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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, v. CROOK, JOE, Defendant.	CASE NO. CR DA NO. P **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PROPER WHEELER PROCEDURE** Trial Date: Time: Dept:

Comes now the Plaintiff, the People of the State of California, by and through its attorneys, EDWIN L. MILLER, JR., District Attorney, and , Deputy District Attorney and respectfully submit the following **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PROPER WHEELER PROCEDURE** in the above-referenced case:

ARGUMENT

I

A PEREMPTORY CHALLENGE IS PRESUMED TO BE CONSTITUTIONALLY PERMISSIBLE

A party exercising a peremptory challenge in a criminal action is presumed to be doing so on constitutionally permissible grounds, that is, on grounds of specific bias.

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> Thus, '[a] prosecutor may act freely on the basis of "hunches," unless and until these acts create a **prima facie** case of group bias, and even then he may rebut the inference.' People v. Moss (1986) 188 Cal.App.3d 268, 273, fn.5.

However, this rebuttable presumption is removed when an opposing party makes a **prima facie** showing that peremptory challenges are being used to exclude prospective jurors from the panel **solely** on the basis of group bias. People v. Wheeler (1978) 22 Cal.3d 258. Batson v. Kentucky (1986) 476 U.S. 79, 89.

A **prima facie** showing must be timely, i.e., before the jury is sworn in. People v. Wheeler, supra.

The objection must be litigated out of the presence of the jury. People v. Wheeler, supra at page 281.

The moving party has the burden of establishing a **prima facie** case to the satisfaction of the court that the prosecutor has challenged jurors solely on the basis of group bias. The moving party cannot question the prosecutor in order to establish a **prima facie** case. The prosecutor's statutory right to refuse to give any reason for the exercise of peremptory challenges continues to exist until the court rules that a **prima facie** showing has been made by the moving party. Penal Code Section 1069. People v. Wheeler, supra at pp. 280-281, fn. 28. People v. Granillo (1987) 197 Cal.App.3d 110, 122.

In the instant case,

[insert relevant facts and argument]

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II

A PRIMA FACIE SHOWING OF GROUP BIAS CONSISTS OF THREE COMPONENTS

A **prima facie** showing of group bias must consist of three components:

(1) a complete record of the circumstances must be made;

(2) establish that the challenged jurors are members of a cognizable group within the meaning of the representative cross-section rule; and

(3) show a **strong likelihood** that such persons are being challenged because of their group association rather than because of any specific bias. People v. Howard (1992) 1 Cal.4th 1132, 1154; People v. Wheeler, supra, at page 280, footnote omitted; see also People v. Fuentes (1992) 54 Cal.3d 707, 714. (Emphasis added.)

(1) A complete record of the circumstances must be made.

The first requirement of a prima facie case is the party "should make as complete a record of the circumstances as is feasible." People v. Wheeler, supra, at page 280. However, it should be noted that when a criminal defendant makes a **Wheeler** motion, the California Supreme Court places an affirmative duty on the court and counsel to help in making the record:

> When a **Wheeler** motion is made, we believe it to be the duty of the court, and both counsel as officers of the court, to cooperate to construct as complete a record as is feasible. People v. Motton (1985) 39 Cal.3d 596, 605.

This means that both counsel and the court should be specific on the record as to which ethnic, racial, or gender group is being discussed and which challenged jurors were a member of that

group. Also, the number of challenged jurors is an important part of the record. Finally, the defendant's group status should be stated on the record, i.e., whether he/she is a member of the same group as the challenged jurors.

In the case at bar,

[insert relevant facts and argument]

(2) The challenged jurors are members of a cognizable group.

The following groups have been recognized by the courts as cognizable groups, either in the context of a **Wheeler** motion or a related context (whether there has been a constitutionally invalid selection of a jury panel):

a. Any ethnic or economic group. People v. Wheeler, supra at page 283.

b. Blacks. People v. Wheeler, supra at page 280, fn. 26; see also People v. Johnson (1989) 22 Cal.3d 296; People v. Harris (1984) 36 Cal.3d 36, 51.

c. Black women. People v. Motton, supra, at page 605-607.

d. Spanish surnamed (Hispanics). People v. Trevino (1985) 39 Cal.3d 667, 676, 683-688; People v. Harris, supra, 36 Cal.3d 36, 51; People v. McCaskey (1989) 207 Cal.App.3d 248, 252.

e. Caucasians. People v. Snow (1987) 44 Cal.3d 216, 229, concurring opinion of Eagleson, J., citing, Bakke v. Regents of University of California (1976) 18 Cal.3d 34 (affd. in part, revd. in part, University of California Regents v. Bakke (1978) 438 U.S. 265.

f. Men. People v. Cervantes (1991) 233 Cal.App.3d 323, 334.

g. Women. Didonato v. Santini (1991) 232 Cal.App.3d 721, 733; Taylor V. Louisiana (1975) 419 U.S. 522.

h. Daily wage earners/non-supervisory, "blue collar" workers. Thiel v. Southern Pacific Co. (1946) 328 U.S. 217, 225; People v. Turner (1986) 42 Cal.3d 711, 722.

The following groups have been held not to be cognizable groups:

a. Ex-felons. Rubio v. Superior Court (1979) 24 Cal.3d 93.

b. Resident aliens. Rubio v. Superior Court (1979) 24 Cal.3d 93.

c. Jurors who have reservations about the death penalty. People v. Zimmerman (1984) 36 Cal.3d 154 (plur. opn.); People v. Turner (1984) 43 Cal.3d 302, 313-315 (plur. opn.); People v. Chavez (1985) 39 Cal.3d 823; 827; People v. Miranda (1987) 44 Cal.3d 57, 80.

d. Young people. People v. Thorpe, (1988) 205 Cal.App.3d 1171, 1176; People v. Marbley (1986) 181 Cal.App.3d 45, 47-48; People v. Parras (1984) 159 Cal.App.3d 875, 855; People v. Estrada (1979) 93 Cal.App.3d 76, 93.

The defendant need not be a member of the cognizable group at issue to object on Wheeler grounds. Wheeler, supra, 22 Cal.3d at p. 28.

In the case at bar,

[insert relevant facts and argument]

(3) Moving party must show a strong likelihood that the challenged jurors are being challenged solely because of their group association, rather than because of any specific bias.

Each case is unique in this area, and must be analyzed on its own merits. In **Wheeler, supra**, 22 Cal.3d 258, the California Supreme Court listed several illustrations of the type of evidence that might tend to show a strong likelihood that peremptory challenges are based on group association:

> (1) the prosecutor has excluded all or most of an identified group from the venire;
>
> (2) he [or she] has used a disproportionate number of peremptory challenges against members of this group; or
>
> (3) the jurors in question have only their group identification in common; or
>
> (4) apart from their group identification they are as heterogeneous as the community as a whole.
>
> (5) the failure of his [or her] opponent to engage these same jurors in more than desultory **voir dire**, or indeed to ask them any questions at all.
>
> Lastly, under **Peters** and **Taylor** the defendant need not be a member of the excluded group in order to complain of a violation of the representative cross-section rule: yet if he is, and especially if in addition his alleged victim is a member of the group to which the majority of the remaining jurors belong, these facts may also be called to the court's attention.
>
> **Id** at pp. 280-281, fn. omitted; see also, People v. Rousseau (1982) 129 Cal.App.3d 526,

The determination of whether a defendant has established a **prima facie** case "is largely within the province of the trial court whose decision is subject only to limited review. [Citations] People v. Wimberly (1992) 5 Cal.App.4th 773, 782, citing, People v. Allen (1989) 212 Cal.App.3d 306, 313. The entire record of the voir dire will be examined by the reviewing court, however, the reviewing

court will give "considerable deference" or "substantial deference" to a trial court's ruling in this regard. This is due to the trial judge's "knowledge of local conditions and local prosecutors, powers of observation, understanding of trial techniques, and judicial experience." Id, citing, People v. Sanders (1990) 51 Cal.3d 471, 501. See also, People v. Howard (1992) 1 Cal.4th 1132; People v. Bittaker (1989) 48 Cal.3d 1046, 1092; quoting **Wheeler**, supra, 22 Cal.3d at 281; see also Batson v. Kentucky (1986) 476 U.S. 79, 97.

The "great deference" standard of review is an application of the substantial evidence test. People v. Jackson (1992) 92 Daily Journal D.A.R. 13961, 13962 (4DCA, Div. 2)(E009504)(10-9-92.) "Because the trial court's assessment of these explanations rests largely upon evaluations of credibility, both [the California and U.S. Supreme Courts] generally give such assessments great deference." Id, citing, People v. Pride (1992) 3 Cal.4th 195, 230, fn. 10.

" ... [W]hen the moving party has made a **prima facie** showing of group bias in the exercise of peremptory challenges, and the opposing party has offered an explanation for the challenges which on its face is free of group bias, the issue presented to the trial court is one of fact. Accordingly, its ruling on the motion will be upheld on appeal if it is supported by substantial evidence, unless the record indicates that the trial court misunderstood the nature of its obligations under **Wheeler**, or otherwise based its ruling on something other than a resolution of that factual issue." Id at 13964.

The exclusion of two black jurors is not a **prima facie** showing of systematic exclusion by the prosecutor. Id, citing,

People v. Rousseau (1982) 129 Cal.App.3d 526, 536; People v. Wright (1990) 52 Cal.3d 367, 399; People v. Howard (1992) 1 Cal.4th 1132, 1154. See also People v. Harvey (1984) 163 Cal.App.3d 90, 110-111.

Although the courts have refused to establish an arbitrary number of peremptory challenges that the prosecution must make before a defendant can show a **prima facie** case, the courts have construed **Rousseau** and **Harvey** as establishing a rule that a defendant fails to make a **prima facie** case by showing **only** that the prosecution used peremptory challenges against two black jurors. People v. Wimberly, supra, 5 Cal.App.4th 773, 783, fn.3, citing, People v. Turner (1986) 42 Cal.3d 711, 719, fn.4 and accompanying text; People v. Christopher (1991) 1 Cal.App.4th 666, 673; People v. Fuller (1982) 136 Cal.App.3d 403, 410.

Counsel's assertion that he had "reason to believe" that a **Wheeler** violation was taking place is wholly insufficient evidence of a **prima facie** case. People v. Wimberly, supra at 782-784.

Also, the following motion by a defense attorney was found to be totally inadequate by the California Supreme Court:

> [T]here [have] been two black people that advanced to the point where they were on the panel at one time. Both of them were excluded by the District Attorney, and it is my position they were excluded because they are black and for no other reason. I would like to make a motion under **Wheeler** on that basis. People v. Howard, supra, 1 Cal.4th 1132, 1154.

The Supreme Court commented that such a limited showing offers little practical assistance to the trial court, which must determine from "all the circumstances of the case" whether there is "a strong likelihood" that prospective jurors have been challenged because of their group association rather than because of any specific bias. Id, citing, People v. Wheeler, supra, 22 Cal.3d at p. 280.

It is true that the California Supreme Court said in a footnote that even "a single discriminatory exclusion may violate a defendant's right to a representative jury." People v. Fuentes (1991) 54 Cal.3d 707, 726, fn.4. However, later that same year, the California Court of Appeals referred to the **Fuentes** decision, and commented that "[a]s a practical matter, however, the challenge of one or two jurors can rarely suggest a **pattern** of impermissible exclusion." People v. Christopher (1991) 1 Cal.App.4th 666, 671. (Note that People v. Sanchez (1992) 6 Cal.App.4th 913 which held that the exclusion of one juror from a cognizable group established **Wheeler** error was ordered de-published in August of 1992.)

In the case at bar,

[insert relevant facts and argument]

III

UPON A FINDING OF A PRIMA FACIE SHOWING, THE BURDEN SHIFTS TO THE NON-MOVING PARTY TO PROVIDE A DETAILED AND NEUTRAL JUSTIFICATION FOR EACH CHALLENGED JUROR

Once the court rules that the moving party has established a **prima facie** case, the burden shifts to the other party to come forward with a detailed, specific and neutral explanation as to each juror and which is related to the particular case to be tried. People v. Johnson (1989) 47 Cal.3d 1194, 1218.

This justification must be done as to each such juror individually and should be done at the time the challenge is exercised rather than waiting until the end of jury selection and then attempting to recall why the challenges were made. The judge

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must issue a ruling as to each such juror individually. People v. Fuentes, supra, 54 Cal.3d 707, 718-719.

The explanations given by the non-moving party must be reasonably specific and neutral. People v. Johnson, supra, 47 Cal.3d 1194, 1218. The explanation need not rise to the level of a challenge for cause. People v. Wheeler, supra, 22 Cal.3d at pp. 281-282, fn. omitted. In order to sustain the burden of justification, the party must:

> " ... satisfy the court that he exercised such peremptories on grounds that were reasonably relevant to the particular case on trial or its parties or witnesses -- i.e., for reasons of **specific bias** as defined herein.
>
> He, too, may support his showing by reference to the totality of the circumstances:
>
> for example, it will be relevant if he can demonstrate that in the course of this same voir dire he also challenged similarly situated members of the majority group on identical or comparable grounds."
>
> **Id.**

An attorney may exercise peremptory challenges based upon the body language of a juror, his or her mode of answering questions, and upon the subjective impressions of the prosecutor. People v. Johnson (1989) 47 Cal.3d 1194, 1215-1222.

In the instant case,

[insert relevant facts and argument]

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IV

TRIAL COURT'S DETERMINATION AND REMEDY

Once the moving party has made a **prima facie** showing of exclusion of protected class and prosecution has explained its challenges, the trial court must exercise its own judgment as to the propriety of the prosecution's challenges. People v. Hall (1983) 35 Cal.3d 161, 168-173.

In ruling on a **Wheeler** motion, a trial court has no "range" of options. If the prosecutor's explanation is disbelieved then the court must grant the motion and begin jury selection anew. People v. Jackson, supra, at 13963, citing, People v. Wheeler, supra, 22 Cal.3d at p. 282. "Conversely, if the trial court finds the prosecutor's explanation credible and supportive of his or her peremptory challenges independent of group bias, the court must deny the motion. ... Once the factual issue is decided, the trial court's disposition of the motion is mandatory, not discretionary." Id.

... If the court finds that the peremptory challenges were used improperly, the only remedy is to dismiss the jurors so far selected, quash any remaining venire, draw a new venire, and begin jury selection anew. No other sanctions or penalties are authorized. People v. Wheeler, supra, 22 Cal.3d at p. 282, fn. 29.

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CONCLUSION

The proper Wheeler procedure is as follows:

1. There is a presumption of constitutionally permissible peremptory challenges.

2. A prima facie showing must be made by the moving party consisting of 3 components. (See text, page 3.)

3. The trial court must make a ruling on the prima facie showing.

4. If a prima facie showing is found by the trial court, the burden shifts to the non-moving party to provide a specific and neutral justification for each challenged juror.

5. The trial court must make a factual finding as to the non-moving party's justifications.

6. If the trial court finds that peremptory challenges were exercised on the basis of group bias, not specific bias, then the present jury must be dismissed, and a new jury panel must be called.

Dated:

Respectfully submitted:

EDWIN L. MILLER, JR.
District Attorney

By: _____
Deputy District Attorney

Attorneys for Plaintiff

POINTS TO IMPLEMENT

1. Take contemporaneous notes of impressions as to each juror, with no concern as to how trivial the reason. Be specific.

2. After the defense attorney says "Wheeler," make him/her meet the rebuttable presumption burden and put on a proper prima facie showing. (3 components. See attached Memorandum.)

3. If appropriate, argue that a proper prima facie showing has not been made by the defense attorney.

4. Make the trial court rule on the prima facie issue before stating your justifications as to each juror.

5. Even if the judge rules that no prima facie showing has been made, insist on putting your justifications on the record as to each challenged juror.

6. Then ask the the judge to rule on each justification for each juror. ("Substantial deference rule.")

7. If Points 2 through 6 are not going well, ask for time to submit written points and authorities. (See attached Memorandum.)

8. If appropriate, consider making a Wheeler motion as to the defense.

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ALAMEDA

THE PEOPLE OF THE STATE OF CALIFORNIA,	
vs.	No.
	POINTS & AUTHORITIES
	RE: JURY VOIR DIRE
Defendant.	

The People respectfully request the Honorable Court to permit counsel to personally ask questions of the prospective jurors regarding their background and attitudes concerning the circumstances and nature of this case, its participants and doctrines of law likely to be relevant in this case which the population at large is commonly known to harbor strong feelings in an effort to detect bias within the prospective jurors which would warrant a challenge for cause.

In an effort to detect such bias the People respectfully request that the court permit **open ended questions** by counsel of the prospective jurors on these issues.

Alternatively, if the Honorable Court will not permit counsel to personally ask such voir dire questions of the prospective jurors the People respectfully request that the Honorable Court make the inquiry of the prospective jurors on the factual issues concerning the circumstances

and nature of this case,its participants, and doctrines of law which are likely to be relevant in this case. The People request that the Honorable Court in making such inquiry use **open-ended questions** beyond the broad general questions of the jurors willingness to apply whatever law the court instructs them to follow and the jurors verbal statement to set aside any personal experience and/or attitude concerning a particular state of facts.

This request is based upon:

1. The nature of this case and its participants;

2. The anticipated factual issues which will be developed through the presentation of evidence;

3. The anticipated doctrines of law which will be relevant to this case;

4. The fact that the population at large is commonly known to harbor strong feelings towards such issues of fact and doctrines of law as to warrant a challenge for cause;

5. The need to ask open ended questions to detect such bias;

6. The fact that the broad general voir dire questions set forth in *Section 8.5(b)* of the *Standards of Judicial Administration* are insufficient to permit the discovery of actual bias given the circumstances and nature of this case, its participants and anticipated applicable doctrines of law.

7. The attached points and authorities.

I

PROPOSITION 115 DOES PERMIT COUNSEL UPON A SHOWING OF GOOD CAUSE TO SUPPLEMENT THE COURT'S EXAMINATION OF THE PROSPECTIVE JURORS.

Civil Code of Procedure, section 223.
California Rules of Court, Rule 228.1(5) & 516.1(a)(5)
California Rules of Court, Rule 228.2 & 516.2

While Proposition 115 dramatically altered the jury selection process by adopting the Federal Court model of jury voir dire, it did not envision the complete exclusion of the attorneys from personally asking prospective jurors questions where there is a showing of good cause.

The recognition of the propriety of the court to permit counsel to directly ask questions of the prospective jurors is further reflected in California Rules of Court concerning **Pre-voir dire conference** in Rules 228.1(a)(5) and 516.1(a)(5) and **Supplementalexamination** in Rules 228.2 and 516.2.

II

"THE RIGHT TO VOIR DIRE..., IS NOT A CONSTITUTIONAL RIGHT BUT A **MEANS TO ACHIEVE THE END OF AN IMPARTIAL JURY.**"
People v. Bittaker, 48 C3d 1046, 1087.

The United States Supreme Court has similarly recognized that voir dire "plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored." (*Rosales-Lopez v. United States*, 451 U.S. 182, 188). The United States Supreme Court in *J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419, 1329 (1994) obverved:

"If conducted properly, voir dire can inform litigants about potential jurors, making reliance upon sterotypical and pejorative notions about a particular gender or race both unnecessary and unwise. Voir dire provides a means of discovering actual or implied bias and a firmer basis upon which the parties may exercise their peremptory challenges intelligently."

"THE EXAMINATION OF PROSPECTIVE JURORS IN A CRIMINAL CASE SHOULD INCLUDE ALL QUESTIONS NECESSARY TO INSURE THE SELECTION OF A FAIR AND IMPARTIAL JURY."
Standards of Judicial Administration, Section 8.5(a)(2)

"...THE COURT MUST PERMIT QUESTIONING ABOUT LEGAL DOCTRINES THAT ARE MATERIAL TO THE TRIAL AND CONTROLVERSIAL IN THE SENSE THAT THEY ARE **LIKELY TO INVOKE STRONG FEELINGS AND RESISTENCE TO THEIR APPLICATION**"
People v. Pinholster, 1 C4th 865, 915

THE TRIAL JUDGE MAY, UPON A SHOWING OF GOOD CAUSE, PERMIT SUPPLEMENTAL EXAMINATION CALCULATED TO DISCOVER POSSIBLE BIAS OR PREJUDICE WITH REGARD TO THE CIRCUMSTANCES OF THE PARTICULAR CASE, RELEVANT TO A CHALLENGE FOR CAUSE.
Standards of Judicial Administration, Section 8.5(a)(2)

IN MAKING THE DETERMINATION OF GOOD CAUSE FOR COUNSEL TO SUPPLEMENT THE COURT'S EXAMINATION OF PROSPECTIVE JURORS IN CRIMINAL CASES UNDER CODE OF CIVIL PROCEDURE SECTION 223, **THE COURT SHOULD CONSIDER ALL RELEVANT MATTERS WHICH MAY LEAD TO A SIGNIFICANT POSSIBILITY OF BIAS BECAUSE OF THE NATURE OF THE CASE OR ITS PARTICIPANTS.**
Standards of Judicial Administration, Section 8.7.

GOOD CAUSE CAN BE SHOWN AT ANY TIME DURING THE JURY SELECTION PROCESS TO EXPAND THE PERMISSIBLE SCOPE OF ATTORNEY PARTICIPATION IN VOIR DIRE. Standards of Judicial Administration, Section 8.7.

"IF [THE CONSTITUTIONAL RIGHT TO AN IMPARTIAL JURY] IS NOT TO BE EN EMPTY ONE, THE DEFENDANTS MUST, UPON REQUEST, BE PERMITTED SUFFICIENT INQUIRY INTO THE BACKGROUND AND ATTITUDES OF THE JURORS TO ENABLE THEM TO EXERCISE INTELLIGENTLY THEIR PEREMPTORY CHALLENGES."
People v. Williams, 29 C3d 392, 405 citing: *United States v. Dellinger* 472 F.2d 340, 368, *Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 602; *Swain v. Alabama*, 380 U.S. 202, 218-219.

III

THE RIGHT TO MEANINGFUL VOIR DIRE APPLIES EQUALLY TO THE PROSECUTION.
People v. Williams, 29 C3d 392, 404, 407; *People v. Wheeler*, 22 C3d 258.

As our Supreme Court noted in *Williams* at 404:

> Peremptory challenges "are of little value to the accused *or the state* if counsel is forced to utilize them unaided by relevant information." (emphasis added).

The Court went on to note at 407:

> "Neither the defendant *nor the prosecution* should suffer an improper restriction upon a reasonable voir dire examination of prospective jurors or a frustration of an intelligent exercise of peremptory challenges or challenges for cause."

The Court went on to note a problem which prosecutor frequently face [pages 404-405]:

> "...largely because they have been deprived of a reasonable opportunity to gather helpful information, counsel have often resorted of necessity to means of jury selection that are reprehensible and in some cases of dubious constitutionality. Thus in *People v. Wheeler*, 22 C3d 258, we held that jurors are not to be peremptorily challenged on the basis of group bias alone. *But unless counsel is given a significant opportunity to probe under the surface to determine the potential juror's individual attitudes, he may be relegated to a Catch-22 alternative of making his decision on the superficial basis we held impermissible in Wheeler, or making it on no basis at all.*" [emphasis added].

IV

BROAD GENERAL STATEMENTS THAT ONE KNOWS OF NO REASON WHY HE SHOULD NOT SERVE AS AN IMPARTIAL JURY IS INSUFFICIENT FOR *BIAS OFTEN DECEIVES ITS HOST* AND FURTHER QUESTIONING MAY REVEAL A BIAS WHICH THE PROSPECTIVE JUROR IS UNAWARE OR WHICH BECAUSE OF HIS *IMPAIRED OBJECTIVITY, HE UNREASONABLY BELIEVES HE CAN OVERCOME*. *People v. Williams*, 29 C3d 392, 402.

Our Supreme Court set out in *Williams* the problem with limiting voir dire to broad general questions to the prospective jurors on the issue of their ability to be fair at 402:

> "Our courts have become increasingly aware that bias often deceives its host by distorting his view not only of the world around him, but also of himself. "Although we must presume that a potential juror is responding in good faith when he asserts broadly that he can judge the case impartially (citations) further interrogation may reveal bias of which he is unaware of which, because of his impaired objectivity, he unreasonably believes he can overcome.
> "Even if a juror is aware that he holds a particular attitude or knows of certain facts that would make it difficult for him to be even handed, questions about his general ability to be fair may not bring them to mind." [Footnote 3]

In conclusion the Supreme Court in *Williams* observed:

> "'Although each of the jurors asserted that he knew of no reason why he could not serve as an impartial juror, such assertions do not eliminate the necessity for additional reasonable inquiry to uncover concealed or subtle bias.'" [at 402]

V

REASONABLE JURY VOIR DIRE INQUIRY INTO SPECIFIC LEGAL PREJUDICES PERTINENT TO THE TRIAL SHOULD BE PERMITTED FOR PERSONS WHO HARBOR LEGAL PREJUDICES PERTINENT TO THE TRIAL DISPLAY "ACTUAL BIAS," SINCE THEY ARE UNABLE TO ACT WITH THE "ENTIRE IMPARTIALITY" REQUIRED OF JURORS.
People v. Balderas, 41 C3d 144, 183

THERE IS AN "INCREASING MODERN AWARENESS THAT **GENERAL QUESTIONS ABOUT A PROSPECTIVE JUROR'S WILLINGNESS TO 'FOLLOW THE LAW' ARE NOT WELL CALCULATED TO REVEAL SPECIFIC FORMS OF PREJUDICE AND BIAS"**
People v. Balderas, 41 C3d 144, 183.

The Supreme Court in *Williams*, supra., at 410 articulates the problems of the inadequacy of the blanket assurance that the potential juror will follow the court's instructions and its holding concerning discussion of the particular doctrines of law which may be relevant to the case:

> "...in addition to the problem of subtle or unconscious bias that makes a general proclamation of fairmindedness untrustworthy, here the ordinary venireman has a very limited fund of knowledge from which to evaluate the broadly phrased question. His answer may be true to the extent that he is willing generally to act as the judge instructs him. But it is untenable to conclude that the veniremen's general declaration of willingness to obey the judge is tantamount to an oath that he would not hesitate to apply any conceivable instruction, no matter how repugnant to him*. Hence the answer is merely a predictable promise that cannot be expected to reveal

some substantial overtly held bias against particular doctrines.

[*Footnote 14: "By analogy, although nearly everyone adheres to the proposition that the law should be obeyed, a substantial number of motorist, when confronted with the 55 mile-per-hour speed limit, for example, demonstrate that attitudes expressed in the abstract are not always applied in, or on, the concrete."]

The Supreme Court in *Balderas*, supra., later went on to note at 183:

"General questions about whether a juror will follow instructions have only one 'right' answer -- 'yes.' One who wishes to seem fair-minded in the company of peers is unlikely to give a negative response."

The Court in *Balderas* continues by quoting the language set forth above from *Williams*.

VI

"EVEN IF A JUROR HAS PROCLAIMED HIS GENERAL WILLINGNESS TO FOLLOW THE LAW AND INSTRUCTIONS, THE RULE SHOULD NOT PROHIBIT FURTHER REASONABLE QUESTIONING CALCULATED TO ELICIT A JUROR'S *ADMISSION* OF *ACTUAL UNWILLINGNESS* TO APPLY A PARTICULAR RULE OF LAW PERTINENT TO THE IMPENDING TRIAL. ANY OVERT RESISTANCE OF THAT KIND AND DEGREE WOULD FORM THE BASIS FOR A CHALLENGE FOR CAUSE ON GROUNDS OF 'ACTUAL BIAS'"
People v. Balderas, 41 C3d 144, 184

The *Balderas* court observed in Footnote 17 at page 184:

"Indeed, a juror's claim that he or she can follow the law generally may be 'true' as far as it goes, since the juror may not be aware of a specific bias bearing on the case until confronted with it through careful voir dire examination....It therefore seems

logical...to use the questioning process itself to uncover actual bias, **conscious or unconscious**". (emphasis added).

VII

"A VERBAL STATEMENT HE OR SHE WILL SET ASIDE ANY PERSONAL EXPERIENCE AND/OR ATTITUDES CONCERNING A PARTICULAR STATE OF FACTS STANDING ALONE, DOES NOT ESTABLISH THAT PERSON WILL BE A FAIR AND IMPARTIAL JUROR."
People v. Kronemyer, 189 CA3d 314, 336.

The *Kronemyer* court noted the inadequacy of broad general statements and assurances by prospective jurors and the need for further inquiry:

> "In order for a party, and even the court, to make such a determination (that the prospective juror can set aside the personal experiences and/or attitudes) it is necessary to know the nature of those experiences and attitudes and how strongly they are held. An averment that one can set aside personal experiences in judging a case is of little value because one simply may not be aware of the strength or perhaps even the existence of biases which have developed because of personal experiences." (at 336).

VIII

OPEN-ENDED QUESTIONS PROVIDE THE MOST VALUABLE TOOL IN THE SEARCH TO UNCOVER BIAS WHILE CLOSED-ENDED, OR LEADING QUESTIONS, ARE OF LITTLE VALUE.

Our Supreme Court in *Williams* noted the importance of open-ended questions in eliciting information which may reveal a potential juror's bias:

> "This court observed in *People v. Crowe*, 8 C3d at p. 831, fn. 31, that 'Although each of the jurors asserted that he knew of no reason why he could not serve as an impartial juror, such assertions do not eliminate the necessity for additional reasonable inquiry to uncover concealed or subtle bias....a biased juror may be unwilling to confess that bias openly, and questions to which there is a 'right' and a 'wrong' answer may be less likely to reveal such bias then more open-ended questions.'"
> "Moreover, little psychological insight is needed to realize that the setting in which voir dire is conducted creates additional pressures for the venireman to answer questions as he believes the judge would have him answer, or in conformity with the answers of the preceding panelist" (at 403)

At footnote 5 on page 403 the Supreme Court refers to the amicus brief of the National Jury Project with its *"impressive array of empirical studies and surveys supporting these observations"*. Open-ended questions are questions which cannot be answered with a simple "yes" or "no". They usually begin with "what", "how", "why"" or the phrase "Some people think - say - feel ..." Such questions require prospective jurors to use their own words to describe their experiences, opinions and impressions. They encourage the prospective juror to do most of the talking, and they give the court and counsel an

opportunity to learn about the juror's biases, intelligence personality, feelings,honesty, level of nervousness.

Questions formed in this manner are less threatening and judgmental and do not indicate that there is a particular answer desired or that is correct. Questions that are prefaced with the phrase "some people think - say - feel..." are designed to be nonaccusatorial therefore less threatening. For example, *"Some people feel that if a woman invites a man into her home she is giving him consent to have sex with her, what do you think about that?"* Phrased in this fashion the person being asked the question is not being accused of holding such a belief and is more likely to supply information, along with follow-up questions, that will reveal his or her attitude about the subject. [Conrast the above question asked in the classic leading/close-ended fashion: *"Do **you believe** that if a woman invites a man into her home she is giving him consent to have sex with her?"*]

The Supreme Court in *People v. Balderas*, 41 C3d 144, 183, noted the inadequacy of close-ended/leading questions on the issue of revealing bias:

> "...General questions about whether a juror will follow instructions have only one 'right' answer - 'yes.' One who wishes to seem fair-minded in the company of peers is unlikely to give a negative response."

The *Williams* court noted that a restrictive and wooden approach to voir dire is insupportable in light of the unassailable truth that direct and general inquires about juror bias cannot be expected to uncover all forms of partiality [401]. The court went on at footnote 3, page 402, to observe:

> "In addition, even if a juror is aware that he holds a particular attitude or knows of certain facts that would make it difficult for him to be evenhanded, questions about his general ability to be fair may not bring them to mind."

IX

"FAIRLY PHRASED VOIR DIRE QUESTIONS LEGITIMATELY DESIGNED TO DISCLOSE PERSONAL FEATURES OF A JUROR'S PERSONALITY OR LIFE WHICH HAVE A DIRECT BEARING UPON A CHALLENGE FOR CAUSE ...MAY NOT BE EXCLUDED MERELY BECAUSE THEY TEND TO EDUCATE A JUROR..." AS TO SOME OF THE FACTS OF THE CASE.

People v. Kronemyer, 189 CA3d 314, 335.

If, as the Supreme Court in *People v. Bittaker*, 48 Cal 4d 1046, 1087, noted that **"The right to voir dire ...is a means to achieve the end of an impartial jury"** and **"the examination of prospective jurors in a criminal case should include all questions necessary to insure the selection of a fair and**

impartial jury." [*Standards of Judicial Administration, Sectic 8.5(a)(2)*] then it will be **necessary** for the court to **permit questioning** of prospective jurors on **"all relevant matters which may lead to a significant possibility of bias because of the nature of the case or its participants."** [*Standards of Judicial Administration, Section 8.7*].

X

THE FOLLOWING ISSUES HAVE BEEN RECOGNIZED BY THE COURTS AS MATTERS WHICH THE POPULATION AT LARGE IS COMMONLY KNOWN TO HARBOR STRONG FEELINGS AND BIAS CONCERNING THE CIRCUMSTANCES AND THE NATURE OF THE CASE, ITS PARTICIPANTS OR DOCTRINES OF LAW WHICH WOULD WARRANT A CHALLENGE FOR CAUSE.

Rape: The crime, the victim and the offender.

In discussing the high acquittal rate for rape compared to other crimes the Supreme Court noted in *People v. Rincon-Pineda*, 14 C3d 880:

> "These findings are consistent with the leading study of jury behavior, which found that 'the jury chooses to redefine the crime of rape in terms of its notions of assumption of risk,' such that juries will frequently acquit a rapist or convict him of a lesser offense, notwithstanding clear evidence of guilt. This tendency is especially dramatic in the situation supposedly most conducive to fabricated accusations: Where the prosecutrix and the accused are acquainted, and there is no 'evidence of extrinsic violence' to the prosecutrix. The jury 'closely and often harshly, scrutinizes the female

> complainant and is moved to be lenient with the defendant whenever there are suggestions of contributory behavior on her part,' sometimes carrying 'to a cruel extreme,' in cases 'clearly aggravated by extrinsic violence,' its tendency towards leniency for accused rapists."

The Supreme Court in *People v. Bledsoe*, 36 C3d 236, observed that there are widely held misconceptions about rape, the rapist and rape victims. Such misconceptions clearly reflect that the reality that segments of the population harbor strong feelings which amount to bias warranting a challenge for cause.

Children react differently to molestation than adults might expect:

In *People v. Gray*, 187 CA3d 213, the Court of Appeal recognized that there is a significant difference between the reality of child molestation, its effect upon the child and how the child reacts which stands in sharp contrast with perceptions commonly held amongst the general public. *People v. Bowker*, 203 CA3d 385, went on to observe that there are false myths and misconceptions held amongst large segments of the general public concerning the subject of child molestation. These misconceptions and biases are matters which may warrant a challenge for cause and would be appropriate matters for inquiry in jury voir dire.

The credibility of children:

Penal Code section 1127(f) requires the court to instruct the jury where there is a witness 10 years of age or younger that:

> "Although, because of age and level of cognitive development, a child may perform differently as a witness from an adult, that does not mean that a child is any more or less credible a witness than an adult. (And that the jurors) should not discount or distrust the testimony of a child solely because he or she is a child."

The fact that such an instruction has to be given reflects that there are segments of the community that have difficulty in believing and evaluating children, thereby establishing this as a proper area of inquiry.

Domestic Violence:

People v. Blackwell, 191 CA3d 925, 931, specifically held that domestic violence is an appropriate subject matter for inquiry of prospective jurors. *People v. Aris*, 215 CA3 1178 and *People v. Day*, 2 CA4th 405, both recognize that people have many misconceived ideas about battered women and their batterers.

Alcoholism and drugs:

The Court in *Blackwell*, supra., also specifically held that the subject of alcoholism is an area of proper inquiry when it is likely to be relevant in the case. By analogy it would seem that the subject of drugs would also be appropriate.

The law of self defense:

Williams, supra., specifically involved a case of self defense and the court held that it would be an appropriate subject to discuss the relevant law with the perspective jurors because it was likely to be relevant to the case.

The law of principals, aiders and abetters, natural consequences...:

The Supreme Court in *People v. Bittaker*, 48 C3d 1046 at footnote 22 at page 1084, reaffirmed its finding in *People v. Fuentes*, 40 C3d 629, that this is a proper subject for inquiry of jurors:

> "Defense counsel sought to ask jurors whether they believed an accomplice who only aided and abetted a robbery, and did not intend to kill, should be punished as severely as the actual killer. We characterize the proposed questions as relevant to the felony-murder special circumstances, and held the trial court erred in excluding that area of inquiry."

The law of felony-murder:

As noted above the Supreme Court in *Bittaker*, supra., footnote 22, page 1084, [set forth in the section above] the law concerning felony-murder and its vicarious liability provisions are appropriate subjects of jury voir dire by counsel.

Death Penalty Cases:

The United States Supreme Court has long recognized that death penalty cases are different (*Eddings v. Oklahoma*, 455 U.S.104, 71 L.Ed.2d 1,8; *Lockett v. Ohio*, 438 U.S. 586, 57 L.Ed 2d 973.). In *Spivey v. State*, 253 Ga. 187, 197, 319 S.E.2d 420, 431 (1984), cert. denied, 469 U.S. 1132 (1985), the Georgia Supreme Court made this incisive observation about death penalty voir dire while recognizing the need to give potential jurors a chance to formulate their own views:

> "First, it should be noted that prospective jurors rarely come into court with precisely defined opinions relative to the death penalty. Instead, most carry with them contradictions arise from a deep-seated human need to avenge outrageous cruelty, a quasi-religious tendency toward forgiveness, and a sense of the worth of every human life. Few have been called upon to formulate and express their thoughts with any degree of clarity or precision. **In reality, then, voir dire becomes an exercise in the shaping of opinions, more so than their expression.**

> Again and again, the record in death cases will contain answers which are ambiguous, equivocal, and contradictory. That is not because the juror is attempting to dissimulate, but because he never before has been required to formulate and express, with solemnity and finality, a viewpoint on one of the most controversial issues in modern American culture. **The fact that a juror may arrive at a posture which varies from his initial expressions should be understood as exactly what it is -- a final distillation, after substantial questioning by contending counsel and often by the judge, of theretofore unarticulated, amorphous, and casual thoughts upon capital punishment.** (emphasis added)."

In *People v. Noguera*, 4 C4th 599 at 645-647, the prosecutor inquired of each prospective juror whether they would consider imposing the death penalty in a case in which the defendant was only 18 or 19 years old at the time of the killing and in a case in which only one victim was killed. Even though the case was tried before Proposition 115 our Supreme Court noted that these subjects embraced "'matters concerning which either the local community or the population at large is commonly known to harbor strong feelings that may stop short of presumptive bias in law yet significantly skew deliberations in fact' (*People v. Williams*, 29 C3d 392, 408) and 'reasonable inquiry into specific legal prejudices...as the basis for a challenge for cause ' (*People v. Balderas*, 41 C3d 144, 183)." The Court went on to hold:

> "Whether evaluated under the standard prevailing at the time of trial or the current version of Code of Civil Procedure section 223, we conclude that the prosecutor's questions were entirely proper because they were directly relevant to whether a juror would be subject to a challenge for cause....If a juror would not even consider the death penalty in such a case, he or she properly would be subject to challenge for cause." (at 646)

The Court then went on to reiterate its decision in *People v. Fields*, 35 C3d 329 holding:

> "The *Fields* court then concluded that although'...a court may properly prohibit voir dire which seeks to ascertain a juror's views on the death penalty in actual or hypothetical cases not before him,'...a court may properly excuse a prospective juror who would automatically vote against the death penalty in the case before him, regardless of his willingness to consider the death penalty in other cases.'" (*Fields* at 357-358) *People v. Noguera* 4 C4th 599, at 646.

Some areas recognized by the Federal Courts pre-dating *Williams*:

In the trial of those arrested for demonstrating at the 1968 Democratic National Convention, it was reversible error to refuse to allow questions about the jurors' attitudes towards the youth culture and protests against involvement in the war in Vietnam and about any relationship to law enforcement officers [*U.S. v. Dellinger*, 472 F.2d 340, 369.]

In a case in which the crux of the defense involved an admission that defendant had lied, he was entitled to discover

whether prospective jurors had such a moral or ethical repugnance toward liars and lying that they could not evaluate his testimony objectively [*U.S. v. Napoleone*, 349 F.2d 350,354.]

> "BECAUSE OF CERTAIN STEREOTYPES ABOUT FEMALE VICTIMS OF SEXUAL AND PHYSICAL ABUSE IT IS IMPORTANT TO DEVELOP A JURY SELECTION PROCESS THAT WILL MINIMIZE ANY POTENTIAL JUROR BIAS."
> *The Report of the Judicial Council Advisory Committee on Gender Bias in the Courts*, 1990.

In the most intensive and thorough investigation of its kind, *The Judicial Council Advisory Committee on Gender Bias* found that gender bias did exist in the courts of this state and that it manifested itself in a variety of forms. One of the more pernicious was found in those cases involving sexual assault, domestic violence and child abuse in that certain stereotypes about female victims of these crimes were held amongst potential jurors in these cases and unless that bias was discovered those attitudes adversely affected the administration of justice in these cases. *The Advisory Committee* found that the presence of such attitudes amongst potential jurors put into question the crucial issue of fairness in the jury selection process. Thus *The Advisory Committee* recommended that in the examination of prospective

jurors in such cases that the jury selection process needed to incorporate a procedure to discover those potential jurors which held such bias and excuse them and thereby ensure that a fair jury is selected in these cases.

> SECTION 8.5 OF *THE STANDARDS OF JUDICIAL ADMINISTRATION* IS INADEQUATE AND INCAPABLE OF UNCOVERING ATTITUDES OF GENDER BIAS AND STEREOTYPES AS IT PERTAINS TO CASES INVOLVING SEXUAL ASSAULT, DOMESTIC VIOLENCE AND CHILD ABUSE.
> *The Report of the Judicial Council Advisory Committee on Gender Bias in the Courts*, 1990, Recommendation 12(3), Criminal & Juvenile Law Subcommittee.

The Advisory Committee found that the suggested standardized jury voir dire questions set forth in section 8.5 of the *Standards of Judicial Administration* were inadequate to uncover bias and sexual stereotypes about female victims of sexual assault, domestic violence and child abuse among potential jurors, thus resulting in unfairness in the jury selection process in these cases. Thus *The Advisory Committee* recommended that Section 8.5 be amended "to include recommended questions which relate to attitudes of gender bias as it pertains to cases..." involving these issues. [*The Judicial Council* adopted the recommendations of *The Advisory Committee* on November 16, 1990.]

XI

TO LIMIT JURY VOIR DIRE TO THE CLOSE ENDED QUESTIONS SET FORTH IN *SECTION 8.5(b) OF THE STANDARDS OF JUDICIAL ADMINISTRATION* WHEN THE CASE INVOLVES MATTERS WHICH MAY LEAD TO A SIGNIFICANT POSSIBILITY OF BIAS AMONGST THE PROSPECTIVE JURORS DUE TO THE CIRCUMSTANCES AND NATURE OF THE CASE, ITS PARTICIPANTS OR THE APPLICABLE RELEVANT LAW FOR THE PURPOSE OF JUDICIAL ECONOMY IS NOT ONLY LIKELY TO RESULT IN DENYING THE PARTIES A FAIR AND IMPARTIAL JURY, BUT SUCH A PRACTICE IS A **FALSE SAVING OF JUDICIAL TIME AND ECONOMY.**

Our Supreme Court in *People v. Williams*, 29 C3d 392, 414 at footnote 7, made the following observation:

> "A recent empirical study concluded that voir dire consisting of the typical questions about acquaintance with the parties, familiarity with the case, and ability to apply the law as instructed and decide the case impartially 'did not provide sufficient information for attorneys to identify prejudiced jurors.' (Zeisel & Diamond, *The Effect of Peremptory Challenges on Jury and Verdict: An Experiment in the Federal Courts* 30 Stan.L.Rev. 491, 528.)

This recognition is not inconsistent with *Proposition 11* : the new language of *Civil Code of Procedure* section 223, is reflected by the *California Rules of Court* and *Standards of Judicial Administration* enacted in response to *Proposition 11*'s changes to CCP section 223.

It is obvious from *Section 8.5 of the Standards of Judicial Administration* that it is contemplated that jury voir dire is not to be limited to just the closed ended/leading questions set forth in *Section 8.5(b)*. Section 8.5(a)(2) makes it clear that **"The examination of prospective jurors in a criminal case should include all questions necessary to insure the selection of a fair and impartial jury."** From the authorities cited above it is obvious to our Supreme Court that **when there are matters which may lead to a significant possibility of bias because of the circumstances and nature of the case, its participants or the relevant applicable law** that leading/closed ended broad general questions about a prospective jurors willingness to follow the law or ability to be fair and serve as an impartial juror are not only insufficient but completely inadequate in **revealing "specific forms of prejudice and bias"** which would make the juror unfit to serve on the case. *The Standards of Judicial Administration* recognizes this reality by permitting **"...supplemental examination calculated to discover possible bias or prejudice with regard to <u>the circumstances of the particular case</u>..."** upon a showing of good cause. [*Section 8.5(a)(2)*]. *Section 8.7 of the Standards of*

Judicial Administration sets forth that "In making the determination of good cause...the court should consider **all relevant matters which may lead to a significant possibility of bias because of the nature of the case or its participants."** The application of these rules requires open-ended questions.

The failure to ask open-ended questions which require the prospective juror to more fully express him/herself on issues relevant to the case concerning its nature, the participants or applicable law may result in obtaining a jury more quickly but it does so at the expense of empaneling jurors which may be biased. The **perceived savings to judicial time and economy falls by the wayside if, because of such undetected bias, the jury is unable to reach a verdict as a result of such bias and the case has to be retried.**

The asking of open-ended questions on relevant issues concerning the facts/circumstances of the case, the participants, and applicable law in which it is known that segments of the community harbor significant bias on such matters is a *"cheap insurance policy"*.

The additional minutes that it takes to ask the questions can reveal the bias which a juror may not even be aware

which, left undetected, could result in the jury's inability to reach a verdict.

As can be seen from the foregoing, the probing of prospective jurors on such matters with open-ended questions is consistent with the mandates of *Proposition 115* and *section 223 of the Code of Civil Procedure*.

Respectfully submitted.

Looking at the language of CCP 222.5 which deals w/ voir dire in civil cases may give rise to an additional basis of a denial of equal protection

Parties in a civil case where all they are talking about is money have greater rights then in the criminal areana where the stakes are much higher.

"Counsel for each party **shall have the right to examine**

Trial judge should permit **liberal and probing examination calculated to discover bias or prejudice w/ regard to the circumstances of a particular case**

Fact that a topic has been included in judge's exam should not preclude additional non-repetitive questioning by counsel

In exercise discretion to terminate voir dire the judge should consider

Any unique or complex elements, legal or factual in the case

Individual responses or conduct of juror which may evince attitutdes inconsistent w/ suitability to serve

Voir dire permitted to enable counsel to intelligently exercise both peremptory and challenges for cause

Improper questions as its dominate purpose attempts to precondition jurors to a particular result, indoctrinate the jury, or question the prospective jurors concerning the pldings or applicable law.

JURY SELECTION

I. AFTER PROPOSITION 115--DOES IT EXIST?

A. CCP Section 223:

B. Federal cases-"good cause"
1. U.S. v. Jones (1983) 722 F.2d 528
2. U.S. v. Washington (1987) 819 F.2d 221

III. HOW TO CONDUCT VOIR DIRE

E. Number of challenges: See CCP section
   1. Death Penalty cases: 20
   2. Life in Prison cases: 20
   3. Punishment is 90 days or less: 6
   4. All others: 10

IV. WHEELER: IT GOES BOTH WAYS

A. Prima Facie showing of discrimination
   1. Cognizable group-"common thread"
   2. Strong likelihood jurors challenged solely because they belong to the cognizable group
   3. People v. Wright (1990) 52 C3d 367,

B. Justification
   1. This is why you took notes
   2. ONLY explain if court makes finding there has been a prima facie case of discrimination established
   3. Have a juror profile of what type of juror you want on this case
   4. Don't be afraid of Wheeler
   5. Courts have upheld many reasons for challenge:
      -Arrest record
      -Hair/clothes suggest unconventional lifestyle
      -Smiled at defendant/Glared at DA
      -Unsatisfactory jury service in prior criminal case
      -DA wanted balance of men/women, young/old on jury
      -Close relatives had been charged with crimes
      -Familiar with crime scene
      -Not mentally alert
      -Clothes, demeanor and reading of newspaper in jury box indicated "disdain for proceedings"

D. Remedy=New Panel (NOT) keeping challenged juror

Update on *Wheeler* - 11/8/91

The *Wheeler* case prohibits exercising peremptory challenges to jurors based on group bias. *Wheeler* is still very much alive after the advent of judicial voir dire. Deputies should not give any reasons to justify challenges until after the court has made a finding that a *prima facie* showing of discrimination has been established. For further information, please refer to *People v. Cervantes* (1991) 233 CA3d 323, 335-37; *People v. Fuentes* (1991) 54 C3d 707, 711-21; and *People v. Johnson* (1989) 47 C3d 1194, 1214-22.

Wheeler alert - 5/27/92

Most of the recent California cases interpreting *Wheeler* [which prohibits bias in jury selection] have been favorable. In particular, exercising one or two peremptory challenges does not, by itself, indicate presumptive group bias which requires the deputy to state reasons justifying the challenges (*P. v. Wright* (1990) 52 C3d 367, 398-400; *P. v. Christopher* (1991) 1 CA4th 666, 669-73; *P. v. Howard* (1992) 1 C4th 1132, 1153-57; *P. v. Wimberly* (1992) 5 CA4th 773, 781-84; see also *P. v. Rousseau* (1982) 129 CA3d 526, 536-37). One recent case which went the other way - *P. v. Sanchez* (1992) 6 CA4th 913, 916-22 [finding discrimination based on one peremptory] - was decertified on 8/13/92 and thus is not citable as authority.

VOIR DIRE

I. LAW

A. In 1990, the voters passed Proposition 115, which included a new Code of Civil Procedure section 223 regulating voir dire in criminal cases.

1. The court shall conduct the examination of prospective jurors.

2. Upon a showing of good cause, the court may allow the attorneys to question the jurors.

3. Where practicable, voir dire shall occur in the presence of the other jurors.

4. Questioning shall be conducted only to aid in the exercise of challenges for cause.

B. Challenge for Cause - CCP § 225.

1. General Disqualification - CCP § 225(b)(1)(A).

   a. Juror lacks the statutory requirements to be eligible for jury duty - CCP § 203, 228(a).
   b. Deaf, or any other incapacity - CCP § 228(b).
   c. Rarely utilized.

2. Implied Bias - CCP § 225(b)(1)(B), 229.

   a. Eight statutory grounds.
   b. Prejudice is inferred.

3. Actual Bias - CCP § 225(b)(1)(C).

   The existence of a state of mind on the part of the juror in reference of the case, or to any of the parties, which will prevent the juror from acting with entire impartiality, and without prejudice to the substantial rights of any party.

4. Number of challenges - unlimited.

C. Peremptory Challenges.

1. No reason need by given - CCP § 226(b).

2. Number of peremptory challenges allowed.

    a. Depends on punishment allowed and number of defendants on trial.
    b. Single defendant case.

        1. 20 - If punishable by death or life imprisonment - CCP § 231(a).
        2. 6 - If punishable with maximum of 90 days or less - CCP § 231(b).
        3. 10 - All other cases - CCP § 231(a).

    c. Multiple defendant case.

        1. Death or life imprisonment case - CCP § 231(a).

            a. 20 joint challenges.
            b. 5 individual challenges for each defendant.
            c. DA gets same total as entire defense team.

        2. 90 days or less - CCP § 231(b).

            a. 6 joint challenges.
            b. 4 individual challenges for each defendant.
            c. DA get same total as entire defense team.

        3. All other cases - CCP §231(a).

            a. 10 joint challenges.
            b. 5 individual challenges for each defendant.
            c. DA gets same total as entire defense team.

    d. Alternates - CCP § 234.

        1. Single defendant case - one per number of alternates.

        2. Multiple defendant cases - each defendant gets one per number of alternates.

        3. DA gets same total number as defense team.

    e. A pass does not count as a challenge - CCP § 231(d)(e).

II. PROCEDURE

A. Pre-Voir Dire Conference - Rule 228.1.

1. Establish ground rules.

2. How many jurors will be called into the box?

3. Will judge allow attorney questioning?

4. Time limits.

5. Number of alternates.

6. Give judge voir dire questions.

B. Court clerk will summon a jury panel to courtroom.

C. Clerk will take roll and swear the panel - CCP § 232.

D. Questioning the jurors.

1. Judge will question jurors first - CCP §223.

    a. Will typically ask 8 - 10 general questions. See Standard of Judicial Administration, § 8.5.
    b. Very limited follow-up.

2. Defense Attorney will question second.

    a. Defense will "challenge for cause" - CCP § 226(d).
    b. "Pass for cause."

3. DA questions last.

    a. "Pass for cause."
    b. "Approach the Bench" to exercise challenge for cause

E. Challenging the jurors.

1. DA goes first - CCP § 226(d).

    a. "I would ask the court to thank and excuse Juror Number____, Mr/Mrs ."

2. Defense goes second.

3. Continues until both sides pass consecutively.

    a. "The People are pleased with the panel. We pass."
    b. 12 jurors will be sworn.

4. Select Alternates - CCP § 234.

    a. Same order as original 12 jurors.
    b. Swear alternates.

5. Court will excuse unused jurors.

VOIR DIRE

DEPUTY DISTRICT ATTORNEY

I. LAW

A. In 1990, the voters passed Proposition 115, which included a new Code of Civil Procedure section 223 regulating voir dire in criminal cases.

1. The court shall conduct the examination of prospective jurors.

2. Upon a showing of good cause, the court may allow the attorneys to question the jurors.

3. Where practicable, voir dire shall occur in the presence of the other jurors.

4. Questioning shall be conducted only to aid in the exercise of challenges for cause.

B. CCP § 223 has been amended to give the parties the right to conduct limited Voir Dire.

1. Amendment becomes effective January 1, 2001.
2. Court can limit amount of time allotted to the parties.
3. Shall be conducted "only in the aid of the exercise of challenges for cause."

C. Challenge for Cause - CCP § 225.

1. General Disqualification - CCP § 225(b)(1)(A).

   a. Juror lacks the statutory requirements to be eligible for jury duty - CCP § 203, 228(a).
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The existence of a state of mind on the part of the juror in reference of the case, or to any of the parties, which will prevent the juror from acting with entire impartiality, and without prejudice to the substantial rights of any party.

4. Number of challenges - unlimited.

D. Peremptory Challenges.

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2. Number of peremptory challenges allowed.

a. Depends on punishment allowed and number of defendants on trial.
b. Single defendant case.

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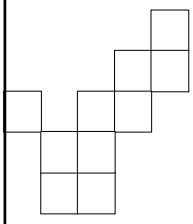

BATSON-WHEELER

Why *Batson-Wheeler* exists?

- Constitution forbids all forms of purposeful discrimination in jury selection.
- *Batson v. Kentucky* (1986) 476 U.S. 79, 88

Why Batson-Wheeler exists?

- A defendant has the right to be tried by a jury whose members are chosen pursuant to non-discriminatory criteria. Purposeful discrimination violates a defendant's right to equal protection. *Batson* at p. 86
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- A party may NOT use peremptories to remove prospective jurors solely on the basis of group bias.
- Group bias is a presumption that jurors are biased because they are members of a group distinguished on racial, religious, ethnic, or similar grounds.

Groups not afforded *Wheeler* protection:

- Less educated or blue-collar workers
- Ex-felons and resident aliens
- Community residents for less than 1 year
- Spanish-surnamed juror, if evidence that juror married into the name, does not constitute a "Hispanic." ***People v. Trevino* (1985) 39 Cal.3d 667, 684**

Whose remedy?

- Accusation of *Wheeler* violation can be lodged by both **prosecution** and defense.
- **Both sides** are entitled to jury free from manipulation based on prejudice against cognizable groups.
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REVERSE *BATSON-WHEELER*

- Prosecutors can and should make reverse *Batson-Wheeler* claims where evidence warrants.

Defendant's race doesn't matter

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- Any defendant has standing.
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- If a party believes opponent is using peremptories to strike jurors on the grounds of group bias, s/he must "raise the point" in a timely fashion and make a PF case of such discrimination to the satisfaction of court.
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Timely?

- Where a court has indicated alternate jurors will be used, the impanelment of the jury is not deemed complete until the alternates are selected and sworn.
- Thus, *Wheeler* motions can be made up until the swearing of the alternates.
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What happens next?

- Once the trial court finds the moving party has established a prima facie case, the burden shifts to the opposing party to provide a race- or group-neutral explanation for the peremptories.
- *People v. Silva* (2001) 25 Cal.4th 345, 384
- *People v. McGee* (12-18-02) 2002 DJDAR 14255

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Findings

- Separate findings as to each juror not necessary, but preferred.
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- Judge **must inquire** into proferred explanations.
- "Sincere and reasoned inquiry" and findings as to **genuineness**.
- **Create a record** that can be intelligently considered on appeal.

What is remedy if *Wheeler* challenge granted? *People v. Willis*

- Dismissal of venire
- Mistrial
- Assessment of sanctions
- Reseating any improperly discharged jurors.
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- Anything that seems fair

What are permissible bases upon which to base a peremptory?

What are permissible bases to exercising a peremptory?

- In a capital case, a juror's views about the death penalty are a permissible race- and group-neutral basis for exercising a peremptory.
- *People v. McDermott* (2002) 2002 Cal. LEXIS 5236

Hunches = OK
Arbitrary Exclusion = OK

- Jurors can be excused based on "hunches."
- Even "arbitrary" exclusion is permissible, so long as the reasons are not based on impermissible group bias.
  - *People v. Hall* (1983) 35 Cal.3d 161, 170
- Trivial reason, if genuine, will suffice.
  - *People v. Arias* (1996) 13 Cal.4th 92, 136.

Relative with Convictions = OK

- That a prospective juror has a relative convicted of a crime is a valid race-neutral reason to excuse that juror.
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- Prospective juror legitimately kicked who appeared overwhelmed and emotional by outside stresses. She cried twice and referred to her "nerves."

Hostile Looks = OK

- Hostile looks from a prospective juror can themselves support a peremptory challenge.
- *Turner* and *Wheeler.*

Demeanor/Body language=ok

- "Soft and reluctant responses" and "soft-spoken demeanor" may affect ability to deliberate. *People v. Arias* (1996) 13 Cal.4th 92, 137-139.
- "Tentative" and "low-keyed." *People v. Dunn* (1995) 40 Cal.App.4th 1039, 1046-47.
- Juror smiling at D, "weird," "overweight." *People v. Johnson* (1989) 47 Cal.3d 1194, 1217-19.

Juror in Defense Camp = OK

- If prosecutor sincerely believes juror would be skeptical of the People's evidence, this too can justify a peremptory challenge.
- *People v. Johnson* at p. 1217. Here, juror kept agreeing with defense.

Juror's Bias vs. Vic/Wit = OK

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- "[Counsel] may fear bias on the part of one juror simply because his clothes or hair length suggest an unconventional lifestyle."
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Shaky grasp of English = OK

- It is a permissible use of a peremptory to kick a black juror who had "an extremely poor grasp of the English language." Here, juror had to deliberate exceedingly long in order to answer. He could not understand the instructions given by him to the court and asked things be repeated three times.
- *Turner. See also Barber.*

Dim bulb = OK

- Juror strikes prosecutor as "mentally slow."
- *People v. Welch* (1999) 20 Cal.4th 701, 746.
- Juror doesn't follow judge's instructions.
- *People v. Perez* (1994) 29 Cal.App.4th 1313, 1322-25.

Limited life experience

- Responses and age (25) suggest lack of involvement in society and distrust of system. Juror had a child, was unmarried, not registered to vote. *Arias*
- "Young," "single," and "no jury experience." *People v. Perez* (1994) 29 Cal.App.4th 1313, 1322-25.

Occupation

- Reporter. *People v. Jenkins* (2000) 22 Cal.4th 900, 994.
- Sole Black juror challenged since, as a social worker, was likely to have a "more forgiving attitude." *People v. Hayes* (1996) 44 Cal.App.4th 1238, 1245.
- But, sham excuse when Chinese computer programmer excused because attorney never allows computer programmers on criminal juries. *People v. Lopez* (1991) 3 Cal.App.4th Supp. 11, 17.

Next at bat looks better

- Variety of factors and considerations go into a lawyer's decision. *Johnson* at 1220-21.
- Multiple challenges justified on basis of counsel's reason that "at the time of the strike, … there were more favorable prospective jurors about to be called into the jury box." *People v. Alvarez* (1996) 14 Cal.4th 155, 194-95.

Miscellaneous permissible bases

- Okay to challenge juror who is sleeping.
- *People v. Jenkins* (2000) 22 Cal.4th 900, 994.
- Juror's acquaintance with defense counsel.
- *People v. Williams* (1997) 16 Cal.4th 635, 664.

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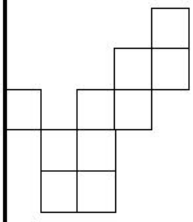

BATSON-WHEELER

Why *Batson-Wheeler* exists?

- Constitution forbids all forms of purposeful discrimination in jury selection.
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- A defendant has the right to be tried by a jury whose members are chosen pursuant to non-discriminatory criteria. Purposeful discrimination violates a defendant's right to equal protection. *Batson* at p. 86
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- *Turner and Barber*

Impermissible bases?

"Regarding the girl generally speaking, I'm looking for men. I assume – maybe I'm sexist but I generally associate men with being able to make tough, hard decisions."

Impermissible bases: Gender

- Females are more "emotional" than males.
- Males think more "logically" than females.

Elimination of Bias: Gender Bias

- "...I'm trying to get men on this jury. Middle-aged men. That's what I'm trying to get. And she [a Filipino woman] doesn't fit the mold of the type of group I'm trying to put together to work—sexually—in this case."

Continued…

- "His hair was a little long for my taste. He seemed to have sympathy with the criminals, the people who stole his car. I don't want people who have sympathy for criminals."

Transcript continued…

- **"…She works at a museum. She's what I would associate with having a liberal, left-type thinking. I don't know what she is, but those factors that I associate with that is someone who might identify more with criminals than victims."**
- **"The male was an obese individual. Probably the most discriminated people in the world. And I often find in my experience that obese people don't have the sort of social contact and work together skills of someone I would like to work on my jury. They tend to be outcasts and unhappy people."**

Transcript continued…

"I'm guessing she's a 26-year-old female with what I call a butch haircut and two or three earrings in her ear."

Transcript continued…

- "…The second one I kicked off, she doesn't seem to have much substance. She's a cake decorator and hairdresser. She's never been married. She hasn't had that experience."

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VOIR DIRE

CCP SECTION 223

- Court conducts initial examination
- Parties can ask the court to ask additional questions
- Counsel "shall have the right to examine"
- Court's discretion to limit examination
- Voir dire conducted only to aid in challenges for cause

CHALLENGE FOR CAUSE
General Disqualification: CCP 225

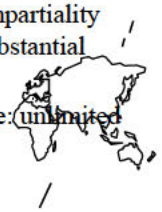
- Juror lacks the statutory requirements (e.g. age, citizenship, language, felons-CCP203)
- Deafness or other incapacity if renders person incapable of sitting (but see 203(6))

Implied Bias per CCP 225, 229

- Consanguinity
- Other relationship to a party (partner, employer, landlord, etc.)
- Interest in result
- Unqualified opinion based upon knowledge of facts
- Enmity against or bias for any party
- Prejudice inferred, challenge "may be taken"

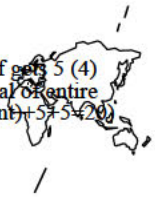
Actual Bias per CCP 225(b)(1)(c)

- The existence of a state of mind on the part of the juror in reference to the case, or to any of the parties, which will prevent the juror from acting with entire impartiality and without prejudice to the substantial rights of any party.
- Number of challenges for cause: unlimited



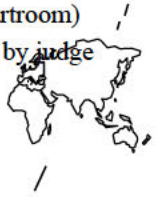
Peremptory Challenges

- No reason need be given-CCP 226 (but see Wheeler/Batson)
- A pass doesn't count as a challenge CCP231(d)(e)
- Number of challenges
  - 6/10/20
  - Multiple defendant cases each def gets 5 (4) additional and prosecutor gets total of entire defense (e.g. in 2 def case 10 (joint)+5+5=20)



Procedures

- Pre-Voir Dire conference (Rule 4.200)
  - Establish ground rules
  - Number of jurors to be questioned (12, six-pack, the whole dang courtroom)
  - Submitted questions covered by judge
  - Time limits
  - Number of alternates



Procedures cont'd

- Court clerk will summon panel to the courtroom
- Clerk will take roll and swear the panel

Procedure cont'd

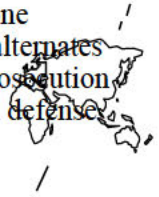
- Judge goes first with standard questions and limited follow up
- Defense attorney next and will either challenge or pass for cause
- DDA questions last
  - "pass for cause" or ask to approach bench to exercise challenge for cause

Procedures cont'd
Exercising peremptory challenges

- DDA goes first: "Would the court thank and excuse juror number 2, Ms. Jones."
- Defense goes second and then back and forth
- "The People are pleased with the panel: We pass."

Peremptory Challenges cont'd

- Alternates- CCP 234
  - Single defendant case one challenge per number of alternates
  - Multiple defendant case one challenge per number of alternates for each defendant and prosecution gets same number as total defense



VOIR DIRE

I. LAW

A. In 1990, the voters passed Proposition 115, which included a new Code of Civil Procedure section 223 regulating voir dire in criminal cases.

1. The court shall conduct the examination of prospective jurors.

2. Upon a showing of good cause, the court may allow the attorneys to question the jurors.

3. Where practicable, voir dire shall occur in the presence of the other jurors.

4. Questioning shall be conducted only to aid in the exercise of challenges for cause.

B. Challenge for Cause - CCP § 225.

1. General Disqualification - CCP § 225(b)(1)(A).

   a. Juror lacks the statutory requirements to be eligible for jury duty - CCP § 203, 228(a).
   b. Deaf, or any other incapacity - CCP § 228(b).
   c. Rarely utilized.

2. Implied Bias - CCP § 225(b)(1)(B), 229.

   a. Eight statutory grounds.
   b. Prejudice is inferred.

3. Actual Bias - CCP § 225(b)(1)(C).

   The existence of a state of mind on the part of the juror in reference of the case, or to any of the parties, which will prevent the juror from acting with entire impartiality, and without prejudice to the substantial rights of any party.

4. Number of challenges - unlimited.

C. Peremptory Challenges.

1. No reason need be given - CCP § 226(b).

2. Number of peremptory challenges allowed.

    a. Depends on punishment allowed and number of defendants on trial.
    b. Single defendant case.

        1. 20 - If punishable by death or life imprisonment - CCP § 231(a).
        2. 6 - If punishable with maximum of 90 days or less - CCP § 231(b).
        3. 10 - All other cases - CCP § 231(a).

    c. Multiple defendant case.

        1. Death or life imprisonment case - CCP § 231(a).

            a. 20 joint challenges.
            b. 5 individual challenges for each defendant.
            c. DA gets same total as entire defense team.

        2. 90 days or less - CCP § 231(b).

            a. 6 joint challenges.
            b. 4 individual challenges for each defendant.
            c. DA get same total as entire defense team.

        3. All other cases - CCP §231(a).

            a. 10 joint challenges.
            b. 5 individual challenges for each defendant.
            c. DA gets same total as entire defense team.

    d. Alternates - CCP § 234.

        1. Single defendant case - one per number of alternates.

        2. Multiple defendant cases - each defendant gets one per number of alternates.

        3. DA gets same total number as defense team.

    e. A pass does not count as a challenge - CCP § 231(d)(e).

II. PROCEDURE

A. Pre-Voir Dire Conference - Rule 228.1.

1. Establish ground rules.

2. How many jurors will be called into the box?

3. Will judge allow attorney questioning?

4. Time limits.

5. Number of alternates.

6. Give judge voir dire questions.

B. Court clerk will summon a jury panel to courtroom.

C. Clerk will take roll and swear the panel - CCP § 232.

D. Questioning the jurors.

1. Judge will question jurors first - CCP §223.

   a. Will typically ask 8 - 10 general questions. See Standard of Judicial Administration, § 8.5.
   b. Very limited follow-up.

2. Defense Attorney will question second.

   a. Defense will "challenge for cause" - CCP § 226(d).
   b. "Pass for cause."

3. DA questions last.

   a. "Pass for cause."
   b. "Approach the Bench" to exercise challenge for cause

E. Challenging the jurors.

1. DA goes first - CCP § 226(d).

    a. "I would ask the court to thank and excuse Juror Number____, Mr/Mrs_____."

2. Defense goes second.

3. Continues until both sides pass consecutively.

    a. "The People are pleased with the panel. We pass."
    b. 12 jurors will be sworn.

4. Select Alternates - CCP § 234.

    a. Same order as original 12 jurors.
    b. Swear alternates.

5. Court will excuse unused jurors.

Voir Dire

I. LAW

A. The Adoption of Proposition 115 in 1990 Changed Voir Dire.

1. Pre-Proposition 115 Rules

a. The attorneys participated in the questioning process.

b. The purpose of voir dire was to allow the parties to intelligently exercise their peremptory challenges. (*People v. Williams* (1981) 29 Cal.3d 392.)

2. In 1990, the voters passed Proposition 115, which included a new Code of Civil Procedure section 223 regulating voir dire in criminal cases.

"In a criminal case, the court shall conduct the examination of prospective jurors. However, the court may permit the parties, upon a showing of good cause, to supplement the examination by such further inquiry as it deems proper, or shall itself submit to the prospective jurors upon such a showing, such additional questions by the parties as it deems proper." (Code Civ. Proc., § 223.)

a. The court shall conduct the examination of prospective jurors.

b. Upon a showing of good cause, the court may allow the attorneys to question the jurors.

c. Where practicable, voir dire shall occur in the presence of the other jurors.

d. Questioning shall be conducted only to aid in the exercise of challenges for cause.

3. Section 222 was amended effective January 1, 2001, to again allow attorney questioning.

> "In a criminal case, the court shall conduct an initial examination of prospective jurors. The court may submit to the prospective jurors additional questions requested by the parties as it deems proper. Upon completion of the court's initial examination, counsel for each party shall have the right to examine, by oral and direct questioning, any or all of the prospective jurors. The court may, in the exercise of its discretion, limit the oral and direct questioning of prospective jurors by counsel. The court may specify the maximum amount of time that counsel for each party may question an individual juror, or may specify an aggregate amount of time for each party, which can then be allocated among the prospective jurors by counsel."

   a. Amendment become effective January 1, 2001.

   b. Court can limit amount of time allotted to the parties.

   c. Shall be conducted "only in the aid of the exercise of challenges for cause."

B. Challenges

   1. Challenge for Cause

      a. Unlimited Number

      b. Three Types of Challenges for Cause

         (1) General disqualification – that the juror is disqualified from serving in the action on trial. (Code Civ. Proc., § 225(b)(1)(A).)

            (a) Section 203 lists general disqualifications for jurors:

               1) Persons who are not citizens of the United States.

2) Persons who are less than 18 years of age.

3) Persons who are not domiciliaries of the State of California, as determined pursuant to Article 2 (commencing with Section 2020) of Chapter 1 of Division 2 of the Elections Code.

