[prosecutor could be suspicious of jurors' equivocal answers indicating juror was not forthcoming about true opinion]; ***People*** **v.** ***Roldan*** (2005) 35 Cal.4th 646, 703 [proper to challenge juror who "was not entirely candid, initially reporting he was a 'peace officer' when he was not"]; ***People*** **v.** ***Welch*** (1999) 20 Cal.4th 701, 746 [proper to remove juror where juror said she had no children during voir dire but who, according to a bailiff, had a child seated on her lap in the jury room]; ***People*** **v.** ***Adanandus*** (2007) 157 Cal.App.4th 496, 500; ***People*** **v.** ***Cardenas*** (2007) 155 Cal.App.4th 1468, 1475; **see also** ***People*** **v.** ***Salcido*** (2008) 44 Cal.4th 93, 140 [fact juror less than direct in answering questions relating to his views on the death penalty provided neutral grounds for excusing juror]; ***People*** **v.** ***Cox*** (2010) 187 Cal.App.4th 337, 360 [noting challenged juror had "evasively responded, 'Not necessarily,'" when asked if he was a member of a gang]; ***People*** **v.** ***Neuman*** (2009) 176 Cal.App.4th 571, 586-587 [fact juror gave somewhat conflicting answers regarding her ability to put aside the fact she had been a victim of molestation (i.e., by initially claiming she gave the issue much thought but then later becoming much more unequivocal and boasting of an "incredible ability of being impartial with everything that happened to me") neutral grounds for removing juror]; ***Gonzalez*** **v.** ***Brown*** (9th Cir. 2009) 585 F.3d 1202, 1205, 1209-1210 [finding prosecutor properly challenged juror who had been "very evasive" when asked about her license suspension]; ***Hayes*** **v.** ***Woodford*** (9th Cir 2002) 301 F.3d 1054, 1082-1083 [the fact a juror claimed he had been accepted for employment with a police department (when that would have been impossible because of the department's age requirement) and appeared prone to exaggeration (i.e., juror made a comment he had a "photostatic" mind) provided legitimate grounds for booting the juror].)

Such lack of forthrightness is often revealed by a juror mischaracterizing a relative or friend as being the "victim" of a crime when, in fact, later questioning reveals the relative or friend was the *suspect* in the crime. (**See** ***People*** **v.** ***Davis*** (2008) 164 Cal.App.4th 305, 313 [fact juror initially *mistakenly or intentionally* characterized her son as a victim of a DUI driver but later revealed her son had actually been arrested for DUI was, inter alia, a proper basis for challenging the juror]. ***Cook*** **v.** ***LaMarque*** (9th Cir. 2010) 593 F.3d 810, 816 [juror properly challenged on ground she initially claimed her brother shot someone in self-defense although in reality, her brother had been convicted of the crime and self-defense was an unsuccessful defense to prosecution].)

8. Juror gives answers indicating juror would have sympathy for persons in defendant's situation

If a juror expresses attitudes reflecting a belief that a defendant's social environment or history might excuse or mitigate his or her criminal behavior, this can provide neutral grounds for challenging a juror. (**See** ***People*** **v.** ***Watson*** (2008) 43 Cal.4th 652, 673-675 [proper to excuse juror who said her childhood friend had committed murders but did not deserve the death penalty because of the neighborhood he grew up in and fact friend came from single parent home];***People*** **v.** ***Cruz*** (2008) 44 Cal.4th 636, 657-659 [prosecutor properly challenged juror who, inter alia, had "some sympathy toward those individuals who became intoxicated"]; ***Ngo*** **v.** ***Giurbino*** (9th Cir. 2011) 651 F.3d 1112, 1116-1117 [prosecutor provide neutral basis for

challenging juror where juror's responses regarding a gun purchase indicated to the prosecutor that the prospective juror shared the defendants' attitude about guns].)

In gang cases, contacts with or sympathy for gang members can be a neutral basis for excluding a juror. In ***People*** **v.** ***Watson*** (2008) 43 Cal.4th 652, the court held that that contacts with members of street gangs where the prospective juror lived provided support for the prosecutor's bias concerns. (**Id.** at pp. 679-680; **see also** ***People*** **v.** ***Williams*** (1997) 16 Cal.4th 153, 191 [that prospective juror might be sympathetic to defendant because of his high school familiarity with Blood gang members warranted peremptory challenge]; ***People*** **v.** ***Rushing*** (2011) 197 Cal.App.4th 801, 811 [proper to excuse juror in gang case because, inter alia, juror expressed some degree of sympathy for gang members when she said she believed people joined gangs because they had nowhere else to turn]; ***People*** **v.** ***Cox*** (2010) 187 Cal.App.4th 337, 347-348, 356 [proper to excuse juror who not only knew about the local gang, but grew up with members of that gang and "ran with them" when he was 12 or 13 and to excuse another juror who had friends in gangs in her area and reported she had held a friend's gun]; ***United States*** **v.** ***Stinson*** (9th Cir. 2011) 647 F.3d 1196, 1207 [fact juror had personal familiarity with gangs was a neutral explanation for excusing juror].)

9. Juror has life experiences or characteristics that might make the juror overly sympathetic to, or biased towards, a person in the defendant's position

If a juror has had experiences that might cause her to sympathize or empathize with the criminal defendant on trial, this can provide neutral grounds for excusing the juror. (**See** ***People*** **v.** ***McKinzie*** (2012) 54 Cal.4th 1302, 1321-1322 [fact juror had been arrested for domestic violence was proper basis to challenge because, inter alia, defendant's prior acts of domestic violence would be introduced in penalty phase and juror might be sympathetic to defendant]; ***People*** **v.** ***Watson*** (2008) 43 Cal.4th 652, 676, 680 [proper to challenge juror who, inter alia, had brother who worked in CYA and sometimes would tell her "a sad story from an inmate's point of view"; fact juror has had substantial exposure to gang members such that it might make it more difficult for her to impose the death penalty in a gang-related drive-by shooting case was neutral reason to exercise a challenge against the juror]; ***People*** **v.** ***Salcido*** (2008) 44 Cal.4th 93, 140 [juror's own history of alcoholism resulting in a court martial and abusive behavior toward his family was proper ground for excusing juror because it could predispose him to bias in favor of a defendant who might use alcoholism as mitigation in a death penalty case]; ***People*** **v.** ***Stanley*** (2006) 39 Cal.4th 913, 940 [finding sympathy for defendant a valid race-neutral reason for peremptory challenge].)

Similarly, if the juror and defendant have characteristics in common, this can be a valid basis for excusing the juror. (**See** ***People*** **v.** ***Pearson*** (2013) 56 Cal.4th 393, 422 [fact both juror and defendant were governmental employees responsible to a supervisor was an adequate non-racial reason for challenging the juror]; ***Jamerson*** **v.** ***Runnels*** (9th Cir. 2013) 713 F.3d 1218, 1228 [prosecutor could properly use challenge based on fear that juror who suffered a long term bout of hepatitis might sympathize with defendant who

also had physical ailment - leg impairment]; ***Williams*** **v.** ***Rhoades*** (9th Cir. 2004) 354 F.3d 1101, 1109-1010 [fear that a juror might identify with the defendant because both had young sons was a valid, race-neutral reason to exercise a peremptory strike]; **see also** ***United States v. Brown*** (8th Cir. 2009) 560 F.3d 754, 763 [strike of a prospective juror valid because both the juror and the defendant received public assistance; and cited favorably in ***Jamerson*** **v.** ***Runnels*** (9th Cir. 2013) 713 F.3d 1218 to illustrate principle proper to challenge juror who might identify with the defendant on that basis].)

10. Juror has life experiences or a viewpoint that might cause the juror to question some aspect of the prosecution's case

If a juror expresses sentiments, has prior experiences, or has attributes that might bear on how the prosecution's case is viewed (i.e., doubts about the validity of certain types of evidence or certain types of witnesses), this can provide neutral grounds for challenging the juror. (**See** ***People*** **v.** ***Pearson*** (2013) 56 Cal.4th 393, 422 [proper to excuse juror based on fact she thought psychologists and psychiatrists were "good" and "would have a good opinion" in court]; ***People*** **v.** ***Jones*** (2011) 51 Cal.4th 346, 368 [proper for prosecutor to challenge African-American juror based on the prosecutor's "feeling that she would look down upon those kids," whom he described as "kind of rough" "black kids," due possibly to her "overbearing manner"]; ***People*** **v.** ***Watson*** (2008) 43 Cal.4th 652, 676 [fact juror had trouble describing her own assailant when she was a victim of purse snatching, inter alia, provided neutral grounds for challenging a juror in a case dependent on identification testimony]; ***People*** **v.** ***Gutierrez*** (2002) 28 Cal.4th 1083, 1124-1125 [proper, in a case involving defense mental expert witnesses, to remove one juror who gave answers indicating he might rely too heavily on the expert opinion testimony of psychologists, another juror who said he never disagreed with a psychologist's evaluation of a student and expressed hesitancy in disagreeing with an expert; and to bump another juror who stated he felt "transsexuals were sick" where the victim was a transsexual]; ***Briggs*** **v.** ***Grounds*** (9th Cir. 2011) 682 F.3d 1165, 1172, 1179-1180 [prosecutor could properly challenge juror based on juror's own involvement in the workplace-sexual-harassment investigation and the concern that his involvement would affect how he viewed the prosecution witnesses (two teenage victims of sexual assault); and challenge another juror who indicated he never discussed the possibility of being sexually assaulted with his daughters, thought teenagers were more susceptible to coaching, thought sexual assault victims are sometimes less believable because of age or personal background, and said yes to the question of whether he had a bias but failed to explain that answer on voir dire].)

11. Juror has connection to parties or persons involved in the case

In ***People*** **v.** ***Pearson*** (2013) 56 Cal.4th 393, the court held it was proper to excuse juror based on either the fact the juror was acquainted with the prosecutor from having previously cleaned his office or on the fact the juror knew one of the defense witnesses. (**Id.** at p. 422.) In ***People*** **v.** ***Cox*** (2010) 187 Cal.App.4th 337, the court held the prosecutor could properly challenge a juror based on the fact that the juror had a conversation with one of defendant's family members in the elevator and apparently had some familiarity with

family members of the defendant who might appear in court. (**Id.** at p. 350.) Another juror in ***Cox*** was also held to have been challenged for neutral reasons based on, inter alia, the fact that the juror had a possible affiliation with the defendants - one defendant had nudged the other defendant and pointed toward the juror when she was seated. (**Id.** at p. 356.) In ***Hayes*** **v.** ***Woodford*** (9th Cir. 2002) 301 F.3d 1054, a prosecutor's challenge to a juror was upheld as race-neutral where a person's wallet had been found at a crime scene pertinent to this case, and the juror's daughter employed the wallet's owner. (**Id.** at pp. 1082-1083.) And in ***Carrera*** **v.** ***Ayers*** (9th Cir. 2012) 699 F.3d 1104, the court held the fact the juror worked at the juvenile detention facility where the defendant's co-defendant was held was an "obvious" non-discriminatory reason for challenging the juror. (**Id.** at p. 1108.)

12. Juror has religious beliefs or bias that might affect his or her decision

If a person's religious beliefs would make it difficult for the juror to sit in judgment, convict, or impose a penalty, this can provide neutral grounds for challenging 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.** ***Mills*** (2010) 48 Cal.4th 158, 184 [prospective juror who "believed Satan controls this world and the people in it" was properly challenged for "strident ... religious views"]; ***People*** **v.** ***Martin*** (1998) 64 Cal.App.4th 378, 384 [prosecutor properly challenged Jehovah's Witness whose voir dire answers indicated her "religious views might render her uncomfortable with sitting in judgment of a fellow human being"]; ***People*** **v.** ***Allen*** (1989) 212 Cal.App.3d 306, 315-316 [proper to remove juror who was pastor where, inter alia, she conceded her religious views might interfere with her ability to deliberate].)

If a juror has a religious bias that can also be a race-neutral reason for removing the juror, even if it cannot be shown the parties to the trial or witnesses would be target of that bias. For example, in ***People*** **v.** ***Rushing*** (2011) 197 Cal.App.4th 801, the juror allegedly challenged by the prosecutor for discriminatory reasons was the only juror who responded affirmatively to the question of "A party, witness, or attorney may come from a particular national, racial, or religious group or may have a lifestyle different from your own. Would that fact in any way affect your ability to be a fair and impartial juror?" When asked to elaborate, the juror explained that she answered affirmatively as to the "religious part" because "depending on the person's view" of "religion or God, it affects their whole outlook on everything." The juror stated, "[I]f somebody doesn't believe in God then I think just their whole outlook on everything [sic]." The juror indicated that she didn't know how that might affect how she viewed the witness, that she disagreed with some religions, and that it may be an issue for her as a juror. However, the juror also said she did not believe her views would prevent her from being a fair juror, and that she understood this was not a religious court. (**Id.** at p. 809.) The court found that the juror's statements reflected an acknowledged religious prejudice against atheists which might have prevented her from being a fair juror. The court rejected the defendant's argument that because "religious beliefs were not an issue in the case nor would the religious

beliefs of any of the witnesses or defendants ever become part of the trial the juror's bias would not matter." (**Id.** at p. 812.) The court found the prosecutor could have been legitimately concerned the juror "might discover or assume that any one of the trial participants (e.g., witnesses, attorneys, etc.) was a non-believer and, accordingly, view that person in a negative light." (**Ibid.**)

If a particular congregation has a reputation for being "controversial," this can also be a legitimate reason for challenging the juror - and does not constitute impermissible discrimination based on religious affiliation. (**See e.g.,** ***People v. Jones*** (2011) 51 Cal.4th 346, 367 [proper to challenge juror who was member of the African Methodist Episcopal Church in Los Angeles because the particular congregration was, in his view, "constantly controversial," and he did not "particularly want anybody that's controversial on my jury panel"].)

Editor's note: As to whether a religious group can constitute a cognizable class, see this outline, section V-A-4, at p. 23.

13. Juror expresses an unwillingness or reluctance to follow the law

a. Reluctance to Follow Law in General or Regarding a Specific Aspect of the Law

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

In ***People*** v. ***Riccardi*** (2012) 54 Cal.4th 758, the court held it was proper to challenge a juror who initially expressed a strong reluctance to considering evidence of flight as consciousness of guilt, and, who only half-heartedly accepted the principle after being told such evidence could be considered - even though the juror was later "rehabilitated" and said he could "certainly" follow the flight instruction. (**Id.** at pp. 793-794.)

b. Holding People to a Higher Burden of Proof

In ***People*** v. ***Watson*** (2008) 43 Cal.4th 652, the court held the fact the juror indicated he might hold the prosecution to a higher burden of proof than beyond a reasonable doubt was a neutral reason for challenging a juror. (**Id.** at pp. 679-680; **see also** ***Briggs*** v. ***Grounds*** (9th Cir. 2011) 682 F.3d 1165, 1172-1174 [proper to challenge jurors who indicated they would hold the prosecution to a higher standard of proof than required by law]; ***Gonzalez*** v. ***Brown*** (9th Cir. 2009) 585 F.3d 1202, 1205, 1209-1210 [upholding determination prosecutor exercised a challenge against juror for a neutral reason where the juror kept answering he expected the People to prove it beyond *all* doubt].)

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

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

14. Juror's demeanor, attitude, and behavior during court proceedings

A juror's overall demeanor can be a neutral reason for challenging a juror. (**See** ***Thaler*** **v.** ***Haynes*** (2010) 130 S.Ct. 1171, 1172-1175; ***People*** **v.** ***DeHoyos*** (2013) 57 Cal.4th 79 [2013 WL 3369075, *19]; ***People*** **v.** ***Stanley*** (2006) 39 Cal.4th 913, 939.) Among things that a prosecutor may legitimately take into account in deciding whether to strike or retain juror are 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.)* "Even an inflection in the voice can make a difference in the meaning. The sentence, 'She never said she missed him,' is susceptible of six different meanings, depending on which word is emphasized." (***Lenix*** at p. 622.) "Indeed, even less tangible evidence of potential bias may bring forth a peremptory challenge: either party may feel a mistrust of a juror's objectivity on no more than the 'sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another' (citation omitted) upon entering the box the juror may have smiled at the defendant, for instance, or glared at him." (***People*** **v.** ***Reynoso*** (2003) 31 Cal.4th 903, 917, citing to ***Wheeler*** at 275.) *Note: The significance of a juror's body language is discussed below in this outline, section VI-D-17 at p. 62.

a. Late to court

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

b. Inattention

"A genuine concern that a prospective juror is not paying sufficient attention to the proceedings is a race-neutral basis for a peremptory challenge." (***People*** **v.** ***DeHoyos*** (2013) 57 Cal.4th 79 [158 Cal.Rptr.3d 797, 831]; **accord** ***People*** **v.** ***Lopez*** (2013) 56 Cal.4th 1028, 1049.) In ***People*** **v.** ***Davis*** (2008) 164 Cal.App.4th 305, the court found, inter alia, the fact the juror was inattentive provided neutral grounds for challenging the juror. (**Id.** at pp. 315.)

c. Arrogant, flippant, or insufficiently serious attitude

In ***Thaler*** **v.** ***Haynes*** (2010) 130 S.Ct. 1171, the court recognized that the fact a juror exhibits a light-hearted or humorous attitude, especially in a serious case, can be a neutral reason for challenging the juror. (**Id.** at p. 1172.)

In ***People*** **v.** ***DeHoyos*** (2013) 57 Cal.4th 79 [2013 WL 3369075], the court held a prosecutor could validly have concerns about a juror's lack of understanding of the "gravity of a juror's personal responsibility in a

capital case" based on the juror stating she was not apprehensive about making a life-and-death decision in a capital case and looking forward to sitting. (**Id.** at pp. 16-17.)

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

In ***People*** **v.** ***Reynoso*** (2003) 31 Cal.4th 903, the court observed that the fact a juror was "laughing at an inappropriate point during voir dire" has been upheld as a valid ground for bumping a juror even though the appellate court could not verify the conduct occurred based on the record. (**Id.** at p. 917; **see also** ***People v. Perez*** (1994) 29 Cal.App.4th 1313, 1330.)

In ***People*** **v.** ***Ayala*** (2000) 24 Cal.4th 243, the court held ***Wheeler*** was not violated by challenging of juror who, inter alia, "exhibited a somewhat flippant attitude in responding to various questions during general voir dire." (**Id.** at p. 264.)

In ***Briggs*** **v.** ***Grounds*** (9th Cir. 2011) 682 F.3d 1165, the Ninth Circuit held there was nothing pretextual in challenging a juror were the juror's demeanor and manner of responding to the prosecutors questions on voir dire suggested the juror was not taking the selection process seriously and was flippant and evasive in his answers. (**Id.** at p. 1178 [and noting that least four exchanges between the prosecutor and the juror where the juror answered questions with questions or avoided giving any direct answer].)

d. Attempt to avoid jury service

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

e. Reluctance to answer questions

In ***People*** **v.** ***Howard*** (2008) 42 Cal.4th 1000, the court stated "[a]n advocate may legitimately be concerned about a prospective juror who will not answer questions." (**Id.** at p. 1019 [and noting one of the challenged jurors declined to fill out substantial portions of the jury questionnaire, marking "confidential" on "almost all of his answers"].)

f. Insufficiently forthcoming or expressive during questioning

The fact a juror appears "quiet during voir dire" is a valid basis for challenging a juror because this could lead

a prosecutor to believe the juror will be "hesitant to discuss issues or any number of other factors that might influence the verdict." (***People*** **v.** ***Cox*** (2010) 187 Cal.App.4th 337, 358.)

