only 5 percent of the jury panelists not excused for cause. However, the court rejected this argument as, "[s]tanding alone, defendant's statistics do not raise an inference of discrimination," and noted that "African-Americans comprised 5 percent of the jury pool but represented nearly 10 percent of the selected jury." (**Id.** at p. 905; **see also** ***People v. Bonilla*** (2007) 41 Cal.4th 313, 344 [finding no inference of discrimination against Hispanics, where Hispanics comprised 10% of

jury pool, prosecution used 10 percent of its challenges on Hispanics (three of 30), and the final jury was roughly 10 percent Hispanic (1 of 12)].)

Prosecutors should consider placing on the record the number of members of the identified group in the jury box and panel as needed to show they have **not** used a disproportionate number of their challenges against members of the cognizable class.

3. Whether the jurors removed share only their membership in the cognizable group, but in all other respects have little in common

In deciding whether a prima facie case has been made, it is proper to consider whether "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[.]" (***People*** **v.** ***Wheeler*** (1978) 22 Cal.3d 258, 280; ***People*** **v.** ***Bell*** (2007) 40 Cal.4th 582, 597.) That is, a court can consider whether, aside from their group membership, the jurors have little in common. (***People*** **v.** ***Clark*** (2012) 52 Cal.4th 856, 905-906; **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].)

However, as pointed out in ***People v. Thomas*** (2012) 53 Cal.4th 771, even if challenged jurors have nothing in common besides their race, "this circumstance does not, in itself, create an inference of" discrimination where "obvious bases for the prosecutor's decision to excuse many of the jurors appear in the record[.]" (**Id.** at p. 795.)

If the jurors who were removed shared *more* in common (when it comes to characteristics relevant to the prosecutor's concerns about their "favorability" as jurors) than just membership in the cognizable class, the prosecutor should point this out to the court. (**See** ***People*** **v.** ***Bell*** (2007) 40 Cal.4th 582, 599 [considering fact 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]; ***People*** **v.** ***Clark*** (2012) 52 Cal.4th 856, 906 [noting defendant had pointed to nothing in the record suggesting that the four challenged jurors shared no characteristics other than their race in finding no prima facie case was made]; ***People*** **v.** ***Trevino*** (1997) 55 Cal.App.4th 396, 411 [finding the trial court properly denied ***Wheeler*** motion where challenged jurors shared a characteristic besides being Hispanic, i.e., the juror or juror's spouse had a connection with an organization providing health care -mental or physical].)

4. Whether the prosecutor failed to engage the identified jurors in any, or desultory, questioning

In deciding whether a prima facie case has been made, it is proper to consider whether the prosecutor failed "to engage these same jurors in more than desultory voir dire, or indeed to ask them any questions at all" (***People* v. *Wheeler*** (1978) 22 Cal.3d 258, 281; ***People* v. *Bell*** (2007) 40 Cal.4th 582, 597; **accord *People* v. *Clark*** (2012) 52 Cal.4th 856, 906; **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].) "A failure to engage in meaningful voir dire on a subject of purported concern can, in some circumstances, be circumstantial evidence suggesting the stated concern is pretextual." (***People* v. *Lomax*** (2010) 49 Cal.4th 530, 573; **see also *People* v. *Lewis*** (2008) 43 Cal.4th 415, 476 [noting failure to engage in meaningful voir dire on a topic the party says was important in the decision to challenge the juror is a factor, albeit not a dispositive factor, that can suggest the stated reason is pretextual].) On the other hand, an inference that the prosecutor's reasons were genuine may be drawn where the prosecutor's questioning *did* focus on the topic related to reasons provided for challenging the juror. (**See *People* v. *Riccardi*** (2012) 54 Cal.4th 758, 788 ***People* v. *Booker*** (2011) 51 Cal.4th 141, 166.)