4) Persons who are not residents of the jurisdiction wherein they are summoned to serve.

5) Persons who have been convicted of malfeasance in office or a felony, and whose civil rights have not been restored.

6) Persons who are not possessed of sufficient knowledge of the English language, provided that no person shall be deemed incompetent solely because of the loss of sight or hearing in any degree or other disability which impedes the person's ability to communicate or which impairs or interferes with the person's mobility.

7) Persons who are serving as grand or trial jurors in any court of this state.

8) Persons who are the subject of conservatorship.

(b) Section 228(b) lists additional requirements: A loss of hearing, or the existence of any other incapacity which satisfies the court that the challenged person is incapable of performing the duties of a juror in the particular action without prejudice to the substantial right of the challenging party.

(2) Implied Bias – Section 229

A challenge for implied bias may be taken for one or more of the following causes, and for no other:

(a) Consanguinity or affinity within the fourth degree to any party, to an officer of a corporation which is a party, or to any alleged witness or victim in the case at bar.

(b) Standing in the relation of, or being the parent, spouse, or child of one who stands in the relation of, business with either party; or surety on any bond or obligation for either party, or being the holder of bonds or shares of capital stock of a corporation which is a party; or having stood within one year previous to the filing of the complaint in the action in the relation of attorney and client with either party or with the attorney for either party. A depositor of a bank or a holder of a savings account in a savings and loan association shall not be deemed a creditor of that bank or savings and loan association for the purpose of this paragraph solely by reason of his or her being a depositor or account holder.

(c) Having served as a trial or grand juror or on a jury of inquest in a civil or criminal action or been a witness on a previous or pending trial between the same parties, or involving the same specific offense or cause of action; or having served as a trial or grand juror or on a jury within one year previously in any criminal or civil action or proceeding in which either party was the plaintiff or defendant or in a criminal action where either party was the defendant.

(d) Interest on the part of the juror in the event of the action, or in the main question involved in the action, except his or her interest as a member or citizen or taxpayer of a county, city and county, incorporated city or town, or other political subdivision of a county, or municipal water district.

(e) Having an unqualified opinion or belief as to the merits of the action founded upon knowledge of its material facts or of some of them.

(f) The existence of a state of mind in the juror evincing enmity against, or bias towards, either party.

(g) That the juror is party to an action pending in the court for which he or she is drawn and which action is set for trial before the panel of which the juror is a member.

(h) If the offense charged is punishable with death, the entertaining of such conscientious opinions as would preclude the juror finding the defendant guilty; in which case the juror may neither be permitted nor compelled to serve.

(3) Actual Bias – Section 225(b)(1)(C)

Actual bias - the existence of a state of mind on the part of the juror in reference to the case, or to any of the parties, which will prevent the juror from acting with entire impartiality, and without prejudice to the substantial rights of any party.

2. Peremptory Challenges

a. No Reason Need be Given – CCP § 226(b).

b. Number of Peremptory Challenges Allowed.

(1) Depends on punishment allowed and number of defendants on trial.

(2) Single defendant case.

(a) 20 – If punishable by death or life imprisonment – CCP § 231(a).

(b) 6 – if punishable with maximum of 90 days or less – CCP § 231(b).

(c) 10 – all other cases – CCP § 231(a).

(3) Multiple defendant case.

(a) Death or life imprisonment case – CCP § 231(a).

1) 20 joint challenges.

2) 5 individual challenges for each defendant.

3) DA gets same total as entire defense team.

(b) 90 days or less – CCP § 231(b).

1) 6 joint challenges.

2) 4 individual challenges for each defendant.

3) DA gets same total as entire defense team.

c) All other cases – CCP § 231(a).

1) 10 joint challenges

2) 5 individual challenges

3) DA gets same total as entire defense team

(4) Alternates – CCP § 234.

(a) Single defendant case – one per number of alternates.

(b) Multiple defendant cases – each defendant gets one per number of alternates.

(c) DA gets same total number as defense team.

(5) A pass does not count as a challenge – CCP § 231(d)(e).

II. APPLICATION OF THE LAW

A. Defense challenge for cause.

1. Erroneous denial of defense challenge is not reversible per se. *Ross v. Oklahoma* (1988) 487 US 81, 87; *People v. Edwards* (1991) 54 Cal.3d 787, 830.)

2. To prevail on appeal, defendant must show prejudice, that is, 1) he used a peremptory challenge on the questioned juror, 2) he exhausted all his peremptory challenges, and 3) he expressed dissatisfaction with the final jury. (*People v. Morris* (1991) 53 Cal.3d 152, 184; *People v. Mickey* (1991) 54 Cal.3d 612, 683: *People v. Crittenden* (1994) 9 Cal.4th 83, 121; *People v. Samayoa* (1997) 15 Cal.3d 795, 821; *People v. Cunningham* (2001) 25 Cal.3d 926, 976.)

3. No prejudice if the juror was not part of the final jury. (*People v. Edwards* (1991) 54 Cal.3d 787, 830; *People v. Clarke* (1992) 3 Cal.4th 41, 155; *People v. Johnson* (1992) 3 Cal.4th 1183, 1210; *People v. Cain* (1995) 10 Cal.4th 1, 61; *People v. Hawkins* (1995) 10 Cal.4th 920, 939; *People v. Horton* (1995) 11 Cal.4th 1068, 1093; *People v. Ramos* (1997) 15 Cal.4th 1133, 1159; *People v. Barnett* (1998) 17 Cal.4th 1044, 1113; *People v. Millwee* (1998) 18 Cal.4th 96, 146.)

4. No prejudice if defendant did not use all peremptory challenges. (*People v. Kelly* (1990) 51 Cal.3d 931, 960; *People v. Morris* (1991) 53 Cal.3d 152, 184; *People v. Price* (1991) 1 Cal.4th 324, 401; *People v. Danielson* (1992) 3 Cal.4th 691, 713; *People v. Mayfield* (1993) 5 Cal.4th 142, 169; *People v. Garceau* (1993) 6 Cal.4th 140, 174; *People v. Cain* (1995) 10 Cal.4th 1, 61; *People v. Lucas* (1995) 12 Cal.4th 415, 480; *People v. Samayoa* (1997) 15 Cal.4th 795, 821; *People v. Ramos* (1997) 15 Cal.4th 1133, 1158; *People v. Williams* (1997) 16 Cal.4th 635, 667; *People v. Barnett* (1998) 17 Cal.4th 1044, 1113; *People v. Millwee* (1998) 18 Cal.4th 96, 146; *People v. Bolin* (1998) 18 Cal.4th 297, 315; *People v. Ochoa* (1998) 19 Cal.4th 353, 444; *People v. Waidla* (2000) 22 Cal.4th 690, 715; *People v. Bemore* (2000) 22 Cal.4th 809, 837; *People v. Ayala* (2000) 23 Cal.4th 225, 261; *People v. Lewis* (2001) 25 Cal.4th 610, 634.)

5. Defendant must express dissatisfaction with the final jury to prove prejudice. (*People v. Edwards* (1991) 54 Cal.3d 787, 830; *People v. Danielson* (1992) 3 Cal.4th 691, 713; *People v. Lucas* (1995) 12 Cal.4th 415, 830; *People v. Williams* (1997) 16 Cal.4th 635, 667; *People v. Millwee* (1998) 18 Cal.4th 96, 146; *People v. Ochoa* (1998) 19 Cal.4th 353, 444; *People v. Bemore* (2000) 22 Cal.4th 809, 837; *People v. Ayala* (2000) 23 Cal.4th 225, 261; *People v. Lewis* (2001) 25 Cal.4th 610, 634; *People v. Weaver* (2001) 26 Cal.4th 876, 911; *People v. Seaton* (2001) 26 Cal.4th 598, 637.)

6. Being required to use a peremptory challenge on a denied challenge for cause does not establish prejudice. (*People v. Gordon* (1990) 50 Cal.3d 1223, 1247; *People v. Kaurish* (1990) 52 Cal.3d 648, 674.)

7. Did defendant request additional peremptory challenges? (*People v. Edwards* (1991) 54 Cal.3d 787, 831.)

    a. Request for additional challenges denied. (*People v. Pride* (1992) 3 Cal.4th 195, 230; *People v. Ramos* (1997) 15 Cal.4th 1133, 1159; *People v. Williams* (1997) 16 Cal.4th 635, 667.)

8. No duty on court sua sponte to excuse juror on its own motion. (*People v. Bolin* (1998) 18 Cal.4th 297, 315; *People v. Lucas* (1995) 12 Cal.4th 415, 481.)

9. Examples of proper denial of defense challenge for cause. (*People v. Stankewitz* (1990) 51 Cal.3d 72, 103; *People v. Kelly* (1990) 51 Cal.3d 931, 960; *People v. Mincey* (1992) 2 Cal.4th 457; *People v. McPeters* (1992) 2 Cal.4th 1148, 1177; *People v. Crittenden* (1994) 9 Cal.4th 83, 122; *People v. Samayoa* (1997) 15 Cal.4th 795, 822; *People v. Williams* (1997) 16 Cal.4th 635, 668; *People v. Jenkins* (2000) 22 Cal.4th 900, 987; *People v. Cunningham* (2001) 25 Cal.4th 926, 976; *People v. Weaver* (2001) 26 Cal.4th 876, 911.)

10. Court not required to allow defense opportunity to rehabilitate challenged juror if bias is obvious. (*People v. Bittaker* (1989) 48 Cal.3d 1046, 1085; *People v. Carpenter* (1997) 15 Cal.4th 312, 355; *People v. Samayoa* (1997) 15 Cal.3d 795, 823.)

11. Court not required to tell juror his civic duty requires him to set aside his personal beliefs regarding the death penalty. (*People v. Sanders* (1990) 15 Cal.3d 471, 503; *People v. Miranda* (1987) 44 Cal.3d 57, 96.)

B. DA challenge for cause.

1. Use same standard as defense challenge for cause (*Witt*). (*People v. Crittenden* (1994) 9 Cal.4th 83, 121; *People v. Pride* (1992) 3 Cal.4th 195, 227; *People v. Mincey* (1992) 2 Cal.4th 408, 456; *People v. Bradford* (1997) 15 Cal.4th 1229, 1318.)

2. Erroneous granting of DA challenge is reversible per se. (*Grey v. Mississippi* (1987) 481 US 648, 666; *People v. Cooper* (1991) 53 Cal.3d 771, 809; *People v. Edwards* (1991) 54 Cal.3d 787, 831.)

    a. Reverses penalty verdict, not guilt. (*People v. Ashmus* (1991) 54 Cal.3d 932, 962.)

    b. If juror's answers equivocal, trial judge's ruling will be upheld. (*People v. Ruiz* (1988) 44 Cal.3d 589, 618; *People v. Ghent* (1987) 43 Cal.3d 739, 768; *People v. Coleman* (1988) 46 Cal.3d 749, 767.)

C. Peremptory Challenges

1. It is improper to ask questions intended solely to educate the jury, compel the jurors to commit to vote a certain way, prejudice the jury, argue the case, indoctrinate the jury, instruct the jury on the law, or test the juror's knowledge of the law. (*People v. Edwards* (1912) 163 Cal. 752; *People v. Willams* (1981) 29 Cal.3d 392, 408; *People v. Ashmus* (1991) 54 Cal.3d 932, 959.)

2. It is permissible to ask a juror about his attitude about a particular rule of law only if (1) the rule is relevant or material to the case, and (2) the rule appears to be controversial; e.g., the juror has indicated some hostility toward the rule, or it is commonly known the community harbors strong feelings about it. (*People v. Balderas* (1985) 41 Cal.3d 144, 185; *People v. Williams* (1981) 29 Cal.3d 392, 408.)

3. Examples of Permissible Questions

   a. California's self-defense "no need to retreat in your own home" rule is controversial and was relevant in this case, so conviction is reversed for forbidding questions on attitudes about this rule. (*People v. Williams* (1981) 29 Cal.3d 392, 411.)

   b. Whether an accomplice to murder should be subject to the death penalty, with or without intent to kill, was a proper subject for voir dire in *People v. Fuentes* (1985) 40 Cal.3d 629.

   c. Asked jurors whether they would be able to vote guilty if, after deliberations, they were persuaded that the changes had been proved beyond a reasonable doubt. (*People v. Fierro* (1991) 1 Cal.4th 173, 209; *People v. Riel* (2000) 22 Cal.4th 1153, 1178.)

   d. In order to avoid a hung jury the prosecutor observed that each juror must "come to your own conclusion," but also stressed the value of "work[ing] together to try to discover the truth." (*People v. Fierro* (1991) 1 Cal.4th 173, 210, fn 8.)

e. Questions designed to determine jurors' views regarding the felony-murder rule. (*People v. Pinholster* (1992) 1 Cal.4th 865, 913; *People v. Ochoa* (2001) 26 Cal.4th 398, 431; *People v. Ervin* (2000) 22 Cal.4th 48, 70.)

f. Whether they would view a person's possession of recently stolen property as circumstantial evidence that the person stole the property, whether they considered rape more of an assaultive than a sexually motivated offense, and whether they thought it was possible for a young man to rape an elderly woman and not be mentally ill. (*People v. Mendoza* (2000) 24 Cal.4th 130, 167.)

4. Examples of Impermissible Questions (Typically Asked by the Defense):

a. Do you believe in self-defense in the home? (Not controversial; *People v. Williams* (1981) 29 Cal.3d 392, 411.)

b. What was the most important part of Proposition 8? (Unfocused; *People v. Wells* (1983) 149 Cal.App.3d 721, 726.)

c. Why did you vote as you did on Proposition 8? (Invades juror's privacy; *People v. Wells* (1983) 149 Cal.App.3d 721, 726.)

d. The defense proposed a lengthy, factually detailed question that would have given prospective jurors substantial information about defendant's victims and the manner in which they were killed. He then wanted to ask whether the juror would automatically vote for death. (*People v. Mason* (1991) 52 Cal.3d 909, 940 fn 9.)

e. "Whether, if they believed that a witness was an informant and was testifying 'in exchange for some lesser sentence,' then that 'would have some bearing on the weight or credibility that that witness may have in your mind?' " (*People v. Mason* (1991) 52 Cal.3d 909, 940.)

f. Questions regarding Governor's commutation power. (*People v. Pinholster* (1992) 1 Cal.4th 865, 918; *People v. Carpenter* (1997) 15 Cal.4th 312, 359.)

g. The prosecutor remarked that it would be proper to consider "sympathetic factors" in defendant's favor, but that defendant would be appearing in court "dressed up and decent" and had "over six years to get ready for today." The prosecutor continued in a similar vein that "[w]hat you're not going to have is the victim appear[ing] in court . . . " (*People v. Montiel* (1993) 5 Cal.4th 877, 914-915, fn 14.)

h. In penalty re-trial, defense counsel wanted to inform jury the first penalty trial resulted in a hung jury and ask jurors about their knowledge of the first trial. (*People v. Wash* (1993) 6 Cal.4th 215, 252.)

i. Defense counsel wanted to inform jury that penalty reversal was not caused by an appellate reversal of an earlier death verdict. (*People v. Wash* (1993) 6 Cal.4th 215, 254.)

j. "The court's restriction on questions regarding a prospective juror's birth date, religion and religious service attendance, or voting on the retention of Chief Justice Rose Bird," was not an abuse of discretion. (*People v. Ramos* (1997) 15 Cal.4th 1133, 1158.)

k. Asking a juror whether he had voted for a ballot proposition to enact the death penalty or would vote for such a penalty in a public election may be error. (*People v. Ochoa* (1998) 19 Cal.4th 53, 428.)

l. Asking a prospective juror whether the Supreme Court's capital opinions under former Chief Justice Rose Bird were "kind of off base" and whether the vote not to retain her or other justices was correct maybe error. (*People v. Ochoa* (1998) 19 Cal.4th 353, 428.)

m. "What do you feel is a proper punishment for someone who has committed a rape or other serious sexually related crime?" (*People v. Ochoa* (1998) 19 Cal.4th 353, 444.)

n. Many detailed questions regarding personal experience with sexual molestation in a child molestation-murder case. (*People v. Earp* (1999) 20 Cal.4th 826, 851, fn 1.)

VOIR DIRE

CCP SECTION 223

- Court conducts initial examination
- Parties can ask the court to ask additional questions
- Counsel "shall have the right to examine"
- Court's discretion to limit examination
- Voir dire conducted only to aid in challenges for cause

CHALLENGE FOR CAUSE
General Disqualification: CCP 225

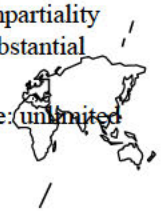
- Juror lacks the statutory requirements (e.g. age, citizenship, language, felons-CCP203)
- Deafness or other incapacity if renders person incapable of sitting (but see 203(6))

Implied Bias per CCP 225, 229

- Consanguinity
- Other relationship to a party (partner, employer, landlord, etc.)
- Interest in result
- Unqualified opinion based upon knowledge of facts
- Enmity against or bias for any party
- Prejudice inferred, challenge "may be taken"

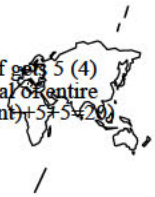
Actual Bias per CCP 225(b)(1)(c)

- The existence of a state of mind on the part of the juror in reference to the case, or to any of the parties, which will prevent the juror from acting with entire impartiality and without prejudice to the substantial rights of any party.
- Number of challenges for cause: unlimited



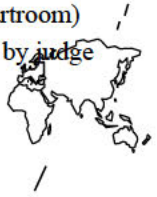
Peremptory Challenges

- No reason need be given-CCP 226 (but see Wheeler/Batson)
- A pass doesn't count as a challenge CCP231(d)(e)
- Number of challenges
  - 6/10/20
  - Multiple defendant cases each def gets 5 (4) additional and prosecutor gets total of entire defense (e.g. in 2 def case 10 (joint)+5+5=20)



Procedures

- Pre-Voir Dire conference (Rule 4.200)
  - Establish ground rules
  - Number of jurors to be questioned (12, six-pack, the whole dang courtroom)
  - Submitted questions covered by judge
  - Time limits
  - Number of alternates



Procedures cont'd

- Court clerk will summon panel to the courtroom
- Clerk will take roll and swear the panel

Procedure cont'd

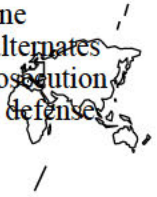
- Judge goes first with standard questions and limited follow up
- Defense attorney next and will either challenge or pass for cause
- DDA questions last
  - "pass for cause" or ask to approach bench to exercise challenge for cause

Procedures cont'd
Exercising peremptory challenges

- DDA goes first: "Would the court thank and excuse juror number 2, Ms. Jones."
- Defense goes second and then back and forth
- "The People are pleased with the panel: We pass."

Peremptory Challenges cont'd

- Alternates- CCP 234
  - Single defendant case one challenge per number of alternates
  - Multiple defendant case one challenge per number of alternates for each defendant and prosecution gets same number as total defense



BATSON-WHEELER AND BEYOND:

ELIMINATING BIAS
IN JURY SELECTION

Why *Batson-Wheeler* exists?

- Constitution forbids all forms of purposeful discrimination in jury selection.
- *Batson v. Kentucky* (1986) 476 U.S. 79, 88

Why Batson-Wheeler exists?

- A defendant has the right to be tried by a jury whose members are chosen pursuant to non-discriminatory criteria. Purposeful discrimination violates a defendant's right to equal protection. *Batson* at p. 86
- When systematic exclusion occurs, the defendant, excluded jurors, and community are harmed. *Id.* at p. 87

Group Bias

- A party may NOT use peremptories to remove prospective jurors solely on the basis of group bias.
- Group bias is a presumption that jurors are biased because they are members of a group distinguished on racial, religious, ethnic, or similar grounds.

Groups not afforded *Wheeler* protection:

- Less educated or blue-collar workers
- Ex-felons and resident aliens
- Community residents for less than 1 year
- Spanish-surnamed juror, if evidence that juror married into the name, does not constitute a "Hispanic." ***People v. Trevino* (1985) 39 Cal.3d 667, 684**

Whose remedy?

- Accusation of *Wheeler* violation can be lodged by both **prosecution** and defense.
- **Both sides** are entitled to jury free from manipulation based on prejudice against cognizable groups.
  - *Georgia v. McCollum (1992) 505 U.S. 42 applies the Wheeler rule to defense counsel.*
  - *People v. Willis (2002) 27 Cal.4th 811.*

REVERSE *BATSON-WHEELER*

- Prosecutors can and should make reverse *Batson-Wheeler* claims where evidence warrants.

Defendant's race doesn't matter

- Defendant need not be a member of the excluded group to complain of a violation of *Wheeler*.
- Any defendant has standing.
- *People v. Farnham* (2002) 28 Cal.4th 107

How is a *Wheeler* challenge made?

- If a party believes opponent is using peremptories to strike jurors on the grounds of group bias, s/he must "raise the point" in a timely fashion and make a PF case of such discrimination to the satisfaction of court.
  - *People v. Wheeler*, (1978) 22 Cal.3d 258, 280

Timely?

- Where a court has indicated alternate jurors will be used, the impanelment of the jury is not deemed complete until the alternates are selected and sworn.
- Thus, *Wheeler* motions can be made up until the swearing of the alternates.
- *People v. Gore* (1993) 18 Cal.App.4th 692

What happens next?

- Once the trial court finds the moving party has established a prima facie case, the burden shifts to the opposing party to provide a race- or group-neutral explanation for the peremptories.
- *People v. Silva* (2001) 25 Cal.4th 345, 384
- *People v. McGee* (12-18-02) 2002 DJDAR 14255

What must the "accused" counsel provide?

- Counsel need only identify facially valid race- or group-neutral reasons why prospective jurors were excused.
- The explanations need not justify a challenge for cause.
- *People v. Silva* (2001) 25 Cal.4th 345, 384.

Jury Composition as a Defense

- The "accused" should point out if the jury includes(-ed) members of a group allegedly discriminated against.
- While this is not conclusive, "it is an indication of good faith in exercising peremptories, and an objective factor for the trial judge to consider in ruling on Wheeler."
- ***People v. Gutierrez* (2002) 28 Cal.4th 1083**

The judge then makes the call.

- After the party exercising the peremptory provides a legal reason for each challenge, the trial court must then decide whether the moving party has proved purposeful racial discrimination.
- Deferential standard of review if sincere attempt to evaluate reasons.
- *People v. McDermott* (2002) 28 Cal.4th 946

Findings

- Separate findings as to each juror not necessary, but preferred.
- If reasons stated are inherently plausible and supported by the record, the trial court need not question further or make detailed findings.
- (*McDermott* at p. 41)

Judge's Findings = Specific

People v. Allen (2002) DJDAR 9489

- Judge **must inquire** into proferred explanations.
- "Sincere and reasoned inquiry" and findings as to **genuineness**.
- **Create a record** that can be intelligently considered on appeal.

What is remedy if *Wheeler* challenge granted? *People v. Willis*

- Dismissal of venire
- Mistrial
- Assessment of sanctions
- Reseating any improperly discharged jurors.
- Give "innocent" counsel more peremptories.
- Anything that seems fair

What are permissible bases upon which to base a peremptory?

What are permissible bases to exercising a peremptory?

- In a capital case, a juror's views about the death penalty are a permissible race- and group-neutral basis for exercising a peremptory.
- *People v. McDermott* (2002) 2002 Cal. LEXIS 5236

Hunches = OK
Arbitrary Exclusion = OK

- Jurors can be excused based on "hunches."
- Even "arbitrary" exclusion is permissible, so long as the reasons are not based on impermissible group bias.
  - *People v. Hall* (1983) 35 Cal.3d 161, 170
- Trivial reason, if genuine, will suffice.
  - *People v. Arias* (1996) 13 Cal.4th 92, 136.

Relative with Convictions = OK

- That a prospective juror has a relative convicted of a crime is a valid race-neutral reason to excuse that juror.
- *People v. Cummings* (1993) 4 Cal.4th 1233, 1282.

Bad Blood vs. Cops = OK

- A peremptory challenge is justified where prospective juror complained of police harassment, even if juror now claims he harbors no bad feelings about the episode…counsel could still retain some doubts.
- *People v. Johnson* (1989) 47 Cal.3d 1194, 1215

Undue Reliance on Experts = OK to Kick

- A juror who states he might rely "too heavily on expert opinion testimony of psychologists" and automatically believe the expert without reasoned analysis of the opinion could justify a peremptory challenge against him.
- *People v. Gutierrez* (2002) 28 Cal.4th 1083; *People v. Johnson* at p. 1215.

Nervous Nellie = OK to Kick

Gutierrez

- Factors indicating a difficulty or inability to focus on the evidence may serve to justify a peremptory challenge…even if assurances given.
- Prospective juror legitimately kicked who appeared overwhelmed and emotional by outside stresses. She cried twice and referred to her "nerves."

Hostile Looks = OK

- Hostile looks from a prospective juror can themselves support a peremptory challenge.
- *Turner* and *Wheeler.*

Demeanor/Body language=ok

- "Soft and reluctant responses" and "soft-spoken demeanor" may affect ability to deliberate. *People v. Arias* (1996) 13 Cal.4th 92, 137-139.
- "Tentative" and "low-keyed." *People v. Dunn* (1995) 40 Cal App.4th 1039, 1046-47.
- Juror smiling at D, "weird," "overweight." *People v. Johnson* (1989) 47 Cal 3d 1194, 1217-19.

Juror in Defense Camp = OK

- If prosecutor sincerely believes juror would be skeptical of the People's evidence, this too can justify a peremptory challenge.
- *People v. Johnson* at p. 1217. Here, juror kept agreeing with defense.

Juror's Bias vs. Vic/Wit = OK

- It is permissible to base a peremptory challenge on a juror's professed dislike of group of which your victims or witnesses are a part.
- In *Gutierrez*, juror stated he felt transsexuals were "sick human beings" and some witnesses were transsexual.

Juror Intransigence = OK

- It is a valid race-neutral basis to peremptorily challenge a juror who states he will not be influenced by anyone's opinion but his own.
- *People v. Davenport* (1995) 11 Cal.4th at 1171, 1203 and *Gutierrez.*

Juror Intransigence = OK

- Counsel could rightfully feel concern that he would not be able to consider the opinions of his fellow jurors (a valid ground for challenge).
- *People v. Davenport* (1995) 11 Cal.4th at 1171, 1203 and *Gutierrez.*

Juror's claim of impartiality can be discounted.

- A prospective juror's claim that s/he can be impartial can be *discounted* if the initial impression given was that the opposite was true. The initial impression, if legal, can be the basis for a peremptory challenge.
- *Gutierrez*,*Turner, Johnson*

Prior hung jury = OK

- A prospective juror who served in a case that resulted in a hung jury constitutes a legitimate concern.
- This prior experience jeopardizes the possibility of a unanimous verdict.
- *People v. Turner* and *People v. Farnham*

Visiting a relative in jail = OK

- A prospective juror visited a nephew in Chino but claimed the experience would have no impact on him as a juror.
- Counsel can surmise that a relative's adversary contact with the criminal justice system makes the juror unsympathetic to the prosecution.
- *Farnham*

Manner of Dress = OK

People v. Barber (1988) 200 Cal.App.3d 378.

- "[Counsel] may fear bias on the part of one juror simply because his clothes or hair length suggest an unconventional lifestyle."
- Approving of using a peremptory to kick a juror because he wore a Coors jacket to court. Such dress may also suggest a lack of respect for the court.

Shaky grasp of English = OK

- It is a permissible use of a peremptory to kick a black juror who had "an extremely poor grasp of the English language." Here, juror had to deliberate exceedingly long in order to answer. He could not understand the instructions given by him to the court and asked things be repeated three times.
- *Turner. See also Barber.*

Dim bulb = OK

- Juror strikes prosecutor as "mentally slow."
- *People v. Welch* (1999) 20 Cal.4th 701, 746.
- Juror doesn't follow judge's instructions.
- *People v. Perez* (1994) 29 Cal.App.4th 1313, 1322-25.

Limited life experience

- Responses and age (25) suggest lack of involvement in society and distrust of system. Juror had a child, was unmarried, not registered to vote. *Arias*
- "Young," "single," and "no jury experience."
  People v. Perez (1994) 29 Cal.App.4th 1313, 1322-25.

Occupation

- Reporter. *People v. Jenkins* (2000) 22 Cal.4th 900, 994.
- Sole Black juror challenged since, as a social worker, was likely to have a "more forgiving attitude." *People v. Hayes* (1996) 44 Cal.App.4th 1238, 1245.
- But, sham excuse when Chinese computer programmer excused because attorney never allows computer programmers on criminal juries. *People v. Lopez* (1991) 3 Cal.App.4th Supp. 11, 17.

Next at bat looks better

- Variety of factors and considerations go into a lawyer's decision. *Johnson* at 1220-21.
- Multiple challenges justified on basis of counsel's reason that "at the time of the strike, … there were more favorable prospective jurors about to be called into the jury box." *People v. Alvarez* (1996) 14 Cal.4th 155, 194-95.

Miscellaneous permissible bases

- Okay to challenge juror who is sleeping.
- *People v. Jenkins* (2000) 22 Cal.4th 900, 994.
- Juror's acquaintance with defense counsel.
- *People v. Williams* (1997) 16 Cal.4th 635, 664.

IMPERMISSIBLE GROUP BIAS

- RACE
- COLOR
- GENDER
- RELIGION
- SEXUAL ORIENTATION
- NATIONAL ORIGIN
- OR, SIMILAR GROUNDS

Voir Dire

I. LAW

A. The Adoption of Proposition 115 in 1990 Changed Voir Dire.

1. Pre-Proposition 115 Rules

a. The attorneys participated in the questioning process.

b. The purpose of voir dire was to allow the parties to intelligently exercise their peremptory challenges. (*People v. Williams* (1981) 29 Cal.3d 392.)

2. In 1990, the voters passed Proposition 115, which included a new Code of Civil Procedure section 223 regulating voir dire in criminal cases.

"In a criminal case, the court shall conduct the examination of prospective jurors. However, the court may permit the parties, upon a showing of good cause, to supplement the examination by such further inquiry as it deems proper, or shall itself submit to the prospective jurors upon such a showing, such additional questions by the parties as it deems proper." (Code Civ. Proc., § 223.)

a. The court shall conduct the examination of prospective jurors.

b. Upon a showing of good cause, the court may allow the attorneys to question the jurors.

c. Where practicable, voir dire shall occur in the presence of the other jurors.

d. Questioning shall be conducted only to aid in the exercise of challenges for cause.

3. Section 223 was amended effective January 1, 2001, to again allow attorney questioning.

"In a criminal case, the court shall conduct an initial examination of prospective jurors. The court may submit to the prospective jurors additional questions requested by the parties as it deems proper. Upon completion of the court's initial examination, counsel for each party shall have the right to examine, by oral and direct questioning, any or all of the prospective jurors. The court

may, in the exercise of its discretion, limit the oral and direct questioning of prospective jurors by counsel. The court may specify the maximum amount of time that counsel for each party may question an individual juror, or may specify an aggregate amount of time for each party, which can then be allocated among the prospective jurors by counsel."

a. Amendment become effective January 1, 2001.

b. Court can limit amount of time allotted to the parties.

c. Shall be conducted "only in the aid of the exercise of challenges for cause."

B. Two Types of Challenges

1. Challenge for Cause – CCP § 225.

a. General Disqualification – CCP § 225(b)(1)(A).

1. Juror lacks the statutory requirements to be eligible for jury duty – CCP § 203, 228(a).
2. Deaf, or any other incapacity – CCP § 228(b).
3. Rarely utilized.

b. Implied Bias – CCP § 225(b)(1)(B), 229.

1. Eight statutory grounds.
2. Prejudice is inferred.

c. Actual Bias – CCP § 225(b)(1)(C).

The existence of a state of mind on the part of the juror in reference of the case, or to any of the parties, which will prevent the juror from acting with entire impartiality, and without prejudice to the substantial rights of any party.

d. Number of challenges – unlimited.

2. Peremptory Challenges

a. No reason need be given – CCP § 226(b).

b. Number of peremptory challenges allowed.

1) Depends on punishment allowed and number of defendants on trial.

2) Single defendant case.

a) 20 – If punishable by death or life imprisonment – CCP § 231(a).
b) 6 – If punishable with maximum of 90 days or less – CCP § 231(b).
c) 10 – all other cases – CCP § 231(a).

3) Multiple defendant case.

a) Death or life imprisonment case – CCP § 231(a).

1) 20 joint challenges.
2) 5 individual challenges for each defendant.
3) DA gets same total as entire defense team.

b) 90 days or less – CCP § 231(b).

1) 6 joint challenges.
2) 4 individual challenges for each defendant.
3) DA gets same total as entire defense team.

c) All other cases – CCP § 231(a).

1) 10 joint challenges.
2) 5 individual challenges for each defendant.
3) DA gets same total as entire defense team.

4) Alternates – CCP § 234.

a) Single defendant case – one per number of alternates.
b) Multiple defendant cases – each defendant gets one per number of alternates.
c) DA gets same total number as defense team.

5) A pass does not count as a challenge – CCP § 231(d)(e).

II. PROCEDURE

A. Pre-Voir Dire Conference – Rule 228.1.

1. Establish ground rules.

2. How many jurors will be called into the box?

3. Will judge allow attorney questioning?

4. Time limits.

5. Number of alternates.

6. Give judge voir dire questions.

B. Court clerk will summon a jury panel to courtroom.

C. Clerk will take roll and swear the panel – CCP § 232.

D. Questioning the jurors.

1. Judge will question jurors first – CCP § 223.

   a. Will typically ask 8 – 10 general questions. See Standard of Judicial Administration, § 8.5.
   b. Very limited follow-up.

2. Defense Attorney will question second.

   a. Defense will "challenge for cause" – CCP § 226(d).
   b. "Pass for cause."

3. DA questions last.

   a. "Pass for cause."
   b. "Approach the Bench" to exercise challenge for cause.

E. Challenging the jurors.

1. DA goes first – CCP § 226(d).

   a. "I would ask the court to thank and excuse Juror Number _____, Mr/Mrs ."

2. Defense goes second.

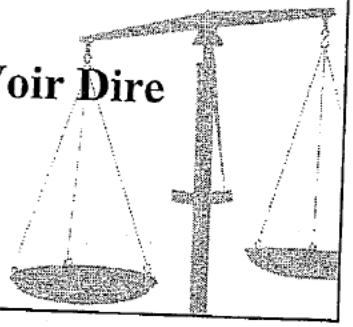
3. Continues until both sides pass consecutively.

   a. "The People are pleased with the panel. We pass."
   b. 12 jurors will be sworn.

4. Select Alternates – CCP § 234.

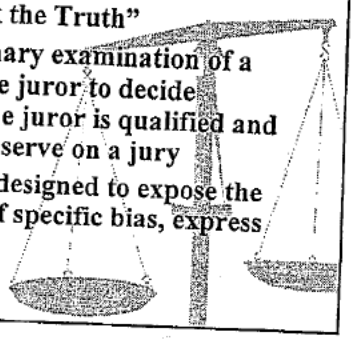
   a. Same order as original 12 jurors.
   b. Swear alternates.

Voir Dire



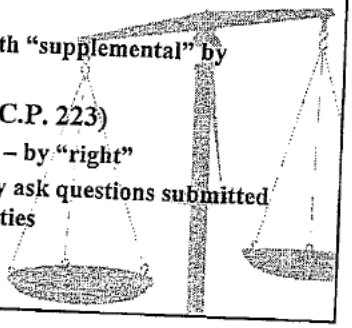
Voir Dire

- "To Speak the Truth"
- A preliminary examination of a prospective juror to decide whether the juror is qualified and suitable to serve on a jury
- Questions designed to expose the existence of specific bias, express or implied



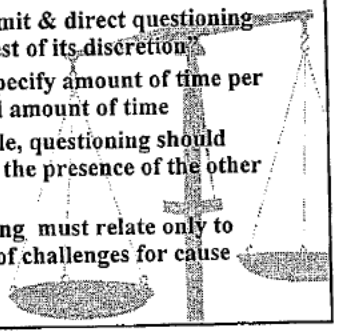
Who Conducts Voir Dire

- Pre-2000
  - Judge, with "supplemental" by attorneys
- Today (C.C.P. 223)
  - Attorneys – by "right"
  - Court may ask questions submitted by the parties



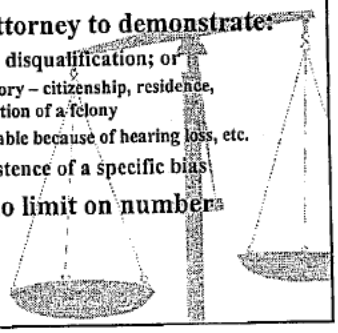
Limitations on Voir Dire

- Court may limit & direct questioning "in the interest of its discretion"
- Court may specify amount of time per juror or total amount of time
- When possible, questioning should take place in the presence of the other jurors
- All questioning must relate only to the exercise of challenges for cause



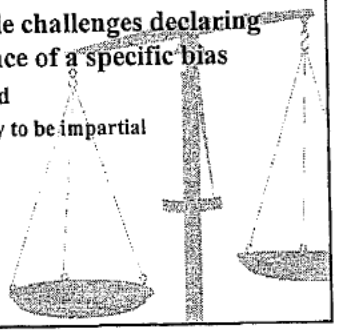
Challenges for Cause

- Require attorney to demonstrate:
  1. General disqualification; or
     1. Statutory – citizenship, residence, conviction of a felony
     2. Incapable because of hearing loss, etc.
  2. The existence of a specific bias
- There is no limit on number



Challenges for Cause

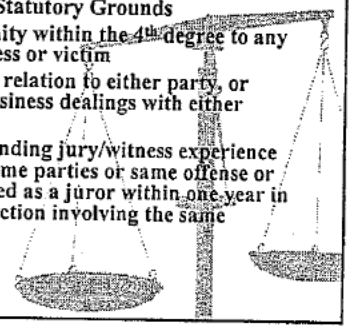
- Permissible challenges declaring the existence of a specific bias
  - Expressed
    - Inability to be impartial
  - Implied



Challenges for Cause

Implied Bias – Statutory Grounds

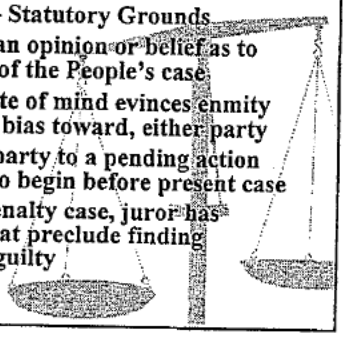
- Consanguinity within the 4th degree to any party, witness or victim
- Standing in relation to either party, or previous business dealings with either party
- Previous/pending jury/witness experience involving same parties or same offense or having served as a juror within one year in a criminal action involving the same defendant



Challenges for Cause

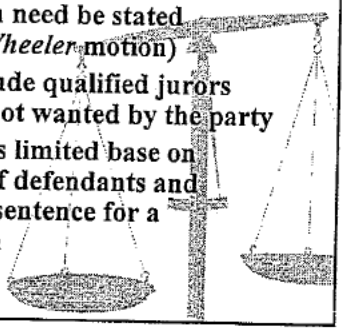
Implied Bias – Statutory Grounds

- Juror has an opinion or belief as to the merits of the People's case
- Juror's state of mind evinces enmity against, or bias toward, either party
- Juror is a party to a pending action that is set to begin before present case
- In death penalty case, juror has opinions that preclude finding defendant guilty



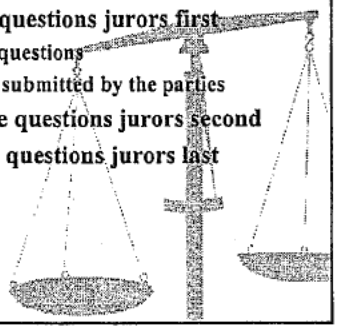
Peremptory Challenges

- No reason need be stated (absent *Wheeler* motion)
- May exclude qualified jurors who are not wanted by the party
- Number is limited base on number of defendants and potential sentence for a conviction



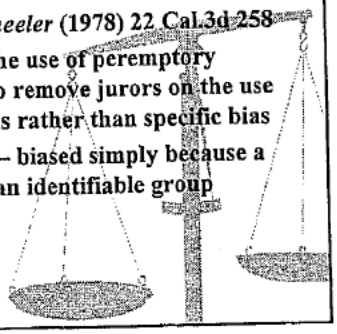
The Voir Dire Process

- The Judge questions jurors first
  - Standard questions
  - Questions submitted by the parties
- The defense questions jurors second
- The People questions jurors last



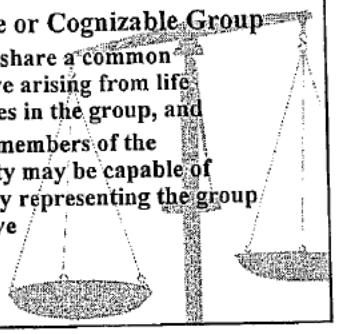
People v. Wheeler

- *People v. Wheeler* (1978) 22 Cal.3d 258
- Dealt with the use of peremptory challenges to remove jurors on the use of group bias rather than specific bias
- Group bias – biased simply because a member of an identifiable group



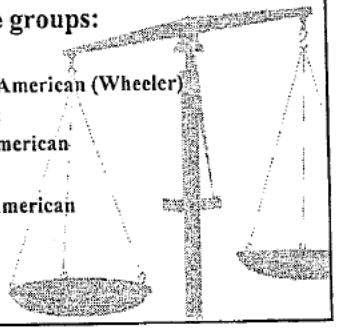
People v. Wheeler

- Identifiable or Cognizable Group
  - Members share a common perspective arising from life experiences in the group, and
  - No other members of the community may be capable of adequately representing the group perspective



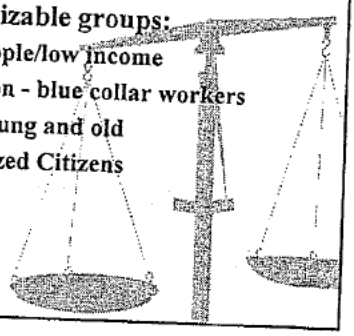
People v. Wheeler

- Cognizable groups:
  - Race
    - African-American (Wheeler)
    - Hispanic
    - Asian-American
  - Ethnicity
    - Native American
  - Religion
    - Jewish



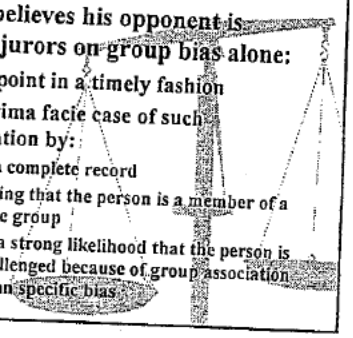
People v. Wheeler

- Non-cognizable groups:
  - Poor people/low income
  - Education - blue collar workers
  - Age – young and old
  - Naturalized Citizens



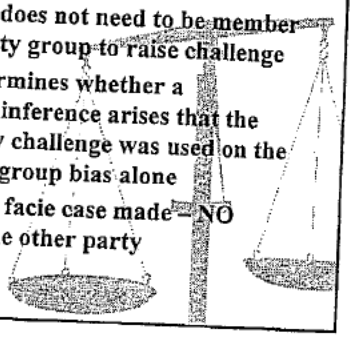
People v. Wheeler

- If a party believes his opponent is dismissing jurors on group bias alone:
  - Raise the point in a timely fashion
  - Make a prima facie case of such discrimination by:
    - Making a complete record
    - Establishing that the person is a member of a cognizable group
    - Showing a strong likelihood that the person is being challenged because of group association rather than specific bias



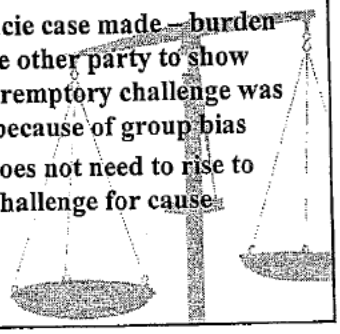
People v. Wheeler

- Defendant does not need to be member of a minority group to raise challenge
- Court determines whether a reasonable inference arises that the peremptory challenge was used on the grounds of group bias alone
- If no prima facie case made – NO action by the other party



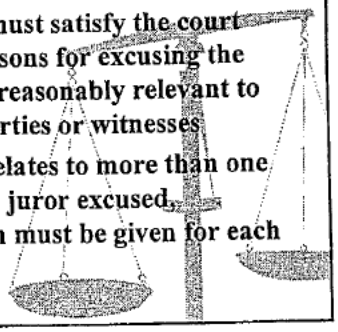
People v. Wheeler

- If prima facie case made – burden shifts to the other party to show that the peremptory challenge was not made because of group bias
- Showing does not need to rise to level of a challenge for cause



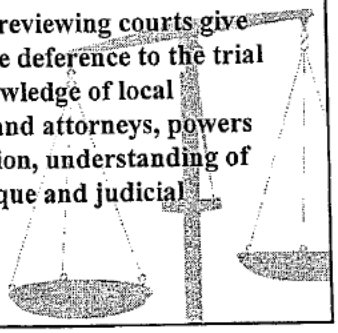
People v. Wheeler

- The party must satisfy the court that the reasons for excusing the juror were reasonably relevant to the case, parties or witnesses
- If motion relates to more than one prospective juror excused, justification must be given for each



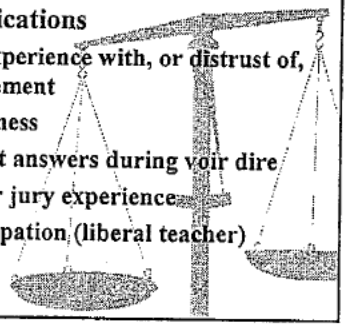
People v. Wheeler

- On appeal, reviewing courts give considerable deference to the trial judge's knowledge of local conditions and attorneys, powers of observation, understanding of trial technique and judicial experience



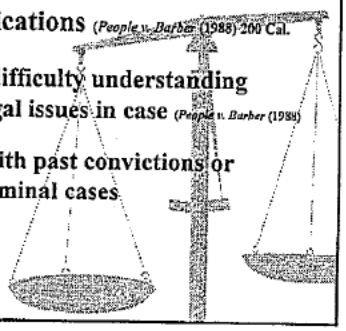
People v. Wheeler

- Some Justifications
  - Negative experience with, or distrust of, law enforcement
  - Inattentiveness
  - Inconsistent answers during voir dire
  - Other prior jury experience
  - Juror Occupation (liberal teacher)



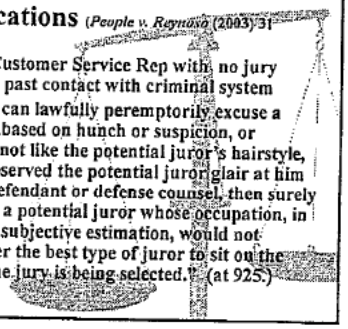
People v. Wheeler

- Some Justifications (*People v. Barber* (1988) 200 Cal. App. 3d. 378)
  - Perceived difficulty understanding complex legal issues in case (*People v. Barber* (1988) 200 Cal. App. 3d. 378)
  - Relatives with past convictions or pending criminal cases



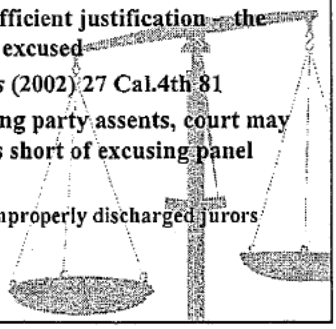
People v. Wheeler

- Some Justifications (*People v. Reynoso* (2003) 31 Cal.4th 903)
  - Occupation as Customer Service Rep with no jury experience & no past contact with criminal system
  - "If a prosecutor can lawfully peremptorily excuse a potential juror abased on hunch or suspicion, or because he does not like the potential juror's hairstyle, or because he observed the potential juror glair 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." (at 925.)



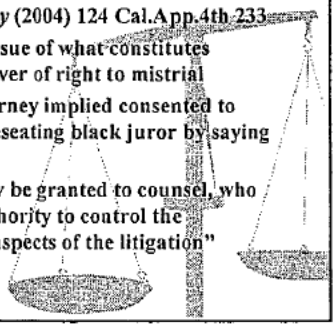
People v. Wheeler

- If there is insufficient justification – the entire panel is excused
- *People v. Willis* (2002) 27 Cal.4th 81
  - If complaining party assents, court may make orders short of excusing panel
    - sanctions
    - reseating improperly discharged jurors



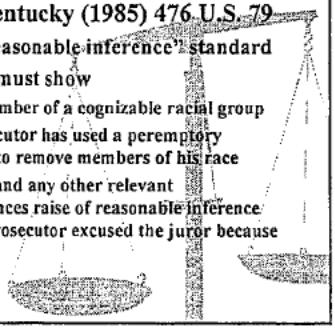
People v. Wheeler

- *People v. Overby* (2004) 124 Cal.App.4th 233
  - Addressed issue of what constitutes effective waiver of right to mistrial
  - Defense attorney implied consented to remedy of reseating black juror by saying "submit"
  - Consent may be granted to counsel, who "has the authority to control the procedural aspects of the litigation"



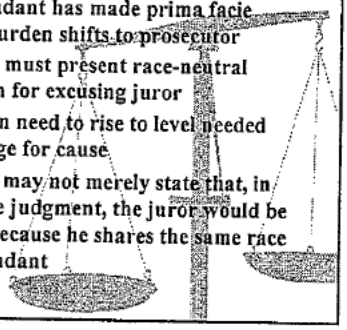
Batson v. Kentucky

- Batson v. Kentucky (1985) 476 U.S. 79
  - Applied "reasonable inference" standard
  - Defendant must show
    - He is a member of a cognizable racial group
    - The prosecutor has used a peremptory challenge to remove members of his race
    - The facts and any other relevant circumstances raise of reasonable inference that the prosecutor excused the juror because of his race



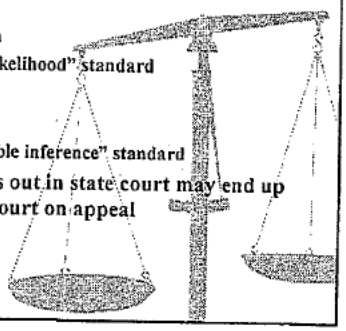
Batson v. Kentucky

- Once defendant has made prima facie showing, burden shifts to prosecutor
- Prosecutor must present race-neutral explanation for excusing juror
- Explanation need to rise to level needed for challenge for cause
- Prosecutor may not merely state that, in his intuitive judgment, the juror would be impartial because he shares the same race as the defendant



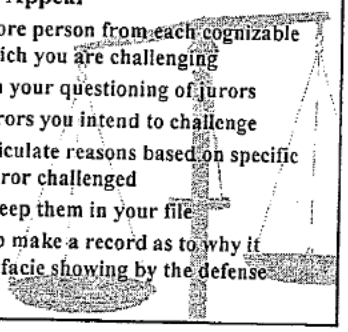
Wheeler vs. Batson

- Wheeler
  - California
  - "Strong likelihood" standard
- Batson
  - Federal
  - "Reasonable inference" standard
- What starts out in state court may end up in federal court on appeal



Wheeler/Batson

- Suggestions for Appeal
  - Keep one or more person from each cognizable group from which you are challenging
  - Be consistent in your questioning of jurors
  - Question all jurors you intend to challenge
  - Be ready to articulate reasons based on specific bias for each juror challenged
  - Take notes & keep them in your file
  - Ask the court to make a record as to why it denied a prima facie showing by the defense



VOIR DIRE OUTLINE

INTRODUCTION:

1. The right to a trial by jury is guaranteed by the Sixth Amendment of the United States Constitution; applied to the states through the 14th Amendment. (*Duncan v. Louisiana* (1968) 391 U.S. 145.)
2. California law also guarantees a trial by jury:
   a. "In criminal actions in which a felony is charged, the jury shall consist of 12 persons. In criminal actions in which a misdemeanor is charged, the jury shall consist of 12 persons or a lesser number agreed on by the parties in open court." (Cal. Const., Art. I, § 16.)

WHAT IS VOIR DIRE?

1. **Voir dire** (vwahr **deer** *also* vor **deer** *or* vor **dIr**), *n.* [Law French "to speak the truth"] A preliminary examination of a prospective juror by a judge or lawyer to decide whether the prospect is qualified and suitable to serve on a jury. Loosely, the term refers to the jury-selection phase of a trial. (Black's Law Dictionary, 8th Ed. 2004)
2. The term "Voir Dire" refers to the questioning of either a juror or a witness as to competency and qualifications. In the jury selection process, the Voir Dire examination properly consists of questions designed to expose the existence of specific bias, express or implied, in order to aid the attorneys in deciding whether to challenge for cause. (C.C.P § 223.)
3. A criminal jury is formed in the same manner as in civil actions. (P.C. § 1046; see *People v. Visciotti* (1992) 2 Cal.4th 1, 37, 41 [absent statutory authority for departure, trial court should follow procedures established by C.C.P. 222 in selecting prospective jurors].)

WHO CONDUCTS VOIR DIRE

1 Prior to 2000, C.C.P. 223 placed examination of prospective jurors in the hands of the trial court. However, the court was authorized, under a showing of good cause, to permit "supplemental" examination by the parties. (see C.C.P. § 473.)

2. In 2000, C.C.P. 223 was amended to provide that counsel for each party, on completion of the initial examination by the court, "shall have the *right* to examine, by oral and direct questioning, any and all of the prospective jurors." Also, the court may submit to the prospective jurors any additional questions requested by the parties that it deems proper.

3. Attorney Voir Dire is not without limitations. C.C.P. 223 gives trial courts broad discretion in the control attorney voir dire, setting the following limitations:
   a. The court may, in the exercise of its discretion, limit the oral and direct questioning of the prospective jurors by counsel.
   b. The court may specify the maximum amount of time that counsel for each party may question an individual juror.
   c. The court may specify an aggregate amount of time for each party, which can then be allocated among the prospective jurors by counsel.
   d. In all criminal cases, voir dire of prospective jurors shall, where practicable, take place in the presence of the other jurors.
   e. All questioning must relate only to the exercise of challenges for cause.

4. While both the court and attorneys may conduct voir dire, only counsel may challenge a juror. (C.C.P. § 225)

CHALLENGES:

1. There are two types of challenges to individual jurors: 'peremptory' and 'for cause.' (C.C.P. § 225(b).)
   a. 'Peremptory' challenges do not require counsel to state a reason, and permits counsel to exclude jurors who are qualified but are not desired by the party.

b. 'For cause' challenges require counsel to demonstrate either general disqualification or the existence of specific bias in the challenged juror.
    i. A juror may be generally disqualified if he/she lacks the statutory qualifications for a competent juror, (citizenship, residence, conviction of a felony, etc.)(C.C.P. § 203) or if he/she has a loss of hearing or other incapacity rendering the person incapable of performing a juror's duties. (C.C.P. § 228.)
    ii. Through voir dire examination, counsel may discover the existence of facts which demonstrate a specific bias, either express or implied. Such facts would prevent or substantially impair the juror from acting with entire impartiality, and without prejudice to the substantial rights of any party. (C.C.P.§225(b)(1)); *People v. Caudillo* (2004) 122 Cal.App.4th 1417, 1429.)

2. Because defendants are guaranteed the right to a fair and impartial jury, and a juror challenged 'for cause' has a demonstrated specific bias, there are no limits on the number of 'for cause' challenges.
3. Because counsel is not required to state a reason for 'peremptory' challenges (unless challenge is objected to through *Wheeler* motion), the number of 'peremptory' challenges is limited, depending on two things:
    a. The number of defendants, and
    b. The potential sentence for a conviction.
        i. If the offense is punishable by a maximum of 90 days or less in the county jail, each side is entitled to six (6) peremptory challenges. (C.C.P. § 231(b).)
            1. When two or more defendants are jointly tried, and the offense is punishable by a maximum of 90 days or less in the county jail, their challenges shall be exercised jointly, but each defendant shall also be entitled to four (4) additional challenges which may be exercised separately, and the state shall also be entitled to additional challenges equal to the number of all the additional separate challenges allowed the defendants. (C.C.P. § 231(b).)

ii. If the offense is punishable by death or imprisonment for life, each side is entitled to twenty (20) peremptory challenges. (C.C.P. § 231(a).)

iii. In all other cases, each side is entitled to ten (10) peremptory challenges. (C.C.P. § 231(a).)

1. When two or more defendants are jointly tried, and the offense is punishable by death, life imprisonment, or in all other cases, their challenges shall be exercised jointly, but each defendant shall also be entitled to five (5) additional challenges which may be exercised separately, and the people shall also be entitled to additional challenges equal to the number of all the additional separate challenges allowed the defendants. (C.C.P. § 231(a).)

4. To facilitate the intelligent exercise of both peremptory challenges and those for cause, parties may inform prospective jurors of the general facts of the case. (*People v. Ochoa* (2001) 26 Cal. 4th 398, 431; *People v. Ervin* (2000) 22 Cal.4th 48, 70.)

5. **Peremptory:**

a. A prospective juror's view of the death penalty is a permissible race-neutral and group-neutral basis for exercising a peremptory challenge in a capital case. Such is the case even if that juror represents the only member of a cognizable group. (*People v. McDermott* (2002) 28 Cal. 4th 946, 970.)

b. Because a peremptory challenge may be used for any reason, a prosecutor legitimately may exercise a peremptory challenge against a juror who is skeptical about imposing the death penalty, when this juror admits that it would be hard for him to impose the death penalty on a defendant who maintains his innocence, even if the jury finds defendant guilty. (*People v. Burgener* (2003) 29 Cal. 4th 833, 864; *People v. Catlin* (2001) 26 Cal.4th 81, 118, 109.)

6. **For Cause:**

a. Assessing the qualifications of jurors challenged for cause is a matter falling within the broad discretion of the trial court. On appeal, the court will uphold

the trial court's decision if it is fairly supported by the record, and accept as binding the trial court's determination as to the prospective juror's true state of mind when the prospective juror has given conflicting or ambiguous statements. (*People v. Farnam* (2002) 28 Cal.4th 107, 132, opinion modified, 2002 WL 1763061 (Cal. 2002); *People v. Weaver* (2001) 26 Cal.4th 876, 910.)

b. In according deference on appeal to trial court rulings on motions to exclude for cause, appellate courts recognize that a trial judge who observes and speaks with a prospective juror and hears that person's responses (noting, among other things, the person's tone of voice, apparent level of confidence, and demeanor), gleans valuable information that simply does not appear on the record. (*People v. Caudillo* (2004) 122 Cal.App.4th 1417, 1428.)

c. Permissible challenges declaring the existence of a specific bias:

   i. Expressed:

      1. Inability to be impartial. (*People v. Fultz* (1895) 109 Cal. 258; *People v. Owens* (1899) 123 Cal. 482, 488; *People v. Moore* (1923) 64 Cal.App. 328, 329)

   ii. Implied:

      1. Statutory Grounds:

         A. Consanguinity or affinity within the fourth degree to any party, witness, or victim in the case. (C.C.P. § 225(a).)

         B. Standing in the relation of either party, or having previous business dealings with either party. (C.C.P. § 225(b).)

         C. Previous/pending jury/witness experience involving same parties, same specific offense or cause of action; or having served as a juror within one year previously in a criminal action involving the defendant. (C.C.P. § 225(c).)

         D. Juror has an interest in the outcome of the trial. (C.C.P. § 225(d).)

E. Juror has an opinion or belief as to the merits of the People's case. (C.C.P. § 225(e).)

F. Juror's state of mind evinces enmity against, or bias towards, either party. (C.C.P. § 225(f).)

G. Juror is party to a pending action that is set to begin before present case. (C.C.P. § 225(g).)

H. In potential death penalty case, juror entertains opinion that precludes finding defendant guilty. (C.C.P. § 225(h); see also, *Death Penalty Cases, infra.*)

2. Death Penalty Cases

A. The trial judge may excuse for cause a prospective juror who on voir dire expresses views about capital punishment, either for or against, that would prevent or substantially impair the performance of the juror's duties as defined by the court's instructions and the juror's oath. (*People v. Bolden* (2002) 29 Cal.4th 515, 537; *People v. Crittenden* (1994) 9 Cal.4th 83, 121, quoting *Wainwright v. Witt* (1985) 469 U.S. 412, 424.)

B. A prospective juror is properly excluded if he or she is unable to conscientiously consider all of the sentencing alternatives, including the death penalty where appropriate. (*People v. Lewis* (2001) 26 Cal. 4th 334, 352-353; *People v. Jenkins* (2000) 22 Cal.4th 900, 987.)

C. However, be alert for prospective jurors who might automatically impose the death penalty upon reaching a verdict of guilty. If the death penalty is imposed by a jury containing even one juror who would vote automatically for the death penalty without considering the mitigating evidence, the state is disentitled to execute the sentence. (*People v. Weaver* (2001) 26 Cal. 4th 876, 910; *Morgan v. Illinois* (1992) 504 U.S. 719, 729.)

d. Keep in mind, for defendant to preserve the right to assert on appeal that the trial court wrongly denied a challenge for cause, defendant must: (1) exercise a peremptory challenge to remove the juror in question; (2) use all of his or her peremptory challenges; and (3) communicate to the court dissatisfaction with the jury selected. Failure to do any of these steps waives the right to appeal the denial. (*People v. Seaton* (2001) 26 Cal. 4th 598, 637.)

THE EFFECT OF *WHEELER*:

1. *People v. Wheeler* (1978) 22 Cal.3d 258, dealt with the use of peremptory challenges to remove prospective jurors on the basis of group bias, rather than specific bias.
   a. Group bias exists when a party presumes that certain jurors are biased merely because they are members of an identifiable (cognizable) group.
      i. To qualify as a cognizable group, the following requirements must be met:
         1. The members must share a common perspective arising from life experience in the group, and
         2. no other members of the community may be capable of adequately representing the group perspective. (Coleman, *Meeting the Wheeler Challenge*, Vol. XIX, Prosecutor's Notebook, pp. 2-4.)

ii. Cognizable groups include the following:

1. Race

A. African-Americans. (see, e.g. *Wheeler)*

B. Hispanics. (see, e.g. *People v. Perez* (1996) 48 Cal.App.4th 1310, 1315.)

C. Asian-Americans. (cf., *People v. Lopez* (1991) 3 Cal.App.4th Supp. 11) [Chinese]; *People v. Williams* (1994) 26 Cal.App.4th Supp. 1 [Filipino].)

2. Ethnicity

A. Native Americans. (see, e.g. *United States v. Bauer* (9th Cir. 1996) 75 F.3d 1366.)

3. Religion

A. Jewish. (see, e.g. *People v. Johnson* (1989) 47 Cal.3d 1194.)

4. Gender (unclear)

A. The only California case found on pure gender basis alone is unciteable: *People v. Avitt* (1995) 35 Cal.App.4th 94 was ordered depublished by the Supreme Court on August 24, 1995.

B. Examples of non-cognizable groups include :

1. Poor persons/low income. (see, e.g. *People v. Johnson* (1989) 47 Cal.3d 1194, 1214.)

2. Low education/blue collar workers. (see, e.g. *People v. Estrada* (1979) 93 Cal.App.3d 76, 91.)

3. Age. (see, e.g. *People v. Marbley* (1986) 181 Cal.App.3d 45, 48 [young people]; *People v. McCoy* (1995) 40 Cal.App.4th 778, 783 [people over 70].)

4. Naturalized citizens. (see, e.g. *People v. Gonzalez* (1989) 211 Cal.App.3d 1186, 1202 [dicta])

b. Bias based on association in any of the above cognizable groups is different from specific bias, which relates to the particular case on trial or the parties or witnesses thereto.

2. The law presumes that each party will use that party's challenges for cause and peremptory challenges "to remove those prospective jurors who appear most likely to be biased against him or in favor of his opponent; by so doing, it is hoped, the extremes of potential prejudice on both sides will be eliminated, leaving a jury as impartial as can be obtained from the available venire." (*People v. Wheeler* (1978) 22 Cal.3d 258, 274.)
    a. Evidence of potential bias may arise out of mere intuition. 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' upon entering the box the juror may have smiled at the defendant, for instance, or glared at him.
    b. Responsive to this reality, the law allows removal of a biased juror by a challenge for which no reason 'need be given,' i.e., publicly stated: in many instances the party either cannot establish his reason by normal methods of proof or cannot do so without causing embarrassment to the challenged venireman and resentment among the remaining jurors. (*People v. Wheeler* (1978) 22 Cal.3d 258, 275.)
3. The *Wheeler* court held that the right to trial by a jury drawn from a representative cross-section of the community is guaranteed equally and independently by the Sixth Amendment to the federal Constitution and by article I, section 16, of the California Constitution. (*Wheeler*, 22 Cal.3d at p. 272.)
    a. Further authority exists in the statutes: A party may not use a peremptory challenge to remove a prospective juror on the basis of an assumption that the prospective juror is biased merely because of his or her race, color, religion, sex, national origin, sexual orientation, or similar grounds. (C.C.P. § 231.5.)
4. While a party is not entitled to a petit jury that *proportionately* represents every group in the community, a party is constitutionally entitled to a jury that is as near an approximation of the ideal cross-section of the community as the process of random draw permits.

5. The *Wheeler* court explained that the rationale of [Supreme Court] decisions [on this issue], is that "in our heterogeneous society jurors will inevitably belong to diverse and often overlapping groups defined by race, religion, ethnic or national origin, sex, age, education, occupation, economic condition, place of residence, and political affiliation; that it is unrealistic to expect jurors to be devoid of opinions, preconceptions, or even deep-rooted biases derived from their life experiences in such groups; and hence that the only practical way to achieve an overall impartiality is to encourage the representation of a variety of such groups on the jury so that the respective biases of their members, to the extent they are antagonistic, will tend to cancel each other out." (*Wheeler*, 22 Cal.3d at pp 266-267.)
   a. Members of any such group may certainly still be excluded through peremptory challenge, provided that the basis for the challenge is *specific* bias.
   b. The language in *Wheeler* was based on *Thiel v. Southern Pacific Co.* (1946) 328 U.S. 217, 220: "The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community. [Citations.] This does not mean, of course, that every jury must contain representatives of all the economic, social, religious, racial, political and geographical groups of the community; frequently such complete representation would be impossible. But it does mean that prospective jurors shall be selected by court officials without systematic and intentional exclusion of any of these groups." (*Wheeler*, 22 Cal.3d at p. 268.)

THE *WHEELER* SOLUTION:

1. If a party believes his opponent is using his peremptory challenges to strike jurors on the ground of group bias alone, he must:
   a. Raise the point in a timely fashion, and
   b. Make a prima facie case of such discrimination to the satisfaction of the court, by proceeding through a series of steps:

i. First, he should make as complete a record of the circumstances as is feasible.

ii. Second, he must establish that the persons excluded are members of a cognizable group within the meaning of the representative cross-section rule.

iii. Third, from all the circumstances of the case he must show a *strong likelihood* that such persons are being challenged because of their group association rather than because of any specific bias. (*Wheeler*, 22 Cal.3d at p. 280.)

2. Upon presentation of this and similar evidence, and in the absence of the jury, the court must determine whether a *reasonable inference* arises that peremptory challenges are being used on the ground of group bias alone.

3. If the court finds that a prima facie case has been made, the burden shifts to the other party to show (if he can) that the peremptory challenges in question were not predicated on group bias alone.

   a. The showing need not rise to the level of a challenge for cause. But to sustain his burden of justification, the allegedly offending party must satisfy the court that he exercised such peremptories on grounds that were reasonably relevant to the particular case on trial or its parties or witnesses - i.e., for reasons of specific bias. (*Wheeler*, 22 Cal.3d at pp. 281-82.)

   b. Because of the trial judge's knowledge of local conditions and local prosecutors, powers of observation, understanding of trial techniques, and judicial experience, reviewing courts must give *considerable deference* to the determination of whether or not a prima facie case has been established. (*People v. Trevino* (1997) 55 Cal.App.4th 396, 402; *People v. Wimberly* (1992) 5 Cal.App.4th 773.)

   c. To ensure against undue prejudice to a party unsuccessfully making a peremptory challenge refused as racially discriminatory, courts may use sidebar conferences for the making of peremptory challenges, followed by appropriate disclosure in open court as to successful challenges. (*People v. Willis* (2002) 27 Cal.4th at p. 821-822; *See also*, *People v. Williams* (1994) 26 Cal.App.4th Supp. 1, 7-8.)

4. If the court finds that the burden of justification is not sustained as to *any* of the questioned peremptory challenges, the presumption of their validity is rebutted.
   a. Accordingly, the court must then conclude that the jury as constituted fails to comply with the representative cross-section requirement, and it must dismiss the jurors thus far selected. (*Wheeler*, 22 Cal.3d at p. 282.)
   b. **The *Willis* Solution:** While the *Wheeler* court held that the remaining venire must also be dismissed, and the jury selection process must begin anew, the *Willis* court held that such consequences would accomplish nothing more than to reward improper voir dire challenges and postpone trial. (*People v. Willis* (2002) 27 Cal.4th 811, 821.)
      1. *Willis* held that as long as the complaining party assents, the trial court has the discretion to issue appropriate orders short of outright dismissal of the remaining jury, including assessment of sanctions against counsel whose challenges exhibit group bias and reseating any improperly discharged jurors if they are available to serve. (*Id.*)
      2. If the complaining party effectively waives its right to a mistrial, preferring to take its chances with the remaining venire, ordinarily, the court should honor that waiver rather than dismiss the venire and subjecting the parties to additional delay. (*Id.* at 823-824.)
      3. The Supreme Court in *Willis* did not specify what constitutes consent to an alternate remedy or an effective waiver of the right to a mistrial. However, the Court in *People v. Overby* (2004) 124 Cal.App.4th 1237, 22 Cal.Rptr. 233, 237 did address this issue.
         i. In *Overby,* the defense attorney immediately asked the court to order a black juror who was excused by the prosecutor to remain in the courtroom. The attorney then made a Batson-Wheeler motion, alleging that the prosecutor improperly used her peremptory challenge to exclude the black juror because of a presumed group bias based on her race. (Note, this was

the first black juror that the prosecutor had peremptorily challenged.) (*Id.* at 237-237)

ii. The defense attorney did not ask for any specific remedy. At a sidebar, the court granted the motion and elected to reseat the juror rather than excuse the entire panel. When the court asked the defense attorney if she wished to be heard on the court's decision, the attorney said "submit". The prosecutor objected. The court reseated the juror and voir dire resumed. (*Id.* at 237.)

iii. The prosecutor immediately made a Batson-Wheeler motion that was denied. Later that day, the prosecutor asked for reconsideration of both rulings, and argued that the jury venire should be dismissed. At no time did the defense attorney state that she agreed that the venire should be dismissed. (*Id.*)

iv. The Court found that defendant's counsel impliedly consented to the remedy of reseating a black juror as a remedy for the prosecutor's challenge to a jury in violation of *Batson-Wheeler* and that consent may be granted by counsel, who as a general rule. "has the authority to control the procedural aspects of the litigation." (*Id*, citing *In re Horton* (1991) 54 Cal.3d. 82, 94.)

5. **Note:** The defendant need not be a member of the excluded group in order to complain of a violation of the representative cross-section rule; yet if he is, and especially if in addition his alleged victim is a member of the group to which the majority of the remaining jurors belong, these facts may also be called to the court's attention. (*Wheeler*, 22 Cal.3d at p. 281.)
6. All claims in California courts that peremptory challenges are being used to strike jurors solely on the ground of group bias are to be governed by Cal. Const., art. I, § 16, and the procedure outlined by the court.

a. The *Wheeler* court specifically rejected the rules outlined in *Swain v. Alabama*, as they provide less protection to California residents than the rules outlined in *Wheeler*. (*Wheeler*, 22 Cal.3d at p. 285.)