In ***People*** **v.** ***Cox*** (2010) 187 Cal.App.4th 337, the court held that, inter alia, the fact the juror did not provide any affirmative responses to any of the court's questions so that the prosecutor felt as if she "got very little information from" the juror was deemed a race neutral justification for removing the juror. (**Id.** at p. 349; **cf.**, ***People*** **v.** ***Long*** (2010) 189 Cal.App.4th 826, 839-848 [rejecting claim by prosecutor that juror did not participate in jury voir dire where record showed juror did answer some questions].)

g. Lack of interest

In ***People v. Battle*** (2011) 197 Cal.App.4th 50, a juror was asked whether she had previously served on a jury. The juror had previously served on a jury but stated she could not remember what type of case it was or even whether it was a criminal case. The court agreed with the trial court that the juror's response "exhibited a lack of interest and lack of memory—acceptable reasons for a peremptory challenge." (**Id.** at p. 60-61.)

h. Unwillingness or inability to interact with other jurors

An "advocate is entitled to consider a panelist's willingness to consider competing views [and] openness to different opinions and experiences[.]" (***People*** **v.** ***Lenix*** (2008) 44 Cal.4th 602, 623.) Thus, the California Supreme Court has held that a juror's unwillingness to interact with other jurors is a valid reason for a peremptory challenge. (***People*** **v.** ***Garcia*** (2011) 52 Cal.4th 706, 749 [prosecutor could properly challenge juror out of concern juror would be close-minded based on juror stating she learned from previous experience on hung jury to avoid being swayed by the views of others]; ***People*** **v.** ***Watson*** (2008) 43 Cal.4th 652, 681 [peremptory challenge supported by relevant race-neutral concerns where a juror appears too stubborn or opinionated to appropriately participate in jury deliberations]; ***People*** **v.** ***Gutierrez*** (2002) 28 Cal.4th 1083, 1124-1125 [proper to challenge juror who said he would not be influenced by anyone's opinion but his own because prosecutor could be concerned juror would not listen to the opinions of other jurors]; ***People*** **v.** ***Ayala*** (2000) 24 Cal.4th 243, 264 [***Wheeler*** not violated by where prosecutor removed juror who, inter alia, referred to the average juror as Joe Six-Pack and stated "most people bother me" on ground juror had attitude that would "create alienation and hostility on the part of the other jurors"]; ***People*** **v.** ***Cox*** (2010) 187 Cal.App.4th 337, 345-346 [a juror's expressed disinclination to talk to or deal with other people and statements indicating he would not be open to having his mind changed by the other jurors or in changing the other jurors' minds was a proper neutral basis for challenging the juror].)

i. Hesitation in answering

If a juror hesitates in answering or equivocates when asked whether she could be fair or impartial, this can potentially provide a race neutral basis for removing the juror. (**See** ***People v. Cox*** (2010) 187 Cal.App.4th 337, 352-353; **accord** ***People v. Jones*** (2011) 51 Cal.4th 346, 367 ["the circumstance that a prospective juror

hesitates over whether he would favor (or try to protect) one side provides a valid reason for the opposing side to use a peremptory challenge out of caution"].)

j. Too deferential

In ***People v. DeHoyos*** (2013) 57 Cal.4th 79 [2013 WL 3369075], the court held a prosecutor could properly challenge a juror because, inter alia, the juror's deferential demeanor "suggested he would be unable to independently reach a judgment on the issues[.]" (**Id.** at p. *19.)

15. Reluctance to serve

A reluctance to serve on the jury is a neutral reason for challenging a juror. (**See *Carrera* v. *Ayers*** (9th Cir. 2012) 699 F.3d 1104, 1108 [calling fact juror appeared bitter about being called to jury service an "obvious nondiscriminatory reason" for challenging the juror]; ***United States* v. *Stinson*** (9th Cir. 2011) 647 F.3d 1196, 1206-1207 [proper to challenge juror because of juror's insistence she did not want to serve].)

16. Eagerness to serve

An eagerness to serve, at least in a brutal capital case, can be valid neutral grounds for challenging a juror. (**See *People* v. *DeHoyos*** (2013) 57 Cal.4th 79 [2013 WL 3369075, *16 [proper to excuse juror who said "she was looking forward to sitting on a capital case" because it indicates person might have a hidden reason or agenda for wanting to be seated].)

17. Body Language

"A prospective juror may be excused based upon facial expressions, gestures [or] hunches[.]" (***People* v. *Lenix*** (2008) 44 Cal.4th 602, 613.) "Experienced trial lawyers recognize what has been borne out by common experience over the centuries. There is more to human communication than mere linguistic content." (***People* v. *Jones*** (2011) 51 Cal.4th 346, 363; ***People* v. *Lenix*** (2008) 44 Cal.4th 602, 622.) "Myriad subtle nuances may shape it, including attitude, attention, interest, ***body language, facial expression and eye contact.*** 'Even an inflection in the voice can make a difference in the meaning." (**Ibid.**, emphasis added.) "Depending on intonation and facial expression, the same or similar answers coming from different prospective jurors may have very different meanings, and 'those differences may legitimately impact the prosecutor's decision to strike or retain the prospective juror.'" (***People* v. *Long*** (2010) 189 Cal.App.4th 826, 845, citing to ***People* v. *Lenix*** (2008) 44 Cal.4th at p. 623.) Peremptory challenges based on alienating "bare looks and gestures" are race neutral and not improper. (***People* v. *Phillips*** (2007) 147 Cal.App.4th 810, 819, citing to ***People* v. *Wheeler*** (1978) 22 Cal.3d 258, 276.)

For example, in ***People* v. *Elliott*** (2012) 53 Cal.4th 535, the court held that the failure of a juror to make eye contact with anybody provided a neutral reason for challenging the juror. (**Id.** at pp. 569-570.) And in ***People* v. *Gutierrez*** (2002) 28 Cal.4th 1083, the court held that hostile looks from a prospective juror can themselves support a peremptory challenge. (**Id.** at p. 1125.)

CAVEAT: If a prosecutor is going to rely on nonverbal cues (body language), it is important to: (i) be as specific as possible in describing the behavior involved; (ii) explain what the prosecutor believes is the significance of the behavior; and (iii) attempt to obtain confirmation of the observations from the trial judge, or failing that, attempt to obtain a finding on the record that the court credits the observations as true, despite not having observed them.

A case that illustrates the rationale behind this advice is ***People* v. *Long*** (2010) 189 Cal.App.4th 826. In *Long*, the prosecutor exercised peremptory challenges against three Vietnamese jurors, and stated that she had challenged one of them because, during questioning of the entire panel, he did not participate in the discussion or make eye contact with the prosecutor during the entire voir dire. The prosecutor also stated she "did not feel comfortable with his body language and the way that he was expressing himself, or able to express himself in the context of a juror." (**Id.** at pp. 839-840, 843.) The prosecutor *did not further describe* what it was about the juror's body language or manner of expressing himself that made her uncomfortable and neither defense counsel nor the court challenged the prosecutor's assertions. In denying the defendant's ***Batson*** motion, the trial court made only a general finding that the prosecutor's reasons were legitimate. (***Long, supra***, 189 Cal.App.4th at p. 843.) On appeal, the appellate court reviewed the transcript and found the first reason (lack of participation) was "demonstrably false." (**Id.** at p. 843.) In conjunction with the lack of any description in the record (by the trial court or the prosecutor) of what was disturbing about the juror's body language or his way of expressing himself, the fact that the trial court accepted as legitimate a reason unsupported by the record also cast doubt on the legitimacy of these other reasons. Thus, the appellate court held the trial court had "erred in accepting the prosecutor's virtually unverifiable and unverified explanation for challenging" the juror. (**Id.** at p. 848.)

Editors note: The *Long* court seemed to ignore the fact the prosecutor has stated the juror did not make any eye contact with the prosecutor - a more specific reason than simply that the prosecutor had qualms about the jurors' body language.

As pointed out in ***People* v. *Allen*** (2004) 115 Cal.App.4th 542, simply saying that a peremptory challenge is based on a juror's demeanor, without a fuller description of what the prospective juror was or was not doing, provides no indication of what the prosecutor observed, and no basis for the court to evaluate the genuineness of the purported non-discriminatory reason. (**Id.** at p. 551.) Rather, the trial court should probe into what it is about a juror's body language, dress and demeanor the prosecutor dislikes. (**Id.** at p. 553; **but see *People v. Jones*** (2011) 51 Cal.4th 346, 358, 367 [rejecting argument prosecutor's asserted reliance on body language was insufficient reason where the prosecutor did not go on to describe exactly what the body

language was; and noting "an explanation need not be that specific" albeit also noting "the prosecutor's overall explanation regarding the juror was clear and reasonably specific"].)

18. Juror's appearance, including clothing, hairstyle, or other accoutrements

In the case of ***People*** v. ***Wheeler*** (1978) 22 Cal.3d 258 itself, the court indicated it is not impermissible for a prosecutor to "fear bias ... because [a juror's] clothes or hair length suggest an unconventional life-style." (**Id.** at p. 275; ***People*** v. ***Rushing*** (2011) 197 Cal.App.4th 801, 808; **see also *People*** v. ***Reynoso*** (2003) 31 Cal.4th 903, 917 [prosecutor may challenge juror because he does not like potential juror's hairstyle].)

In ***People v. Elliott*** (2012) 53 Cal.4th 535, the court held the fact that the juror came to court every day dressed in jeans and a t-shirt (i.e., in a manner that stood out in its informality) and had a bizarre/unusual hairstyle were both held to be valid reasons for challenging the juror. (**Id.** at pp. 568-570.)

In ***People*** v. ***Cruz*** (2008) 44 Cal.4th 636, the court held a prosecutor properly challenged a juror based on, inter alia, the fact the juror had "long hair," "Fu Manchu type" facial hair, had come to court in a long, unbuttoned flannel shirt, and thereafter arrived in a plain white T-shirt. (**Id.** at p. 657-658, 661.)

19. Lack of "rapport" between the prosecutor and the juror

It is debatable whether a prosecutors' statement of "lack of rapport" with a juror, without further explanation, will be deemed a valid reason for as a basis for challenging a juror. In ***Briggs*** v. ***Grounds*** (9th Cir. 2011) 682 F.3d 1165, one of several reasons a prosecutor gave for challenging a juror was that the prosecutor did not have a good "rapport" with the juror, i.e., the prosecutor did not "get a warm feeling from" the juror " the prosecutor "actually got a cold stare with little eye contact," and felt the juror "had no connection with" the juror while there "was actually good rapport" between the defense attorney and the juror. (**Id.** at p. 1174.) Because the state trial court did not make a specific finding about this justification, the Ninth Circuit could not presume that the trial court credited or discredited this reason, and thus did not take the reason into consideration. However, in a footnote, the Ninth Circuit distinguished the prosecutor's detailed justification for excusing the juror, in which rapport played a minor role, in the case before it as being "far different than the reason found insufficient in ***United States v. Horsley*** (11th Cir. 1989) 864 F.2d 1543, a case where the court held a prosecutor's explanation for exercising peremptory challenge to strike black venireman that "I just got a feeling about him," was legally insufficient to refute a prima facie case of purposeful racial discrimination. (***Briggs*** at p. 1177, fn. 12.) Significantly, the ***Briggs*** court noted it "could not find, and the dissent does not cite, any Ninth Circuit precedent to support the distinction between a 'rapport and a demeanor-based justification." (**Ibid.**) Equally significantly, while recognizing the inherent problem of citing rapport, the ***Briggs*** court *disagreed* with the dissenting opinion that it had to reject "the rapport justification" simply because it would be too easy for prosecutors to mask racial animus by claiming a lack of

rapport with a juror. (**Id.** at p. 1177, fn. 13; **see also *Johnson* v. *Haviland*** (unreported N.D. Cal. 2013) 2013 WL 3354435, *4 [prosecutor's inability to "establish personal rapport," not pretextual].)

Editor's note: Any claim of lack of rapport should be flushed out as much as possible.

20. Juror lacks mental ability to understand the issues or proceedings

"A concern with a juror's ability to understand the proceedings and anticipated testimony is [a] proper basis for a challenge." (***People* v. *DeHoyos*** (2013) 57 Cal.4th 79 [2013 WL 3369075, *19]; **see also *People* v. *Muhammed*** (2003) 108 Cal.App.4th 313, 322 ["As a general proposition, an honestly held belief that a prospective juror will be unable to understand the case is a legitimate basis for a peremptory challenge" - albeit deferring to the trial court's determination that this rationale was a pretext in the case before it].)

In ***People* v. *DeHoyos*** (2013) 57 Cal.4th 79 [2013 WL 3369075, *19], the court held a prosecutor could properly challenge a juror on grounds that the juror would "very easily be overwhelmed" by the massive amounts of psychological and psychiatric testimony expected where the juror had limited life experience and education, had "light" reading interests, made several spelling errors on the jury questionnaire (including misspelling his own ethnicity), was initially confused when read some penalty phase jury instructions, and was deferential. (**Id.** at pp. *18-*19.) In ***People* v. *Watson*** (2008) 43 Cal.4th 652, the court held the fact a juror, inter alia, exhibited significant confusion about the death penalty determination provided a neutral ground for removing the juror. (**Id.** at p. 682.) In ***People* v. *Ledesma*** (2006) 39 Cal.4th 641, the court held a prosecutor properly challenged a juror on grounds she "was not very bright," gave inconsistent answers, and was a "follower." (**Id.** at pp. 678-679.) In ***People* v. *Welch*** (1999) 20 Cal.4th 701, the court found the fact a juror appeared to the prosecutor as "mentally slow" was a proper basis for exclusion. (**Id.** at p. 746.) In ***People* v. *Reynoso*** (2003) 31 Cal.4th 903, the court upheld a prosecutor's challenge of a juror due to, inter alia, her "insufficient educational experience," and her inattentiveness and lack of involvement the jury selection process. (Id. at pp. 924-925.) In ***People* v. *Battle*** (2011) 197 Cal.App.4th 50, the court held a juror's inability to remember anything about her previous jury service was an acceptable reason for challenging the juror. (**Id.** at pp. 60-61.) In ***People* v. *Davis*** (2008) 164 Cal.App.4th 305, the court found that, inter alia, the fact a juror seemed very confused, sat in the wrong chair, did not seem to be able to follow the court's instructions, and appeared dazed and somewhat unresponsive provided neutral grounds for challenging the juror. (**Id.** at pp. 312-313.) And in ***United States* v. *Murillo*** (9th Cir. 2002) 288 F.3d 1126, the court found a juror's apparent trouble communicating was a proper ground for a peremptory challenge. (**Id.** at pp. 1135-1137.)

21. Juror's reading and television preferences

The fact a juror claimed that she *never read a book* and her statement that "Judge Judy" was her favorite TV show were legitimate grounds for bumping a juror. (**See *United States* v. *Murillo*** (9th Cir. 2002) 288

F.3d 1126, 1135-1137.) The fact that juror stated only "Hot V.W." when asked about the books he read for pleasure provided a valid reason, inter alia, to remove a juror where the trial would involve sophisticated psychological and psychiatric testimony. (**See *People* v. *DeHoyos*** (2013) 57 Cal.4th 79 [158 Cal.Rptr.3d 797, 825-826].)

22. Juror lacks psychological or emotional ability to focus on the trial

"Concern that a prospective juror is extremely emotional and overwhelmed by outside stresses is a proper race-neutral ground for a peremptory challenge." (***People* v. *DeHoyos*** (2013) 57 Cal.4th 79 [158 Cal.Rptr.3d 797, 830].)

In ***People* v. *DeHoyos*** (2013) 57 Cal.4th 79 [158 Cal.Rptr.3d 797], the court held it was proper to remove a juror who apparently had unresolved feelings about being a victim, appeared very anxious, exhibited concerned and pained facial expressions, seemed emotionally upset, described himself as an emotional person, and vacillated in his responses to questioning about his ability to handle the issues in this case. (**Id.** at pp 829-830.) The ***DeHoyos*** court also upheld the prosecutor's excusal of a juror who "forgot" that she had a close cousin who had been murdered and that her older brother had been arrested a number of times for minor offenses as this could properly cause the prosecutor to be concerned whether the was paying enough attention to the process and to her responsibilities. (**Id.** at p. 831.)

In ***People* v. *Gutierrez*** (2002) 28 Cal.4th 1083, the court held the prosecutor was justified in challenging a juror on grounds her ability to concentrate or fairly deliberate on the evidence would be compromised where the juror appeared extremely emotional and overwhelmed by outside stresses, repeatedly referred to her "nerves" and to being under considerable stress, and cried twice during voir dire. (**Id.** at p. 1124; see also ***Mitchell* v. *Superior Court*** (1984) 155 Cal.App.3d 624, 628.)

23. Juror provides strange or inconsistent responses

In People* v. *Elliott (2012) 53 Cal.4th 535, the court noted that a juror's "inconsistency and ambiguity of" responses suggested she might have difficulty performing her duties as a juror." (**Id.** at p. 567.)

In ***People* v. *Thomas*** (2011) 51 Cal.4th 449, the court held a prosecutor could properly challenge a juror based on, inter alia, the fact that the juror told a "bizarre" story about witnessing a home invasion robbery by men wearing beekeeper hats and said being a juror would not pose a financial hardship because he was "not living in a money based world." (**Id.** at pp. 472, 475.)

In ***People* v. *Neuman*** (2009) 176 Cal.App.4th 571, a juror, in response to a question about whether, when reading about someone being arrested or charged with a crime in the paper, she thought "where there's smoke, there's fire" or thought that people are presumed innocent and the paper may omit certain crucial

facts," stated the latter - because she was recently a victim of media manipulation, where she was quoted out of context, but then offered no explanation as to how she came to be in that situation. The court found this "strange" response to be neutral grounds to challenge the juror. (**Id.** at pp. 586-587.)

24. Juror has difficulty making a decision

An "advocate is entitled to consider a panelist's . . . acceptance of responsibility for making weighty decisions." (***People* v. *Lenix*** (2008) 44 Cal.4th 602, 623.) In ***People* v. *Fiu*** (2008) 165 Cal.App.4th 360, the juror repeatedly expressed a concern that it might be difficult for her to make a decision regarding guilt if the defendant was present in the courtroom. This was found to be a neutral reason for removing the juror. (**Id.** at p. 395; **see also *Briggs* v. *Grounds*** (9th Cir. 2011) 682 F.3d 1165, 1177 [fact juror said "she was not good at assessing who is telling the truth—plausibly could compound the prosecutor's concern" that juror would not be a good juror].)

25. Juror has "too much" or "too little" education

In ***People* v. *Reynoso*** (2003) 31 Cal.4th 903, the court stated it would be lawful and valid for an attorney to "peremptorily excuse a potential juror because he or she feels the potential juror's occupation reflects too much education, and that a juror with that particularly high a level of education would likely be specifically biased against their witnesses, or their client's position in the case. (**Id.** at p. 926, fn. 6; **see also *Ngo* v. *Giurbino*** (9th Cir. 2011) 651 F.3d 1112, 1116-1117 ["striking a juror who is 'overly educated' is sufficiently race-neutral to shift the burden back on the defendant to prove purposeful discrimination"].)