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 may also be considered in determining whether an inference of discriminatory purpose may arise. (**See *Miller-El* v. *Dretke*** (2005) 545 U.S. 231, 255-257)

It should be kept in mind, however, that the failure to ask many questions of a juror before challenging the juror is a factor of limited significance in cases in which juror questionnaires (especially extensive questionnaires) are used and the prosecutor is able to gather information about the jurors without directly asking them questions, i.e., by observing their responses and demeanor during individual questioning by the court and/or during group voir dire. (**See *People* v. *Dement*** (2011) 53 Cal.4th 1, 20; ***People* v. *Clark*** (2012) 52 Cal.4th 856, 906-907; **see also *People* v. *Taylor*** (2010) 48 Cal.4th 574, 615-616 [that the prospective juror had completed a 98-question questionnaire was notable when the prosecutor failed to ask any questions]; ***People* v. *Bell*** (2007) 40 Cal.4th 582, 598-599, fn. 5 [noting the trial court's comment that "when you have a questionnaire, it can never be a perfunctory examination'"].)

The failure to ask many questions of a juror is also of diminished significance in situations where the "attorneys [are] not permitted to question prospective jurors directly, but instead ha[ve] to ask the trial court to inquire into areas of special concern." (***People* v. *Lomax*** (2010) 49 Cal.4th 530, 573.)

Finally, even where there has been little or no questioning about a particular subject, a party need not inquire into every possible concern that party may have regarding a prospective juror. (**See *People* v. *Jones*** (2011) 51 Cal.4th 346, 363; ***Carrera* v. *Ayers*** (9th Cir. 2012) 699 F.3d 1104, 1111 [no "desultory" questioning where prosecutor asked Hispanic-surnamed prospective jurors whether the fact that the defendant was "of Spanish descent" would affect their deliberations without asking potential white jurors similar ethnicity-

based questions].)

If applicable, prosecutors should make sure the record shows that the prosecutor has not engaged in "desultory questioning" of members of the cognizable class.

Editor's note: The significance of "desultory questioning" in general (as well as on a particular topic) is discussed in greater depth in this outline, section VII-I at p. 97.

5. Whether the defendant is a member of the excluded group and if the alleged victim is a member of the group to which the majority of the remaining jurors belong

In deciding whether a prima facie case has been made, it is proper to consider whether 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. (***People* v. *Wheeler*** (1978) 22 Cal.3d 258, 281; ***People* v. *Bell*** (2007) 40 Cal.4th 582, 597; **accord *People* v. *Clark*** (2012) 52 Cal.4th 856, 906.)

If the defendant is not a member of the cognizable class at issue, this fact should be reflected in the record. (**See *People* v. *Dement*** (2011) 53 Cal.4th 1, 20 [fact defendant was not a member of the cognizable class was a factor that, because it was absent, failed to support an inference of discrimination]; ***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]; ***People* v. *Neuman*** (2009) 176 Cal.App.4th 571, 581 [fact that defendant is ***not*** a member of the cognizable class can support finding of no prima facie case]; ***People* v. *Chambie*** (1987) 189 Cal.App.3d 149, 157 [noting prosecutor's statement that he did not consider the case to be one in which there was any possible motivation for excluding jurors because they were black since the case involved a black investigating officer and black victim as well as a black defendant].)

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].)

If the ***victim*** belongs to the same cognizable class as the challenged juror, this tends to rebut an inference

of discrimination (**see *People* v. *Bell*** (2007) 40 Cal.4th 582, 599) as does the fact the victim belongs to the same group as the defendant (**see *People* v. *Thomas*** (2012) 53 Cal.4th 771, 794 [no inference of discrimination arose where two of three victims were of same race as defendant].) Thus, if the victim was a member of cognizable class at issue, this fact should be reflected in the record.