NON-*WHEELER* JUSTIFIABLE REASONS TO CHALLENGE JUROR

1. If the court requests justification for challenging a minority member, the following reasons have been upheld. (Coleman, *Meeting the Wheeler Challenge*, Vol. XIX, Prosecutor's Notebook, pp. 24-30.)
   a. Juror has negative experience with, or distrust of, law enforcement. (*See, e.g., People v. Mayfield* (1997) 14 Cal.4th 668, 724-26; *United States v. Bauer* (9th Cir. 1996) 84 F.3d 1549; *People v. Dunn* (1995) 40 Cal.App.4th 1039, 1046-47.)
   b. Juror is inattentive or provides inconsistent answers during voir dire. (*See, e.g., People v. Arias* (1996) 13 Cal.4th 92, 137-139; *People v. Perez* (1994) 29 Cal.App.4th 1313, 1322-25; *People v. Gonzalez* (1989) 211 Cal.App.3d 1186, 1200.)
   c. Juror behavior may alienate one side. (*See, e.g., Purkett v. Elem* (1995) 514 U.S. 765; *People v. Douglas* (1995) 36 Cal.App.4th 1681, 1690; *People v. Bernard* (1994) 27 Cal.App.4th 458, 467-69.)
   d. Other prior jury experience. (*See, e.g., People v. Hayes* (1996) 44 Cal.App.4th 1238, 1245; *People v. Crittenden* (1994) 9 Cal.4th 83, 118; *United States v. Power* (9th Cir. 1989) 881 F.2d 733, 740.)
   e. Juror occupation. (*See, e.g., People v. Turner* (1994) 8 Cal.4th 137, 168-72; *People v. Barber* (1988) 200 Cal.App.3d 378, 389-94.)

***WHEELER* MOTIONS ON APPEAL:**

1. The court in *People v. Trevino*, *supra*, noted that the California Supreme Court has had to deal with very poor showings by *Wheeler* objectors, leaving precious little in the record for review.

2. Problems arise because the reviewing court is often forced to speculate on the record, since the party exercising the challenge need not justify the challenge unless a prima facie case of discrimination is shown, and *Wheeler* does not require the trial court to explain its reasons for not finding a prima facie case. (Coleman, *Meeting the Wheeler Challenge*, Vol. XIX, Prosecutor's Notebook, p. 7.)
3. Consequently, attorneys should anticipate the possibility of a *Wheeler* challenge and remember that an appellate court will do a further review of the record even if the trial court does not find a prima facie case. (*Id.*)
4. In anticipation that a *Wheeler* motion will be appealed, the following tactics should help create a record that will justify any challenges you make:
   a. If possible, keep on the jury one or more members of each cognizable group from which you are challenging persons. (Coleman, *Meeting the Wheeler Challenge*, Vol. XIX, Prosecutor's Notebook, p. 7-8.)
   b. If the court allows voir dire, be consistent in your questioning of jurors you plan to keep and those you plan to challenge. (*Id.*)
   c. To develop specific bias, question *all* jurors you plan to challenge. (*Id.*)
   d. For each person challenged, develop, and be ready to articulate, a characteristic based on specific bias factors unrelated to group membership. Make careful notes and save them in your court file. (*Id.*)
   e. Finally, ask the trial court to make a record as to why it denied a prima facie showing by the defense, especially if the trial court follows proper procedure and does not require you to make any showing. (*Id.*)

***WHEELER* MISTAKES:**

1. Never assume that because the defense has not objected to your challenges, a *Wheeler* motion cannot be brought. (*See, e.g., People v. Lopez* (1991) 3 Cal.App.4th Supp 11. [trial court initiated *Wheeler* proceedings on its own motion. Holding: No error, as the right to an impartial jury drawn from a cross-section of the community is part of the

'American system.']; Coleman, *Meeting the Wheeler Challenge*, Vol. XIX, Prosecutor's Notebook, p. 13.)

2. Never offer justification for challenges unless the court has made a specific finding, on the record, that defense counsel has made a prima facie showing of discrimination. Doing so may provide the court with unnecessary explanations that may ultimately be used against you. (*See, e.g., People v. Cervantes* (1991) 233 Cal.App.3d 323, 335-337; Coleman, *Meeting the Wheeler Challenge*, Vol. XIX, Prosecutor's Notebook, p. 13.)

COMPARATIVE ANALYSIS:

1. When two or more prospective jurors share a non-cognizable group characteristic, and the minority member is challenged while the majority member remains, the reasonable inference is that the minority member was challenged on the basis of cognizable group bias (violating *Wheeler*). (Coleman, *Meeting the Wheeler Challenge*, Vol. XIX, Prosecutor's Notebook, p. 8.)
2. Such comparisons of those challenged with those who remain is known as *comparative analysis*. (*Id.*)
3. The California courts specifically rejected comparative analysis in *People v. Jones* (1997) 15 Cal.4th 119, 162, *People v. Johnson* (1989) 47 Cal.3d 1194, 1220-21, and in *People v. Landry* (1996) 49 Cal.App.4th 785, 791. (Coleman, *Meeting the Wheeler Challenge*, Vol. XIX, Prosecutor's Notebook, pp. 8-9.)
4. Federal courts, however, permit comparative analysis, and cases that start in California state courts may ultimately end up in federal courts. (*See, e.g., Turner v. Marshall* (9th Cir. 1997) 121 F.3d 1248.)
   a. In *Turner*, defendant was convicted in California Superior Court of first degree felony murder, robbery, and burglary on March 21, 1990. Defendant's *Wheeler* motion was denied by the trial court. The California Court of Appeal affirmed defendant's conviction, and the California Supreme Court denied review.

b. After defendant's habeas corpus writ was denied in the U.S. District Court, the Ninth Circuit found a prima facie case of prosecutorial discrimination and remanded the case back to the District Court to hear a *Batson* motion. The magistrate ultimately concluded that no *Batson* violation had occurred. (Coleman, *Meeting the Wheeler Challenge*, Vol. XIX, Prosecutor's Notebook, pp. 9-10.)

c. While the United States Supreme Court denied review, the Ninth Circuit remanded the case with instructions entitling Turner to a new trial. The Ninth Circuit further stated: ". . . a comparative analysis of jurors struck and those remaining is a well-established tool for exploring the possibility that facially race-neutral reasons are a pretext for discrimination." (Coleman, *Meeting the Wheeler Challenge*, Vol. XIX, Prosecutor's Notebook, p. 10 citing *Turner v. Marshall* (9th Cir. 1997) 121 F.3d 1248, 1251-1252.

5. Accordingly, attorneys should always use caution when exercising peremptory challenges to exclude minority members that share a non-cognizable characteristic with a majority member.

   a. In addition to the precautionary tactics listed above, try to develop multiple reasons for challenging each member, as any one reason susceptible to comparative analysis will not be found wanting on pretextual grounds in light of the other reasons. (Coleman, *Meeting the Wheeler Challenge*, Vol. XIX, Prosecutor's Notebook, p. 10.)

***WHEELER vs. BATSON*:**

1. *Wheeler* came first, in 1978, then *Batson*, in 1986.
2. *Wheeler* was a California Supreme Court case; *Batson* was a United States Supreme Court case.
3. *Wheeler* held that when making a claim that an opponent is challenging jurors on the basis of group bias, the standard of proof is a "*strong likelihood*." *Batson* held that the

standard of proof is a "*reasonable inference*." The courts are divided as to whether the standards are the same, or, if different, which is easier.

4. In Federal courts, the *Batson* standard is followed, whereas in California courts the *Wheeler* standard applies.
5. Attorneys in state courts should exercise caution whenever a *Wheeler/Batson* motion arises. The difference between these two standards was litigated in *Wade v. Terhune* (9th Cir.2000) 202 F.3d 1190, 1192, and again in *Cooperwood v. Cambra* (9th Cir. 2001) 245 F.3d 1042, 1047.
   a. The *Cooperwood* court held that "the Wheeler standard ... does not satisfy the constitutional requirement laid down in Batson." (*Cooperwood* (9th Cir. 2001) 245 F.3d at 1046.)
   b. Further, the *Cooperwood* court held that "regardless of the California Supreme Court's 'clarification' of the language used in *Wheeler*, we will continue to apply *Wade's* de novo review requirement whenever state courts use the "strong likelihood" standard, as these courts are applying a lower standard of scrutiny to peremptory strikes than the federal Constitution permits." (*Id.*; *See also, Wade v. Terhune* (9th Cir. 2000) 202 F.3d 1190, 1192.)

THE *BATSON* DECISION:

1. As noted above, *Batson* followed *Wheeler* and addressed the *Wheeler* issue in the federal courts. *Batson* also held that purposeful discrimination on the basis of group bias is illegal, however *Batson* applied the *reasonable inference* standard.
2. The Supreme Court in *Batson* held that:
   a. The 14th Amendment Equal Protection Clause forbids the prosecutor from challenging potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable to impartially consider the State's case against a black defendant, and

b. To establish a prima facie case of purposeful discrimination in selection of the petit jury, the defendant must show:
    1. That defendant is a member of a cognizable racial group,
    2. The prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race, and
    3. That the facts and any other relevant circumstances raise a reasonable inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race. (*Batson v. Kentucky* (1985) 476 U.S. 79, 94.)
c. Once the defendant makes a prima facie showing, the burden shifts to the State to come forward with a neutral explanation for challenging black jurors. (*Id.*)
    1. The court emphasized that the prosecutor's explanation need not rise to the level justifying exercise of a challenge for cause. (See *McCray v. Abrams* (1984) 750 F.2d 1113, 1132 [There are any number of bases on which a party may believe, not unreasonably, that a prospective juror may have some slight bias that would not support a challenge for cause but that would make excusing him or her desirable. Such reasons, if they appear to be genuine, should be accepted by the court, which will bear the responsibility of assessing the genuineness of the prosecutor's response and of being alert to reasons that are pre-textual.].)
    2. But the prosecutor may not rebut the defendant's prima facie case of discrimination by stating merely that he challenged jurors of the defendant's race on the assumption--or his intuitive judgment--that they would be partial to the defendant because of their shared race. Nor may the prosecutor rebut the defendant's case merely by denying that he had a discriminatory motive or "affirm[ing] [his] good faith in making individual selections." (*Batson v. Kentucky* (1985) 476 U.S. at 98, citing *Alexander v. Louisiana*, *supra*, 405 U.S., at 632.)

3. The prosecutor therefore must articulate a neutral explanation related to the particular case to be tried.

d. The trial court then will have the duty to determine if the defendant has established purposeful discrimination. (*Batson v. Kentucky* (1985) 476 U.S. at 98.)

VOIR DIRE OUTLINE

INTRODUCTION:

1. The right to a trial by jury is guaranteed by the Sixth Amendment of the United States Constitution; applied to the states through the 14th Amendment. (*Duncan v. Louisiana* (1968) 391 U.S. 145.)
2. California law also guarantees a trial by jury:
   a. "In criminal actions in which a felony is charged, the jury shall consist of 12 persons. In criminal actions in which a misdemeanor is charged, the jury shall consist of 12 persons or a lesser number agreed on by the parties in open court." (Cal. Const., Art. I, § 16.)

WHAT IS VOIR DIRE?

1. **Voir dire** (vwahr **deer** *also* vor **deer** *or* vor **dIr**), *n.* [Law French "to speak the truth"] A preliminary examination of a prospective juror by a judge or lawyer to decide whether the prospect is qualified and suitable to serve on a jury. Loosely, the term refers to the jury-selection phase of a trial. (Black's Law Dictionary, 8th Ed. 2004)
2. The term "Voir Dire" refers to the questioning of either a juror or a witness as to competency and qualifications. In the jury selection process, the Voir Dire examination properly consists of questions designed to expose the existence of specific bias, express or implied, in order to aid the attorneys in deciding whether to challenge for cause. (C.C.P § 223.)
3. A criminal jury is formed in the same manner as in civil actions. (P.C. § 1046; see *People v. Visciotti* (1992) 2 Cal.4th 1, 37, 41 [absent statutory authority for departure, trial court should follow procedures established by C.C.P. 222 in selecting prospective jurors].)

WHO CONDUCTS VOIR DIRE

1 Prior to 2000, C.C.P. 223 placed examination of prospective jurors in the hands of the trial court. However, the court was authorized, under a showing of good cause, to permit "supplemental" examination by the parties. (see C.C.P. § 473.)

2. In 2000, C.C.P. 223 was amended to provide that counsel for each party, on completion of the initial examination by the court, "shall have the *right* to examine, by oral and direct questioning, any and all of the prospective jurors." Also, the court may submit to the prospective jurors any additional questions requested by the parties that it deems proper.
3. Attorney Voir Dire is not without limitations. C.C.P. 223 gives trial courts broad discretion in the control attorney voir dire, setting the following limitations:
   a. The court may, in the exercise of its discretion, limit the oral and direct questioning of the prospective jurors by counsel.
   b. The court may specify the maximum amount of time that counsel for each party may question an individual juror.
   c. The court may specify an aggregate amount of time for each party, which can then be allocated among the prospective jurors by counsel.
   d. In all criminal cases, voir dire of prospective jurors shall, where practicable, take place in the presence of the other jurors.
   e. All questioning must relate only to the exercise of challenges for cause.
4. While both the court and attorneys may conduct voir dire, only counsel may challenge a juror. (C.C.P. § 225)

CHALLENGES:

1. There are two types of challenges to individual jurors: 'peremptory' and 'for cause.' (C.C.P. § 225(b).)
   a. 'Peremptory' challenges do not require counsel to state a reason, and permits counsel to exclude jurors who are qualified but are not desired by the party.
   b. 'For cause' challenges require counsel to demonstrate either general disqualification or the existence of specific bias in the challenged juror.

i. A juror may be generally disqualified if he/she lacks the statutory qualifications for a competent juror, (citizenship, residence, conviction of a felony, etc.)(C.C.P. § 203) or if he/she has a loss of hearing or other incapacity rendering the person incapable of performing a juror's duties. (C.C.P. § 228.)

ii. Through voir dire examination, counsel may discover the existence of facts which demonstrate a specific bias, either express or implied. Such facts would prevent or substantially impair the juror from acting with entire impartiality, and without prejudice to the substantial rights of any party. (C.C.P.§225(b)(1)); *People v. Caudillo* (2004) 122 Cal.App.4th 1417, 1429.)

2. Because defendants are guaranteed the right to a fair and impartial jury, and a juror challenged 'for cause' has a demonstrated specific bias, there are no limits on the number of 'for cause' challenges.
3. Because counsel is not required to state a reason for 'peremptory' challenges (unless challenge is objected to through *Wheeler* motion), the number of 'peremptory' challenges is limited, depending on two things:
   a. The number of defendants, and
   b. The potential sentence for a conviction.
      i. If the offense is punishable by a maximum of 90 days or less in the county jail, each side is entitled to six (6) peremptory challenges. (C.C.P. § 231(b).)
         1. When two or more defendants are jointly tried, and the offense is punishable by a maximum of 90 days or less in the county jail, their challenges shall be exercised jointly, but each defendant shall also be entitled to four (4) additional challenges which may be exercised separately, and the state shall also be entitled to additional challenges equal to the number of all the additional separate challenges allowed the defendants. (C.C.P. § 231(b).)
      ii. If the offense is punishable by death or imprisonment for life, each side is entitled to twenty (20) peremptory challenges. (C.C.P. § 231(a).)

iii. In all other cases, each side is entitled to ten (10) peremptory challenges. (C.C.P. § 231(a).)

1. When two or more defendants are jointly tried, and the offense is punishable by death, life imprisonment, or in all other cases, their challenges shall be exercised jointly, but each defendant shall also be entitled to five (5) additional challenges which may be exercised separately, and the people shall also be entitled to additional challenges equal to the number of all the additional separate challenges allowed the defendants. (C.C.P. § 231(a).)

4. To facilitate the intelligent exercise of both peremptory challenges and those for cause, parties may inform prospective jurors of the general facts of the case. (*People v. Ochoa* (2001) 26 Cal. 4th 398, 431; *People v. Ervin* (2000) 22 Cal.4th 48, 70.)

5. **Peremptory:**

   a. A prospective juror's view of the death penalty is a permissible race-neutral and group-neutral basis for exercising a peremptory challenge in a capital case. Such is the case even if that juror represents the only member of a cognizable group. (*People v. McDermott* (2002) 28 Cal. 4th 946, 970.)

   b. Because a peremptory challenge may be used for any reason, a prosecutor legitimately may exercise a peremptory challenge against a juror who is skeptical about imposing the death penalty, when this juror admits that it would be hard for him to impose the death penalty on a defendant who maintains his innocence, even if the jury finds defendant guilty. (*People v. Burgener* (2003) 29 Cal. 4th 833, 864; *People v. Catlin* (2001) 26 Cal.4th 81, 118, 109.)

6. **For Cause:**

   a. Assessing the qualifications of jurors challenged for cause is a matter falling within the broad discretion of the trial court. On appeal, the court will uphold the trial court's decision if it is fairly supported by the record, and accept as binding the trial court's determination as to the prospective juror's true state of

mind when the prospective juror has given conflicting or ambiguous statements. (*People v. Farnam* (2002) 28 Cal.4th 107, 132, opinion modified, 2002 WL 1763061 (Cal. 2002); *People v. Weaver* (2001) 26 Cal.4th 876, 910.)

b. In according deference on appeal to trial court rulings on motions to exclude for cause, appellate courts recognize that a trial judge who observes and speaks with a prospective juror and hears that person's responses (noting, among other things, the person's tone of voice, apparent level of confidence, and demeanor), gleans valuable information that simply does not appear on the record. (*People v. Caudillo* (2004) 122 Cal.App.4th 1417, 1428.)

c. Permissible challenges declaring the existence of a specific bias:

   i. Expressed:

      1. Inability to be impartial. (*People v. Fultz* (1895) 109 Cal. 258; *People v. Owens* (1899) 123 Cal. 482, 488; *People v. Moore* (1923) 64 Cal.App. 328, 329)

   ii. Implied:

      1. Statutory Grounds:

         A. Consanguinity or affinity within the fourth degree to any party, witness, or victim in the case. (C.C.P. § 225(a).)

         B. Standing in the relation of either party, or having previous business dealings with either party. (C.C.P. § 225(b).)

         C. Previous/pending jury/witness experience involving same parties, same specific offense or cause of action; or having served as a juror within one year previously in a criminal action involving the defendant. (C.C.P. § 225(c).)

         D. Juror has an interest in the outcome of the trial. (C.C.P. § 225(d).)

         E. Juror has an opinion or belief as to the merits of the People's case. (C.C.P. § 225(e).)

         F. Juror's state of mind evinces enmity against, or bias towards, either party. (C.C.P. § 225(f).)

G. Juror is party to a pending action that is set to begin before present case. (C.C.P. § 225(g).)

H. In potential death penalty case, juror entertains opinion that precludes finding defendant guilty. (C.C.P. § 225(h); see also, *Death Penalty Cases, infra.*)

2. Death Penalty Cases

A. The trial judge may excuse for cause a prospective juror who on voir dire expresses views about capital punishment, either for or against, that would prevent or substantially impair the performance of the juror's duties as defined by the court's instructions and the juror's oath. (*People v. Bolden* (2002) 29 Cal.4th 515, 537; *People v. Crittenden* (1994) 9 Cal.4th 83, 121, quoting *Wainwright v. Witt* (1985) 469 U.S. 412, 424.)

B. A prospective juror is properly excluded if he or she is unable to conscientiously consider all of the sentencing alternatives, including the death penalty where appropriate. (*People v. Lewis* (2001) 26 Cal. 4th 334, 352-353; *People v. Jenkins* (2000) 22 Cal.4th 900, 987.)

C. However, be alert for prospective jurors who might automatically impose the death penalty upon reaching a verdict of guilty. If the death penalty is imposed by a jury containing even one juror who would vote automatically for the death penalty without considering the mitigating evidence, the state is disentitled to execute the sentence. (*People v. Weaver* (2001) 26 Cal. 4th 876, 910; *Morgan v. Illinois* (1992) 504 U.S. 719, 729.)

d. Keep in mind, for defendant to preserve the right to assert on appeal that the trial court wrongly denied a challenge for cause, defendant must: (1) exercise a peremptory challenge to remove the juror in question; (2) use all of his or her peremptory challenges; and (3) communicate to the court dissatisfaction with

the jury selected. Failure to do any of these steps waives the right to appeal the denial. (*People v. Seaton* (2001) 26 Cal. 4th 598, 637.)

THE EFFECT OF *WHEELER*:

1. *People v. Wheeler* (1978) 22 Cal.3d 258, dealt with the use of peremptory challenges to remove prospective jurors on the basis of group bias, rather than specific bias.
   a. Group bias exists when a party presumes that certain jurors are biased merely because they are members of an identifiable (cognizable) group.
      i. To qualify as a cognizable group, the following requirements must be met:
         1. The members must share a common perspective arising from life experience in the group, and
         2. no other members of the community may be capable of adequately representing the group perspective. (Coleman, *Meeting the Wheeler Challenge*, Vol. XIX, Prosecutor's Notebook, pp. 2-4.)
      ii. Cognizable groups include the following:
         1. Race
            A. African-Americans. (see, e.g. *Wheeler)*
            B. Hispanics. (see, e.g. *People v. Perez* (1996) 48 Cal.App.4th 1310, 1315.)
            C. Asian-Americans. (cf., *People v. Lopez* (1991) 3 Cal.App.4th Supp. 11) [Chinese]; *People v. Williams* (1994) 26 Cal.App.4th Supp. 1 [Filipino].)
         2. Ethnicity
            A. Native Americans. (see, e.g. *United States v. Bauer* (9th Cir. 1996) 75 F.3d 1366.)
         3. Religion
            A. Jewish. (see, e.g. *People v. Johnson* (1989) 47 Cal.3d 1194.)
         4. Gender (unclear)
            A. The only California case found on pure gender basis alone is unciteable: *People v. Avitt* (1995) 35 Cal.App.4th 94 was ordered depublished by the Supreme Court on August 24, 1995.
            B. Examples of non-cognizable groups include :

1. Poor persons/low income. (see, e.g. *People v. Johnson* (1989) 47 Cal.3d 1194, 1214.)
2. Low education/blue collar workers. (see, e.g. *People v. Estrada* (1979) 93 Cal.App.3d 76, 91.)
3. Age. (see, e.g. *People v. Marbley* (1986) 181 Cal.App.3d 45, 48 [young people]; *People v. McCoy* (1995) 40 Cal.App.4th 778, 783 [people over 70].)
4. Naturalized citizens. (see, e.g. *People v. Gonzalez* (1989) 211 Cal.App.3d 1186, 1202 [dicta])

b. Bias based on association in any of the above cognizable groups is different from specific bias, which relates to the particular case on trial or the parties or witnesses thereto.

2. The law presumes that each party will use that party's challenges for cause and peremptory challenges "to remove those prospective jurors who appear most likely to be biased against him or in favor of his opponent; by so doing, it is hoped, the extremes of potential prejudice on both sides will be eliminated, leaving a jury as impartial as can be obtained from the available venire." (*People v. Wheeler* (1978) 22 Cal.3d 258, 274.)
   a. Evidence of potential bias may arise out of mere intuition. 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' upon entering the box the juror may have smiled at the defendant, for instance, or glared at him.
   b. Responsive to this reality, the law allows removal of a biased juror by a challenge for which no reason 'need be given,' i.e., publicly stated: in many instances the party either cannot establish his reason by normal methods of proof or cannot do so without causing embarrassment to the challenged venireman and resentment among the remaining jurors. (*People v. Wheeler* (1978) 22 Cal.3d 258, 275.)

3. The *Wheeler* court held that the right to trial by a jury drawn from a representative cross-section of the community is guaranteed equally and independently by the Sixth Amendment to the federal Constitution and by article I, section 16, of the California Constitution. (*Wheeler*, 22 Cal.3d at p. 272.)
    a. Further authority exists in the statutes: A party may not use a peremptory challenge to remove a prospective juror on the basis of an assumption that the prospective juror is biased merely because of his or her race, color, religion, sex, national origin, sexual orientation, or similar grounds. (C.C.P. § 231.5.)
4. While a party is not entitled to a petit jury that *proportionately* represents every group in the community, a party is constitutionally entitled to a jury that is as near an approximation of the ideal cross-section of the community as the process of random draw permits.
5. The *Wheeler* court explained that the rationale of [Supreme Court] decisions [on this issue], is that "in our heterogeneous society jurors will inevitably belong to diverse and often overlapping groups defined by race, religion, ethnic or national origin, sex, age, education, occupation, economic condition, place of residence, and political affiliation; that it is unrealistic to expect jurors to be devoid of opinions, preconceptions, or even deep-rooted biases derived from their life experiences in such groups; and hence that the only practical way to achieve an overall impartiality is to encourage the representation of a variety of such groups on the jury so that the respective biases of their members, to the extent they are antagonistic, will tend to cancel each other out." (*Wheeler*, 22 Cal.3d at pp 266-267.)
    a. Members of any such group may certainly still be excluded through peremptory challenge, provided that the basis for the challenge is *specific* bias.
    b. The language in *Wheeler* was based on *Thiel v. Southern Pacific Co*. (1946) 328 U.S. 217, 220: "The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community. [Citations.] This does not mean, of course, that every jury must contain representatives of all the economic,

social, religious, racial, political and geographical groups of the community; frequently such complete representation would be impossible. But it does mean that prospective jurors shall be selected by court officials without systematic and intentional exclusion of any of these groups." (*Wheeler*, 22 Cal.3d at p. 268.)

THE *WHEELER* SOLUTION:

1. If a party believes his opponent is using his peremptory challenges to strike jurors on the ground of group bias alone, he must:
   a. Raise the point in a timely fashion, and
   b. Make a prima facie case of such discrimination to the satisfaction of the court, by proceeding through a series of steps:
      i. First, he should make as complete a record of the circumstances as is feasible.
      ii. Second, he must establish that the persons excluded are members of a cognizable group within the meaning of the representative cross-section rule.
      iii. Third, from all the circumstances of the case he must show a *strong likelihood* that such persons are being challenged because of their group association rather than because of any specific bias. (*Wheeler*, 22 Cal.3d at p. 280.)
2. Upon presentation of this and similar evidence, and in the absence of the jury, the court must determine whether a *reasonable inference* arises that peremptory challenges are being used on the ground of group bias alone.
3. If the court finds that a prima facie case has been made, the burden shifts to the other party to show (if he can) that the peremptory challenges in question were not predicated on group bias alone.
   a. The showing need not rise to the level of a challenge for cause. But to sustain his burden of justification, the allegedly offending party must satisfy the court that he exercised such peremptories on grounds that were reasonably relevant to the particular case on trial or its parties or witnesses - i.e., for reasons of specific bias. (*Wheeler*, 22 Cal.3d at pp. 281-82.)

b. Because of the trial judge's knowledge of local conditions and local prosecutors, powers of observation, understanding of trial techniques, and judicial experience, reviewing courts must give *considerable deference* to the determination of whether or not a prima facie case has been established. (*People v. Trevino* (1997) 55 Cal.App.4th 396, 402; *People v. Wimberly* (1992) 5 Cal.App.4th 773.)

c. To ensure against undue prejudice to a party unsuccessfully making a peremptory challenge refused as racially discriminatory, courts may use sidebar conferences for the making of peremptory challenges, followed by appropriate disclosure in open court as to successful challenges. (*People v. Willis* (2002) 27 Cal.4th at p. 821-822; *See also*, *People v. Williams* (1994) 26 Cal.App.4th Supp. 1, 7-8.)

4. If the court finds that the burden of justification is not sustained as to *any* of the questioned peremptory challenges, the presumption of their validity is rebutted.

   a. Accordingly, the court must then conclude that the jury as constituted fails to comply with the representative cross-section requirement, and it must dismiss the jurors thus far selected. (*Wheeler*, 22 Cal.3d at p. 282.)

   b. **The *Willis* Solution:** While the *Wheeler* court held that the remaining venire must also be dismissed, and the jury selection process must begin anew, the *Willis* court held that such consequences would accomplish nothing more than to reward improper voir dire challenges and postpone trial. (*People v. Willis* (2002) 27 Cal.4th 811, 821.)

      1. *Willis* held that as long as the complaining party assents, the trial court has the discretion to issue appropriate orders short of outright dismissal of the remaining jury, including assessment of sanctions against counsel whose challenges exhibit group bias and reseating any improperly discharged jurors if they are available to serve. (*Id.*)

      2. If the complaining party effectively waives its right to a mistrial, preferring to take its chances with the remaining venire, ordinarily, the court should honor that waiver rather than dismiss the venire and subjecting the parties to additional delay. (*Id.* at 823-824.)

3. The Supreme Court in *Willis* did not specify what constitutes consent to an alternate remedy or an effective waiver of the right to a mistrial. However, the Court in *People v. Overby* (2004) 124 Cal.App.4th 1237, 22 Cal.Rptr. 233, 237 did address this issue.

    i. In *Overby,* the defense attorney immediately asked the court to order a black juror who was excused by the prosecutor to remain in the courtroom. The attorney then made a Batson-Wheeler motion, alleging that the prosecutor improperly used her peremptory challenge to exclude the black juror because of a presumed group bias based on her race. (Note, this was the first black juror that the prosecutor had peremptorily challenged.) (*Id.* at 237-237)

    ii. The defense attorney did not ask for any specific remedy. At a sidebar, the court granted the motion and elected to reseat the juror rather than excuse the entire panel. When the court asked the defense attorney if she wished to be heard on the court's decision, the attorney said "submit". The prosecutor objected. The court reseated the juror and voir dire resumed. (*Id*. at 237.)

    iii. The prosecutor immediately made a Batson-Wheeler motion that was denied. Later that day, the prosecutor asked for reconsideration of both rulings, and argued that the jury venire should be dismissed. At no time did the defense attorney state that she agreed that the venire should be dismissed. (*Id.*)

    iv. The Court found that defendant's counsel impliedly consented to the remedy of reseating a black juror as a remedy for the prosecutor's challenge to a jury in violation of *Batson-Wheeler* and that consent may be granted by counsel, who as a general rule. "has the authority to control the procedural aspects of the litigation." (*Id*, citing *In re Horton* (1991) 54 Cal.3d. 82, 94.)

5. **Note:** The defendant need not be a member of the excluded group in order to complain of a violation of the representative cross-section rule; yet if he is, and especially if in addition his alleged victim is a member of the group to which the majority of the remaining jurors belong, these facts may also be called to the court's attention. (*Wheeler*, 22 Cal.3d at p. 281.)
6. All claims in California courts that peremptory challenges are being used to strike jurors solely on the ground of group bias are to be governed by Cal. Const., art. I, § 16, and the procedure outlined by the court.
    a. The *Wheeler* court specifically rejected the rules outlined in *Swain v. Alabama*, as they provide less protection to California residents than the rules outlined in *Wheeler*. (*Wheeler*, 22 Cal.3d at p. 285.)

NON-*WHEELER* JUSTIFIABLE REASONS TO CHALLENGE JUROR

1. If the court requests justification for challenging a minority member, the following reasons have been upheld. (Coleman, *Meeting the Wheeler Challenge*, Vol. XIX, Prosecutor's Notebook, pp. 24-30.)
    a. Juror has negative experience with, or distrust of, law enforcement. (*See, e.g., People v. Mayfield* (1997) 14 Cal.4th 668, 724-26; *United States v. Bauer* (9th Cir. 1996) 84 F.3d 1549; *People v. Dunn* (1995) 40 Cal.App.4th 1039, 1046-47.)
    b. Juror is inattentive or provides inconsistent answers during voir dire. (*See, e.g., People v. Arias* (1996) 13 Cal.4th 92, 137-139; *People v. Perez* (1994) 29 Cal.App.4th 1313, 1322-25; *People v. Gonzalez* (1989) 211 Cal.App.3d 1186, 1200.)
    c. Juror behavior may alienate one side. (*See, e.g., Purkett v. Elem* (1995) 514 U.S. 765; *People v. Douglas* (1995) 36 Cal.App.4th 1681, 1690; *People v. Bernard* (1994) 27 Cal.App.4th 458, 467-69.)
    d. Other prior jury experience. (*See, e.g., People v. Hayes* (1996) 44 Cal.App.4th 1238, 1245; *People v. Crittenden* (1994) 9 Cal.4th 83, 118; *United States v. Power* (9th Cir. 1989) 881 F.2d 733, 740.)

e. Juror occupation. (*See, e.g., People v. Turner* (1994) 8 Cal.4th 137, 168-72; *People v. Barber* (1988) 200 Cal.App.3d 378, 389-94.)

***WHEELER* MOTIONS ON APPEAL:**

1. The court in *People v. Trevino*, *supra*, noted that the California Supreme Court has had to deal with very poor showings by *Wheeler* objectors, leaving precious little in the record for review.
2. Problems arise because the reviewing court is often forced to speculate on the record, since the party exercising the challenge need not justify the challenge unless a prima facie case of discrimination is shown, and *Wheeler* does not require the trial court to explain its reasons for not finding a prima facie case. (Coleman, *Meeting the Wheeler Challenge*, Vol. XIX, Prosecutor's Notebook, p. 7.)
3. Consequently, attorneys should anticipate the possibility of a *Wheeler* challenge and remember that an appellate court will do a further review of the record even if the trial court does not find a prima facie case. (*Id.*)
4. In anticipation that a *Wheeler* motion will be appealed, the following tactics should help create a record that will justify any challenges you make:
   a. If possible, keep on the jury one or more members of each cognizable group from which you are challenging persons. (Coleman, *Meeting the Wheeler Challenge*, Vol. XIX, Prosecutor's Notebook, p. 7-8.)
   b. If the court allows voir dire, be consistent in your questioning of jurors you plan to keep and those you plan to challenge. (*Id.*)
   c. To develop specific bias, question *all* jurors you plan to challenge. (*Id.*)
   d. For each person challenged, develop, and be ready to articulate, a characteristic based on specific bias factors unrelated to group membership. Make careful notes and save them in your court file. (*Id.*)
   e. Finally, ask the trial court to make a record as to why it denied a prima facie showing by the defense, especially if the trial court follows proper procedure and does not require you to make any showing. (*Id.*)

***WHEELER* MISTAKES:**

1. Never assume that because the defense has not objected to your challenges, a *Wheeler* motion cannot be brought. (*See, e.g.*, *People v. Lopez* (1991) 3 Cal.App.4th Supp 11. [trial court initiated *Wheeler* proceedings on its own motion. Holding: No error, as the right to an impartial jury drawn from a cross-section of the community is part of the 'American system.']; Coleman, *Meeting the Wheeler Challenge*, Vol. XIX, Prosecutor's Notebook, p. 13.)
2. Never offer justification for challenges unless the court has made a specific finding, on the record, that defense counsel has made a prima facie showing of discrimination. Doing so may provide the court with unnecessary explanations that may ultimately be used against you. (*See, e.g., People v. Cervantes* (1991) 233 Cal.App.3d 323, 335-337; Coleman, *Meeting the Wheeler Challenge*, Vol. XIX, Prosecutor's Notebook, p. 13.)

COMPARATIVE ANALYSIS:

1. When two or more prospective jurors share a non-cognizable group characteristic, and the minority member is challenged while the majority member remains, the reasonable inference is that the minority member was challenged on the basis of cognizable group bias (violating *Wheeler*). (Coleman, *Meeting the Wheeler Challenge*, Vol. XIX, Prosecutor's Notebook, p. 8.)
2. Such comparisons of those challenged with those who remain is known as *comparative analysis*. (*Id.*)
3. The California courts specifically rejected comparative analysis in *People v. Jones* (1997) 15 Cal.4th 119, 162, *People v. Johnson* (1989) 47 Cal.3d 1194, 1220-21, and in *People v. Landry* (1996) 49 Cal.App.4th 785, 791. (Coleman, *Meeting the Wheeler Challenge*, Vol. XIX, Prosecutor's Notebook, pp. 8-9.)

4. Federal courts, however, permit comparative analysis, and cases that start in California state courts may ultimately end up in federal courts. (*See, e.g., Turner v. Marshall* (9th Cir. 1997) 121 F.3d 1248.)
    a. In *Turner*, defendant was convicted in California Superior Court of first degree felony murder, robbery, and burglary on March 21, 1990. Defendant's *Wheeler* motion was denied by the trial court. The California Court of Appeal affirmed defendant's conviction, and the California Supreme Court denied review.
    b. After defendant's habeas corpus writ was denied in the U.S. District Court, the Ninth Circuit found a prima facie case of prosecutorial discrimination and remanded the case back to the District Court to hear a *Batson* motion. The magistrate ultimately concluded that no *Batson* violation had occurred. (Coleman, *Meeting the Wheeler Challenge*, Vol. XIX, Prosecutor's Notebook, pp. 9-10.)
    c. While the United States Supreme Court denied review, the Ninth Circuit remanded the case with instructions entitling Turner to a new trial. The Ninth Circuit further stated: ". . . a comparative analysis of jurors struck and those remaining is a well-established tool for exploring the possibility that facially race-neutral reasons are a pretext for discrimination." (Coleman, *Meeting the Wheeler Challenge*, Vol. XIX, Prosecutor's Notebook, p. 10 citing *Turner v. Marshall* (9th Cir. 1997) 121 F.3d 1248, 1251-1252.
5. Accordingly, attorneys should always use caution when exercising peremptory challenges to exclude minority members that share a non-cognizable characteristic with a majority member.
    a. In addition to the precautionary tactics listed above, try to develop multiple reasons for challenging each member, as any one reason susceptible to comparative analysis will not be found wanting on pretextual grounds in light of the other reasons. (Coleman, *Meeting the Wheeler Challenge*, Vol. XIX, Prosecutor's Notebook, p. 10.)

***WHEELER vs. BATSON*:**

1. *Wheeler* came first, in 1978, then *Batson*, in 1986.
2. *Wheeler* was a California Supreme Court case; *Batson* was a United States Supreme Court case.
3. *Wheeler* held that when making a claim that an opponent is challenging jurors on the basis of group bias, the standard of proof is a "*strong likelihood*." *Batson* held that the standard of proof is a "*reasonable inference*." The courts are divided as to whether the standards are the same, or, if different, which is easier.
4. In Federal courts, the *Batson* standard is followed, whereas in California courts the *Wheeler* standard applies.
5. Attorneys in state courts should exercise caution whenever a *Wheeler*/*Batson* motion arises. The difference between these two standards was litigated in *Wade v. Terhune* (9th Cir.2000) 202 F.3d 1190, 1192, and again in *Cooperwood v. Cambra* (9th Cir. 2001) 245 F.3d 1042, 1047.
    a. The *Cooperwood* court held that "the Wheeler standard ... does not satisfy the constitutional requirement laid down in Batson." (*Cooperwood* (9th Cir. 2001) 245 F.3d at 1046.)
    b. Further, the *Cooperwood* court held that "regardless of the California Supreme Court's 'clarification' of the language used in *Wheeler*, we will continue to apply *Wade's* de novo review requirement whenever state courts use the "strong likelihood" standard, as these courts are applying a lower standard of scrutiny to peremptory strikes than the federal Constitution permits." (*Id.*; *See also, Wade v. Terhune* (9th Cir. 2000) 202 F.3d 1190, 1192.)

THE *BATSON* DECISION:

1. As noted above, *Batson* followed *Wheeler* and addressed the *Wheeler* issue in the federal courts. *Batson* also held that purposeful discrimination on the basis of group bias is illegal, however *Batson* applied the *reasonable inference* standard.
2. The Supreme Court in *Batson* held that:

a. The 14th Amendment Equal Protection Clause forbids the prosecutor from challenging potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable to impartially consider the State's case against a black defendant, and
b. To establish a prima facie case of purposeful discrimination in selection of the petit jury, the defendant must show:
    1. That defendant is a member of a cognizable racial group,
    2. The prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race, and
    3. That the facts and any other relevant circumstances raise a reasonable inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race. (*Batson v. Kentucky* (1985) 476 U.S. 79, 94.)
c. Once the defendant makes a prima facie showing, the burden shifts to the State to come forward with a neutral explanation for challenging black jurors. (*Id.*)
    1. The court emphasized that the prosecutor's explanation need not rise to the level justifying exercise of a challenge for cause. (See *McCray v. Abrams* (1984) 750 F.2d 1113, 1132 [There are any number of bases on which a party may believe, not unreasonably, that a prospective juror may have some slight bias that would not support a challenge for cause but that would make excusing him or her desirable. Such reasons, if they appear to be genuine, should be accepted by the court, which will bear the responsibility of assessing the genuineness of the prosecutor's response and of being alert to reasons that are pre-textual.].)
    2. But the prosecutor may not rebut the defendant's prima facie case of discrimination by stating merely that he challenged jurors of the defendant's race on the assumption--or his intuitive judgment--that they would be partial to the defendant because of their shared race. Nor may the prosecutor rebut the defendant's case merely by denying that he had a discriminatory motive or

"affirm[ing] [his] good faith in making individual selections." (*Batson v. Kentucky* (1985) 476 U.S. at 98, citing *Alexander v. Louisiana*, *supra*, 405 U.S., at 632.)

3. The prosecutor therefore must articulate a neutral explanation related to the particular case to be tried.

d. The trial court then will have the duty to determine if the defendant has established purposeful discrimination. (*Batson v. Kentucky* (1985) 476 U.S. at 98.)

Voir Dire.

If an allegation of juror misconduct occurs during voir dire then the obvious remedy is to excuse the juror either on a peremptory challenge or a challenge for cause. Every prosecutor should be accurately aware of *Wheeler* challenges when excusing a juror. Thus, if a juror is being excused for bias then the record needs to be clear about the reason the juror is being excused. (***People v. Wheeler*** (1978) 22 Cal.3d 258.) Moreover, in order to prevent error the record needs to be clear that the juror has not been excused for an impermissible reason such as race, gender or religion, etc.

Obviously, bias is a reason for excusing a juror, however *not* articulating why you believe the juror is biased may hurt you later on appeal. The best way to avoid error is to get the defense to stipulate to excusing the juror; usually, neither party wants a juror who is not forthcoming or acting in some unusual or inattentive manner.

To find actual bias on the part of an individual juror so as to allow a challenge for cause, the court must find the existence of a state of mind with reference to the case or the parties that would prevent the prospective juror from acting with entire impartiality and without prejudice to the substantial rights of either party. (***People v. Horning***, 2004 Daily Journal D.A.R. 14, 997 (Dec. 16, 2004); 22 Cal. Rptr.3d 305.)

If a prospective juror fails to disclose pertinent information, or provides erroneous information which is discovered before the jury is sworn then the proper remedy is a challenge for cause as evidencing implied bias. (**Code of Civil Procedure** sections 226, 228, 229, 230; ***People v. Morris*** (1991) 53 Cal.3d 152, 183-184.)

Moreover, misconduct on voir dire is not technically jury misconduct because these members of the public are not part of any jury panel until they are sworn in.

"**WHEELER**." People v. Wheeler (1978) 22 Cal.3d 258. Motion to quash a jury venire and repeat jury selection, alleging a discriminatory exercise of peremptory challenges to exclude members of a cognizable group on a biased basis. The Equal Protection clause of the Fourteenth Amendment forbids either side of a lawsuit to excuse a juror based on a "group bias." Batson v. Kentucky (1986) 476 U.S. 79 [90 L.Ed.2d 69, 106 S.Ct. 1712]; see also article I, section 16 of the California Constitution.

"Peremptory challenges traditionally have been viewed as one means of assuring the selection of a qualified and unbiased jury (*Batson at p. 91*) to be asserted by either the defense or prosecution on his or her own dislike, without showing any cause without reason or for no reason, arbitrarily and capriciously. Courts have generally tried to accommodate these two competing interests: the historical privilege of peremptory challenge free of judicial control and the constitutional prohibition on exclusion of persons from jury service on account of race. (*Batson at p. 91.*)" People v. Williams (1997) 16 Cal.4th 635, 663.

The moving party bears the initial burden of making a prima facie showing that the opposing party has exercised its peremptory challenges on the basis of a group bias. (*Batson at pp. 96-97.)*[1/] The requisite of such a showing include proof that "the persons excluded are members of a cognizable group" and that "all the circumstances of the case … show a strong likelihood ("reasonable inference") that such persons are being challenged because of their group association rather than because of any specific bias." (*Wheeler, supra, 22 Cal.3d at p. 280*.) Once this showing has been made, the burden shifts to the other party "to articulate a race neutral explanation for striking the juror." (*Batson at pp. 97-98*; *People v. Alvarez (1996) 14 Cal.4th 155, 193.*) If the trial court requests such an explanation, it is generally presumed the prima facie showing was made.

"Under *Wheeler* and *Batson,* if a party believes his opponent is using his peremptory challenges to strike jurors on the ground of group bias alone, he must raise the point in timely fashion and make a prima facie case of such discrimination to the satisfaction of the court. First, ... he should make a complete record of the circumstances as is feasible. Second, he must establish that the persons excluded are members of a cognizable group .... Third, from all the circumstances of the case, he must show a strong likelihood that such persons are being challenged because of their group association." People v. Welch (1999) 20 Cal.4th 701, 745. Recently this "strong likelihood" standard of part three has been interpreted to mean "reasonable inference." People v. Box (2000) 23 Cal.4th 1153, 1188 fn. 7. On review, "if the record suggests grounds on which the prosecutor might reasonably have challenged the jurors, we affirm that ruling." People v. Johnson (2003) 30 Cal.4th 1302, 1325 (**Cert.Gtd. by USSC** on 1-7-05)), People v. Howard (1992) 1 Cal.4th 1132, 1155.

> "Absent intentional discrimination, parties should be free to exercise their peremptory strikes for any reason or no reason at all." (**Hernandez v. New York (1991) 500 U.S. 352** [114 L.Ed.2d 395, 414, 111 S.Ct. 1859] (conc. opn by O'Conner, J.)

"The proper focus of a *Batson/Wheeler* inquiry, of course, is on the subjective *genuineness* of the race-neutral reasons given for the peremptory challenge, *not* on the objective *reasonableness* of the reasons." People v. Reynoso (2003) 31 Cal.4th 903, 924, citing *Purkett, supra, 519 U.S. at p. 769* (emphasis included).

"Only then does the burden shift to the prosecution to explain adequately the

racial exclusion. (*Batson at p. 94*) But the prosecutor's explanation need not rise to the level justifying the exercise of a challenge for cause. (*Batson at p. 97*) Rather, adequate justification by the prosecutor may be no more than a hunch about the prospective juror, so long as it shows that the peremptory challenges were exercised for reasons other than impermissible group bias and not simply as a 'mask for race prejudice' (*Powers v. Ohio, 499 U.S. at p. 416*)" People v. Williams (1997) 16 Cal.4th 635, 664.

Under **People v. Wheeler (1978) 22 Cal.3d 258**, the remedy is a motion to quash a jury venire and repeat jury selection, alleging a discriminatory exercise of peremptory challenges to exclude members of a cognizable group on a biased basis. *Wheeler* was a response to the use of peremptory challenges to exclude jurors solely on the basis of racial, religious, or similar grounds. People v. Snow (1987) 44 Cal.3d 216, 222. However, if the aggrieved party consents, other remedies are available, such as denying the challenged "peremptory and seating the juror." People v. Willis (2002) 27 Cal.4th 811.

ΛThere is a presumption that challenges are being exercised in a constitutional manner. People v. Reynoso (2003) 31 Cal.4th 903, 908; People v. Clair (1992) 2 Cal.4th 629, 652; People v. Hall (1989) 208 Cal.App.3d 34, 39.

Exclusion of one or a small number of a cognizable class does not establish a prima facie showing. People v. Wright (1990) 52 Cal.3d 367, 399; People v. Harvey (1984) 163 Cal.App.3d 90, 110-112; People v. Rousseau (1982) 129 Cal.App.3d 526, 536-537; see also People v. Howard (1991) 1 Cal.4th 1132, 1154. However, if other factors such as the race of the defendant and/or the victim which illustrates the strikes were made on the basis of group bias, one or two strikes may constitutes a prima facie showing. People v. Moss (1986) 188 Cal.App.3d 268, 275-278. In People v. Christopher (1991) 1 Cal.App.4th 666, the court held that one strike may be sufficient, but generally it must be a "pattern." A *Batson* challenge must be granted when even only one of the strikes is improperly motivated. People v. Silva (2001) 25 Cal.4th 345, 386; People v. Granillo (1987) 197 Cal.App.3d 110.

If an explanation for the use of peremptory challenges would reveal trial strategy, the party may request an in camera hearing. Georgia v. McCollum (1992) 505 U.S. 42 [120 L.Ed.2d 33, 50, 112 S.Ct. 2348]. And the California Supreme Court has noted the "[c]ontemporaneous notes by the prosecutor for the reasons for peremptory challenges may prove to be indispensable to the *Wheeler* process. We also encourage the trial courts to make whatever notations are feasible when jurors are being examined." People v. Fuentes (1991) 54 Cal.3d 707, 719, fn. 6.

California does not apply a "comparative analysis" approach where explanations for excusing jurors are inconsistent with other jurors who are not in the same equal protection classifications (race, sex, ethnicity). "The rule is clear in this state, ..., that in evaluating the sufficiency of the prosecutor's explanations, a reviewing court will not engage in such a comparative analysis regarding persons the prosecutor accepted." People v. Ervin (2000) 22 Cal.4th 48, 76; see also People v. Johnson (2003) 30 Cal.4th 1302, 1318-1325 (**Cert.Gtd. by USSC** on 1-7-05)) "[W]e do not engage in a comparative analysis of various juror responses to evaluate the good faith of the prosecutor's stated reasons for excusing a particular juror, because comparative analysis of jurors unrealistically ignores the variety of factors and considerations that go into a lawyer's decision to select certain jurors while challenging others that appear to be similar." People v. Williams (1997) 16 Cal.4th 635, 664. And "[i]t is of course 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.

Miller-El v. Cockrell (2003) 537 U.S. 322 [154 L.Ed.2d 931, 123 S.Ct. 1029]
[federal court must consider whether state prosecutor excluded jurors in capital murder trial based on race in violation of *Batson;* disparate questioning of Black venire members to develop grounds for peremptory challenges may show discriminatory intent]

United States v. Martinez-Salazar (2000) 528 U.S. 304
[145 L.Ed.2d 792, 120 S.Ct. 774]
[although potential juror should have been excused for cause, defendant's exercise of peremptory challenges to remove juror did not impair his peremptory challenges; "We reject the Government's contention (which California followed) that under federal law a defendant is obligated to use a peremptory challenge to cure the judge's error. We hold that if the defendant elects to cure such an error by exercising a peremptory challenge and is subsequently convicted by a jury on which no biased juror sat, he has not been deprived of any rule-based or constitutional right." (120 S.Ct. at p. 778.) See also Poland v. Stewart (9th Cir. 1999) 169 F.3d 573; United States v. Gonzalez (9th Cir. 2000) 214 F.3d 1109 (reversal required for failure to excuse for cause juror with experience similar to conduct alleged against defendant and who may not be fair and impartial); but see People v. Ayala (2000) 23 Cal.4th 225, 261 ("Defendant concedes that he did not use all of his peremptory challenges. Accordingly, he has waived his claim that the prospective jurors should have been excused for cause. [citing *Martinez-Salazar*]"]

Campbell v. Louisiana (1998) 523 U.S. 392 [140 L.Ed.2d 551, 118 S.Ct. 1419]
[white defendant has standing for 14th Amendment objection to exclusion of blacks from grand jury based on prima facie showing that no blacks had been grand jury foreman for sixteen years]

Purkett v. Elem (1995) 514 U.S. 765 [131 L.Ed.2d 834, 115 S.Ct. 1769]
[prosecutor's explanation for striking black jurors from panel held to be race neutral; juror #1: long unkempt hair; juror #2: belief that because juror had a gun pointed at him during a robbery would believe that a robbery required a gun; court held that in a *Batson* challenge when a defendant has made out a prima facie case of racial discrimination, the race-neutral reasons that the prosecutor gives to rebut that case do not have to be intrinsically plausible. (131 L.Ed.2d at p. 839); Jurors may be excused based on 'hunches' and even 'arbitrary' exclusion is permissible, so long as the reasons are not based on impermissible group bias. (131 L.Ed.2d at pp. 839-840); It is the defendant's burden to establish that the prosecutor's stated reasons for excusing a prospective juror are pretextual and that the prosecutor acted with a discriminatory intent. (131 L.Ed.2d at p. 839)) "[T]he ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike." (*Ibid.*)]

J.E.B. v. Alabama (1994) 511 U.S. 127 [128 L.Ed.2d 89, 114 S.Ct. 1419]
[*Batson* rule bars exclusion of all male jurors by prosecution. "A trial lawyer's judgments about a juror's sympathies are sometimes based on experienced hunches and educated guesses ..." (conc. opn. of O'Conner)]

Georgia v. McCollum (1992) 505 U.S. 42 [120 L.Ed.2d 33, 112 S.Ct. 2348]
[*Batson* rule applies to defendants as well as the prosecution; see also People v. Pagel (1986) 186 Cal.App.3d Supp. 1]

Trevino v. Texas (1992) 503 U.S. 562 [118 L.Ed.2d 193, 112 S.Ct. 1547]
[Hispanic defendant may challenge exclusion of blacks from jury]

Hernandez v. New York (1991) 500 U.S. 352 [114 L.Ed.2d 395, 111 S.Ct.1859]
["Official action will not be held unconstitutional solely because it produces a racially disproportionate impact. .... Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." (114 L.Ed.2d at p. 406.) DA removed 4 Hispanic jurors, 2 because they had relatives with criminal convictions and 2 who were hesitant to accept the interpreter as the final arbiter of what was said by each witness; defendant, victim and all witnesses were Hispanic; Court upheld the strikes]

Powers v. Ohio (1991) 499 U.S. 400 [113 L.Ed.2d 411, 111 S.Ct. 1364]
[white defendant may challenge exclusion of blacks from the jury itself (see also *Wheeler*, 22 Cal.3d at p. 281.)]

Holland v. Illinois (1990) 493 U.S. 474 [107 L.Ed.2d 905, 110 S.Ct. 803]
[white defendant may challenge exclusion of blacks from the jury venire]

Griffith v. Kentucky (1987) 479 U.S. 314 [93 L.Ed.2d 649, 107 S.Ct. 708]
[*Batson* applied retroactively]

Batson v. Kentucky (1986) 476 U.S. 79 [90 L.Ed.2d 69, 106 S.Ct. 1712]
[prosecutor crosses the line between what is constitutionally permissible and impermissible in exercising peremptory challenges by using those challenges "to exclude blacks [or others] from the jury fro reasons wholly unrelated to the outcome of the particular case on trial or deny blacks or others the same right and opportunity to participate in the administration of justice enjoyed by the white population." (p. 91)]

Vasquez v. Hillery (1986) 474 U.S. 254 [88 L.Ed.2d 598, 106 S.Ct. 617]
[exclusion of blacks from county grand jury warranted habeas corpus relief despite the fact defendant received a fair trial]

Hobby v. United States (1984) 468 U.S. 339 [82 L.Ed.2d 260,104 S.Ct. 3093]
[defendant may raise a due process claim on the basis of discriminatory selection of grand jury forepersons, regardless of whether he is a member of the groups excluded; white male defendant may challenge exclusion of women and African-Americans from grand jury foreperson in federal court]

Castaneda v. Partida (1977) 430 U.S. 482 [51 L.Ed.2d 498, 97 S.Ct. 1272]
[to establish equal protection violation in grand jury selection one must (1) show that the excluded group is a cognizable class; (2) demonstrate a degree of underrepresentation given the proportion of the excluded group in the total population compared to the proportion called to serve as grand jurors over a significant period of time; and (3) show that the selection procedure is susceptible of abuse or is not racially neutral to bolster the presumption of discrimination raised by the statistical disparity (*id* at pp. 494-495)]

People v. Morrison (2004) 34 Cal.4th 698, 709-710 (21 Cal.Rptr.3d 682)
[failure to raise timely *Wheeler-Batson* challenge at trial despite the fact the prosecutor voluntarily and on his own initiative gave reasons for

challenging the five African-American jurors and defense made no comments and the trial court did not make any kind of finding still did not excuse the failure to object]

People v. Griffin (2004) 33 Cal.4th 536, 553-557 (15 Cal.Rptr.3d 743)
[*Wheeler* motion properly denied by trial court without requiring a justification by the prosecutor; after 12 jurors and two of the four alternates were selected and sworn, the defense made a *Wheeler* motion, the prospective juror stated he had never served as a juror, unmarried, and worked for the railroad and implied he could choose either death or LWOP, was a recent high school graduated and had relatives who had been arrested and/or incarcerated and expressed strong feelings about the use and effects of alcohol; "We sustain the ruling when the record discloses grounds upon which the prosecutor properly might have exercised the peremptory challenges against the prospective jurors in question." (p. 555)]

People v. Cleveland (2004) 32 Cal.4th 704, 730-734 (11 Cal.Rptr.3d 236)
[*Wheeler* motion properly denied: Juror "S" stated "I feel it would be difficult to sentence anyone to death … or participating in the decision." (see *Davenport 11 Cal.4th 1171, 1202*) ; Juror "L" stated "I'm not in favor of the death penalty but I do understand that by law it is acceptable at time necessary"; Juror "J: stated her son had been in juvenile detention and stated she believed in upholding the law; and finally Juror "F" was a LVN and a psychiatric tech and her husband worked at a group home; all four were excused by the prosecution after which the defense made separate *Wheeler* motions which were denied and the trial court found no prima facie showing; overall the prosecutor used 14 peremptory challenges against African-Americans and the final jury panel included four African-Americans (including one alternate) and two of the three capital defendants and both murder victims were African-American; court also noted that a party questioning juror "in more than desultory voir dire, or indeed asked them any questions at all (*Wheeler at p. 281)*." (p. 733); and although a single race-based challenge is improper, remaining percentage and excusal percentage is "probative" (p. 734, citing *Turner, 8 Cal.4th 137, 168)*]

People v. Reynoso (2003) 31 Cal.4th 903
[trial court's conclusion that prosecutor's exercise of peremptory challenges was sincere and genuine is entitled to great deference on appeal; "It is well settled that peremptory challenges based on counsel's observations are not improper. … 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 bare looks and gestures of another … In *Fuentes,* we explained that nothing in *Wheeler* disallows reliance on the prospective jurors' body language or manner of answering questions as a basis for rebutting a prima facie case of exclusion for group bias." (p. 917) And the court noted the race/ethnicity of both the defendant and victim may be relevant factors in the analysis. (p. 926, fn. 7; see also *People v. Johnson (2003) 30 Cal.4th 1325, 1323*)]

People v. Yeoman (2003) 31 Cal.4th 93, 115-118

[excusing 4 African American jurors proper, judge found no prima facie showing as to three: Margaret B. was a 42 year old surgical nurse who stated she did not want to serve, could not judge another person and felt frustrated that the Supreme Court is far to the right; Theresa H. was a 32 year old computer system administrator who did not agree with reinstating the death penalty in 1978 and the causes of crime were the haves and the haves not; and Vera M. was a 52 year old seamstress left blank written questions regarding crime and the death penalty;

"Defense counsel's cursory reference to prospective jurors by name, number, occupation and race were insufficient. … without making any effort to set out the other relevant circumstances, such as the prospective jurors' individual characteristics, the nature of the prosecutor's voir dire, or the prospective jurors' answers to questions." (p. 115; see also People v. Heard (2003) 31 Cal.4th 946, 969-971)

Juror Issac J. was a 43 year old correction officer at Vacaville (who the trial court found a prima facie showing) who the prosecutor stated was excused had not answered the written question about the death penalty and when questioned said he had not given the subject much thought (which was the prosecutor's only oral area of questioning) was a race neutral reason which both the trial court and the Supreme Court accepted]

People v. Jones (2003) 30 Cal.4th 1084, 1102-1105

[the only two black jurors were excused for apparent race neutral reasons and hence no prima facie showing; juror who initially expressed reluctance to impose capital punishment despite being rehabilitated by defense counsel was properly excused by a prosecution peremptory challenge and other juror excused based on leaving employment at CRC and expressed difficulty in making decisions]

People v. Johnson (2003) 30 Cal.4th 1302

(Cert.Gtd. by USSC and then dismissed for lack of jurisdiction (124 S.Ct. 1833) because all issues not final; appellate court decided remaining issues in unpublished opinion; then **Cert.Gtd. by USSC** on 1-7-05))

["We conclude that *Wheeler's* terms, a 'strong likelihood' and a 'reasonable inference,' refers to the same test, and this test is consistent with *Batson*. Under both *Wheeler* and *Batson*, to state a prima facie case, the objector must show that it is more likely than not the other party's peremptory challenges, if unexplained, were based on impermissible group bias. We also conclude that *Batson* does not require state reviewing courts to engage in comparative juror analysis for the first time on appeal." (p. 1306)

"Thus, *Batson* permits a court to require the objector to present, not merely 'some evidence' permitting the inference, but 'strong evidence' that makes discriminatory intent more likely than not if the challenges are not explained." (p. 1316)

Under *Wheeler* and *Batson*, "to state a prima facie case, the objector must show that it is more likely than not the other party's peremptory challenges, if unexplained, were based on impermissible

group bias." (p. 1318)

"In support of his position (for comparative analysis), defendant cites *Miller-El [537 U.S. 322]*, but that case merely provides another example of a reviewing court considering evidence of comparative juror analysis after it had been presented to the trial court." (p. 1321)

"The *Batson* court rejected the argument that its holding would 'create serious administrative difficulties' and noted that California had not found its own version to be 'burdensome for trial judges.' However, requiring trial courts to engage in comparative juror analysis sua sponte in the middle of the trial *would* be burdensome. Moreover permitting appellate courts to overturn trial court decisions based on their own nuances of the trial not apparent from the record, is inconsistent with the deference reviewing courts necessarily give trial courts. We see nothing in the high court decisions requiring us to defer less to trial courts or engage in our own comparative juror analysis for the first time on appeal." (p. 1324, emphasis included)

And Court upheld prosecutor's dismissing all three prospective African American jurors and found no prima facie showing; based on (#1) "C.T." child less (this was a baby death case), no arrest by police for robbery of her home, and refused to answer questionnaire questions about prosecution and defense attorneys (no argument by defense to this juror), (#2) "S.E." parent arrested for robbery 30 years ago and did not know if she could be fair, (#3) "R.L." sister who used drugs, and her answers on the questionnaire indicated a misunderstanding of certain issues (pp. 1325-1328)]

People v. Boyette (2002) 29 Cal.4th 381, 419-423 (modified 29 Cal.4th 1018a)
[trial court upheld finding of no prima facie showing of group bias by excusing four of six African-American female prospective jurors who all favored LWOP over the death penalty; "Although the three jurors in question were all African-American women, defense counsel did not provide any other reason why he believed group bias motivated the prosecutor." (p. 422)]

People v. Gutierrez (2002) 28 Cal.4th 1083, 1121-1126
[*Wheeler* claim for excusing Hispanic jurors properly denied; "While the fact that the jury included members of a group allegedly discriminated against is not conclusive, it 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." (p. 1123) "True in *People v. Trevino* (1985) 39 Cal.3d 667, 684, we held that Spanish surnamed sufficiently describes the cognizable class Hispanic under *Wheeler* – but only where no one knows at the time of the challenge whether the Spanish-surnamed prospective juror is Hispanic." Here juror indicated she was white and not Hispanic; other jurors excused because (1) father had been imprisoned for drug-related charges and (2) would rely too heavily on psychologists' testimony; (3) appeared extremely emotional and overwhelmed by outside stresses; (4) initially requested to be relieved; and (5) prior experiences with law enforcement were negative]

People v. McDermott (2002) 28 Cal.4th 946, 966-981

[right after selecting a jury, juror disclosed misconduct and was removed by stipulation, trial court reopened jury selection and another juror selected; during this process *Wheeler/Batson* challenge properly rejected as prosecution's strikes based on juror responses to imposition of the death penalty; "... the 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." (p. 969) The prosecutor responded to the challenge by general statements attributable to all African-American jurors excused; "Although we agree that it is generally preferable to have individual reasons and individual findings for each challenged juror, we have never required them." (p. 980)]

People v. Farnam (2002) 28 Cal.4th 107, 138

["prosecutor may reasonably surmise that a close relative's adversary contact with the criminal justice system might make a prospective juror unsympathetic to the prosecution" and hence is a race-neutral reason]

☞ People v. Willis (2002) 27 Cal.4th 811

[trial court's failure to seat a new/different jury panel after finding defendant used peremptory challenges in racially biased manner was proper based on defense counsel's systematic removal of white males from the jury was error; instead the trial court upheld the peremptory challenges; "... the trial court, acting with the prosecutor's assent [the aggrieved party], had discretion to consider and impose remedies or sanctions short of outright dismissal of the entire jury venire." (p. 814); see also *People v. Williams 26 Cal.App.4th Supp. 1*.

"We think the benefits of discretionary alternatives to mistrial and dismissal of the remaining jury venire outweigh any possible drawbacks. As the present case demonstrates, situations can arise in which the remedy of mistrial and dismissal of the venire accomplish nothing more than to reward improper voir dire challenges and postpone trial. Under such circumstances, and with the assent of the complaining party, the trial court should have the discretion to issue appropriate orders short of outright dismissal of the remaining jurors; including assessment of sanctions against counsel whose challenges exhibit group bias and reseating any improperly discharged jurors if they are available to serve. In the event improperly challenged jurors have been discharged, some cases have suggested that the court might allow the innocent party additional peremptory challenges." (pp. 821-822)

"Additionally, to ensure against undue prejudice to the party unsuccessfully making the peremptory challenge, the courts may employ the *Williams* procedure of using sidebar conferences followed by appropriate disclosure in open court as to *successful* challenges. (See *Williams, supra,* 26 Cal.App.4th at pp. Supp. 7-8, distinguishing *People v. Harris (additional citations omitted.)*" (p. 822)

"We note that the [ABA] 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.' (ABA Stds. for Crim. Justice, Discovery and Trial by Jury (3d ed. 1996) std. 15-2.7, p. 167.) But requiring all challenges to be made at sidebar may be unduly burdensome. Trail 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. For example, to avoid prejudicing the party making unsuccessful challenges in open court, the court in its discretion might 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." (p. 822)]

People v. Catlin (2001) 26 Cal.4th 81, 115-119

[prosecution validly excused Juror Mr. W. for religious view that "God is the only one who has the right to take a life" and Juror R who stated she had doubts about imposing the death penalty based on her church; "We reject ... defendant's contention that we should compare the responses of jurors who were excused with the responses of those who were not excused in analyzing whether the trial court's reasoned effort to evaluate the prosecutor's claims satisfied *Wheeler* and *Batson*." (fn. 5)]

People v. Anderson (2001) 25 Cal.4th 543, 568-570

[defense counsel not incompetent for failing to bring a *Batson/Wheeler* motion for prosecutor's excusing and 76 year old African-American woman who insisted she had no scruples for or against the death penalty and felt duty bound to follow instructions despite her personal and Biblical views that everyone should be forgiven ("70 times 7"); and in fact defense may have wanted her excused for her strong statement that she would follow the court's instruction]

☞ People v. Silva (2001) 25 Cal.4th 345, 375-386 **(Reversal)**

[penalty phase jury selection violated *Batson* and hence death sentence reversed; court found prosecutor struck prospective jurors due to race, here the prosecution excused one man for equivocating on the death penalty which the court found unsupported by the transcript;

"Once the opponent of a peremptory challenge has made out a prima facie case of racial discrimination (step one), the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step two). If a race-neutral explanation is tendered, the trial court must then decide (step three) whether the opponent of the strike has proved purposeful racial discrimination." (p. 384 quoting *Purkett, 514 U.S. 765, 767).*

"Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." (p. 384 quoting *Purkett at p. 768*.)