On the other hand, a lack of education can also be a basis for challenging a juror - especially if the lack of education is being used as a proxy for a lack of sufficient ability to understand the evidence. (**See *People* v. *DeHoyos*** (2013) 57 Cal.4th 79 [158 Cal.Rptr.3d 797, 820].)

The fact that a prosecutor is concerned both about jurors with too much and too little education - even in the same case - does not mean the prosecutor does not have a genuine neutral concern. (**See e.g., *People* v. *DeHoyos*** (2013) 57 Cal.4th 79 [158 Cal.Rptr.3d 797, 828] [noting it "is reasonable to desire jurors with sufficient education and intellectual capacity to thoughtfully consider anticipated expert testimony, but to reject jurors who have so much interest, education, and experience in the same field as the anticipated testimony that they are likely to have established views and predispositions regarding the testimony, which they might share with the other jurors"].)

26. Juror has "too much" knowledge in a particular area

A concern that the juror has too much knowledge of a particular area such that the juror might rely on his or her own specialized knowledge or come into a case with a predisposition based on that knowledge, and/or that

other jurors might use the juror as source of that knowledge is a valid neutral concern that will support a challenge. (**See *People* v. *DeHoyos*** (2013) 57 Cal.4th 79 [2013 WL 3369075, *20]

27. Juror has previously served on a hung jury

The fact a panelist has previously served on a jury that was unable to reach a verdict "constitutes a legitimate concern for the prosecution, which seeks a jury that can reach a unanimous verdict[.]" (***People* v. *Farnam*** (2002) 28 Cal.4th 107, 138; ***People* v. *Turner*** (1994) 8 Cal.4th 137, 170; **see also *People* v. *Garcia*** (2011) 52 Cal.4th 706, 749 [proper to excuse juror who had previously served on jury that deadlocked on intent]; ***People* v. *Bonilla*** (2007) 41 Cal.4th 313, 349 [upholding dismissal of juror who, inter alia, had previously served on deadlocked jury and said she "would adhere to her views" if faced with the same situation again]; ***Ngo v. Giurbino*** (9th Cir. 2011) 651 F.3d 1112, 1116-1117 [fact juror served on five previous juries, three of which hung, was neutral basis for challenging juror].)

28. Juror has previously served on a jury that acquitted

"That a juror acquitted in a prior case is a valid, race-neutral reason to strike." (***United States* v. *Mitchell*** (9th Cir. 2007) 502 F.3d 931, 958; ***United States v. Thompson*** (9th Cir.1987) 827 F.2d 1254, 1260;

29. Juror has language difficulties

The fact a juror has indicated she might have difficulty understanding spoken English is a valid, neutral reason for challenging a juror. (**See *People* v. *Jurado*** (2006) 38 Cal.4th 72, 107 but **see *Ayala* v. *Wong*** (9th Cir. 2012) 693 F.3d 945, 967[suggesting, in tortured reasoning, that the fact the prosecutor cited illiteracy as a basis for challenging a juror who was Spanish speaking could potentially be viewed a pretext for what in fact was a race based peremptory challenge where the juror was not a native English speaker, needed someone to fill out the questionnaire for him, and had difficulty writing in English, but was not truly illiterate since he had graduated from high school and attended college in the United States, was perfectly capable of reading the summary of legal issues that was given to prospective jurors before voir dire questioning, and did not fill out the questionnaire himself because he was concerned about his English spelling].)

30. Juror directly or indirectly expresses reluctance to impose the death penalty in a death penalty case

Statements or attitudes of a juror that reflect a reluctance to impose the death penalty provide neutral reasons for excusing the juror. (**See *People* v. *Riccardi*** (2012) 54 Cal.4th 758, 788; ***People* v. *Streeter*** (2012) 54 Cal.4th 205, 226; ***People* v. *Thomas*** (2012) 53 Cal.4th 771, 795; ***People v. Elliott*** (2012) 53 Cal.4th 535, 561; ***People v. Vines*** (2011) 51 Cal.4th 830, 849-851; ***People* v. *Booker*** (2011) 51 Cal.4th 141, 167; ***People v. Cowan*** (2010) 50 Cal.4th 401, 448-449; ***People* v. *Watson*** (2008) 43 Cal.4th 652, 673-675, 679-681

People v. *Lewis* (2008) 43 Cal.4th 415, 472; *People* v. *Welch* (1999) 20 Cal.4th 701, 746.)

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

Even excusing jurors with "a neutral stance" on the death penalty is valid reason for excusing a juror where a prosecutor is seeking the jurors with the "strongest" position on capital punishment. (**See** *People v. Lomax* (2010) 49 Cal.4th 530, 572; **see also** *People* v. *Streeter* (2012) 54 Cal.4th 205, 225 [prosecutor could properly challenge juror who indicated a willingness to impose the death penalty only under very limited circumstances and if the defendant confessed, facts not present in the case]; *People v. Blacksher* (2011) 52 Cal.4th 769, 802 [proper to excuse juror who was only "moderately" in favor of the death penalty and believed a life sentence was a more severe penalty].)

31. The juror may be distracted due to financial hardship or other difficulties stemming from the juror's absence from work due to jury service

The fact a juror may experience hardship or difficulties in serving that may distract the juror from focusing on the case can be neutral grounds for challenging the juror. (**See** *People* v. *Clark* (2012) 52 Cal 4th 856, 907 [proper to excuse juror who indicated jury service might be problematic because he recently had been promoted to a management position in the company and was scheduled in the following month to begin 15 weeks of training, and when asked if this would cause him distraction stated that while he "could be conscious of what's happening around here," he emphasized how much the promotion meant to him and that it was "a great step" for him in his career]; *People* v. *Jenkins* (2000) 22 Cal.4th 900, 994, 1044 [the risk of detriment to the prospective juror's employment if he was required to serve on a lengthy trial was a proper race-neutral ground for his excusal]; *People* v. *Neuman* (2009) 176 Cal.App.4th 571, 585-586 [fact jurors asked to be excused due to hardship from having to work and go to school, along with lengthy commutes provided neutral grounds for challenging jurors].)

32. 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

a. Counselors

In *People v. Clark* (2012) 52 Cal.4th 856, the court held the fact a juror was a licensed pastoral counselor

with a master's degree in theological studies, was working toward a Ph.D, and, along with his wife led religious services for the homeless and helped them obtain social service benefits was a valid neutral basis for excusing that juror. (**Id.** at p. 907.)

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

In ***People* v. *Neuman*** (2009) 176 Cal.App.4th 571 the fact the mother of the one of the challenged jurors "had been involved for more than all her life as a counselor and probation officer" provide a neutral ground for removing a juror. (**Id.** at p. 586)

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

b. Drug treatment affiliation

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

c. Healthcare workers

In ***People* v. *Trevino*** (1997) 55 Cal.App.4th 396, the court indicated that challenging jurors on grounds they (or their spouse) worked in health care would constitute a race-neutral reason. (**Id.** at p. 411; accord ***People* v. *Rushing*** (2011) 197 Cal.App.4th 801, 812.) In ***People* v. *Howard*** (1992) 1 Cal.4th 1132, the court held a prospective juror's professional training as a nurse suggested a possible ground for the prosecutor's challenge. (**Id.** at pp. 1156.) In ***People* v. *Davis*** (2008) 164 Cal.App.4th 305, the court held it was proper for a prosecutor to excuse a juror who was a certified nursing assistant based on the prosecutor's ***own personal bad experiences, outside of court***, with nursing assistants. (**Id.** at p. 313.)

d. Legal professions (judges, attorneys, employees of court or attorneys)

It is proper to excuse a juror who works in the legal field (or who has family members in the legal field) out of a concern that such a juror might exercise undue influence on the jury.

In ***People* v. *Clark*** (2012) 52 Cal.4th 856, the court held the prosecutor could properly remove an administrative law judge since it was reasonable to believe the judge "might consciously or unconsciously exert undue influence during the deliberative process, or that fellow jurors would ascribe to her a special legal expertise." (**Id.** at p. 907.)

In ***People*** **v.** ***Buckley*** (1997) 53 Cal.App.4th 658, the court found the prosecutor has stated race-neutral grounds for excusing a prospective juror based on the juror's history of working in various legal departments. (**Id.** at pp. 667-668.)

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

In ***People*** **v.** ***Chambie*** (1987) 189 Cal.App.3d 149, the court held the prosecutor had non-racial grounds for removing a juror who the prosecutor felt other jurors might tend to defer to since she was in law school. (**Id.** at p. 156; **see also** ***Ngo*** **v.** ***Giurbino*** (9th Cir. 2011) 651 F.3d 1112, 1116-1117 [fact juror had a law degree was, inter alia, neutral reason for challenging juror].)

e. Probation or parole officers

In ***People*** **v.** ***Neuman*** (2009) 176 Cal.App.4th 571 the fact the mother of the one of the challenged jurors "had been involved for more than all her life as a counselor and ***probation officer***" provide a neutral ground for removing a juror. (**Id.** at p. 586) In ***People*** **v.** ***Lewis*** (2008) 43 Cal.4th 415, the court held it was proper to excuse parole agent with a psychology degree. (**Id.** at pp. 476-477.)

f. Psychologists/psychiatrists

In ***People*** **v.** ***Landry*** (1996) 49 Cal.App.4th 785, the court held it was proper to excuse a juror who, inter alia, had a background in psychiatry or psychology (**Id.** at pp. 789-790; **see also** ***People*** **v.** ***Adanandus*** (2007) 157 Cal.App.4th 496, 508.) In ***People*** **v.** ***Cox*** (2010) 187 Cal.App.4th 337, the court held it was proper to excuse a juror because the juror was employed as a "psychiatric social worker." (**Id.** at p. 347.) In ***People*** **v.** ***Clark*** (2012) 52 Cal.4th 856, the court held a valid neutral reason for excusing a juror could be based on the fact the juror had taken college courses in psychology, and had expressed the view that someone who commits murder must have "something wrong with them in their mind." (**Id.** at p. 907.) In ***People*** **v.** ***Blacksher*** (2011) 52 Cal.4th 769, 802 [fact juror was a psychology major and characterized that discipline as a "science" was a valid neutral reason for excusing juror where "[h]er background thus posed the danger of having her own specialized knowledge influence her decisionmaking regarding the significance of the claims of defendant's mental illness"]; **see also** ***People*** **v.** ***DeHoyos*** (2013) 57 Cal.4th 79 [158 Cal.Rptr.3d 797, 828 [proper to challenge juror who had taken numerous undergraduate and postgraduate psychology courses and was considering seeking a master's degree in the area out of concern juror would "have a predisposition toward accepting defense psychological evidence"]; ***People*** **v.** ***Gutierrez*** (2002) 28 Cal.4th 1083, 1124-1125 [prosecutor's belief that the prospective juror would place too much weight on the opinion testimony of mental health experts justified the peremptory challenge]; ***Ngo*** **v.** ***Giurbino*** (9th Cir. 2011) 651 F.3d 1112, 1116-1117 [fact juror had psychology background was, inter alia, neutral reason for challenging juror where prosecutor said she was concerned the defense might call psychologists or psychiatrists as witnesses].)

g. Religious leaders

In ***People v. Clark*** (2012) 52 Cal.4th 856 the court held the fact a juror was a licensed pastoral counselor with a master's degree in theological studies, was working toward a Ph.D, and led religious services for the homeless and also helped them obtain social service benefits was a valid neutral basis for excusing that juror. (**Id.** at p. 907.) In ***People*** **v.** ***Semien*** (2008) 162 Cal.App.4th 701, the court held a prosecutor had legitimate grounds for challenging a pastor who dealt with homeless people since the pastor was "in the business of forgiveness," and the prosecutor was not required to accept the pastors' assurance that he could find someone guilty." (**Id.** at p. 708.)

h. Social workers or social service type workers

If a juror has a background in, or is employed in, social service type work, this can provide neutral grounds for challenging the juror. (**See** ***Felkner*** **v.** ***Jackson*** (2011) 131 S.Ct. 1305, 1306 [proper to excuse a juror who had a masters in social work and interned in jail, probably in the psych unit]; ***People*** **v.** ***Streeter*** (2012) 54 Cal.4th 205, 225 [proper to challenge social services caseworker and juror who graduated with a BA in sociology and was a social worker for 30 years]; ***People*** **v.** ***Clark*** (2011) 52 Cal.4th 856, 907 [peremptory challenge properly based on juror's experience in counseling or social services] ***People*** **v.** ***Watson*** (2008) 43 Cal.4th 652, 677 [proper to excuse a juror who, inter alia, was a social worker]; ***People*** **v.** ***Turner*** (1994) 8 Cal.4th 137, 170 [proper to excuse a juror who had trained with the Department of Social Services]; ***People*** **v.** ***Cox*** (2010) 187 Cal.App.4th 337, 347 [proper to excuse a juror employed as a "psychiatric social worker"]; ***People*** **v.** ***Landry*** (1996) 49 Cal.App.4th 785, 789-790 [proper to excuse a juror who, inter alia, had worked in a youth services agency]; ***People*** **v.** ***Perez*** (1996) 48 Cal.App.4th 1310, 1315 [no prima facie case where challenged members shared characteristic of being single and working in "social services or caregiving fields"]; accord ***People*** **v.** ***Adanandus*** (2007) 157 Cal.App.4th 496, 508.) Indeed, even if someone close to the juror has a background or job in social work, this can provide neutral grounds for challenging the juror. (**See** ***People*** **v.** ***Semien*** (2008) 162 Cal.App.4th 701, 707-708 [proper to excuse a juror who, inter alia, had a wife working in the county welfare department].)

i. Teachers

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

33. Juror (or close relative of juror) is employed in a profession whose members make "bad prosecution jurors"

"Occupation can be a permissible, non-discriminatory reason for exercising a peremptory challenge." (***People*** **v.** ***Rushing*** (2011) 197 Cal.App.4th 801, 811.) Even jurors who work in professions that do not necessarily reflect an orientation toward rehabilitation and sympathy for defendants may be challenged if persons working in the profession are honestly viewed as poor prosecution jurors. As noted in ***People*** **v.** ***Reynoso*** (2003) 31 Cal.4th 903, "[i]f a prosecutor can lawfully peremptorily excuse a potential juror based on a hunch or suspicion, or because he does not like the potential juror's hairstyle, or because he observed the potential juror glare at him, or smile at the defendant or defense counsel, then surely he can challenge a potential juror whose occupation, in the prosecutor's subjective estimation, would not render him or her the best type of juror to sit on the case for which the jury is being selected." (**Id.** at pp. 924-925; **but see** ***United States*** **v.** ***Murillo*** (9th Cir. 2002) 288 F.3d 1126, 1135-1137 [claim juror was bumped because juror worked for a casino was not given much credence where a large part of the county's citizens also worked in casinos].)

a. Customer Service Workers

In in ***People*** **v.** ***Reynoso*** (2003) 31 Cal.4th 903, the court upheld a prosecutor's challenge to a juror on grounds she was a "customer service representative" with a lack of educational experience was a legitimate basis to believe that such a juror would not be the best person to decide a multi-defendant murder case, especially when coupled with the juror's inattentiveness and lack of prior experience with the criminal justice system. (**Id.** at p. 925.)

b. Postal Workers

In ***Jamerson*** **v.** ***Runnels*** (9th Cir. 2013) 713 F.3d 1218, the court found the prosecutor's explanation for removing a postal worker based on a past "terrible experiences with postal workers" coupled with the jurors' facial expressions, could be a valid neutral basis for seeking to excuse the juror. (**Id.** at pp. 1234-1235 [albeit also noting the explanation was not "overwhelmingly persuasive"].) In ***People*** **v.** ***Rushing*** (2011) 197 Cal.App.4th 801, the court held challenging a juror because her husband was a postal worker could provide a race-neutral reason for excusing a juror and cited to three out-of-state cases finding challenges against postal workers by prosecutors was proper: ***Williams*** **v.** ***Groose*** (8th Cir. 1996) 77 F.3d 259, 261 ["The prosecutor explained he removed jurors Lacy and Tillman because they are postal workers. This reason is race neutral."]; ***Johnson*** **v.** ***State*** (Ga. 1996) 470 S.E.2d 637, 639 [that prospective juror "was a postal worker, and postal workers, in the prosecutor's experience, do not make good jurors" was legitimate neutral reason]; ***State*** **v.** ***Hinkle*** (Mo.App. E.D.1999) 987 S.W.2d 11, 13 [that "postal workers are historically bad jurors for the state" was legitimate neutral reason]. (***Rushing***, at p. 812; **see also** ***Johnson*** **v.** ***Haviland*** (unreported N.D. Cal. 2013) 2013 WL 3354435, *4 [upholding challenge to juror where prosecutor noted, "I have yet to find a postal worker employee who impresses me as someone who would be sympathetic to law enforcement."].)

34. Lack of Employment or Underemployment of Juror or Juror's Family Member

Lack of employment or under-employment of a juror or family member of juror can be a neutral basis for challenging a juror. For example, in ***People*** **v.** ***Thomas*** (2011) 51 Cal.4th 449, the court held a prosecutor could properly challenge a juror based on the fact that the juror was "irresponsible" in that he was thirty-one, but had not had significant employment in his life and lived out of a van on his father's property. (**Id.** at pp. 472-473, 475; **see also** ***People*** **v.** ***Jones*** (2011) 51 Cal.4th 346, 363 [concern over the fact the juror has unemployed *children* was held to be a race neutral reason for challenging juror]; ***Stubbs*** **v.** ***Gomez*** (9th Cir.1999) 189 F.3d 1099, 1106 [upholding a prosecutor's challenge of a juror on ground she lacked employment experience and experience outside of the home and citing to ***United States*** **v.** ***Hunter*** (7th Cir.1996) 86 F.3d 679, 683 for the proposition that employment status and personal history are race-neutral reasons for striking a juror]; ***People v. Vines*** (2011) 51 Cal.4th 830, 852-853 [prosecutor could properly view kept juror more favorably than challenged juror because spouse of former was employed and spouse of latter was not]; cf., ***United States v. Brown*** (8th Cir. 2009) 560 F.3d 754, 763 (cited favorably in ***Jamerson*** **v.** ***Runnels*** (9th Cir. 2013) 713 F.3d 1218, 122[strike of a prospective juror valid because both the juror and the defendant received public assistance; and to illustrate principle proper to challenge juror who might identify with the defendant on that basis].)

35. Marital status

In ***People*** **v.** ***Hamilton*** (2009) 45 Cal.4th 863, the court upheld challenges to one juror who the prosecutor challenged because, inter alia, she was single, and to another juror on grounds, she was an unmarried mother. (**Id.** at p 899, 903-905; **see also** ***People*** **v.** ***Perez*** (1996) 48 Cal.App.4th 1310, 1315 [no prima facie case where challenged members shared characteristic of *being single* and working in "social services or caregiving fields"])

36. Other jurors who would be more favorable to the prosecutor are due up

It is a valid neutral reason for challenging a juror that other jurors who are more favorably disposed to the prosecution will be seated if the jurors in the cognizable group are removed. Thus, in ***People v. Jones*** (2011) 51 Cal.4th 346, the court found the prosecutor had both a plausible and race neutral reason for excusing a juror who the prosecutor characterized as having some "good qualities"" where the prosecutor "believed he had even better potential jurors who had not yet been called, and defendant had already exhausted his peremptory challenges." (**Id.** at p. 367.)