6. Whether 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. The prosecutor's acceptance of a panel including members of the cognizable class at issue, "while not conclusive, was '"an indication of the prosecutor's good faith in exercising his peremptories, and ... an appropriate fact for the trial judge to consider in ruling on a ***Wheeler*** objection...."' (***People v. Streeter*** (2012) 54 Cal.4th 205, 224; ***People* v. *Dement*** (2011) 53 Cal.4th 1, 20; ***People* v. *Hartsch*** (2010) 49 Cal.4th 472, 487; ***People* v. *Snow*** (1987) 44 Cal.3d 216, 225.) Numerous cases have found this factor to be significant in finding no prima facie case was met. (**See *People v. Streeter*** (2012) 54 Cal.4th 205, 224 [no prima facie case where prosecutor accepted jury five times with up to four African-American jurors seated in jury box]; ***People* v. *Dement*** (2011) 53 Cal.4th 1, 19, fn. 4 [noting prosecutor repeatedly passed on panel containing women in finding lack of prima facie case]; ***People* v. *Clark*** (2012) 52 Cal.4th 856, 903-908 [no prima facie case where prosecutor repeatedly passed on panel containing two African-American jurors before eventually excusing them and one African-American served on the panel]; ***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]; ***People* v. *Thomas*** (2012) 53 Cal.4th 771, 796 [no prima facie case of discrimination against African-Americans where, inter alia, prosecution first passed on panel with four African-Americans and passed again where two African-Americans and one half-African-American juror was on the panel]; ***People* v. *Cornwell*** (2005) 37 Cal.4th 50, 69-70 [no inference of bias in excusing one of two African-American prospective jurors, given that the other African-American prospective juror was passed repeatedly by the prosecutor and sat on the jury]; ***Gonzalez v. Brown*** (9th Cir. 2009) 585 F.3d 1202, 1210 [the fact the prosecutor accepted one of the African-American jurors twice before she exercised a peremptory strike to remove that juror suggests that her motives for exercising the strike were not racial, especially considering the prosecutor had plenty of challenges left when she passed the second time (i.e., the prosecutor did not accept that juror twice simply because her peremptory strikes were running low)].)

7. Whether the prosecutor sought to keep members of the cognizable class from being excused for cause or hardship

In ***People v. Streeter*** (2012) 54 Cal.4th 205, the court denied a defendant's claim that the prosecutor's challenge of several African American jurors was racially-based because, inter alia, "after extensive

questioning, the prosecutor successfully rehabilitated two African-American jurors . . . staving off defense challenges for cause. The prosecutor's desire to keep African-American jurors on the jury tended to show that the prosecutor was motivated by the jurors' individual views instead of their race." (**Id.** at p. 224.)

In ***People* v. *Jones*** (2011) 51 Cal.4th 346, the court held that the prosecutor's "desire to have had as jurors the three [African-American jurors] who were excused for hardship or cause," helped show that the prosecutor's motive in challenging other African-American jurors was not racially-motivated. (**Id.** at p. 363.)

Editor's note: This factor is discussed in greater depth in this outline, section VI-L at p. 77.

8. Whether there appears to be reasonable neutral grounds for excusing the identified jurors

In deciding whether a prima facie case has been made, the California Supreme Court has made it clear that it is proper to consider whether there appear to be reasonable neutral grounds for excusing the jurors. (***See People* v. *Clark*** (2012) 52 Cal.4th 856, 907; ***People* v. *Bonilla*** (2007) 41 Cal.4th 313, 343.)