"... we note that the trial court erred in excluding the defense from the hearing at which the prosecutor stated his reason." (p. 384 citing *People v. Ayala (2000) 24 Cal.4th 243, 262 and United States v. Thompson (9th Cir. 1987) 827 F.3d 1254, 1257*);

"... the trial court erred in failing to point out inconsistencies and to

ask probing questions. The trial court has a duty to determine the credibility of the proffered explanations (*McClain v. Prunty (9th Cir. 2000) 217 F.3d 1209, 1220*), and it should be suspicious when presented with reasons that are unsupported or otherwise implausible (citing to *Purkett and McClain*)." (p. 385)

"Although an isolated mistake or misstatement that the trial court recognized as such is generally insufficient to demonstrate discriminatory intent (*People v. Williams (1997) 16 Cal.4th 153, 189*), it is another matter altogether when, as here, the record of voir dire provides no support for the prosecutor's stated reasons for exercising a peremptory challenge and the trial court failed to probe the issue (citing *McClain and Johnson v. Vasquez (9th Cir. 1993) 3 F.3d 1327, 1331*)." (p. 385)

"Although we generally accord great deference to the trial court's ruling that a particular reason is genuine, we do so only when the trial court has made a sincere and reasoned attempt to evaluate each stated reason as applied to each juror. (citing to *Fuentes and Jackson*) When the prosecutor's stated reasons are both inherently plausible and supported by the record, the trial court need not question the prosecutor or make detailed findings. But when the prosecutor's stated reasons are either unsupported by the record, inherently implausible, or both, more is required of the trial court than a global finding that the reasons appear sufficient." (pp. 385-386)]

People v. Ayala (2000) 24 Cal.4th 243, 259-269

[holding ex parte hearings on reasons for exercising peremptory challenges after *Wheeler/Batson* challenge harmless error (vigorous dissent by Justices George and Kennard); excluding juror Olanders G. due to responses indicated in juror questionnaire that opposed the death penalty, despite fact that during *Hovey* voir dire the juror indicated he had changed these views]

People v. Box (2000) 23 Cal.4th 1153, 1185-1190

[no *Wheeler/Batson* error by prosecution's excusing three African-American prospective jurors; Mr. H's arrest by the San Diego Police Department, Mr. A's relative who had been shot by police and his relatively low general opinion of police, and Ms. W's reluctance to call the police when her home was burglarized; court clarified the *Wheeler* standard to be consistent with *Batson in light of* Wade v. *Terhune (9th Cir. 2000) 202 F.3d 1190, 1195-1197:* "*Batson* ... used a 'raise an inference' standard instead of saying as this court did in ...*Wheeler* that defendant must show a strong likelihood. ... in California, a 'strong likelihood' means 'a reasonable inference.' " (fn. 7); "...prospective jurors may be excused based on 'hunches' and even 'arbitrary' exclusion is permissible, so long as the reasons are not based on impermissible group bias." fn. 6 citing *Turner 8 Cal.4th 137, 164,* and *Purkett* ("a 'legitimate reason' is not a reason that makes sense, but a reason that does not deny equal protection." *514 U.S. 765, 769)*]

People v. Jenkins (2000) 22 Cal.4th 900, 992-995

[prosecutor excusing one African-American prospective juror despite fact

that he showed reluctance to impose the death penalty and his father had been a deputy sheriff for 20 years; without making a prima facie showing, court invited a response which the prosecutor accepted and stated that jurors occupation as a “reporter” for a local newspaper would threaten the juror's impartiality and possible threat to job security were all race neutral and factually supported]

People v. Ervin (2000) 22 Cal.4th 48, 74-77

[prosecutor used 9 of 15 peremptory challenges to excuse African-American prospective jurors and the actual jury contained only 1 African-American juror and 1 alternate; prosecutor's stated reasons were (1) the defense accepted one juror without asking her a single question, drawing suspicions of her neutrality; (2) juror nervous and shaking and was a juvenile counselor with a belief in rehabilitation might induce her to reject the death penalty; (3) a bible college student who indicated a reluctance to impose the death penalty; (4) a NRA member with a “deeply religious bent” which caused prosecutor to believe he was not likely to favor the death penalty; (5) drug history and was “weak” on the death penalty; (6) female who prosecutor believed was too young being only 21 years old and appeared too eager to remain on jury despite holding both a job and attending classes]

People v. Hayes (1999) 21 Cal.4th 1211, 1283-1285

[no *Wheeler* error during selection of retrial penalty phase jury that prosecutor excused the only African-American juror based on her stated disapproval of the death penalty, especially in California]

People v. Welch (1999) 20 Cal.4th 701, 745-746

[defendant African-American tried before a jury that contained three trial jurors and two alternates who were African-American; the prosecution moved to exclude three trial and one alternate jurors; defense objected under *Wheeler* and trial judge found no prima facie case, but invited the prosecutor to explain the reasons for excusing these jurors (honesty, mental slowness, reluctance to impose the death penalty) and after hearing it, the court again found no prima facie showing which were found to be race neutral on appeal]

People v. Bolin (1998) 18 Cal.4th 297, 316-317

[no *Batson* error in excluding three jurors with Hispanic surnames as not preserved on appeal as no objection made]

People v. Jones (1998) 17 Cal.4th 279, 293-295

[four African-American jurors properly excused based on:#1 conflicting answers as to whether she had followed the case in the media; #2 hostility toward the DA and the death penalty; #3 opposition to the death penalty “because the Bible says we should not kill”; and #4 could not impose the death penalty]

People v. Williams (Darren) (1997) 16 Cal.4th 635, 662-666

[prosecution excusing first six African-American jurors were valid peremptories; juror “JT” based on questions of credibility, juror had asked to be excused due kidney problems and a rambling answer about a liquor store robbery; juror “HW” had three sons close to defendant's age and each had a criminal record and drug problems; juror "MC" knew one of the

defense attorneys and worked with his wife; juror "FC" had children close to defendant's age and equivocated on whether she could ever vote for the death penalty;

"Although a defendant has no right to a petit jury composed in whole or in part of persons of the defendant's own race (*Strauder v. West Virginia (1880) 100 U.S. 303, 305*), he or she does have the right to be tried by a jury whose members are selected by non-discriminatory criteria. (*Powers v. Ohio (1991) 499 U.S. 400, 404." (p. 663)*]

People v. Williams (Barry) (1997) 16 Cal.4th 153, 186-191

[no *Wheeler/Batson* error in excusing two African-American jurors in murder case where defendant, victim, and witnesses were all African-American and where grounds race-neutral: #1: DDA stated challenge was a mistake as he had ranked this juror high in both "guilt" and "death penalty" scales and she was a police officer ("A genuine 'mistake' is a race neutral reason."); #2 lived in Blood territory (defendant was a Blood/victim a Crip); went to a High School that was controlled by Bloods and had many friends who were Bloods, ("...law recognizes that a peremptory challenge may be based on a broad spectrum of evidence suggestive of juror partiality. The evidence may range from obviously serious to the apparently trivial, from the virtually certain to the highly speculative." p. 191)]

People v. Jones (1997) 15 Cal.4th 119, 159-163

[all three African-American jurors properly denied: #1 when asked if she could impose the death penalty paused 5 seconds and then said: 'I don't know', but readily admitted she could impose LWOP, had a friend accused of aggravated assault and stated reluctance in sitting in judgment of others especially in death penalty case; #2 brother had been convicted of murder; #3 said she would favor LWOP over the death penalty if there was evidence of insanity (sanity phase pending) which DA stated was 'the guts and essence of the defense case here']

People v. Mayfield (1997) 14 Cal.4th 668, 721-727

[*Wheeler/Batson* challenge properly denied: #1 hesitant to impose the death penalty, did not want to serve on the jury, described herself as more nervous than other jurors, and had been having nightmares about the case; #2 DDA unable to determine jurors attitude about the death penalty, expressed some suspicion of prosecutors and expressed lack of confidence in the system to 'convict the right people'; and #3 expressing opposition in part to the death penalty]

People v. Alvarez (1996) 14 Cal.4th 155, 192-199

[striking seven Latinos and African-Americans for race neutral reasons such as expressions against the death penalty, reluctance to impose the death penalty, having a son recently acquitted for murder, apparent general confusion during voir dire, remorse over a recent death in the family, and more favorable prospective jurors about to be called supported trial court's denial of *Wheeler*/*Batson* challenge]

People v. Jackson (Noel) (1996) 13 Cal.4th 1164, 1195-1198

[*Batson/Wheeler* challenge of all three potential Black jurors properly

denied after implied finding: #1: reluctance to impose the death penalty; #2: bad experiences with law enforcement and would doubt their credibility; #3: would "feel very, very sorry for drug users" which defendant was one, and said she could remember everything and would critical of a witness who could not despite the passage of time, and had a daughter prosecuted by the same DA's office for petty theft]

People v. Arias (1996) 13 Cal.4th 92, 133-140

["a *Wheeler* violation does not require 'systematic' discrimination and it is not negated simply because both sides have dismissed minority jurors or because the find jury is 'representative." (pp. 136-7) Trial court properly denied motion: #1: 34 questionable responses on the questionnaire including views on capital punishment and her daughter was currently being prosecuted by the same DA's office; #2: reluctant and ambivalent answers concerning and the jury's right to impose the death penalty; #3: age (25 years old), marital and parental status (unwed mother), failure to register to vote and view about her boyfriend's crimes]

People v. Davenport (1995) 11 Cal.4th 1171, 1197-1203

[three of prosecutor's first six challenges against Hispanic surname jurors yet the judge noted all three had stated reservations about the death penalty during *Hovey* voir dire]

People v. Crittenden (1994) 9 Cal.4th 83, 114-120

[prosecutor excusing the only African-American in the panel and similar in many aspects to other jurors who remained; however, the juror stated when asked how she felt about serving: "Not good" and that it "was scary." She stated she was against the death penalty "people killing people." Further, the defense attempted to show that in a previous case, the same DDA had removed the only African American on that jury, but the Court noted: "this showing is not very probative, in light of the isolated nature of the prior conduct" and the excusing seemed proper. *(*p. 119)]

People v. Turner (1994) 8 Cal.4th 137, 164-172

[trial court asking for DA's reasons for the record is not a finding that a "prima facie" showing case of systematic exclusion. Defendant failed to "establish from all the circumstances of the case a strong showing that such persons were being challenged because of their group association." (p. 167) The only basis offered by the defense was that the challenged jurors were Black and either had indicated they could be fair and impartial or in fact favored the prosecution. This is insufficient. (*Ibid*.) #1: poor English, long pauses after questions, poor comprehension, could not understand court's instructions, prior jury service on a "hung" jury; #2: hostile body language and answers, negative experience with "the murder of the father of her child;" #3: against the death penalty; all valid reasons.]

People v. Garceau (1993) 6 Cal.4th 140, 170-173

[all Hispanic females were properly excused: #1: logistical problems for daughter and herself to court; #2: members of her family had Arun afoul of the law and had been incarcerated, one was a fugitive; #3: strong reservations about taking the life of another (i.e. the death penalty), and expressed concern about having heard of innocent people being

sentenced all the time; #4: contradictory responses suggesting language and comprehension difficulties; #5: contradictory responses regarding the death penalty, stated that she found the law confusing and probably would forget testimony, and opined that serving as a juror "would be awful"; #6: difficulty understanding reasonable doubt as well as the distinction between the guilt and penalty phases; Hispanic surname females are cognizable suspect class under *Wheeler*]

People v. Montiel (II) (1993) 5 Cal.4th 877, 907-911

["The trial court apparently believed that a group-bias objection can be rebutted only by a showing that the juror in question expressed some *positive prejudice or bias* unfavorable to the excusing party. However, though *Wheeler* distinguished the 'specific bias' which justifies excusal from the 'group bias' which does not, neither *Wheeler* nor *Batson* overturned the traditional rule that peremptory challenges are available against individuals whom counsel suspects even for trivial reasons. (Cite to *Johnson*) To rebut a race or group-bias challenge, counsel need only give a nondiscriminatory reasons which, under all the circumstances including logical relevance to the case, appears genuine and thus support the conclusion that race or group prejudice alone was not the basis for excusing the jury. Here, if Gomez's indifference to the death penalty was a genuine basis for her excusal, it was a permissible one." (fn. 9.)]

People v. Sims (1993) 5 Cal.4th 405, 427-432

[age, maturity, language difficulties, hostility toward the death penalty, inability to understand "reasonable doubt" and cynicism about the removal of Rose Bird justified the removal of 4 Blacks and 4 Hispanics. Court held especially race-neutral because both defendant and victims were white.]

People v. Cummings (1993) 4 Cal.4th 1233, 1282-1284

[DA struck one Black juror because he might have known some of the witnesses and the defendant; another Black juror because he opposed the death penalty and had a brother who might have been prosecuted by the same DA's office and who was giving dirty looks to the DA. The DA also expressed concern that these two jurors seemed to be friendly to a third juror he had excused and the other two may have resented the DA for that.]

People v. Pride (1992) 3 Cal.4th 195, 229-231

[minority jurors with reservations about death penalty was a proper basis including: "strong doubts" or "generally opposed to the death penalty; overt distrust of the legal system particularly its treatment of indigent defendants; deep concern that an innocent person might be executed; and avoiding answering questions about the criminal justice system. "Because the trial court found at least one legitimate race-neutral explanation for each questioned peremptory challenge, no abuse of discretion occurred." (p.230)]

People v. McPeters (1992) 2 Cal.4th 1148, 1173-1174

[juror's statement that he would vote to abolish the death penalty and did not like to judge others were sufficient basis; different juror's hesitation to impose death in a "nickel and dime" robbery was sufficient basis]

People v. Clair (1992) 2 Cal.4th 629, 651-653

[two of four African American women struck due to their opposition to the death penalty; six other minorities for the same reason (p. 653 fn.2); African-American women are cognizable sub group for *Wheeler* purposes (see also People v. Cleveland (2004) 32 Cal.4th 704, 734 (11 Cal.Rptr.3d 236); People v. Mooton (1985) 39 Cal.3d 596, 605-606]

People v. Howard (1992) 1 Cal.4th 1132, 1153-1159

[challenge must be raised the moment the bias arises; defense merely stating that DA had challenged the only two Black prospective jurors was insufficient to make a prima facie showing; however, the trial court is not limited to only to the grounds stated by defense counsel at the time of the motion, but must consider all the circumstances of the case. (p. 1155.) #1: Housewife, non-practicing RN with a degree in sociology stated that she would consider evidence of defendant's background and childhood but would have to be weighed very carefully. #2: Nurse's Aide with a 10th grade education who "passively" answered the *Witherspoon-Witt* questions and had no real opinion on the death penalty.

"[#1's] professional training and [#2's] apparent uncertainty about the death penalty 'suggested ground upon which the prosecutor might reasonably challenged the jurors in question." (p. 1156.)]

People v. Fuentes (1991) 54 Cal.3d 707 (Reversal)

[trial court's failure to carefully evaluate the prosecutor's explanations for challenges to 10 black jurors of the 13 total challenged by prosecution [and 6 black alternate jurors were challenged by the DA]. The jury had three Black jurors and 3 Black alternate jurors. When asked to justify, the DA stated "I only have yes or no on my sheet. ... To answer any challenge, I will need to get the transcripts and the questionnaires ...." When reasons were finally offered, the trial court found some were "totally unreasonable" and others "very spurious."

"[O]n numerous occasions the prosecutor cited as a justification for excusing a particular juror the nature to the juror's employment, recreational choices, or the choice of reading material. The prosecutor also pointed out that the excluded jurors were unfamiliar with the meaning of words, including legal terms ... **The prosecutor did not articulate how these failings related to jury service in this case.**" (pp. 719-720.)]

People v. Mason (1991) 52 Cal.3d 909, 936-939

[DDA properly excused certain African-American jurors based on their reluctance to impose the death penalty. #1 said that she absolutely did not believe in capital punishment. #2 expressed religious objections to the death penalty and doubts about whether she would be able to impose it; #3 said, with some hesitation, that she could impose the death penalty in a proper case, but she also said that she did not like capital punishment; #4 thought that she would consider imposing the death penalty, but previously had been extremely opposed; #5 would not impose the death penalty under any circumstances; #6 said that he did not believe in capital punishment.

"As is often the case, some of these prospective jurors made

conflicting statements. However, just as a trial judge must resolve conflicts in prospective jurors' answers in order to determine their eligibility for service under *Witherspoon-Witt,* an attorney faced with conflicting responses must logically base the decision whether to exercise a peremptory challenge on a prospective juror's entire voir dire examination." (p. 938 fn.8)]

People v. Hayes (1990) 52 Cal.3d 577, 603-606

[Juror 1: outstanding traffic warrant and dissolving marriage to someone in law enforcement; #2: reservation about the death penalty; #3: turned down a job with one police department while accepting one with another [which was not hiring], claimed to have a photostatic mind and made the DA uneasy; and #4 whose daughter was employed by a man whose wallet was found at the murder scene and would be a witness: all found to be valid reasons.]

People v. Wright (1990) 52 Cal.3d 367, 398-400

[excusing the first Black juror who stated she would only vote for the death penalty if she was forced to insufficient to make "a prima facie showing of systematic exclusion or purposeful discrimination"]

People v. Gallego (1990) 52 Cal.3d 115, 166

[*Wheeler* motion must specifically made; motion of underrepresentation of Blacks on all the county's jury panels is not an implied *Wheeler* motion]

People v. Sanders (1990) 51 Cal.3d 471, 499-501

[excusing 4 Spanish surnamed jurors upheld; such is an equal protection class (p. 498) #1: death penalty kind of scary and absolutely opposed to it on religious grounds, but then said she could impose it; #2 concerned about losing work if he were on the jury and "only God could take a man's life"; #3 always choose LWOP over death but then softened; and #4 knew the judge but admitted he had 2 prior arrests, one involving resisting arrest]

People v. Bittaker (1989) 48 Cal.3d 1046, 1091

[DA challenged 5 out of 6 Black jurors and 21 out of 60 White jurors. The trial court afforded the DA a chance to respond and then denied the defense *Wheeler* motion on the ground that the defense had not made out a prima facie showing. The Court noted that the record supports proper grounds for challenging the 5 Black jurors. #1: Studied psychology and said "I really feel that I would try to be an amateur psychologist, psychiatrist, if I was in this case." #2: Expressed doubt that she could vote for first degree murder where the victim's body had never been found. #3: Said she would automatically vote for LWOP, then equivocated. #4: Said that in a death penalty case, the stand of proof should be "absolute proof." #5: "If you ask me if I could kill somebody, I don't know. So I can't just sit here and tell you."]

People v. Johnson (1989) 47 Cal.3d 1194, 1218-1219

[subjective reasons such as body language, attitude, or demeanor sufficient]

People v. Walker (1988) 47 Cal.3d 605, 625-626

[juror's previous negative experience with police officers, juror's negative view regarding police credibility sufficient despite prosecutor asking only

perfunctory questions]

People v. Snow (1987) 44 Cal.3d 216 (Reversal)

[six of sixteen DA strikes were of Blacks; fact defense counsel was excluding whites did not justify DA's strikes; fact prosecutor accepted jury contain two Blacks was not a conclusive factor (was evidence of prosecutor's good faith)]

People v. Haskett (1982) 30 Cal.3d 841

[defendant cannot raise *Wheeler* challenge for the first time on appeal]

People v. Overby (2004) 124 Cal.App.4th 1237 (22 Cal.Rptr.3d 233)

[consent to *Batson-Wheeler* remedy of reseating juror under *Willis* properly implied by request that proposed excused juror remain in courtroom and submission to this remedy without argument]

People v. Robinson (2004) 116 Cal.App.4th 1302 (11 Cal.Rptr.3d 182)(**Rev.Gtd.**)

(*watch also for **People v. Ibarra** (Rev.Gtd.6-9-04) (murder conviction reversed due to error in conducting Wheeler challenge during jury selection)*

[prosecutor properly excused juror but followed a "limited" *Wheeler* procedure previously found to be error in *People v. McGee (2002) 104 Cal.App.4th 559*; [excusing black juror who was an employee of the sheriff's department but also served as a chaplain in the county jail created a combination of factors that was a race neutral reason (pp. ____; see also *People v. Martin (1998) 64 Cal.App.4th 378; People v. Allen (1989) 212 Cal.App.3d* 306); but court did note "Excluding jurors merely because they have religious beliefs is as impermissible as excluding jurors based upon race or ethnicity." (p. ___); court went on to hold the procedure employed by the trial court was error by not having prosecutor offer justification for certain peremptory challenges]

People v. Allen (2004) 115 Cal.App.4th 542 (9 Cal.Rptr.3d 374)

[trial court's failure to determine whether prosecutor improperly used peremptory challenges based on race requires reversal of conviction; and remand not appropriate in this "unremarkable" trial (fn. 10)]

People v. Muhammad (2003) 108 Cal.App.4th 313

[finding prosecutor violated *Wheeler* does not subject prosecutor to specific sanction under CCP §177.5]

People v. Morris (2003) 107 Cal.App.4th 402

[Wheeler motion properly denied where defendant failed to identify which excused jurors were due to race and did not identify what the juror's ethnicity was and where trial court found that no prima facie showing was made to require the prosecutor to justify the challenges and hence insufficient record to establish prejudice; and defendant does not have "standing" to challenge denial of prosecutor's *Wheeler* motion despite trial court finding a violation for excusing white males but trial court choose to award no sanction in this pre-*Willis* prosecution]

People v. McGee (2002) 104 Cal.App.4th 559

[court improperly denied *Wheeler* motion without a proper hearing and case remanded for new hearing on defense *Wheeler* challenge; see also People v. Robinson (2004) 116 Cal.App.4th 1302 (**Rev.Gtd.**)]

People v. Mello (2002) 97 Cal.App.4th 511

[trial court erred by instruction prospective jurors during voir dire "that if they harbored racial bias against defendant because of her race (African-American) to lie about it under oath and make up some other reason to be excused from serving as jurors on this case."; see also People v. Abbaszadeh (2003) 106 Cal.App.4th 642 (same judge: same voir dire error)]

People v. Gomez (2001) 92 Cal.App.4th 1 (**dep.**)

[prosecution's discriminatory use of peremptory challenge to exclude Hispanics from jury despite claim that spouse's perceived occupation indicated a "liberal" tendency]

People v. Turner (2001) 90 Cal.App.4th 413 **(Reversal)**

[prosecutor's dismissal of juror from city with substantial African American population (Inglewood) is "mere surrogate or proxy" for group bias]

People v. Gray (2001) 87 Cal.App.4th 781

[trial court erred in not allowing prosecutor to justify "strikes" in response to defense *Wheeler* motion; African-American males are a cognizable class (contrary to trial court's ruling); two African-American male jurors properly excluded, third no readily apparent reason (no criminal record, his son-in-law was a police officer)]

People v. Currie (2001) 87 Cal.App.4th 225

[right to impartial jury is not violated if underrepresentation of "group" is not caused by selection process but by members' failure to appear; and prosecutor did not commit *Wheeler* error by peremptory challenges against four African-American jurors (two of which he renewed on appeal); #1 was undecided about the death penalty; #2 because DDA perceived her to be too liberal, too sympathetic to drug uses and persons who engage in criminal conduct and expressed a preference for LWOP over than the death penalty; her husband was a drug abuser and had been accused of assault and battery (this is a race neutral reason in itself *Williams 16 Cal.4th 635, 664-665*)]

People v. Martinez (2000) 82 Cal.App.4th 339, 343-347

[prosecutor preempting 4 Hispanic jurors from the panel proper; Juror L.A. had several family members who had been arrested, some of whom were in prison; Juror P.V. had two DUIs and a spousal abuse convictions; Juror J.A.'s father had been arrested for spousal abuse: "These contacts with the criminal justice system provided valid reasons for excluding these potential jurors." And Juror J.A. appeared unwilling to serve. "Reluctance to serve is another nondiscriminatory reason supporting a peremptory challenge." Juror Y.S. was a single mother of two, gave very short answers to questions and had never served on a jury, never been arrested, had no family members who had been arrested, and did not know any police officers, lawyers, or other court personnel. "The prosecutor could have legitimately excused her because she lacked sufficient life experience." Also, she worked for Home Depot which is where the defendant claimed he was working the morning of the charged crime. And the application of an arguably "erroneous legal standard of

"strong likelihood" under *Wade v. Terhune* did not require reversal]

People v. Williams (2000) 78 Cal.App.4th 1118
[men are an equal protection class that cannot be systematically excluded]

People v. Garcia (2000) 77 Cal.App.4th 1269
[homosexuals constitute cognizable class and their exclusion from a jury could violate *Batson/Wheeler*; see also CCP §231.5 prohibiting "sexual orientation" as a ground for use of peremptory challenge]

People v. Rodriguez (1999) 76 Cal.App.4th 1093
[hearing to contest race-neutral peremptory challenge does not have to conducted by original trial judge when reasons are objectively verifiable; the reasons were here]

People v. Brown (1999) 75 Cal.App.4th 916
[absence of Chinese, Filipino, or Hispanic forepersons on grand jury for 36 years did not violate African American defendant's constitutional rights; see also People v. Corona (1989) 211 Cal.App.3d 529 (general discussion on composition of grand jury)]

People v. Walker (1998) 64 Cal.App.4th 1062
[*Batson* race-based peremptory challenge must appear racially motivated under all relevant circumstances; recognized the "untenable position" the appellate court is placed when no justification for strike is in the record]

People v. Martin (1998) 64 Cal.App.4th 378
[striking one of two African-American jurors due to response to question if she "has moral, religious, or other principals that make it difficult to determine whether someone is guilty or not?" the juror answered, "I'm a Jehovah's Witness, so it depends on the nature of the case ...." was not *Wheeler* error; court did recognized that "religion" would be an equal protection classification; "We are persuaded that the peremptory challenge of a juror's relevant personal values is not improper even though those views may be founded in the juror's religious beliefs."]

People v. Trevino (1997) 55 Cal.App.4th 396
[no group bias if challenges are not based solely on group association: "After an exhaustive review of the record, there is a common thread which runs through *all* the People's challenges–not just those of jurors belonging to a cognizable class. Six of the seven jurors peremptorily challenged by the People were either employed in the health professions or had spouses employed in this field."]

People v. Buckley (1997) 53 Cal.App.4th 658
[defendant failed to show two jurors were excluded based solely on race; showing that defendant and both excused jurors were African-American; #1 was in a car when friend arrested for DUI and was a legal "technician"; #2 had a brother pending a burglary trial in a neighboring county and stated search warrants "do quite a bit of damage, which is unnecessary" (case involved a shoot out during a search warrant)]

People v. Rodriguez (1996) 50 Cal.App.4th 1013
[failure to excuse jury after invalid peremptory challenge of alternate jury could be harmless error; remanded for hearing; if peremptory challenge was improper the motion should have been granted and entire jury

selection begun anew even though jury was sworn and court then conducted selection of alternates]

People v. Landry (1996) 49 Cal.App.4th 785
[denial of request to augment record with entire voir dire transcript does not deny effective review of *Batson* challenge]

People v. Perez (1996) 48 Cal.App.4th 1310
[two jurors with Hispanic surnames are properly excused for proper reasons: both worked for social services/ care-giving and prosecution excused other non-Hispanics in the fields; and the victim was also Hispanic; and motion untimely when made after jury and alternates sworn]

People v. Irvin (1996) 46 Cal.App.4th 1340
[finding of prima facie showing on earlier *Wheeler* motion not binding on subsequent motions]

People v. Dunn (1995) 40 Cal.App.4th 1039
[appellate court is not required to conduct comparative analysis of prospective jurors selected and rejected]

People v. McCoy (1995) 40 Cal.App.4th 778
[person 70 years and older are not a distinctive group whose systematic exclusion violates 6th Amendment]

People v. Perez (1994) 29 Cal.App.4th 1313
[challenges of 4 Hispanic jurors justified based on lack of "life experiences" upheld]

People v. Bernard (1994) 27 Cal.App.4th 458
[defendant fails to meet prima facie burden/"strong likelihood" test]

People v. Tapia (1994) 25 Cal.App.4th 984
[limited remand for the trial court to evaluate whether the prosecutor's stated reasons for the challenges were genuine and not a "sham" shielding group bias, the trial court improperly used an objective standard in which it found "good cause" to excuse each of the jurors]

People v. Smith (1993) 21 Cal.App.4th 342
[trial court's failure to order new jury selection after juror was improperly excused under *Wheeler* requires reversal]

People v. Ferro (1993) 21 Cal.App.4th 1
[court's inquiry to prosecutor after challenge is not a prima facie finding]

People v. Gore (1993) 18 Cal.App.4th 692
[jury selection is not complete for *Batson/Wheeler* purposes until alternates have also been selected; also People v. Ortega (1984) 156 Cal.App.3d 63]

People v. Rojas (1992) 11 Cal.App.4th 950, 955-958
[3 black females properly excluded for neutral reasons]

People v. Harris (1992) 10 Cal.App.4th 672
[peremptory challenges must be made in open court and not at sidebar]

People v. Jackson (1992) 10 Cal.App.4th 13
["substantial evidence standard"]

People v. Wimberly (1992) 5 Cal.App.4th 773, 781-784
[challenging two African-American jurors without more is not a "prima facie" showing]

People v. Christopher (1991) 1 Cal.App.4th 666

[held that while exclusion of even a single prospective juror may in theory violate a defendant's right to a representative jury, the prosecutor's challenge of one or two prospective jurors of the same racial or ethnic background as the defendant will not establish a prima facie case of impermissible group-based bias in the absence of other significant supporting evidence; fact that defendant was a member of the same group as the excluded juror was relevant, but there was no victim of a different racial or ethnic group to which the other jurors belonged]

People v. Cervantes (1991) 233 Cal.App.3d 323

[failure to offer reasons for peremptory challenges]

People v. Harper (1991) 228 Cal.App.3d 843

[upheld challenge to only Black for (1) being familiar with a club that "was central to the defendant's alibi"; (2) worked in an area where drugs were sold, but did not raise her hand when the prosecutor asked if anyone had seen drug use or sales." The DA explained this indicates "she's not telling the truth or she is really naive." (*Id.* at p. 848, fn. 1) (3) she was very placid jury during selection and (4) her husband was unemployed.]

People v. Gonzalez (1989) 211 Cal.App.3d 1186 (Reversal)

[excusing a juror because he was a naturalized citizen constituted the kind of "decision-making by racial stereotype" condemned in *Wheeler*.]

People v. McCaskey (1989) 207 Cal.App.3d 1056

[a preliminary showing of group bias can be demonstrated by showing the DA struck most or all of the members of the group from the venire or used a disproportionate number of his peremptories against the group.]

People v. Barber (1988) 200 Cal.App.3d 378

[#1: a teacher and had a first cousin with a pending criminal case and teachers tended to be "liberal"; #2: wore a Coors jacket, brother convicted of theft, shy and withdrawn, and did not seem to grasp the legal concepts; "A prosecutor may [legitimately] fear bias .... simply because [of the juror's] clothes or hair length suggest an unconventional lifestyle." *(*p. 396); #3: a tractor driver ("unprofessional"); was confused with the presumption of innocence; felt that serving as a juror would cause financial hardship; #4: difficulty understanding the privilege against self-incrimination and had an uncle with a prior arrest; all valid explanations.]

People v. King (1987) 195 Cal.App.3d 923

[in a rape case, the DA properly excuse one Black man because he was older (and would hold traditional values and thus believe the victim got what she deserved); and another because his wife was the primary source of income in the family; even though an older White man was not excused by the DA.]

People v. Williams (1994) 26 Cal.App.4th Supp. 1

[dismissal of entire panel not the only remedy; especially if parties agree; affirms trial judge requiring parties to state ground for the peremptories at sidebar and then granting them if both sides agreed rather than chancing the dismissal of a third full panel for defense *Wheeler* bias against whites and Asians. Court refused to permit defense peremptory of a Filipino-American juror and the defense appealed; rejected any *Harris* 10

Cal.App.4th 672 error, distinguishing closed--anonymous process there held reversible from the more open, at least accountable process here]

People v. Lopez (1992) 3 Cal.App.4th Supp. 11
[dismissal of entire panel only remedy]

Boyd v. Newland (9th Cir. 2004) ___ F.3d ___ (04 DAR 15387)
["comparative juror analysis" (which the Ninth Circuit recognizes) must be addressed to the trial court or waived on habeas review; court found a juror's reluctance to serve on a juror was a "race-neutral" reasons justifying peremptory strike]

United States v. You (9th Cir. 2004) 382 F.3d 958
[during jury selection, prosecutor excused four jurors against women which was challenged by the defense as being gender based and discriminatory; the prosecutor offered reasons for each: #1 lacked sufficient age and maturity; #2 would not look the prosecutor in the eye; #3 was an artists and often used a "pen name" and the prosecutor stated that several witnesses used aliases; and #4 held an administrative job and did not deal with people and to the prosecutor "seemed to lack the intellect to serve on a jury"; the trial judge agreed with the explanations on the record which was upheld on appeal; in following and analyzing "step #3" (trial court must determine whether the defendant has shown purposeful discrimination) requires the trial court must do more than label the government's explanations "plausible"; "[i]nstead the district court must make a deliberate decision whether purposeful discrimination occurred. At a minimum, this procedure must include a clear record that the trial court made a deliberate decision on the ultimate question of purposeful discrimination."]

Paulino v. Castro (9th Cir. 2004) 371 F.3d 1083
[pattern of peremptory challenges raises inference of *Batson* error and required prosecutor to offer race neutral reasons; five of prosecutors first six challenges were to African Americans and no race neutral reasons apparent so case remanded for hearing]

Collins v. Rice (9th Cir. 2004) 365 F.3d 667
[prosecutor's dismissal of one juror was improper and mandates new trial]

Williams v. Rhoades (9th Cir. 2004) 354 F.3d 1101
[prosecutor's peremptory strike of African-American juror not a *Batson* violation; juror was a 60 year old woman who bore similarities to key prosecution witness who was hostile to the case and had originally been charged as a co-conspirator with defendant]

United States v. Alanis (9th Cir. 2003) 335 F.3d 965
[trial court has a duty to complete all steps of *Batson* process without further request or objection from counsel; "When a defendant objects to a prosecutor's peremptory strikes of potential jurors in alleged violation of the Equal Protection Clause, trial courts are supposed to evaluate the constitutionality of the prosecutor's actions using the three step process the Supreme Court announced in *Batson*. In this appeal we determine whether, after a prosecutor offers a race neutral explanation for the peremptory strikes (step two of the *Batson* process), a trial court must proceed to step three to make a deliberate decision on purposeful

discrimination even absent a further affirmative request by the defendant. We conclude that a defendant's original objection imposes on the trial court an obligation to complete the third step of the *Batson* process, when required, without further request from counsel. We also hold that, on these facts, a *Batson* equal protection violation occurred." Four of government's explanations for striking men also were present in women left on the jury]

Lewis v. Lewis (9th Cir. 2003) 321 F.3d 824
[trial and state appellate courts failed to determine whether purposeful racial discrimination occurred in jury selection; African-American female juror who stated she was married with one child, her husband was an engineer, and she was a testing supervisor at Raytheon, a niece who was a "nurse officer" and a nephew who was a "jailor" both locally but did not discuss their work; after being struck by the prosecutor, the defense brought a *Wheeler* motion and the trial court asked for the prosecutor to explain (finding a prima facie showing) stated a concern she Apotentially had information from the jail ... might cause issues which the trial court accepted and did not allow defense counsel to clarify; 9th Circuit was critical of trial court not allowing defense to clarify and prosecutor's stated reason was insufficient; and since the prosecutor stated other reasons to justify the strike which the trial court rejected, the prosecutor1s reasons and thus on appellate review the prosecutor's "credibility"]

United States v. Hernandez-Herrera (9th Cir. 2001) 273 F.3d 1213
[striking one Hispanic juror did not make out prima facia showing]

☞ Copperwood v. Cambra (9th Cir. 2001) 245 F.3d 1042
[without reasonable inference of racial bias, the fact prosecutor passed several times and then excused an African-American juror while leaving several other African-American jurors did not establish *Batson* error on habeas review; again noting the *Wade/Box* ambiguity]

McClain v. Prunty (9th Cir. 2000) 217 F.3d 1209 (Reversal)
[race based peremptory challenges violate *Batson:* reasons given for excusing jurors were found to be "pretextual" in light of they were the only African American potential jurors]

☞ Wade v. Terhune (9th Cir. 2000) 202 F.3d 1191
[when challenging discriminatory peremptory challenges, defendant must show "inference" of racial bias, not "strong likelihood" (as California uses) to establish sufficient evidence of *Batson* error; see also Fernandez v. Roe (9th Cir. 2002) 286 F.3d 1073 (remanded due to standard uncertainty)]

United States v. Harris (7th Cir. 1999) 197 F.3d 870
[no *Batson* error by prosecutor striking juror because her disability and medication made her prone to drowsiness]

Stubbs v. Gomez (9th Cir. 1999) 189 F.3d 1099
[prosecutor did not use peremptory challenges discriminatorily where used to excuse 3 African-American jurors after excusing 5 others for cause]

Tolbert v. Page (9th Cir. 1999) 147 F.3d 1137 (**en banc**)
[California case: trial court's prima facie determination of whether jury

selection was discriminatory is given a presumption of correctness by appellate court: 9th Cir. en banc overruled *Turner v. Marshall (9th Cir. 1995) 63 F.3d 807*. Three judge panel had previously affirmed the denial of the habeas writ in Tolbert v. Gomez (9th Cir. 1999) 147 F.3d 1137; Burks v. Borg (9th Cir. 1994) 27 F.3d 1424, 1426-1430 (trial judge's ruling on prosecutor's reasons given deference if credibility issue)]

United States v. Gilliam (9th Cir. 1999) 167 F.3d 1273
[prosecution excusing Hispanic juror who had been unemployed for one year and concern that juror would be unable to serve as a conscientious juror not a *Batson* violation; "The prosecutor's explanation, to satisfy *Batson*, need only be facially valid; it need not be persuasive or even plausible so long as it is race-neutral. See *Purkett v. Elm*, 514 U.S. 765, 767-68."]

Windham v. Merkle (9th Cir. 1998) 163 F.3d 1092
[state's failure to raise defense to charge of discriminatory jury challenges allows defendant to now show prejudice; but noting the prosecution strikes against women appear on their face to violate *J.E.B.*]

Turner (Robert) v. Marshall (9th Cir. 1997) 121 F.3d 1248
[no valid challenge to Black juror for aversion to gory pictures given white juror's greater squeamishness]

United States v. Annigoni (9th Cir. 1996) 96 F.3d 1132 (en banc)
[erroneous denial of defense peremptory juror challenge for *Batson* error requires automatic reversal]

Johnson v. Campbell (9th Cir. 1996) 92 F.3d 951
[court need not question challenged juror about his sexual orientation absent inference of purposeful discrimination]

United States v. Wills (9th Cir. 1996) 88 F.3d 704
[Juror #1: African-American male who expressed reluctance to accept accomplice testimony and had a relative falsely arrested by the FBI based on accomplice statement; Juror #2: African-American female stated she felt "prejudice goes on" and she "was affected by different races at times." Trial court's finding of no prima facie showing upheld.]

United States v. Contreras-Contreras (9th Cir. 1996) 83 F.3d 1103
[prosecution's volunteered explanation for challenging Black juror does not preserve issue of appeal where defendant did not object]

United States v. Bauer (9th Cir. 1996) 75 F.3d 1366
(superseded on other grounds by 84 F.3d 1549)
[excusing 2 Native Americans based on living near the defendants a valid "race" neutral ground. "Peremptory challenges are based upon professional judgment and educated hunches rather than research. Counsel is entitled to exercise his full professional judgment in pursing his client's legitimate interest in using peremptory challenges to secure a fair and impartial jury."]

United States v. Santiago-Martinez (9th Cir. 1995) 58 F.3d 422
[obesity is not a protected class]

United States v. Vasquez-Lopez (9th Cir. 1994) 22 F.3d 900
[government's peremptory challenge against only black on jury panel is not prima facie showing]

United States v. Omoruyi (9th Cir. 1993) 7 F.2d 880 (Reversal)

[single females who might be attracted to defendant improper reason]

Johnson v. Vasquez (9th Cir. 1993) 3 F.3d 1327

[race-neutral reasons for challenging African-American venireperson are pretextual and require reversal]

United States v. Changco (9th Cir. 1993) 1 F.3d 837, 839, cert.den

[combination of race and gender not a *Batson* category]

United States v. Pichay (9th Cir. 1993) 986 F.2d 1259

[young adults are not cognizable group; see also Ford v. Seabold (6th Cir. 1988) 841 F.2d 677 (college students and young people); see also People v. Marbley (1986) 181 Cal.App.3d 45; discussed but not resolved in People v. Ayala (2000) 23 Cal.4th 225, 257]

Palmer v. Estelle (9th Cir. 1993) 985 F.2d 456

[court cannot rely solely that some Blacks were jurors in *Batson* challenge]

United States v. DeGross (9th Cir. 1992) 960 F.2d 1435

[peremptory challenge to males violates *Batson*]

United States v. Bishop (9th Cir. 1992) 959 F.2d 820

[excuse: juror lives in a violent, poverty-stricken community and thus would have a tendency not to believe police witnesses because they might pick on black people held insufficient justification]

United States v. Allison (11th Cir. 1990) 908 F.2d 1531

[presence of blacks on a jury undercuts the inference of racially motivated peremptory challenges and defeats the prima facie claim of *Batson* error]

Senegal v. White (N.D.Ca. 1995) 881 F.Supp. 1421

[excuse: "I don't like to sit in judgment of anyone" based on juror's belief in God and had a planned vacation. "Discrimination is not established merely by the fact that persons of a recognized race have been removed from the jury in a disproportionate manner. The defendant is required to show other circumstances showing racial bias."]

Edmonson v. Leesville Concrete Co. (1991) 500 U.S. 614

[114 L.Ed.2d 660, 111 S.Ct. 2077]

[in federal civil jury trial, the Equal Protection component of the 5th Amen. protects a private litigant's use of peremptory challenges based on race]

"**PROSECUTORIAL MISCONDUCT IN VOIR DIRE**." The same standard of misconduct applies in voir dire as in cross examination. People v. Ochoa (1998) 19 Cal.4th 353, 427 citing People v. Samayoa (1997) 15 Cal.4th 795, 841.

People v. Smith (2003) 30 Cal.4th 581, 602-604

[no misconduct if prosecutor asks jurors if proven beyond a reasonable doubt that the defendant is guilty of special circumstance murder and they thought the death penalty was appropriate, could they impose it]

People v. Ochoa (1998) 19 Cal.4th 353, 427-429

[asking juror to commit to vote for death penalty if appropriate not misconduct; nor was asking jurors about how the voted for the death penalty ballot initiative or on the Rose Bird retention election (on this issue see also People v. Ramos (1997) 15 Cal.4th 1133, 1158; People v. Morales (1988) 203 Cal.App.3d 970, 974)]

JURY SELECTION IN SEXUAL ASSAULT CASES

A. Guiding Principle

Jury Selection is important in all trials, but is of critical importance for the successful prosecution of sexual assault cases. Therefore, jury selection deserves thorough preparation and knowledge.

B. Key Components to Effective Jury Selection

- **Know the law and the rules**

You should learn the controlling statutes on this subject and the case law that interprets it. The controlling statutes on jury selection are contained in the Code of Civil Procedure (CCP) sections 190

through 237. CCP 223, 225, and 228 through 231. are regularly utilized in criminal jury trials and set out the method of voir dire, the requirements for a challenge for cause and the number of preemptory challenges permitted to each side. CCP 223 provides that in a criminal trial, each party could submit questions for the court to pose to the prospective jurors; it also establishes that each party has "the right to examine, by oral and direct questioning, any or all prospective jurors." It also limits the examination of prospective jurors to be conducted "only in the aid of the exercise of challenges for cause."

An area of implied bias that is outlined under the law is pursuant to CCP 229(f) "The existence of a state of mind in the juror evincing enmity against, or bias towards, either party."

You should also learn the judicial rules regarding jury selection. The San Diego Superior Court's web page includes jury selection information that is very useful. It has the script that the courts are encouraged to read to jurors and it even has an approved questionnaire with many good questions.

In addition, you should learn the particular way that a certain court does jury selection. Courts conduct jury selection differently utilizing their own system of examining 12 jurors at a time or more jurors.

A prosecutor should also know the law of "Wheeler" regarding preemptory challenges and know how to make the right record that supports that a preemptory challenge is made ethically and without bias against a protected class.

Voir Dire

1. LAW

   A. The Adoption of Proposition 115 in 1990 Changed Voir Dire.

      1. Pre-Proposition 115 Rules

         a. The attorneys participated in the questioning process.

         b. The purpose of voir dire was to allow the parties to intelligently exercise their peremptory challenges. (*People v. Williams* (1981) 29 Cal.3d 392.)

      2. In 1990, the voters passed Proposition 115, which included a new Code of Civil Procedure section 223 regulating voir dire in criminal cases.

         - "In a criminal case, the court shall conduct the examination of prospective jurors. However, the court may permit the parties, upon a showing of good cause, to supplement the examination by such further inquiry as it deems proper, or shall itself submit to the prospective jurors upon such a showing, such additional questions by the parties as it deems proper." (Code Civ. Proc., § 223.)

         a. The court shall conduct the examination of prospective jurors.

         b. Upon a showing of good cause, the court may allow the attorneys to question the jurors.

         c. Where practicable, voir dire shall occur in the presence of the other jurors.

         d. Questioning shall be conducted only to aid in the exercise of challenges for cause.

3. Section 223 was amended effective January 1, 2001, to again allow attorney questioning.

   - "In a criminal case, the court shall conduct an initial examination of prospective jurors. The court may submit to the prospective jurors additional questions requested by the parties as it deems proper. Upon completion of the court's initial examination, counsel for each party shall have the right to examine, by oral and direct questioning, any or all of the prospective jurors. The court may, in the exercise of its discretion, limit the oral and direct questioning of prospective jurors by counsel. The court may specify the maximum amount of time that counsel for each party may question an individual juror, or may specify an aggregate amount of time for each party, which can then be allocated among the prospective jurors by counsel."

   a. Amendment becomes effective January 1, 2001.

   b. Court can limit amount of time allotted to the parties.

   c. Shall be conducted "only in the aid of the exercise of challenges for cause."

B. Two Types of Challenges

1. Challenge for Cause – CCP § 225.

   a. General Disqualification – CCP § 225(b)(1)(A).

      1. Juror lacks the statutory requirements to be eligible for jury duty – CCP § 203, 228(a).
      2. Deaf, or any other incapacity – CCP § 228(b).
      3. Rarely utilized.

   b. Implied Bias – CCP § 225(b)(1)(B), 229.

      1. Eight statutory grounds.
      2. Prejudice is inferred.

   c. Actual Bias – CCP § 225(b)(1)(C).

      - The existence of a state of mind on the part of the juror in reference of the case, or to any of the parties, which will prevent the juror from acting with entire impartiality, and without prejudice to the substantial rights of any party.

   d. Number of challenges – unlimited.

2. Peremptory Challenges

    a. No reason need be given – CCP § 226(b).

    b. Number of peremptory challenges allowed.

        1. Depends on punishment allowed and number of defendants on trial.
        2. Single defendant case.

            a) 20 - If punishable by death or life imprisonment – CCP § 231(a).
            b) 6 - If punishable with maximum of 90 days or less – CCP § 231(b).
            c) 10 - all other cases – CCP § 231(a).

        3. Multiple defendant case.

            a) Death or life imprisonment case – CCP § 231(a).

                1) 20 joint challenges.
                2) 5 individual challenges for each defendant.
                3) DA gets same total as entire defense team.

            b) 90 days or less – CCP § 231(b).

                1) 6 joint challenges.
                2) 4 individual challenges for each defendant.
                3) DA gets same total as entire defense team.

            c) All other cases – CCP § 231(a).

                1) 10 joint challenges.
                2) 5 individual challenges for each defendant.
                3) DA gets same total as entire defense team.

        4. Alternates – CCP § 234.

            a) Single defendant case – one per number of alternates.
            b) Multiple defendant cases – each defendant gets one per number of alternates.
            c) DA gets same total number as defense team.

        5. A pass does not count as a challenge – CCP § 231(d)(e).

C. Wheeler motion (*People v. Wheeler* (1978) 22 Cal.3rd 258)

- The use of peremptory challenges to remove prospective jurors on the basis of a presumed group bias based on membership in a racial, ethnic, religious or gender group violates the state and federal constitution. See also *Batson v. Kentucky* (1986) 476 U.S. 79.

1. A peremptory challenge is presumed to be exercised on constitutionally permissible grounds.

2. The moving party has the burden of establishing a prima facie case that the opposing side has challenged jurors solely on the basis of group bias.

   a. The excused juror must be a member of a cognizable group.
   b. The moving party must "raise an inference" that the challenge was based upon membership in the cognizable group, and not because of specific bias.

3. Upon a judicial finding that a prima facie case exists, the burden shifts to the non-moving party to make a detailed and group-neutral justification for the peremptory challenge.

4. The court must decide whether the peremptory challenge was made for constitutionally permissible reasons.

5. If the *Wheeler* motion is granted several remedies exist, including begin voir dire again with a new panel or seating the challenged juror. The offending attorney may have to self-report to the state bar for disciplinary proceedings.

2. PROCEDURE

A. Pre-Voir Dire Conference – Rule 228.1.

1. Establish ground rules.

2. How many jurors will be called into the box?

3. What topics will be addressed by the judge?

4. Time limits.

5. Number of alternates.

6. Give judge voir dire questions.

B. Court clerk will summon a jury panel to courtroom.

C. Clerk will take roll and swear the panel – CCP § 232.

D. Questioning the jurors.

1. Judge will question jurors first – CCP § 223.

    a. Will typically ask 8 – 10 general questions. See Standard of Judicial Administration, § 8.5.
    b. Very limited follow-up.

2. Defense Attorney will question second.

    a. Defense will "challenge for cause" – CCP § 226(d).
    b. "Pass for cause."

3. DA questions last.

    a. "Pass for cause."
    b. "Approach the Bench" to exercise challenge for cause.

E. Exercising peremptory challenges.

1. DA goes first – CCP § 226(d).

    a. "I would ask the court to thank and excuse Juror Number _____, Mr/Mrs _____."

2. Defense goes second.

3. Continues until both sides pass consecutively.

    a. "The People are pleased with the panel. We pass."
    b. 12 jurors will be sworn.

4. Select Alternates – CCP § 234.

    a. Same order as original 12 jurors.
    b. Swear alternates.

5. Court will excuse unused jurors.

Bias in the Prosecution of Cases

- **Jury Selection Process**
  - ***People v. Wheeler*, 22 Cal. 3d 258 (1978)**
  - ***Batson v. Kentucky*, 476 U.S. 79 (1986)**

VOIR DIRE

I. LAW

A. The Adoption of Proposition 115 in 1990 Changed Voir Dire.

1. Pre-Proposition 115 Rules
    a. The attorneys participated in the questioning process.
    b. The purpose of voir dire was to allow the parties to intelligently exercise their peremptory challenges. (*People v. Williams* (1981) 29 Cal.3d 392.)

2. In 1990, the voters passed Proposition 115, which included a new Code of Civil Procedure section 223 regulating voir dire in criminal cases.

    "In a criminal case, the court shall conduct the examination of prospective jurors. However, the court may permit the parties, upon a showing of good cause, to supplement the examination by such further inquiry as it deems proper, or shall itself submit to the prospective jurors upon such a showing, such additional questions by the parties as it deems proper." (Code of Civ. Proc., §223.)

    a. The court shall conduct the examination of prospective jurors.
    b. Upon a showing of good cause, the court may allow the attorneys to question the jurors.
    c. Where practicable, voir dire shall occur in the presence of the other jurors.
    d. Questioning shall be conducted only to aid in the exercise of challenges for cause.

3. Section 223 was amended effective January 1, 2001, to again allow attorney questioning.

> "In a criminal case, the court shall conduct an initial examination of prospective jurors. The court may submit to the prospective jurors additional questions requested by the parties as it deems proper. Upon completion of the court's initial examination, counsel for each party shall have the right to examine, by oral and direct questioning, any or all of the prospective jurors. The court may, in the exercise of its discretion, limit the oral and direct questioning of prospective jurors by counsel. The court may specify the maximum amount of time that counsel for each party may question an individual juror, or may specify an aggregate amount of time for each party, which can then be allocated among the prospective jurors by counsel."

   a. Amendment become effective January 1, 2001.
   b. Court can limit amount of time allotted to the parties.
   c. Shall be conducted "only in the aid of the exercise of challenges for cause."

B. <u>Two Types of Challenges</u>

1. Challenge for Cause – CCP § 225.
   a. General Disqualification – CCP § 225(b)(1)(A).
      - Juror lacks the statutory requirements to be eligible for jury duty – CCP §§ 203, 228(a).
      - Deaf, or any other incapacity – CCP §228(b).
      - Rarely utilized.
   b. Implied Bias – CCP §§ 225(b)(1)(B), 229.
      - Eight statutory grounds.
      - Prejudice is inferred.
   c. Actual Bias – CCP § 225(b)(1)(C).
      - The existence of a state of mind on the part of the juror in reference of the case, or to any of the parties, which will prevent the juror from acting with entire impartiality, and without prejudice to the substantial rights of any party.
   d. Number of challenges – unlimited.

2. Peremptory Challenges
    a. No reason need be given – CCP § 226(b).
    b. Number of peremptory challenges allowed.
        - Depends on punishment allowed and number of defendants on trial.
        - Single defendant case.
            A. 20 – If punishable by death or life imprisonment – CCP § 231(a)
            B. 6 – If punishable with maximum of 90 days or less – CCP § 231(b).
            C. 10 – all other cases – CCP § 231(a).
        - Multiple defendant case.
            A. Death or life imprisonment case – CCP § 231(a).
                - 20 joint challenges.
                - 5 individual challenges for each defendant.
                - DA gets same total as entire defense team.
            B. 90 days or less – CCP § 231 (b).
                - 6 joint challenges
                - 4 individual challenges for each defendant.
                - DA gets same total as entire defense team.
            C. All other cases – CCP § 231 (a).
                - 10 joint challenges.
                - 5 individual challenges for each defendant.
                - DA gets same total number as entire defense team.
        - Alternates – CCP § 234.
            A. Single defendant case – one per number of alternates.
            B. Multiple defendant cases – each defendant gets one per number of alternate.
            C. DA gets same total number as defense team.
        - A pass does not count as a challenge – CCP § 231(d)(e).

C. *Wheeler* motion (*People v. Wheeler* (1978) 22 Cal.3d 258)

The use of peremptory challenges to remove prospective jurors on the basis of a presumed group bias based on membership in a racial, ethnic, religious or gender group violates the state and federal constitution. See also *Batson v. Kentucky* (1986) 476 U.S. 79.

1. A peremptory challenge is presumed to be exercised on constitutionally permissible grounds.

2. The moving party has the burden of establishing a prima facie case that the opposing side has challenged jurors solely on the basis of group bias.
    a. The excused juror must be a member of a cognizable group.
    b. The moving party must "raise an inference" that the challenge was based upon membership in the cognizable group, and not because of specific bias.

3. Upon a judicial finding that a prima facie case exists, the burden shifts to the non-moving party to make a detailed and group-neutral justification for the peremptory challenge.

4. The court must decide whether the peremptory challenge was made for constitutionally permissible reasons.

5. If the *Wheeler* motion is granted several remedies exist, including begin voir dire again with a new panel or seating the challenged juror. The offending attorney may have to self-report to the state bar for disciplinary proceedings.

II. PROCEDURE

A. Pre-Voir Dire Conference – Rule 228.1

1. Establish ground rules.

2. How many jurors will be called into the box?

3. What topics will be addressed by the judge?

4. Time limits.

5. Number of alternates.

6. Give judge voir dire questions.

B. Court clerk will summon a jury panel to courtroom.

C. Clerk will take roll and swear the panel – CCP §232.

D. Questioning the jurors.

1. Judge will question jurors first – CCP §223.
    a. Will typically ask 8 – 10 general questions. See Standard of Judicial Administration, § 8.5
    b. Very limited follow-up.

2. Defense Attorney will question second.
    a. Defense will "challenge for cause" – CCP § 226(d).
    b. "Pass for cause."

3. DA questions last.
    a. "Pass for cause."
    b. "Approach the Bench" to exercise challenge for cause.

E. Exercising peremptory challenges.

1. DA goes first – CCP § 226(d).
    a. "I would ask the court to thank and excuse Juror Number ___, Mr./Mrs. _____."

2. Defense goes second.

3. Continues until both sides pass consecutively.
    a. "The People are pleased with the panel. We pass."
    b. 12 jurors will be sworn.

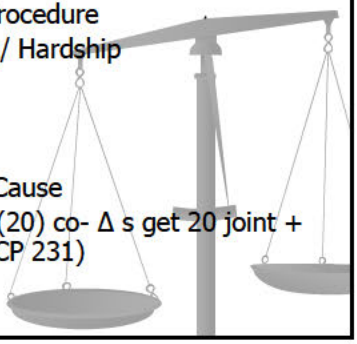
4. Select Alternates – CCP § 234.
    a. Same order as original 12 jurors.
    b. Swear alternates.

5. Court will excuse unused jurors.

DEATH PENALTY JURY SELECTION

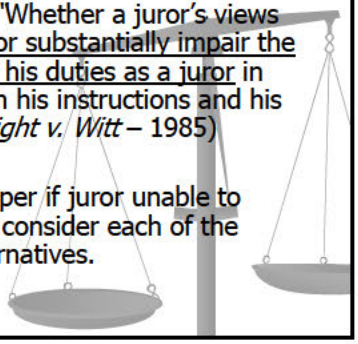
Procedure

- Time Qualifying/ Hardship
- Questionnaires
- Stipulations
- Voir Dire
- Challenges for Cause
- Peremptories - (20) co- Δ s get 20 joint + 5 individual (CCP 231)



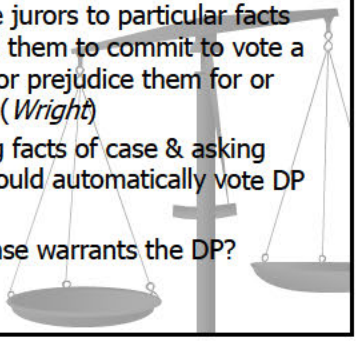
Death Qualification Standard

- *Witt* standard*:* 'Whether a juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." (*Wainwright v. Witt* – 1985)
- Exclusion is proper if juror unable to conscientiously consider each of the sentencing alternatives.



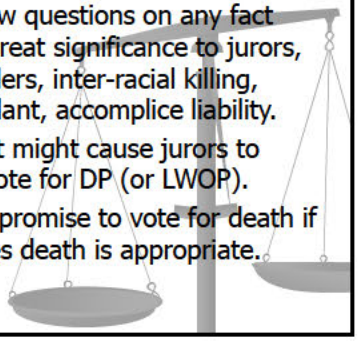
Improper Questions

- Qs that educate jurors to particular facts of case, compel them to commit to vote a particular way, or prejudice them for or against a party (*Wright*)
- Qs summarizing facts of case & asking jurors if they would automatically vote DP (*Mason*)
- What type of case warrants the DP?



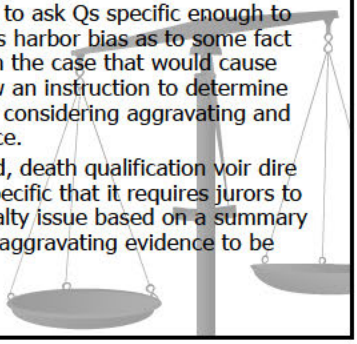
Proper Questions

- Court must allow questions on any fact likely to be of great significance to jurors, e.g., prior murders, inter-racial killing, youthful defendant, accomplice liability.
- Any factors that might cause jurors to automatically vote for DP (or LWOP).
- Asking juror to promote to vote for death if juror determines death is appropriate.



Scope of Questioning
In Court's Discretion

- A party is entitled to ask Qs specific enough to determine if jurors harbor bias as to some fact or circumstance in the case that would cause them not to follow an instruction to determine penalty only after considering aggravating and mitigating evidence.
- On the other hand, death qualification voir dire must not be so specific that it requires jurors to prejudge the penalty issue based on a summary of mitigating and aggravating evidence to be presented.



Capital Case Voir Dire

I. LAW

A. The Adoption of Proposition 115 in 1990 Changed Voir Dire. *People v. Edwards* (1991) 54 Cal.3rd 787, 829; *People v. Carpenter* (1997) 15 Cal.4th 312, 353; *People v. Jenkins* (2000) 22 Cal.4th 900, 990.

1. Pre-Proposition 115 Rules

a. The attorneys participated in the questioning process.

b. The purpose of voir dire was to allow the parties to intelligently exercise their peremptory challenges. (*People v. Williams* (1981) 29 Cal.3d 392.)

2. In 1990, the voters passed Proposition 115, which included a new Code of Civil Procedure section 223 regulating voir dire in criminal cases.

"In a criminal case, the court shall conduct the examination of prospective jurors. However, the court may permit the parties, upon a showing of good cause, to supplement the examination by such further inquiry as it deems proper, or shall itself submit to the prospective jurors upon such a showing, such additional questions by the parties as it deems proper." (Code Civ. Proc., § 223.)

a. The court shall conduct the examination of prospective jurors.

b. Upon a showing of good cause, the court may allow the attorneys to question the jurors.

c. Where practicable, voir dire shall occur in the presence of the other jurors.

d. Questioning shall be conducted only to aid in the exercise of challenges for cause.

3. Section 222 was amended effective January 1, 2001, to again allow attorney questioning.

> "In a criminal case, the court shall conduct an initial examination of prospective jurors. The court may submit to the prospective jurors additional questions requested by the parties as it deems proper. Upon completion of the court's initial examination, counsel for each party shall have the right to examine, by oral and direct questioning, any or all of the prospective jurors. The court may, in the exercise of its discretion, limit the oral and direct questioning of prospective jurors by counsel. The court may specify the maximum amount of time that counsel for each party may question an individual juror, or may specify an aggregate amount of time for each party, which can then be allocated among the prospective jurors by counsel."

a. Amendment become effective January 1, 2001.

b. Court can limit amount of time allotted to the parties.

c. Shall be conducted "only in the aid of the exercise of challenges for cause."

B. Challenges.

1. Challenge for Cause – Because voir dire "shall be conducted only to aid in the exercise of challenges for case," the specific grounds must be known.

a. Unlimited Number

b. Three Types of Challenges for Cause

(1) **General disqualification** – that the juror is disqualified from serving in the action on trial. (Code Civ. Proc., § 225(b)(1)(A).)

(a) Section 203 lists general disqualifications for jurors:

1) Persons who are not citizens of the United States.

2) Persons who are less than 18 years of age.

3) Persons who are not domiciliaries of the State of California, as determined pursuant to Article 2 (commencing with Section 2020) of Chapter 1 of Division 2 of the Elections Code.

4) Persons who are not residents of the jurisdiction wherein they are summoned to serve.

5) Persons who have been convicted of malfeasance in office or a felony, and whose civil rights have not been restored.

6) Persons who are not possessed of sufficient knowledge of the English language, provided that no person shall be deemed incompetent solely because of the loss of sight or hearing in any degree or other disability which impedes the person's ability to communicate or which impairs or interferes with the person's mobility.

7) Persons who are serving as grand or trial jurors in any court of this state.

8) Persons who are the subject of conservatorship.

(b) Section 228(b) lists additional requirements: A loss of hearing, or the existence of any other incapacity which satisfies the court that the challenged person is incapable of performing the duties of a juror in the particular action without prejudice to the substantial right of the challenging party.

(2) **Implied Bias** – Section 229

A challenge for implied bias may be taken for one or more of the following causes, and for no other:

(a) Consanguinity or affinity within the fourth degree to any party, to an officer of a corporation which is a party, or to any alleged witness or victim in the case at bar.

(b) Standing in the relation of, or being the parent, spouse, or child of one who stands in the relation of, business with either party; or surety on any bond or obligation for either party, or being the holder of bonds or shares of capital stock of a corporation which is a party; or having stood within one year previous to the filing of the complaint in the action in the relation of attorney and client with either party or with the attorney for either party. A depositor of a bank or a holder of a savings account in a savings and loan association shall not be deemed a creditor of that bank or savings and loan association for the purpose of this paragraph solely by reason of his or her being a depositor or account holder.

(c) Having served as a trial or grand juror or on a jury of inquest in a civil or criminal action or been a witness on a previous or pending trial between the same parties, or involving the same specific offense or cause of action; or having served as a trial or grand juror or on a jury within one year previously in any criminal or civil action or proceeding in which either party was the plaintiff or defendant or in a criminal action where either party was the defendant.

(d) Interest on the part of the juror in the event of the action, or in the main question involved in the action, except his or her interest as a member or citizen or taxpayer of a county, city and county, incorporated city or town, or other political subdivision of a county, or municipal water district.

(e) Having an unqualified opinion or belief as to the merits of the action founded upon knowledge of its material facts or of some of them.

(f) The existence of a state of mind in the juror evincing enmity against, or bias towards, either party.

(g) That the juror is party to an action pending in the court for which he or she is drawn and which action is set for trial before the panel of which the juror is a member.

(h) If the offense charged is punishable with death, the entertaining of such conscientious opinions as would preclude the juror finding the defendant guilty; in which case the juror may neither be permitted nor compelled to serve.

(3) **Actual Bias** – Section 225(b)(1)(C)

Actual bias - the existence of a state of mind on the part of the juror in reference to the case, or to any of the parties, which will prevent the juror from acting with entire impartiality, and without prejudice to the substantial rights of any party.

2. Peremptory Challenges

a. No Reason Need be Given – CCP § 226(b).

b. Number of Peremptory Challenges Allowed.

(1) Depends on punishment allowed and number of defendants on trial.

(2) Single defendant case.

(a) 20 – If punishable by death or life imprisonment – CCP § 231(a).

(b) 6 – if punishable with maximum of 90 days or less – CCP § 231(b).

(c) 10 – all other cases – CCP § 231(a).

(3) Multiple defendant case.

(a) Death or life imprisonment case – CCP § 231(a).

1) 20 joint challenges.

2) 5 individual challenges for each defendant.

3) DA gets same total as entire defense team.

(b) 90 days or less – CCP § 231(b).

1) 6 joint challenges.

2) 4 individual challenges for each defendant.

3) DA gets same total as entire defense team.

c) All other cases – CCP § 231(a).

1) 10 joint challenges

2) 5 individual challenges

3) DA gets same total as entire defense team

(4) Alternates – CCP § 234.

(a) Single defendant case – one per number of alternates.

(b) Multiple defendant cases – each defendant gets one per number of alternates.

(c) DA gets same total number as defense team.

(5) A pass does not count as a challenge – CCP § 231(d)(e).

II. APPLICATION OF THE LAW

A. Defense challenge for cause.

1. The standard is "whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Wainright v. Witt*

(1985) 469 U.S. 412, 424; *People v. Ghent* (1987) 43 Cal.3rd 739, 767.

2. Erroneous denial of defense challenge is not reversible per se. *Ross v. Oklahoma* (1988) 487 US 81, 87; *People v. Edwards* (1991) 54 Cal.3d 787, 830.)

3. To prevail on appeal, defendant must show prejudice, that is: 1) he used a peremptory challenge on the questioned juror, 2) he exhausted all his peremptory challenges, and 3) he expressed dissatisfaction with the final jury. (*People v. Morris* (1991) 53 Cal.3d 152, 184; *People v. Mickey* (1991) 54 Cal.3d 612, 683: *People v. Crittenden* (1994) 9 Cal.4th 83, 121; *People v. Samayoa* (1997) 15 Cal.3d 795, 821; *People v. Cunningham* (2001) 25 Cal.3d 926, 976.)

4. No prejudice if the juror was not part of the final jury. (*People v. Edwards* (1991) 54 Cal.3d 787, 830; *People v. Clarke* (1992) 3 Cal.4th 41, 155; *People v. Johnson* (1992) 3 Cal.4th 1183, 1210; *People v. Cain* (1995) 10 Cal.4th 1, 61; *People v. Hawkins* (1995) 10 Cal.4th 920, 939; *People v. Horton* (1995) 11 Cal.4th 1068, 1093; *People v. Ramos* (1997) 15 Cal.4th 1133, 1159; *People v. Barnett* (1998) 17 Cal.4th 1044, 1113; *People v. Millwee* (1998) 18 Cal.4th 96, 146.)

5. No prejudice if defendant did not use all peremptory challenges. (*People v. Kelly* (1990) 51 Cal.3d 931, 960; *People v. Morris* (1991) 53 Cal.3d 152, 184; *People v. Price* (1991) 1 Cal.4th 324, 401; *People v. Danielson* (1992) 3 Cal.4th 691, 713; *People v. Mayfield* (1993) 5 Cal.4th 142, 169; *People v. Garceau* (1993) 6 Cal.4th 140, 174; *People v. Cain* (1995) 10 Cal.4th 1, 61; *People v. Lucas* (1995) 12 Cal.4th 415, 480; *People v. Samayoa* (1997) 15 Cal.4th 795, 821; *People v. Ramos* (1997) 15 Cal.4th 1133, 1158; *People v. Williams* (1997) 16 Cal.4th 635, 667; *People v. Barnett* (1998) 17 Cal.4th 1044, 1113; *People v. Millwee* (1998) 18 Cal.4th 96, 146; *People v. Bolin* (1998) 18 Cal.4th 297, 315; *People v. Ochoa* (1998) 19 Cal.4th 353, 444; *People v. Waidla* (2000) 22 Cal.4th 690, 715; *People v. Bemore* (2000) 22 Cal.4th 809, 837; *People v. Ayala* (2000) 23 Cal.4th 225, 261; *People v. Lewis* (2001) 25 Cal.4th 610, 634.)

6. Being required to use a peremptory challenge on a denied challenge for cause does not establish prejudice. (*People v. Gordon* (1990) 50 Cal.3d 1223, 1247; *People v. Kaurish* (1990) 52 Cal.3d 648, 674.)

7. Did defendant request additional peremptory challenges? (*People v. Edwards* (1991) 54 Cal.3d 787, 831.)

    a. Request for additional challenges denied. (*People v. Pride* (1992) 3 Cal.4th 195, 230; *People v. Ramos* (1997) 15 Cal.4th 1133, 1159; *People v. Williams* (1997) 16 Cal.4th 635, 667.)

8. Defendant must express dissatisfaction with the final jury to prove prejudice. (*People v. Edwards* (1991) 54 Cal.3d 787, 830; *People v. Danielson* (1992) 3 Cal.4th 691, 713; *People v. Lucas* (1995) 12 Cal.4th 415, 830; *People v. Williams* (1997) 16 Cal.4th 635, 667; *People v. Millwee* (1998) 18 Cal.4th 96, 146; *People v. Ochoa* (1998) 19 Cal.4th 353, 444; *People v. Bemore* (2000) 22 Cal.4th 809, 837; *People v. Ayala* (2000) 23 Cal.4th 225, 261; *People v. Lewis* (2001) 25 Cal.4th 610, 634; *People v. Weaver* (2001) 26 Cal.4th 876, 911; *People v. Seaton* (2001) 26 Cal.4th 598, 637.

9. No duty on court sua sponte to excuse juror on its own motion. (*People v. Bolin* (1998) 18 Cal.4th 297, 315; *People v. Lucas* (1995) 12 Cal.4th 415, 481.)

10. Court not required to allow defense opportunity to rehabilitate challenged juror if bias is obvious. (*People v. Bittaker* (1989) 48 Cal.3d 1046, 1085; *People v. Carpenter* (1997) 15 Cal.4th 312, 355; *People v. Samayoa* (1997) 15 Cal.3d 795, 823.)

11. Court not required to tell juror his civic duty requires him to set aside his personal beliefs regarding the death penalty. (*People v. Sanders* (1990) 15 Cal.3d 471, 503; *People v. Miranda* (1987) 44 Cal.3d 57, 96.)

12. Examples of proper denial of defense challenge for cause. (*People v. Stankewitz* (1990) 51 Cal.3d 72, 103; *People v. Kelly* (1990) 51 Cal.3d 931, 960; *People v. Mincey* (1992) 2 Cal.4th 457; *People v. McPeters* (1992) 2 Cal.4th 1148, 1177; *People v. Crittenden* (1994) 9 Cal.4th 83, 122; *People v. Samayoa* (1997) 15 Cal.4th 795, 822; *People v. Williams* (1997) 16 Cal.4th 635, 668; *People v. Jenkins* (2000) 22 Cal.4th 900, 987; *People v. Cunningham* (2001)25 Cal.4th 926, 976; *People v. Weaver* (2001) 26 Cal.4th 876, 911.)

B. DA challenge for cause.

1. Use same standard (*Witt*) as defense challenge for cause. (*People v. Crittenden* (1994) 9 Cal.4th 83, 121; *People v. Pride* (1992) 3 Cal.4th 195, 227; *People v. Mincey* (1992) 2 Cal.4th 408, 456; *People v. Bradford* (1997) 15 Cal.4th 1229, 1318.)

2. Erroneous granting of DA challenge is reversible per se. (*Grey v. Mississippi* (1987) 481 US 648, 666; *People v. Cooper* (1991) 53 Cal.3d 771, 809; *People v. Edwards* (1991) 54 Cal.3d 787, 831.)

    a. Reverses penalty verdict, not guilt. (*People v. Ashmus* (1991) 54 Cal.3d 932, 962.)

    b. If juror's answers equivocal, trial judge's ruling will be upheld. (*People v. Ruiz* (1988) 44 Cal.3d 589, 618; *People v. Ghent* (1987) 43 Cal.3d 739, 768; *People v. Coleman* (1988) 46 Cal.3d 749, 767.)

C. Peremptory Challenges.

1. It is improper to ask questions intended solely to educate the jury, compel the jurors to commit to vote a certain way, prejudice the jury, argue the case, indoctrinate the jury, instruct the jury on the law, or test the juror's knowledge of the law. (*People v. Edwards* (1912) 163 Cal. 752; *People v. Willams* (1981) 29 Cal.3d 392, 408; *People v. Ashmus* (1991) 54 Cal.3d 932, 959.)

2. It is permissible to ask a juror about his attitude about a particular rule of law only if (1) the rule is relevant or material to the case, and (2) the rule appears to be controversial; e.g., the juror has indicated some hostility toward the rule, or it is commonly known the community harbors strong feelings about it. (*People v. Balderas* (1985) 41 Cal.3d 144, 185; *People v. Williams* (1981) 29 Cal.3d 392, 408.)