37. Juror was friendly with juror who was challenged by the prosecution

If an attorney senses that a juror might resent the attorney as a result of the attorney challenging *another* juror, this can be a neutral reason for challenging the juror. (**See *Johnson* v. *Haviland*** (unreported N.D. Cal. 2013) 2013 WL 3354435, *4.)

38. Juror lives or works in a city known for anti-law enforcement attitudes

Certain cities (e.g., Berkeley, CA) are known to attract and be populated by persons not very sympathetic to the prosecution. Living/working in such a city can be a valid basis for challenging a juror. (**See *People v. Huggins*** (2006) 38 Cal.4th 175, 229 [proper to challenge juror on grounds "he was born in Berkeley and might share anti-death-penalty views the prosecutor believed to be prevalent there" and noting at p. 231, fn. 15, that it does "not matter whether it was reasonable for the prosecutor to doubt the desirability of prospective jurors who were born in Berkeley," it is a permissible reason "[a]bsent evidence that being born in Berkeley . . . is so closely associated with a protected group that they are surrogates for membership in the group and thus arguably impermissible"]: ***Johnson* v. *Haviland*** (unreported N.D. Cal. 2013) 2013 WL 3354435, *4 [upholding challenge where, inter alia, the prosecutor indicated his concern that the juror worked for the Berkeley Unified School District, which was generally a very liberal area, and is "not particularly one that you can expect to have a lot of people who are sympathetic to law enforcement, at least in these types of cases"].)

That being said, prosecutors should be alert that if the area where a juror works or lives is serving as a proxy for race or ethnicity, the challenge will be invalid. (**See** this outline, section VI-E-1 at p. 75.)

E. What are Impermissible Reasons for Challenging a Juror?

"[T]he exercise of a peremptory challenge must not be based on either the race of the juror or the racial stereotypes held by the party." (***Georgia* v. *McCollum*** (1992) 505 U.S. 42, 59.) Although the language of ***McCollum*** speaks only to race and racial stereotypes, the ***Batson/Wheeler*** principles apply to defense peremptory challenges excusing jurors improperly on the basis of race, ***gender, or ethnic grounds.*** (**See *United States* v. *Martinez-Salazar*** (2000) 528 U.S. 304, 315; ***People* v. *Willis*** (2002) 27 Cal.4th 811, 813-814.)

1. Proxy reasons: criteria so closely tied to race/ethnicity, they act as stand-ins for cognizable classes

No case has held that simply because people share a similar belief system (other than a shared religion) or geographical location, they may be treated as a cognizable class. To the contrary, the fact that people share a similar belief system will *not* create a cognizable class. (**See *People* v. *Howard*** (1992) 1 Cal.4th 1132, 1157

["persons opposed to the death penalty do not make up a cognizable class for *Wheeler* purposes"]; ***People* v. *Wheeler*** (1978) 22 Cal.3d 258, 276 [indicating, by way of dicta, that persons who favor "law and order" are not a cognizable class].)

However, courts may sometimes find that a proffered justification is so closely tied to race that it ceases to be race-neutral and becomes a surrogate for impermissible racial biases. (**See *Stubbs* v. *Gomez*** (9th Cir. 1992) 189 F.3d 1099, 1106.) In other words, a generic reason or group-based presupposition that would be applicable in all criminal trials to members of a minority is not race-neutral. (**See *United States* v. *Bishop*** (9th Cir. 1992) 959 F.2d 820, 823-826.)

For example, ***United States v. Bishop*** (9th Cir. 1992) 959 F.2d 82, the court found that the prosecutor's justification for striking 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" was improper because 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. (**Id.** at pp. 821, 825.) The justification implicitly equated "low-income, black neighborhoods with violence, and the experience of violence with its acceptance," and "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"].)

Editor's note: *Bishop* is also discussed in section V-A-7 at pp. 24-25.

It usually is not easy to establish a reason is a proxy for race. (**See *People* v. *Booker*** (2011) 51 Cal.4th 141, 167 [although defense claimed prosecutor was removing jurors with religious reservations about imposing the death penalty "as a proxy for *racial* discrimination" under the theory that since African-Americans allegedly were more prone to hold such religious reservations (a sentiment actually expressed by the trial judge), removing African-American jurors on this basis was just a proxy for racial discrimination, the the claim was ultimately rejected because "as the trial court noted and defendant concedes, the prosecutor also challenged jurors of other races based on these same reservations"]; ***People* v. *Calvin*** (2008) 159 Cal.App.4th 1377, 1379 [rejecting the argument that skepticism toward the criminal justice system is so prevalent among African-Americans that it should be considered a proxy for race and that, as a result, peremptory challenges based on such an attitude should be deemed discriminatory].) And this is especially true when there is a specific link

between the stated reason and the basis for the challenge. (**See *People* v. *Williams*** (1997) 16 Cal.4th 153, 190-191.) 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; **see also *People* v. *Williams*** (1997) 16 Cal.4th 153, 191 [although defendant claimed prosecutor was using residence as a proxy for race, the court held the prosecutor had properly excluded an African-American prospective juror because the juror had attended high school in a "Blood gang area" and the prosecutor could link the juror's actual experiences with a concern the juror would be sympathetic to a defendant who was Blood gang member].)

F. Can a Prosecutor Challenge a Juror Based on the Prosecutor's *Own* Idiosyncratic Personal Biases?

Although it is fairly well-established that a prosecutor can rely on stereotypical assumptions about persons involved in certain occupations tilting toward the defense (**see** this outline, section VI-D-32 at pp. 69-72), can a prosecutor's idiosyncratic hostility towards members of a particular profession provide neutral grounds for challenging a juror?

In general, "[a]n advocate is permitted to rely on his or her own experiences and to draw conclusions from them." (***People* v. *Lenix*** (2008) 44 Cal.4th 602, 629.) "[E]ven hunches and idiosyncratic reasons may support a peremptory challenge." (**Ibid.**)

For example in ***People* v. *Rushing*** (2011) 197 Cal.App.4th 801 the court cited with approval ***Johnson* v. *State*** (Ga. 1995) 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." (*Rushing*, at p. 812, emphasis added.) And in ***People* v. *Davis*** (2008) 164 Cal.App.4th 305, the prosecutor challenged a juror who was a certified nursing assistant (CNA) because of the prosecutor's own personal bias against CNAs stemming from the bad experiences the prosecutor had outside of court with CNAs who were working in her father's nursing home. This was found to be a neutral reason for challenging the juror, notwithstanding a lack of any assertion that CNAs lean toward the defense from an objective standpoint. (**Id.** at p. 313.)

G. Should a Prosecutor Ask the Trial Court to Confirm the Prosecutor's Observations Regarding a Juror's Demeanor or Non-verbal Body Language?

It is especially important to seek verification of observations made by the prosecutor regarding a juror that will not be reflected in the transcript - such as the juror's demeanor, attitude, body language, facial expressions, and/or intonation.

Where the explanation for a peremptory challenge is based on a prospective juror's demeanor, the judges are **supposed to** "take into account, among other things, any observations of the juror that the judge was able to make during the voir dire." (***Thaler*** **v.** ***Haynes*** (2010) 130 S.Ct. 1171, 1174.)

Moreover, when the explanation for a peremptory challenge "invoke[s] a juror's demeanor," the trial judge's "first hand observations" are of great importance. (***Thaler*** **v.** ***Haynes*** (2010) 130 S.Ct. 1171, 1174; ***Snyder v. Louisiana***, (2008) 552 U.S. 472, 477.)

It is not required that the trial court "make explicit and detailed findings for the record in every instance in which the court determines to credit a prosecutor's demeanor-based reasons for exercising a peremptory challenge." (***People*** **v.** ***Williams*** (2013) 56 Cal.4th 630, 653; ***People*** **v.** ***Reynoso*** (2003) 31 Cal.4th 903, 939 [and noting, at p. 929 that "[t]he impracticality of requiring a trial judge to take note for the record of each prospective juror's demeanor with respect to his or her ongoing contacts with the prosecutor during voir dire is self-evident"]. **see also** ***People*** **v.** ***Long*** (2010) 189 Cal.App.4th 826, 848 [judges are not expected to "provide a continuous recorded narrative during jury voir dire of the appearance, behavior, and intonation of each prospective juror"].) Moreover, even if a judge cannot confirm the observation, this does not mean the judge will is precluded from finding the demeanor explanation credible. It is not necessary that the judge personally observe and recall the relevant aspect of the prospective juror's demeanor. The judge can consider the attorney's own demeanor in assessing whether to believe the attorney who is claiming a challenge is based on juror demeanor evidence that was not observed by the judge. (**See** ***Thaler*** **v.** ***Haynes*** (2010) 130 S.Ct. 1171, 1175; ***People*** **v.** ***Long*** (2010) 189 Cal.App.4th 826, 842; **see also** ***People*** **v.** ***Lenix*** (2008) 44 Cal.4th 602, 619 [noting that while is not necessary the court observe the specific behavior alleged as the basis for the challenge, "the court must be satisfied that the specifics offered by the prosecutor are consistent with the answers it heard and the overall behavior of the panelist" and "the record must reflect the trial court's determination on this point"].)

However, while it may prove awkward, if a prosecutor is basing a challenge to a juror on the basis of the juror's demeanor, it is important to ask whether the judge made the same observations as the prosecutor. As pointed out in Justice Moreno's concurring opinion in ***People*** **v.** ***Lenix*** (2008) 44 Cal.4th 602, "[w]hen a trial judge validates a prosecutor's challenge based on the prospective juror's demeanor, and makes clear that such

demeanor is the primary reason for validating the challenge, then it is difficult to imagine any circumstance under which an appellate court would second-guess that judgment." (***Lenix***, at p. 634, conc. opn., J. Moreno.)

In addition, if the trial judge is not asked to validate the observation, an appellate court may not ***necessarily*** presume that the trial judge credited the prosecutor's explanation. (**Compare *Snyder* v. *Louisiana*** (2008) 128 S.Ct. 1203, 1209-1210 [recognizing that while deference to the trial judge "is especially appropriate where a trial judge has made a finding that an attorney credibly relied on demeanor in exercising a strike[,]" but declining to defer to the trial judge's acceptance of the prosecutor's allegedly neutral explanation he removed a juror based on the juror's demeanor where the prosecutor's other explanation for removing the juror was unsupported by the record and the trial judge "responded to the prosecutor's two proffered reasons by simply allowing the challenge without explanation"] and ***People* v. *Long*** (2010) 189 Cal.App.4th 826, 848 [observing that the normal deference to a trial court's implied finding will not apply where there is only a prosecutor's statement that he removed a juror because of the juror's body language and the juror's way of expressing himself without further description, and where another reason the trial court ruled legitimate was demonstrably inaccurate]; *with* ***Thaler* v. *Haynes*** (2010) 130 S.Ct. 1171, 1175 [where the explanation for a peremptory challenge is based on a prospective juror's demeanor, the judge should take into account, among other things, any observations of the juror that the judge was able to make during the voir dire but neither *Batson* nor ***Snyder*** require "that a demeanor-based explanation must be rejected if the judge did not observe or cannot recall the juror's demeanor"]; ***People* v. *Elliott*** (2012) 53 Cal.4th 535, 569 [reviewing court may infer that trial court agreed with prosecutor's statement that prospective juror "'wouldn't make eye contact with anybody'" where "[d]efense counsel did not deny that [prospective juror] had failed to make eye contact"]; and ***People* v. *Adanandus*** (2007) 157 Cal.App.4th 496, 510 [where neither trial court nor defense counsel contradicted prosecutor's account of challenged jurors' demeanor or manner of responding to his questions, this suggests the prosecutor's description is accurate].)

H. Should a Prosecutor Place on the Record Why He or She Kept Jurors Who Were, At Least, Superficially Similarly Situated to the Challenged Juror, for Comparative Analysis Purposes?

If the defense has relied on a comparative analysis, it will be necessary to explain why a juror who the defense is claiming is similarly situated is not similarly situated. If the defense has not relied on comparative analysis in their arguments, it is not required that the prosecutor engage in any comparative analysis. 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.) Nevertheless, if there is a concern that the judge may do so, it may be wise to anticipate this analysis and short circuit it by explaining the reasons why jurors who might appear to be similarly situated are not, in fact, similarly situated. Conversely, a prosecutor may wish to point out the fact that other challenged panelists, *regardless of* whether or not they were members of the cognizable class

at issue, were challenged on the same ground or grounds as the panelist whom the defense is claiming was improperly excused. (**See *People* v. *Watson*** (2008) 43 Cal.4th 652, 680 [noting prosecutor challenged both jurors who were similarly situated regarding their exposure to gangs in finding prosecutor acted for non-discriminatory reasons].)

For a full description of the nature of comparative analysis, **see** this outline, section VII-H at pp. 93-102.

I. Should the Prosecutor Point Out that the Victims or Prosecution Witnesses are Members of the Same Cognizable Class the Defense is Claiming is Being Discriminated Against?

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

In ***People* v. *DeHoyos*** (2013) 158 Cal.Rptr.3d 797, the court said it was appropriate for the trial court to take into consideration the fact the victim, as well as the defendant, belonged to the same cognizable class (Hispanic) as the challenged juror (i.e., because it made it unlikely the prosecutor would be concerned about minorities unduly identifying with the defendant) in denying a ***Batson-Wheeler*** motion. (**Id.** at pp. 832.)

Thus, when the victims or witnesses are of the same cognizable class as the challenged juror, prosecutors should point out this fact as it provides some evidence that would tend to substantiate a lack of motive on the part of the prosecutor to exclude members of the cognizable class at issue.

J. Should the Prosecutor Point Out the Defendant is Not a Member of the Cognizable Class the Defense is Claiming is Being Discriminated Against?

Although a defendant may properly bring a ***Batson-Wheeler*** motion based on a prosecutor's removal of members of a cognizable class to which the defendant does not belong, the fact the defendant is not a member of the cognizable class at issue "remains a subject of proper consideration by the court." (***People* v. *Farnam*** (2002) 28 Cal.4th 107, 135.) This factor weighs against a finding the challenge was improper. (**See *People* v. *Neuman*** (2009) 176 Cal.App.4th 571, 579.)

K. Should the Prosecutor Point Out He or She is a Member of the Cognizable Class the Defense is Claiming is Being Discriminated Against?

The fact a prosecutor is a member of the same cognizable class as the challenged juror does not insulate a prosecutor from being found to have exercised his or her challenges in a discriminatory fashion. Although as a practical matter, a defense attorney is less likely to use a ***Batson-Wheeler*** challenge in an attempt to surreptitiously prejudice the jury against the prosecutor when the juror being challenged and the prosecutor are of the same cognizable class, there does not appear to be any cases indicating that the fact the prosecutor is of the same or different cognizable class as the challenged juror is relevant. All prosecutors (regardless of the cognizable class to which they belong) are entitled to the presumption that they are exercising their challenges in a constitutional manner. (**See *People* v. *Salcido*** (2008) 44 Cal.4th 93, 136.)

L. Should the Prosecutor Point Out that He or She Passed on the Panel While it Contained Members of the Cognizable Class at Issue?

The fact a prosecutor has passed on a juror who is a member of the cognizable class in issue, while not conclusive on the issue of good faith, is "an indication of good faith in exercising peremptories, and an appropriate factor for the trial judge to consider in ruling on a *Wheeler* objection." (***People* v. *Jones*** (2011) 51 Cal.4th 346, 363; ***People* v. *Turner*** (1994) 8 Cal.4th 13, 168; ***People* v. *Adanandus*** (2007) 157 Cal.App.4th 496, 511; ***People* v. *Irvin*** (1996) 46 Cal.App.4th 1340, 1355; **see also *Aleman* v. *Uribe*** (9th Cir. 2013) 2013 WL 3619980, *5 [prosecutor's acceptance of minorities on the jury a valid but not necessarily dispositive factor; *Gonzalez* v. *Brown* (9th Cir. 2009) 585 F.3d 1202, 1210 [the fact the prosecutor twice passed on panel with African-American juror suggests her motives for exercising the strike were not racial, especially considering the prosecutor had plenty of challenges left when she passed the second time].) Thus, if a prosecutor has passed on a panel that includes members of the cognizable class at issue, this should be pointed out. (**See *People* v. *Carasi*** (2008) 44 Cal.4th 1263, 1294-1295.)

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

M. Should the Prosecutor Point Out that He or She Would Have Kept (and/or Tried to Rehabilitate) a Juror in the Cognizable Class Who was Excused for Cause or for Hardship?

The fact that the prosecutor would have accepted a juror belonging to the cognizable class at issue who was challenged for cause by the defense, attempted to "rehabilitate" such a juror, or argued against excusing such a juror is a factor that weighs against a finding the prosecutor acted in a discriminatory manner in challenging another juror of the same cognizable class. (**See *People v. Streeter*** (2012) 54 Cal.4th 205, 224; ***People* v. *Jones*** (2011) 51 Cal.4th 346, 362.)

In ***People v. Streeter*** (2012) 54 Cal.4th 205, the California Supreme Court denied a claim 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, when asked to justify his reasons for challenging three African-American jurors, the prosecutor explained that one African-American juror whom he had rated highly as a possible juror had been excused for cause, and that he had been reluctant to stipulate to the hardship excusals of two other African-American prospective jurors because he would have liked to see them on the jury. The California Supreme Court upheld the trial court's finding that the prosecutor was credible regarding the jurors excused for hardship and took this factor into account in finding the prosecutor used his challenges properly. As to the juror who was excused for cause the California Supreme Court reviewed the record, which allowed them to independently determine that the prosecutor questioned the juror in a manner "obviously designed to do what is called rehabilitate the juror—that is, to elicit answers that would make her not subject to a challenge for cause," and also took this fact into account in finding the prosecutor acted properly (**Id** at p 362 [and noting that taking into account these facts, the prosecutor wanted five of the eight African-American jurors who were excused for hardship or cause or were called into the box].)
Thus, it is important for a prosecutor to put on the record whether he or she would have found a juror who was removed for cause or due to hardship acceptable, had opposed the defense challenge for cause, and/or had fought to rehabilitate the juror challenged for cause.

N. If a Prosecutor Was Unaware that the Juror Belonged to the Cognizable Class at Issue, Should the Prosecutor Place this Fact on the Record?

The fact the prosecutor was **honestly** unaware that a particular juror belonged to the cognizable class that the defense is claiming the prosecutor was being discriminated against should be placed on the record. This

constitutes evidence the prosecutor was not seeking to remove the juror for an impermissible purpose. (**See** ***United States*** **v.** ***Guerrero*** (9th Cir. 2010) 595 F.3d 1059, 1063.) In ***United States*** **v.** ***Guerrero*** (9th Cir. 2010) 595 F.3d 1059, the court agreed that "in the modern world it can be difficult, if not impossible, to accurately identify the race/ethnicity of everyone we meet[,]" but noted that "***Batson*** is predicated not on the potential juror's actual race/ethnicity, but on the prosecutor's perception of that race/ethnicity as the reason for striking an otherwise qualified venire person. This is true because ***Batson*** is seeking to cure government misconduct based on racial prejudice, not to simply guarantee an ethnically diverse jury. (**Id.** at p. 1063, fn. 3.)