The rule *may* be different in the Ninth Circuit. (***People* v. *Neuman*** (2009) 176 Cal.App.4th 571, 583 [indicating that Ninth Circuit may have different view on whether the existence of reasonable neutral grounds for excusing jurors may be considered at the first step, but California courts are bound by California Supreme Court precedent]; *compare* ***Johnson* v. *Finn*** (9th Cir. 2012) 665 F.3d 1063, 1071 [stating when it comes to determining whether a prima facie case has been made, the fact "there were numerous legitimate race-neutral reasons for the prosecutor to excuse each of the ... prospective jurors" is not a relevant circumstance]; ***Williams v. Runnels*** (9th Cir.2006) 432 F.3d 1102, 1107-1108 [holding that when reviewing whether a prima facie showing of statistical disparity has been rebutted in a *Batson* step-one claim , the "other relevant circumstances" must do more than indicate that the record would support race-neutral reasons for the questioned challenges"] *with* ***United States* v. *Stinson*** (9th Cir. 2011) 647 F.3d 1196, 1206-1207 [finding trial court properly declined to find prima facie case based, in part, on existence of obvious reason for challenging juror]; ***Paulino* v. *Castro*** (9th Cir.2004) 371 F.3d 1083, 1091-1092 ["when '"the record contains entirely plausible reasons, independent of race, why" a prosecutor may have exercised peremptories, such reasons have usually helped persuade us that defendant made no prima facie showing ....'"]; ***Johnson* v. *Campbell*** (9th Cir. 1996) 92 F.3d 951, 953-954 [prima facie case not established under ***Batson*** where "there was an obvious neutral reason for the challenge"].)

In the unreported federal decision of ***Johnson v. Hedgpeth*** (C.D.Cal. 2012) 2012 WL 2411203, the court took into consideration the existence of neutral reasons in upholding a state court's finding of no prima facie case and noted that while "some Ninth Circuit cases decided on de novo review have held that where an inference of discrimination is initially supported by a strong showing of statistical disparity, the ***Batson*** prima

facie case cannot be rebutted simply by reliance on plausible race-neutral reasons for the challenged strikes discerned by the court from the record [citing to ***Johnson*** **v.** ***Finn*** (9th Cir. 2012) 665 F.3d 1063, 1071 and ***Williams*** **v.** ***Runnels*** (9th Cir.2006) 432 F.3d 1102, 1107-1108], "[f]or purposes of AEDPA review, these circuit court decisions do not clearly establish any general rule precluding such an analysis of the record as part of the step-one inquiry in all cases, nor do they dictate that the state courts were objectively unreasonable in considering the legitimate reasons for strikes suggested by the record in this case, given the lack of a significant statistical underpinning for Petitioner's Batson claim." (**Id.** at p. *8, fn. 11.)

Editor's note: The various types of valid neutral grounds for challenging a juror are discussed in this outline, section VI-C at pp. 47-70.)

9. Whether the answers provided by the challenged jurors were favorable to the prosecution

It appears that it is proper to consider whether the answers provided by the challenged jurors were favorable to the prosecution in deciding whether a prima facie case has been made, but the absence of an obvious reason to strike a juror will not suggest a discriminatory purpose where answers were not *excessively* favorable to the prosecution and other circumstances suggest the challenge was not done for a racial purpose. (**See** ***People*** **v.** ***Thomas*** (2012) 53 Cal.4th 771, 794-795.)

10. Whether the prosecutor or prosecutor's office has a history of discriminatory jury selection

Evidence of the historical practice of the prosecutor or the prosecutor's office of discriminatory jury selection practice is relevant in assessing whether an inference of discriminatory purpose can arise. (**See** ***Miller-El*** **v.** ***Dretke*** (2005) 545 U.S. 231, 253, 264-266.) Conversely, the lack of any such history or evidence of a historical practice of non-discriminatory selection tends to undermine any inference of discriminatory purpose. (**See** ***People v. Lenix*** (2008) 44 Cal.4th 602, 630 [noting that "[t]here is no indication that the prosecutor or his office relied on racial factors" in upholding trial court's finding prosecutor's reasons for removing African-American juror were proper].)

D. Should the Trial Court Do a "Comparative Analysis" at the Prima Facie Level?

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. (**See *Miller El* v. *Dretke*** (2005) 545 U.S. 231, 241; ***Cook* v. *LaMarque*** (9th Cir. 2010) 593 F.3d 810, 815.)

If the trial court reserves ruling on the ***Batson-Wheeler*** motion until after the parties have completed their jury selection, then a *properly conducted* comparative analysis may be helpful in supporting or dispelling a claim an attorney is exercising a challenge for impermissible reasons.