3. Examples of Permissible Questions Relating to Murder

   a. Asked jurors whether they would be able to vote guilty if, after deliberations, they were persuaded that the changes had been proved beyond a reasonable doubt. (*People v. Fierro* (1991) 1 Cal.4th 173, 209.)

   b. "[I]f I prove beyond a reasonable doubt each and every element of each of the offenses charged . . . can you assure me that you would be willing to return a verdict of guilty even though you have unanswered questions?" *People v. Riel* (2000) 22 Cal.4th 1153, 1178 fn. 4.

   c. In order to avoid a hung jury the prosecutor observed that each juror must "come to your own conclusion," but also stressed the value of "work[ing] together to try to discover the truth." (*People v. Fierro* (1991) 1 Cal.4th 173, 210, fn 8.)

   d. In questioning a juror, the prosecutor asked her if she believed a person charged with committing a crime such as defendant's must be insane. The prosecutor also asked: Do you feel there could be such a thing as a person who is legally insane? *People v. Fields* (1983) 35 Cal.3rd 329, 358.

   e. Questions designed to determine jurors' views regarding the felony-murder rule. (*People v. Pinholster* (1992) 1 Cal.4th 865, 913; *People v. Ochoa* (2001) 26 Cal.4th 398, 431; *People v. Ervin* (2000) 22 Cal.4th 48, 70.)

f. California's self-defense "no need to retreat in your own home" rule is controversial and was relevant in this case, so conviction is reversed for forbidding questions on attitudes about this rule. (*People v. Williams* (1981) 29 Cal.3d 392, 411.)

g. Whether they would view a person's possession of recently stolen property as circumstantial evidence that the person stole the property, whether they considered rape more of an assaultive than a sexually motivated offense, and whether they thought it was possible for a young man to rape an elderly woman and not be mentally ill. (*People v. Mendoza* (2000) 24 Cal.4th 130, 167.)

4. Examples of Impermissible Questions Relating to Murder (Typically Asked by the Defense):

a. Do you believe in self-defense in the home? (Not controversial; *People v. Williams* (1981) 29 Cal.3d 392, 411.)

b. "Whether, if they believed that a witness was an informant and was testifying 'in exchange for some lesser sentence,' then that 'would have some bearing on the weight or credibility that that witness may have in your mind?' " (*People v. Mason* (1991) 52 Cal.3d 909, 940.)

c. In a death penalty case, the court did not "allow either party to discuss the law – such as the meaning of diminished capacity – or ask questions that required the prospective jurors to pretry the facts of the case." *People v. Rich* (1988) 45 Cal.3rd 1036, 1104.

d. Defense counsel was not permitted to question prospective jurors regarding their ability to view accomplice testimony with suspicion and distrust. *People v. Johnson* (1989) 47 Cal.3rd 1194, 1224.

e. In an eyewitness case where the defense expected to call Dr. Elizabeth Loftus, the defense was prohibited from eliciting opinions of potential jurors concerning the effects of stress on perception. *People v. Sanders* (1990) 51 Cal.3rd 471, 506.

f. Defense counsel stated, "It's clear a girlfriend has an interest to lie. I just want to make sure that the jurors don't automatically, before they hear her testimony, say she's lying because she's the girlfriend." The trial court barred this line of questioning on the ground that the defendant was trying to educate the jurors and induce them to prejudge the evidence. We cannot say that the court abused its discretion in doing so. *People v. Helton* (1984) 162 Cal.App.3rd 1141, 1145.

g. "What do you feel is a proper punishment for someone who has committed a rape or other serious sexually related crime?" (*People v. Ochoa* (1998) 19 Cal.4th 353, 444.)

h. Many detailed questions regarding personal experience with sexual molestation in a child molestation-murder case. (*People v. Earp* (1999) 20 Cal.4th 826, 851, fn 1.)

i. In a capital murder case where one victim was a three year old child, defendant requested that the trial court inquire as to the ages of the prospective jurors' grandchildren. The court denied the request, stating, "Whether you're going to be prejudiced by the fact that a young child is involved in this case doesn't turn upon whether you have one at the moment. It turns upon whether your personality and capacities are such as to be able to deal with the wrench that goes with that. No matter how many or how few grandchildren you have got or what age you are. It's something that jurors are going to have to deal with; they're going to have to be able to set aside." *People v. Box* (2000) 23 Cal.4th 1153, 1178.

j. In a capital murder trial defendant wanted the following questions included on the questionnaire:

What has been your favorite job and what (do/did) you enjoy about it?"
"What has been your least favorite job and what (do/did) you dislike most about it?"

"If you were a supervisor or employer, what do you think is the best way to keep workers in line?"

"A person should maintain his or her belief on a subject so long as he or she feels that belief if right. Strongly Agree ___ Agree Somewhat ___ Disagree Somewhat ___ Strongly Disagree ___ Please explain."

People v. Navarette (2003) 30 Cal.4th 458, 486.

k. "The court's restriction on questions regarding a prospective juror's birth date, religion and religious service attendance, or voting on the retention of Chief Justice Rose Bird," was not an abuse of discretion. (*People v. Ramos* (1997) 15 Cal.4th 1133, 1158.)

l. Why did you vote as you did on Proposition 8? (Invades juror's privacy) (*People v. Wells* (1983) 149 Cal.App.3d 721, 726.)

m. What was the most important part of Proposition 8? (Unfocused) (*People v. Wells* (1983) 149 Cal.App.3d 721, 726.)

n. Asking a prospective juror whether the Supreme Court's capital opinions under former Chief Justice Rose Bird were "kind of off base" and whether the vote not to retain her or other justices was correct may be error. (*People v. Ochoa* (1998) 19 Cal.4th 353, 428.)

D. Death Qualification Voir Dire.

1. The test.

> "With respect to questions directing the juror's attention to the facts of the case, we have observed that: "The *Witherspoon-Witt* [citations] voir dire seeks to determine only the views of the prospective jurors about capital punishment in the abstract . . . . [Citations.] The inquiry is directed to whether, without knowing the specifics of the case, the juror has an 'open mind' on the penalty determination. There was no error in ruling that questions related to the jurors' attitudes toward evidence that was to be introduced in this trial could not be asked during the sequestered *Witherspoon-Witt* voir dire." (*People v. Clark* (1990) 50 Cal.3rd 583, 597; see also *People v. Sanders* (1995) 11 Cal.4th 475, 539. Nor is it error to preclude counsel from seeking to compel a prospective juror to commit to vote in a particular way (*People v. Rich* (1988) 45 Cal.3rd 1036, 1105, or to preclude counsel from indoctrinating the jury as to a particular view of the facts. *People v. Jenkins* (2000) 22 Cal.4th 900, 990.

2. However, "A challenge for cause may be based on the prospective juror's response when informed of facts or circumstances likely to be present in the case being tried. (*People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1005.) Thus, we have affirmed the principle that either party is entitled to ask prospective jurors questions that are specific enough to determine if those jurors harbor bias, as to some fact or circumstance shown by the trial evidence, that would cause them not to follow an instruction directing them to determine penalty after considering aggravating and mitigating evidence. (*People v. Cash* (2002) 28 Cal.4th 703, 720-721. "Our decisions have explained that death-qualification voir dire must avoid two extremes. On the one hand, it must not be so abstract that it fails to identify those jurors whose death penalty views would prevent or substantially impair the performance of their duties as jurors in the case being tried. On the other hand, it must not be so specific that it requires the prospective jurors to prejudge the penalty issue based on a summary of the mitigating and aggravating evidence likely to be presented. (See *People v. Jenkins* [*supra*, 22 Cal.4th at

pp. 990-991 . . . [not error to refuse to allow counsel to ask juror given 'detailed account of the facts' in the case if she 'would impose' death penalty].) In deciding where to strike the balance in a particular case, trial courts have considerable discretion." (*Cash, supra*, at pp. 721-722.) *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 47.

3. Compare the following cases:

    a. *People v. Pinholster* (1992) 1 Cal.4th 865, 916-918. The prosecutor was allowed to ask questions about jurors' willingness to impose the death penalty in a burglary-murder case. "Each juror's reluctance to impose the death penalty was based not on an evaluation of the particular facts of the case, but on an abstract inability to impose the death penalty in a felony-murder case." *Id.* at 916.

    "Defendant objects that fact-based voir dire is impermissible under *Witt, supra*, 469 U.S. 412. As we have already noted, we have commented in the past that questions directed to jurors' attitudes toward the particular facts of the case are not relevant to the death-qualification process, so that a trial court that refused to permit such questions did not err. (*People v. Clark, supra*, 50 Cal.3rd at p. 597.) We have also said, however, that "a court may properly excuse a prospective juror who would automatically vote against the death penalty in the case before him, regardless of his willingness to consider the death penalty in other cases." (*People v. Fields, supra,* 35 Cal.3rd at pp. 357-358.) *Id.* at 917-918.

    "Trial courts have broad discretion in determining what questions to permit. (*People v. Johnson, supra,* 47 Cal.3rd at p. 1224.) We see no prejudicial error in allowing questions regarding the particular facts of the case as long as more relevant questions and answers provide the basis for the court's decision." *Id.* at 918.

b. *People v. Medina* (1995) 11 Cal.4th 694, 745-746. Initially, the trial court did not permit defense questions asking jurors' whether they could vote for life imprisonment if the defendant had committed multiple murders.

"The inquiry that defendant sought to make was not relevant to the death qualification process, however . . . . [V]oir dire seeks to determine only the views of the prospective jurors about capital punishment in the abstract, to determine if any, because of opposition to the death penalty, would 'vote *against* the death penalty without regard to the evidence produced at trial.' [Citations.] Such a juror may be excused because he or she would be unable to faithfully and impartially apply the law. The inquiry is directed to whether, without knowing the specifics of the case, the juror has an 'open mind' on the penalty determination. There was no error in ruling that questions related to the jurors' attitudes toward evidence that was to be introduced in this trial could not be asked during the sequestered . . . voir dire." [Fn. omitted.] *Id.* at 746.

c. *People v. Cash* (2002) 28 Cal.4th 703, 718-723. The defendant had prior murders. He wanted to ask jurors "whether there were any particular crimes" or "any facts" that would cause that juror "automatically to vote for the death penalty." The trial court prohibited such questions. The Supreme Court reversed the death verdict.

"Thus, we affirmed the principle that either party is entitled to ask prospective jurors questions that are specific enough to determine if those jurors harbor bias, as to some or circumstance shown by the trial evidence, that would cause them not to follow an instruction directing them to determine a penalty after considering aggravating and mitigating evidence." *Id.* at 720-721.

"Our decisions have explained that death-qualification voir dire must avoid two extremes. On the one hand, it must not be so abstract that it fails to identify those jurors whose

death penalty views would prevent or substantially impair the performance of their duties as jurors in the case being tried. On the other hand, it must not be so specific that it requires the prospective jurors to prejudge the penalty issue based on a summary of the mitigating and aggravating evidence likely to be presented." *Id.* at 721-722.

d. *People v. Burgener* (2003) 29 Cal.4th 833, 865-866. In a penalty phase retrial "the trial court sustained the People's objections when defense counsel asked prospective jurors whether they would impose the death penalty after considering a rather detailed account of some of the facts of this case, and whether a prospective juror could continue to be impartial after hearing a list of defendant's prior crimes. There was no error in ruling that questions related to the jurors attitudes toward evidence that was to be introduced in this trial could not be asked during the sequestered [death-qualification] voir dire.'" (*Jenkins, supra,* 22 Cal.4th at p. 991.) Defendant had no right to ask specific questions that invited prospective jurors to prejudge the penalty issue based on a summary of the aggravating or mitigating evidence (*People v. Cash* (2002) 28 Cal.4th 703, 721-722 [122 Cal.Rptr.2d 545, 50 P.3d 332]), to educate the jury as to the facts of the case (*People v. Sanders* (1995) 11 Cal.4th 475, 538-539 [46 Cal.Rptr.2d 751, 905 P.2d 420]), or to instruct the jury in matters of law (*People v. Ashmus* (1991) 54 Cal.3rd 932, 959 [2 Cal.Rptr. 2d 112, 820 P.2d 214])." *Id.* at 865.

e. *People v. Navarette* (2003) 30 Cal.4th 458, 489-490. The defendant complained because the court limited his oral questioning, relating to the nature of the crimes charged. The Supreme Court rejected the defendant's contentions because his questionnaire did address these issues. The Court addressed *Medina* as compared with *Pinholster* and *Cash.*

"Defendant argues that *Medina* prevented him from asking jurors if they would automatically impose the death

penalty in a double-murder case, whereas under *Pinholster*, the People are free to inquire whether any jurors would automatically refuse to impose the death penalty in a burglary-murder case. This imbalance, he claims, led to a jury that was biased in favor of the death penalty, in violation of his rights under the federal Constitution.

We need not decide the continuing validity of our comment in *Medina*, because here the trial court did not prevent defendant from asking jurors whether they would automatically impose the death penalty in a multiple-murder case, the defendant did ask such a question." *Id.* at 489-490.

f. *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 47-48. "Coffman complains the trial court prevented her counsel from questioning the prospective jurors on their views regarding the circumstances of the case that were likely to be presented in evidence in order to determine how such circumstances might affect their ability to fairly determine the proper penalty in the event of a conviction."

In reality, "the trial court invited counsel to draft a proposed question for prospective jurors eliciting their attitudes toward the death penalty and in fact itself questioned a prospective juror whether he could weigh all the evidence before reaching a penalty determination in a case involving multiple murder."

Citing *Jenkins* and *Cash*, the Court found no abuse of discretion. "Unlike in *People v. Cash, supra,* 28 Cal.4th at pages 720-722, the trial court did not categorically prohibit inquiry into the effect on prospective jurors of the other murders, evidence of which was presented in the course of the trial. Rather, the trial court merely cautioned Coffman's counsel not to recite specific evidence expected to come before the jury in order to induce the juror to commit to voting in a particular way. (See *People v. Burgener* (2003) 29 Cal.4th 833, 865." Id. at 47-48.

g. *People v. Viera* (2005) 35 Cal.4th 264, 283-286. "Prior to the commencement of voir dire, defense counsel submitted a proposed jury questionnaire that contained the following question: "Do you feel you would automatically vote for death instead of life imprisonment with no parole if you found the defendant guilty of two or more murders?" The prosecution objected that the subject areas "should be covered by the Court" in its death qualification voir dire. "The question was not included in the jury questionnaire. Moreover, the judge's questions to prospective jurors did not ask this or a similar question."

Citing *Cash*, the defendant claimed he was entitled to a reversal of the death verdict. After contrasting the facts in *Medina* with those in *Cash*, the Supreme Court found the defendant made no effort to ask this legitimate question during the oral portion of voir dire.

"As our discussion of *Medina* in *Cash* suggests, a trial court's categorical prohibition of an inquiry into whether a prospective juror could vote for life without parole for a defendant convicted of multiple murder would be error. Multiple murder falls into the category of aggravating or mitigating circumstances "likely to be of great significance to prospective jurors." (*Cash, supra,* 28 Cal.4th at p. 721.) The Attorney General does not dispute this point. Rather, the Attorney General argues that defendant was not denied the opportunity to conduct voir dire on the subject of multiple murder. We agree.

Although the trial court did not include the sough-after question on multiple murder in the jury questionnaire, it never suggested that defense counsel could not raise the issue in voir dire." *Id.* at 285. "Although asking the multiple-murder question in the jury questionnaire would not have been improper, refusal to include the question was not error so long as there was an opportunity to ask the question during voir dire. Because defendant did not attempt to have the trial court conduct a multiple murder inquiry during voir dire, and the trial court was given no

opportunity to rule on the propriety of that inquiry, we conclude defendant cannot claim error." *Id.* at 286.

4. Examples of Permissible Death Qualifying Questions

   a. "Court: Both sides are entitled to have 12 jurors that, if necessary, can make that choice and make the choice based on the law that I outlined and make it fair for the defendant, fair for the prosecution, the sides they represent here. Do you believe you are a juror who can do that or do you think that your abilities are substantially impaired by your feelings about the death penalty? *People v. Harris* (2005) 37 Cal.4th 310, 330.

   b. The court asked each individual panel member, out of the presence of other prospective jurors, five questions, which may be paraphrased as follows: (1) Would you automatically refuse to impose the death penalty regardless of the evidence or the law in the case? (2) If defendant were found guilty of first degree murder with special circumstances at the guilt phase, would you automatically vote to impose the death penalty without regard to the evidence or the law? (3) Would your death penalty views prevent you from making an impartial decision as to the defendant's guilt? (4) Are your views such that you would never vote to impose the death penalty? (5) Are your views such that you would refuse to consider imposing the death penalty *in this case? People v. Balderas* (1985) 41 Cal.3rd 144, 187-188.

   c. The prosecutor asked: "[I]f I could prove to you beyond a reasonable doubt and to a moral certainty that he's guilty of murder, first degree murder with special circumstances, and based upon the second phase of this trial, the penalty phase, that you thought the death penalty was appropriate, could you then take that system and say, 'Yes, that man, Gregory Smith, he deserves the death penalty,' and vote accordingly; could you do that?" *People v. Smith* (2003) 30 Cal.4th 581, 603 fn. 3.

d. The defense wanted to ask: "Whether there are any aggravating circumstances which would cause a prospective juror to automatically vote for the death penalty, without considering the alternative of life imprisonment without possibility of parole." *People v. Cash* (2002) 28 Cal.4th 703, 719.

e. "Do you feel you would automatically vote for death instead of life imprisonment with no parole if you found the defendant guilty of two or more murders?" *People v. Viera* (2005) 35 Cal.4th 264, 283.

f. Whether an accomplice to murder should be subject to the death penalty, with or without intent to kill, was a proper subject for voir dire in *People v. Fuentes* (1985) 40 Cal.3rd 629.

g. The trial court permitted the prosecutor to ask each prospective juror whether, in the words of a representative query, the fact that a capital defendant was "18 or 19 at the time of the killing . . . [would] automatically cause you to vote for the lesser punishment of life imprisonment without possibility of parole?" In addition, the prosecutor was permitted to ask each juror in the sequestered voir dire whether "you would be able to consider imposing the death penalty . . . if we have one victim as opposed to requiring that the defendant kill two or more people?" *People v. Noguera* (1992) 4 Cal.4th 599, 645.

h. In an effort to illustrate the difference between "consider" and "chose", the prosecutor asked: "You can walk by Tiffany's and you can look in the window and you can meaningfully consider this $15,000 stone and that gold Rolex watch; right? And you can think, well, I'd rather have this one with the rubies in it or that with the stones in it or this beautiful diamond ring. But there is a difference between considering and choosing. Could you ever possibly choose the death penalty?" *People v. Smith* (2003) 30 Cal.4th 581, 602-603.

i. In describing the penalty phase of trial, the prosecutor gave illustrations of aggravating and mitigating evidence. As an example of aggravating evidence, he often mentioned a hypothetical defendant with a history of many prior felony convictions. To illustrate mitigating evidence, he often mentioned a hypothetical defendant who had received the Congressional Medal of Honor, was a war hero, had saved someone's life, or had no prior criminal history. The illustrations of aggravating evidence used by the prosecutor and the trial court resembled the aggravating evidence actually presented by the prosecution in this case, whereas the illustrations of mitigating evidence were wholly unlike defendant's mitigating evidence. *People v. Seaton* (2001) 26 Cal.4th 598, 635-636.

j. At the outset of voir dire, counsel informed the trial court that he wished to question the prospective jurors as to whether they believed a robbery accomplice who does not kill should be punished as severely as an intentional killer. Accordingly, counsel submitted for the court's approval the following question: "Do you believe that one who only aids and abets the commission of an attempted robbery and does not intentionally aid and abet the actual killing during the commission of said attempted robbery should be treated under the law in the same fashion as the actual killer?" *People v. Fuentes* (1985) 40 Cal.3rd 629, 637.

5. Examples of Impermissible Death Qualifying Questions (Typically asked by the defense)

a. The defense proposed a lengthy, factually detailed question that would have given prospective jurors substantial information about defendant's victims and the manner in which they were killed. He then wanted to ask whether the juror would automatically vote for death. (*People v. Mason* (1991) 52 Cal.3rd 909, 940 fn. 4).

b. In an effort to determine whether the evidence of serious burn injuries suffered by the victims would cause a jury to automatically vote for the death penalty, defendant sought

to inquire about the prospective jurors' attitudes toward such injuries. The People objected and, at that stage of the examination, the court ruled that the jury would not be told of the injuries suffered by Ava Gawronski, and defendant would not be permitted to ask the prospective jurors if knowledge of the extent of those injuries would affect their ability to perform their duties. *People v. Clark* (1990) 50 Cal.3rd 583, 596. But see fn. 3.

c. Defense counsel posed a hypothetical question to a prospective juror as follows. "[T]wo men go into a restaurant in the early morning hours. They herd 11 people, two customers and nine employees, to the back area of the restaurant. The two men are armed with shotguns. They rob all the people and make them lie on the floor and they rob them all. They put them all in a freezer. The people obey all the orders and instructions that the two men give them. They do not fight with them or protest. They are told to get on their knees and face the walls. They do that. No one says anything. And the two men open fire, as you put it, with their shotguns. And they go on firing even though one of the victims begs for her life. They do not stop firing until they run out of ammunition. They pick up the casings that their guns have expended. They leave everybody in this darkened freezer where people are dying and people are moaning. [¶] Now, if those are the facts that you are presented with at the penalty phase, you understand you are entitled to rely on those facts as one of the circumstances in deciding a penalty, do you not?" Defense counsel was also permitted to ask: "Now, don't you believe that that's precisely the kind of case where with your ideas of justice, the death penalty is the only appropriate kind of penalty?" She then asked if various hypothetical aggravating and mitigating factors—such as the defendant's criminal record, age, and background—would make a difference to the juror. *People v. Sanders* (1995) 11 Cal.4th 475, 535.

d. A juror was asked: "So now you're in a penalty phase with the defendant like this one, who has committed

this kind of a crime and I want you to ask yourself, after looking inside yourself whether you could actually vote to put another human being to death for doing a crime like this:

"Let's assume you have a person who decides to commit a robbery because he wants to make some additional money. He goes out and gets himself a loaded handgun to make the odds more in his favor that he'll be successful. And he finds a victim that he thinks has some money and sure enough, the victim has some money when the defendant sticks him up. Sometime about this point the defendant has the brilliant thought that if I let this guy go, he's going to the police and I might get caught and whereas if I don't let him go, don't leave any witnesses, I won't get caught, in other words, I'd better kill him to make myself more certain of getting away.

"That's exactly what he does; he shoots the victim once through the heart and subsequently he's caught and he's been brought before us and you have found beyond any doubt that he's guilty of first degree murder committed during the course of a robbery.

"Do you think it's possible that you could go in the jury room, look the other jurors in the eye and knowing you'll have to come out and look the defendant in the eye also, say I think this crime is so horrendous and the other background facts we've heard are so horrendous, he should be put to death?" *People v. Visciotti* (1992) 2 Cal.4th 1, 46-47. (Defense counsel did not, but should have objected).

e. The prosecutor asked: "If we get to the penalty phase, if we get that far, then you've already found the man guilty of first degree murder. It's a horrible crime. And you found he committed this murder while he was engaged in a robbery, based on facts that would be something like a man decides to commit a robbery, arms himself with a handgun to make sure he's successful, robs his victim. During the course of the robbery it occurs to him that if the

victim is not alive, there won't be anybody going to the police and complain . . . . So, realizing that, the robber points his gun at the victim, pulls the trigger, shoots him once through the heart and kills him.

That's the type of facts we're going to be dealing with, something along those lines, perhaps.

Do you feel just, first of all, theoretically like it's possible you could vote for the death penalty if you're faced with facts such as those?" *People v. Visciotti* (1992) 2 Cal.4th 1, 46. (Defense counsel did not, but should have objected).

f. Defense counsel was precluded from informing the prospective jurors that defendant had been convicted of first degree murder and that the special circumstance of torture murder had been found true, and prohibiting mention of the specific facts surrounding the torture murder, in violation of his Sixth Amendment right to a fair trial. *People v. Davenport* (1995) 11 Cal.4th 1171, 1204.

g. The court curtailed voir dire only when defendant asked her what type of murder case warranted the death penalty. *People v. DeSantis* (1992) 2 Cal.4th 1198, 1218.

h. If Adolf Hitler were on trial charged with murdering six million people . . . ." The court refused to permit the question, saying that "I don't think it is fair to ask a juror to speculate what they might do with Adolf Hitler. We therefore conclude that a court may properly prohibit voir dire which seeks to ascertain a juror's views on the death penalty in actual or hypothetical cases not before him. *People v. Fields* (1983) 35 Cal.3rd 329, 354-357.

i. The defense was precluded from questioning potential jurors regarding factors and circumstances they would deem significant in selecting an appropriate sentence. *People v. Johnson* (1989) 47 Cal.3rd 1194, 1225.

j. "Is life without the possibility of parole an appropriate sentence for someone who robs, rapes and kills an elderly woman?" *People v. Wright* (1990) 52 Cal.3rd 367, 419 fn. 18.

k. "What do you feel is a proper punishment for someone who has committed a rape or other serious sexually related crime?" (*People v. Ochoa* (1998) 19 Cal.4th 353, 444.)

l. The defense extensively questioned the prospective jurors on their understanding of the two possible sentences at the penalty phase, defense counsel declared that life imprisonment without possibility of parole meant life imprisonment *without possibility of parole.* In so doing, they stated or implied that the penalty would inexorably be carried out. They contrasted life imprisonment without possibility of parole, which might be imposed on defendant, with life imprisonment *simpliciter*, which had been imposed on such notorious criminals as Charles Manson and Sirhan Sirhan. *People v. Ashmus* (1991) 54 Cal.3rd 932, 957-960.

m. The prosecutor remarked that it would be proper to consider "sympathetic factors" in defendant's favor, but that defendant would be appearing in court "dressed up and decent" and had "over six years to get ready for today." The prosecutor continued in a similar vein that "[w]hat you're not going to have is the victim appear[ing] in court . . ." (*People v. Montiel* (1993) 5 Cal.4th 877, 914-915, fn. 14.)

n. In penalty re-trial, defense counsel wanted to inform jury the first penalty trial resulted in a hung jury and asked jurors about their knowledge of the first trial. (*People v. Wash* (1993) 6 Cal.4th 215, 252.)

o. Defense counsel wanted to inform jury that penalty reversal was not caused by an appellate reversal of an earlier death verdict. (*People v. Wash* (1993) 6 Cal.4th 215, 254.)

p. Questions regarding Governor's commutation power. (*People v. Pinholster* (1992) 1 Cal.4th 865, 918; *People v. Carpenter* (1997) 15 Cal.4th 312, 359.)

q. Asking a juror whether he had voted for a ballot proposition to enact the death penalty or would vote for such a penalty in a public election may be error. (*People v. Ochoa* (1998) 19 Cal.4th 53, 428.)

r. Asking a prospective juror whether the Supreme Court's capital opinions under former Chief Justice Rose Bird were "kind of off base" and whether the vote not to retain her or other justices was correct may be error. (*People v. Ochoa* (1998) 19 Cal.4th 353, 428.)

Voir Dire

I. LAW

A. The Adoption of Proposition 115 in 1990 Changed Voir Dire. *People v. Edwards* (1991) 54 Cal.3rd 787, 829; *People v. Carpenter* (1997) 15 Cal.4th 312, 353; *People v. Jenkins* (2000) 22 Cal.4th 900, 990.

1. Pre-Proposition 115 Rules

   a. The attorneys participated in the questioning process.

   b. The purpose of voir dire was to allow the parties to intelligently exercise their peremptory challenges. (*People v. Williams* (1981) 29 Cal.3d 392.)

2. In 1990, the voters passed Proposition 115, which included a new Code of Civil Procedure section 223 regulating voir dire in criminal cases.

   "In a criminal case, the court shall conduct the examination of prospective jurors. However, the court may permit the parties, upon a showing of good cause, to supplement the examination by such further inquiry as it deems proper, or shall itself submit to the prospective jurors upon such a showing, such additional questions by the parties as it deems proper." (Code Civ. Proc., § 223.)

   a. The court shall conduct the examination of prospective jurors.

   b. Upon a showing of good cause, the court may allow the attorneys to question the jurors.

c. Where practicable, voir dire shall occur in the presence of the other jurors.
d. Questioning shall be conducted only to aid in the exercise of challenges for cause.

3. Section 222 was amended effective January 1, 2001, to again allow attorney questioning.

> "In a criminal case, the court shall conduct an initial examination of prospective jurors. The court may submit to the prospective jurors additional questions requested by the parties as it deems proper. Upon completion of the court's initial examination, counsel for each party shall have the right to examine, by oral and direct questioning, any or all of the prospective jurors. The court may, in the exercise of its discretion, limit the oral and direct questioning of prospective jurors by counsel. The court may specify the maximum amount of time that counsel for each party may question an individual juror, or may specify an aggregate amount of time for each party, which can then be allocated among the prospective jurors by counsel."

a. Amendment become effective January 1, 2001.

b. Court can limit amount of time allotted to the parties.

c. Shall be conducted "only in the aid of the exercise of challenges for cause."

B. Challenges.

1. Challenge for Cause – Because voir dire "shall be conducted only to aid in the exercise of challenges for case," the specific grounds must be known.

a. Unlimited Number

b. Three Types of Challenges for Cause

(1) **General disqualification** – that the juror is disqualified from serving in the action on trial. (Code Civ. Proc., § 225(b)(1)(A).)

(a) Section 203 lists general disqualifications for jurors:

1) Persons who are not citizens of the United States.

2) Persons who are less than 18 years of age.

3) Persons who are not domiciliaries of the State of California, as determined pursuant to Article 2 (commencing with Section 2020) of Chapter 1 of Division 2 of the Elections Code.

4) Persons who are not residents of the jurisdiction wherein they are summoned to serve.

5) Persons who have been convicted of malfeasance in office or a felony, and whose civil rights have not been restored.

6) Persons who are not possessed of sufficient knowledge of the English language, provided that no person shall be deemed incompetent solely because of the loss of sight or hearing in any degree or other disability which impedes the person's ability to communicate or which impairs or interferes with the person's mobility.

7) Persons who are serving as grand or trial jurors in any court of this state.
8) Persons who are the subject of conservatorship.

(b) Section 228(b) lists additional requirements: A loss of hearing, or the existence of any other incapacity which satisfies the court that the challenged person is incapable of performing the duties of a juror in the particular action without prejudice to the substantial right of the challenging party.

(2) **Implied Bias** – Section 229

A challenge for implied bias may be taken for one or more of the following causes, and for no other:

(a) Consanguinity or affinity within the fourth degree to any party, to an officer of a corporation which is a party, or to any alleged witness or victim in the case at bar.

(b) Standing in the relation of, or being the parent, spouse, or child of one who stands in the relation of, business with either party; or surety on any bond or obligation for either party, or being the holder of bonds or shares of capital stock of a corporation which is a party; or having stood within one year previous to the filing of the complaint in the action in the relation of attorney and client with either party or with the attorney for either party. A depositor of a bank or a holder of a savings account in a savings and loan association shall not be deemed a creditor of that bank or savings and loan association for the purpose of this paragraph solely by reason of his or her being a depositor or account holder.

(c) Having served as a trial or grand juror or on a jury of inquest in a civil or criminal action or been a witness on a previous or pending trial between the same parties, or involving the same specific offense or cause of action; or having served as a trial or grand juror or on a jury within one year previously in any criminal or civil action or proceeding in which either party was the plaintiff or defendant or in a criminal action where either party was the defendant.

(d) Interest on the part of the juror in the event of the action, or in the main question involved in the action, except his or her interest as a member or citizen or taxpayer of a county, city and county, incorporated city or town, or other political subdivision of a county, or municipal water district.

(e) Having an unqualified opinion or belief as to the merits of the action founded upon knowledge of its material facts or of some of them.

(f) The existence of a state of mind in the juror evincing enmity against, or bias towards, either party.

(g) That the juror is party to an action pending in the court for which he or she is drawn and which action is set for trial before the panel of which the juror is a member.

(h) If the offense charged is punishable with death, the entertaining of such conscientious opinions as would preclude the juror finding the defendant guilty; in which case the juror

may neither be permitted nor compelled to serve.

(3) **Actual Bias** – Section 225(b)(1)(C)

Actual bias - the existence of a state of mind on the part of the juror in reference to the case, or to any of the parties, which will prevent the juror from acting with entire impartiality, and without prejudice to the substantial rights of any party.

2. Peremptory Challenges

a. No Reason Need be Given – CCP § 226(b).

b. Number of Peremptory Challenges Allowed.

(1) Depends on punishment allowed and number of defendants on trial.

(2) Single defendant case.

(a) 20 – If punishable by death or life imprisonment – CCP § 231(a).

(b) 6 – if punishable with maximum of 90 days or less – CCP § 231(b).

(c) 10 – all other cases – CCP § 231(a).

(3) Multiple defendant case.

(a) Death or life imprisonment case – CCP § 231(a).

1) 20 joint challenges.

2) 5 individual challenges for each defendant.

3) DA gets same total as entire defense team.

(b) 90 days or less – CCP § 231(b).

1) 6 joint challenges.

2) 4 individual challenges for each defendant.

3) DA gets same total as entire defense team.

c) All other cases – CCP § 231(a).

1) 10 joint challenges

2) 5 individual challenges

3) DA gets same total as entire defense team

(4) Alternates – CCP § 234.

(a) Single defendant case – one per number of alternates.

(b) Multiple defendant cases – each defendant gets one per number of alternates.

(c) DA gets same total number as defense team.

(5) A pass does not count as a challenge – CCP § 231(d)(e).

II. APPLICATION OF THE LAW

A. Defense challenge for cause.

1. The standard is "whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Wainright v. Witt* (1985) 469 U.S. 412, 424; *People v. Ghent* (1987) 43 Cal.3rd 739, 767.

2. Erroneous denial of defense challenge is not reversible per se. *Ross v. Oklahoma* (1988) 487 US 81, 87; *People v. Edwards* (1991) 54 Cal.3d 787, 830.)

3. To prevail on appeal, defendant must show prejudice, that is: 1) he used a peremptory challenge on the questioned juror, 2) he exhausted all his peremptory challenges, and 3) he expressed dissatisfaction with the final jury. (*People v. Morris* (1991) 53 Cal.3d 152, 184; *People v. Mickey* (1991) 54 Cal.3d 612, 683: *People v. Crittenden* (1994) 9 Cal.4th 83, 121; *People v. Samayoa* (1997) 15 Cal.3d 795, 821; *People v. Cunningham* (2001) 25 Cal.3d 926, 976.)

4. No prejudice if the juror was not part of the final jury. (*People v. Edwards* (1991) 54 Cal.3d 787, 830; *People v. Clarke* (1992) 3 Cal.4th 41, 155; *People v. Johnson* (1992) 3 Cal.4th 1183, 1210; *People v. Cain* (1995) 10 Cal.4th 1, 61; *People v. Hawkins* (1995) 10 Cal.4th 920, 939; *People v. Horton* (1995) 11 Cal.4th 1068, 1093; *People v. Ramos* (1997) 15 Cal.4th 1133, 1159; *People v. Barnett* (1998) 17 Cal.4th 1044, 1113; *People v. Millwee* (1998) 18 Cal.4th 96, 146.)

5. No prejudice if defendant did not use all peremptory challenges. (*People v. Kelly* (1990) 51 Cal.3d 931, 960; *People v. Morris* (1991) 53 Cal.3d 152, 184; *People v. Price* (1991) 1 Cal.4th 324, 401; *People v. Danielson* (1992) 3 Cal.4th 691, 713; *People v. Mayfield* (1993) 5 Cal.4th 142, 169; *People v. Garceau* (1993) 6 Cal.4th 140, 174; *People v. Cain* (1995) 10 Cal.4th 1, 61; *People v. Lucas* (1995) 12 Cal.4th 415, 480; *People v. Samayoa* (1997) 15 Cal.4th 795, 821; *People v. Ramos* (1997) 15 Cal.4th 1133, 1158; *People v. Williams* (1997) 16 Cal.4th 635, 667; *People v. Barnett* (1998) 17 Cal.4th 1044, 1113; *People v. Millwee* (1998) 18 Cal.4th 96, 146; *People v. Bolin* (1998) 18 Cal.4th 297, 315; *People v. Ochoa* (1998) 19 Cal.4th 353, 444; *People v.*

Waidla (2000) 22 Cal.4th 690, 715; *People v. Bemore* (2000) 22 Cal.4th 809, 837; *People v. Ayala* (2000) 23 Cal.4th 225, 261; *People v. Lewis* (2001) 25 Cal.4th 610, 634.)

6. Being required to use a peremptory challenge on a denied challenge for cause does not establish prejudice. (*People v. Gordon* (1990) 50 Cal.3d 1223, 1247; *People v. Kaurish* (1990) 52 Cal.3d 648, 674.)

7. Did defendant request additional peremptory challenges? (*People v. Edwards* (1991) 54 Cal.3d 787, 831.)

    a. Request for additional challenges denied. (*People v. Pride* (1992) 3 Cal.4th 195, 230; *People v. Ramos* (1997) 15 Cal.4th 1133, 1159; *People v. Williams* (1997) 16 Cal.4th 635, 667.)

8. Defendant must express dissatisfaction with the final jury to prove prejudice. (*People v. Edwards* (1991) 54 Cal.3d 787, 830; *People v. Danielson* (1992) 3 Cal.4th 691, 713; *People v. Lucas* (1995) 12 Cal.4th 415, 830; *People v. Williams* (1997) 16 Cal.4th 635, 667; *People v. Millwee* (1998) 18 Cal.4th 96, 146; *People v. Ochoa* (1998) 19 Cal.4th 353, 444; *People v. Bemore* (2000) 22 Cal.4th 809, 837; *People v. Ayala* (2000) 23 Cal.4th 225, 261; *People v. Lewis* (2001) 25 Cal.4th 610, 634; *People v. Weaver* (2001) 26 Cal.4th 876, 911; *People v. Seaton* (2001) 26 Cal.4th 598, 637.

9. No duty on court sua sponte to excuse juror on its own motion. (*People v. Bolin* (1998) 18 Cal.4th 297, 315; *People v. Lucas* (1995) 12 Cal.4th 415, 481.)

10. Court not required to allow defense opportunity to rehabilitate challenged juror if bias is obvious. (*People v. Bittaker* (1989) 48 Cal.3d 1046, 1085; *People v. Carpenter* (1997) 15 Cal.4th 312, 355; *People v. Samayoa* (1997) 15 Cal.3d 795, 823.)

11. Court not required to tell juror his civic duty requires him to set aside his personal beliefs regarding the death penalty. (*People v. Sanders* (1990) 15 Cal.3d 471, 503; *People v. Miranda* (1987) 44 Cal.3d 57, 96.)

12. Examples of proper denial of defense challenge for cause. (*People v. Stankewitz* (1990) 51 Cal.3d 72, 103; *People v. Kelly* (1990) 51 Cal.3d 931, 960; *People v. Mincey* (1992) 2 Cal.4th 457; *People v. McPeters* (1992) 2 Cal.4th 1148, 1177; *People v. Crittenden* (1994) 9 Cal.4th 83, 122; *People v. Samayoa* (1997) 15 Cal.4th 795, 822; *People v. Williams* (1997) 16 Cal.4th 635, 668; *People v. Jenkins* (2000) 22 Cal.4th 900, 987; *People v. Cunningham* (2001)25 Cal.4th 926, 976; *People v. Weaver* (2001) 26 Cal.4th 876, 911.)

B. DA challenge for cause.

1. Use same standard (*Witt*) as defense challenge for cause. (*People v. Crittenden* (1994) 9 Cal.4th 83, 121; *People v. Pride* (1992) 3 Cal.4th 195, 227; *People v. Mincey* (1992) 2 Cal.4th 408, 456; *People v. Bradford* (1997) 15 Cal.4th 1229, 1318.)

2. Erroneous granting of DA challenge is reversible per se. (*Grey v. Mississippi* (1987) 481 US 648, 666; *People v. Cooper* (1991) 53 Cal.3d 771, 809; *People v. Edwards* (1991) 54 Cal.3d 787, 831.)

    a. Reverses penalty verdict, not guilt. (*People v. Ashmus* (1991) 54 Cal.3d 932, 962.)

    b. If juror's answers equivocal, trial judge's ruling will be upheld. (*People v. Ruiz* (1988) 44 Cal.3d 589, 618; *People v. Ghent* (1987) 43 Cal.3d 739, 768; *People v. Coleman* (1988) 46 Cal.3d 749, 767.)

C. Peremptory Challenges.

1. It is improper to ask questions intended solely to educate the jury, compel the jurors to commit to vote a certain way, prejudice the jury, argue the case, indoctrinate the jury, instruct the jury on the law, or test the juror's knowledge of the law. (*People v. Edwards* (1912) 163 Cal. 752; *People v. Willams* (1981) 29 Cal.3d 392, 408; *People v. Ashmus* (1991) 54 Cal.3d 932, 959.)

2. It is permissible to ask a juror about his attitude about a particular rule of law only if (1) the rule is relevant or material to the case, and (2) the rule appears to be controversial; e.g., the juror has indicated some hostility toward the rule, or it is commonly known the community harbors strong feelings about it. (*People v. Balderas* (1985) 41 Cal.3d 144, 185; *People v. Williams* (1981) 29 Cal.3d 392, 408.)

3. Examples of Permissible Questions Relating to Murder

   a. Asked jurors whether they would be able to vote guilty if, after deliberations, they were persuaded that the changes had been proved beyond a reasonable doubt. (*People v. Fierro* (1991) 1 Cal.4th 173, 209.)

   b. "[I]f I prove beyond a reasonable doubt each and every element of each of the offenses charged . . . can you assure me that you would be willing to return a verdict of guilty even though you have unanswered questions?" *People v. Riel* (2000) 22 Cal.4th 1153, 1178 fn. 4.

   c. In order to avoid a hung jury the prosecutor observed that each juror must "come to your own conclusion," but also stressed the value of "work[ing] together to try to discover the truth." (*People v. Fierro* (1991) 1 Cal.4th 173, 210, fn 8.)

   d. In questioning a juror, the prosecutor asked her if she believed a person charged with committing a crime such as defendant's must be insane. The prosecutor also asked: Do you feel there could be such a thing as a person who is legally insane? *People v. Fields* (1983) 35 Cal.3rd 329, 358.

   e. Questions designed to determine jurors' views regarding the felony-murder rule. (*People v. Pinholster* (1992) 1 Cal.4th 865, 913; *People v. Ochoa* (2001) 26 Cal.4th 398, 431; *People v. Ervin* (2000) 22 Cal.4th 48, 70.)

f. California's self-defense "no need to retreat in your own home" rule is controversial and was relevant in this case, so conviction is reversed for forbidding questions on attitudes about this rule. (*People v. Williams* (1981) 29 Cal.3d 392, 411.)

g. Whether they would view a person's possession of recently stolen property as circumstantial evidence that the person stole the property, whether they considered rape more of an assaultive than a sexually motivated offense, and whether they thought it was possible for a young man to rape an elderly woman and not be mentally ill. (*People v. Mendoza* (2000) 24 Cal.4th 130, 167.)

4. Examples of Impermissible Questions Relating to Murder (Typically Asked by the Defense):

a. Do you believe in self-defense in the home? (Not controversial; *People v. Williams* (1981) 29 Cal.3d 392, 411.)

b. "Whether, if they believed that a witness was an informant and was testifying 'in exchange for some lesser sentence,' then that 'would have some bearing on the weight or credibility that that witness may have in your mind?' " (*People v. Mason* (1991) 52 Cal.3d 909, 940.)

c. In a death penalty case, the court did not "allow either party to discuss the law – such as the meaning of diminished capacity – or ask questions that required the prospective jurors to pretry the facts of the case." *People v. Rich* (1988) 45 Cal.3rd 1036, 1104.

d. Defense counsel was not permitted to question prospective jurors regarding their ability to view accomplice testimony with suspicion and distrust. *People v. Johnson* (1989) 47 Cal.3rd 1194, 1224.

e. In an eyewitness case where the defense expected to call Dr. Elizabeth Loftus, the defense was prohibited from eliciting opinions of potential jurors concerning the effects of stress on perception. *People v. Sanders* (1990) 51 Cal.3rd 471, 506.

f. Defense counsel stated, "It's clear a girlfriend has an interest to lie. I just want to make sure that the jurors don't automatically, before they hear her testimony, say she's lying because she's the girlfriend." The trial court barred this line of questioning on the ground that the defendant was trying to educate the jurors and induce them to prejudge the evidence. We cannot say that the court abused its discretion in doing so. *People v. Helton* (1984) 162 Cal.App.3rd 1141, 1145.

g. "What do you feel is a proper punishment for someone who has committed a rape or other serious sexually related crime?" (*People v. Ochoa* (1998) 19 Cal.4th 353, 444.)

h. Many detailed questions regarding personal experience with sexual molestation in a child molestation-murder case. (*People v. Earp* (1999) 20 Cal.4th 826, 851, fn 1.)

i. In a capital murder case where one victim was a three year old child, defendant requested that the trial court inquire as to the ages of the prospective jurors' grandchildren. The court denied the request, stating, "Whether you're going to be prejudiced by the fact that a young child is involved in this case doesn't turn upon whether you have one at the moment. It turns upon whether your personality and capacities are such as to be able to deal with the wrench that goes with that. No matter how many or how few grandchildren you have got or what age you are. It's something that jurors are going to have to deal with; they're going to have to be able to set aside." *People v. Box* (2000) 23 Cal.4th 1153, 1178.

j. In a capital murder trial defendant wanted the following questions included on the questionnaire:

What has been your favorite job and what (do/did) you enjoy about it?"
"What has been your least favorite job and what (do/did) you dislike most about it?"

"If you were a supervisor or employer, what do you think is the best way to keep workers in line?"

"A person should maintain his or her belief on a subject so long as he or she feels that belief if right. Strongly Agree ___ Agree Somewhat ___ Disagree Somewhat ___ Strongly Disagree ___ Please explain."

People v. Navarette (2003) 30 Cal.4th 458, 486.

k. "The court's restriction on questions regarding a prospective juror's birth date, religion and religious service attendance, or voting on the retention of Chief Justice Rose Bird," was not an abuse of discretion. (*People v. Ramos* (1997) 15 Cal.4th 1133, 1158.)

l. Why did you vote as you did on Proposition 8? (Invades juror's privacy) (*People v. Wells* (1983) 149 Cal.App.3d 721, 726.)

m. What was the most important part of Proposition 8? (Unfocused) (*People v. Wells* (1983) 149 Cal.App.3d 721, 726.)

n. Asking a prospective juror whether the Supreme Court's capital opinions under former Chief Justice Rose Bird were "kind of off base" and whether the vote not to retain her or other justices was correct may be error. (*People v. Ochoa* (1998) 19 Cal.4th 353, 428.)

D. Death Qualification Voir Dire.

1. The test.

> "With respect to questions directing the juror's attention to the facts of the case, we have observed that: "The *Witherspoon-Witt* [citations] voir dire seeks to determine only the views of the prospective jurors about capital punishment in the abstract . . . . [Citations.] The inquiry is directed to whether, without knowing the specifics of the case, the juror has an 'open mind' on the penalty determination. There was no error in ruling that questions related to the jurors' attitudes toward evidence that was to be introduced in this trial could not be asked during the sequestered *Witherspoon-Witt* voir dire." (*People v. Clark* (1990) 50 Cal.3rd 583, 597; see also *People v. Sanders* (1995) 11 Cal.4th 475, 539. Nor is it error to preclude counsel from seeking to compel a prospective juror to commit to vote in a particular way (*People v. Rich* (1988) 45 Cal.3rd 1036, 1105, or to preclude counsel from indoctrinating the jury as to a particular view of the facts. *People v. Jenkins* (2000) 22 Cal.4th 900, 990.

2. However, "A challenge for cause may be based on the prospective juror's response when informed of facts or circumstances likely to be present in the case being tried. (*People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1005.) Thus, we have affirmed the principle that either party is entitled to ask prospective jurors questions that are specific enough to determine if those jurors harbor bias, as to some fact or circumstance shown by the trial evidence, that would cause them not to follow an instruction directing them to determine penalty after considering aggravating and mitigating evidence. (*People v. Cash* (2002) 28 Cal.4th 703, 720-721. "Our decisions have explained that death-qualification voir dire must avoid two extremes. On the one hand, it must not be so abstract that it fails to identify those jurors whose death penalty views would prevent or substantially impair the performance of their duties as jurors in the case being tried. On the other hand, it must not be so specific that it requires the prospective jurors to prejudge the penalty issue based on a summary of the mitigating and aggravating evidence likely to be presented. (See *People v. Jenkins* [*supra*, 22 Cal.4th at

pp. 990-991 . . . [not error to refuse to allow counsel to ask juror given 'detailed account of the facts' in the case if she 'would impose' death penalty].) In deciding where to strike the balance in a particular case, trial courts have considerable discretion." (*Cash, supra*, at pp. 721-722.) *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 47.

3. Compare the following cases:

    a. *People v. Pinholster* (1992) 1 Cal.4th 865, 916-918. The prosecutor was allowed to ask questions about jurors' willingness to impose the death penalty in a burglary-murder case. "Each juror's reluctance to impose the death penalty was based not on an evaluation of the particular facts of the case, but on an abstract inability to impose the death penalty in a felony-murder case." *Id.* at 916.

    "Defendant objects that fact-based voir dire is impermissible under *Witt, supra*, 469 U.S. 412. As we have already noted, we have commented in the past that questions directed to jurors' attitudes toward the particular facts of the case are not relevant to the death-qualification process, so that a trial court that refused to permit such questions did not err. (*People v. Clark, supra*, 50 Cal.3rd at p. 597.) We have also said, however, that "a court may properly excuse a prospective juror who would automatically vote against the death penalty in the case before him, regardless of his willingness to consider the death penalty in other cases." (*People v. Fields, supra,* 35 Cal.3rd at pp. 357-358.) *Id.* at 917-918.

    "Trial courts have broad discretion in determining what questions to permit. (*People v. Johnson, supra,* 47 Cal.3rd at p. 1224.) We see no prejudicial error in allowing questions regarding the particular facts of the case as long as more relevant questions and answers provide the basis for the court's decision." *Id.* at 918.

b. *People v. Medina* (1995) 11 Cal.4th 694, 745-746. Initially, the trial court did not permit defense questions asking jurors' whether they could vote for life imprisonment if the defendant had committed multiple murders.

"The inquiry that defendant sought to make was not relevant to the death qualification process, however . . . . [V]oir dire seeks to determine only the views of the prospective jurors about capital punishment in the abstract, to determine if any, because of opposition to the death penalty, would 'vote *against* the death penalty without regard to the evidence produced at trial.' [Citations.] Such a juror may be excused because he or she would be unable to faithfully and impartially apply the law. The inquiry is directed to whether, without knowing the specifics of the case, the juror has an 'open mind' on the penalty determination. There was no error in ruling that questions related to the jurors' attitudes toward evidence that was to be introduced in this trial could not be asked during the sequestered . . . voir dire." [Fn. omitted.] *Id.* at 746.

c. *People v. Cash* (2002) 28 Cal.4th 703, 718-723. The defendant had prior murders. He wanted to ask jurors "whether there were any particular crimes" or "any facts" that would cause that juror "automatically to vote for the death penalty." The trial court prohibited such questions. The Supreme Court reversed the death verdict.

"Thus, we affirmed the principle that either party is entitled to ask prospective jurors questions that are specific enough to determine if those jurors harbor bias, as to some or circumstance shown by the trial evidence, that would cause them not to follow an instruction directing them to determine a penalty after considering aggravating and mitigating evidence." *Id.* at 720-721.

"Our decisions have explained that death-qualification voir dire must avoid two extremes. On the one hand, it must not be so abstract that it fails to identify those jurors whose

death penalty views would prevent or substantially impair the performance of their duties as jurors in the case being tried. On the other hand, it must not be so specific that it requires the prospective jurors to prejudge the penalty issue based on a summary of the mitigating and aggravating evidence likely to be presented." *Id.* at 721-722.

d. *People v. Burgener* (2003) 29 Cal.4th 833, 865-866. In a penalty phase retrial "the trial court sustained the People's objections when defense counsel asked prospective jurors whether they would impose the death penalty after considering a rather detailed account of some of the facts of this case, and whether a prospective juror could continue to be impartial after hearing a list of defendant's prior crimes. There was no error in ruling that questions related to the jurors attitudes toward evidence that was to be introduced in this trial could not be asked during the sequestered [death-qualification] voir dire.'" (*Jenkins, supra,* 22 Cal.4th at p. 991.) Defendant had no right to ask specific questions that invited prospective jurors to prejudge the penalty issue based on a summary of the aggravating or mitigating evidence (*People v. Cash* (2002) 28 Cal.4th 703, 721-722 [122 Cal.Rptr.2d 545, 50 P.3d 332]), to educate the jury as to the facts of the case (*People v. Sanders* (1995) 11 Cal.4th 475, 538-539 [46 Cal.Rptr.2d 751, 905 P.2d 420]), or to instruct the jury in matters of law (*People v. Ashmus* (1991) 54 Cal.3rd 932, 959 [2 Cal.Rptr. 2d 112, 820 P.2d 214])." *Id.* at 865.

e. *People v. Navarette* (2003) 30 Cal.4th 458, 489-490. The defendant complained because the court limited his oral questioning, relating to the nature of the crimes charged. The Supreme Court rejected the defendant's contentions because his questionnaire did address these issues. The Court addressed *Medina* as compared with *Pinholster* and *Cash.*

"Defendant argues that *Medina* prevented him from asking jurors if they would automatically impose the death

penalty in a double-murder case, whereas under *Pinholster*, the People are free to inquire whether any jurors would automatically refuse to impose the death penalty in a burglary-murder case. This imbalance, he claims, led to a jury that was biased in favor of the death penalty, in violation of his rights under the federal Constitution.

We need not decide the continuing validity of our comment in *Medina*, because here the trial court did not prevent defendant from asking jurors whether they would automatically impose the death penalty in a multiple-murder case, the defendant did ask such a question." *Id.* at 489-490.

f. *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 47-48. "Coffman complains the trial court prevented her counsel from questioning the prospective jurors on their views regarding the circumstances of the case that were likely to be presented in evidence in order to determine how such circumstances might affect their ability to fairly determine the proper penalty in the event of a conviction."

In reality, "the trial court invited counsel to draft a proposed question for prospective jurors eliciting their attitudes toward the death penalty and in fact itself questioned a prospective juror whether he could weigh all the evidence before reaching a penalty determination in a case involving multiple murder."

Citing *Jenkins* and *Cash*, the Court found no abuse of discretion. "Unlike in *People v. Cash, supra,* 28 Cal.4th at pages 720-722, the trial court did not categorically prohibit inquiry into the effect on prospective jurors of the other murders, evidence of which was presented in the course of the trial. Rather, the trial court merely cautioned Coffman's counsel not to recite specific evidence expected to come before the jury in order to induce the juror to commit to voting in a particular way. (See *People v. Burgener* (2003) 29 Cal.4th 833, 865." Id. at 47-48.

g. *People v. Viera* (2005) 35 Cal.4th 264, 283-286. "Prior to the commencement of voir dire, defense counsel submitted a proposed jury questionnaire that contained the following question: "Do you feel you would automatically vote for death instead of life imprisonment with no parole if you found the defendant guilty of two or more murders?" The prosecution objected that the subject areas "should be covered by the Court" in its death qualification voir dire. "The question was not included in the jury questionnaire. Moreover, the judge's questions to prospective jurors did not ask this or a similar question."

Citing *Cash*, the defendant claimed he was entitled to a reversal of the death verdict. After contrasting the facts in *Medina* with those in *Cash*, the Supreme Court found the defendant made no effort to ask this legitimate question during the oral portion of voir dire.

"As our discussion of *Medina* in *Cash* suggests, a trial court's categorical prohibition of an inquiry into whether a prospective juror could vote for life without parole for a defendant convicted of multiple murder would be error. Multiple murder falls into the category of aggravating or mitigating circumstances "likely to be of great significance to prospective jurors." (*Cash, supra,* 28 Cal.4th at p. 721.) The Attorney General does not dispute this point. Rather, the Attorney General argues that defendant was not denied the opportunity to conduct voir dire on the subject of multiple murder. We agree.

Although the trial court did not include the sough-after question on multiple murder in the jury questionnaire, it never suggested that defense counsel could not raise the issue in voir dire." *Id.* at 285. "Although asking the multiple-murder question in the jury questionnaire would not have been improper, refusal to include the question was not error so long as there was an opportunity to ask the question during voir dire. Because defendant did not attempt to have the trial court conduct a multiple murder inquiry during voir dire, and the trial court was given no

opportunity to rule on the propriety of that inquiry, we conclude defendant cannot claim error." *Id.* at 286.

4. Examples of Permissible Death Qualifying Questions

   a. "Court: Both sides are entitled to have 12 jurors that, if necessary, can make that choice and make the choice based on the law that I outlined and make it fair for the defendant, fair for the prosecution, the sides they represent here. Do you believe you are a juror who can do that or do you think that your abilities are substantially impaired by your feelings about the death penalty? *People v. Harris* (2005) 37 Cal.4th 310, 330.

   b. The court asked each individual panel member, out of the presence of other prospective jurors, five questions, which may be paraphrased as follows: (1) Would you automatically refuse to impose the death penalty regardless of the evidence or the law in the case? (2) If defendant were found guilty of first degree murder with special circumstances at the guilt phase, would you automatically vote to impose the death penalty without regard to the evidence or the law? (3) Would your death penalty views prevent you from making an impartial decision as to the defendant's guilt? (4) Are your views such that you would never vote to impose the death penalty? (5) Are your views such that you would refuse to consider imposing the death penalty *in this case? People v. Balderas* (1985) 41 Cal.3rd 144, 187-188.

   c. The prosecutor asked: "[I]f I could prove to you beyond a reasonable doubt and to a moral certainty that he's guilty of murder, first degree murder with special circumstances, and based upon the second phase of this trial, the penalty phase, that you thought the death penalty was appropriate, could you then take that system and say, 'Yes, that man, Gregory Smith, he deserves the death penalty,' and vote accordingly; could you do that?" *People v. Smith* (2003) 30 Cal.4th 581, 603 fn. 3.

d. The defense wanted to ask: "Whether there are any aggravating circumstances which would cause a prospective juror to automatically vote for the death penalty, without considering the alternative of life imprisonment without possibility of parole." *People v. Cash* (2002) 28 Cal.4th 703, 719.

e. "Do you feel you would automatically vote for death instead of life imprisonment with no parole if you found the defendant guilty of two or more murders?" *People v. Viera* (2005) 35 Cal.4th 264, 283.

f. Whether an accomplice to murder should be subject to the death penalty, with or without intent to kill, was a proper subject for voir dire in *People v. Fuentes* (1985) 40 Cal.3rd 629.

g. The trial court permitted the prosecutor to ask each prospective juror whether, in the words of a representative query, the fact that a capital defendant was "18 or 19 at the time of the killing . . . [would] automatically cause you to vote for the lesser punishment of life imprisonment without possibility of parole?" In addition, the prosecutor was permitted to ask each juror in the sequestered voir dire whether "you would be able to consider imposing the death penalty . . . if we have one victim as opposed to requiring that the defendant kill two or more people?" *People v. Noguera* (1992) 4 Cal.4th 599, 645.

h. In an effort to illustrate the difference between "consider" and "chose", the prosecutor asked: "You can walk by Tiffany's and you can look in the window and you can meaningfully consider this $15,000 stone and that gold Rolex watch; right? And you can think, well, I'd rather have this one with the rubies in it or that with the stones in it or this beautiful diamond ring. But there is a difference between considering and choosing. Could you ever possibly choose the death penalty?" *People v. Smith* (2003) 30 Cal.4th 581, 602-603.

i. In describing the penalty phase of trial, the prosecutor gave illustrations of aggravating and mitigating evidence. As an example of aggravating evidence, he often mentioned a hypothetical defendant with a history of many prior felony convictions. To illustrate mitigating evidence, he often mentioned a hypothetical defendant who had received the Congressional Medal of Honor, was a war hero, had saved someone's life, or had no prior criminal history. The illustrations of aggravating evidence used by the prosecutor and the trial court resembled the aggravating evidence actually presented by the prosecution in this case, whereas the illustrations of mitigating evidence were wholly unlike defendant's mitigating evidence. *People v. Seaton* (2001) 26 Cal.4th 598, 635-636.

j. At the outset of voir dire, counsel informed the trial court that he wished to question the prospective jurors as to whether they believed a robbery accomplice who does not kill should be punished as severely as an intentional killer. Accordingly, counsel submitted for the court's approval the following question: "Do you believe that one who only aids and abets the commission of an attempted robbery and does not intentionally aid and abet the actual killing during the commission of said attempted robbery should be treated under the law in the same fashion as the actual killer?" *People v. Fuentes* (1985) 40 Cal.3rd 629, 637.

5. Examples of Impermissible Death Qualifying Questions (Typically asked by the defense)

a. The defense proposed a lengthy, factually detailed question that would have given prospective jurors substantial information about defendant's victims and the manner in which they were killed. He then wanted to ask whether the juror would automatically vote for death. (*People v. Mason* (1991) 52 Cal.3rd 909, 940 fn. 4).

b. In an effort to determine whether the evidence of serious burn injuries suffered by the victims would cause a jury to automatically vote for the death penalty, defendant sought

to inquire about the prospective jurors' attitudes toward such injuries. The People objected and, at that stage of the examination, the court ruled that the jury would not be told of the injuries suffered by Ava Gawronski, and defendant would not be permitted to ask the prospective jurors if knowledge of the extent of those injuries would affect their ability to perform their duties. *People v. Clark* (1990) 50 Cal.3rd 583, 596. But see fn. 3.

c. Defense counsel posed a hypothetical question to a prospective juror as follows. "[T]wo men go into a restaurant in the early morning hours. They herd 11 people, two customers and nine employees, to the back area of the restaurant. The two men are armed with shotguns. They rob all the people and make them lie on the floor and they rob them all. They put them all in a freezer. The people obey all the orders and instructions that the two men give them. They do not fight with them or protest. They are told to get on their knees and face the walls. They do that. No one says anything. And the two men open fire, as you put it, with their shotguns. And they go on firing even though one of the victims begs for her life. They do not stop firing until they run out of ammunition. They pick up the casings that their guns have expended. They leave everybody in this darkened freezer where people are dying and people are moaning. [¶] Now, if those are the facts that you are presented with at the penalty phase, you understand you are entitled to rely on those facts as one of the circumstances in deciding a penalty, do you not?" Defense counsel was also permitted to ask: "Now, don't you believe that that's precisely the kind of case where with your ideas of justice, the death penalty is the only appropriate kind of penalty?" She then asked if various hypothetical aggravating and mitigating factors—such as the defendant's criminal record, age, and background—would make a difference to the juror. *People v. Sanders* (1995) 11 Cal.4th 475, 535.

d. A juror was asked: "So now you're in a penalty phase with the defendant like this one, who has committed

this kind of a crime and I want you to ask yourself, after looking inside yourself whether you could actually vote to put another human being to death for doing a crime like this:

"Let's assume you have a person who decides to commit a robbery because he wants to make some additional money. He goes out and gets himself a loaded handgun to make the odds more in his favor that he'll be successful. And he finds a victim that he thinks has some money and sure enough, the victim has some money when the defendant sticks him up. Sometime about this point the defendant has the brilliant thought that if I let this guy go, he's going to the police and I might get caught and whereas if I don't let him go, don't leave any witnesses, I won't get caught, in other words, I'd better kill him to make myself more certain of getting away.

"That's exactly what he does; he shoots the victim once through the heart and subsequently he's caught and he's been brought before us and you have found beyond any doubt that he's guilty of first degree murder committed during the course of a robbery.

"Do you think it's possible that you could go in the jury room, look the other jurors in the eye and knowing you'll have to come out and look the defendant in the eye also, say I think this crime is so horrendous and the other background facts we've heard are so horrendous, he should be put to death?" *People v. Visciotti* (1992) 2 Cal.4th 1, 46-47. (Defense counsel did not, but should have objected).

e. The prosecutor asked: "If we get to the penalty phase, if we get that far, then you've already found the man guilty of first degree murder. It's a horrible crime. And you found he committed this murder while he was engaged in a robbery, based on facts that would be something like a man decides to commit a robbery, arms himself with a handgun to make sure he's successful, robs his victim. During the course of the robbery it occurs to him that if the

victim is not alive, there won't be anybody going to the police and complain . . . . So, realizing that, the robber points his gun at the victim, pulls the trigger, shoots him once through the heart and kills him.

That's the type of facts we're going to be dealing with, something along those lines, perhaps.

Do you feel just, first of all, theoretically like it's possible you could vote for the death penalty if you're faced with facts such as those?" *People v. Visciotti* (1992) 2 Cal.4th 1, 46. (Defense counsel did not, but should have objected).

f. Defense counsel was precluded from informing the prospective jurors that defendant had been convicted of first degree murder and that the special circumstance of torture murder had been found true, and prohibiting mention of the specific facts surrounding the torture murder, in violation of his Sixth Amendment right to a fair trial. *People v. Davenport* (1995) 11 Cal.4th 1171, 1204.

g. The court curtailed voir dire only when defendant asked her what type of murder case warranted the death penalty. *People v. DeSantis* (1992) 2 Cal.4th 1198, 1218.

h. If Adolf Hitler were on trial charged with murdering six million people . . . ." The court refused to permit the question, saying that "I don't think it is fair to ask a juror to speculate what they might do with Adolf Hitler. We therefore conclude that a court may properly prohibit voir dire which seeks to ascertain a juror's views on the death penalty in actual or hypothetical cases not before him. *People v. Fields* (1983) 35 Cal.3rd 329, 354-357.

i. The defense was precluded from questioning potential jurors regarding factors and circumstances they would deem significant in selecting an appropriate sentence. *People v. Johnson* (1989) 47 Cal.3rd 1194, 1225.

j. "Is life without the possibility of parole an appropriate sentence for someone who robs, rapes and kills an elderly woman?" *People v. Wright* (1990) 52 Cal.3rd 367, 419 fn. 18.

k. "What do you feel is a proper punishment for someone who has committed a rape or other serious sexually related crime?" (*People v. Ochoa* (1998) 19 Cal.4th 353, 444.)

l. The defense extensively questioned the prospective jurors on their understanding of the two possible sentences at the penalty phase, defense counsel declared that life imprisonment without possibility of parole meant life imprisonment *without possibility of parole.* In so doing, they stated or implied that the penalty would inexorably be carried out. They contrasted life imprisonment without possibility of parole, which might be imposed on defendant, with life imprisonment *simpliciter*, which had been imposed on such notorious criminals as Charles Manson and Sirhan Sirhan. *People v. Ashmus* (1991) 54 Cal.3rd 932, 957-960.

m. The prosecutor remarked that it would be proper to consider "sympathetic factors" in defendant's favor, but that defendant would be appearing in court "dressed up and decent" and had "over six years to get ready for today." The prosecutor continued in a similar vein that "[w]hat you're not going to have is the victim appear[ing] in court . . ." (*People v. Montiel* (1993) 5 Cal.4th 877, 914-915, fn. 14.)

n. In penalty re-trial, defense counsel wanted to inform jury the first penalty trial resulted in a hung jury and asked jurors about their knowledge of the first trial. (*People v. Wash* (1993) 6 Cal.4th 215, 252.)

o. Defense counsel wanted to inform jury that penalty reversal was not caused by an appellate reversal of an earlier death verdict. (*People v. Wash* (1993) 6 Cal.4th 215, 254.)

p. Questions regarding Governor's commutation power. (*People v. Pinholster* (1992) 1 Cal.4th 865, 918; *People v. Carpenter* (1997) 15 Cal.4th 312, 359.)

q. Asking a juror whether he had voted for a ballot proposition to enact the death penalty or would vote for such a penalty in a public election may be error. (*People v. Ochoa* (1998) 19 Cal.4th 53, 428.)

r. Asking a prospective juror whether the Supreme Court's capital opinions under former Chief Justice Rose Bird were "kind of off base" and whether the vote not to retain her or other justices was correct may be error. (*People v. Ochoa* (1998) 19 Cal.4th 353, 428.)

JURY SELECTION

MAKING A RECORD

- Write down all non-discriminatory race-neutral reasons for each peremptory challenge when it is made and preserve notes for future reference
- Engage in meaningful questioning of minority jurors (See, Fernandez v. Roe (9th Cir. 2002) 286 F.3d 1073, 1079.)

WHEELER MOTIONS

MAKING A RECORD

- Once defense objects that peremptory challenge for discriminatory purpose, request trial court expressly find whether prima facie case has been made
- Do not oppose the trial court's finding a prima facie case, unless no inference of discrimination can be drawn from the cold record
- If prima facie case found, be sure to present all race-neutral reasons for challenge on record

BEGIN AT VOIR DIRE

- Controversial area of law:
- Questioning may be allowed on an area of law that is both material to the case and controversial. *People v. Balderas* (1985) 41 Cal.3rd 144 at 183-184.

C. Address the Concept in Voir Dire

Questioning may be allowed on an area of law that is both material to the case and controversial. (*People v. Balderas* (1985) 41 Cal.3rd 144 at 183-184.)

EFFECTIVE JURY SELECTION

A. Guiding Principle

Jury Selection is critical to successful jury trials. Therefore, jury selection deserves thorough preparation and knowledge.

B. Key Components to Effective Jury Selection

- **Know the law and the rules**

You should learn the controlling statutes on this subject and the case law that interprets it. The controlling statutes on jury selection are contained in the Code of Civil Procedure (CCP)

sections 190 through 237. CCP 223, 225, and 228 through 231 are regularly

utilized in criminal jury trials and set out the method of voir dire, the requirements for a challenge for cause and the number of preemptory challenges permitted to each side.

CCP 223 provides that in a criminal trial, each party could submit questions for the court to pose to the prospective jurors; it also establishes that each party has "the right to examine, by oral and direct questioning, any or all prospective jurors." It also limits the examination of prospective jurors to be conducted "only in the aid of the exercise of challenges for cause."

An area of implied bias that is outlined under the law is pursuant to CCP 229(f) "The existence of a state of mind in the juror evincing enmity against, or bias towards, either party."

You should also learn the judicial rules regarding jury selection. The San Diego Superior Court's web page includes jury selection information that is very useful. It has the script that the courts are encouraged to read to jurors and it even has an approved questionnaire with many good questions.

In addition, you should learn the particular way that a certain court does jury selection. Courts conduct jury selection differently utilizing their own system of examining 12 jurors at a time or more jurors.

A prosecutor should also know the law of Batson/Wheeler regarding preemptory challenges and know how to make the right record that supports that a preemptory challenge is made ethically and without bias against a protected class.