O. Should a Prosecutor Put on Evidence of His Own (or His Office's Past History of Non-Discriminatory Use of Peremptory Challenges?

In assessing credibility, the 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 that employs him or her." (***People*** **v.** ***DeHoyos*** (2013) 53 Cal.4th 79 [[158 Cal.Rptr.3d 797, 821]; ***People v. Lenix*** (2008) 44 Cal.4th 602, 613.) A history or evidence of a historical practice of discriminatory selection tends to support a claim of discriminatory use of challenges. (**See** ***Miller-El*** **v.** ***Dretke*** (2005) 545 U.S. 231, 253, 263-264 [finding racially discriminatory use of challenges based, in part on the fact "that for decades leading up to the time this case was tried prosecutors in the Dallas County office had followed a specific policy of systematically excluding blacks from juries}].) Conversely, a lack of any such history on the part of the prosecutor or office 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].)

In ***People*** **v.** ***DeHoyos*** (2013)158 Cal.Rptr.3d 797, the California Supreme Court held it was appropriate for the trial court, at the third stage, to take into consideration the fact that the prosecutor had been forthright with the trial court in a **previous** trial (albeit in the same case) and the fact that the prosecutor had previously left a member of the cognizable group at issue on the jury in a previous trial (albeit in the same case) in denying a Batson/Wheeler motion. (**Id.** at p. 832; cf., ***Currie*** **v.** ***Lewis*** (N.D. Cal. May 13, 2013) 2013 WL 1994558, *7-*9, *13-*14 [taking into account prosecutor's history of ***Batson*** violations, including during earlier trial in same case, but still finding prosecutor's reasons for challenging jurors not pretextual].)

Thus, if the prosecutor has a prior history of accepting jurors belonging to the cognizable class at issue and/or the prosecutor's office has a history condemning use of discriminatory challenges, this should be brought to the attention of the court.

P. Should a Prosecutor Ask for a Transcript of the Voir Dire Before Providing Reasons for Challenging Jurors?

Although California courts are relatively forgiving of a prosecutor who proffers a reason for removing a juror based on an erroneous recollection of what a juror stated (**see *People* v. *Elliott*** (2012) 53 Cal.4th 535, 561; ***People* v. *Jones*** (2011) 51 Cal.4th 346, 366; ***People* v. *Taylor*** (2009) 47 Cal.4th 850, 896), a failure of the record to support a prosecutors' allegedly neutral reasons for challenging a juror can still result in a finding that the prosecutor was acting in a pretextual manner (**see *People* v. *Silva*** (2001) 25 Cal.4th 345, 386). In addition, the Ninth Circuit is considerably more likely than a California court to interpret a misrecollection by a prosecutor giving allegedly neutral reasons for removing a juror as evidence supporting a claim the prosecutor had an improper motive. (**See e.g., *Ali* v. *Hickman*** (9th Cir. 2009) 584 F.3d 1174, 1190; ***Cook* v. *LaMarque*** (9th Cir. 2010) 593 F.3d 810, 818). Finally, if one of the reasons a prosecutor provides for challenging a juror turns out to be unsupported by the record, a reviewing court may be less likely on appeal to give deference to a trial court's findings of nondiscriminatory purpose. (**See *Snyder* v. *Louisiana*** (2008) 552 U.S. 472; ***People v. Long*** (2010) 189 Cal.App.4th 826, 843.)

Thus, it is strongly **recommended** that if a prosecutor does not have a very accurate recollection of juror responses, the prosecutor should ask for readback or for a transcript to be provided of, at least, the answers given by the challenged juror and/or other jurors whose responses would be useful for a comparative analysis. (See ***Lewis v. Lewis*** (9th Cir. 2003) 321 F.3d 824 [suggesting counsel can be of particular assistance at the third stage "when afforded the opportunity to review a transcript of the jury selection proceedings"].)

VII Step Three: Deciding Whether the Prosecutor Engaged in Discriminatory Use of Peremptory Challenges

At the third stage of a *Batson-Wheeler* motion, the trial court is tasked with determining whether the prosecutor's purportedly neutral reasons for excusing a juror are genuine. 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.)

The party claiming a ***Batson-Wheeler*** violation must establish this claim at step three by a preponderance of the evidence. (***Crittenden* v. *Ayers*** (9th Cir. 2010) 624 F.3d 943, 954-955.) "The ***prosecutor*** need not establish with evidence on the record that her voir dire instincts are objectively correct; instead, the ***defendant*** must show that the prosecutor's reasons are not subjectively genuine." (***Jamerson* v. *Runnels*** (9th Cir. 2013) 713 F.3d 1218, 1229, emphasis added.)

A. In General, Should a *Batson-Wheeler* Motion be Denied When an Attorney Has a Genuine Non-discriminatory Reason for Challenging a Juror - Even if the Reason "Makes No Sense?"

"[T]he law recognizes that a peremptory challenge may be predicated on a broad spectrum of evidence suggestive of juror partiality. The evidence may range from the obviously serious to the apparently trivial, from the virtually certain to the highly speculative." (***People*** **v.** ***Wheeler*** (1978) 22 Cal.3d 258, 275.)

In ***People*** **v.** ***Cruz*** (2008) 44 Cal.4th 636, the California Supreme Court reiterated some principles it had espoused in ***People*** **v.** ***Guerra*** (2006) 37 Cal.4th 1067, 1100 and ***People*** **v.** ***Reynoso*** (2003) 31 Cal.4th 903, 919 regarding what constitutes legitimate grounds for a prosecutor to peremptorily challenge a juror: "'All that matters is that the prosecutor's reason for exercising the peremptory challenge is sincere and legitimate, legitimate in the sense of being nondiscriminatory.' [Citation omitted by author.) A reason that makes no sense is nonetheless 'sincere and legitimate' as long as it does not deny equal protection." (***Cruz*** at p. 655, quoting ***Reynoso*** at p. 924; **see also** ***Aleman*** **v.** ***Uribe*** (9th Cir. 2013) 2013 WL 3619980, *3 quoting ***Jamerson*** **v.** ***Runnels*** (9th Cir.2013) 713 F.3d 1218, 1224 ["Although the prosecutor's reasons for the strike must relate to the case to be tried, the court need not believe that 'the stated reason represents a sound strategic judgment' to find the prosecutor's rationale persuasive; rather, it need be convinced only that the justification 'should be believed'"].)

B. What Types of Evidence Can a Court Take Into Account in Assessing Whether the Prosecutor's Purported Neutral Grounds for Challenging a Juror are Genuine?

The types of evidence that may be considered in deciding whether a prima facie case of discriminatory use of peremptory challenges has been made out may also be taken into consideration in assessing the genuineness of a prosecutor's allegedly neutral reasons for challenging a juror (see *People* v. *Jones* (2011) 51 Cal.4th 346, 362) - albeit the weight to be given these factors may change and additional factors may also be taken into consideration.

Thus, the trial court may consider the following first stage factors at the third stage:

1. Whether the prosecutor has struck most or all members of the cognizable group from the venire (**see** this outline, sections V-B and V-C-1, at pp. 30-34)

2. Whether the prosecutor has used disproportionate number of peremptory challenges against the cognizable group (**see** this outline, sections V-C-2, at pp. 35-37)

3. Whether the jurors removed share only their membership in the cognizable group, but in other respects have little in common (**see** this outline, sections V-C-3, at p. 37) and the discussion of comparative analysis in section VII-H at pp. 93-102

4. Whether the prosecutor failed to engage jurors in the cognizable class in desultory voir dire or failed to ask them any questions at all (**see** this outline, sections V-C-4, at p. 37 and VII-I at p. 97)

5. whether the defendant is a member of the excluded group, especially if in addition his alleged victim is a member of the group to which the majority of the remaining jurors belong (**see** this outline, sections V-C-5, at p. 39)

6. whether the prosecutor passed on a panel that included members of the cognizable class (**see** this outline, sections V-C-6, at p. 39)

7. whether the prosecutor sought to keep members of the cognizable class excused for cause or hardship (**see** this outline, sections V-C-7, at p. 40)

8. whether there appear to be reasonable neutral grounds for excusing the jurors (see this outline, section V-C-8 at p. 41, VI-D at pp. 48-75)

9. whether the answers provided by the challenged jurors were favorable to the prosecution (see this outline, sections V-C-9, at p. 42)

10 whether there is evidence of the historical practice of the prosecutor or the prosecutor's office at discriminatory jury selection practice (**see** this outline, sections V-C-10, at p. 42)

In addition, the court should consider:

10 "the court's own experiences as a lawyer and bench officer in the community" (*People* v. *Lenix* (2008) 44 Cal.4th 602, 613

11. evidence deduced from a comparative analysis (**see** this outline, sections VII-H, at pp. 93-102)

12. evidence stemming from the prosecutor's demeanor in explaining the reasons (see this outline at p. 11)

13. whether the prosecutor's asserted reasons are supported by the record

C. Is a Prosecutor or Court Required to Assume a Juror's Responses are True?

The fact that a juror provides an answer that "contradicts" the basis for the prosecutor's challenge does not mean the prosecutor's reason will be held pretextual. "[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 [prosecutor could still have concerns about juror's being too tolerant of crime, despite juror's averments to the contrary]; ***People v. Jones*** (2011) 51 Cal.4th 346, 367 [prosecutor could rightly be concerned about juror who initially hesitated before answering, "Yeah, in a way" when asked if he would have a "tendency of trying to protect [defendant] on a case like this because you're black?" even though, on further questioning, the juror said this answer related to earlier questioning regarding defendant's hairstyle, and he later stated he would not protect defendant just because he was African-American.]; ***People*** **v.** ***Cowan*** (2010) 50 Cal.4th 401, 446, 450 prosecutor could disbelieve juror (and properly challenge juror) who initially stated in questionnaire she could not sit in judgment because she was Islamic but then later said she could]; ***Briggs*** **v.** ***Grounds*** (9th Cir. 2011) 682 F.3d 1165, 1175 [prosecutor not required to ignore jurors' answers to question reflecting she would hold prosecutor to higher burden of proof even though she eventually acquiesced to the agreeing she would not upon the judge's explanations].)

Numerous cases have held that a prosecutor is entitled to dismiss a juror who has had negative contacts with law enforcement the criminal justice system or have close relatives who had such negative contacts, notwithstanding the juror's assurances that the prior experiences would not impact the juror. (***People*** v. ***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.) Many other cases have found the prosecutor is not bound by the jurors' answers in regards to other issues as well. (**See e.g.,** ***Rice*** v. ***Collins*** (2006) 546 U.S. 333, 341 [notwithstanding young juror's oral response she could be impartial, prosecutor entitled to believe juror's youth and lack of ties to the community would make her a bad juror for the prosecution]; ***People*** v. ***Riccardi*** (2012) 54 Cal.4th 758, 793-794 [prosecutor entitled to reject juror on ground juror could not follow the flight instruction where the juror initially expressed a strong reluctance to considering evidence of flight as consciousness of guilt even though the juror was later "rehabilitated" and said he could "certainly" follow the flight instruction]; ***People*** v. ***Taylor*** (2010) 48 Cal.4th 574, 643, fn. 19 [prosecutor legitimately could have believed prospective juror who worked as nurse would be inclined to credit defense mental health experts, despite her questionnaire statement to the contrary]; ***People*** v. ***Young*** (2005) 34 Cal.4th 1149, 1174 [even though prospective juror who worked as therapist "gave assurances she harbored no biases or opinions that would affect her ability to be open-minded and fair, the prosecutor might have reasonably exercised a challenge to excuse [her] on this basis" because there might be evidence of "extreme mental disturbance" at penalty phase]; ***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]; ***People*** v. ***Rushing*** (2011) 197 Cal.App.4th 801, 812 [prosecutor could be legitimately concerned that juror would allow her

religious beliefs to affect her service, despite the juror's claim to the contrary]; ***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].)

D. Is a Prosecutor Entitled to Exercise a Challenge Based on the Overall Composition of the Jury?

As noted in ***People*** **v.** ***Lenix*** (2008) 44 Cal.4th 602, 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.)

"It is also common knowledge among trial lawyers that the same factors used in evaluating a juror may be given different weight depending on the number of peremptory challenges the lawyer has at the time of the exercise of the particular challenge and the number of challenges remaining with the other side. Near the end of the voir dire process a lawyer will naturally be more cautious about spending his increasingly precious peremptory challenges. Thus at the beginning of voir dire the lawyer may exercise his challenges freely against a person who has had a minor adverse police contact and later be more hesitant with his challenges on that ground for fear that if he exhausts them too soon, he may be forced to go to trial with a juror who exhibits an even stronger bias. Moreover, as the number of challenges decreases, a lawyer necessarily evaluates whether the prospective jurors remaining in the courtroom appear to be better or worse than those who are seated. If they appear better, he may elect to excuse a previously passed juror hoping to draw an even better juror from the remaining panel." (***People*** **v.** ***Reynoso*** (2003) 31 Cal.4th 903, 918-919; ***People*** **v.** ***Johnson*** (1989) 47 Cal.3d 1194, 1220-1221.)

In ***People*** **v.** ***Riccardi*** (2012) 54 Cal.4th 758, the court found the prosecutor had exercised a challenge of an African-American juror for a valid reason where the prosecutor had initially passed on the juror four times, but then decided to challenge the juror when the opportunity arose to replace the juror with a juror more favorably disposed toward the prosecution and imposition of the death penalty. (**Id.** at p. 789.)

In ***Gonzalez*** **v.** ***Brown*** (9th Cir. 2009) 585 F.3d 1202, the Ninth Circuit upheld the finding of a trial court that a prosecutor had exercised a challenge of an African-American juror for a neutral reason where the prosecutor had initially passed twice on the juror but then decided to challenge the juror in light of the changing jury composition. (**Id.** at p. 1205, 1209-1210.)

E. Is the Challenge of a Juror Valid if the Prosecutor Has a Mixed-Motivation (both Proper and Improper) for Challenging a Juror?

The United States Supreme Court has not addressed the question of whether a ***Batson-Wheeler*** motion should be granted if the court finds a prosecutor challenged a juror based on mixed motives (i.e., the prosecutor has both improper and proper motives for challenging the juror). (**See** ***Snyder*** **v.** ***Louisiana*** (2008 128 S.Ct. 1203, 1212.) There is a split in the federal circuits. The Second, Third, Fourth, Eighth, and Eleventh, Circuits hold that "where both race-based and race-neutral reasons have motivated a challenged decision, . . . the Court allows those accused of unlawful discrimination to prevail, despite clear evidence of racially discriminatory motivation, if they can show that the challenged decision would have been made even absent the impermissible motivation, or, put another way, that the discriminatory motivation was not a "but for" cause of the challenged decision." (***Cook*** **v.** ***LaMarque*** (9th Cir. 2010) 593 F.3d 810, 814.) The Ninth Circuit, however, has rejected the mixed motives approach and, on review, limits its inquiry to whether limit our inquiry to whether the prosecutor was "motivated in substantial part by discriminatory intent." (***Cook*** **v.** ***LaMarque*** (9th Cir. 2010) 593 F.3d 810, 815; **see also** ***Ayala*** **v.** ***Wong*** (9th Cir. 2012) 693 F.3d 945, 971 ["[a] court need not find all nonracial reasons pretextual in order to find racial discrimination"].)

F. In Assessing Discriminatory Intent, How Significant is the Fact a Prosecutor Has Cited a Reason for Excusing a Juror that is Not Supported by the Record or is Mistaken About What a Juror Said?

Sometimes a prosecutor will proffer an allegedly neutral reason for challenging a juror that is based on a misrecollection of what the juror wrote in a questionnaire or stated in court. How significant is this fact on the question of whether the prosecutor's reason was a pretext to cover a discriminatory intent?

The fact that a reason cited by the prosecutor as a basis for challenging a particular is not borne out, or contradicted, by the record **can be viewed as evidence of pretext**. (**See e.g.,** ***Snyder*** **v.** ***Louisiana*** (2008) 552 U.S. 472; ***People*** **v.** ***Silva*** (2001) 25 Cal.4th 345, 386; ***People v. Long*** (2010) 189 Cal.App.4th 826, 843; **see also** ***People*** **v.** ***Jones*** (2011) 51 Cal.4th 346, 366 [recognizing the failure of the record to support the prosecutor's reason is relevant, though not dispositive].)

Moreover, a factual mistake or claim unsupported by the record may also cast doubt on the genuineness of other reasons provided by the prosecutor. For example, in ***People v. Long*** (2010) 189 Cal.App.4th 826, the prosecutor provided two basic reasons for challenging a juror: the juror did not participate in group questioning and the juror exhibited negative body language, including failing to make eye contact. (**Id.** at p. 843.) When the appellate court reviewed the transcript it found the first reason was "demonstrably false." Because the first reason was proven to be false, the appellate court was unwilling to give the normal deference to the trial court's determination that the second reason was legitimate in the absence of any specific or verified description of the juror's body language or manner of expressing himself or why it was "disturbing or unseemly." (**Id.** at p. 848.)

However, California courts recognize that attorneys can make *honest* mistakes about what a juror has stated and that "a genuine 'mistake' is a race-neutral reason" for exercising a peremptory challenge. (***People v. Williams*** (1997) 16 Cal.4th 153, 189; ***People v. Phillips*** (2007) 147 Cal.App.4th 810, 814.) Just because a mistake has been made in recollecting what a juror said does not mean the attorney is being pretextual. (**See *People v. Elliott*** (2012) 53 Cal.4th 535, 561; ***People v. Jones*** (2011) 51 Cal.4th 346, 366; ***People v. Taylor*** (2009) 47 Cal.4th 850, 896.) "While an attorney who offers unsupported explanations for excusing a prospective juror may be trying to cover for the fact his or her real motivation is discriminatory, alternatively this may reflect nothing more than a misguided sense that more reasons must be better than fewer ***or simply a failure of accurate recollection.***" (***People v. Taylor*** (2009) 47 Cal.4th 850, 896, emphasis added.)

In ***People v. Jones*** (2011) 51 Cal.4th 346, for example, the prosecutor misstated what a juror had written when providing reasons for challenging a juror. The prosecutor said that the juror's son had been accused of attempt murder or murder when, in fact, the juror had stated on the questionnaire only that his son had been accused of a crime and that it went to trial without describing what the crime was and what happened. (**Id.** at pp. 358, 366.) The *Jones* court found this misstatement did not mean the prosecutor was acting in a pretextual manner:

> No reason appears to assume the prosecutor intentionally misstated the matter. He might have based what he thought on information he obtained outside the record. Or he may simply have misremembered the record. The prosecutor had to keep track of dozens of prospective jurors, thousands of pages of jury questionnaires, and several days of jury voir dire, and then he had to make his challenges in the heat of trial. He did not have the luxury of being able to double-check all the facts that appellate attorneys and reviewing courts have. Under the circumstances, it is quite plausible that he simply made an honest mistake of fact. Such a mistake would not show racial bias, especially given that an accurate statement (that [the juror] wrote that his son had been accused of, and tried for, a crime but left the rest of the answer blank) would also have provided a race-neutral reason for the challenge. ¶ The purpose of a hearing on a ***Wheeler/ Batson*** motion is not to test the prosecutor's memory but to determine whether the reasons given are genuine and race neutral. 'Faulty memory,

> clerical errors, and similar conditions that might engender a "mistake" of the type the prosecutor proffered to explain his peremptory challenge are not necessarily associated with impermissible reliance on presumed group bias.' (***People*** **v.** ***Williams*** (1997) 16 Cal.4th 153, 187 [alternate citations omitted].) This 'isolated mistake or misstatement' (***People v. Silva*** [(2001)] 25 Cal.4th [345,] 385, [alternate citations omitted) does not alone compel the conclusion that this reason was not sincere." (***Jones,*** at p. 366; **see also** ***People v. Elliott*** (2012) 53 Cal.4th 535, 561 [factual mistakes about where a juror was sitting and when voir dire occurred are the type of mistakes that are the result of a fault memory and are not "necessarily associated with impermissible reliance on presumed group bias"].)