However, if the trial court decides to rule upon a ***Batson-Wheeler*** motion ***before*** jury selection is completed, then comparative analysis is less helpful as a means of supporting an inference the challenges are being exercised for a permissible purpose. This is because the removed jurors may only be compared to other removed jurors. The removed jurors cannot be compared to jurors who have not been removed because it is unknown which jurors still sitting will not later be removed.

Comparative analysis is generally useless for purposes of determining whether a first stage prima facie case has been established unless the prosecutor proffers reasons for challenging jurors. "Whatever use comparative juror analysis might have in a third-stage case for determining whether a prosecutor's proffered justifications for his [or her] strikes are pretextual, it has little or no use where the analysis does not hinge on the prosecution's actual proffered rationales." (***People* v. *Taylor*** (2010) 48 Cal.4th 574, 617.)

Comparative analysis may also be used to ***affirmatively*** support an inference that a prosecutor is **not** using his or her challenges in an impermissible manner (aka "reverse comparative analysis"). If there are two jurors who have given very similar responses, one who belongs to the cognizable class and one who does not, and the party has challenged **both** jurors for the ***same*** reason, then an inference can arise that the purported basis of the challenge is **not** a pretext designed to conceal a discriminatory purpose. (**See *People* v. *Jackson*** (1996) 13 Cal.4th 1164, 1254.) This form of comparative analysis may potentially be conducted even at the prima facie level if some of the jurors who have been challenged are not from the same cognizable class as the juror who was purportedly improperly struck.

E. Should a 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. *Garcia*** (2011) 52 Cal.4th 706, 746; ***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. This is because the judge's decision will often be challenged on appeal. A reviewing court may affirm the finding by examining the record for race-neutral grounds upon which the prosecutor *might* have challenged the prospective jurors in question. (***People*** **v.** ***Taylor*** (2010) 48 Cal.4th 574, 614, fn. 9; ***People v. Hoyos*** (2007) 41 Cal.4th 872, 900-901, fn. 15; ***People*** **v.** ***Lancaster*** (2007) 41 Cal.4th 50, 76; ***People*** **v.** ***Avila*** (2006) 38 Cal.4th 491, 554; ***People*** **v.** ***Bonilla*** (2007) 41 Cal.4th 313, 343-359; ***People*** **v.** ***Neuman*** (2009) 176 Cal.App.4th 571, 580 citing to ***People v. Davis*** (2009) 46 Cal.4th 539; ***People v. Carasi*** (2008) 44 Cal.4th 1263, 1295, fn. 17 (conc. & dis.opn. of Kennard, J.); **see also** ***People*** **v.** ***Farnam*** (2002) 28 Cal.4th 107, 135.) A prosecutor may have many neutral reasons for challenging a juror that are not obvious or reflected in the record. A reviewing court will not be able to adequately consider those reasons unless the prosecutor states the reasons.

Moreover, putting the reasons on the records avoids the problem of having to remember what the reasons were for excusing a juror many years later. (**See** ***Paulino*** **v.** ***Harrison*** (9th Cir. 2008) 542 F.3d 692, 700; ***Yee*** **v.** ***Duncan*** (9th Cir. 2006) 463 F.3d 893, 899.)

One caveat: The rules governing how an appellate court will review a "prima facie" finding vary depending on whether, when, and how a prosecutor places his or her reasons on the record. Here are the rules:

"When a trial court, after a ***Wheeler/Batson*** motion has been made, requests the prosecution to justify its peremptory challenges, then the question whether defendant has made a prima facie showing is either considered moot (**see** ***Hernandez v. New York*** (1991) 500 U.S. 352, 359, 111 S.Ct. 1859, 114 L.Ed.2d 395) or a finding of a prima facie showing is considered implicit in the request (***People*** **v.** ***Fuentes*** (1991) 54 Cal.3d 707, 715–716 [alternate citation omitted]). But when . . . the trial court states that it does not believe a prima facie case has been made, and then invites the prosecution to justify its challenges for purposes of completing the record on appeal, the question whether a prima facie case has been made is not mooted, nor is a finding of a prima facie showing implied. (***Turner***, ***supra***, 8 Cal.4th at p. 167 [alternate citations omitted]) When the trial court under these circumstances rules that no prima facie case has been made, 'the reviewing court considers the entire record of voir dire. [Citation.] "If the record 'suggests grounds upon which the prosecutor might reasonably have challenged' the jurors in question,'" we reject the challenge. (***People v. Davenport*** (1995) 11 Cal.4th 1171, 1200.)" (***People*** **v.** ***Welch*** (1999) 20 Cal.4th 701, 745-746; **accord** ***People*** **v.** ***Taylor*** (2010) 48 Cal.4th 574, 613.)

Thus, if the judge allows a prosecutor to put her reasons on the record, it is a good idea to make it clear on

the record whether the trial court is finding no prima facie case *without considering* those reasons.

F. Should a Prosecutor Provide a Comparative Analysis Explaining Why Jurors Not Belonging to the Cognizable Class Who Were Challenged Were Not Similarly Situated to the Juror Belonging to the Cognizable Class Who Was Challenged?

If a court has not found a prima facie case but gives the prosecutor an opportunity to go on the record regarding his or her reasons for challenging the jurors at issue, it is questionable whether the prosecutor should use the opportunity to provide reasons why the prosecutor did or did not challenge jurors **not** belonging to the cognizable class in question.

As pointed out in ***People v. Jones*** (2011) 51 Cal.4th 346, "no authority has imposed the additional burden of anticipating all possible unmade claims of comparative juror analysis and explaining why other jurors were not challenged. (**Id.** at p. 365.)

The upside to the prosecutor establishing why jurors belonging to different cognizable classes than the challenged jurors were or were not challenged is that if the defense argues on appeal that the trial court erred in declining to find a prima facie case, the prosecutor's explanation may assist the appellate court in finding no prima facie case was established. Moreover, if the reviewing court finds a prima facie had been established, it may assist the reviewing court in, nevertheless, finding there was a proper basis for challenging the jurors in question at the third stage analysis.

The downside to the prosecutor in proffering reasons for keeping or challenging a particular juror is manifold. First, it is somewhat onerous. Second, it may reveal more of jury-selection strategy than necessary - especially if the court hears the ***Batson-Wheeler*** motion before jury selection is completed. Third, on review, the appellate court *may* be prevented from speculating about reasons why a juror not in the cognizable class was or was not removed. (**See *People* v. *Jones*** (2011) 51 Cal.4th 346,365-366 [allowing reviewing court doing comparative analysis for first time on appeal to speculate on reasons why prosecutor did *not* challenge jurors - at least where no actual reasons were provided by the prosecutor].) Fourth, if jury selection is on-going, it may make it more difficult (albeit not impossible) to explain why a juror later kept was not similarly situated to a juror challenged where the juror kept had a characteristic the prosecutor *earlier* cited as a characteristic the prosecutor disliked.

VI. Step Two: Stating the Grounds for the Challenges

Once a prima facie case is made, the "'burden shifts to the [party who originally challenged the juror] to explain adequately the racial [or other cognizable class] exclusion' by offering permissible . . . neutral

justifications for the strikes." (***Johnson* v. *California*** (2005) 545 U.S. 162, 168 [bracketed portions and other modifications added by author].) This burden of production cannot be satisfied "by merely denying that he had a discriminatory motive or by merely affirming his good faith." (***Purkett* v. *Elem*** (1995) 514 U.S. 765, 768-769.)

A. Should the Prosecutor Ask to Proffer His or Her Reasons for Excluding a Juror Outside the Presence of the Defense?

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 privately 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]; ***Ayala* v. *Wong*** (9th Cir. 2012) 693 F.3d 945 [finding error in ***People* v. *Ayala*** (2000) 24 Cal.4th 243 was prejudicial]; ***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.**)

B. Should the Prosecutor 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.) The fact a trial