IV. Jury Selection

a. Overview – The process of selecting a jury involves much more that what we commonly call "voir dire". In order select a jury, you must be familiar with the rules regarding *selection methods*, *challenges*, *Batson/(Wheeler)*

b. Methods of Jury Selection – Depending on the judge you are in front of, you may be faced with several different methods of selecting a jury. There are really two main types and variations of either type.

i. "12 Pack", "18 Pack"

1. How it Works

a. *This is the most common type of selection method that you will see*. Usually, the court clerk will call 12 or 18 or 20 names from a random list of all the potential jurors. Those jurors will fill the jury box in the order called and, if more that 12, will fill the front row of the audience. The rest of the potential jurors will then fill the remaining seats in the courtroom.

b. Voir Dire is then conducted by the judge and attorneys of the first 12 or 18 or 20 potential jurors.

c. Once the challenges begin, jurors leave the courtroom when they are challenged until only 11 remain.

d. The clerk then calls jurors to fill the vacant seats and the process starts all over again. This continues until both sides pass or are out of challenges.

ii. "**<u>Federal Method"</u>**

1. How it Works

a. This method seems to be gaining popularity with judges primarily. It is usually a faster method and avoids excused jurors knowing which side excused them.

b. In this method, unlike the "12 Pack" method, the attorneys move their chairs to the opposite side of counsel tables so that they are facing the courtroom doors and the audience and their backs are to the judge.

c. The potential jurors are called in by the clerk according to the order on the random list. All of the potential jurors are assigned a seat and a number in the courtroom.

d. Voir Dire is then conducted on *<u>ALL</u>* of the potential jurors *<u>ONCE</u>*.

e. Once challenges begin, they are done silently by the attorneys on a master sheet. The attorneys may challenge anyone they wish from the entire panel. The attorneys pass the sheet back and forth until both pass or run out of challenges.

f. The judge will then excuse all challenged jurors at once. The ***first 12 unchallenged jurors*** will then make up the jury.

c. Challenges – There are two types of challenges, *<u>challenges for cause</u>* and *<u>peremptory challenges</u>*. The rules regarding juror challenges can be found in the ***Code of Civil Procedure (CCP).***

i. Challenges for Cause – Challenges for cause can be made by either side generally for either *implied bias* or *actual bias* (***CCP Section 225(b)***)

1. Implied Bias – There are nine categories of implied bias listed in ***CCP 229***:

    a. Affinity to a party, witness, or victim

    b. Relation to a party or attorney

    c. Previous served as a juror or witness in an action between the parties

    d. Interest in the outcome

    e. Having a belief on the merits based on knowledge of the facts

    f. Bias for or against either party

    g. Juror is a party to an action pending in the same court

    h. Opposition to the death penalty

2. Actual Bias – Defined as "*the existence of a state of mind on the part of the juror in reference to the case, or to any of the parties, which will prevent the juror from acting with entire impartiality, and without prejudice to the substantial rights of any party*." (***CCP section 225(b)(1)(C)***)

    a. Juror states that it would be difficult to keep an open mind because of the nature of the case

    b. Juror admits bias for or against a group involved in the case

    c. Juror admits having settled opinions about issues in the case

d. Juror can not promise to judge the case only on the facts and the law

e. ***Note***: The fact that a juror does not wish to sit because the case may be too emotional is *not* grounds for excuse for cause.

3. The ultimate determination of excusal for cause is made by the court. (***CCP section 230***)

ii. Peremptory Challenges – A peremptory challenge may be made by either party and is an objection to a juror for which no reason need by given. The court is required to excuse jurors challenged peremptorily. (***CCP section 231***)

1. Number – The number of peremptory challenges depends upon the possible sentence of the offense charged and the number of defendants.

a. If the offense is punishable with *maximum term of imprisonment of 90 days or less*, each side gets *6* peremptory challenges. (***CCP section 231***)

b. If the offense is punishable with *death or with imprisonment in the state prison for life*, each side gets *20* peremptory challenges. (***CCP section 231(a)***). The prosecution of first degree murder without special circumstances which carries a term of 25 years to life, constitutes imprisonment for life within the meaning of CCP section 231(a).

c. In *all other cases* each side gets *10* peremptory challenges.

d. Multiple defendant cases

i. Punishment of 90 days or less – The People get *6* challenges and the defendants get *6 challenges jointly*. Each defendant is additionally entitled to *4 separate challenges*. The People get as

many challenges as are allowed all defendants. (***CCP section 231(b)***)

ii. Life in prison and death cases – The People get *20* challenges and the defendants get *20 challenges jointly*. Each defendant is additionally entitled to *5 separate challenges*. The People get as many challenges as are allowed all defendants. (***CCP section 231(a)***)

iii. All other cases – The People get *10* challenges and the defendants get *10 challenges jointly*. Each defendant is additionally entitled to *5 separate challenges*. The People get as many challenges as are allowed all defendants. (***CCP section 231(a)***)

iii. Keeping Track of Challenges – There are various methods of keeping track of juror information and challenges. Most court clerks will provide a master courtroom diagram with squares representing each seat. Most people use post it notes or a combination of post it notes and note pad to keep track of jurors and their responses to questions

d. Batson/ (Wheeler) – One of the things every prosecutor dreads is what's commonly called "*getting Wheelered*". It usually occurs following the People's use of a peremptory challenge against someone of a particular race or ethnic background. *The defense makes a motion usually on state and federal grounds that the prosecutor has excused a juror based on racial, ethnic or other improper grounds (cognizable class) and has therefore violated the defendant's Constitutional right to a fair and impartial jury*.

Note: A *Batson/ (Wheeler)* motion may be made by *either party.*

i. Cognizable Classes Generally – The clearly recognized classes are *RACE, ETHNICITY, RELIGION, GENDER, SEXUAL ORIENTATION*

ii. What is *Batson/ (Wheeler)*?

1. History

    a. *Batson v. Kentucky* (1986) 476 U.S. 79 **is** the federal standard and *People v. Wheeler* (1978) 22 Cal.3d 258 ***was*** the California standard used to determine whether the peremptory challenge was improper.

    b. Both cases used procedures involving 3 part tests to determine the propriety of the challenge. However, the first prong of the tests in each case were different. *Defendants argued the state burden (Wheeler) was more difficult for them to meet than the federal burden (Batson)*.

    c. The California Supreme Court tried to reconcile the two cases in 2003 in *People v. Johnson* (2003) 30 Cal.4th 1302.

    d. In 2005, the U.S. Supreme Court reversed *Johnson* and "clarified" the *Batson* decision by stating that the first prong of the *Batson* test need only be satisfied by production of evidence sufficient to permit the trial judge to draw an *inference of discrimination*. *Johnson v. California* (2005) 545 U.S. 162

2. Current State of the Law - Still a 3 prong test based on the holdings of *Batson* and *Johnson.*

    a. First Prong – The party objecting to the peremptory challenge must make out a prima facie case "*by showing the totality of the facts gives rise to an inference of a discriminatory purpose.*"

    b. Second Prong – If a prima facie case is made, the "*burden shifts to the [party making the original, objected to juror challenge] to explain adequately the racial [or other cognizable class] exclusion by offering permissible race neutral justifications for the strikes*."

c. Third Prong – If "*a race neutral explanation is tendered, the trial court must then decide…whether the opponent of the strike has proved purposeful racial discrimination.*"

iii. Practice Tips to Avoid *Batson/ (Wheeler)*

1. Realize that a challenge will likely come at some point during jury selection and be ready to deal with it.

2. It should go without saying but ***NEVER*** excuse a juror on the basis of race, ethnicity, religion, gender etc..

3. Question all jurors you plan to challenge

4. Assume that a prima facie case will be made and be prepared to give race neutral reasons for excusing the juror.

5. If defense counsel fails to make a prima facie case, consider asking the judge to make a record supporting the denial.

6. Know the accepted race neutral reasons for challenging a juror and use those if you are asked to provide your reasons after the finding of a prima facie case.

BATSON / WHEELER CONCERNS

A PRACTICAL APPROACH

All trial attorneys must understand the law as it relates to the proper exercise of peremptory challenges in jury trials. The law is constantly changing at the state and federal appellate levels. This outline will summarize the relevant law and suggest practical approaches to responding to allegations of misconduct. A much more thorough discussion can be found in Mr. Jerry Coleman's publication Mr. Wheeler Goes to Washington available on the CDAA website.

The Law:

The state and federal constitutions prohibit the use of peremptory challenges to exclude prospective jurors based on race or gender. *People v. Bonilla* (2007) 41 Cal.. 4th 313; *People v. Wheeler* (1978) 22 Cal. 3d 258; *Batson v. Kentucky* (1986) 476 U.S. 79.

There is a presumption that a peremptory challenge is being exercised properly. That presumption may be rebutted by the opposing party who has the burden of demonstrating impermissible discrimination. *People v. Griffin* (2004) 33 Cal. 4th 536.

The opposing party must establish a prima facie case of discrimination by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose. *Johnson v. California* (2005) 545 U.S. 162.

In deciding whether a prima facie case has been made, the trial court may consider a number of factors including but not limited to :

- whether most or all members of an identified group have been excluded by the party.
- few if any questions were asked of the challenged jurors at issue
- the challenged jurors at issue share only this single characteristic of group membership (e.g. all are Hispanic) and in all other respects are heterogeneous.
- the defendant belongs to the identified group and the victim belongs to the majority group of seated jurors.

If a prima facie case is made, the burden shifts to the other party (usually the prosecution) to explain the challenge by offering race/gender neutral justifications. *People v. Bonilla*, supra.

The court must then decide whether purposeful discrimination has been proved. People. Bonilla, supra. The trial and appellate courts may engage in comparative analysis of the challenged and seated jurors. *People v. Cornwell* (2005) 37 Cal. 4th 50; *People v. Ward* (2005) 36 Cal. 4th 186.

Cognizable groups are those based on race, gender, religion and sexual orientation. *Rubio v. Superior Court* (1979) 24 Cal. 3d 93. So far the factors of income, age, education level, proficiency with the English language and death penalty skeptics have not been deemed sufficient to establish a cognizable group .

A Wheeler motion must be made before the jury is sworn. *People v. Perez* (1996) 48 Cal.App. 4th 1310.

Practical Considerations:

- Reviewing courts only have the record to consider.

- After the passage of a few months or years you will not remember this prospective juror or the reasons you challenged him or her. Document your reasons and save them.

- Find a way to articulate your race/gender neutral reasons for challenging this juror. Document your reasons and save them.

- Someone has to note how may members off an identified group are in the panel, were challenged or remain on the jury.

Recommended procedure:

1) Question all prospective jurors.

2) Articulate and document race/gender neutral reasons for the challenge.

3) If the court finds that a prima facie showing has been made, state your neutral reasons (all of them) on the record. Note: Do not volunteer your reasons before the court rules on whether a prima facie showing has been made or you run the risk of an implied finding of a prima facie case being established. *People v. Arias* (1996) 13 Cal. 4th 92, 135.

4) If the court finds no prima facie case has been made, have the court make a record as to why it has not been made. <u>Put your neutral reasons on the record even though the</u>

court finds no prima facie case has been made. " Though not strictly required, it is better practice for the trial court to have the prosecution put on the record its race-neutral explanation for any contested peremptory challenge, even when the trial court may ultimately conclude no prima facie case has been made out. This may assist the trial court in evaluating the challenge and will certainly assist reviewing courts in fairly assessing whether any constitutional violation has been established." *People. v. Bonilla*, supra, at p. 343, footnote 13.

5) If the court grants a Wheeler motion the court may empanel an new group of prospective jurors or reseat the challenged juror. *People v. Willis* (2002) 27 Cal. 4th 811. If the juror is reseated, make sure you get that challenge credited back to you.

6) In all cases, save your legible notes on all jurors –those challenged by either side and those seated.

Voir Dire

I. LAW

A. The Adoption of Proposition 115 in 1990 Changed Voir Dire. *People v. Edwards* (1991) 54 Cal.3rd 787, 829; *People v. Carpenter* (1997) 15 Cal.4th 312, 353; *People v. Jenkins* (2000) 22 Cal.4th 900, 990.

1. Pre-Proposition 115 Rules

   a. The attorneys participated in the questioning process.

   b. The purpose of voir dire was to allow the parties to intelligently exercise their peremptory challenges. (*People v. Williams* (1981) 29 Cal.3d 392.)

2. In 1990, the voters passed Proposition 115, which included a new Code of Civil Procedure section 223 regulating voir dire in criminal cases.

   "In a criminal case, the court shall conduct the examination of prospective jurors. However, the court may permit the parties, upon a showing of good cause, to supplement the examination by such further inquiry as it deems proper, or shall itself submit to the prospective jurors upon such a showing, such additional questions by the parties as it deems proper." (Code Civ. Proc., § 223.)

   a. The court shall conduct the examination of prospective jurors.

   b. Upon a showing of good cause, the court may allow the attorneys to question the jurors.

c. Where practicable, voir dire shall occur in the presence of the other jurors.
d. Questioning shall be conducted only to aid in the exercise of challenges for cause.

3. Section 222 was amended effective January 1, 2001, to again allow attorney questioning.

> "In a criminal case, the court shall conduct an initial examination of prospective jurors. The court may submit to the prospective jurors additional questions requested by the parties as it deems proper. Upon completion of the court's initial examination, counsel for each party shall have the right to examine, by oral and direct questioning, any or all of the prospective jurors. The court may, in the exercise of its discretion, limit the oral and direct questioning of prospective jurors by counsel. The court may specify the maximum amount of time that counsel for each party may question an individual juror, or may specify an aggregate amount of time for each party, which can then be allocated among the prospective jurors by counsel."

a. Amendment become effective January 1, 2001.

b. Court can limit amount of time allotted to the parties.

c. Shall be conducted "only in the aid of the exercise of challenges for cause."

B. Challenges.

1. Challenge for Cause – Because voir dire "shall be conducted only to aid in the exercise of challenges for case," the specific grounds must be known.

a. Unlimited Number

b. Three Types of Challenges for Cause

(1) **General disqualification** – that the juror is disqualified from serving in the action on trial. (Code Civ. Proc., § 225(b)(1)(A).)

(a) Section 203 lists general disqualifications for jurors:

1) Persons who are not citizens of the United States.

2) Persons who are less than 18 years of age.

3) Persons who are not domiciliaries of the State of California, as determined pursuant to Article 2 (commencing with Section 2020) of Chapter 1 of Division 2 of the Elections Code.

4) Persons who are not residents of the jurisdiction wherein they are summoned to serve.

5) Persons who have been convicted of malfeasance in office or a felony, and whose civil rights have not been restored.

6) Persons who are not possessed of sufficient knowledge of the English language, provided that no person shall be deemed incompetent solely because of the loss of sight or hearing in any degree or other disability which impedes the person's ability to communicate or which impairs or interferes with the person's mobility.

7) Persons who are serving as grand or trial jurors in any court of this state.
8) Persons who are the subject of conservatorship.

(b) Section 228(b) lists additional requirements: A loss of hearing, or the existence of any other incapacity which satisfies the court that the challenged person is incapable of performing the duties of a juror in the particular action without prejudice to the substantial right of the challenging party.

(2) **Implied Bias** – Section 229

A challenge for implied bias may be taken for one or more of the following causes, and for no other:

(a) Consanguinity or affinity within the fourth degree to any party, to an officer of a corporation which is a party, or to any alleged witness or victim in the case at bar.

(b) Standing in the relation of, or being the parent, spouse, or child of one who stands in the relation of, business with either party; or surety on any bond or obligation for either party, or being the holder of bonds or shares of capital stock of a corporation which is a party; or having stood within one year previous to the filing of the complaint in the action in the relation of attorney and client with either party or with the attorney for either party. A depositor of a bank or a holder of a savings account in a savings and loan association shall not be deemed a creditor of that bank or savings and loan association for the purpose of this paragraph solely by reason of his or her being a depositor or account holder.

(c) Having served as a trial or grand juror or on a jury of inquest in a civil or criminal action or been a witness on a previous or pending trial between the same parties, or involving the same specific offense or cause of action; or having served as a trial or grand juror or on a jury within one year previously in any criminal or civil action or proceeding in which either party was the plaintiff or defendant or in a criminal action where either party was the defendant.

(d) Interest on the part of the juror in the event of the action, or in the main question involved in the action, except his or her interest as a member or citizen or taxpayer of a county, city and county, incorporated city or town, or other political subdivision of a county, or municipal water district.

(e) Having an unqualified opinion or belief as to the merits of the action founded upon knowledge of its material facts or of some of them.

(f) The existence of a state of mind in the juror evincing enmity against, or bias towards, either party.

(g) That the juror is party to an action pending in the court for which he or she is drawn and which action is set for trial before the panel of which the juror is a member.

(h) If the offense charged is punishable with death, the entertaining of such conscientious opinions as would preclude the juror finding the defendant guilty; in which case the juror

may neither be permitted nor compelled to serve.

(3) **Actual Bias** – Section 225(b)(1)(C)

Actual bias - the existence of a state of mind on the part of the juror in reference to the case, or to any of the parties, which will prevent the juror from acting with entire impartiality, and without prejudice to the substantial rights of any party.

2. Peremptory Challenges

a. No Reason Need be Given – CCP § 226(b).

b. Number of Peremptory Challenges Allowed.

(1) Depends on punishment allowed and number of defendants on trial.

(2) Single defendant case.

(a) 20 – If punishable by death or life imprisonment – CCP § 231(a).

(b) 6 – if punishable with maximum of 90 days or less – CCP § 231(b).

(c) 10 – all other cases – CCP § 231(a).

(3) Multiple defendant case.

(a) Death or life imprisonment case – CCP § 231(a).

1) 20 joint challenges.

2) 5 individual challenges for each defendant.

3) DA gets same total as entire defense team.

(b) 90 days or less – CCP § 231(b).

1) 6 joint challenges.

2) 4 individual challenges for each defendant.

3) DA gets same total as entire defense team.

c) All other cases – CCP § 231(a).

1) 10 joint challenges

2) 5 individual challenges

3) DA gets same total as entire defense team

(4) Alternates – CCP § 234.

(a) Single defendant case – one per number of alternates.

(b) Multiple defendant cases – each defendant gets one per number of alternates.

(c) DA gets same total number as defense team.

(5) A pass does not count as a challenge – CCP § 231(d)(e).

II. APPLICATION OF THE LAW

A. Defense challenge for cause.

1. The standard is "whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Wainright v. Witt* (1985) 469 U.S. 412, 424; *People v. Ghent* (1987) 43 Cal.3rd 739, 767.

2. Erroneous denial of defense challenge is not reversible per se. *Ross v. Oklahoma* (1988) 487 US 81, 87; *People v. Edwards* (1991) 54 Cal.3d 787, 830.)

3. To prevail on appeal, defendant must show prejudice, that is: 1) he used a peremptory challenge on the questioned juror, 2) he exhausted all his peremptory challenges, and 3) he expressed dissatisfaction with the final jury. (*People v. Morris* (1991) 53 Cal.3d 152, 184; *People v. Mickey* (1991) 54 Cal.3d 612, 683: *People v. Crittenden* (1994) 9 Cal.4th 83, 121; *People v. Samayoa* (1997) 15 Cal.3d 795, 821; *People v. Cunningham* (2001) 25 Cal.3d 926, 976.)

4. No prejudice if the juror was not part of the final jury. (*People v. Edwards* (1991) 54 Cal.3d 787, 830; *People v. Clarke* (1992) 3 Cal.4th 41, 155; *People v. Johnson* (1992) 3 Cal.4th 1183, 1210; *People v. Cain* (1995) 10 Cal.4th 1, 61; *People v. Hawkins* (1995) 10 Cal.4th 920, 939; *People v. Horton* (1995) 11 Cal.4th 1068, 1093; *People v. Ramos* (1997) 15 Cal.4th 1133, 1159; *People v. Barnett* (1998) 17 Cal.4th 1044, 1113; *People v. Millwee* (1998) 18 Cal.4th 96, 146.)

5. No prejudice if defendant did not use all peremptory challenges. (*People v. Kelly* (1990) 51 Cal.3d 931, 960; *People v. Morris* (1991) 53 Cal.3d 152, 184; *People v. Price* (1991) 1 Cal.4th 324, 401; *People v. Danielson* (1992) 3 Cal.4th 691, 713; *People v. Mayfield* (1993) 5 Cal.4th 142, 169; *People v. Garceau* (1993) 6 Cal.4th 140, 174; *People v. Cain* (1995) 10 Cal.4th 1, 61; *People v. Lucas* (1995) 12 Cal.4th 415, 480; *People v. Samayoa* (1997) 15 Cal.4th 795, 821; *People v. Ramos* (1997) 15 Cal.4th 1133, 1158; *People v. Williams* (1997) 16 Cal.4th 635, 667; *People v. Barnett* (1998) 17 Cal.4th 1044, 1113; *People v. Millwee* (1998) 18 Cal.4th 96, 146; *People v. Bolin* (1998) 18 Cal.4th 297, 315; *People v. Ochoa* (1998) 19 Cal.4th 353, 444; *People v.*

Waidla (2000) 22 Cal.4th 690, 715; *People v. Bemore* (2000) 22 Cal.4th 809, 837; *People v. Ayala* (2000) 23 Cal.4th 225, 261; *People v. Lewis* (2001) 25 Cal.4th 610, 634.)

6. Being required to use a peremptory challenge on a denied challenge for cause does not establish prejudice. (*People v. Gordon* (1990) 50 Cal.3d 1223, 1247; *People v. Kaurish* (1990) 52 Cal.3d 648, 674.)

7. Did defendant request additional peremptory challenges? (*People v. Edwards* (1991) 54 Cal.3d 787, 831.)

    a. Request for additional challenges denied. (*People v. Pride* (1992) 3 Cal.4th 195, 230; *People v. Ramos* (1997) 15 Cal.4th 1133, 1159; *People v. Williams* (1997) 16 Cal.4th 635, 667.)

8. Defendant must express dissatisfaction with the final jury to prove prejudice. (*People v. Edwards* (1991) 54 Cal.3d 787, 830; *People v. Danielson* (1992) 3 Cal.4th 691, 713; *People v. Lucas* (1995) 12 Cal.4th 415, 830; *People v. Williams* (1997) 16 Cal.4th 635, 667; *People v. Millwee* (1998) 18 Cal.4th 96, 146; *People v. Ochoa* (1998) 19 Cal.4th 353, 444; *People v. Bemore* (2000) 22 Cal.4th 809, 837; *People v. Ayala* (2000) 23 Cal.4th 225, 261; *People v. Lewis* (2001) 25 Cal.4th 610, 634; *People v. Weaver* (2001) 26 Cal.4th 876, 911; *People v. Seaton* (2001) 26 Cal.4th 598, 637.

9. No duty on court sua sponte to excuse juror on its own motion. (*People v. Bolin* (1998) 18 Cal.4th 297, 315; *People v. Lucas* (1995) 12 Cal.4th 415, 481.)

10. Court not required to allow defense opportunity to rehabilitate challenged juror if bias is obvious. (*People v. Bittaker* (1989) 48 Cal.3d 1046, 1085; *People v. Carpenter* (1997) 15 Cal.4th 312, 355; *People v. Samayoa* (1997) 15 Cal.3d 795, 823.)

11. Court not required to tell juror his civic duty requires him to set aside his personal beliefs regarding the death penalty. (*People v. Sanders* (1990) 15 Cal.3d 471, 503; *People v. Miranda* (1987) 44 Cal.3d 57, 96.)

12. Examples of proper denial of defense challenge for cause. (*People v. Stankewitz* (1990) 51 Cal.3d 72, 103; *People v. Kelly* (1990) 51 Cal.3d 931, 960; *People v. Mincey* (1992) 2 Cal.4th 457; *People v. McPeters* (1992) 2 Cal.4th 1148, 1177; *People v. Crittenden* (1994) 9 Cal.4th 83, 122; *People v. Samayoa* (1997) 15 Cal.4th 795, 822; *People v. Williams* (1997) 16 Cal.4th 635, 668; *People v. Jenkins* (2000) 22 Cal.4th 900, 987; *People v. Cunningham* (2001)25 Cal.4th 926, 976; *People v. Weaver* (2001) 26 Cal.4th 876, 911.)

B. DA challenge for cause.

1. Use same standard (*Witt*) as defense challenge for cause. (*People v. Crittenden* (1994) 9 Cal.4th 83, 121; *People v. Pride* (1992) 3 Cal.4th 195, 227; *People v. Mincey* (1992) 2 Cal.4th 408, 456; *People v. Bradford* (1997) 15 Cal.4th 1229, 1318.)

2. Erroneous granting of DA challenge is reversible per se. (G*rey v. Mississippi* (1987) 481 US 648, 666; *People v.* C*ooper* (1991) 53 Cal.3d 771, 809; *People v. Edwards* (1991) 54 Cal.3d 787, 831.)

a. Reverses penalty verdict, not guilt. (*People v. Ashmus* (1991) 54 Cal.3d 932, 962.)

b. If juror's answers equivocal, trial judge's ruling will be upheld. (*People v. Ruiz* (1988) 44 Cal.3d 589, 618; *People v. Ghent* (1987) 43 Cal.3d 739, 768; P*eople v. Coleman* (1988) 46 Cal.3d 749, 767.)

C. Peremptory Challenges.

1. It is improper to ask questions intended solely to educate the jury, compel the jurors to commit to vote a certain way, prejudice the jury, argue the case, indoctrinate the jury, instruct the jury on the law, or test the juror's knowledge of the law. (*People v. Edwards* (1912) 163 Cal. 752; *People v. Willams* (1981) 29 Cal.3d 392, 408; *People v. Ashmus* (1991) 54 Cal.3d 932, 959.)

2. It is permissible to ask a juror about his attitude about a particular rule of law only if (1) the rule is relevant or material to the case, and (2) the rule appears to be controversial; e.g., the juror has indicated some hostility toward the rule, or it is commonly known the community harbors strong feelings about it. (*People v. Balderas* (1985) 41 Cal.3d 144, 185; *People v. Williams* (1981) 29 Cal.3d 392, 408.)

3. Examples of Permissible Questions Relating to Murder

   a. Asked jurors whether they would be able to vote guilty if, after deliberations, they were persuaded that the changes had been proved beyond a reasonable doubt. (*People v. Fierro* (1991) 1 Cal.4th 173, 209.)

   b. "[I]f I prove beyond a reasonable doubt each and every element of each of the offenses charged . . . can you assure me that you would be willing to return a verdict of guilty even though you have unanswered questions?" *People v. Riel* (2000) 22 Cal.4th 1153, 1178 fn. 4.

   c. In order to avoid a hung jury the prosecutor observed that each juror must "come to your own conclusion," but also stressed the value of "work[ing] together to try to discover the truth." (*People v. Fierro* (1991) 1 Cal.4th 173, 210, fn 8.)

   d. In questioning a juror, the prosecutor asked her if she believed a person charged with committing a crime such as defendant's must be insane. The prosecutor also asked: Do you feel there could be such a thing as a person who is legally insane? *People v. Fields* (1983) 35 Cal.3rd 329, 358.

   e. Questions designed to determine jurors' views regarding the felony-murder rule. (*People v. Pinholster* (1992) 1 Cal.4th 865, 913; *People v. Ochoa* (2001) 26 Cal.4th 398, 431; *People v. Ervin* (2000) 22 Cal.4th 48, 70.)

f. California's self-defense "no need to retreat in your own home" rule is controversial and was relevant in this case, so conviction is reversed for forbidding questions on attitudes about this rule. (*People v. Williams* (1981) 29 Cal.3d 392, 411.)

g. Whether they would view a person's possession of recently stolen property as circumstantial evidence that the person stole the property, whether they considered rape more of an assaultive than a sexually motivated offense, and whether they thought it was possible for a young man to rape an elderly woman and not be mentally ill. (*People v. Mendoza* (2000) 24 Cal.4th 130, 167.)

4. Examples of Impermissible Questions Relating to Murder (Typically Asked by the Defense):

a. Do you believe in self-defense in the home? (Not controversial; *People v. Williams* (1981) 29 Cal.3d 392, 411.)

b. "Whether, if they believed that a witness was an informant and was testifying 'in exchange for some lesser sentence,' then that 'would have some bearing on the weight or credibility that that witness may have in your mind?' " (*People v. Mason* (1991) 52 Cal.3d 909, 940.)

c. In a death penalty case, the court did not "allow either party to discuss the law – such as the meaning of diminished capacity – or ask questions that required the prospective jurors to pretry the facts of the case." *People v. Rich* (1988) 45 Cal.3rd 1036, 1104.

d. Defense counsel was not permitted to question prospective jurors regarding their ability to view accomplice testimony with suspicion and distrust. *People v. Johnson* (1989) 47 Cal.3rd 1194, 1224.

e. In an eyewitness case where the defense expected to call Dr. Elizabeth Loftus, the defense was prohibited from eliciting opinions of potential jurors concerning the effects of stress on perception. *People v. Sanders* (1990) 51 Cal.3rd 471, 506.

f. Defense counsel stated, "It's clear a girlfriend has an interest to lie. I just want to make sure that the jurors don't automatically, before they hear her testimony, say she's lying because she's the girlfriend." The trial court barred this line of questioning on the ground that the defendant was trying to educate the jurors and induce them to prejudge the evidence. We cannot say that the court abused its discretion in doing so. *People v. Helton* (1984) 162 Cal.App.3rd 1141, 1145.

g. "What do you feel is a proper punishment for someone who has committed a rape or other serious sexually related crime?" (*People v. Ochoa* (1998) 19 Cal.4th 353, 444.)

h. Many detailed questions regarding personal experience with sexual molestation in a child molestation-murder case. (*People v. Earp* (1999) 20 Cal.4th 826, 851, fn 1.)

i. In a capital murder case where one victim was a three year old child, defendant requested that the trial court inquire as to the ages of the prospective jurors' grandchildren. The court denied the request, stating, "Whether you're going to be prejudiced by the fact that a young child is involved in this case doesn't turn upon whether you have one at the moment. It turns upon whether your personality and capacities are such as to be able to deal with the wrench that goes with that. No matter how many or how few grandchildren you have got or what age you are. It's something that jurors are going to have to deal with; they're going to have to be able to set aside." *People v. Box* (2000) 23 Cal.4th 1153, 1178.

j. In a capital murder trial defendant wanted the following questions included on the questionnaire:

> What has been your favorite job and what (do/did) you enjoy about it?"
> "What has been your least favorite job and what (do/did) you dislike most about it?"
>
> "If you were a supervisor or employer, what do you think is the best way to keep workers in line?"
>
> "A person should maintain his or her belief on a subject so long as he or she feels that belief if right. Strongly Agree ___ Agree Somewhat____Disagree Somewhat____Strongly Disagree____Please explain."
>
> *People v. Navarette* (2003) 30 Cal.4th 458, 486.

k. "The court's restriction on questions regarding a prospective juror's birth date, religion and religious service attendance, or voting on the retention of Chief Justice Rose Bird," was not an abuse of discretion. (*People v. Ramos* (1997) 15 Cal.4th 1133, 1158.)

l. Why did you vote as you did on Proposition 8? (Invades juror's privacy) (*People v. Wells* (1983) 149 Cal.App.3d 721, 726.)

m. What was the most important part of Proposition 8? (Unfocused) (*People v. Wells* (1983) 149 Cal.App.3d 721, 726.)

n. Asking a prospective juror whether the Supreme Court's capital opinions under former Chief Justice Rose Bird were "kind of off base" and whether the vote not to retain her or other justices was correct may be error. (*People v. Ochoa* (1998) 19 Cal.4th 353, 428.)

D. Death Qualification Voir Dire.

1. The test.

> "With respect to questions directing the juror's attention to the facts of the case, we have observed that: "The *Witherspoon-Witt* [citations] voir dire seeks to determine only the views of the prospective jurors about capital punishment in the abstract . . . . [Citations.] The inquiry is directed to whether, without knowing the specifics of the case, the juror has an 'open mind' on the penalty determination. There was no error in ruling that questions related to the jurors' attitudes toward evidence that was to be introduced in this trial could not be asked during the sequestered *Witherspoon-Witt* voir dire." (*People v. Clark* (1990) 50 Cal.3rd 583, 597; see also *People v. Sanders* (1995) 11 Cal.4th 475, 539. Nor is it error to preclude counsel from seeking to compel a prospective juror to commit to vote in a particular way (*People v. Rich* (1988) 45 Cal.3rd 1036, 1105, or to preclude counsel from indoctrinating the jury as to a particular view of the facts. *People v. Jenkins* (2000) 22 Cal.4th 900, 990.

2. However, "A challenge for cause may be based on the prospective juror's response when informed of facts or circumstances likely to be present in the case being tried. (*People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1005.) Thus, we have affirmed the principle that either party is entitled to ask prospective jurors questions that are specific enough to determine if those jurors harbor bias, as to some fact or circumstance shown by the trial evidence, that would cause them not to follow an instruction directing them to determine penalty after considering aggravating and mitigating evidence. (*People v. Cash* (2002) 28 Cal.4th 703, 720-721. "Our decisions have explained that death-qualification voir dire must avoid two extremes. On the one hand, it must not be so abstract that it fails to identify those jurors whose death penalty views would prevent or substantially impair the performance of their duties as jurors in the case being tried. On the other hand, it must not be so specific that it requires the prospective jurors to prejudge the penalty issue based on a summary of the mitigating and aggravating evidence likely to be presented. (See *People v. Jenkins* [*supra*, 22 Cal.4th at

3. Compare the following cases:

    a. *People v. Pinholster* (1992) 1 Cal.4th 865, 916-918. The prosecutor was allowed to ask questions about jurors' willingness to impose the death penalty in a burglary-murder case. "Each juror's reluctance to impose the death penalty was based not on an evaluation of the particular facts of the case, but on an abstract inability to impose the death penalty in a felony-murder case." *Id.* at 916.

    "Defendant objects that fact-based voir dire is impermissible under *Witt, supra*, 469 U.S. 412. As we have already noted, we have commented in the past that questions directed to jurors' attitudes toward the particular facts of the case are not relevant to the death-qualification process, so that a trial court that refused to permit such questions did not err. (*People v. Clark, supra*, 50 Cal.3rd at p. 597.) We have also said, however, that "a court may properly excuse a prospective juror who would automatically vote against the death penalty in the case before him, regardless of his willingness to consider the death penalty in other cases." (*People v. Fields, supra,* 35 Cal.3rd at pp. 357-358.) *Id.* at 917-918.

    "Trial courts have broad discretion in determining what questions to permit. (*People v. Johnson, supra,* 47 Cal.3rd at p. 1224.) We see no prejudicial error in allowing questions regarding the particular facts of the case as long as more relevant questions and answers provide the basis for the court's decision." *Id.* at 918.

b. *People v. Medina* (1995) 11 Cal.4th 694, 745-746. Initially, the trial court did not permit defense questions asking jurors' whether they could vote for life imprisonment if the defendant had committed multiple murders.

"The inquiry that defendant sought to make was not relevant to the death qualification process, however . . . . [V]oir dire seeks to determine only the views of the prospective jurors about capital punishment in the abstract, to determine if any, because of opposition to the death penalty, would 'vote *against* the death penalty without regard to the evidence produced at trial.' [Citations.] Such a juror may be excused because he or she would be unable to faithfully and impartially apply the law. The inquiry is directed to whether, without knowing the specifics of the case, the juror has an 'open mind' on the penalty determination. There was no error in ruling that questions related to the jurors' attitudes toward evidence that was to be introduced in this trial could not be asked during the sequestered . . . voir dire." [Fn. omitted.] *Id.* at 746.

c. *People v. Cash* (2002) 28 Cal.4th 703, 718-723. The defendant had prior murders. He wanted to ask jurors "whether there were any particular crimes" or "any facts" that would cause that juror "automatically to vote for the death penalty." The trial court prohibited such questions. The Supreme Court reversed the death verdict.

"Thus, we affirmed the principle that either party is entitled to ask prospective jurors questions that are specific enough to determine if those jurors harbor bias, as to some or circumstance shown by the trial evidence, that would cause them not to follow an instruction directing them to determine a penalty after considering aggravating and mitigating evidence." *Id.* at 720-721.

"Our decisions have explained that death-qualification voir dire must avoid two extremes. On the one hand, it must not be so abstract that it fails to identify those jurors whose

death penalty views would prevent or substantially impair the performance of their duties as jurors in the case being tried. On the other hand, it must not be so specific that it requires the prospective jurors to prejudge the penalty issue based on a summary of the mitigating and aggravating evidence likely to be presented." *Id.* at 721-722.

d. *People v. Burgener* (2003) 29 Cal.4th 833, 865-866. In a penalty phase retrial "the trial court sustained the People's objections when defense counsel asked prospective jurors whether they would impose the death penalty after considering a rather detailed account of some of the facts of this case, and whether a prospective juror could continue to be impartial after hearing a list of defendant's prior crimes. There was no error in ruling that questions related to the jurors attitudes toward evidence that was to be introduced in this trial could not be asked during the sequestered [death-qualification] voir dire.'" (*Jenkins, supra,* 22 Cal.4th at p. 991.) Defendant had no right to ask specific questions that invited prospective jurors to prejudge the penalty issue based on a summary of the aggravating or mitigating evidence (*People v. Cash* (2002) 28 Cal.4th 703, 721-722 [122 Cal.Rptr.2d 545, 50 P.3d 332]), to educate the jury as to the facts of the case (*People v. Sanders* (1995) 11 Cal.4th 475, 538-539 [46 Cal.Rptr.2d 751, 905 P.2d 420]), or to instruct the jury in matters of law (*People v. Ashmus* (1991) 54 Cal.3rd 932, 959 [2 Cal.Rptr. 2d 112, 820 P.2d 214])." *Id.* at 865.

e. *People v. Navarette* (2003) 30 Cal.4th 458, 489-490. The defendant complained because the court limited his oral questioning, relating to the nature of the crimes charged. The Supreme Court rejected the defendant's contentions because his questionnaire did address these issues. The Court addressed *Medina* as compared with *Pinholster* and *Cash*.

"Defendant argues that *Medina* prevented him from asking jurors if they would automatically impose the death

penalty in a double-murder case, whereas under *Pinholster*, the People are free to inquire whether any jurors would automatically refuse to impose the death penalty in a burglary-murder case. This imbalance, he claims, led to a jury that was biased in favor of the death penalty, in violation of his rights under the federal Constitution.

We need not decide the continuing validity of our comment in *Medina*, because here the trial court did not prevent defendant from asking jurors whether they would automatically impose the death penalty in a multiple-murder case, the defendant did ask such a question." *Id.* at 489-490.

f. *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 47-48. "Coffman complains the trial court prevented her counsel from questioning the prospective jurors on their views regarding the circumstances of the case that were likely to be presented in evidence in order to determine how such circumstances might affect their ability to fairly determine the proper penalty in the event of a conviction."

In reality, "the trial court invited counsel to draft a proposed question for prospective jurors eliciting their attitudes toward the death penalty and in fact itself questioned a prospective juror whether he could weigh all the evidence before reaching a penalty determination in a case involving multiple murder."

Citing *Jenkins* and *Cash*, the Court found no abuse of discretion. "Unlike in *People v. Cash, supra,* 28 Cal.4th at pages 720-722, the trial court did not categorically prohibit inquiry into the effect on prospective jurors of the other murders, evidence of which was presented in the course of the trial. Rather, the trial court merely cautioned Coffman's counsel not to recite specific evidence expected to come before the jury in order to induce the juror to commit to voting in a particular way. (See *People v. Burgener* (2003) 29 Cal.4th 833, 865." Id. at 47-48.

g. *People v. Viera* (2005) 35 Cal.4th 264, 283-286. "Prior to the commencement of voir dire, defense counsel submitted a proposed jury questionnaire that contained the following question: "Do you feel you would automatically vote for death instead of life imprisonment with no parole if you found the defendant guilty of two or more murders?" The prosecution objected that the subject areas "should be covered by the Court" in its death qualification voir dire. "The question was not included in the jury questionnaire. Moreover, the judge's questions to prospective jurors did not ask this or a similar question."

Citing *Cash*, the defendant claimed he was entitled to a reversal of the death verdict. After contrasting the facts in *Medina* with those in *Cash*, the Supreme Court found the defendant made no effort to ask this legitimate question during the oral portion of voir dire.

"As our discussion of *Medina* in *Cash* suggests, a trial court's categorical prohibition of an inquiry into whether a prospective juror could vote for life without parole for a defendant convicted of multiple murder would be error. Multiple murder falls into the category of aggravating or mitigating circumstances "likely to be of great significance to prospective jurors." (*Cash, supra,* 28 Cal.4th at p. 721.) The Attorney General does not dispute this point. Rather, the Attorney General argues that defendant was not denied the opportunity to conduct voir dire on the subject of multiple murder. We agree.

Although the trial court did not include the sough-after question on multiple murder in the jury questionnaire, it never suggested that defense counsel could not raise the issue in voir dire." *Id.* at 285. "Although asking the multiple-murder question in the jury questionnaire would not have been improper, refusal to include the question was not error so long as there was an opportunity to ask the question during voir dire. Because defendant did not attempt to have the trial court conduct a multiple murder inquiry during voir dire, and the trial court was given no

opportunity to rule on the propriety of that inquiry, we conclude defendant cannot claim error." *Id.* at 286.

4. Examples of Permissible Death Qualifying Questions

    a. "Court: Both sides are entitled to have 12 jurors that, if necessary, can make that choice and make the choice based on the law that I outlined and make it fair for the defendant, fair for the prosecution, the sides they represent here. Do you believe you are a juror who can do that or do you think that your abilities are substantially impaired by your feelings about the death penalty? *People v. Harris* (2005) 37 Cal.4th 310, 330.

    b. The court asked each individual panel member, out of the presence of other prospective jurors, five questions, which may be paraphrased as follows: (1) Would you automatically refuse to impose the death penalty regardless of the evidence or the law in the case? (2) If defendant were found guilty of first degree murder with special circumstances at the guilt phase, would you automatically vote to impose the death penalty without regard to the evidence or the law? (3) Would your death penalty views prevent you from making an impartial decision as to the defendant's guilt? (4) Are your views such that you would never vote to impose the death penalty? (5) Are your views such that you would refuse to consider imposing the death penalty *in this case? People v. Balderas* (1985) 41 Cal.3rd 144, 187-188.

    c. The prosecutor asked: "[I]f I could prove to you beyond a reasonable doubt and to a moral certainty that he's guilty of murder, first degree murder with special circumstances, and based upon the second phase of this trial, the penalty phase, that you thought the death penalty was appropriate, could you then take that system and say, 'Yes, that man, Gregory Smith, he deserves the death penalty,' and vote accordingly; could you do that?" *People v. Smith* (2003) 30 Cal.4th 581, 603 fn. 3.

d. The defense wanted to ask: "Whether there are any aggravating circumstances which would cause a prospective juror to automatically vote for the death penalty, without considering the alternative of life imprisonment without possibility of parole." *People v. Cash* (2002) 28 Cal.4th 703, 719.

e. "Do you feel you would automatically vote for death instead of life imprisonment with no parole if you found the defendant guilty of two or more murders?" *People v. Viera* (2005) 35 Cal.4th 264, 283.

f. Whether an accomplice to murder should be subject to the death penalty, with or without intent to kill, was a proper subject for voir dire in *People v. Fuentes* (1985) 40 Cal.3rd 629.

g. The trial court permitted the prosecutor to ask each prospective juror whether, in the words of a representative query, the fact that a capital defendant was "18 or 19 at the time of the killing . . . [would] automatically cause you to vote for the lesser punishment of life imprisonment without possibility of parole?" In addition, the prosecutor was permitted to ask each juror in the sequestered voir dire whether "you would be able to consider imposing the death penalty . . . if we have one victim as opposed to requiring that the defendant kill two or more people?" *People v. Noguera* (1992) 4 Cal.4th 599, 645.

h. In an effort to illustrate the difference between "consider" and "chose", the prosecutor asked: "You can walk by Tiffany's and you can look in the window and you can meaningfully consider this $15,000 stone and that gold Rolex watch; right? And you can think, well, I'd rather have this one with the rubies in it or that with the stones in it or this beautiful diamond ring. But there is a difference between considering and choosing. Could you ever possibly choose the death penalty?" *People v. Smith* (2003) 30 Cal.4th 581, 602-603.

i. In describing the penalty phase of trial, the prosecutor gave illustrations of aggravating and mitigating evidence. As an example of aggravating evidence, he often mentioned a hypothetical defendant with a history of many prior felony convictions. To illustrate mitigating evidence, he often mentioned a hypothetical defendant who had received the Congressional Medal of Honor, was a war hero, had saved someone's life, or had no prior criminal history. The illustrations of aggravating evidence used by the prosecutor and the trial court resembled the aggravating evidence actually presented by the prosecution in this case, whereas the illustrations of mitigating evidence were wholly unlike defendant's mitigating evidence. *People v. Seaton* (2001) 26 Cal.4th 598, 635-636.

j. At the outset of voir dire, counsel informed the trial court that he wished to question the prospective jurors as to whether they believed a robbery accomplice who does not kill should be punished as severely as an intentional killer. Accordingly, counsel submitted for the court's approval the following question: "Do you believe that one who only aids and abets the commission of an attempted robbery and does not intentionally aid and abet the actual killing during the commission of said attempted robbery should be treated under the law in the same fashion as the actual killer?" *People v. Fuentes* (1985) 40 Cal.3rd 629, 637.

5. Examples of Impermissible Death Qualifying Questions (Typically asked by the defense)

a. The defense proposed a lengthy, factually detailed question that would have given prospective jurors substantial information about defendant's victims and the manner in which they were killed. He then wanted to ask whether the juror would automatically vote for death. (*People v. Mason* (1991) 52 Cal.3rd 909, 940 fn. 4).

b. In an effort to determine whether the evidence of serious burn injuries suffered by the victims would cause a jury to automatically vote for the death penalty, defendant sought

to inquire about the prospective jurors' attitudes toward such injuries. The People objected and, at that stage of the examination, the court ruled that the jury would not be told of the injuries suffered by Ava Gawronski, and defendant would not be permitted to ask the prospective jurors if knowledge of the extent of those injuries would affect their ability to perform their duties. *People v. Clark* (1990) 50 Cal.3rd 583, 596. But see fn. 3.

c. Defense counsel posed a hypothetical question to a prospective juror as follows. "[T]wo men go into a restaurant in the early morning hours. They herd 11 people, two customers and nine employees, to the back area of the restaurant. The two men are armed with shotguns. They rob all the people and make them lie on the floor and they rob them all. They put them all in a freezer. The people obey all the orders and instructions that the two men give them. They do not fight with them or protest. They are told to get on their knees and face the walls. They do that. No one says anything. And the two men open fire, as you put it, with their shotguns. And they go on firing even though one of the victims begs for her life. They do not stop firing until they run out of ammunition. They pick up the casings that their guns have expended. They leave everybody in this darkened freezer where people are dying and people are moaning. [¶] Now, if those are the facts that you are presented with at the penalty phase, you understand you are entitled to rely on those facts as one of the circumstances in deciding a penalty, do you not?" Defense counsel was also permitted to ask: "Now, don't you believe that that's precisely the kind of case where with your ideas of justice, the death penalty is the only appropriate kind of penalty?" She then asked if various hypothetical aggravating and mitigating factors—such as the defendant's criminal record, age, and background—would make a difference to the juror. *People v. Sanders* (1995) 11 Cal.4th 475, 535.

d. A juror was asked: "So now you're in a penalty phase with the defendant like this one, who has committed

this kind of a crime and I want you to ask yourself, after looking inside yourself whether you could actually vote to put another human being to death for doing a crime like this:

"Let's assume you have a person who decides to commit a robbery because he wants to make some additional money. He goes out and gets himself a loaded handgun to make the odds more in his favor that he'll be successful. And he finds a victim that he thinks has some money and sure enough, the victim has some money when the defendant sticks him up. Sometime about this point the defendant has the brilliant thought that if I let this guy go, he's going to the police and I might get caught and whereas if I don't let him go, don't leave any witnesses, I won't get caught, in other words, I'd better kill him to make myself more certain of getting away.

"That's exactly what he does; he shoots the victim once through the heart and subsequently he's caught and he's been brought before us and you have found beyond any doubt that he's guilty of first degree murder committed during the course of a robbery.

"Do you think it's possible that you could go in the jury room, look the other jurors in the eye and knowing you'll have to come out and look the defendant in the eye also, say I think this crime is so horrendous and the other background facts we've heard are so horrendous, he should be put to death?" *People v. Visciotti* (1992) 2 Cal.4th 1, 46-47. (Defense counsel did not, but should have objected).

e. The prosecutor asked: "If we get to the penalty phase, if we get that far, then you've already found the man guilty of first degree murder. It's a horrible crime. And you found he committed this murder while he was engaged in a robbery, based on facts that would be something like a man decides to commit a robbery, arms himself with a handgun to make sure he's successful, robs his victim. During the course of the robbery it occurs to him that if the

victim is not alive, there won't be anybody going to the police and complain . . . . So, realizing that, the robber points his gun at the victim, pulls the trigger, shoots him once through the heart and kills him.

That's the type of facts we're going to be dealing with, something along those lines, perhaps.

Do you feel just, first of all, theoretically like it's possible you could vote for the death penalty if you're faced with facts such as those?" *People v. Visciotti* (1992) 2 Cal.4th 1, 46. (Defense counsel did not, but should have objected).

f. Defense counsel was precluded from informing the prospective jurors that defendant had been convicted of first degree murder and that the special circumstance of torture murder had been found true, and prohibiting mention of the specific facts surrounding the torture murder, in violation of his Sixth Amendment right to a fair trial. *People v. Davenport* (1995) 11 Cal.4th 1171, 1204.

g. The court curtailed voir dire only when defendant asked her what type of murder case warranted the death penalty. *People v. DeSantis* (1992) 2 Cal.4th 1198, 1218.

h. If Adolf Hitler were on trial charged with murdering six million people . . . ." The court refused to permit the question, saying that "I don't think it is fair to ask a juror to speculate what they might do with Adolf Hitler. We therefore conclude that a court may properly prohibit voir dire which seeks to ascertain a juror's views on the death penalty in actual or hypothetical cases not before him. *People v. Fields* (1983) 35 Cal.3rd 329, 354-357.

i. The defense was precluded from questioning potential jurors regarding factors and circumstances they would deem significant in selecting an appropriate sentence. *People v. Johnson* (1989) 47 Cal.3rd 1194, 1225.

j. "Is life without the possibility of parole an appropriate sentence for someone who robs, rapes and kills an elderly woman?" *People v. Wright* (1990) 52 Cal.3rd 367, 419 fn. 18.

k. "What do you feel is a proper punishment for someone who has committed a rape or other serious sexually related crime?" (*People v. Ochoa* (1998) 19 Cal.4th 353, 444.)

l. The defense extensively questioned the prospective jurors on their understanding of the two possible sentences at the penalty phase, defense counsel declared that life imprisonment without possibility of parole meant life imprisonment *without possibility of parole.* In so doing, they stated or implied that the penalty would inexorably be carried out. They contrasted life imprisonment without possibility of parole, which might be imposed on defendant, with life imprisonment *simpliciter*, which had been imposed on such notorious criminals as Charles Manson and Sirhan Sirhan. *People v. Ashmus* (1991) 54 Cal.3rd 932, 957-960.

m. The prosecutor remarked that it would be proper to consider "sympathetic factors" in defendant's favor, but that defendant would be appearing in court "dressed up and decent" and had "over six years to get ready for today." The prosecutor continued in a similar vein that "[w]hat you're not going to have is the victim appear[ing] in court . . ." (*People v. Montiel* (1993) 5 Cal.4th 877, 914-915, fn. 14.)

n. In penalty re-trial, defense counsel wanted to inform jury the first penalty trial resulted in a hung jury and asked jurors about their knowledge of the first trial. (*People v. Wash* (1993) 6 Cal.4th 215, 252.)

o. Defense counsel wanted to inform jury that penalty reversal was not caused by an appellate reversal of an earlier death verdict. (*People v. Wash* (1993) 6 Cal.4th 215, 254.)

p. Questions regarding Governor's commutation power. (*People v. Pinholster* (1992) 1 Cal.4th 865, 918; *People v. Carpenter* (1997) 15 Cal.4th 312, 359.)

q. Asking a juror whether he had voted for a ballot proposition to enact the death penalty or would vote for such a penalty in a public election may be error. (*People v. Ochoa* (1998) 19 Cal.4th 53, 428.)

r. Asking a prospective juror whether the Supreme Court's capital opinions under former Chief Justice Rose Bird were "kind of off base" and whether the vote not to retain her or other justices was correct may be error. (*People v. Ochoa* (1998) 19 Cal.4th 353, 428.)

Voir Dire

I. LAW

A. The Adoption of Proposition 115 in 1990 Changed Voir Dire.

1. Pre-Proposition 115 Rules

a. The attorneys participated in the questioning process.

b. The purpose of voir dire was to allow the parties to intelligently exercise their peremptory challenges. (*People v. Williams* (1981) 29 Cal.3d 392.)

2. In 1990, the voters passed Proposition 115, which included a new Code of Civil Procedure section 223 regulating voir dire in criminal cases.

> "In a criminal case, the court shall conduct the examination of prospective jurors. However, the court may permit the parties, upon a showing of good cause, to supplement the examination by such further inquiry as it deems proper, or shall itself submit to the prospective jurors upon such a showing, such additional questions by the parties as it deems proper." (Code Civ. Proc., § 223.)

a. The court shall conduct the examination of prospective jurors.

b. Upon a showing of good cause, the court may allow the attorneys to question the jurors.

c. Where practicable, voir dire shall occur in the presence of the other jurors.

d. Questioning shall be conducted only to aid in the exercise of challenges for cause.

3. Section 223 was amended effective January 1, 2001, to again allow attorney questioning.

> "In a criminal case, the court shall conduct an initial examination of prospective jurors. The court may submit to the prospective jurors additional questions requested by the parties as it deems proper. Upon completion of the court's initial examination, counsel for each party shall have the right to examine, by oral and direct questioning, any or all of the prospective jurors. The court may, in the exercise of its discretion, limit the oral and direct questioning of prospective jurors by counsel. The court may

specify the maximum amount of time that counsel for each party may question an individual juror, or may specify an aggregate amount of time for each party, which can then be allocated among the prospective jurors by counsel."

a. Amendment become effective January 1, 2001.

b. Court can limit amount of time allotted to the parties.

c. Shall be conducted "only in the aid of the exercise of challenges for cause."

B. Two Types of Challenges

1. Challenge for Cause – CCP § 225.

a. General Disqualification – CCP § 225(b)(1)(A).

1. Juror lacks the statutory requirements to be eligible for jury duty – CCP § 203, 228(a).
2. Deaf, or any other incapacity – CCP § 228(b).
3. Rarely utilized.

b. Implied Bias – CCP § 225(b)(1)(B), 229.

1. Eight statutory grounds.
2. Prejudice is inferred.

c. Actual Bias – CCP § 225(b)(1)(C).

The existence of a state of mind on the part of the juror in reference of the case, or to any of the parties, which will prevent the juror from acting with entire impartiality, and without prejudice to the substantial rights of any party.

d. Number of challenges – unlimited.

2. Peremptory Challenges

a. No reason need be given – CCP § 226(b).

b. Number of peremptory challenges allowed.

1) Depends on punishment allowed and number of defendants on trial.

2) Single defendant case.

a) 20 – If punishable by death or life imprisonment – CCP § 231(a).
b) 6 – If punishable with maximum of 90 days or less – CCP § 231(b).
c) 10 – all other cases – CCP § 231(a).

3) Multiple defendant case.

a) Death or life imprisonment case – CCP § 231(a).

1) 20 joint challenges.
2) 5 individual challenges for each defendant.
3) DA gets same total as entire defense team.

b) 90 days or less – CCP § 231(b).

1) 6 joint challenges.
2) 4 individual challenges for each defendant.
3) DA gets same total as entire defense team.

c) All other cases – CCP § 231(a).

1) 10 joint challenges.
2) 5 individual challenges for each defendant.
3) DA gets same total as entire defense team.

4) Alternates – CCP § 234.

a) Single defendant case – one per number of alternates.
b) Multiple defendant cases – each defendant gets one per number of alternates.
c) DA gets same total number as defense team.

5) A pass does not count as a challenge – CCP § 231(d)(e).

II. PROCEDURE

A. Pre-Voir Dire Conference – Rule 228.1.

1. Establish ground rules.

2. How many jurors will be called into the box?

3. Will judge allow attorney questioning?

4. Time limits.

5. Number of alternates.

6. Give judge voir dire questions.

B. Court clerk will summon a jury panel to courtroom.

C. Clerk will take roll and swear the panel – CCP § 232.

D. Questioning the jurors.

1. Judge will question jurors first – CCP § 223.

   a. Will typically ask 8 – 10 general questions. See Standard of Judicial Administration, § 8.5.
   b. Very limited follow-up.

2. Defense Attorney will question second.

   a. Defense will "challenge for cause" – CCP § 226(d).
   b. "Pass for cause."

3. DA questions last.

   a. "Pass for cause."
   b. "Approach the Bench" to exercise challenge for cause.

E. Challenging the jurors.

1. DA goes first – CCP § 226(d).

   a. "I would ask the court to thank and excuse Juror Number _____, Mr/Mrs _____."

2. Defense goes second.

3. Continues until both sides pass consecutively.

   a. "The People are pleased with the panel. We pass."
   b. 12 jurors will be sworn.

4. Select Alternates – CCP § 234.

   a. Same order as original 12 jurors.
   b. Swear alternates.

5. Court will excuse unused jurors.

BATSON / WHEELER

I. BATSON / WHEELER MOTIONS

a. At some time during their career, every prosecutor will have to deal with a *Wheeler* motion. It usually occurs following the People's use of a peremptory challenge against someone of a particular race, gender or ethnic background.

b. How it works – The defense makes a motion, usually on state and federal grounds, that the prosecutor has excused a juror based on racial, ethnic or other improper grounds (cognizable class) and has therefore violated the defendant's Constitutional right to a fair and impartial jury. **Note**: While the defense usually brings the motion, it may be made by *either party.*

c. *People v. Wheeler* (1978) 22 Cal. 3d 258 – Peremptory challenges based on group bias violates the defendant's right to jury trial in the California Constitution. *Batson v. Kentucky* (1986) 476 U.S. 79 – Race based challenges violate the Equal Protection Clause of the U.S. Constitution.

   i. Cognizable Classes –
      1. RACE
      2. ETHNICITY
      3. RELIGION
      4. GENDER
      5. SEXUAL ORIENTATION

   ii. Non-Cognizable Classes
      1. Poor
      2. Less Educated
      3. Battered Women

4. Young
5. People over 70
6. Insufficient English

iii. History

1. *Batson* ***is*** the federal standard and *Wheeler* ***was*** the California standard used to determine whether the peremptory challenge was improper.

    a. Both cases used procedures involving 3 part tests to determine the propriety of the challenge. However, the first prong of the tests in each case was different. *Defendants argued the state burden (Wheeler) was more difficult for them to meet than the federal burden (Batson)*.

    b. The California Supreme Court tried to reconcile the two cases in 2003 in *People v. Johnson* (2003) 30 Cal. 4th 1302.

    c. In 2005, the U.S. Supreme Court reversed *Johnson* and "clarified" the *Batson* decision by stating that the first prong of the *Batson* test need only be satisfied by production of evidence sufficient to permit the trial judge to draw an *inference of discrimination*. *Johnson v. California* (2005) 545 U.S. 162.

2. Current State of the Law - Still a 3 prong test based on the holdings of *Batson* and *Johnson.*

    a. STEP 1 – The party objecting to the peremptory challenge must make out a prima facie case "*by showing the totality of the relevant facts gives rise to an inference of a discriminatory purpose.*"

        i. Presumption that challenge was made on a constitutionally permissible ground

        ii. Burden is on party making challenge to demonstrate a prima facie case

iii. Rebut the showing of a prima facie case

1. Members of the group allegedly discriminated against were left on the panel.

2. Good faith argument that you didn't know the challenged juror was a member of a cognizable group. *People v. Barber* (1988) 200 Cal.App.3d 378, 389.

3. Consider justifying challenges before you make them if you see a problem coming up. Court can use this as evidence of the prosecutor's sincerity. *U.S. v. Contreras-Contreras* (9th Cir. 1996) 83 F. 3d 1103.

b. STEP 2 – If a prima facie case is made, the "*burden shifts to the [party making the original, objected to juror challenge] to explain adequately the racial [or other cognizable class] exclusion by offering permissible race neutral justifications for the strikes*."

i. "The justification need not support a challenge for cause, and even a 'trivial' reason, if genuine and neutral, will suffice." (*People v. Arias* (1996) 13 Cal. 4th 92, 136 citing *People v. Montiel* (1993) 5 Cal. 4th 877, 910, fn. 9.)

ii. Permissible Reasons

1. Hostility towards law enforcement - (*People v. Turner* (1994) 8 Cal. 4th 137, 171)

2. Nervous - (*People v. Johnson* (1989) 47 Cal. 3d 1194, 1217-1219)

3. Unconventional appearance - (*People v. Ward* (2005) 36 Cal. 4th 186, 202)

4. Too Eager - (*People v. Ervin* (2000) 22 Cal. 4th 48)

5. Sleepy - (*People v. Johnson* (1989) 47 Cal. 3d 1194, 1217-1219)

6. Can't understand English - (*Hernandez v. New York* (1991) 500 U.S. 352, 356-357)

7. Hostility – (*People v. Turner* (1994) 8 Cal. 4th 137, 168-172)

8. Intelligence – (*People v. Arias* (1996) 13 Cal. 4th 92, 137-139)

9. Sympathetic to defendant – (*People v. Mayfield* (1997) 14 Cal. 4th 668, 724, 726)

10. Past jury experience - (*People v. Farnam* (2002) 28 Cal. 4th 107, 138)

11. Limited life experience - (*People v. Arias* (1996) 13 Cal. 4th 92, 137-139)

12. Occupation - (*People v. Ervin* (2000) 22 Cal. 4th 48, 75)

13. Desire for next juror - (*People v. Alvarez* (1996) 14 Cal. 4th 155, 194-195)

c. STEP 3 – "*If a race neutral explanation is tendered, the trial court must then decide… whether the opponent of the strike has proved purposeful racial discrimination.*"

i. In analyzing the reason given, the court must make a "sincere and reasoned attempt to evaluate each stated reason as applied to each challenged juror." (*People v. Silva* (2001) 25 Cal. 4th 345, 386)

d. Practical Issues

i. The court raises its own *Batson/Wheeler* motion. (*People v. Lopez* (1991) 3 Cal. App. 4th Supp. 11)

ii. The court asks you to justify challenge(s) *before* finding a prima facie case.

iii. The court finds no prima facie case made, but asks you to justify challenges. (*People v. Cornwell* (2005) 37 Cal 4th 50)

iv. Multiple *Batson/Wheeler* challenges in a single voir dire

1. New prima facie case must be shown with every motion. (*People v. Irvin* (1996) 46 Cal. App. 4th 1340)

2. Court has no duty to request reasons for previously challenged jurors where motion was denied. (*People v. Avila* (2006) 38 Cal 4th 491)

e. Comparative Analysis

1. Comparing the common non-racial characteristics between challenged and non-challenged jurors of different racial backgrounds. (e.g. Prosecutor leaves a white teacher on the jury but challenges an African American teacher.) Argument is that prosecutor is discriminating instead of kicking teachers because a teacher was left on the jury.

2. History

a. Federal Courts approved of comparative analysis in *Turner v. Marshall* (9th Cir. 1997) 121 F. 3d 1248.

b. California rejected comparative analysis in *People v. Landry* (1996) 49 Cal.App.4th 785. *People v. Jones* (1997) 15 Cal. 4th 119.

c. However, things began to change in 2003 with *Johnson*. Then in 2005, the U.S. Supreme Court decided *Miller-El v. Dretke* (2005) 545 U.S. 231 using comparative analysis in the decision.

3. Current Law – Comparative analysis used in California in *People v. Ward* (2005) 36 Cal. 4th 186. However, no California case has been reversed based on a comparative analysis.

4. *Snyder v. Louisiana* (2008) 552 U.S. ___ , 128 S.Ct. 1203.

f. Dealing with *Batson/Wheeler* Motions

i. Realize that a challenge will likely come at some point during jury selection and be ready to deal with it.

ii. It should go without saying, but ***NEVER*** excuse a juror on the basis of race, ethnicity, religion, gender etc…

iii. Question all jurors you plan to challenge.

iv. Be prepared to rebut a prima facie case by arguing applicable factors:

1. Point out any members of the group who were not challenged.

2. If you were honestly not aware the juror was a member of a cognizable group. *People v. Barber* (1988) 200 Cal.App.3d 378, 389. Challenged juror appeared to be a white and non-Hispanic to DA. DA did not recognize the surname to be Hispanic. Court found DA to be sincere.

3. Possible to justify challenges before you make them if you see a problem coming up. Court can use this as evidence of the prosecutor's sincerity. *U.S. v. Contreras-Contreras* (9th Cir. 1996) 83 F. 3d 1103.

v. Assume that a prima facie case will be made and be prepared to give race neutral reasons for excusing the juror. Following are a list of some accepted race neutral reasons:

vi. If defense counsel fails to make a prima facie case, consider asking the judge to make a record supporting the denial.

1. If judge finds no prima facie case, consider stating your reasons anyway.

2. Do not give reasons unless the court specifically finds no prima facie case. Giving reasons without a specific finding on the first prong will constitute an implied finding of a prima facie case. *People v. Arias* (1996) 13 Cal. 4th 92; *People v. Gutierrez* (2002) 28 Cal. 4th 1083.

vii. Save your notes. If case is reviewed later, voir dire may be an issue. Always save your notes so that if asked, you are better able to recollect why you may have challenged a specific juror.

g. Remedies

i. If a Wheeler motion is granted, the entire venire is dismissed, a new venire is brought in, and jury selection starts over.

ii. *People v. Willis* (2002) 27 Cal. 4th 811 – Allows other remedies for a *Wheeler* violation if offended party agrees.

1. Fines

2. Reseating wrongfully excused juror

3. *Possibly* allowing offended party more challenges

h. Consequences

i. Motion Granted at Trial – Remedies are arguably sanctions

1. B&P 6086.7(a)(3) – Court must notify the bar of any judicial sanctions against an attorney…

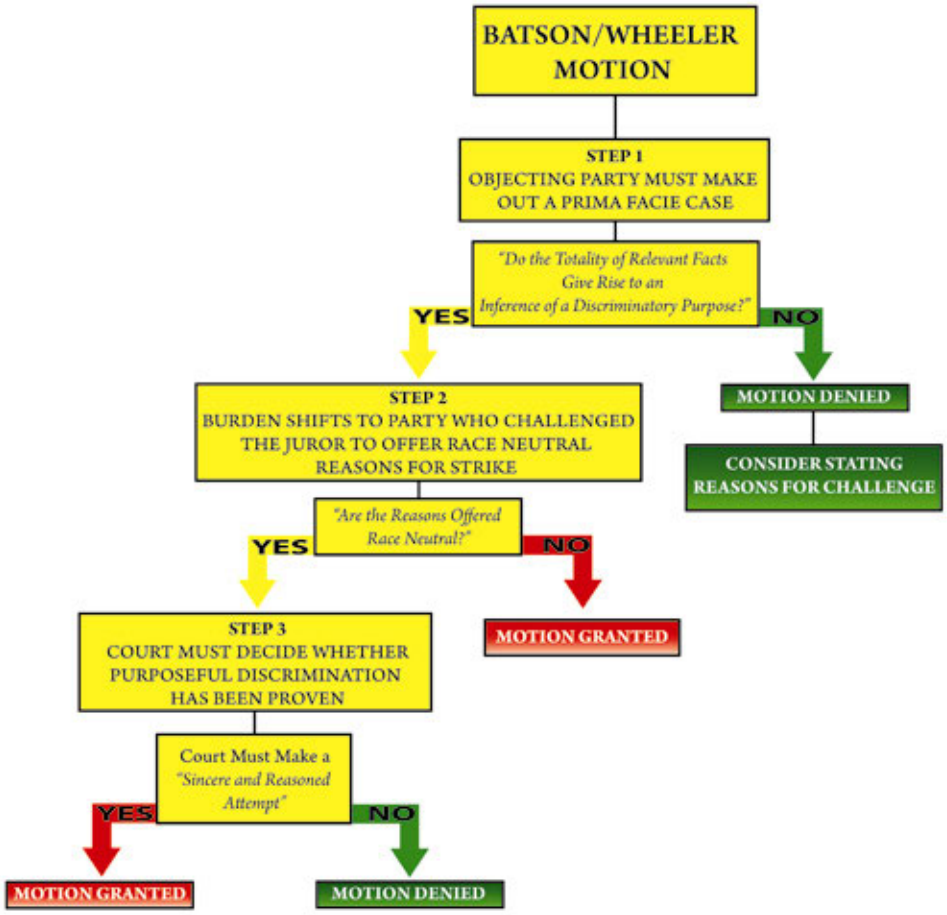
2. B&P 6068(o)(3) – Attorney must self report any judicial sanction …

3. However, reporting will likely not be required unless the conduct is egregious.

ii. Motion Erroneously Denied and Case Reversed

1. B&P 6086.7(b)(2) – Court must notify bar whenever there is a reversal.

2. B&P 6068(o)(7) – Attorney must notify bar whenever reversal is based in whole or in part upon misconduct of the attorney.


BATSON/WHEELER MOTION
STEP 1
OBJECTING PARTY MUST MAKE OUT A PRIMA FACIE CASE
"Do the Totality of Relevant Facts Give Rise to an Inference of a Discriminatory Purpose?"
YES
NO
MOTION DENIED
CONSIDER STATING REASONS FOR CHALLENGE
STEP 2
BURDEN SHIFTS TO PARTY WHO CHALLENGED THE JUROR TO OFFER RACE NEUTRAL REASONS FOR STRIKE
"Are the Reasons Offered Race Neutral?"
YES
NO
MOTION GRANTED
STEP 3
COURT MUST DECIDE WHETHER PURPOSEFUL DISCRIMINATION HAS BEEN PROVEN
Court Must Make a "Sincere and Reasoned Attempt"
YES
NO
MOTION GRANTED
MOTION DENIED

RESOURCES

- **Mr. Wheeler Goes to Washington by Jerry Coleman**
- **Protecting the Record after a Batson Challenge by Steven Oetting and Barbara Oetting**
- **Dealing with Batson/Wheeler Motions by Patrick Whalen**

IV. Jury Selection

a. Overview – The process of selecting a jury involves much more that what we commonly call "voir dire". In order select a jury, you must be familiar with the rules regarding *selection methods*, *challenges*, *Batson/(Wheeler)*

b. Methods of Jury Selection – Depending on the judge you are in front of, you may be faced with several different methods of selecting a jury. There are really two main types and variations of either type.

i. "12 Pack", "18 Pack"

1. How it Works

a. *This is the most common type of selection method that you will see*. Usually, the court clerk will call 12 or 18 or 20 names from a random list of all the potential jurors. Those jurors will fill the jury box in the order called and, if more that 12, will fill the front row of the audience. The rest of the potential jurors will then fill the remaining seats in the courtroom.

b. Voir Dire is then conducted by the judge and attorneys of the first 12 or 18 or 20 potential jurors.

c. Once the challenges begin, jurors leave the courtroom when they are challenged until only 11 remain.

d. The clerk then calls jurors to fill the vacant seats and the process starts all over again. This continues until both sides pass or are out of challenges.

ii. "**<u>Federal Method"</u>**

1. How it Works

a. This method seems to be gaining popularity with judges primarily. It is usually a faster method and avoids excused jurors knowing which side excused them.

b. In this method, unlike the "12 Pack" method, the attorneys move their chairs to the opposite side of counsel tables so that they are facing the courtroom doors and the audience and their backs are to the judge.

c. The potential jurors are called in by the clerk according to the order on the random list. All of the potential jurors are assigned a seat and a number in the courtroom.

d. Voir Dire is then conducted on *<u>ALL</u>* of the potential jurors *<u>ONCE</u>*.

e. Once challenges begin, they are done silently by the attorneys on a master sheet. The attorneys may challenge anyone they wish from the entire panel. The attorneys pass the sheet back and forth until both pass or run out of challenges.

f. The judge will then excuse all challenged jurors at once. The ***first 12 unchallenged jurors*** will then make up the jury.

c. Challenges – There are two types of challenges, *<u>challenges for cause</u>* and *<u>peremptory challenges</u>*. The rules regarding juror challenges can be found in the ***Code of Civil Procedure (CCP).***

i. Challenges for Cause – Challenges for cause can be made by either side generally for either *implied bias* or *actual bias* (***CCP Section 225(b)***)

1. Implied Bias – There are nine categories of implied bias listed in ***CCP 229***:

    a. Affinity to a party, witness, or victim

    b. Relation to a party or attorney

    c. Previous served as a juror or witness in an action between the parties

    d. Interest in the outcome

    e. Having a belief on the merits based on knowledge of the facts

    f. Bias for or against either party

    g. Juror is a party to an action pending in the same court

    h. Opposition to the death penalty

2. Actual Bias – Defined as "*the existence of a state of mind on the part of the juror in reference to the case, or to any of the parties, which will prevent the juror from acting with entire impartiality, and without prejudice to the substantial rights of any party*." (***CCP section 225(b)(1)(C)***)

    a. Juror states that it would be difficult to keep an open mind because of the nature of the case

    b. Juror admits bias for or against a group involved in the case

    c. Juror admits having settled opinions about issues in the case

d. Juror can not promise to judge the case only on the facts and the law

e. ***Note***: The fact that a juror does not wish to sit because the case may be too emotional is *not* grounds for excuse for cause.