Similarly, an honest misrecollection of ***which*** juror made a statement will not establish pretext. (**See** ***People*** **v.** ***Williams*** (2013) 56 Cal.4th 630, 661 [finding on review that where it was likely the prosecutor had mistakenly but honestly confused two jurors and challenged one of them based on the responses given by the other, there was no ***Batson-Wheeler*** violation where the responses given -no matter who gave them - reflected a valid non-racial basis (i.e., hesitancy in imposing the death penalty) for excusal]; ***People*** **v.** ***Phillips*** (2007) 147 Cal.App.4th 810, 814, 819 [no ***Batson-Wheeler*** violation where prosecutor gave a reason for excusing the juror the prosecutor later discovered (and disclosed) was based on information in the questionnaire of *another* juror].)

The Ninth Circuit is more prone than most courts to putting the most negative spin possible on the prosecutor's motives when the prosecutor's misquotes a juror and/or the record does not factually support the prosecutor's proffered reason. (**See e.g.,** ***Ali*** **v.** ***Hickman*** (9th Cir. 2009) 584 F.3d 1174, 1190; ***Cook*** **v.** ***LaMarque*** (9th Cir. 2010) 593 F.3d 810, 818; ***McClain v. Prunty*** (9th Cir. 2000) 217 F.3d 1209, 1220-1224; ***Johnson v. Vasquez*** (9th Cir. 1993) 3 F.3d 1327, 1331.)

However, even the Ninth Circuit does not view every misstatement as evidence of pretext. "[I]f a prosecutor makes a mistake in good faith, such as an innocent transposition of juror information, then that mistake does not support the conclusion that the prosecutor's explanation is clearly not credible." (***Aleman*** **v.** ***Uribe*** (9th Cir. 2013) 2013 WL 3619980, *3 [and noting that "***Batson*** prohibits purposeful discrimination, not honest, unintentional mistakes"].) This holds true especially when the inaccuracy "does nothing to change the basis for the strike." (***Aleman*** **v.** ***Uribe*** (9th Cir. 2013) 2013 WL 3619980, *3; **accord** ***Jamerson*** **v.** ***Runnels*** (9th Cir. 2013) 713 F.3d 1218, 1232, fn. 7 [finding prosecutor's mistaken belief that a juror had multiple "brothers serving time," rather than just a single brother, did not offer any proof of discriminatory intent because "[w]hether or not the juror had one brother or two brothers incarcerated, the same justification for the strike remained—the juror might have an unfavorable view of the system based upon a family member's involvement in it"].)

Indeed, in ***Rice v. Collins*** (2006) 546 U.S. 333, the High Court took the Ninth Circuit to task for inferring that a prosecutor's reason for removing a juror (#16) was pretextual simply because the prosecutor referred to a different juror (#19) as "young" even though she was a grandmother . The court pointed out that it was

quite plausible that the prosecutor simply misspoke with respect to a juror's numerical designation and that it was a "tenuous inference to say that an accidental reference with respect to one juror, Juror 19, undermines the prosecutor's credibility with respect to Juror 16. Seizing on what can plausibly be viewed as an innocent transposition makes little headway toward the conclusion that the prosecutor's explanation was clearly not credible." (**Id.** at p. 340; **see also** ***Aleman*** **v.** ***Uribe*** (9th Cir. 2013) 2013 WL 3619980, *4 [finding a prosecutor's honest mistake in attributing statement of one juror that she was too prissy for police work to another juror in attempting to show the latter juror was properly challenged was not evidence of pretext where the record supported the prosecutor's claim his mistake was due to feeling ill, the challenged juror was sitting near the juror who made the "prissy" comment, and the challenged juror made a similar comment to the prissy comment]; ***Briggs*** **v.** ***Grounds*** (9th Cir. 2011) 682 F.3d 1165, 1173, fn .7, 1179-1180 [although in one instance, prosecutor mischaracterized exchange between defense counsel and challenged juror in support of challenge, and in another instance, seemed to merge the juror's answers to two separate questions, court still considered the reasons where it appeared the prosecutor's mix-up stemmed from innocent confusion of different answers that did not undermine thrust of prosecutor's claim].)

G. Does Each Specific Reason Have to Provide a Neutral Justification by Itself or Can the Reasons Be Considered Cumulatively?

In ***Briggs*** **v.** ***Grounds*** (9th Cir. 2011) 682 F.3d 1165, the prosecutor gave numerous reasons for challenging a particular juror, including a lack of rapport with the juror and the jurors' responses (i) that if there was a slight doubt in her mind, that would be reasonable doubt, (ii) that she might need a little bit more evidence in a rape case than in an auto case, (iii) had no opinion on whether sex victims were more or less believable, (iv) gave an ambiguous answer as to whether, in the absence of DNA evidence, she could convict a defendant of a sexual crime, (v) she would hesitate to convict on the word of a single witness, and (vi) that she was not a good judge of telling the truth, and (vii) that she did not have a good rapport with the juror but the defense did. (**Id.** at pp. 1173-1178

The court held that even though "each detail" cited by the prosecutor did not "necessarily constitute a stand-alone justification," and some were "weak" reasons if taken in isolation, in total they "provided support for her overall concern" that the juror would hold the prosecution to a higher burden of proof than the law required. (**Id.** at p. 1174.)

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

1. What is comparative analysis?

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; ***People*** **v.** ***DeHoyos*** (2013) 57 Cal.4th 79 [[158 Cal.Rptr.3d 797, 828]; ***People*** **v.** ***Lenix*** (2008) 44 Cal.4th 602, 621; ***Cook*** **v.** ***LaMarque*** (9th Cir. 2010) 593 F.3d 810, 815.)

"[E]vidence of comparative juror analysis must be considered in the trial court and even for the first time on appeal if relied upon by defendant and the record is adequate to permit the urged comparisons." (***People*** v. ***Lenix*** (2008) 44 Cal.4th 602, 622.) However, "comparative juror analysis is but one form of circumstantial evidence that is relevant, but not necessarily dispositive, on the issue of intentional discrimination." (***People*** v. ***McKinzie*** (2012) 54 Cal.4th 1302, 1320; ***People*** **v.** ***Lenix*** (2008) 44 Cal.4th 602, 622.)

2. What is "reverse" comparative analysis?

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. This type of comparative analysis is sometimes referred to as "reverse," "affirmative" or "positive" 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; ***People*** **v.** ***Trevino*** (1997) 55 Cal.App.4th 396, 411-412 [finding trial court properly denied defendant's *Wheeler* motion because, inter alia, alleged basis for challenge (i.e., the juror's or juror's spouse connection with an organization that provided health care) was shared by each of the Hispanic jurors challenged and non-Hispanic jurors who were challenged].)

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.

3. A valid comparative analysis must take into account much more than a single shared factor

One of the most common mistakes made by counsel attempting to use comparative analysis to establish an impermissible motive is to compare a removed juror belonging to one cognizable class with a retained juror not belonging to the same cognizable class on the basis of an isolated characteristic. For example, let's say a prosecutor challenges a Hispanic-American juror for the asserted reason that the juror had a relative with a criminal history but allows a non-Hispanic-American juror to remain on the jury. The defense attorney may claim that this shows the prosecutor is not truly concerned about the fact that challenged juror has a relative with a criminal history and this creates an inference the challenged juror was actually removed because the prosecutor has a bias against Hispanic-Americans. However, the conclusion the defense attorney is asking the court to draw is **only valid** insofar as the two jurors being compared are, *in fact*, similarly situated ***in other respects.*** Whether the jurors are truly similarly situated (even on the isolated characteristic alone) would depend, inter alia, on how close the relative is to each juror, how similar are the criminal history records of the respective jurors, and what type of attitudes the juror has regarding their relatives' criminal history.

Even more important, a comparative analysis using the isolated characteristic is relatively useless if there exists other characteristics present or absent that allow a distinction to be drawn between the challenged juror and the unchallenged juror. "Two panelists might give a similar answer on a given point. Yet the risk posed by one panelist might be offset by other answers, behavior, attitudes or experiences that make one juror on balance more or less desirable." (***People*** **v.** ***Jones*** (2011) 51 Cal.4th 346, 365; ***People*** **v.** ***Booker*** (2011) 51 Cal.4th 141, 166; ***People*** **v.** ***Taylor*** (2009) 47 Cal.4th 850, 887.)

Although courts applying comparative analysis sometimes engage in very simplistic or superficial comparisons, "overlapping responses alone are not enough to demonstrate purposeful discrimination." (***People*** **v.** ***Calvin*** (2008) 159 Cal.App.4th 1377, 1389, citing to ***People*** **v.** ***Lewis and Oliver*** (2006) 39 Cal.4th 970, 1020.) "To prove such a claim, a defendant must engage in a careful side-by-side comparative analysis to demonstrate that the dismissed and retained jurors were "similarly situated." (***People*** **v.** ***Calvin*** (2008) 159 Cal.App.4th 1377, 1389, citing to ***People*** **v.** ***Lewis and Oliver*** (2006) 39 Cal.4th 970, 1016-1024.) Although the jurors used for comparison "need not be identical in all respects," the jurors being compared "must be materially similar in the respects significant to the prosecutor's stated basis for the challenge." (***People*** **v.** ***DeHoyos*** (2013) 57 Cal.4th 79 [[158 Cal.Rptr.3d 797, 825].) Jurors who gives similar responses to one question are not similarly situated where the jurors do not have otherwise have a "substantially similar combination of [relevant] responses[.]" (**Ibid; see also** ***People*** **v.** ***Watson*** (2008) 43 Cal.4th 652, 675-676 [noting none of the comparative jurors shared the combined characteristics relied upon by the prosecutor in excusing the juror in rejecting defense argument comparative analysis showed prosecutors' reasons were pretextual].)

"An attorney must consider many factors in deciding how to use the limited number of peremptory challenges available and often must accept jurors despite some concerns about them. A party concerned about one factor need not challenge every prospective juror to whom that concern applies in order to legitimately challenge any of them." (***People* v. *Jones*** (2011) 51 Cal.4th 346, 365.)

Moreover, in doing a comparative analysis, courts must take into account that "[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." (***People* v. *Lenix*** (2008) 44 Cal.4th 602, 631; **see also *People* v. *Vines*** (2011) 51 Cal.4th 830, 851-852 [finding jurors not similarly situated for comparative analysis purposes despite giving similar answers and sharing some personal characteristics including academic background, occupation, place of residence, and a preference for science fiction movies, where the jurors differed in age and life experience (i.e., unlike the challenged juror, the kept juror was a supervisor with the power to hire and fire, had been in the military, had a spouse who was employed, had raised a child to adulthood, had a daughter who worked in a fast food restaurant like the victims who were killed, and had a relative who had been a victim of a crime]; ***People* v. *Watson*** (2008) 43 Cal.4th 652, 672-682 [rejecting numerous claims that jurors were similarly situated for comparative analysis purposes where both booted and seated jurors were similar in some aspects but different in others]; ***People* v. *Gray*** (2005) 37 Cal.4th 168, 190-191 [the prosecutor may have preferred not to strike the other jurors for other positive reasons that suggested they would be a favorable juror for the prosecution].)

Even when two jurors give ostensibly similar answers, the ***way*** in which the answer is given may reveal that one juror is giving a genuine response and the other is not. The differences in the manner in how a juror answers a question "may legitimately impact the prosecutor's decision to strike or retain the prospective juror." (*People* v. *Lenix* (2008) 44 Cal.4th 602, 623.)

It is extremely important that the comparative analysis conducted take into account nuanced distinctions (**See *People* v. *DeHoyos*** (2013) 158 Cal.Rptr.3d 797, 822-825 fn. 5 [juror who was challenged, inter alia, because she made a statement reflecting an eagerness to serve in a *particular* and brutal death penalty case was not comparably situated to unchallenged juror who made statements reflecting that the juror thought everybody should do jury service in *general* and who, unlike the challenged juror, seemed to understand the gravity of responsibility being undertaken by service].)

a. <u>Variances in the nature of the criminal records of jurors or persons close to jurors can show jurors are not similarly situated for comparative analysis purposes</u>

In ***People* v. *Riccardi*** (2012) 54 Cal.4th 758, the defense argued a comparative analysis of the arrest records of prospective jurors or their relatives revealed that the prosecution's dismissal of two African-American jurors (one whose son was recently arrested on six counts of assault) and the other who was arrested 25 years earlier during a student protest against the lack of a black studies program. However, the California

Supreme Court rejected the argument, noting the jurors who were retained had relatively minor arrest records: one had been court-martialed for going 2-days AWOL in the late 1960's, had been arrested for DUI many years earlier and had a son arrested for vandalism; one had a husband accidentally arrested for a warrant on outstanding tickets; and one had a son arrested for "unpaid tickets." (**Id.** at pp. 795-796.) In addition, the court declined to compare the challenged jurors to Caucasian jurors who were initially passed on by the prosecution but later removed, but held that even if a comparison was done, their records were relatively minor: one had a husband arrested for drunkenness; one's deceased mother had prior arrest records for drunkenness and petty theft; and one had a friend arrested for a DUI. (**Id.** at p.796.) The court stated "none of the compared jurors or prospective jurors revealed a record comparable to the arrest of the [challenged juror']s son for six counts of assault or the nature of [the challenged's juror's] arrest, which suggested" she might have "firm anti-authoritarian opinions and might also harbor a mistrust of the criminal justice system." (**Id.** at p. 796; **see also** ***People*** **v.** ***Jones*** (2011) 51 Cal.4th 346, 366 [juror with son accused of crime in California not similarly situated to juror with brother accused of a crime in *another country*]; ***People*** **v.** ***Ledesma*** (2006) 39 Cal.4th 641, 679 [challenged juror's prior convictions for brandishing a weapon and driving under the influence distinguished him from other jurors with traffic citations].)

b. <u>Some examples of comparative analysis finding superficial similarities between challenged and unchallenged jurors did not show jurors were similarly situated</u>

In ***Felkner*** **v.** ***Jackson*** (2011) 131 S.Ct. 1305, the prosecutor challenged two African-American jurors. The first juror believed he had been stopped frequently by police in California while he was between the ages of 16-30 due to his race and age. The defense argued the challenge was pretextual because the prosecutor did not challenge a white juror who believed he had been stopped while driving in Illinois several years earlier as part of what he believed to be a "scam" by Illinois police targeting drivers with California license plates, and who also complained that he had been disappointed by the failure of law enforcement officers to investigate the burglary of his car. The United States Supreme Court found that it was not unreasonable for the lower California court of appeal to have concluded that the unchallenged juror's "negative experience out of state and the car burglary is not comparable to [the challenged juror's] 14 years of perceived harassment by law enforcement based in part on race." (**Id.** at pp. 1306-1307.) The second African-American juror was challenged by the prosecutor on the ground she had a master's degree in social work and had interned in the county jail, probably in the psych unit as a sociologist of some sort. The defense claimed the prosecutor did not ask questions of (and retained) other jurors of comparable educational background. The High Court also found it was not unreasonable for the court of appeal to have concluded that the fact the prosecutors treated unchallenged jurors with "backgrounds in law, bio-chemistry or environmental engineering" and who had not worked in the jail did not show the prosecutor's asserted reason was pretextual. (**Ibid.**)

In ***People v. Lenix*** (2008) 44 Cal.4th 602, the defense claimed that the prosecution improperly exercised a peremptory challenge against a black female panelist (i.e., a member of the venire). During the course of

questioning, the panelist stated that "murder aspect" of the case concerned her. When the prosecutor followed up by asking if there was something beyond what might trouble anybody about murder charges, the panelist said, "The fact someone lost a life." (**Id.** at p. 609.) The prosecutor asked if anyone close to the panelist had been involved in something like that. The panelist answered that her sister's husband, to whom she was close, had been murdered 10 or 11 years ago. When asked if the murder was gang related, the panelist said it was. The prosecutor asked which gang committed the offense, and the panelist replied no one had ever been arrested. In response to further questions from the prosecutor, the panelist said she did not have any trouble with law enforcement for failing to make an arrest and would not hold the experience against the defendant. The panelist said there was nothing else the parties needed to know about the murder or any "similar situations." (**Id.** at p. 609.) Later, the prosecutor asked the entire venire: "Has anybody here had any contacts with law enforcement that were hostile, confrontational, adverse, however you want to describe it, that might carry over into what we're going to do here in this courtroom? Anybody at all? Traffic ticket you didn't feel you deserved?" The black female panelist was the sole juror to reply; she stated that she had gotten a traffic ticket. When asked whether the officer was impolite "or anything like that," the panelist answered, "No. Well, no one ever feels they deserve a ticket. That was all." The prosecutor asked, "You feel that maybe he was a little shading the truth a little bit in it?" The panelist answered, "Yeah." The prosecutor then asked, "Did you feel you deserved it?" The panelist replied, "I didn't know if I deserved it or not, so I just went along with it." (**Id.** at p. 609.) Initially, the prosecutor accepted (i.e., passed on) the jury panel that included the black female panelist as well as a black male panelist. After the defense challenged the black male panelist, the prosecutor against accepted the panel. Following another defense peremptory challenge, the prosecutor challenged a Hispanic panelist. The defense then made a ***Batson-Wheeler*** motion, which the trial judge reserved until the completion of voir dire. Only after the defense exercised another peremptory challenge, did the prosecutor challenge the black female panelist. Ultimately, the panel was composed of six Caucasians, four Hispanics, and two Filipinos. (**Id.** at p. 610.) When the prosecutor was asked to explain his reasons for removing the black female panelist, the prosecutor stated he was concerned about her statement regarding the traffic ticket, noting she was the only juror who raised her hand when the prosecutor asked about uncomfortable run-ins with the police and while the panelist (somewhat inconsistently) indicated the encounter wasn't adversarial, that she didn't know whether the officer was lying, and didn't fight the ticket, the prosecutor believed there was "probably a lot more to it than that[.]" The prosecutor also expressed concerned that the juror's brother (sic) was involved in a gang-related homicide because, in the prosecutor's experience, people who are victims of gangs quite often are themselves gang members and that could have negative repercussions on the prosecutor's case - a case involving a gang-related murder. (**Id.** at pp. 610-611.) The California Supreme Court accepted the premise that comparative analysis could be done for the first time on appeal in reviewing a ***Batson-Wheeler*** motion that progressed to the third stage. Nevertheless, the court held that applying comparative analysis did not undermine the trial court's finding that prosecutor exercised his challenges for proper motives. (**Id.** at p. 630.) The court **rejected** the notion that the removed panelist was similarly situated to another juror who had a fairly hostile interaction with the police when they responded to a call from the juror's mother after the juror had taken away some keys from his mother to

prevent her from driving while intoxicated. The juror stated the police threatened to mace his brother unless the keys were returned. The juror thought about sending a letter to the editor but chose not to because he "figured they're trying ... to handle that situation without getting hurt." (**Id.** at p. 630.) The court observed that the prosecutor's hesitation regarding the removed panelist was based on his sense of her possible lingering resentment, whereas the juror who was kept stated he realized that the police were acting out of concern for their safety and so he did not complain about their conduct. (**Ibid.**) The court also **rejected** the defense argument that the removed panelist was similar to another juror who was kept. That other juror had a cousin who shot and killed someone when he was 16 years old. The cousin was convicted and sent to jail but was eventually released and was "doing great." The juror stated that his cousin was treated fairly by the police and courts, and "it was a bad situation, but it turned out to be a good situation for him." (**Id.** at p. 630.) That juror was a high school acquaintance of one of the police officers identified as a potential witness in defendant's case and the juror described the officer as "a really good guy." (**Ibid.**) Although the defendant argued the prosecutor's concern about the gang affiliation of the brother of the removed panelist was pretextual because the prosecutor did not display similar concerns that the other juror's cousin might be a gang member (e.g., because he never asked about the gang status of the other juror's cousin), the court held, in light of the juror's comments about his cousin's past experience and present circumstances, the prosecutor could have found such question unnecessary. (**Id.** at pp. 630-631.) Moreover, the court stated the fact the juror held a high opinion of a prosecution witness "would likely have been significant in the prosecutor's decision to retain the juror and further distinguishes this juror from" the removed panelist. (**Id.** at p. 631.)