3. The ultimate determination of excusal for cause is made by the court. (***CCP section 230***)

ii. Peremptory Challenges – A peremptory challenge may be made by either party and is an objection to a juror for which no reason need by given. The court is required to excuse jurors challenged peremptorily. (***CCP section 231***)

1. Number – The number of peremptory challenges depends upon the possible sentence of the offense charged and the number of defendants.

a. If the offense is punishable with *maximum term of imprisonment of 90 days or less*, each side gets *6* peremptory challenges. (***CCP section 231***)

b. If the offense is punishable with *death or with imprisonment in the state prison for life*, each side gets *20* peremptory challenges. (***CCP section 231(a)***). The prosecution of first degree murder without special circumstances which carries a term of 25 years to life, constitutes imprisonment for life within the meaning of CCP section 231(a).

c. In *all other cases* each side gets *10* peremptory challenges.

d. Multiple defendant cases

i. Punishment of 90 days or less – The People get *6* challenges and the defendants get *6 challenges jointly*. Each defendant is additionally entitled to *4 separate challenges*. The People get as

many challenges as are allowed all defendants. (***CCP section 231(b)***)

ii. Life in prison and death cases – The People get *20* challenges and the defendants get *20 challenges jointly*. Each defendant is additionally entitled to *5 separate challenges*. The People get as many challenges as are allowed all defendants. (***CCP section 231(a)***)

iii. All other cases – The People get *10* challenges and the defendants get *10 challenges jointly*. Each defendant is additionally entitled to *5 separate challenges*. The People get as many challenges as are allowed all defendants. (***CCP section 231(a)***)

iii. Keeping Track of Challenges – There are various methods of keeping track of juror information and challenges. Most court clerks will provide a master courtroom diagram with squares representing each seat. Most people use post it notes or a combination of post it notes and note pad to keep track of jurors and their responses to questions

d. Batson/ (Wheeler) – One of the things every prosecutor dreads is what's commonly called "*getting Wheelered*". It usually occurs following the People's use of a peremptory challenge against someone of a particular race or ethnic background. *The defense makes a motion usually on state and federal grounds that the prosecutor has excused a juror based on racial, ethnic or other improper grounds (cognizable class) and has therefore violated the defendant's Constitutional right to a fair and impartial jury*.

Note: A *Batson/ (Wheeler)* motion may be made by *either party.*

i. Cognizable Classes Generally – The clearly recognized classes are *RACE, ETHNICITY, RELIGION, GENDER, SEXUAL ORIENTATION*

ii. What is *Batson/ (Wheeler)*?

1. History

    a. *Batson v. Kentucky* (1986) 476 U.S. 79 **is** the federal standard and *People v. Wheeler* (1978) 22 Cal.3d 258 ***was*** the California standard used to determine whether the peremptory challenge was improper.

    b. Both cases used procedures involving 3 part tests to determine the propriety of the challenge. However, the first prong of the tests in each case were different. *Defendants argued the state burden (Wheeler) was more difficult for them to meet than the federal burden (Batson)*.

    c. The California Supreme Court tried to reconcile the two cases in 2003 in *People v. Johnson* (2003) 30 Cal.4th 1302.

    d. In 2005, the U.S. Supreme Court reversed *Johnson* and "clarified" the *Batson* decision by stating that the first prong of the *Batson* test need only be satisfied by production of evidence sufficient to permit the trial judge to draw an *inference of discrimination*. *Johnson v. California* (2005) 545 U.S. 162

2. Current State of the Law - Still a 3 prong test based on the holdings of *Batson* and *Johnson.*

    a. First Prong – The party objecting to the peremptory challenge must make out a prima facie case "*by showing the totality of the facts gives rise to an inference of a discriminatory purpose.*"

    b. Second Prong – If a prima facie case is made, the "*burden shifts to the [party making the original, objected to juror challenge] to explain adequately the racial [or other cognizable class] exclusion by offering permissible race neutral justifications for the strikes*."

c. Third Prong – If "*a race neutral explanation is tendered, the trial court must then decide…whether the opponent of the strike has proved purposeful racial discrimination.*"

iii. Practice Tips to Avoid *Batson/ (Wheeler)*

1. Realize that a challenge will likely come at some point during jury selection and be ready to deal with it.

2. It should go without saying but ***NEVER*** excuse a juror on the basis of race, ethnicity, religion, gender etc..

3. Question all jurors you plan to challenge

4. Assume that a prima facie case will be made and be prepared to give race neutral reasons for excusing the juror.

5. If defense counsel fails to make a prima facie case, consider asking the judge to make a record supporting the denial.

6. Know the accepted race neutral reasons for challenging a juror and use those if you are asked to provide your reasons after the finding of a prima facie case.

BATSON/WHEELER MOTIONS

People v. Wheeler (1978) 22 Cal. 3d 25

- Peremptory challenges based on group bias violate the defendant's right to jury trial.

BATSON/WHEELER MOTIONS

Batson v. Kentucky (1986) 476 U.S. 79

- Race based challenges violate the Equal Protection Clause of the U.S. Constitution.

BATSON/WHEELER MOTIONS

- Cognizable Groups
  - Race, Ethnicity, Religion, Gender
  - Sexual Orientation
- Non-Cognizable Groups
  - Poor, Less Educated, Young, Over 70, Insufficient English

BATSON/WHEELER MOTIONS

- History
- Current Law
  - 3 Step Test
    1. Inference of Discrimination
    2. Race Neutral Reasons
    3. Has Purposeful Discrimination been Proved

BATSON/WHEELER MOTIONS

- Comparative Analysis
  - Example
  - Alive in California – *People v. Ward* (2005) 36 Cal. 4th 186; Unpublished Cases
  - Be Aware of it !!

BATSON/WHEELER MOTIONS

- Dealing with the Motions
  - NEVER kick based on race, gender, etc…
  - Question all jurors
  - Rebut Prima Facie case
  - If no Prima Face case found, consider giving reasons
  - Save all your notes!!!

BATSON/WHEELER MOTIONS

- REMEDIES & CONSEQUENCES IF MOTION IS GRANTED
  - New Panel
  - Report to the State Bar

PRINCIPLES OF VOIR DIRE

BATSON / WHEELER MOTIONS

a. OVERVIEW – At some time during their career, every prosecutor will have to deal with a *Wheeler* motion. It usually occurs following the People's use of a peremptory challenge against someone of a particular race, gender or ethnic background.

b. How it works – The defense makes a motion, usually on state and federal grounds, that the prosecutor has excused a juror based on racial, ethnic or other improper grounds (cognizable class) and has therefore violated the defendant's Constitutional right to a fair and impartial jury. **Note**: While the defense usually brings the motion, it may be made by *either party.*

c. *People v. Wheeler* (1978) 22 Cal. 3d 258 – Peremptory challenges based on group bias violates the defendant's right to jury trial in the California Constitution. *Batson v. Kentucky* (1986) 476 U.S. 79 – Race based challenges violate the Equal Protection Clause of the U.S. Constitution.

   i. Cognizable Classes –
      1. RACE
      2. ETHNICITY
      3. RELIGION
      4. GENDER
      5. SEXUAL ORIENTATION

   ii. Non-Cognizable Classes
      1. Poor
      2. Less Educated
      3. Battered Women
      4. Young

5. People over 70
6. Insufficient English

iii. History

1. *Batson* is the federal standard and *Wheeler* was the California standard used to determine whether the peremptory challenge was improper.

    a. Both cases used procedures involving 3 part tests to determine the propriety of the challenge. However, the first prong of the tests in each case was different. *Defendants argued the state burden (Wheeler) was more difficult for them to meet than the federal burden (Batson)*.

    b. The California Supreme Court tried to reconcile the two cases in 2003 in *People v. Johnson* (2003) 30 Cal. 4th 1302.

    c. In 2005, the U.S. Supreme Court reversed *Johnson* and "clarified" the *Batson* decision by stating that the first prong of the *Batson* test need only be satisfied by production of evidence sufficient to permit the trial judge to draw an *inference of discrimination*. *Johnson v. California* (2005) 545 U.S. 162.

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c. Third Prong – If "*a race neutral explanation is tendered, the trial court must then decide… whether the opponent of the strike has proved purposeful racial discrimination.*"

iv. Comparative Analysis

1. Comparing the common non-racial characteristics between challenged and non-challenged jurors of different racial backgrounds. (E.g. Prosecutor leaves a white teacher on the jury but challenges an African American teacher.) Argument is that prosecutor is discriminating instead of kicking teachers because a teacher was left on the jury.

2. History

a. Federal Courts approved of comparative analysis in *Turner v. Marshall* (9th Cir. 1997) 121 F. 3d 1248.

b. California rejected comparative analysis in *People v. Landry* (1996) 49 Cal.App.4th 785. *People v. Jones* (1997) 15 Cal. 4th 119.

c. However, things began to change in 2003 with *Johnson*. Then in 2005, the U.S. Supreme Court decided *Miller-El v. Dretke* (2005) 545 U.S. 231 using comparative analysis in the decision.

3. Current Law – Comparative analysis used in California in *People v. Ward* (2005) 36 Cal. 4th 186.

d. Dealing with *Batson/Wheeler* Motions

i. Realize that a challenge will likely come at some point during jury selection and be ready to deal with it.

ii. It should go without saying, but ***NEVER*** excuse a juror on the basis of race, ethnicity, religion, gender etc…

iii. Question all jurors you plan to challenge.

iv. Be prepared to rebut a prima facie case by arguing applicable factors:

    1. Point out any members of the group who were not challenged.

    2. If you were honestly not aware the juror was a member of a cognizable group. *People v. Barber* (1988) 200 Cal.App.3d 378, 389. Challenged juror appeared to be a white and non-Hispanic to DA. DA did not recognize the surname to be Hispanic. Court found DA to be sincere.

    3. Possible to justify challenges before you make them if you see a problem coming up. Court can use this as evidence of the prosecutor's sincerity. *U.S. v. Contreras-Contreras* (9th Cir. 1996) 83 F. 3d 1103.

v. Assume that a prima facie case will be made and be prepared to give race neutral reasons for excusing the juror. Following are a list of some accepted race neutral reasons:

    1. Hostility towards law enforcement

    2. Nervous

    3. Unconventional appearance

    4. Sleepy

    5. Can't understand English

    6. Angry

    7. Mentally slow

    8. Sympathetic to defendant

    9. Disinterested

    10. Past jury experience

    11. Limited life experience

    12. Occupation

13. Desire for next juror

vi. If defense counsel fails to make a prima facie case, consider asking the judge to make a record supporting the denial.

1. If judge finds no prima facie case, consider stating your reasons anyway.

2. Do not give reasons unless the court specifically finds no prima facie case. Giving reasons without a specific finding on the first prong will constitute an implied finding of a prima facie case. *People v. Arias* (1996) 13 Cal. 4th 92; *People v. Gutierrez* (2002) 28 Cal. 4th 1083.

vii. Save your notes. If case is reviewed later, voir dire may be an issue. Always save your notes so that if asked, you are better able to recollect why you may have challenged a specific juror.

e. Remedies

i. If a Wheeler motion is granted, the entire venire is dismissed, a new venire is brought in, and jury selection starts over.

ii. *People v. Willis* (2002) 27 Cal. 4th 811 – Allows other remedies for a *Wheeler* violation if offended party agrees.

1. Fines

2. Reseating wrongfully excused juror

3. *Possibly* allowing offended party more challenges

f. Consequences

i. Motion Granted at Trial – Remedies are arguably sanctions

1. B&P 6086.7(a)(3) – Court must notify the bar of any judicial sanctions against an attorney…

2. B&P 6068(o)(3) – Attorney must self report any judicial sanction …

ii. Motion Erroneously Denied and Case Reversed

1. B&P 6086.7(b)(2) – Court must notify bar whenever there is a reversal.

2. B&P 6068(o)(7) – Attorney must notify bar whenever reversal is based in whole or in part upon misconduct of the attorney.

RESOURCES

- **Introduction to Jury Selection - How the Power of Persuasion Can Influence the Power of Twelve by Shauna Boliker**
- **Mr. Wheeler Goes to Washington by Jerry Coleman**
- **Protecting the Record after a Batson Challenge by Steven Oetting and Barbara Oetting**
- **Dealing with Batson/Wheeler Motions by Patrick Whalen**

BATSON / WHEELER

I. BATSON / WHEELER MOTIONS

a. OVERVIEW – At some time during their career, every prosecutor will have to deal with a *Wheeler* motion. It usually occurs following the People's use of a peremptory challenge against someone of a particular race, gender or ethnic background.

b. *People v. Wheeler* (1978) 22 Cal. 3d 258 – Peremptory challenges based on group bias violates the defendant's right to jury trial in the California Constitution. *Batson v. Kentucky* (1986) 476 U.S. 79 – Race based challenges violate the Equal Protection Clause of the U.S. Constitution.

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1. *Batson* is the federal standard and *Wheeler* was the California standard used to determine whether the peremptory challenge was improper.

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c. However, things began to change in 2003 with *Johnson*. Then in 2005, the U.S. Supreme Court decided *Miller-El v. Dretke* (2005) 545 U.S. 231 using comparative analysis in the decision.

d. *Snyder v. Louisiana* (2008)

3. Current Law – *People v. Lenix* (2008) 44 Cal.4th 602. Comparative analysis can be conducted for the first time on appeal if the record is adequate to permit the comparisons.

a. Comparative analysis is one piece of circumstantial evidence to be used in the determination of whether there was intentional discrimination.

c. Dealing with *Batson/Wheeler* Motions

i. Realize that a challenge will likely come at some point during jury selection and be ready to deal with it.

ii. It should go without saying, but ***NEVER*** excuse a juror on the basis of race, ethnicity, religion, gender etc…

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4. Sleepy

5. Can't understand English

6. Angry

7. Mentally slow

8. Sympathetic to defendant

9. Disinterested

10. Past jury experience

11. Limited life experience

12. Occupation

13. Desire for next juror

vi. If defense counsel fails to make a prima facie case, consider asking the judge to make a record supporting the denial.

    1. If judge finds no prima facie case, consider stating your reasons anyway.

    2. Do not give reasons unless the court specifically finds no prima facie case. Giving reasons without a specific finding on the first prong will constitute an implied finding of a prima facie case. *People v. Arias* (1996) 13 Cal. 4th 92; *People v. Gutierrez* (2002) 28 Cal. 4th 1083.

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- History
- Current Law
  - 3 Step Test – *People v. Johnson* (2005) 545 U.S. 162
    - STEP 1 - Inference of Discrimination
    - STEP 2 - Race Neutral Reasons
    - STEP 3 - Has Purposeful Discrimination been Proved?

STEP 1

- Defense burden to show a prima facie case "*by showing the totality of the relevant facts gives rise to an inference of a discriminatory purpose.*"

STEP 1

- Presumption that challenge was permissible
- Argue defense has not met their burden

STEP 2

- If prima facie case is made "*burden shifts to explain adequately the racial [or other cognizable class] exclusion by offering permissible race neutral justifications for the strikes*."

PERMISSIBLE REASONS

- Hostility towards law enforcement - (*People v. Turner* (1994) 8 Cal. 4th 137, 171)
- Nervous - (*People v. Johnson* (1989) 47 Cal. 3d 1194, 1217-1219)

PERMISSIBLE REASONS

- Unconventional appearance - (*People v. Ward* (2005) 36 Cal. 4th 186, 202)
- Too Eager - (*People v. Ervin* (2000) 22 Cal. 4th 48)
- Sleepy - (*People v. Johnson* (1989) 47 Cal. 3d 1194, 1217-1219)

PERMISSIBLE REASONS

- Can't understand English - (*Hernandez v. New York* (1991) 500 U.S. 352, 356-357)
- Angry - (*People v. Turner* (1994) 8 Cal. 4th 137, 171)

PERMISSIBLE REASONS

- Past jury experience - (*People v. Farnam* (2002) 28 Cal. 4th 107, 138)
- Limited life experience - (*People v. Arias* (1996) 13 Cal. 4th 92, 137-139)
- Mentally slow – (*People v. Arias* (1996) 13 Cal. 4th 92, 137-139)

PERMISSIBLE REASONS

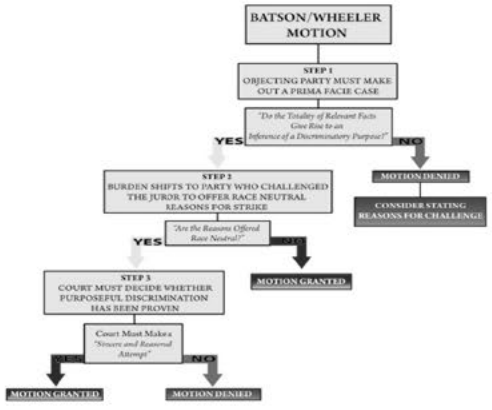
- Occupation - (*People v. Ervin* (2000) 22 Cal. 4th 48, 75)
- Desire for next juror - (*People v. Alvarez* (1996) 14 Cal. 4th 155, 194-195)

STEP 3

- "*If a race neutral explanation is tendered, the trial court must then decide…whether the opponent of the strike has proved purposeful racial discrimination.*"

STEP 3

- In analyzing the reason given, the court must make a "sincere and reasoned attempt to evaluate each stated reason as applied to each challenged juror." (*People v. Silva* (2001) 25 Cal. 4th 345, 386)



PRACTICAL ISSUES

-Court *can* raise its own motion

-Court asks for reasons *before* finding a prima facie case

-Court finds no prima facie case but asks for reasons

-Multiple motions in a single voir dire

COMPARATIVE ANALYSIS

- Example
- *Miller-El v. Dretke* (2005) 545 U.S. 231
- Alive in California??
  - *People v. Ward* (2005) 36 Cal. 4th 186
- *Snyder v. Louisiana* (2008) 552 U.S. ___ , 128 S.Ct. 1203.

PRACTICE TIPS

- NEVER kick based on race, gender, etc…
- Question all jurors you plan on kicking
- Rebut Prima Facie case
- If no Prima Facie case found, consider giving reasons – *People v. Cornwell* (2005) 37 Cal. 4th 50.
- Save all your notes!!!

PRACTICE TIPS

- If Prima Facie case is found, provide race-neutral reasons for your strikes.
- Examples
- Remember Comparative Analysis!
- Judge then determines using a "*sincere and reasoned* attempt to evaluate each reason as to each juror." *People v. Silva* (2001) 25 Cal. 4th 345, 386.

REMEDIES

-New Panel

-Possible Report to the State Bar

JURY SELECTION IN SEXUAL ASSAULT CASES

A. Guiding Principle

Jury Selection is important in all trials, but is of critical importance for the successful prosecution of sexual assault cases. Therefore, jury selection deserves thorough preparation and knowledge.

B. Key Components to Effective Jury Selection

- **Know the law and the rules**

You should learn the controlling statutes on this subject and the case law that interprets it. The controlling statutes on jury selection are contained in the Code of Civil Procedure (CCP) sections 190 through 237. CCP 223, 225, and 228 through 231. are regularly utilized in criminal jury trials and set out the method of voir dire, the requirements for a challenge for cause and the number of preemptory challenges permitted to each side. CCP 223 provides that in a criminal trial, each party could submit questions for the court to pose to the prospective jurors; it also establishes that each party has "the right to examine, by oral and direct questioning, any or all prospective jurors." It also limits the examination of prospective jurors to be conducted "only in the aid of the exercise of challenges for cause."

An area of implied bias that is outlined under the law is pursuant to CCP 229(f) "The existence of a state of mind in the juror evincing enmity against, or bias towards, either party."

You should also learn the judicial rules regarding jury selection. The San Diego Superior Court's web page includes jury selection information that is very useful. It has the script that the courts are encouraged to read to jurors and it even has an approved questionnaire with many good questions.

In addition, you should learn the particular way that a certain court does jury selection. Courts conduct jury selection differently utilizing their own system of examining 12 jurors at a time or more jurors.

A prosecutor should also know the law of “Wheeler” regarding preemptory challenges and know how to make the right record that supports that a preemptory challenge is made ethically and without bias against a protected class.

Voir Dire

I. LAW

A. The Adoption of Proposition 115 in 1990 Changed Voir Dire. *People v. Edwards* (1991) 54 Cal.3rd 787, 829; *People v. Carpenter* (1997) 15 Cal.4th 312, 353; *People v. Jenkins* (2000) 22 Cal.4th 900, 990.

1. Pre-Proposition 115 Rules

   a. The attorneys participated in the questioning process.

   b. The purpose of voir dire was to allow the parties to intelligently exercise their peremptory challenges. (*People v. Williams* (1981) 29 Cal.3d 392.)

2. In 1990, the voters passed Proposition 115, which included a new Code of Civil Procedure section 223 regulating voir dire in criminal cases.

   "In a criminal case, the court shall conduct the examination of prospective jurors. However, the court may permit the parties, upon a showing of good cause, to supplement the examination by such further inquiry as it deems proper, or shall itself submit to the prospective jurors upon such a showing, such additional questions by the parties as it deems proper." (Code Civ. Proc., § 223.)

   a. The court shall conduct the examination of prospective jurors.

   b. Upon a showing of good cause, the court may allow the attorneys to question the jurors.

c. Where practicable, voir dire shall occur in the presence of the other jurors.
d. Questioning shall be conducted only to aid in the exercise of challenges for cause.

3. Section 222 was amended effective January 1, 2001, to again allow attorney questioning.

> "In a criminal case, the court shall conduct an initial examination of prospective jurors. The court may submit to the prospective jurors additional questions requested by the parties as it deems proper. Upon completion of the court's initial examination, counsel for each party shall have the right to examine, by oral and direct questioning, any or all of the prospective jurors. The court may, in the exercise of its discretion, limit the oral and direct questioning of prospective jurors by counsel. The court may specify the maximum amount of time that counsel for each party may question an individual juror, or may specify an aggregate amount of time for each party, which can then be allocated among the prospective jurors by counsel."

a. Amendment become effective January 1, 2001.

b. Court can limit amount of time allotted to the parties.

c. Shall be conducted "only in the aid of the exercise of challenges for cause."

B. Challenges.

1. Challenge for Cause – Because voir dire "shall be conducted only to aid in the exercise of challenges for case," the specific grounds must be known.

a. Unlimited Number

b. Three Types of Challenges for Cause

(1) **General disqualification** – that the juror is disqualified from serving in the action on trial. (Code Civ. Proc., § 225(b)(1)(A).)

(a) Section 203 lists general disqualifications for jurors:

1) Persons who are not citizens of the United States.

2) Persons who are less than 18 years of age.

3) Persons who are not domiciliaries of the State of California, as determined pursuant to Article 2 (commencing with Section 2020) of Chapter 1 of Division 2 of the Elections Code.

4) Persons who are not residents of the jurisdiction wherein they are summoned to serve.

5) Persons who have been convicted of malfeasance in office or a felony, and whose civil rights have not been restored.

6) Persons who are not possessed of sufficient knowledge of the English language, provided that no person shall be deemed incompetent solely because of the loss of sight or hearing in any degree or other disability which impedes the person's ability to communicate or which impairs or interferes with the person's mobility.

7) Persons who are serving as grand or trial jurors in any court of this state.
8) Persons who are the subject of conservatorship.

(b) Section 228(b) lists additional requirements: A loss of hearing, or the existence of any other incapacity which satisfies the court that the challenged person is incapable of performing the duties of a juror in the particular action without prejudice to the substantial right of the challenging party.

(2) **Implied Bias** – Section 229

A challenge for implied bias may be taken for one or more of the following causes, and for no other:

(a) Consanguinity or affinity within the fourth degree to any party, to an officer of a corporation which is a party, or to any alleged witness or victim in the case at bar.

(b) Standing in the relation of, or being the parent, spouse, or child of one who stands in the relation of, business with either party; or surety on any bond or obligation for either party, or being the holder of bonds or shares of capital stock of a corporation which is a party; or having stood within one year previous to the filing of the complaint in the action in the relation of attorney and client with either party or with the attorney for either party. A depositor of a bank or a holder of a savings account in a savings and loan association shall not be deemed a creditor of that bank or savings and loan association for the purpose of this paragraph solely by reason of his or her being a depositor or account holder.

(c) Having served as a trial or grand juror or on a jury of inquest in a civil or criminal action or been a witness on a previous or pending trial between the same parties, or involving the same specific offense or cause of action; or having served as a trial or grand juror or on a jury within one year previously in any criminal or civil action or proceeding in which either party was the plaintiff or defendant or in a criminal action where either party was the defendant.

(d) Interest on the part of the juror in the event of the action, or in the main question involved in the action, except his or her interest as a member or citizen or taxpayer of a county, city and county, incorporated city or town, or other political subdivision of a county, or municipal water district.

(e) Having an unqualified opinion or belief as to the merits of the action founded upon knowledge of its material facts or of some of them.

(f) The existence of a state of mind in the juror evincing enmity against, or bias towards, either party.

(g) That the juror is party to an action pending in the court for which he or she is drawn and which action is set for trial before the panel of which the juror is a member.

(h) If the offense charged is punishable with death, the entertaining of such conscientious opinions as would preclude the juror finding the defendant guilty; in which case the juror

may neither be permitted nor compelled to serve.

(3) **Actual Bias** – Section 225(b)(1)(C)

Actual bias - the existence of a state of mind on the part of the juror in reference to the case, or to any of the parties, which will prevent the juror from acting with entire impartiality, and without prejudice to the substantial rights of any party.

2. Peremptory Challenges

a. No Reason Need be Given – CCP § 226(b).

b. Number of Peremptory Challenges Allowed.

(1) Depends on punishment allowed and number of defendants on trial.

(2) Single defendant case.

(a) 20 – If punishable by death or life imprisonment – CCP § 231(a).

(b) 6 – if punishable with maximum of 90 days or less – CCP § 231(b).

(c) 10 – all other cases – CCP § 231(a).

(3) Multiple defendant case.

(a) Death or life imprisonment case – CCP § 231(a).

1) 20 joint challenges.

2) 5 individual challenges for each defendant.

3) DA gets same total as entire defense team.

(b) 90 days or less – CCP § 231(b).

1) 6 joint challenges.

2) 4 individual challenges for each defendant.

3) DA gets same total as entire defense team.

c) All other cases – CCP § 231(a).

1) 10 joint challenges

2) 5 individual challenges

3) DA gets same total as entire defense team

(4) Alternates – CCP § 234.

(a) Single defendant case – one per number of alternates.

(b) Multiple defendant cases – each defendant gets one per number of alternates.

(c) DA gets same total number as defense team.

(5) A pass does not count as a challenge – CCP § 231(d)(e).

II. APPLICATION OF THE LAW

A. Defense challenge for cause.

1. The standard is "whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Wainright v. Witt* (1985) 469 U.S. 412, 424; *People v. Ghent* (1987) 43 Cal.3rd 739, 767.

2. Erroneous denial of defense challenge is not reversible per se. *Ross v. Oklahoma* (1988) 487 US 81, 87; *People v. Edwards* (1991) 54 Cal.3d 787, 830.)

3. To prevail on appeal, defendant must show prejudice, that is: 1) he used a peremptory challenge on the questioned juror, 2) he exhausted all his peremptory challenges, and 3) he expressed dissatisfaction with the final jury. (*People v. Morris* (1991) 53 Cal.3d 152, 184; *People v. Mickey* (1991) 54 Cal.3d 612, 683: *People v. Crittenden* (1994) 9 Cal.4th 83, 121; *People v. Samayoa* (1997) 15 Cal.3d 795, 821; *People v. Cunningham* (2001) 25 Cal.3d 926, 976.)

4. No prejudice if the juror was not part of the final jury. (*People v. Edwards* (1991) 54 Cal.3d 787, 830; *People v. Clarke* (1992) 3 Cal.4th 41, 155; *People v. Johnson* (1992) 3 Cal.4th 1183, 1210; *People v. Cain* (1995) 10 Cal.4th 1, 61; *People v. Hawkins* (1995) 10 Cal.4th 920, 939; *People v. Horton* (1995) 11 Cal.4th 1068, 1093; *People v. Ramos* (1997) 15 Cal.4th 1133, 1159; *People v. Barnett* (1998) 17 Cal.4th 1044, 1113; *People v. Millwee* (1998) 18 Cal.4th 96, 146.)

5. No prejudice if defendant did not use all peremptory challenges. (*People v. Kelly* (1990) 51 Cal.3d 931, 960; *People v. Morris* (1991) 53 Cal.3d 152, 184; *People v. Price* (1991) 1 Cal.4th 324, 401; *People v. Danielson* (1992) 3 Cal.4th 691, 713; *People v. Mayfield* (1993) 5 Cal.4th 142, 169; *People v. Garceau* (1993) 6 Cal.4th 140, 174; *People v. Cain* (1995) 10 Cal.4th 1, 61; *People v. Lucas* (1995) 12 Cal.4th 415, 480; *People v. Samayoa* (1997) 15 Cal.4th 795, 821; *People v. Ramos* (1997) 15 Cal.4th 1133, 1158; *People v. Williams* (1997) 16 Cal.4th 635, 667; *People v. Barnett* (1998) 17 Cal.4th 1044, 1113; *People v. Millwee* (1998) 18 Cal.4th 96, 146; *People v. Bolin* (1998) 18 Cal.4th 297, 315; *People v. Ochoa* (1998) 19 Cal.4th 353, 444; *People v.*

Waidla (2000) 22 Cal.4th 690, 715; *People v. Bemore* (2000) 22 Cal.4th 809, 837; *People v. Ayala* (2000) 23 Cal.4th 225, 261; *People v. Lewis* (2001) 25 Cal.4th 610, 634.)

6. Being required to use a peremptory challenge on a denied challenge for cause does not establish prejudice. (*People v. Gordon* (1990) 50 Cal.3d 1223, 1247; *People v. Kaurish* (1990) 52 Cal.3d 648, 674.)

7. Did defendant request additional peremptory challenges? (*People v. Edwards* (1991) 54 Cal.3d 787, 831.)

    a. Request for additional challenges denied. (*People v. Pride* (1992) 3 Cal.4th 195, 230; *People v. Ramos* (1997) 15 Cal.4th 1133, 1159; *People v. Williams* (1997) 16 Cal.4th 635, 667.)

8. Defendant must express dissatisfaction with the final jury to prove prejudice. (*People v. Edwards* (1991) 54 Cal.3d 787, 830; *People v. Danielson* (1992) 3 Cal.4th 691, 713; *People v. Lucas* (1995) 12 Cal.4th 415, 830; *People v. Williams* (1997) 16 Cal.4th 635, 667; *People v. Millwee* (1998) 18 Cal.4th 96, 146; *People v. Ochoa* (1998) 19 Cal.4th 353, 444; *People v. Bemore* (2000) 22 Cal.4th 809, 837; *People v. Ayala* (2000) 23 Cal.4th 225, 261; *People v. Lewis* (2001) 25 Cal.4th 610, 634; *People v. Weaver* (2001) 26 Cal.4th 876, 911; *People v. Seaton* (2001) 26 Cal.4th 598, 637.

9. No duty on court sua sponte to excuse juror on its own motion. (*People v. Bolin* (1998) 18 Cal.4th 297, 315; *People v. Lucas* (1995) 12 Cal.4th 415, 481.)

10. Court not required to allow defense opportunity to rehabilitate challenged juror if bias is obvious. (*People v. Bittaker* (1989) 48 Cal.3d 1046, 1085; *People v. Carpenter* (1997) 15 Cal.4th 312, 355; *People v. Samayoa* (1997) 15 Cal.3d 795, 823.)

11. Court not required to tell juror his civic duty requires him to set aside his personal beliefs regarding the death penalty. (*People v. Sanders* (1990) 15 Cal.3d 471, 503; *People v. Miranda* (1987) 44 Cal.3d 57, 96.)

12. Examples of proper denial of defense challenge for cause. (*People v. Stankewitz* (1990) 51 Cal.3d 72, 103; *People v. Kelly* (1990) 51 Cal.3d 931, 960; *People v. Mincey* (1992) 2 Cal.4th 457; *People v. McPeters* (1992) 2 Cal.4th 1148, 1177; *People v. Crittenden* (1994) 9 Cal.4th 83, 122; *People v. Samayoa* (1997) 15 Cal.4th 795, 822; *People v. Williams* (1997) 16 Cal.4th 635, 668; *People v. Jenkins* (2000) 22 Cal.4th 900, 987; *People v. Cunningham* (2001)25 Cal.4th 926, 976; *People v. Weaver* (2001) 26 Cal.4th 876, 911.)

B. DA challenge for cause.

1. Use same standard (*Witt*) as defense challenge for cause. (*People v. Crittenden* (1994) 9 Cal.4th 83, 121; *People v. Pride* (1992) 3 Cal.4th 195, 227; *People v. Mincey* (1992) 2 Cal.4th 408, 456; *People v. Bradford* (1997) 15 Cal.4th 1229, 1318.)

2. Erroneous granting of DA challenge is reversible per se. (*Grey v. Mississippi* (1987) 481 US 648, 666; *People v. Cooper* (1991) 53 Cal.3d 771, 809; *People v. Edwards* (1991) 54 Cal.3d 787, 831.)

    a. Reverses penalty verdict, not guilt. (*People v. Ashmus* (1991) 54 Cal.3d 932, 962.)

    b. If juror's answers equivocal, trial judge's ruling will be upheld. (*People v. Ruiz* (1988) 44 Cal.3d 589, 618; *People v. Ghent* (1987) 43 Cal.3d 739, 768; *People v. Coleman* (1988) 46 Cal.3d 749, 767.)

C. Peremptory Challenges.

1. It is improper to ask questions intended solely to educate the jury, compel the jurors to commit to vote a certain way, prejudice the jury, argue the case, indoctrinate the jury, instruct the jury on the law, or test the juror's knowledge of the law. (*People v. Edwards* (1912) 163 Cal. 752; *People v. Willams* (1981) 29 Cal.3d 392, 408; *People v. Ashmus* (1991) 54 Cal.3d 932, 959.)

2. It is permissible to ask a juror about his attitude about a particular rule of law only if (1) the rule is relevant or material to the case, and (2) the rule appears to be controversial; e.g., the juror has indicated some hostility toward the rule, or it is commonly known the community harbors strong feelings about it. (*People v. Balderas* (1985) 41 Cal.3d 144, 185; *People v. Williams* (1981) 29 Cal.3d 392, 408.)

3. Examples of Permissible Questions Relating to Murder

    a. Asked jurors whether they would be able to vote guilty if, after deliberations, they were persuaded that the changes had been proved beyond a reasonable doubt. (*People v. Fierro* (1991) 1 Cal.4th 173, 209.)

    b. "[I]f I prove beyond a reasonable doubt each and every element of each of the offenses charged . . . can you assure me that you would be willing to return a verdict of guilty even though you have unanswered questions?" *People v. Riel* (2000) 22 Cal.4th 1153, 1178 fn. 4.

    c. In order to avoid a hung jury the prosecutor observed that each juror must "come to your own conclusion," but also stressed the value of "work[ing] together to try to discover the truth." (*People v. Fierro* (1991) 1 Cal.4th 173, 210, fn 8.)

    d. In questioning a juror, the prosecutor asked her if she believed a person charged with committing a crime such as defendant's must be insane. The prosecutor also asked: Do you feel there could be such a thing as a person who is legally insane? *People v. Fields* (1983) 35 Cal.3rd 329, 358.

    e. Questions designed to determine jurors' views regarding the felony-murder rule. (*People v. Pinholster* (1992) 1 Cal.4th 865, 913; *People v. Ochoa* (2001) 26 Cal.4th 398, 431; *People v. Ervin* (2000) 22 Cal.4th 48, 70.)

f. California's self-defense "no need to retreat in your own home" rule is controversial and was relevant in this case, so conviction is reversed for forbidding questions on attitudes about this rule. (*People v. Williams* (1981) 29 Cal.3d 392, 411.)

g. Whether they would view a person's possession of recently stolen property as circumstantial evidence that the person stole the property, whether they considered rape more of an assaultive than a sexually motivated offense, and whether they thought it was possible for a young man to rape an elderly woman and not be mentally ill. (*People v. Mendoza* (2000) 24 Cal.4th 130, 167.)

4. Examples of Impermissible Questions Relating to Murder (Typically Asked by the Defense):

a. Do you believe in self-defense in the home? (Not controversial; *People v. Williams* (1981) 29 Cal.3d 392, 411.)

b. "Whether, if they believed that a witness was an informant and was testifying 'in exchange for some lesser sentence,' then that 'would have some bearing on the weight or credibility that that witness may have in your mind?' " (*People v. Mason* (1991) 52 Cal.3d 909, 940.)

c. In a death penalty case, the court did not "allow either party to discuss the law – such as the meaning of diminished capacity – or ask questions that required the prospective jurors to pretry the facts of the case." *People v. Rich* (1988) 45 Cal.3rd 1036, 1104.

d. Defense counsel was not permitted to question prospective jurors regarding their ability to view accomplice testimony with suspicion and distrust. *People v. Johnson* (1989) 47 Cal.3rd 1194, 1224.

e. In an eyewitness case where the defense expected to call Dr. Elizabeth Loftus, the defense was prohibited from eliciting opinions of potential jurors concerning the effects of stress on perception. *People v. Sanders* (1990) 51 Cal.3rd 471, 506.

f. Defense counsel stated, "It's clear a girlfriend has an interest to lie. I just want to make sure that the jurors don't automatically, before they hear her testimony, say she's lying because she's the girlfriend." The trial court barred this line of questioning on the ground that the defendant was trying to educate the jurors and induce them to prejudge the evidence. We cannot say that the court abused its discretion in doing so. *People v. Helton* (1984) 162 Cal.App.3rd 1141, 1145.

g. "What do you feel is a proper punishment for someone who has committed a rape or other serious sexually related crime?" (*People v. Ochoa* (1998) 19 Cal.4th 353, 444.)

h. Many detailed questions regarding personal experience with sexual molestation in a child molestation-murder case. (*People v. Earp* (1999) 20 Cal.4th 826, 851, fn 1.)

i. In a capital murder case where one victim was a three year old child, defendant requested that the trial court inquire as to the ages of the prospective jurors' grandchildren. The court denied the request, stating, "Whether you're going to be prejudiced by the fact that a young child is involved in this case doesn't turn upon whether you have one at the moment. It turns upon whether your personality and capacities are such as to be able to deal with the wrench that goes with that. No matter how many or how few grandchildren you have got or what age you are. It's something that jurors are going to have to deal with; they're going to have to be able to set aside." *People v. Box* (2000) 23 Cal.4th 1153, 1178.

j. In a capital murder trial defendant wanted the following questions included on the questionnaire:

What has been your favorite job and what (do/did) you enjoy about it?"
"What has been your least favorite job and what (do/did) you dislike most about it?"

"If you were a supervisor or employer, what do you think is the best way to keep workers in line?"

"A person should maintain his or her belief on a subject so long as he or she feels that belief if right. Strongly Agree ___ Agree Somewhat ___ Disagree Somewhat ___ Strongly Disagree ___ Please explain."

People v. Navarette (2003) 30 Cal.4th 458, 486.

k. "The court's restriction on questions regarding a prospective juror's birth date, religion and religious service attendance, or voting on the retention of Chief Justice Rose Bird," was not an abuse of discretion. (*People v. Ramos* (1997) 15 Cal.4th 1133, 1158.)

l. Why did you vote as you did on Proposition 8? (Invades juror's privacy) (*People v. Wells* (1983) 149 Cal.App.3d 721, 726.)

m. What was the most important part of Proposition 8? (Unfocused) (*People v. Wells* (1983) 149 Cal.App.3d 721, 726.)

n. Asking a prospective juror whether the Supreme Court's capital opinions under former Chief Justice Rose Bird were "kind of off base" and whether the vote not to retain her or other justices was correct may be error. (*People v. Ochoa* (1998) 19 Cal.4th 353, 428.)

D. Death Qualification Voir Dire.

1. The test.

> "With respect to questions directing the juror's attention to the facts of the case, we have observed that: "The *Witherspoon-Witt* [citations] voir dire seeks to determine only the views of the prospective jurors about capital punishment in the abstract . . . . [Citations.] The inquiry is directed to whether, without knowing the specifics of the case, the juror has an 'open mind' on the penalty determination. There was no error in ruling that questions related to the jurors' attitudes toward evidence that was to be introduced in this trial could not be asked during the sequestered *Witherspoon-Witt* voir dire." (*People v. Clark* (1990) 50 Cal.3rd 583, 597; see also *People v. Sanders* (1995) 11 Cal.4th 475, 539. Nor is it error to preclude counsel from seeking to compel a prospective juror to commit to vote in a particular way (*People v. Rich* (1988) 45 Cal.3rd 1036, 1105, or to preclude counsel from indoctrinating the jury as to a particular view of the facts. *People v. Jenkins* (2000) 22 Cal.4th 900, 990.

2. However, "A challenge for cause may be based on the prospective juror's response when informed of facts or circumstances likely to be present in the case being tried. (*People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1005.) Thus, we have affirmed the principle that either party is entitled to ask prospective jurors questions that are specific enough to determine if those jurors harbor bias, as to some fact or circumstance shown by the trial evidence, that would cause them not to follow an instruction directing them to determine penalty after considering aggravating and mitigating evidence. (*People v. Cash* (2002) 28 Cal.4th 703, 720-721. "Our decisions have explained that death-qualification voir dire must avoid two extremes. On the one hand, it must not be so abstract that it fails to identify those jurors whose death penalty views would prevent or substantially impair the performance of their duties as jurors in the case being tried. On the other hand, it must not be so specific that it requires the prospective jurors to prejudge the penalty issue based on a summary of the mitigating and aggravating evidence likely to be presented. (See *People v. Jenkins* [*supra*, 22 Cal.4th at

3. Compare the following cases:

   a. *People v. Pinholster* (1992) 1 Cal.4th 865, 916-918. The prosecutor was allowed to ask questions about jurors' willingness to impose the death penalty in a burglary-murder case. "Each juror's reluctance to impose the death penalty was based not on an evaluation of the particular facts of the case, but on an abstract inability to impose the death penalty in a felony-murder case." *Id.* at 916.

      "Defendant objects that fact-based voir dire is impermissible under *Witt, supra*, 469 U.S. 412. As we have already noted, we have commented in the past that questions directed to jurors' attitudes toward the particular facts of the case are not relevant to the death-qualification process, so that a trial court that refused to permit such questions did not err. (*People v. Clark, supra*, 50 Cal.3rd at p. 597.) We have also said, however, that "a court may properly excuse a prospective juror who would automatically vote against the death penalty in the case before him, regardless of his willingness to consider the death penalty in other cases." (*People v. Fields, supra,* 35 Cal.3rd at pp. 357-358.) *Id.* at 917-918.

      "Trial courts have broad discretion in determining what questions to permit. (*People v. Johnson, supra,* 47 Cal.3rd at p. 1224.) We see no prejudicial error in allowing questions regarding the particular facts of the case as long as more relevant questions and answers provide the basis for the court's decision." *Id.* at 918.

b. *People v. Medina* (1995) 11 Cal.4th 694, 745-746. Initially, the trial court did not permit defense questions asking jurors' whether they could vote for life imprisonment if the defendant had committed multiple murders.

"The inquiry that defendant sought to make was not relevant to the death qualification process, however . . . . [V]oir dire seeks to determine only the views of the prospective jurors about capital punishment in the abstract, to determine if any, because of opposition to the death penalty, would 'vote *against* the death penalty without regard to the evidence produced at trial.' [Citations.] Such a juror may be excused because he or she would be unable to faithfully and impartially apply the law. The inquiry is directed to whether, without knowing the specifics of the case, the juror has an 'open mind' on the penalty determination. There was no error in ruling that questions related to the jurors' attitudes toward evidence that was to be introduced in this trial could not be asked during the sequestered . . . voir dire." [Fn. omitted.] *Id.* at 746.

c. *People v. Cash* (2002) 28 Cal.4th 703, 718-723. The defendant had prior murders. He wanted to ask jurors "whether there were any particular crimes" or "any facts" that would cause that juror "automatically to vote for the death penalty." The trial court prohibited such questions. The Supreme Court reversed the death verdict.

"Thus, we affirmed the principle that either party is entitled to ask prospective jurors questions that are specific enough to determine if those jurors harbor bias, as to some or circumstance shown by the trial evidence, that would cause them not to follow an instruction directing them to determine a penalty after considering aggravating and mitigating evidence." *Id.* at 720-721.

"Our decisions have explained that death-qualification voir dire must avoid two extremes. On the one hand, it must not be so abstract that it fails to identify those jurors whose

death penalty views would prevent or substantially impair the performance of their duties as jurors in the case being tried. On the other hand, it must not be so specific that it requires the prospective jurors to prejudge the penalty issue based on a summary of the mitigating and aggravating evidence likely to be presented." *Id.* at 721-722.

d. *People v. Burgener* (2003) 29 Cal.4th 833, 865-866. In a penalty phase retrial "the trial court sustained the People's objections when defense counsel asked prospective jurors whether they would impose the death penalty after considering a rather detailed account of some of the facts of this case, and whether a prospective juror could continue to be impartial after hearing a list of defendant's prior crimes. There was no error in ruling that questions related to the jurors attitudes toward evidence that was to be introduced in this trial could not be asked during the sequestered [death-qualification] voir dire.'" (*Jenkins, supra,* 22 Cal.4th at p. 991.) Defendant had no right to ask specific questions that invited prospective jurors to prejudge the penalty issue based on a summary of the aggravating or mitigating evidence (*People v. Cash* (2002) 28 Cal.4th 703, 721-722 [122 Cal.Rptr.2d 545, 50 P.3d 332]), to educate the jury as to the facts of the case (*People v. Sanders* (1995) 11 Cal.4th 475, 538-539 [46 Cal.Rptr.2d 751, 905 P.2d 420]), or to instruct the jury in matters of law (*People v. Ashmus* (1991) 54 Cal.3rd 932, 959 [2 Cal.Rptr. 2d 112, 820 P.2d 214])." *Id.* at 865.

e. *People v. Navarette* (2003) 30 Cal.4th 458, 489-490. The defendant complained because the court limited his oral questioning, relating to the nature of the crimes charged. The Supreme Court rejected the defendant's contentions because his questionnaire did address these issues. The Court addressed *Medina* as compared with *Pinholster* and *Cash*.

"Defendant argues that *Medina* prevented him from asking jurors if they would automatically impose the death

penalty in a double-murder case, whereas under *Pinholster*, the People are free to inquire whether any jurors would automatically refuse to impose the death penalty in a burglary-murder case. This imbalance, he claims, led to a jury that was biased in favor of the death penalty, in violation of his rights under the federal Constitution.

We need not decide the continuing validity of our comment in *Medina*, because here the trial court did not prevent defendant from asking jurors whether they would automatically impose the death penalty in a multiple-murder case, the defendant did ask such a question." *Id.* at 489-490.

f. *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 47-48. "Coffman complains the trial court prevented her counsel from questioning the prospective jurors on their views regarding the circumstances of the case that were likely to be presented in evidence in order to determine how such circumstances might affect their ability to fairly determine the proper penalty in the event of a conviction."

In reality, "the trial court invited counsel to draft a proposed question for prospective jurors eliciting their attitudes toward the death penalty and in fact itself questioned a prospective juror whether he could weigh all the evidence before reaching a penalty determination in a case involving multiple murder."

Citing *Jenkins* and *Cash*, the Court found no abuse of discretion. "Unlike in *People v. Cash, supra,* 28 Cal.4th at pages 720-722, the trial court did not categorically prohibit inquiry into the effect on prospective jurors of the other murders, evidence of which was presented in the course of the trial. Rather, the trial court merely cautioned Coffman's counsel not to recite specific evidence expected to come before the jury in order to induce the juror to commit to voting in a particular way. (See *People v. Burgener* (2003) 29 Cal.4th 833, 865." Id. at 47-48.

g. *People v. Viera* (2005) 35 Cal.4th 264, 283-286. "Prior to the commencement of voir dire, defense counsel submitted a proposed jury questionnaire that contained the following question: "Do you feel you would automatically vote for death instead of life imprisonment with no parole if you found the defendant guilty of two or more murders?" The prosecution objected that the subject areas "should be covered by the Court" in its death qualification voir dire. "The question was not included in the jury questionnaire. Moreover, the judge's questions to prospective jurors did not ask this or a similar question."

Citing *Cash*, the defendant claimed he was entitled to a reversal of the death verdict. After contrasting the facts in *Medina* with those in *Cash*, the Supreme Court found the defendant made no effort to ask this legitimate question during the oral portion of voir dire.

"As our discussion of *Medina* in *Cash* suggests, a trial court's categorical prohibition of an inquiry into whether a prospective juror could vote for life without parole for a defendant convicted of multiple murder would be error. Multiple murder falls into the category of aggravating or mitigating circumstances "likely to be of great significance to prospective jurors." (*Cash, supra,* 28 Cal.4th at p. 721.) The Attorney General does not dispute this point. Rather, the Attorney General argues that defendant was not denied the opportunity to conduct voir dire on the subject of multiple murder. We agree.

Although the trial court did not include the sough-after question on multiple murder in the jury questionnaire, it never suggested that defense counsel could not raise the issue in voir dire." *Id.* at 285. "Although asking the multiple-murder question in the jury questionnaire would not have been improper, refusal to include the question was not error so long as there was an opportunity to ask the question during voir dire. Because defendant did not attempt to have the trial court conduct a multiple murder inquiry during voir dire, and the trial court was given no

opportunity to rule on the propriety of that inquiry, we conclude defendant cannot claim error." *Id.* at 286.

4. Examples of Permissible Death Qualifying Questions

   a. "Court: Both sides are entitled to have 12 jurors that, if necessary, can make that choice and make the choice based on the law that I outlined and make it fair for the defendant, fair for the prosecution, the sides they represent here. Do you believe you are a juror who can do that or do you think that your abilities are substantially impaired by your feelings about the death penalty? *People v. Harris* (2005) 37 Cal.4th 310, 330.

   b. The court asked each individual panel member, out of the presence of other prospective jurors, five questions, which may be paraphrased as follows: (1) Would you automatically refuse to impose the death penalty regardless of the evidence or the law in the case? (2) If defendant were found guilty of first degree murder with special circumstances at the guilt phase, would you automatically vote to impose the death penalty without regard to the evidence or the law? (3) Would your death penalty views prevent you from making an impartial decision as to the defendant's guilt? (4) Are your views such that you would never vote to impose the death penalty? (5) Are your views such that you would refuse to consider imposing the death penalty *in this case? People v. Balderas* (1985) 41 Cal.3rd 144, 187-188.

   c. The prosecutor asked: "[I]f I could prove to you beyond a reasonable doubt and to a moral certainty that he's guilty of murder, first degree murder with special circumstances, and based upon the second phase of this trial, the penalty phase, that you thought the death penalty was appropriate, could you then take that system and say, 'Yes, that man, Gregory Smith, he deserves the death penalty,' and vote accordingly; could you do that?" *People v. Smith* (2003) 30 Cal.4th 581, 603 fn. 3.

d. The defense wanted to ask: "Whether there are any aggravating circumstances which would cause a prospective juror to automatically vote for the death penalty, without considering the alternative of life imprisonment without possibility of parole." *People v. Cash* (2002) 28 Cal.4th 703, 719.

e. "Do you feel you would automatically vote for death instead of life imprisonment with no parole if you found the defendant guilty of two or more murders?" *People v. Viera* (2005) 35 Cal.4th 264, 283.

f. Whether an accomplice to murder should be subject to the death penalty, with or without intent to kill, was a proper subject for voir dire in *People v. Fuentes* (1985) 40 Cal.3rd 629.

g. The trial court permitted the prosecutor to ask each prospective juror whether, in the words of a representative query, the fact that a capital defendant was "18 or 19 at the time of the killing . . . [would] automatically cause you to vote for the lesser punishment of life imprisonment without possibility of parole?" In addition, the prosecutor was permitted to ask each juror in the sequestered voir dire whether "you would be able to consider imposing the death penalty . . . if we have one victim as opposed to requiring that the defendant kill two or more people?" *People v. Noguera* (1992) 4 Cal.4th 599, 645.

h. In an effort to illustrate the difference between "consider" and "chose", the prosecutor asked: "You can walk by Tiffany's and you can look in the window and you can meaningfully consider this $15,000 stone and that gold Rolex watch; right? And you can think, well, I'd rather have this one with the rubies in it or that with the stones in it or this beautiful diamond ring. But there is a difference between considering and choosing. Could you ever possibly choose the death penalty?" *People v. Smith* (2003) 30 Cal.4th 581, 602-603.

i. In describing the penalty phase of trial, the prosecutor gave illustrations of aggravating and mitigating evidence. As an example of aggravating evidence, he often mentioned a hypothetical defendant with a history of many prior felony convictions. To illustrate mitigating evidence, he often mentioned a hypothetical defendant who had received the Congressional Medal of Honor, was a war hero, had saved someone's life, or had no prior criminal history. The illustrations of aggravating evidence used by the prosecutor and the trial court resembled the aggravating evidence actually presented by the prosecution in this case, whereas the illustrations of mitigating evidence were wholly unlike defendant's mitigating evidence. *People v. Seaton* (2001) 26 Cal.4th 598, 635-636.

j. At the outset of voir dire, counsel informed the trial court that he wished to question the prospective jurors as to whether they believed a robbery accomplice who does not kill should be punished as severely as an intentional killer. Accordingly, counsel submitted for the court's approval the following question: "Do you believe that one who only aids and abets the commission of an attempted robbery and does not intentionally aid and abet the actual killing during the commission of said attempted robbery should be treated under the law in the same fashion as the actual killer?" *People v. Fuentes* (1985) 40 Cal.3rd 629, 637.

5. Examples of Impermissible Death Qualifying Questions (Typically asked by the defense)

a. The defense proposed a lengthy, factually detailed question that would have given prospective jurors substantial information about defendant's victims and the manner in which they were killed. He then wanted to ask whether the juror would automatically vote for death. (*People v. Mason* (1991) 52 Cal.3rd 909, 940 fn. 4).

b. In an effort to determine whether the evidence of serious burn injuries suffered by the victims would cause a jury to automatically vote for the death penalty, defendant sought

to inquire about the prospective jurors' attitudes toward such injuries. The People objected and, at that stage of the examination, the court ruled that the jury would not be told of the injuries suffered by Ava Gawronski, and defendant would not be permitted to ask the prospective jurors if knowledge of the extent of those injuries would affect their ability to perform their duties. *People v. Clark* (1990) 50 Cal.3rd 583, 596. But see fn. 3.

c. Defense counsel posed a hypothetical question to a prospective juror as follows. "[T]wo men go into a restaurant in the early morning hours. They herd 11 people, two customers and nine employees, to the back area of the restaurant. The two men are armed with shotguns. They rob all the people and make them lie on the floor and they rob them all. They put them all in a freezer. The people obey all the orders and instructions that the two men give them. They do not fight with them or protest. They are told to get on their knees and face the walls. They do that. No one says anything. And the two men open fire, as you put it, with their shotguns. And they go on firing even though one of the victims begs for her life. They do not stop firing until they run out of ammunition. They pick up the casings that their guns have expended. They leave everybody in this darkened freezer where people are dying and people are moaning. [¶] Now, if those are the facts that you are presented with at the penalty phase, you understand you are entitled to rely on those facts as one of the circumstances in deciding a penalty, do you not?" Defense counsel was also permitted to ask: "Now, don't you believe that that's precisely the kind of case where with your ideas of justice, the death penalty is the only appropriate kind of penalty?" She then asked if various hypothetical aggravating and mitigating factors—such as the defendant's criminal record, age, and background—would make a difference to the juror. *People v. Sanders* (1995) 11 Cal.4th 475, 535.

d. A juror was asked: "So now you're in a penalty phase with the defendant like this one, who has committed

this kind of a crime and I want you to ask yourself, after looking inside yourself whether you could actually vote to put another human being to death for doing a crime like this:

"Let's assume you have a person who decides to commit a robbery because he wants to make some additional money. He goes out and gets himself a loaded handgun to make the odds more in his favor that he'll be successful. And he finds a victim that he thinks has some money and sure enough, the victim has some money when the defendant sticks him up. Sometime about this point the defendant has the brilliant thought that if I let this guy go, he's going to the police and I might get caught and whereas if I don't let him go, don't leave any witnesses, I won't get caught, in other words, I'd better kill him to make myself more certain of getting away.

"That's exactly what he does; he shoots the victim once through the heart and subsequently he's caught and he's been brought before us and you have found beyond any doubt that he's guilty of first degree murder committed during the course of a robbery.

"Do you think it's possible that you could go in the jury room, look the other jurors in the eye and knowing you'll have to come out and look the defendant in the eye also, say I think this crime is so horrendous and the other background facts we've heard are so horrendous, he should be put to death?" *People v. Visciotti* (1992) 2 Cal.4th 1, 46-47. (Defense counsel did not, but should have objected).

e. The prosecutor asked: "If we get to the penalty phase, if we get that far, then you've already found the man guilty of first degree murder. It's a horrible crime. And you found he committed this murder while he was engaged in a robbery, based on facts that would be something like a man decides to commit a robbery, arms himself with a handgun to make sure he's successful, robs his victim. During the course of the robbery it occurs to him that if the

victim is not alive, there won't be anybody going to the police and complain . . . . So, realizing that, the robber points his gun at the victim, pulls the trigger, shoots him once through the heart and kills him.

That's the type of facts we're going to be dealing with, something along those lines, perhaps.

Do you feel just, first of all, theoretically like it's possible you could vote for the death penalty if you're faced with facts such as those?" *People v. Visciotti* (1992) 2 Cal.4th 1, 46. (Defense counsel did not, but should have objected).

f. Defense counsel was precluded from informing the prospective jurors that defendant had been convicted of first degree murder and that the special circumstance of torture murder had been found true, and prohibiting mention of the specific facts surrounding the torture murder, in violation of his Sixth Amendment right to a fair trial. *People v. Davenport* (1995) 11 Cal.4th 1171, 1204.

g. The court curtailed voir dire only when defendant asked her what type of murder case warranted the death penalty. *People v. DeSantis* (1992) 2 Cal.4th 1198, 1218.

h. If Adolf Hitler were on trial charged with murdering six million people . . . ." The court refused to permit the question, saying that "I don't think it is fair to ask a juror to speculate what they might do with Adolf Hitler. We therefore conclude that a court may properly prohibit voir dire which seeks to ascertain a juror's views on the death penalty in actual or hypothetical cases not before him. *People v. Fields* (1983) 35 Cal.3rd 329, 354-357.

i. The defense was precluded from questioning potential jurors regarding factors and circumstances they would deem significant in selecting an appropriate sentence. *People v. Johnson* (1989) 47 Cal.3rd 1194, 1225.

j. "Is life without the possibility of parole an appropriate sentence for someone who robs, rapes and kills an elderly woman?" *People v. Wright* (1990) 52 Cal.3rd 367, 419 fn. 18.

k. "What do you feel is a proper punishment for someone who has committed a rape or other serious sexually related crime?" (*People v. Ochoa* (1998) 19 Cal.4th 353, 444.)

l. The defense extensively questioned the prospective jurors on their understanding of the two possible sentences at the penalty phase, defense counsel declared that life imprisonment without possibility of parole meant life imprisonment *without possibility of parole.* In so doing, they stated or implied that the penalty would inexorably be carried out. They contrasted life imprisonment without possibility of parole, which might be imposed on defendant, with life imprisonment *simpliciter*, which had been imposed on such notorious criminals as Charles Manson and Sirhan Sirhan. *People v. Ashmus* (1991) 54 Cal.3rd 932, 957-960.

m. The prosecutor remarked that it would be proper to consider "sympathetic factors" in defendant's favor, but that defendant would be appearing in court "dressed up and decent" and had "over six years to get ready for today." The prosecutor continued in a similar vein that "[w]hat you're not going to have is the victim appear[ing] in court . . ." (*People v. Montiel* (1993) 5 Cal.4th 877, 914-915, fn. 14.)

n. In penalty re-trial, defense counsel wanted to inform jury the first penalty trial resulted in a hung jury and asked jurors about their knowledge of the first trial. (*People v. Wash* (1993) 6 Cal.4th 215, 252.)

o. Defense counsel wanted to inform jury that penalty reversal was not caused by an appellate reversal of an earlier death verdict. (*People v. Wash* (1993) 6 Cal.4th 215, 254.)

p. Questions regarding Governor's commutation power. (*People v. Pinholster* (1992) 1 Cal.4th 865, 918; *People v. Carpenter* (1997) 15 Cal.4th 312, 359.)

q. Asking a juror whether he had voted for a ballot proposition to enact the death penalty or would vote for such a penalty in a public election may be error. (*People v. Ochoa* (1998) 19 Cal.4th 53, 428.)

r. Asking a prospective juror whether the Supreme Court's capital opinions under former Chief Justice Rose Bird were "kind of off base" and whether the vote not to retain her or other justices was correct may be error. (*People v. Ochoa* (1998) 19 Cal.4th 353, 428.)

Voir Dire

I. LAW

A. The Adoption of Proposition 115 in 1990 Changed Voir Dire.

1. Pre-Proposition 115 Rules

a. The attorneys participated in the questioning process.

b. The purpose of voir dire was to allow the parties to intelligently exercise their peremptory challenges. (*People v. Williams* (1981) 29 Cal.3d 392.)

2. In 1990, the voters passed Proposition 115, which included a new Code of Civil Procedure section 223 regulating voir dire in criminal cases.

> "In a criminal case, the court shall conduct the examination of prospective jurors. However, the court may permit the parties, upon a showing of good cause, to supplement the examination by such further inquiry as it deems proper, or shall itself submit to the prospective jurors upon such a showing, such additional questions by the parties as it deems proper." (Code Civ. Proc., § 223.)

a. The court shall conduct the examination of prospective jurors.

b. Upon a showing of good cause, the court may allow the attorneys to question the jurors.

c. Where practicable, voir dire shall occur in the presence of the other jurors.

d. Questioning shall be conducted only to aid in the exercise of challenges for cause.

3. Section 223 was amended effective January 1, 2001, to again allow attorney questioning.

> "In a criminal case, the court shall conduct an initial examination of prospective jurors. The court may submit to the prospective jurors additional questions requested by the parties as it deems proper. Upon completion of the court's initial examination, counsel for each party shall have the right to examine, by oral and direct questioning, any or all of the prospective jurors. The court

may, in the exercise of its discretion, limit the oral and direct questioning of prospective jurors by counsel. The court may specify the maximum amount of time that counsel for each party may question an individual juror, or may specify an aggregate amount of time for each party, which can then be allocated among the prospective jurors by counsel."

a. Amendment become effective January 1, 2001.

b. Court can limit amount of time allotted to the parties.

c. Shall be conducted "only in the aid of the exercise of challenges for cause."

B. Two Types of Challenges

1. Challenge for Cause – CCP § 225.

a. General Disqualification – CCP § 225(b)(1)(A).

1. Juror lacks the statutory requirements to be eligible for jury duty – CCP § 203, 228(a).
2. Deaf, or any other incapacity – CCP § 228(b).
3. Rarely utilized.

b. Implied Bias – CCP § 225(b)(1)(B), 229.

1. Eight statutory grounds.
2. Prejudice is inferred.

c. Actual Bias – CCP § 225(b)(1)(C).

The existence of a state of mind on the part of the juror in reference of the case, or to any of the parties, which will prevent the juror from acting with entire impartiality, and without prejudice to the substantial rights of any party.

d. Number of challenges – unlimited.

2. Peremptory Challenges

a. No reason need be given – CCP § 226(b).

b. Number of peremptory challenges allowed.

1) Depends on punishment allowed and number of defendants on trial.

2) Single defendant case.

a) 20 – If punishable by death or life imprisonment – CCP § 231(a).
b) 6 – If punishable with maximum of 90 days or less – CCP § 231(b).
c) 10 – all other cases – CCP § 231(a).

3) Multiple defendant case.

a) Death or life imprisonment case – CCP § 231(a).

1) 20 joint challenges.
2) 5 individual challenges for each defendant.
3) DA gets same total as entire defense team.

b) 90 days or less – CCP § 231(b).

1) 6 joint challenges.
2) 4 individual challenges for each defendant.
3) DA gets same total as entire defense team.

c) All other cases – CCP § 231(a).

1) 10 joint challenges.
2) 5 individual challenges for each defendant.
3) DA gets same total as entire defense team.

4) Alternates – CCP § 234.

a) Single defendant case – one per number of alternates.
b) Multiple defendant cases – each defendant gets one per number of alternates.
c) DA gets same total number as defense team.

5) A pass does not count as a challenge – CCP § 231(d)(e).

II. PROCEDURE

A. Pre-Voir Dire Conference – Rule 228.1.

1. Establish ground rules.

2. How many jurors will be called into the box?

3. Will judge allow attorney questioning?

4. Time limits.

5. Number of alternates.

6. Give judge voir dire questions.

B. Court clerk will summon a jury panel to courtroom.

C. Clerk will take roll and swear the panel – CCP § 232.

D. Questioning the jurors.

1. Judge will question jurors first – CCP § 223.

   a. Will typically ask 8 – 10 general questions. See Standard of Judicial Administration, § 8.5.
   b. Very limited follow-up.

2. Defense Attorney will question second.

   a. Defense will "challenge for cause" – CCP § 226(d).
   b. "Pass for cause."

3. DA questions last.

   a. "Pass for cause."
   b. "Approach the Bench" to exercise challenge for cause.

E. Challenging the jurors.

1. DA goes first – CCP § 226(d).

   a. "I would ask the court to thank and excuse Juror Number _____, Mr/Mrs ."

2. Defense goes second.

3. Continues until both sides pass consecutively.

   a. "The People are pleased with the panel. We pass."
   b. 12 jurors will be sworn.

4. Select Alternates – CCP § 234.

   a. Same order as original 12 jurors.
   b. Swear alternates.

5. Court will excuse unused jurors.

VOIR DIRE OBJECTIONS

1. The question is not related to challenges for cause or to the intelligent exercise of peremptory challenges.

2. The question attempts to indoctrinate jurors on the law.

3. The question asks jurors to prejudge the evidence.

4. The question tests juror's understanding of the law.

5. Counsel is attempting to prejudice the jury for or against a particular party.

6. Counsel is attempting to argue the case. People v. Williams (1981) 29 C.3d 392, 408

7. Counsel is attempting to educate the jury panel to the particular facts of the case. People v. Williams

8. Question is based on an incorrect statement of the law. People v. Tibbetts (1929) 102 C.A. 787, 789-90

9. Question is in improper form.
   a. If question is proper in scope, the court can still require counsel to rephrase the question in a neutral non-argumentative form. People v. Williams

SPECIFIC EXAMPLES RELATING TO OBJECTIONS 1 – 5:

1. Question is not related to challenge for cause or to the intelligent exercise of peremptory challenges

a. Cannot ask:
   i. What religion do you belong to? People v. Daily (1958) 157 C.A. 2d 649
   ii. Questions that seek to ascertain juror's views on death penalty in actual or hypothetical cases not before him (i.e. Hitler) People v. Fields (1983) 35 C.3d 329

b. Can ask:
   i. Any question "reasonably designed to assist in the intelligent exercise of peremptory challenges" People v. Williams
   ii. Do you belong to any religious sect whose teachings might interfere with the consideration of the case? People v. Daily

iii. Do you have any inherent belief based upon any church's teachings that might interfere with a fair consideration of the case? People v. Daily
iv. Do you belong to any political, religious, social , industrial, fraternal, law enforcement or other organization whose beliefs or teachings would prejudice you for or against either party to the case? People v. Boyle (1937) 22 C.A.2d 143
v. If you were faced with this charge, would you be willing to be tried with jurors who had the same attitude toward the charge and the defendant as you do now? People v. Estorga (1928) 206 C. 81
vi. What is your occupation? People v. Boorman (1956) 142 C.A. 2d 85
vii. May ask about a juror's willingness to apply legal principles. People v. Williams
viii. Questions which seek to expose peremptory level bias, such as:
    1. why are there so few African-americans in professional golf or tennis?
    2. why are there so few African-american presidents of large corporations?
    3. why has there never been an African-american governor in California? People v. Walls (1983) 149 C.A.3d 721

2. Question attempts to indoctrinate jurors on the law
People v. Williams

a. cannot ask:
    a. questions that attempts to indoctrinate the jury as to the meaning or applicability of particular Rules of Law

       example: "Do you have any personal objection to a rule of criminal jurisprudence which provides that those jurors entertaining a reasonable doubt of the defendant's guilt should vote for acquittal?" People v. Parker (1965) 235 C.A. 2d 86
    b. if juror will follow specific jury instructions. People v. Modell (1956) 143 C.A. 2d 724

b. can ask:
    a. questions that tend to indoctrinate but otherwise are sufficient for the intelligent exercise of peremptory challenges. People v. Williams
        i. example: explanation of the law applicable to the case as a basis for hypothetical questions to determine whether the jurors would follow the instructions of the court, and to ascertain their state of mind on the issues presented. People v. Wein (1958) 50 C.2d 383
    b. will you follow the judge's instructions. People v. Modell
    c. may ask about a juror's willingness to apply legal principles. People v. Williams

3. Question asks juror to prejudge the evidence

a. Cannot ask:
    i. Questions that call for a promise inconsistent with a juror's duty to hear the evidence with an open mind and to refrain from forming or expressing an opinion until the case is submitted for decision. People v. Fowler (1918) 178 C. 657
        1. example: Will you give the same credit to the defendant's testimony as you will to any other witness? People v. Fowler

4. Question tests juror's understanding of the law

a. Cannot ask:
    i. Do you understand the difference in degrees of proof in civil and criminal cases? People v. De La Plane (1979) 88 C.A. 3d 223
    ii. Questions about prospective jurors understanding of the discretionary nature of the death penalty. People v. Love (1960) 53 C.2d 843

b. Can ask:
    i. May ask about juror's willingness to apply legal principles (if doctrine is likely to be applied at trial). People v. Williams
        1. example: would you follow the rule that a person may use force in self-defense even though an avenue of retreat is open? People v. Williams, 398, 411

5. Counsel is attempting to prejudice the jury for or against a particular party

a. Cannot ask:
    i. Do you have any objections to a psychologist coming, free of charge to defendant, to help defendant select a jury because he believes the defendant is innocent? Hawk v. Superior Court (1974) 42 C.A. 3d 108

HOW TO HANDLE A BATSON/WHEELER MOTION

I. BATSON / WHEELER MOTIONS

a. At some time during their career, every prosecutor will have to deal with the dreaded "*Wheeler*" motion. It usually occurs following the People's use of a peremptory challenge against someone of a particular race, gender or ethnic background.

b. How it works – The defense makes a motion, usually on state and federal grounds, that the prosecutor has excused a juror based on racial, ethnic or other improper grounds (cognizable class) and has therefore violated the defendant's Constitutional right to a fair and impartial jury. **Note**: While the defense usually brings the motion, it may be made by *either party*.

c. *People v. Wheeler* (1978) 22 Cal. 3d 258 – Peremptory challenges based on group bias violates the defendant's right to jury trial in the California Constitution. *Batson v. Kentucky* (1986) 476 U.S. 79 – Race based challenges violate the Equal Protection Clause of the U.S. Constitution.

    i. Cognizable Classes –
        1. RACE
        2. ETHNICITY
        3. RELIGION
        4. GENDER
        5. SEXUAL ORIENTATION

ii. Non-Cognizable Classes
    1. Poor
    2. Less Educated
    3. Battered Women
    4. Young
    5. People over 70
    6. Insufficient English

iii. History

    1. *Batson* ***is*** the federal standard and *Wheeler* ***was*** the California standard used to determine whether the peremptory challenge was improper.

        a. Both cases used procedures involving 3 part tests to determine the propriety of the challenge. However, the first prong of the tests in each case was different. *Defendants argued the state burden (Wheeler) was more difficult for them to meet than the federal burden (Batson).*

        b. The California Supreme Court tried to reconcile the two cases in 2003 in *People v. Johnson* (2003) 30 Cal. 4th 1302.

        c. In 2005, the U.S. Supreme Court reversed *Johnson* and "clarified" the *Batson* decision by stating that the first prong of the *Batson* test need only be satisfied by production of evidence sufficient to permit the trial judge to draw an *inference of discrimination*. *Johnson v. California* (2005) 545 U.S. 162.