In *People v. Cruz* (2008) 44 Cal.4th 636, the defendant claimed the prosecutor improperly exercised a peremptory challenge against a Hispanic juror on the sole basis of group bias. (**Id.** at p. 654.) The prosecutor gave many reasons for excusing the juror, including the fact he was young, immature, dressed in an informal manner and had long hair and a Fu Manchu moustache. The prosecutor also relied on several facts that the defense argued were pretextual because other jurors who were retained had provided similar answers. The California Supreme Court took a nuanced approach to comparing answers that recognized subtle differences could be very significant. (**Id.** at p. 661.) For instance, one of the reasons cited by the prosecutor was that the juror failed to answer questions on the written jury questionnaire pertaining to his feelings about criminal defense attorneys, prosecutors, and police. The defense argued other retained jurors were similarly situated to the challenged jurors who had indicated "no opinion," "Don't know" (sic) and "N/A." The court rejected this comparison because "the failure to respond to a question altogether is arguably of greater concern than a forthright response of "no opinion" or "Don't know." (**Id** at p. 660.) Another reason asserted by the prosecutor was that the juror had responded "police officers are human, and they can lie too" when asked if he felt a police officer's testimony was more truthful/accurate that of a civilian. The defendant pointed out that eight of the seated jurors answered the same question with either "no" or "not necessarily." However, the court rejected the idea these jurors were similarly situated to the challenged juror because "expressing the opinion that a police officer's testimony is not 'more truthful/accurate than that of a civilian is

qualitatively different than the affirmative response, 'they can lie too.'" (**Id.** at pp. 660-661.)

In ***People* v. *Cox*** (2010) 187 Cal.App.4th 337, the defendant claimed that several jurors who were challenged as a result of family contacts with law enforcement were similarly situated to other retained jurors who had similar life experiences. (**Id.** at p. 357.) However, the court pointed out that there were several other reasons why the retained jurors would be kept while the removed jurors would be booted. For example, one juror has hesitated when asked if she could be fair, while the retained jurors all "expressed confidence without hesitation in their abilities to impartially decide the case." (**Id.** at p. 359.) Another juror who was retained not only had a relative with negative contacts with the criminal justice but had a father who was killed without the killer ever being brought to justice. Moreover, the jurors who were retained had family members who were less closely connected with the juror, had eventually responded positively to the contacts, or who had been in trouble in the more remote past that the family members of the jurors who were challenged. (**Id.** at p. 358.) The defendants in ***Cox*** also argued that the prosecutor retained jurors with gang associations even though jurors who were challenged were removed on this basis. The ***Cox*** court rejected this argument and pointed out distinctions between the retained and removed jurors. For example, unlike the retained jurors, one of the challenged jurors had "evasively responded, 'Not necessarily,'" when asked if he was a member of a gang and had an ex-wife who was taking a bar exam. And unlike the retained jurors, another challenged juror had *current* familiarity with gang members and possibly even the defendants. (**Id.** at pp. 359-360.) The defendants in ***Cox*** claimed that two jurors were booted for being soft-spoken and very quiet but that a juror who the court repeatedly prompted to "speak up" was retained. However, the appellate court found that, after being admonished to speak up, the juror answered questions without difficulty and readily volunteered correct answers, and indicated she would voice her opinions during deliberations, showing she had paid attention to the judge's preliminary instructions and would serve as a thoughtful juror. In contrast, one of the challenged jurors indicated he would not interact with the other jurors during deliberations. Moreover, the other challenged juror, unlike the retained juror, had an incarcerated relative. (**Id.** at p. 360.) The ***Cox*** court also rejected comparisons between a challenged juror who was removed because he was the brother of judge and two retained jurors, one of whom was a legal assistant and another who had cousins who were lawyers. The court noted that, unlike the retained jurors (neither of whom had connections to the field of criminal law), the challenged juror indicated that he would not speak with his brother (who was a prosecutor before becoming a judge) because they had such strong differences of opinion and was a psychiatric social worker. For these same reasons, the challenged juror was also held not similarly situated to two other jurors who the defendant argued might be sympathetic to young people (a musician and a principal assistant to the County Board of Education). (**Id.** at pp. 360-361.) Finally, the court rejected the argument that one of the reasons for removing a challenged juror (i.e., that she had handled a friend's gun) was spurious because the prosecutor had kept several other jurors who had possessed or used firearms. The court observed that unlike the retained jurors, the challenged juror knew a lot of gang members and may have known the defendants. (**Id.** at p. 361.)

4. Does the fact that one juror not belonging to a cognizable class was retained even though the juror appears similarly situated to a juror belonging to a cognizable class who was removed necessarily mean the prosecutor acted for a discriminatory purpose?

Although the fact that a juror not belonging to a cognizable class was retained when a juror belonging to the cognizable class who appears similarly situated to a retained juror was removed provides some evidence of a discriminatory purpose, it is not dispositive especially when it is inconsistent with the overall behavior of the prosecutor. For example, in ***People* v. *Riccardi*** (2012) 54 Cal.4th 758, the prosecutor retained a Caucasian juror who expressed reservations about the death penalty even though this was an asserted reason for removing several African-American jurors. However, when it came to all the other jurors, the prosecutor was consistent in removing jurors of all classes who expressed reservations about capital punishment. The *Riccardi* court held "[t]he fact that defendant has identified a single aberration in the prosecutor's strategy fails to establish a pretextual removal of African-American [p]rospective [j]urors." (**Id.** at p. 792.) The court noted that "a comparative analysis here reveals the obvious — the prosecutor of a death penalty case would be reluctant to keep any prospective juror who expresses some hesitation about being able to return a death verdict in an appropriate case. Accordingly, the prosecutor's explanations for challenging [the African-American prospective jurors] and the trial court's explicit and implicit credibility determinations surrounding those explanations, is supported by substantial evidence and thus entitled to deference." (**Ibid.**)

5. Can a court compare jurors who were later struck by *the defense* in a comparative analysis?

It should seem obvious that the only relevant comparisons in a comparative juror analysis are between the struck jurors and the jurors who are ultimately seated since it is unknown whether the prosecutor would have challenged the juror if the defense had not. Thus, the California Supreme Court in *People v. Riccardi* (2012) 54 Cal.4th 758, declined 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. (**Id.** at p. 796; **accord *People* v. *DeHoyos*** (2013) 57 Cal.4th 79 [158 Cal.Rptr.3d 797, 827].)

However, in ***Ayala* v. *Wong*** (9th Cir. 2012) 693 F.3d 945, the Ninth Circuit held "the otherwise-similar jurors to whom the struck jurors can be compared include those 'permitted to serve' by the prosecution but ultimately struck by the defense." (**Id.** at p. 964, fn. 17.) The Ninth Circuit cited to ***Miller-El* v. *Dretke*** (2005) 545 U.S. 231, 244-245, which compared a struck juror to a juror not challenged by the prosecution who was later challenged by the defense, in support of this principle and then went on to say such comparisons make "perfect sense" as "some of these jurors were not struck by the defense until after the prosecution

had passed them for several rounds, and the 'underlying question is not what the defense thought about these jurors,' but what the prosecution did." (***Ayala***, at 964, fn. 17.)

Editor's note: There are two glaring problems with the analysis in ***Ayala***. First, as the opinion itself implies, some of the jurors used for comparison purposes had **not been passed on** by the prosecution before they were bumped by the defense. Using jurors for comparison purposes whom the prosecutor never accepted is 100% ludicrous. Second, even the fact that a prosecutor passed on a jury containing a juror that the defense later bumped does not necessarily indicate the prosecutor would have ultimately kept the juror. (**See *People* v. *Lenix*** (2008) 44 Cal. 4th 602, 623 ["[t]he selection of a jury is a fluid process, with challenges for cause and peremptory strikes continually changing the composition of the jury before it is finally empanelled"].) Prosecutors often take calculated risks in passing on a jury (in hopes of "going up in jury challenges") knowing that the defense is very unlikely to pass as well even though the prosecutor may fully intend to later bump one or more of the jurors they initially passed on. (**See *People* v. *Riccardi*** (2012) 54 Cal.4th 758, 790-791 [and finding that trying to use jurors for comparison purposes who were originally passed on by the prosecutor but later removed was not a fruitful endeavor].) Thus, while using jurors outside the cognizable class who the defense bumped after the prosecutor passed is not 100% ludicrous, it is still a very dubious proposition and reflects either an infantile understanding, or purposeful ignorance, of prosecutorial trial tactics on the part of the opinion's author. Of course, under a similar rationale, an argument could be made that it is unfair to take into account the fact the *prosecutor* passed on jurors falling into the cognizable class regardless of whether the defense later bumped the juror - something courts routinely do in finding the prosecutor did not exercise his or her challenge for a discriminatory purpose. (**See *People* v. *Carasi*** (2008) 44 Cal.4th 1263, 1294-1295 [no prima facie case of discrimination against females shown because, inter alia, the prosecutor repeatedly passed on panels containing numerous women].) But the two circumstances are not truly similar. It is one thing for a prosecutor to take a risk in keeping a juror who the prosecutor can live with, but may decide to bump after the jury composition changes. It is another thing for a prosecutor who cannot stand the thought of having a member of a particular cognizable class on his or her jury to risk having to do so if the defense decides to pass on the jury.

6. Can a court compare jurors who were initially passed upon by the prosecution but then later dismissed by the prosecutor in a comparative analysis?

In *People* v. *Riccardi* (2012) 54 Cal 4th 758, the defense attempted to argue that the prosecutor's reasons in a death penalty case for removing some African-American jurors was not genuine because the same reasons applied to non-African American jurors who were *initially passed on by the prosecutor but then later challenged by the prosecution.* (**Id.** at pp. 790-791.) However, the court rejected the use of these jurors as a valid basis for comparison because the initial retention of the jurors appears to have a tactical choice in order to allow the prosecutor to create a situation where the prosecution had more remaining challenges than the defense and not because they were Caucasian. That is, since "there appears to be a legitimate explanation for why the prosecutor did not immediately challenge [the Caucasian jurors], the prosecutor's mere delay in dismissing them does not provide reliable '"circumstantial evidence"' in determining 'the legitimacy of a party's explanation for exercising a peremptory challenge.'" (**Id.** at p. 791.)

7. Can "alternate jurors" who were challenged be compared to seated jurors?

Depending on the basis for the challenge, it may not be fair to compare jurors considered during selection of the alternates with jurors considered during selection of the actual jury. For example, in ***People*** **v.** ***Jones*** (2011) 51 Cal.4th 346, the defendant asked the reviewing court to compare the prosecutor's challenge to an African -American juror who was challenged during selection of the alternate jurors with the prosecutor's failure to challenge two White jurors about whom, he claims, the prosecutor should have had similar concerns. (**Id.** at p .368.) However, the California Supreme Court observed that this would be a "false comparison" because the two White jurors were part of the originally chosen jury and thus when the prosecutor had to decide whether to challenge the juror in question, "it was too late to challenge either of the other two jurors." (**Ibid.**) The court then noted that, unlike in selecting the seated jury, in deciding about the challenged African-American juror (and others among the alternates), the prosecutor felt he had the luxury of challenging good jurors in the hope of obtaining even better ones. That is, even if the prosecutor at trial were to view the African-American juror "as more favorable to the prosecution than either of the other two, the prosecutor never had a choice between [that juror] and them." (Ibid.)

8. When can a comparative analysis be conducted?

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.

Moreover, comparative analysis is <u>generally useless</u> 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.) Accordingly, where a trial court determines there was no showing of a prima facie case and does not ask the prosecutor reasons for the excusals or rule on the prosecutor's actual reasons for excusing, California courts will decline to conduct a comparative juror analysis in this "first-stage ***Wheeler/ Batson*** case." (***People*** **v.** ***Streeter*** (2012) 54 Cal.4th 205, 226, fn. 5; ***People*** **v.** ***Mills*** (2010) 48 Cal.4th 158, 174, fn. 3; ***People*** **v.** ***Hawthorne*** (2009) 46 Cal.4th 67, 80, fn. 3.)

The ***Streeter*** court did not address whether appellate comparative juror analysis is required "when the objector has failed to make a prima facie showing of discrimination" but noted that the High Court precedents definitely do **not** mandate the use of comparative juror analysis in a first-stage *Wheeler-Batson* case, where neither the trial court nor the reviewing court has been presented with the prosecutor's reasons or have hypothesized any possible reasons. (**Id.** at p. 622, fn. 15 citing to ***People* v. *Bell*** (2007) 40 Cal.4th 582, 600-601 [which noted that where no reasons are provided at the first stage, comparative analysis would make little sense since there is nothing to compare]; ***People* v. *Howard*** (2008) 42 Cal.4th 1000, 1020; and ***People* v. *Bonilla*** (2007) 41 Cal.4th 313, 350.) Indeed, even when a trial court has allowed a prosecutor to put her reasons for challenging a juror on the record when no prima facie case has been found, the California Supreme Court has declined to engage in comparative juror analysis on review. (***People* v. *Lopez*** (2013) 56 Cal.4th 1028, 1049-1050; ***People* v. *Taylor*** (2010) 48 Cal.4th 574, 616-617.)

Comparative analysis may be done for the first time on appeal if the trial court found a prima facie case and actually proceeded to the second and third stages of the ***Batson-Wheeler*** motion. Reverse comparative analysis may potentially be conducted on appeal even if the trial court did not find a prima facie case. (See this outline, section VII-H-1&2 at pp. 93-94.)

I. The Use of Disparate Questioning Analysis to Assess the Existence of a Discriminatory Motive

In determining whether a prosecutor has exercised her challenge in a discriminatory fashion, courts sometimes consider whether the prosecutor engaged in "disparate questioning" of jurors. If the prosecutor only asked jurors of one cognizable class questions about a particular topic, but not other jurors and the questioned jurors' answers were later used as allegedly neutral justifications for removing them, this can be evidence of discriminatory intent. (**See *Miller-El* v. *Dretke*** (2004) 545 U.S. 231, 246, 250, fn. 8 [a party's failure to engage in meaningful voir dire on a topic the party says is important can suggest the stated reason is pretextual]; ***People* v. *Lomax*** (2010) 49 Cal.4th 530, 573 ["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"]; **cf.**, ***People* v. *DeHoyos*** (2013) 57 Cal.4th 79 [158 Cal.Rptr.3d 797, 832 [fact that prosecutor did in-depth questioning of all the challenged jurors properly considered in ***denying Batson-Wheeler*** motion].)

On the other hand, 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; ***People* v. *Jones*** (2011) 51 Cal.4th 346, 363; **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 of no significance when the court conducts voir dire. (**See *Jamerson* v. *Runnels*** (9th Cir. 2013) 713 F.3d 1218, 1229.) The lack of questioning 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, "[a] party is not required to examine a prospective juror about every aspect that might cause concern before it may exercise a peremptory challenge." (***People* v. *Jones*** (2011) 51 Cal.4th 346, 363.) If there are non-discriminatory reasons for why a prosecutor might question jurors differently, then the existence of "disparate questioning" has little meaning. For example, in ***People* v. *Riccardi*** (2012) 54 Cal.4th 758, a prosecutor challenged some African-American jurors on the basis of their experience with the criminal justice system. The defendant contended that the prosecutor's failure, during the selection of the alternate jurors, to question two Caucasian prospective jurors regarding their relevant arrests, and to remove them, demonstrated that the prosecutor was not genuinely concerned about the criminal justice experience of the prospective jurors. The court rejected the defense argument, noting that, the disclosures by these jurors were of a relatively banal nature that neither party found important to explore in depth and, as to least one of the jurors, both parties were primarily focused exclusively on the juror's distrust of lawyers and the justice system. (**Id.** at pp. 796-797.) In ***People* v. *Jones*** (2011) 51 Cal.4th 346, the defendant claimed the prosecutor's stated concern that the juror's children were unemployed was not sincere or legitimate because he did not question him about this concern. The court rejected this claim, pointing out that not only were there lengthy juror questionnaires supplemented by substantial voir dire questioning of the prospective jurors by the court and the parties, but also that there was a reason that the prosecutor would not spend his time questioning the juror about this concern, namely, the prosecutor used his time questioning the juror about a more pressing concern (i.e., that the juror appeared to be buying into a particular defense theory). (**Id.** at p. 363.) And in ***People* v. *Cowan*** (2010) 50 Cal.4th 401, the court found that the fact the prosecutor did not question prospective about their negative experiences with the justice system, even though these were some of the stated bases for challenging the juror, did not show that the race-neutral reasons for excusing these prospective jurors were pretextual where the prosecutor *did* engage the jurors extensively on the topic that apparently concerned her most: their ability, because of their religious views, to sit in judgment of others and to impose the death penalty. (**Id.** at p. 451.)

J. Should a Court Take Into Account the Defendant's Challenges in Assessing Whether a Prosecutor Properly Challenged a Juror?

It is settled that "the propriety of the prosecutor's peremptory challenges must be determined without regard to the validity of defendant's own challenges." (*People* v. *Reynoso* (2003) 31 Cal.4th 903, 927.)

K. May a Court Take Into Account Facts Justifying a Challenge That are Apparent to a Court But Were Not Stated as Reasons by the Prosecutor?

A trial court "is not permitted to substitute its conjecture or surmise for the actual reasons declared by the prosecutor. '[I]t does not matter that the prosecutor might have had good reasons to strike the prospective jurors. What matters is the real reason they were stricken.'" (*People* v. *Phillips* (2007) 147 Cal.App.4th 810, 818, citing to *Paulino* v. *Castro* (9th Cir.2004) 371 F.3d 1083, 1090.)

VIII. Practice Tips for Prosecutors at the Third Stage

Respond to any issues raised by the judge

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

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

The prosecutor should make sure the following is discernible from the record: "1) the trial court considered the prosecutor's reasons for the peremptory challenges at issue and found them to be race-neutral; 2) those reasons were consistent with the court's observations of what occurred, in terms of the panelist's statements as well as any pertinent nonverbal behavior; and 3) the court made a credibility finding that the prosecutor was truthful in giving race-neutral reasons for the peremptory challenges." (*People* v. *Lenix* (2008) 44 Cal.4th 602, 621.)

Ask the trial judge to take note of the final composition of the jury

As pointed out in *People* v. *Lenix* (2008) 44 Cal.4th 602, "[w]hen a *Wheeler/Batson* motion has been made, it is helpful for the record to reflect the ultimate composition of the jury." (**Id.** at p. 610, fn. 6; **see also** *People v. Neuman* (2009) 176 Cal.App.4th 571, 588, fn. 21 ["the ultimate composition of the jury is a factor to be considered in an appellate court a *Wheeler/Batson* challenge"].)

If the prosecutor passed on a final jury panel that includes a member of the cognizable class allegedly being improperly excluded, this strongly suggests that the prosecutor was not motivated in exercising challenges by the panelist's membership in the class. (**See** ***People v. Dement*** (2011) 53 Cal.4th 1, 20; ***People*** **v.** ***Clark***, (2012) 52 Cal.4th 856, 906; ***People*** **v.** ***Garcia*** (2011) 52 Cal.4th 706, 747-748; ***People*** **v.** ***Lenix*** (2008) 44 Cal.4th 602, 629; ***People*** **v.** ***Kelly*** (2007) 42 Cal.4th 763, 780; ***People*** **v.** ***Cornwell*** (2005) 37 Cal.4th 50, 69-70; ***People*** **v.** ***Reynoso*** (2003) 31 Cal.4th 903, 926; ***People v. Adanandus*** (2007) 157 Cal.App.4th 496, 503-504; **but see** ***People*** **v.** ***Snow*** (1987) 44 Cal.3d 216, 226 ["although the passing of certain jurors may be an indication of the prosecutor's good faith in exercising his peremptories, and may be an appropriate factor for the trial judge to consider in ruling on a ***Wheeler*** objection, it is not a conclusive factor"]; ***Brinson*** **v.** ***Vaughn*** (3d Cir. 2005) 398 F.3d 225, 233 ["a prosecutor may violate ***Batson*** even if the prosecutor passes up the opportunity to strike some African American jurors" and "a prosecutor's decision to refrain from discriminating against some African American jurors does not cure discrimination against others"].)

IX. Remedies for *Batson-Wheeler* Violations

A. Traditional Remedy: Dismissal of Panel

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 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, emphasis added by author.)

Although the California Supreme Court in ***Wheeler*** indicated the remedy upon a finding of discrimination had to be dismissal of the venire, they later recognized that other remedies could be imposed with the consent of the offended party. (**See** ***People*** **v.** ***Willis*** (2002) 27 Cal.4th 811, 814, 821; ***People*** **v.** ***Mata*** (2013) 158 Cal.Rptr.3d 655, 656.)

B. *Alternative* Remedy: Reseating Jurors, Monetary Sanctions, Additional Challenges

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.) The ***Willis*** court held "if 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." (**Id.** at pp. 823-824; ***People*** **v.** ***Mata*** (2013) 158 Cal.Rptr.3d 655, 658.)

Among the alternative remedies suggested by the ***Willis*** court: reseating of the juror, imposition of monetary sanction, and (in dicta) allowing the aggrieved party additional challenges. (**Id.** at p. 821.) 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; **see also** ***People*** **v.** ***Mata*** (2013) 158 Cal.Rptr.3d 655, 657.)

In ***People v. Mata*** (2013) 158 Cal.Rptr.3d 655, the California Supreme Court held that consent to use of the alternative remedy of reseating a juror may be express or implied and may come from the defense attorney. It is not necessary that the defendant expressly or implicitly consent on the record. (**Id.** at pp. 656, 659.) Moreover, the court held that "by failing to object to the trial court's proposed alternative remedy when the opportunity to do so arises, the complaining party impliedly waives the right to the default remedy of quashing the entire venire and impliedly consents to the court's proposed alternative remedy." (**Id** at p. *5; but see ***People*** **v.** ***Overby*** (2004) 124 Cal.App.4th 1237, 1245 [correctly anticipating the holding in ***Mata***, but emphasizing that "it would be preferable and advisable for the trial court to ensure that the record reflects the express consent of the prevailing party whenever an alternate remedy authorized by ***Willis*** . . . is employed"].)

1. Reseating the improperly challenged juror

A trial judge may "disallow the improper challenge(s) and seat the wrongfully excluded juror(s). " (***People*** **v.** ***Willis*** (2002) 27 Cal.4th 811, 820; accord ***People v. Mata*** (2013) 158 Cal.Rptr.3d 655, 656.) However, this remedy 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].)

Minimizing the Prejudice:

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 challenge. This concern would only be magnified if the juror figures out that the challenge was disallowed because the attorney purportedly wanted the juror off the panel because the juror was a member of a cognizable class.
In light of this concern, 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. (**Id.** at pp. 819, 821.)

The ***Willis*** court pointed out that the American Bar Association has included as one of its Criminal Justice Trial by Jury Standards 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." (**Id.** at p. 822.)

However, the ***Willis*** court went on to recognize that requiring all challenges to be made at sidebar may be unduly burdensome. Thus, it stated that trial courts should have discretion to develop appropriate procedures to avoid such burdens, such as limiting such conferences to situations in which the opposing party has voiced a *Wheeler* objection to a particular challenge. (**Id.** at p. 822.)

The ***Willis*** court suggested that the court could require counsel first privately to advise opposing counsel of an anticipated peremptory challenge. If no objection is raised, then the challenge could be openly approved. In that way, only objectionable challenges would be heard at sidebar. (**Id.** at p. 822.)

Practice Note: There is always the possibility that the proper exercise of a peremptory challenge(s) will not be viewed as such by an undiscerning judge. Attorneys who finds themselves in this position and who are facing the sanction of reseating a juror, especially in cases where the juror is aware that you have challenged the juror, should consider dismissing the case before the jury is sworn (i.e., before jeopardy has attached) and refiling the case. It makes little sense to try a case to a foregone conclusion of no better than a hung jury.

2. Monetary sanctions

In ***People*** v. ***Willis*** (2002) 27 Cal.4th 811, the court noted that one appropriate remedy for a ***Wheeler/Batson*** violation is for the offending party to be hit with monetary sanctions. However, the court pointed out that unless this sanction is combined with another remedy, such as reseating the challenged juror, a monetary sanction "fails to vindicate the juror's fundamental right not to be wrongly excluded from participation, and permits the case to be tried by an intentionally unrepresentative and biased jury." (**Id.** at pp. 821, 824 quoting the lower appellate court.)

Moreover, while the sanction imposed in by the trial court in ***Willis*** was a $1,500 fine, the California Supreme Court stated that "in future cases courts should consider framing a more effective form of relief for Wheeler errors . . . and imposing sanctions severe enough to guard against a repetition of the improper conduct." (**Id.** at p. 824.) And, at the very least, an order imposing monetary sanctions should not later be vacated (as the trial judge did in ***Willis***) since doing so makes the sanction meaningless and effectively provides no remedy at all for the violation. (**Id.** at p. 821, quoting the lower appellate court.)

In ***People*** v. ***Muhammed*** (2003) 108 Cal.App.4th 313, the judge imposed monetary sanctions in the amount of $1,500 pursuant to Code of Civil Procedure section 177.5 against the prosecutor for exercising peremptory challenges in a discriminatory fashion. (The judge also threatened to prevent the prosecutor from using any more peremptory challenges but never made good on this threat.) Ultimately, the defendant pled guilty but the People appealed the imposition of the sanctions. (**Id.** at p. 318.) The ***Muhammed*** court recognized that under section 177.5, a monetary sanction can be imposed "for any violation of a lawful court order by a person, done without good cause or substantial justification." (**Id.** at p. 324.) Nevertheless, the court vacated the trial court' order because no order was made before the judge imposed the monetary sanction. (**Id.** at pp. 325-326 and noting, at p. 324, the court's order imposing a monetary sanction was also deficient because it did not comply with section 177.5(b)'s requirement that it "be in writing and shall recite in detail the conduct or circumstances justifying the order"].)

The ***Muhammed*** court stated that if a trial judge wants to impose a monetary sanction for a ***Wheeler/Batson*** violation, it **must** first order counsel not to violate the Equal Protection Clause in selecting jurors, albeit observing that it seems "degrading to the judicial process and to the attorneys who practice before our courts for a court to have to warn counsel that, on penalty of a monetary sanction, they must not violate the Constitution." (**Id.** at pp. 325-326.) Thus, the ***Muhammed*** court anticipated that monetary sanctions would only be imposed after a second ***Wheeler*** motion - the first ***Wheeler*** motion providing the opportunity for an admonition/order from the court. (***Muhammed***, at p. 326, but **see** *People* v. *Bouldon* (2005) 126 Cal.App.4th 1305 [discussed below on this page].) At that juncture, if a court "admonishes counsel that a repetition of specific conduct will result in a monetary sanction, that statement is tantamount to an order not to repeat the conduct, and should suffice under section 177.5. (***Muhammed*** at p. 325.)

The ***Muhammed*** court observed that where the alternative sanction of reseating a challenged juror is not available, there is a stronger reason to impose a monetary sanction. (**Id.** at p. 325.)

Finally, the ***Muhammed*** court stated a monetary sanction may be imposed **in addition to** the granting of the mistrial. (**Id.** at pp. 324-325.)

In ***People*** v. ***Bouldon*** (2005) 126 Cal.App.4th 1305, the court recognized that the decisions in ***Willis*** and ***Muhammed*** anticipated that the order containing the threat of sanctions would issue ***after*** problematic conduct on the part of counsel became evident during voir dire. Nevertheless, the court said such an order

before any challenge is made (i.e. a pre-emptive prophylactic order) *is* authorized by a trial judge's "statutory and the inherent power to exercise reasonable control over all proceedings connected with the litigation before him," and to "take whatever steps [are] necessary to see that no conduct on the part of any person obstructs the administration of justice." (***Bouldon***, at p. 1314 [and noting that the possibility that counsel will incur a financial sanction for violating ***Wheeler*** does not represent a serious impediment to a defendant's right to zealous representation by counsel].)

3. Additional peremptory challenges

In *People* v. *Willis* (2002) 27 Cal.4th 811, the court observed that where the alternative of reseating improperly challenged jurors is not available because the jurors have been discharged, some cases have suggested that the court might allow the innocent party additional peremptory challenges. (**Id.** at p. 821.)

4. Tactical advice from ADA Jerry Coleman

If you are found in violation of ***Wheeler*** and the court reseats a challenged juror, make sure that you get to re-exercise that challenge (albeit not on the juror reseated). That is, if you used challenge number 8 incorrectly, and the juror is reseated, make sure you get your eighth challenge back.

Conversely, if your opponent has been found in violation of ***Wheeler***, make sure to not only ask the court to reseat the last juror challenged but ask for additional challenges for each juror the court has found was improperly bumped and who have already been discharged.

X. Timeliness of a *Batson-Wheeler* Motion

"A motion attacking the use of a peremptory challenge on the basis of group bias must be timely raised" (***People*** v. ***Roldan*** (2005) 35 Cal.4th 646, 701, citing to ***People*** v. ***Thompson*** (1990) 50 Cal.3d 134, 179 and ***People*** v. ***Wheeler*** (1978) 22 Cal.3d 258, 280.) "For example, a ***Wheeler/Batson*** motion first made after the jury has been sworn and the venire dismissed is untimely." (***People*** v. ***Roldan*** (2005) 35 Cal.4th 646, 701, citing to ***People*** v. ***Thompson*** (1990) 50 Cal.3d 134, 179 and ***People*** v. ***Perez*** (1996) 48 Cal.App.4th 1310, 1314.)

A ***Batson-Wheeler*** motion "is timely if made before jury impanelment is completed because 'the impanelment of the jury is not deemed complete until the alternates are selected and sworn.'" (***People*** v. ***McDermott*** (2002) 28 Cal.4th 946, 970; ***People*** v. ***Adanandus*** (2007) 157 Cal.App.4th 496, 500; **accord *People*** v. ***Roldan*** (2005) 35 Cal.4th 646, 701.) The rule requiring a timely ***Batson-Wheeler*** does not mean "such motions must be made, on pain of waiver, immediately upon the exercise of the offending peremptory challenge and before any other challenges have been made." (***People*** v. ***Roldan*** (2005) 35 Cal.4th 646, 701.)

A trial court should probably **not wait until the entire panel** is selected before holding a hearing on a *Batson-Wheeler* challenge for several reasons. First, a defendant is entitled to bring more than *Batson-Wheeler* challenge. (See e.g., *People* v. *Dunn* (1995) 40 Cal.App.4th 1039, 1046-1047; *People* v. *Bernard* (1994) 27 Cal.App.4th 458, 466-467.) Second, in *People* v. *Willis* (2002) 27 Cal.4th 811, the court indicated that reseating jurors who have been discharged is not an appropriate option. (**Id.** at p. 821.) Since postponing a ruling on a *Batson-Wheeler* motion until the end of jury selection would necessarily mean jurors have been discharged, the postponement will limit the possible sanctions open to the trial court to remedy the *Batson-Wheeler* challenge. Third, it is a waste of resources and time to continue with jury selection if the initial challenge is valid.

A prosecutor cannot be required to justify a ***future*** peremptory challenge of a prospective juror who is within a cognizable group; the request is premature. (*People* v. *Clair* (1992) 2 Cal.4th 629, 653.)

XI. Appellate Review Rules

When a trial court does "not satisfy its *Batson/Wheeler* obligations, ... the conviction ... must be reversed. Such 'error is prejudicial per se: "The right to a fair and impartial jury is one of the most sacred and important of the guaranties of the constitution. Where it has been infringed, no inquiry as to the sufficiency of the evidence to show guilt is indulged and a conviction by a jury so selected must be set aside."'" (*People* v. *Allen* (2004) 115 Cal.App.4th 542, 553, citing to *People* v. *Wheeler* (1978) 22 Cal.3d 258, 283.) "The exclusion by peremptory challenge of a single juror on the basis of race or ethnicity is an error of constitutional magnitude requiring reversal." (*People* v. *Silva* (2001) 25 Cal.4th 345, 386.)

However a claim of a *Batson-Wheeler* violation may not be raised for the first time on appeal. (See *People* v. *Howard* (1992) 1 Cal.4th 1132, 1157; *People* v. *Hayes* (1990) 52 Cal.3d 577, 605.)

A. Review Where Finding of No Prima Facie Case Made

A trial court's finding that no prima facie case has been made is entitled to "considerable deference on appeal" and if the record "suggests grounds upon which the prosecutor might reasonably have challenged" the panelists in question, the conviction will be affirmed. (*People* v. *Crittenden* (1994) 9 Cal.4th 83, 116-117; *People* v. *Adanandus* (2007) 157 Cal.App.4th 496, 501.) The only time deference will *not* be given is where the trial court may have applied the incorrect unnecessarily high standard of "more likely than not" instead of the mere "reasonable inference of discrimination" standard in assessing whether a prima facie case has been made out. (See *Johnson* v. *California* (2005) 545 U.S. 162.) In that situation, the record is reviewed independently to "'apply the high court's standard and resolve the legal question whether the record supports an inference that the prosecutor excused a juror' on a prohibited discriminatory basis." (*People* v. *Clark* (2012) 52 Cal.4th 856, 903; *People* v. *Bonilla* (2007) 41 Cal.4th 313, 342.)

1. No prima facie finding – no reasons provided by prosecutor

If a trial court denies a ***Batson-Wheeler*** motion without finding a prima facie case of group bias and the prosecutor does not place any reasons on the record for challenging the juror(s) in question, the reviewing court may consider the entire record of voir dire. (***People*** **v.** ***Adanandus*** (2007) 157 Cal.App.4th 496, 501.) The foregoing rule encompasses "two different ways in which [a reviewing court] may uphold the trial court's denial of a ***Wheeler/Batson*** challenge." (***People*** **v.** ***Neuman*** (2009) 176 Cal.App.4th 571, 580.) First, the finding is affirmed "if an examination of the relevant statistics and pattern of the excusals, or other facts, such as whether defendant is also a member of the group excused, the prosecutor engaged in desultory or no questioning of the prospective jurors in question and whether their only commonality is their membership in a cognizable group (citation omitted), provide substantial evidence to support the trial court's finding that a prima facie case has not been made[.]" (***People*** **v.** ***Neuman*** (2009) 176 Cal.App.4th 571, 580 citing to ***People*** **v.** ***Carasi*** (2008) 44 Cal.4th 1263, 1294 and 1295 and ***People*** **v.** ***Kelly*** (2007) 42 Cal.4th 763, 780]. Second, the finding is affirmed if the record provides "for race-neutral grounds upon which the prosecutor might have challenged the prospective jurors in question." (***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.); ***People*** **v.** ***Hoyos*** (2007) 41 Cal.4th 872, 900-901, fn. 15; ***People*** **v.** ***Lancaster*** (2007) 41 Cal.4th 50, 76; ***People*** **v.** ***Bonilla*** (2007) 41 Cal.4th 313, 341.) This means the reviewing court may speculate as to reasons why the prosecutor may have wished to have challenged the juror(s) in question. If the record suggests grounds upon which the prosecutor might reasonably have challenged the prospective jurors in question, the finding is affirmed. (***People*** **v.** ***Howard*** (1992) 1 Cal.4th 1132, 1155; **but see** ***Williams*** **v.** ***Runnels*** (9th Cir. 2006) 432 F.3d 1102, 1106-1110 [reviewing court will not speculate on reasons challenge may be justified where a trial judge did not find a prima facie showing had been made].)

2. No prima facie case – prosecutor asked for reasons and court relies on those reasons

"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 or a finding of a prima facie showing is considered implicit in the request." (***People*** **v.** ***Welch*** (1999) 20 Cal.4th 701, 746.) If the prosecutor puts on the reasons for bumping a juror (regardless of whether the trial judge has determined there is no prima facie case), and the trial judge then also passes judgment on those reasons, a reviewing court will view what occurred as a "first stage/third stage ***Batson*** hybrid," skip the determination of whether a prima facie case was made, and simply do a third stage analysis. (See ***People*** **v.** ***Riccardi*** (2012) 54 Cal.4th 758, 786-787; ***People*** **v.** ***Booker*** (2011) 51 Cal.4th 141, 161-166; ***People*** **v.** ***Thomas*** (2011) 51 Cal.4th 449, 471-475; ***People*** **v.** ***Cowan*** (2010) 50 Cal.4th 401, 448; ***People*** **v.** ***Mills*** (2010) 48 Cal.4th 158, 174; ***People*** **v.** ***Lewis*** (2008) 43 Cal.4th 415, 471.)