    2. Current State of the Law - Still a 3 prong test based on the holdings of *Batson* and *Johnson.*

        a. STEP 1 – The party objecting to the peremptory challenge must make out a prima facie case "*by showing the totality of the relevant facts gives rise to an inference of a discriminatory purpose.*"

            i. Presumption that challenge was made on a constitutionally permissible ground

ii. Burden is on party making challenge to demonstrate a prima facie case

iii. Rebut the showing of a prima facie case

1. Members of the group allegedly discriminated against were left on the panel.

2. Good faith argument that you didn't know the challenged juror was a member of a cognizable group. *People v. Barber* (1988) 200 Cal.App.3d 378, 389.

3. Consider justifying challenges before you make them if you see a problem coming up. Court can use this as evidence of the prosecutor's sincerity. *U.S. v. Contreras-Contreras* (9th Cir. 1996) 83 F. 3d 1103.

b. STEP 2 – If a prima facie case is made, the "*burden shifts to the [party making the original, objected to juror challenge] to explain adequately the racial [or other cognizable class] exclusion by offering permissible race neutral justifications for the strikes*."

i. "The justification need not support a challenge for cause, and even a 'trivial' reason, if genuine and neutral, will suffice." (*People v. Arias* (1996) 13 Cal. 4th 92, 136 citing *People v. Montiel* (1993) 5 Cal. 4th 877, 910, fn. 9.)

ii. Permissible Reasons

1. Hostility towards law enforcement - (*People v. Turner* (1994) 8 Cal. 4th 137, 171)

2. Nervous - (*People v. Johnson* (1989) 47 Cal. 3d 1194, 1217-1219)

3. Unconventional appearance - (*People v. Ward* (2005) 36 Cal. 4th 186, 202)

4. Too Eager - (*People v. Ervin* (2000) 22 Cal. 4th 48)

5. Sleepy - (*People v. Johnson* (1989) 47 Cal. 3d 1194, 1217-1219)

6. Bilingual Juror Who Won't Defer to Court Translator - (*Hernandez v. New York* (1991) 500 U.S. 352, 356-357)

    a. CAUTION – Be careful when kicking bilingual jurors. (*People v. Gonzales* (2008) 165 Cal.App.4th 620)

7. Hostility – (*People v. Turner* (1994) 8 Cal. 4th 137, 168-172)

8. Intelligence – (*People v. Arias* (1996) 13 Cal. 4th 92, 137-139)

9. Sympathetic to defendant – (*People v. Mayfield* (1997) 14 Cal. 4th 668, 724, 726)

10. Past jury experience - (*People v. Farnam* (2002) 28 Cal. 4th 107, 138)

11. Limited life experience - (*People v. Arias* (1996) 13 Cal. 4th 92, 137-139)

12. Occupation - (*People v. Ervin* (2000) 22 Cal. 4th 48, 75)

13. Desire for next juror - (*People v. Alvarez* (1996) 14 Cal. 4th 155, 194-195)

c. STEP 3 – "*If a race neutral explanation is tendered, the trial court must then decide… whether the opponent of the strike has proved purposeful racial discrimination.*"

i. In analyzing the reason given, the court must make a "sincere and reasoned attempt to evaluate each stated reason as applied to each challenged juror." (*People v. Silva* (2001) 25 Cal. 4th 345, 386)

d. Practical Issues

i. The court raises its own *Batson/Wheeler* motion. (*People v. Lopez* (1991) 3 Cal. App. 4th Supp. 11)

ii. The court asks you to justify challenge(s) *before* finding a prima facie case.

iii. The court finds no prima facie case made, but asks you to justify challenges. (*People v. Cornwell* (2005) 37 Cal 4th 50)

iv. Multiple *Batson/Wheeler* challenges in a single voir dire

1. New prima facie case must be shown with every motion. (*People v. Irvin* (1996) 46 Cal. App. 4th 1340)

2. Court has no duty to request reasons for previously challenged jurors where motion was denied. (*People v. Avila* (2006) 38 Cal 4th 491)

e. Comparative Analysis

i. Comparing the common non-racial characteristics between challenged and non-challenged jurors of different racial backgrounds. (e.g. Prosecutor leaves a white teacher on the jury but challenges an African American teacher.) Argument is that prosecutor is discriminating instead of kicking teachers because a teacher was left on the jury.

ii. History

1. Federal Courts approved of comparative analysis in *Turner v. Marshall* (9th Cir. 1997) 121 F. 3d 1248.

a. California rejected comparative analysis in *People v. Landry* (1996) 49 Cal.App.4th 785. *People v. Jones* (1997) 15 Cal. 4th 119.

b. However, things began to change in 2003 with *Johnson*. Then in 2005, the U.S. Supreme Court decided *Miller-El v. Dretke* (2005) 545 U.S. 231 using comparative analysis in the decision.

c. *Snyder v. Louisiana* (2008) 552 U.S. ___ , 128 S.Ct. 1203.

iii. Current Law – Comparative Analysis is alive in California. *People v. Lenix* (2008) 44 Cal.4th 602.

a. Does not affect the 3 Step Test

b. Comparative Analysis is to be used as a piece of circumstantial evidence to judge credibility in the Third Step.

f. Dealing with *Batson/Wheeler* Motions

i. Realize that a challenge will likely come at some point during jury selection and be ready to deal with it.

ii. It should go without saying, but ***NEVER*** excuse a juror on the basis of race, ethnicity, religion, gender etc…

iii. Question all jurors you plan to challenge.

iv. Be prepared to rebut a prima facie case by arguing applicable factors:

1. Point out any members of the group who were not challenged.

2. If you were honestly not aware the juror was a member of a cognizable group. *People v. Barber* (1988) 200 Cal.App.3d 378, 389. Challenged juror appeared to be a white and non-Hispanic to DA. DA did not recognize

the surname to be Hispanic. Court found DA to be sincere.

3. Possible to justify challenges before you make them if you see a problem coming up. Court can use this as evidence of the prosecutor's sincerity. *U.S. v. Contreras-Contreras* (9th Cir. 1996) 83 F. 3d 1103.

v. Assume that a prima facie case will be made and be prepared to give race neutral reasons for excusing the juror.

vi. If defense counsel fails to make a prima facie case, consider asking the judge to make a record supporting the denial.

1. If judge finds no prima facie case, consider stating your reasons anyway.

2. Do not give reasons unless the court specifically finds no prima facie case. Giving reasons without a specific finding on the first prong will constitute an implied finding of a prima facie case. *People v. Arias* (1996) 13 Cal. 4th 92; *People v. Gutierrez* (2002) 28 Cal. 4th 1083.

vii. Save your notes. If case is reviewed later, voir dire may be an issue. Always save your notes so that if asked, you are better able to recollect why you may have challenged a specific juror.

1. At remand hearing, the prosecutor does NOT have to state reasons under oath. (*People v. Kelly* (2008) 162 Cal.App.4th 797)

2. At remand hearing, the prosecutor does NOT have to turn over original voir dire notes. (*People v. Kelly* (2008) 162 Cal.App.4th 797)

3. At remand hearing, prosecutor cannot be cross-examined by the defense. (*People v. Kelly* (2008) 162 Cal.App.4th 797)

4. "I don't recall" Doesn't Fly - *Paulino v. Harrison* (9th Cir. 2008) 542 F.3d 692.

g. Remedies

    i. If a Wheeler motion is granted, the entire venire is dismissed, a new venire is brought in, and jury selection starts over.

    ii. *People v. Willis* (2002) 27 Cal. 4th 811 – Allows other remedies for a *Wheeler* violation if offended party agrees.

        1. Fines

        2. Reseating wrongfully excused juror

        3. *Possibly* allowing offended party more challenges

h. Consequences

    i. Motion Granted at Trial – Remedies are arguably sanctions

        1. B&P 6086.7(a)(3) – Court must notify the bar of any judicial sanctions against an attorney…

        2. B&P 6068(o)(3) – Attorney must self report any judicial sanction …

        3. However, reporting will likely not be required unless the conduct is egregious.

    ii. Motion Erroneously Denied and Case Reversed

        1. B&P 6086.7(b)(2) – Court must notify bar whenever there is a reversal.

        2. B&P 6068(o)(7) – Attorney must notify bar whenever reversal is based in whole or in part upon misconduct of the attorney.

IV. Jury Selection

a. Overview – The jury selection process is a crucial part of the case. You must be familiar with the rules

b. Mechanics / Rules – Depending on the judge you are in front of, you may be faced with several different methods of selecting a jury. There are really two main types and variations of either type.

i. "12 Pack", "18 Pack"

1. How it Works

a. *This is the most common type of selection method that you will see*. Usually, the court clerk will call 12 or 18 or 20 names from a random list of all the potential jurors. Those jurors will fill the jury box in the order called and, if more that 12, will fill the front row of the audience. The rest of the potential jurors will then fill the remaining seats in the courtroom.

b. Voir Dire is then conducted by the judge and attorneys of the first 12 or 18 or 20 potential jurors.

c. Once the challenges begin, jurors leave the courtroom when they are challenged until only 11 remain.

d. The clerk then calls jurors to fill the vacant seats and the process starts all over again. This continues until both sides pass or are out of challenges.

ii. "Federal Method"

1. How it Works

a. This method seems to be gaining popularity with judges primarily. It is usually a faster method

and avoids excused jurors knowing which side excused them.

b. In this method, unlike the "12 Pack" method, the attorneys move their chairs to the opposite side of counsel tables so that they are facing the courtroom doors and the audience and their backs are to the judge.

c. The potential jurors are called in by the clerk according to the order on the random list. All of the potential jurors are assigned a seat and a number in the courtroom.

d. Voir Dire is then conducted on *ALL* of the potential jurors *ONCE*.

e. Once challenges begin, they are done silently by the attorneys on a master sheet. The attorneys may challenge anyone they wish from the entire panel. The attorneys pass the sheet back and forth until both pass or run out of challenges.

f. The judge will then excuse all challenged jurors at once. The ***first 12 unchallenged jurors*** will then make up the jury.

c. Challenges – There are two types of challenges, *challenges for cause* and *peremptory challenges*. The rules regarding juror challenges can be found in the ***Code of Civil Procedure (CCP 225 - 231).***

i. Challenges for Cause – Challenges for cause can be made by either side generally for either *implied bias* or *actual bias* (***CCP Section 225(b)***)

1. Implied Bias – There are nine categories of implied bias listed in ***CCP 229***:

2. Actual Bias – Defined as "*the existence of a state of mind on the part of the juror in reference to the case, or to any of the parties, which will prevent the juror from acting with entire impartiality, and without prejudice to*

the substantial rights of any party." (***CCP section 225(b)(1)(C)***)

3. The ultimate determination of excusal for cause is made by the court. (***CCP section 230***)

ii. Peremptory Challenges – A peremptory challenge may be made by either party and is an objection to a juror for which no reason need by given. The court is required to excuse jurors challenged peremptorily. (***CCP section 231***)

1. Number – The number of peremptory challenges depends upon the possible sentence of the offense charged and the number of defendants.

   a. If the offense is punishable with *maximum term of imprisonment of 90 days or less*, each side gets *6* peremptory challenges. (***CCP section 231***)

   b. If the offense is punishable with *death or with imprisonment in the state prison for life*, each side gets *20* peremptory challenges. (***CCP section 231(a)***). The prosecution of first degree murder without special circumstances which carries a term of 25 years to life, constitutes imprisonment for life within the meaning of CCP section 231(a).

   c. In *all other cases* each side gets *10* peremptory challenges.

   d. Multiple defendant cases

      i. Punishment of 90 days or less – The People get *6* challenges and the defendants get *6 challenges jointly*. Each defendant is additionally entitled to *4 separate challenges*. The People get as many challenges as are allowed all defendants. (***CCP section 231(b)***)

      ii. Life in prison and death cases – The People get *20* challenges and the

defendants get *20 challenges jointly*. Each defendant is additionally entitled to *5 separate challenges*. The People get as many challenges as are allowed all defendants. (***CCP section 231(a)***)

iii. All other cases – The People get *10* challenges and the defendants get *10 challenges jointly*. Each defendant is additionally entitled to *5 separate challenges*. The People get as many challenges as are allowed all defendants. (***CCP section 231(a)***)

iii. Keeping Track of Challenges – There are various methods of keeping track of juror information and challenges. Most court clerks will provide a master courtroom diagram with squares representing each seat. Most people use post it notes or a combination of post it notes and note pad to keep track of jurors and their responses to questions

V. BATSON / WHEELER MOTIONS

a. At some time during their career, every prosecutor will have to deal with a *Wheeler* motion. It usually occurs following the People's use of a peremptory challenge against someone of a particular race, gender or ethnic background.

b. How it works – The defense makes a motion, usually on state and federal grounds, that the prosecutor has excused a juror based on racial, ethnic or other improper grounds (cognizable class) and has therefore violated the defendant's Constitutional right to a fair and impartial jury. **Note**: While the defense usually brings the motion, it may be made by *either party.*

c. *People v. Wheeler* (1978) 22 Cal. 3d 258 – Peremptory challenges based on group bias violates the defendant's right to jury trial in the California Constitution. *Batson v. Kentucky* (1986) 476 U.S. 79 – Race based challenges violate the Equal Protection Clause of the U.S. Constitution.

i. Cognizable Classes –
    1. RACE
    2. ETHNICITY
    3. RELIGION
    4. GENDER
    5. SEXUAL ORIENTATION

ii. Non-Cognizable Classes
    1. Poor
    2. Less Educated
    3. Battered Women
    4. Young
    5. People over 70
    6. Insufficient English

iii. History

    1. *Batson* ***is*** the federal standard and *Wheeler* ***was*** the California standard used to determine whether the peremptory challenge was improper.

        a. Both cases used procedures involving 3 part tests to determine the propriety of the challenge. However, the first prong of the tests in each case was different. *Defendants argued the state burden (Wheeler) was more difficult for them to meet than the federal burden (Batson)*.

        b. The California Supreme Court tried to reconcile the two cases in 2003 in *People v. Johnson* (2003) 30 Cal. 4th 1302.

        c. In 2005, the U.S. Supreme Court reversed *Johnson* and "clarified" the *Batson* decision by stating that the first prong of the *Batson* test need only be satisfied by production of evidence sufficient to permit the trial judge to draw an *inference of discrimination*. *Johnson v. California* (2005) 545 U.S. 162.

2. Current State of the Law - Still a 3 prong test based on the holdings of *Batson* and *Johnson.*

    a. STEP 1 – The party objecting to the peremptory challenge must make out a prima facie case "*by showing the totality of the relevant facts gives rise to an inference of a discriminatory purpose.*"

        i. Presumption that challenge was made on a constitutionally permissible ground

        ii. Burden is on party making challenge to demonstrate a prima facie case

        iii. Rebut the showing of a prima facie case

            1. Members of the group allegedly discriminated against were left on the panel.

            2. Good faith argument that you didn't know the challenged juror was a member of a cognizable group. *People v. Barber* (1988) 200 Cal.App.3d 378, 389.

            3. Consider justifying challenges before you make them if you see a problem coming up. Court can use this as evidence of the prosecutor's sincerity. *U.S. v. Contreras-Contreras* (9th Cir. 1996) 83 F. 3d 1103.

    b. STEP 2 – If a prima facie case is made, the "*burden shifts to the [party making the original, objected to juror challenge] to explain adequately the racial [or other cognizable class] exclusion by offering permissible race neutral justifications for the strikes*."

        i. "The justification need not support a challenge for cause, and even a 'trivial' reason, if genuine and neutral, will suffice." (*People v. Arias* (1996) 13 Cal.

4th 92, 136 citing *People v. Montiel* (1993) 5 Cal. 4th 877, 910, fn. 9.)

ii. Permissible Reasons

1. Hostility towards law enforcement - (*People v. Turner* (1994) 8 Cal. 4th 137, 171)

2. Nervous - (*People v. Johnson* (1989) 47 Cal. 3d 1194, 1217-1219)

3. Unconventional appearance - (*People v. Ward* (2005) 36 Cal. 4th 186, 202)

4. Too Eager - (*People v. Ervin* (2000) 22 Cal. 4th 48)

5. Sleepy - (*People v. Johnson* (1989) 47 Cal. 3d 1194, 1217-1219)

6. Bilingual Juror Who Won't Defer to Court Translator - (*Hernandez v. New York* (1991) 500 U.S. 352, 356-357)

    a. CAUTION – Be careful when kicking bilingual jurors. (*People v. Gonzales* (2008) 165 Cal.App.4th 620)

7. Hostility – (*People v. Turner* (1994) 8 Cal. 4th 137, 168-172)

8. Intelligence – (*People v. Arias* (1996) 13 Cal. 4th 92, 137-139)

9. Sympathetic to defendant – (*People v. Mayfield* (1997) 14 Cal. 4th 668, 724, 726)

10. Past jury experience - (*People v. Farnam* (2002) 28 Cal. 4th 107, 138)

11. Limited life experience - (*People v. Arias* (1996) 13 Cal. 4th 92, 137-139)

12. Occupation - (*People v. Ervin* (2000) 22 Cal. 4th 48, 75)

13. Desire for next juror - (*People v. Alvarez* (1996) 14 Cal. 4th 155, 194-195)

c. STEP 3 – "*If a race neutral explanation is tendered, the trial court must then decide… whether the opponent of the strike has proved purposeful racial discrimination.*"

i. In analyzing the reason given, the court must make a "sincere and reasoned attempt to evaluate each stated reason as applied to each challenged juror." (*People v. Silva* (2001) 25 Cal. 4th 345, 386)

d. Practical Issues

i. The court raises its own *Batson/Wheeler* motion. (*People v. Lopez* (1991) 3 Cal. App. 4th Supp. 11)

ii. The court asks you to justify challenge(s) *before* finding a prima facie case.

iii. The court finds no prima facie case made, but asks you to justify challenges. (*People v. Cornwell* (2005) 37 Cal 4th 50)

iv. Multiple *Batson/Wheeler* challenges in a single voir dire

1. New prima facie case must be shown with every motion. (*People v. Irvin* (1996) 46 Cal. App. 4th 1340)

2. Court has no duty to request reasons for previously challenged jurors where motion was denied. (*People v. Avila* (2006) 38 Cal 4th 491)

e. Comparative Analysis

i. Comparing the common non-racial characteristics between challenged and non-challenged jurors of different racial backgrounds. (e.g. Prosecutor leaves a white teacher on the jury but challenges an African American teacher.) Argument is that prosecutor is discriminating instead of kicking teachers because a teacher was left on the jury.

ii. History

1. Federal Courts approved of comparative analysis in *Turner v. Marshall* (9th Cir. 1997) 121 F. 3d 1248.

a. California rejected comparative analysis in *People v. Landry* (1996) 49 Cal.App.4th 785. *People v. Jones* (1997) 15 Cal. 4th 119.

b. However, things began to change in 2003 with *Johnson*. Then in 2005, the U.S. Supreme Court decided *Miller-El v. Dretke* (2005) 545 U.S. 231 using comparative analysis in the decision.

c. *Snyder v. Louisiana* (2008) 552 U.S. ___ , 128 S.Ct. 1203.

iii. Current Law – Comparative Analysis is alive in California. *People v. Lenix* (2008) 44 Cal.4th 602.

a. Does not affect the 3 Step Test

b. Comparative Analysis is to be used as a piece of circumstantial evidence to judge credibility in the Third Step.

f. Dealing with *Batson/Wheeler* Motions

i. Realize that a challenge will likely come at some point during jury selection and be ready to deal with it.

ii. It should go without saying, but ***NEVER*** excuse a juror on the basis of race, ethnicity, religion, gender etc…

iii. Question all jurors you plan to challenge.

iv. Be prepared to rebut a prima facie case by arguing applicable factors:

    1. Point out any members of the group who were not challenged.

    2. If you were honestly not aware the juror was a member of a cognizable group. *People v. Barber* (1988) 200 Cal.App.3d 378, 389. Challenged juror appeared to be a white and non-Hispanic to DA. DA did not recognize the surname to be Hispanic. Court found DA to be sincere.

    3. Possible to justify challenges before you make them if you see a problem coming up. Court can use this as evidence of the prosecutor's sincerity. *U.S. v. Contreras-Contreras* (9th Cir. 1996) 83 F. 3d 1103.

v. Assume that a prima facie case will be made and be prepared to give race neutral reasons for excusing the juror. Following are a list of some accepted race neutral reasons:

vi. If defense counsel fails to make a prima facie case, consider asking the judge to make a record supporting the denial.

    1. If judge finds no prima facie case, consider stating your reasons anyway.

    2. Do not give reasons unless the court specifically finds no prima facie case. Giving reasons without a specific finding on the first prong will constitute an implied finding of a prima facie case. *People v. Arias* (1996) 13 Cal. 4th 92; *People v. Gutierrez* (2002) 28 Cal. 4th 1083.

vii. Save your notes. If case is reviewed later, voir dire may be an issue. Always save your notes so that if asked, you are better able to recollect why you may have challenged a specific juror.

    1. At remand hearing, the prosecutor does NOT have to state reasons under oath. (*People v. Kelly* (2008) 162 Cal.App.4th 797)

    2. At remand hearing, the prosecutor does NOT have to . (*People v. Kelly* (2008) 162 Cal.App.4th 797)

3. At remand hearing, prosecutor cannot be cross-examined by the defense. (*People v. Kelly* (2008) 162 Cal.App.4th 797)

g. Remedies

i. If a Wheeler motion is granted, the entire venire is dismissed, a new venire is brought in, and jury selection starts over.

ii. *People v. Willis* (2002) 27 Cal. 4th 811 – Allows other remedies for a *Wheeler* violation if offended party agrees.

1. Fines

2. Reseating wrongfully excused juror

3. *Possibly* allowing offended party more challenges

h. Consequences

i. Motion Granted at Trial – Remedies are arguably sanctions

1. B&P 6086.7(a)(3) – Court must notify the bar of any judicial sanctions against an attorney…

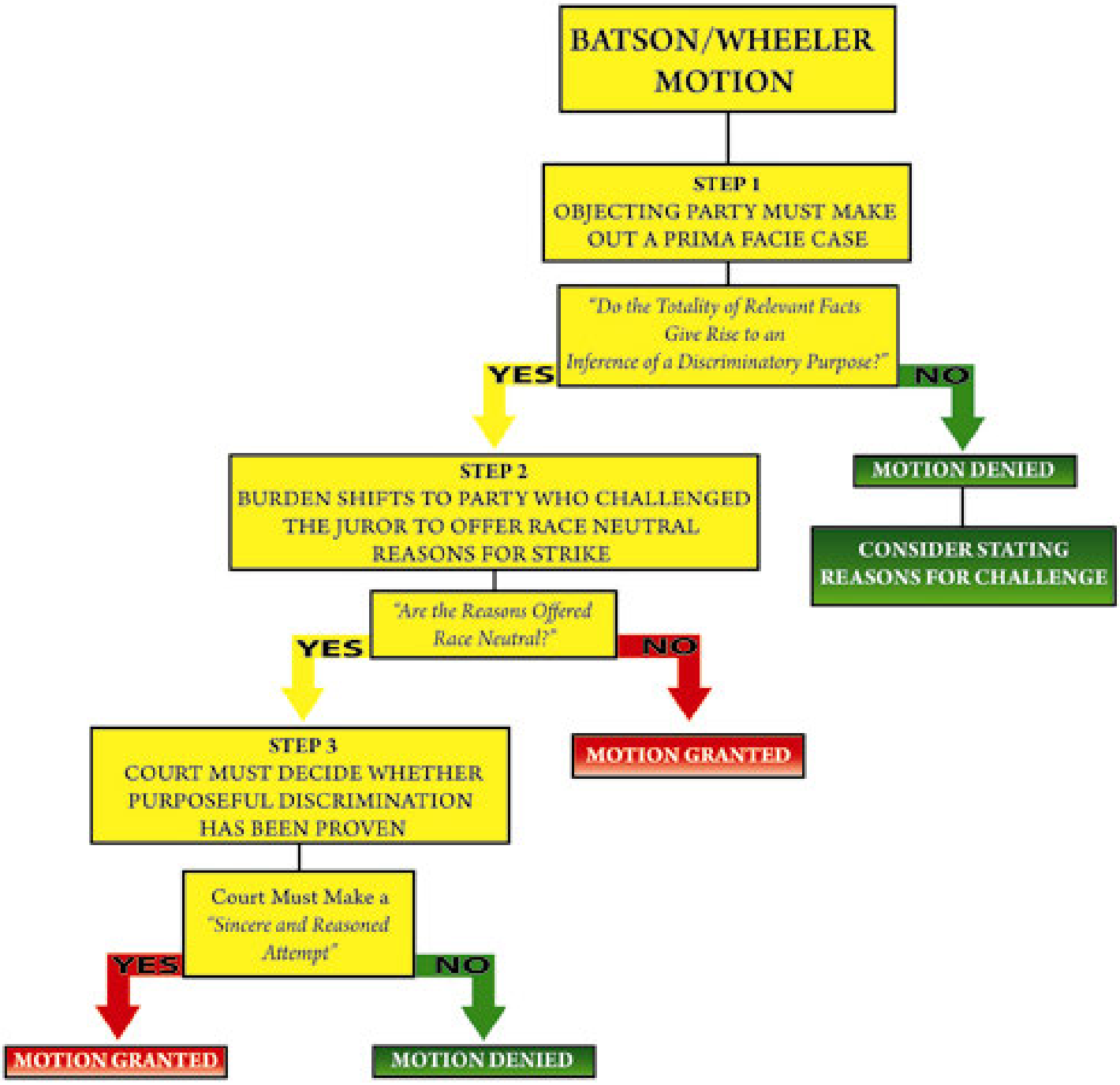
2. B&P 6068(o)(3) – Attorney must self report any judicial sanction …

3. However, reporting will likely not be required unless the conduct is egregious.

ii. Motion Erroneously Denied and Case Reversed

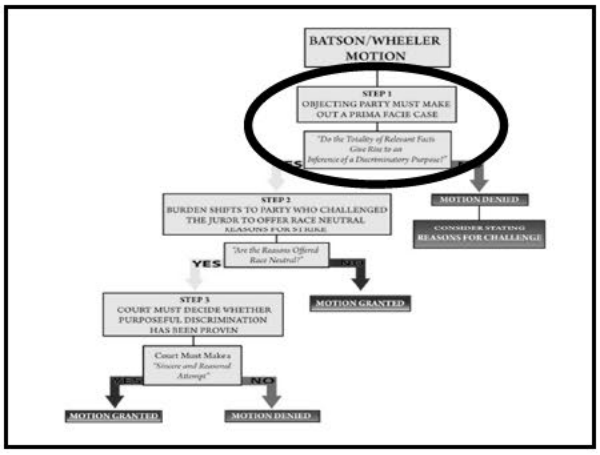
1. B&P 6086.7(b)(2) – Court must notify bar whenever there is a reversal.

2. B&P 6068(o)(7) – Attorney must notify bar whenever reversal is based in whole or in part upon misconduct of the attorney.


BATSON/WHEELER MOTION
STEP 1
OBJECTING PARTY MUST MAKE OUT A PRIMA FACIE CASE
"Do the Totality of Relevant Facts Give Rise to an Inference of a Discriminatory Purpose?"
YES
NO
MOTION DENIED
CONSIDER STATING REASONS FOR CHALLENGE
STEP 2
BURDEN SHIFTS TO PARTY WHO CHALLENGED THE JUROR TO OFFER RACE NEUTRAL REASONS FOR STRIKE
"Are the Reasons Offered Race Neutral?"
YES
NO
MOTION GRANTED
STEP 3
COURT MUST DECIDE WHETHER PURPOSEFUL DISCRIMINATION HAS BEEN PROVEN
Court Must Make a "Sincere and Reasoned Attempt"
YES
NO
MOTION GRANTED
MOTION DENIED

RESOURCES

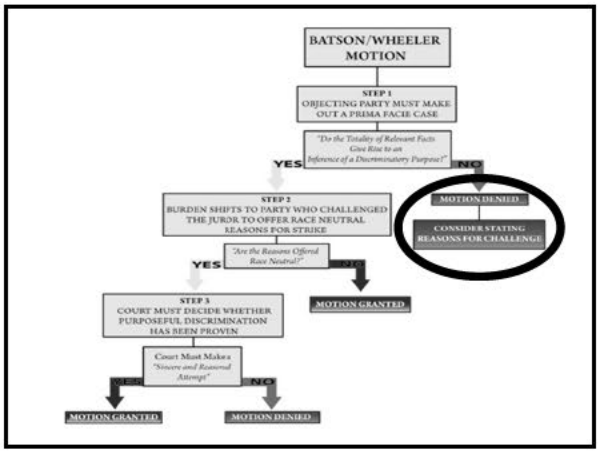
- **Mr. Wheeler Goes to Washington by Jerry Coleman**
- **Protecting the Record after a Batson Challenge by Steven Oetting and Barbara Oetting**
- **Dealing with Batson/Wheeler Motions by Patrick Whalen**



STEP 1 – "PRIMA FACIE CASE"

The party objecting to the peremptory challenge must make out a prima facie case "*by showing the totality of the relevant facts gives rise to an inference of a discriminatory purpose.*"

REBUT THE PRIMA FACIE CASE IF POSSIBLE



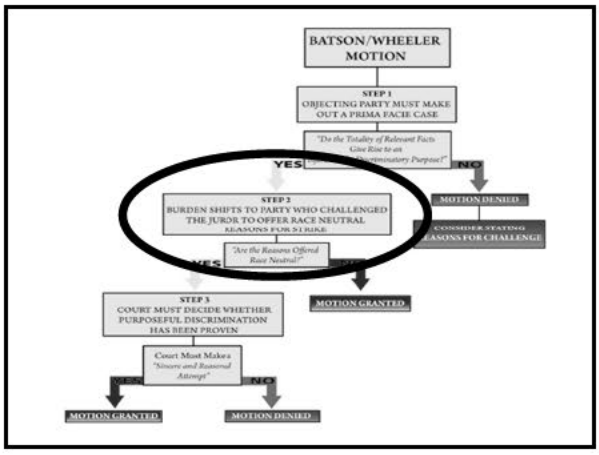
NO PRIMA FACIE CASE =

MOTION DENIED

HOWEVER . . . .

CONSIDER STATING THE REASONS FOR YOUR CHALLENGES

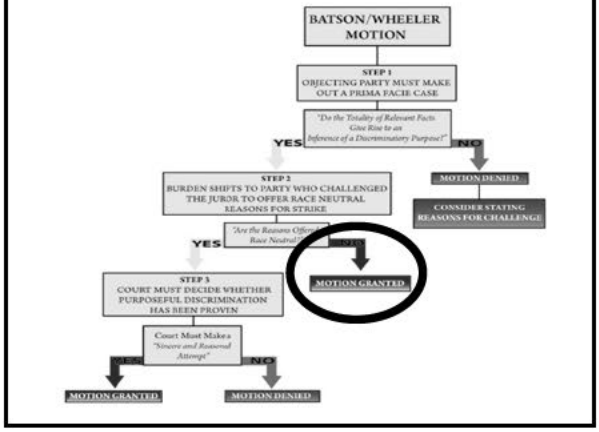
DO NOT GIVE REASONS UNLESS THE COURT HAS MADE A STEP 1 FINDING



PRIMA FACIE CASE = STEP 2

If a prima facie case is made, the "*burden shifts to the [party making the original, objected to juror challenge] to explain adequately the racial [or other cognizable class] exclusion by offering permissible race neutral justifications for the strikes*."

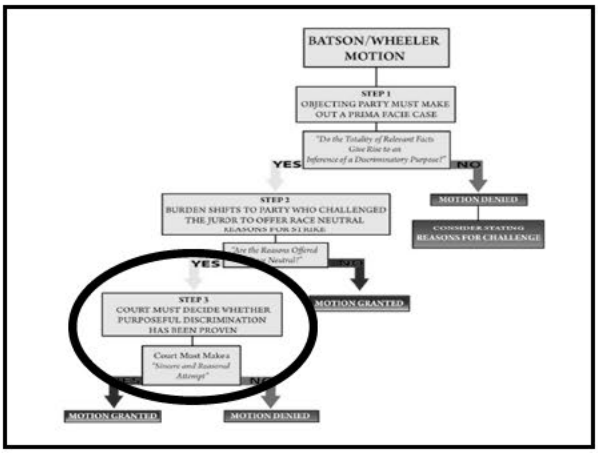
PERMISSIBLE "RACE NEUTRAL" REASONS



NO RACE NEUTRAL REASONS =

MOTION GRANTED

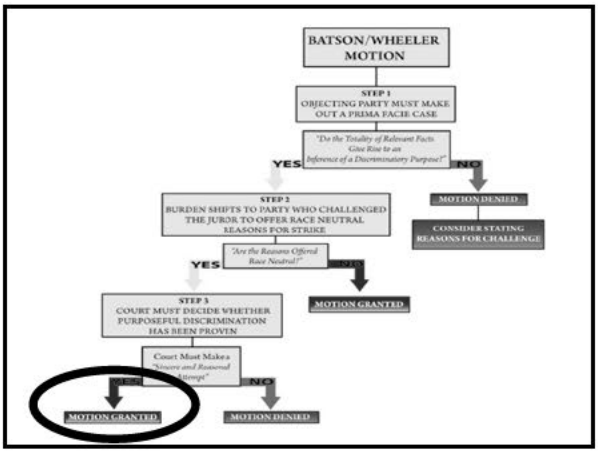
REMEDIES



RACE NEUTRAL REASONS = STEP 3

"If a race neutral explanation is tendered, the trial court must then decide… whether the opponent of the strike has proved purposeful racial discrimination."

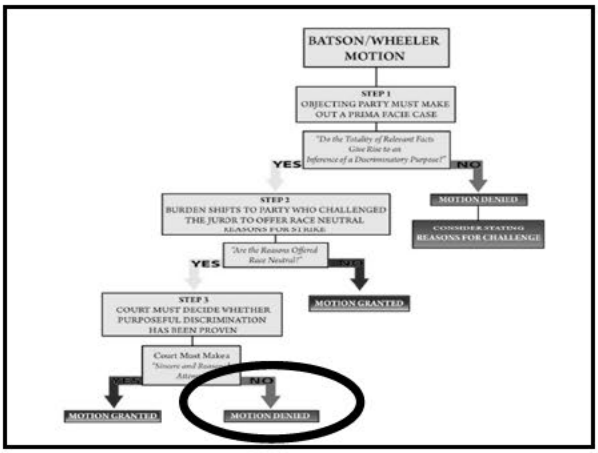
In analyzing the reason given, the court must make a "sincere and reasoned attempt to evaluate each stated reason as applied to each challenged juror."



PURPOSEFUL DISCRIMINATION PROVEN =

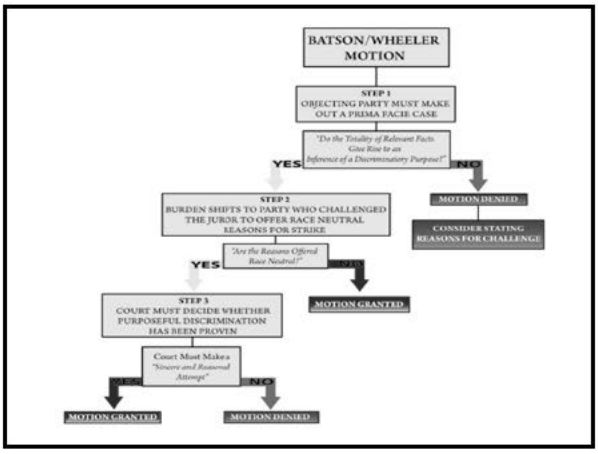
MOTION GRANTED

REMEDIES



PURPOSEFUL DISCRIMINATION NOT PROVEN =

MOTION DENIED



EFFECTIVE JURY SELECTION

A. Guiding Principle

Jury Selection is critical to successful jury trials. Therefore, jury selection deserves thorough preparation and knowledge.

B. Key Components to Effective Jury Selection

- **Know the law and the rules**

You should learn the controlling statutes on this subject and the case law that interprets it. The controlling statutes on jury selection are contained in the Code of Civil Procedure (CCP) sections 190 through 237. CCP 223, 225, and 228 through 231 are regularly

utilized in criminal jury trials and set out the method of voir dire, the requirements for a challenge for cause and the number of preemptory challenges permitted to each side.

CCP 223 provides that in a criminal trial, each party could submit questions for the court to pose to the prospective jurors; it also establishes that each party has "the right to examine, by oral and direct questioning, any or all prospective jurors." It also limits the examination of prospective jurors to be conducted "only in the aid of the exercise of challenges for cause."

An area of implied bias that is outlined under the law is pursuant to CCP 229(f) "The existence of a state of mind in the juror evincing enmity against, or bias towards, either party."

You should also learn the judicial rules regarding jury selection. The San Diego Superior Court's web page includes jury selection information that is very useful. It has the script that the courts are encouraged to read to jurors and it even has an approved questionnaire with many good questions.

In addition, you should learn the particular way that a certain court does jury selection. Courts conduct jury selection differently utilizing their own system of examining 12 jurors at a time or more jurors.

A prosecutor should also know the law of Batson/Wheeler regarding preemptory challenges and know how to make the right record that supports that a preemptory challenge is made ethically and without bias against a protected class.

The Law and Rules of Voir Dire and Jury Selection

- Examination of jurors for challenges for cause. CCP 223
- 10 peremptory/20 life cases
- Defense questions first/People challenge first. CCP 231(d)

Challenge for Cause

Cause:

- Actual Bias
  - Inability to be impartial
- Implied Bias

Actual Bias

- Juror related to a party or witness
- Legal relationship to party or witness
- Previous jury relationship with p or w
- Financial outcome—except as taxpayer
- Unqualified opinion as to merits
- Action pending which would utilize same jury
- Death penalty issues
- Bias towards either party

Implied Bias

- **Attitude towards a party**
- **Witness (cops, attorneys, doctors)**
- **Subject matter (DV, date rape, child)**
- **Mental health issues or system in general**

Proper Voir Dire

- **Any question "reasonably designed to assist in the intelligent exercise of peremptory challenges" People v. Williams**
- **Do you belong to any religious sect whose teachings might interfere with the consideration of the case? People v. Daily**
- **Do you have any inherent belief based upon any church's teachings that might interfere with a fair consideration of the case? People v. Daily**
- **Do you belong to any political, religious, social , industrial, fraternal, law enforcement or other organization whose beliefs or teachings would prejudice you for or against either party to the case? People v. Boyle (1937) 22 C.A.2d 143**

Proper Voir Dire

- If you were faced with this charge, would you be willing to be tried with jurors who had the same attitude toward the charge and the defendant as you do now? People v. Estorga (1928) 206 C. 81
  - Questions that tend to indoctrinate but otherwise are sufficient for the intelligent exercise of peremptory challenges. People v. Williams
    - Example: Explanation of the law applicable to the case as a basis for hypothetical questions to determine whether the jurors would follow the instructions of the court, and to ascertain their state of mind on the issues presented. People v. Wein (1958) 50 C.2d 383

Proper Voir Dire

- Will you follow the judge's instructions? People v. Modell
- May ask about a juror's willingness to apply legal principles. People v. Williams

- **What is your occupation? People v. Boorman (1956) 142 C.A. 2d 85**

Improper Voir Dire

- **What religion do you belong to? People v. Daily (1958) 157 C.A. 2d 649**
- **Questions that seek to ascertain juror's views on death penalty in actual or hypothetical cases not before him (i.e. Hitler) People v. Fields (1983) 35 C.3d 329**
- **Questions that attempts to indoctrinate the jury as to the meaning or applicability of particular Rules of Law**
  - **Example: "Do you have any personal objection to a rule of criminal jurisprudence which provides that those jurors entertaining a reasonable doubt of the defendant's guilt should vote for acquittal?" People v. Parker (1965) 235 C.A. 2d 86**

Voir Dire Objections

- **The question is not related to challenges for cause or to the intelligent exercise of peremptory challenges.**
- **The question attempts to indoctrinate jurors on the law.**
- **The question asks jurors to prejudge the evidence.**
- **The question tests juror's understanding of the law.**
- **Counsel is attempting to prejudice the jury for or against a particular party.**
- **Counsel is attempting to argue the case. People v. Williams (1981) 29 C.3d 392, 408**
- **Counsel is attempting to educate the jury panel to the particular facts of the case. People v. Williams**
- **Question is based on an incorrect statement of the law. People v. Tibbetts (1929) 102 C.A. 787, 789-90**
- **Question is in improper form.**
  - **If question is proper in scope, the court can still require counsel to rephrase the question in a neutral non-argumentative form. People v. Williams**

Batson/Wheeler Rules

- **"The use of peremptory challenges to remove prospective jurors on the sole ground of group bias" Wheeler**
- **"The Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race" Batson**
- **May be raised by either party**
- **Basic rule: There must be "an identifiable group distinguished on racial, religious, ethnic, or similar grounds – we may call this 'group bias'."**

Cognizable Groups

- **Race**
- **Ethnicity – (surnames)**
- **Religion – (sect) caveat: can't judge**
- **Gender**
- **Sexual Orientation**
- **Disability…**

Non Cognizable Groups

- Low income/poor/unemployed
- Less educated
- Blue Collar workers
- Battered Women
- Young Adults
- Age

Batson/Wheeler Three Prong Approach

- Moving party must make Prima Facie "by showing that the totality of the facts gives rise to an *inference* of discriminatory purpose" Johnson 545 U.S. 162
- Once shown the burden shifts to the other party to explain by offering race-neutral justifications
- Trial Court decides whether moving party has proved purposeful racial discrimination

United State v. Collins 9th circuit

- Drug case
- 1st African American juror was struck by defense
- Only remaining African American struck by Prosecutor
- Defense objected
- Prosecutor declined to give reason saying "no pattern:
- Court said no pattern
- 9th Circuit remanded for government to provide justifications

9th Circuit Instruction

- "…encourage prosecutors to state their reasons for peremptory strikes at the time of a Batson challenge…the burden of explaining the reasons for a challenge…is minimal. Judicial economy would be well served…in fact, prosecutors usually have good and permissible reasons for their challenges; refusing to state them can create unnecessary suspicion, as well as unnecessary litigation." Concurring opinion

Comparative Analysis

- "If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar non-black who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at Batson's third step."
- *Miller-El v. Dretke* (2005)545 U.S. 231

Practical Tips

- **Remain Calm**
- **Be thorough in your questioning**
- **Keep notes on each juror and why**
- **Give more than one reason**
- **Think about comparative analysis. Why are you keeping one teacher and not the other?**
- **Make a record of non verbal reasons**
- **"There is more to human communication than mere linguistic content. On appellate review, a voir dire answer sits on a page of transcript. In the trial court, however, advocates and trial judges watch and listen as the answer is delivered. Myriad subtle nuances may shape it, including attitude, attention, interest, body language, facial expression and eye contact." *People v. Lenix* (2008) 44 Cal. 4th 602**

Neutral Justification

- Life experience
- Inability to understand
- Hung Jury
- Hostile Body Language
- Nervous
- Smiled at Defendant
- Good rapport w/ D atty
- Sympathetic looks to D
- Family members arrested

Neutral Justification

- Teachers are liberal
- Clothes/hair
- Non-responsive
- Age—youth is not a class
- Lack of seriousness
- Law Student
- Poor Grooming

Neutral Justification

- Lack of ability to understand legal concepts
- Battered woman
- Anti-death penalty
- Limited education
- Translation—would not follow
- Juror lives close to crime scene
- Hunch/Gut feeling/etc are valid

Penalties and Remedies

Penalties

- B&P 6068© Appellate Court reports you
- B&P 6068(0)(3)—You report you
- B&P 6086.7(b)—reversal for prosecutorial misconduct requires report

Remedies

- Used to be excuse the panel and start again
- "severe" monetary sanctions and/or
- With the consent of moving party, RESEAT the challenged juror *People v. Willis* (2002) 27 Cal.4th 811.
- As to sanctions, Court must make an order first.

Jury Questionnaires

Can You Stipulate to Removal for Cause On the Basis of Answers in Questionnaires Alone?

Yes! And the discussion and stipulations can occur outside the defendant's presence.

People v. *Ervins* (2000) 22 Cal.4th 48, 72.

People v. *Benavides* (2005) 35 Cal.4th 69, 88.

People v. *Cook* (2007) 40 Cal.4th 1334, 1342-1344.

Can The Court Excuse for Cause Over Counsel's Objection on the Basis of Answers in the Questionnaire Alone?

Yes! But only if "it is clear and leaves no doubt that a prospective juror's views about the death penalty would satisfy the *Witt* standard and that the juror is not willing or able to set aside his or her personal views and follow the law." (*People* v. *Wilson* (2008) 44 Cal.4th 758, 787; *People* v. *Stewart* (2004) 33 Cal.4th 425, 445.)

The *Witt* standard: Whether the juror's views regarding the death penalty would "prevent or substantially impair" the performance of his or her duties as defined by the court's instructions and the juror's oath.

Note: Trial courts enjoy great latitude in deciding what questions should be asked on voir dire (*People* v. *Earp* (1999) 20 Cal.4th 826, 852) and the court abuses its discretion, warranting reversal of a conviction on appeal, only when its decision falls outside the bounds of reason resulting in a miscarriage of justice. (*People* v. *Navarette* (2003) 30 Cal.4th 458, 486.)

The potential jurors are sworn by the court pursuant to CCP § 232 before filling out the questionnaires.

Cal. Code of Civ. Proc. § 232:

"Do you, and each of you, understand and agree that you will accurately and truthfully answer, under penalty of perjury, all questions propounded to you concerning your qualifications and competency to serve as a trial juror in the matter pending before this court; and that failure to do so may subject you to criminal prosecution."

Can Potential Jurors Complete the Questionnaires at Home?

yes!

People v. *Ledesma* (2006) 39 Cal.4th 641, 667:

"Jurors were informed in writing that their answers to the questionnaire would have the effect of an answer given under oath and were directed by the judge to 'fill out the questionnaire by yourself and not discuss it with anyone.' …We cannot discern how the procedure followed could have affected the impartiality of the jury." (Emphasis added.)

Comparative Juror Analysis

What is it?

* In "comparative juror analysis" the trial or reviewing court evaluates the prosecutor's proffered race-neutral reason(s) for challenging a prospective juror by examining whether "similarly situated" potential jurors of a different race were not challenged by the prosecution, thus evidencing purposeful discrimination on the part of the prosecution.

Note: This applies to any protected class (e.g., race, gender, or sexual orientation).

Comparative Juror Analysis

When does it come into play?

- It is clear that comparative juror analysis is appropriate and even required at the third stage of a *Batson*/*Wheeler* claim (i.e., after the court has found that the defense has made a prima facie showing that the prosecutor exercised a peremptory challenge based on race and the prosecutor has provided the court with race-neutral reasons for the exercise of his or her challenges).
- It is unclear whether such an analysis should take place at the first stage when a court does not find a prima facie case of discriminatory intent but the prosecutor provides race-neutral justifications for his or her challenges.

Comparative Juror Analysis

Where is it conducted?

* Comparative juror analysis may certainly occur at the trial court and a recent California Supreme Court decision now holds that it may be conducted 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.)

* The appellate court will look to the transcript of the oral voir dire along with any and all questionnaires.

Comparative Juror Analysis

Friendly suggestions

* Include a question on race/ethnicity in your questionnaire.

* Anticipate a *Batson*/*Wheeler* claim by the defense.

* Conduct your own comparative juror analysis when evaluating the questionnaires and be prepared to explain the differences in jurors who seemingly gave similar answers; only one of whom is being challenged.

* Give as many race-neutral reasons as you sincerely have for challenging a prospective juror and ask the court to acknowledge observed nonverbal behavior by the challenged juror and to make a finding that you were truthful in giving your race-neutral reasons.

Bellas v. *Superior Court* (2000) 85 Cal.App.4th 636 [error to preclude defense counsel from retaining copies of completed juror questionnaires].)

Zamudio v. *Superior Court* (1998) 64 Cal.App.4th 24 [absent the request for the personal juror identifying information, section 237 does not apply to jury questionnaires].)

Note: Potential jurors should NOT be told nor should it be inferred that their answers to the questionnaire shall be confidential. In fact, potential jurors should be told that the questionnaires are public records and that if there is information they wish to keep private, they may request to answer the question orally, in private and if the court finds that the subject matter is in fact private, the court may order the transcript of that hearing sealed. (See *Copley Press, Inc*. v. *Superior Court* (1991) 228 Cal.App.3d 77)

HOW TO HANDLE A BATSON/WHEELER MOTION

I. BATSON / WHEELER MOTIONS

a. At some time during their career, every prosecutor will have to deal with the dreaded "*Wheeler"* motion. It usually occurs following the People's use of a peremptory challenge against someone of a particular race, gender or ethnic background.

b. How it works – The defense makes a motion, usually on state and federal grounds, that the prosecutor has excused a juror based on racial, ethnic or other improper grounds (cognizable class) and has therefore violated the defendant's Constitutional right to a fair and impartial jury. **Note**: While the defense usually brings the motion, it may be made by *either party.*

c. *People v. Wheeler* (1978) 22 Cal. 3d 258 – Peremptory challenges based on group bias violates the defendant's right to jury trial in the California Constitution. *Batson v. Kentucky* (1986) 476 U.S. 79 – Race based challenges violate the Equal Protection Clause of the U.S. Constitution.

   i. Cognizable Classes –
      1. RACE
      2. ETHNICITY
      3. RELIGION
      4. GENDER
      5. SEXUAL ORIENTATION

   ii. Non-Cognizable Classes
      1. Poor
      2. Less Educated
      3. Battered Women
      4. Young
      5. People over 70
      6. Insufficient English

   iii. History

      1. *Batson* ***is*** the federal standard and *Wheeler* ***was*** the California standard used to determine whether the peremptory challenge was improper.

a. Both cases used procedures involving 3 part tests to determine the propriety of the challenge. However, the first prong of the tests in each case was different. *Defendants argued the state burden (Wheeler) was more difficult for them to meet than the federal burden (Batson).*

b. The California Supreme Court tried to reconcile the two cases in 2003 in *People v. Johnson* (2003) 30 Cal. 4th 1302.

c. In 2005, the U.S. Supreme Court reversed *Johnson* and "clarified" the *Batson* decision by stating that the first prong of the *Batson* test need only be satisfied by production of evidence sufficient to permit the trial judge to draw an *inference of discrimination*. *Johnson v. California* (2005) 545 U.S. 162.

2. Current State of the Law - Still a 3 prong test based on the holdings of *Batson* and *Johnson.*

   a. STEP 1 – The party objecting to the peremptory challenge must make out a prima facie case "*by showing the totality of the relevant facts gives rise to an inference of a discriminatory purpose.*"

      i. Presumption that challenge was made on a constitutionally permissible ground

      ii. Burden is on party making challenge to demonstrate a prima facie case

      iii. Rebut the showing of a prima facie case

         1. Members of the group allegedly discriminated against were left on the panel.

         2. Good faith argument that you didn't know the challenged juror was a member of a cognizable group. *People v. Barber* (1988) 200 Cal.App.3d 378, 389.

         3. Consider justifying challenges before you make them if you see a problem coming up. Court can use this as evidence of the prosecutor's sincerity. *U.S. v. Contreras-Contreras* (9th Cir. 1996) 83 F. 3d 1103.

   b. STEP 2 – If a prima facie case is made, the "*burden shifts to the [party making the original, objected to juror challenge] to explain adequately the racial [or other cognizable class] exclusion by offering permissible race neutral justifications for the strikes*."

      i. "The justification need not support a challenge for cause, and even a 'trivial' reason, if genuine and neutral, will suffice."

(*People v. Arias* (1996) 13 Cal. 4th 92, 136 citing *People v. Montiel* (1993) 5 Cal. 4th 877, 910, fn. 9.)

ii. Permissible Reasons

1. Hostility towards law enforcement - (*People v. Turner* (1994) 8 Cal. 4th 137, 171)

2. Nervous - (*People v. Johnson* (1989) 47 Cal. 3d 1194, 1217-1219)

3. Unconventional appearance - (*People v. Ward* (2005) 36 Cal. 4th 186, 202)

4. Too Eager - (*People v. Ervin* (2000) 22 Cal. 4th 48)

5. Sleepy - (*People v. Johnson* (1989) 47 Cal. 3d 1194, 1217-1219)

6. Bilingual Juror Who Won't Defer to Court Translator - (*Hernandez v. New York* (1991) 500 U.S. 352, 356-357)

    a. CAUTION – Be careful when kicking bilingual jurors. (*People v. Gonzales* (2008) 165 Cal.App.4th 620)

7. Hostility – (*People v. Turner* (1994) 8 Cal. 4th 137, 168-172)

8. Intelligence – (*People v. Arias* (1996) 13 Cal. 4th 92, 137-139)

9. Sympathetic to defendant – (*People v. Mayfield* (1997) 14 Cal. 4th 668, 724, 726)

10. Past jury experience - (*People v. Farnam* (2002) 28 Cal. 4th 107, 138)

11. Limited life experience - (*People v. Arias* (1996) 13 Cal. 4th 92, 137-139)

12. Occupation - (*People v. Ervin* (2000) 22 Cal. 4th 48, 75)

13. Desire for next juror - (*People v. Alvarez* (1996) 14 Cal. 4th 155, 194-195)

c. STEP 3 – "*If a race neutral explanation is tendered, the trial court must then decide… whether the opponent of the strike has proved purposeful racial discrimination.*"

i. In analyzing the reason given, the court must make a "sincere and reasoned attempt to evaluate each stated reason as applied to each challenged juror." (*People v. Silva* (2001) 25 Cal. 4th 345, 386)

d. Practical Issues

i. The court raises its own *Batson/Wheeler* motion. (*People v. Lopez* (1991) 3 Cal. App. 4th Supp. 11)

ii. The court asks you to justify challenge(s) *before* finding a prima facie case.

iii. The court finds no prima facie case made, but asks you to justify challenges. (*People v. Cornwell* (2005) 37 Cal 4th 50)

iv. Multiple *Batson/Wheeler* challenges in a single voir dire

1. New prima facie case must be shown with every motion. (*People v. Irvin* (1996) 46 Cal. App. 4th 1340)

2. Court has no duty to request reasons for previously challenged jurors where motion was denied. (*People v. Avila* (2006) 38 Cal 4th 491)

e. Comparative Analysis

i. Comparing the common non-racial characteristics between challenged and non-challenged jurors of different racial backgrounds. (e.g. Prosecutor leaves a white teacher on the jury but challenges an African American teacher.) Argument is that prosecutor is discriminating instead of kicking teachers because a teacher was left on the jury.

ii. History

1. Federal Courts approved of comparative analysis in *Turner v. Marshall* (9th Cir. 1997) 121 F. 3d 1248.

a. California rejected comparative analysis in *People v. Landry* (1996) 49 Cal.App.4th 785. *People v. Jones* (1997) 15 Cal. 4th 119.

b. However, things began to change in 2003 with *Johnson*. Then in 2005, the U.S. Supreme Court decided *Miller-El v. Dretke* (2005) 545 U.S. 231 using comparative analysis in the decision.

c. *Snyder v. Louisiana* (2008) 552 U.S. ___ , 128 S.Ct. 1203.

iii. Current Law – Comparative Analysis is alive in California. *People v. Lenix* (2008) 44 Cal.4th 602.

a. Does not affect the 3 Step Test

b. Comparative Analysis is to be used as a piece of circumstantial evidence to judge credibility in the Third Step.

f. Dealing with *Batson/Wheeler* Motions

i. Realize that a challenge will likely come at some point during jury selection and be ready to deal with it.

ii. It should go without saying, but ***NEVER*** excuse a juror on the basis of race, ethnicity, religion, gender etc.

iii. Question all jurors you plan to challenge.

iv. Be prepared to rebut a prima facie case by arguing applicable factors:

1. Point out any members of the group who were not challenged.

2. If you were honestly not aware the juror was a member of a cognizable group. *People v. Barber* (1988) 200 Cal.App.3d 378, 389. Challenged juror appeared to be a white and non-Hispanic to DA. DA did not recognize the surname to be Hispanic. Court found DA to be sincere.

3. Possible to justify challenges before you make them if you see a problem coming up. Court can use this as evidence of the prosecutor's sincerity. *U.S. v. Contreras-Contreras* (9th Cir. 1996) 83 F. 3d 1103.

v. Assume that a prima facie case will be made and be prepared to give race neutral reasons for excusing the juror.

vi. If defense counsel fails to make a prima facie case, consider asking the judge to make a record supporting the denial.

1. If judge finds no prima facie case, consider stating your reasons anyway.

2. Do not give reasons unless the court specifically finds no prima facie case. Giving reasons without a specific finding on the first prong will constitute an implied finding of a prima facie case. *People v. Arias* (1996) 13 Cal. 4th 92; *People v. Gutierrez* (2002) 28 Cal. 4th 1083.

vii. Save your notes. If case is reviewed later, voir dire may be an issue. Always save your notes so that if asked, you are better able to recollect why you may have challenged a specific juror.

1. At remand hearing, the prosecutor does NOT have to state reasons under oath. (*People v. Kelly* (2008) 162 Cal.App.4th 797)

2. At remand hearing, the prosecutor does NOT have to turn over original voir dire notes. (*People v. Kelly* (2008) 162 Cal.App.4th 797)

3. At remand hearing, prosecutor cannot be cross-examined by the defense. (*People v. Kelly* (2008) 162 Cal.App.4th 797)

4. "I don't recall" Doesn't Fly - *Paulino v. Harrison* (9th Cir. 2008) 542 F.3d 692.

g. Remedies

i. If a Wheeler motion is granted, the entire venire is dismissed, a new venire is brought in, and jury selection starts over.

ii. *People v. Willis* (2002) 27 Cal. 4th 811 – Allows other remedies for a *Wheeler* violation if offended party agrees.

1. Fines

2. Reseating wrongfully excused juror

3. *Possibly* allowing offended party more challenges

h. Consequences

i. Motion Granted at Trial – Remedies are arguably sanctions

1. B&P 6086.7(a)(3) – Court must notify the bar of any judicial sanctions against an attorney…

2. B&P 6068(o)(3) – Attorney must self report any judicial sanction …

3. However, reporting will likely not be required unless the conduct is egregious.

ii. Motion Erroneously Denied and Case Reversed

1. B&P 6086.7(b)(2) – Court must notify bar whenever there is a reversal.

2. B&P 6068(o)(7) – Attorney must notify bar whenever reversal is based in whole or in part upon misconduct of the attorney.

JURY SELECTION IN SEXUAL ASSAULT CASES

A. Guiding Principle

Jury Selection is important in all trials, but is of critical importance for the successful prosecution of sexual assault cases. Therefore, jury selection deserves thorough preparation and knowledge.

B. Key Components to Effective Jury Selection

- **Know the law and the rules**

You should learn the controlling statutes on this subject and the case law that interprets it. The controlling statutes on jury selection are contained in the Code of Civil Procedure (CCP) sections 190 through 237. CCP 223, 225, and 228 through 231. are regularly utilized in criminal jury

trials and set out the method of voir dire, the requirements for a challenge for cause and the number of preemptory challenges permitted to each side. CCP 223 provides that in a criminal trial, each party could submit questions for the court to pose to the prospective jurors; it also establishes that each party has "the right to examine, by oral and direct questioning, any or all prospective jurors." It also limits the examination of prospective jurors to be conducted "only in the aid of the exercise of challenges for cause."

An area of implied bias that is outlined under the law is pursuant to CCP 229(f) "The existence of a state of mind in the juror evincing enmity against, or bias towards, either party."

You should also learn the judicial rules regarding jury selection. The San Diego Superior Court's web page includes jury selection information that is very useful. It has the script that the courts are encouraged to read to jurors and it even has an approved questionnaire with many good questions.

In addition, you should learn the particular way that a certain court does jury selection. Courts conduct jury selection differently utilizing their own system of examining 12 jurors at a time or more jurors.

A prosecutor should also know the law of "Wheeler" regarding preemptory challenges and know how to make the right record that supports that a preemptory challenge is made ethically and without bias against a protected class.

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VOIR DIRE

I. LAW

A. The Adoption of Proposition 115 in 1990 Changed Voir Dire.

1. Pre-Proposition 115 Rules
   a. The attorneys participated in the questioning process.
   b. The purpose of voir dire was to allow the parties to intelligently exercise their peremptory challenges. (*People v. Williams* (1981) 29 Cal.3d 392.)

2. In 1990, the voters passed Proposition 115, which included a new Code of Civil Procedure section 223 regulating voir dire in criminal cases.

   "In a criminal case, the court shall conduct the examination of prospective jurors. However, the court may permit the parties, upon a showing of good cause, to supplement the examination by such further inquiry as it deems proper, or shall itself submit to the prospective jurors upon such a showing, such additional questions by the parties as it deems proper." (Code of Civ. Proc., §223.)
   a. The court shall conduct the examination of prospective jurors.
   b. Upon a showing of good cause, the court may allow the attorneys to question the jurors.
   c. Where practicable, voir dire shall occur in the presence of the other jurors.
   d. Questioning shall be conducted only to aid in the exercise of challenges for cause.

3. Section 223 was amended effective January 1, 2001, to again allow attorney questioning.

"In a criminal case, the court shall conduct an initial examination of prospective jurors. The court may submit to the prospective jurors additional questions requested by the parties as it deems proper. Upon completion of the court's initial examination, counsel for each party shall have the right to examine, by oral and direct questioning, any or all of the prospective jurors. The court may, in the exercise of its discretion, limit the oral and direct questioning of prospective jurors by counsel. The court may specify the maximum amount of time that counsel for each party may question an individual juror, or may specify an aggregate amount of time for each party, which can then be allocated among the prospective jurors by counsel."

a. Amendment become effective January 1, 2001.
b. Court can limit amount of time allotted to the parties.
c. Shall be conducted "only in the aid of the exercise of challenges for cause."

B. Two Types of Challenges

1. Challenge for Cause – CCP § 225.
   a. General Disqualification – CCP § 225(b)(1)(A).
      - Juror lacks the statutory requirements to be eligible for jury duty – CCP §§ 203, 228(a).
      - Deaf, or any other incapacity – CCP §228(b).
      - Rarely utilized.
   b. Implied Bias – CCP §§ 225(b)(1)(B), 229.
      - Eight statutory grounds.
      - Prejudice is inferred.
   c. Actual Bias – CCP § 225(b)(1)(C).
      - The existence of a state of mind on the part of the juror in reference of the case, or to any of the parties, which will prevent the juror from acting with entire impartiality, and without prejudice to the substantial rights of any party.
   d. Number of challenges – unlimited.

2. Peremptory Challenges
    a. No reason need be given – CCP § 226(b).
    b. Number of peremptory challenges allowed.
        - Depends on punishment allowed and number of defendants on trial.
        - Single defendant case.
            A. 20 – If punishable by death or life imprisonment – CCP § 231(a)
            B. 6 – If punishable with maximum of 90 days or less – CCP § 231(b).
            C. 10 – all other cases – CCP § 231(a).
        - Multiple defendant case.
            A. Death or life imprisonment case – CCP § 231(a).
                - 20 joint challenges.
                - 5 individual challenges for each defendant.
                - DA gets same total as entire defense team.
            B. 90 days or less – CCP § 231 (b).
                - 6 joint challenges
                - 4 individual challenges for each defendant.
                - DA gets same total as entire defense team.
            C. All other cases – CCP § 231 (a).
                - 10 joint challenges.
                - 5 individual challenges for each defendant.
                - DA gets same total number as entire defense team.
        - Alternates – CCP § 234.
            A. Single defendant case – one per number of alternates.
            B. Multiple defendant cases – each defendant gets one per number of alternate.
            C. DA gets same total number as defense team.
        - A pass does not count as a challenge – CCP § 231(d)(e).

C. *Wheeler* motion (*People v. Wheeler* (1978) 22 Cal.3d 258)

The use of peremptory challenges to remove prospective jurors on the basis of a presumed group bias based on membership in a racial, ethnic, religious or gender group violates the state and federal constitution. See also *Batson v. Kentucky* (1986) 476 U.S. 79.

1. A peremptory challenge is presumed to be exercised on constitutionally permissible grounds.

2. The moving party has the burden of establishing a prima facie case that the opposing side has challenged jurors solely on the basis of group bias.
    a. The excused juror must be a member of a cognizable group.
    b. The moving party must "raise an inference" that the challenge was based upon membership in the cognizable group, and not because of specific bias.

3. Upon a judicial finding that a prima facie case exists, the burden shifts to the non-moving party to make a detailed and group-neutral justification for the peremptory challenge.

4. The court must decide whether the peremptory challenge was made for constitutionally permissible reasons.

5. If the *Wheeler* motion is granted several remedies exist, including begin voir dire again with a new panel or seating the challenged juror. The offending attorney may have to self-report to the state bar for disciplinary proceedings.

II. PROCEDURE

A. Pre-Voir Dire Conference – Rule 228.1

1. Establish ground rules.

2. How many jurors will be called into the box?

3. What topics will be addressed by the judge?

4. Time limits.

5. Number of alternates.

6. Give judge voir dire questions.

B. Court clerk will summon a jury panel to courtroom.

C. Clerk will take roll and swear the panel – CCP §232.

D. Questioning the jurors.

1. Judge will question jurors first – CCP §223.
    a. Will typically ask 8 – 10 general questions. See Standard of Judicial Administration, § 8.5
    b. Very limited follow-up.

2. Defense Attorney will question second.
    a. Defense will "challenge for cause" – CCP § 226(d).
    b. "Pass for cause."

3. DA questions last.
    a. "Pass for cause."
    b. "Approach the Bench" to exercise challenge for cause.

E. Exercising peremptory challenges.

1. DA goes first – CCP § 226(d).
    a. "I would ask the court to thank and excuse Juror Number ___, Mr./Mrs. ."

2. Defense goes second.

3. Continues until both sides pass consecutively.
    a. "The People are pleased with the panel. We pass."
    b. 12 jurors will be sworn.

4. Select Alternates – CCP § 234.
    a. Same order as original 12 jurors.
    b. Swear alternates.

5. Court will excuse unused jurors.

ELIMINATING BIAS IN JURY SELECTION

WHY SHOULD LAWYERS STRIVE FOR UNBIASED JURY SELECTION?

1. JUSTICE FOR DEFENDANTS
2. FAIRNESS FOR JURORS
3. COMMUNITY TRUST
4. PERSONAL ETHICS
5. EXAMPLE FOR OTHERS

THE CASES

- ***Swain v. Alabama*** (1965) US Supreme Court found that the purposeful excuse of African American jurors based on race violated the Equal Protection Clause if the Defendant could prove actual harm.
- ***People v. Wheeler*** (1978) California Supreme Court found the excuse of African American jurors based on race violated the Equal Protection Clause, if Defendant could prove there was no race neutral reason for excuse.
- ***Batson v. Kentucky*** (1986) US Supreme Court found that the party who excuses jurors of a cognizable racial group may have to demonstrate race neutral reasons or risk sanctions.
- ***JEB v. Alabama*** (1994) Established rights for female jurors.

US Law Protects: Race and gender.
CA Law Protects: Race, gender, ethnicity, sexual orientation, religion and other "cognizable" groups.
NOT PROTECTED: Felons, legal residents, youth.

An Irishman ... is emotional, kindly, and sympathetic. If a Presbyterian enters the jury box ... let him go. He is as cold as the grave. Beware of Lutherans, especially the Scandinavians; they are almost sure to convict.

-Clarence Darrow

Batson/Wheeler

- Don't Panic!
- Do call a timeout!
- Defense burden: "to make a prima facie case by showing the totality of the relevant facts gives rise to an inference of a discriminatory purpose."
- Not a numbers game.
- Do rebut with the record: others in group are still on panel, lack of knowledge, etc...
- If the court makes a prima facie case, the burden shifts to you to provide an adequate race or group neutral reason for challenge. (hostile, nervous, unconventional appearance, too eager, sleepy, bilingual and can't defer to translator, low intelligence, sympathetic to defendant, jury experience, life experience, occupation, desire for next juror.
- If court finds that challenge was group based you start over and may have reporting obligations. Post conviction: REVERSAL/REPORTING

The Law and Rules of Voir Dire and Jury Selection

- Examination of jurors for challenges for cause. CCP 223
- 10 peremptory/20 life cases
- Defense questions first/People challenge first. CCP 231(d)

Challenge for Cause

Cause:

- Actual Bias
  - Inability to be impartial
- Implied Bias

Actual Bias

- Juror related to a party or witness
- Legal relationship to party or witness
- Previous jury relationship with p or w
- Financial outcome—except as taxpayer
- Unqualified opinion as to merits
- Action pending which would utilize same jury
- Death penalty issues
- Bias towards either party

Implied Bias

- **Attitude towards a party**
- **Witness (cops, attorneys, doctors)**
- **Subject matter (DV, date rape, child)**
- **Mental health issues or system in general**

Proper Voir Dire

- **Any question "reasonably designed to assist in the intelligent exercise of peremptory challenges" People v. Williams**
- **Do you belong to any religious sect whose teachings might interfere with the consideration of the case? People v. Daily**
- **Do you have any inherent belief based upon any church's teachings that might interfere with a fair consideration of the case? People v. Daily**
- **Do you belong to any political, religious, social , industrial, fraternal, law enforcement or other organization whose beliefs or teachings would prejudice you for or against either party to the case? People v. Boyle (1937) 22 C.A.2d 143**

Proper Voir Dire

- If you were faced with this charge, would you be willing to be tried with jurors who had the same attitude toward the charge and the defendant as you do now? People v. Estorga (1928) 206 C. 81
  - Questions that tend to indoctrinate but otherwise are sufficient for the intelligent exercise of peremptory challenges. People v. Williams
    - Example: Explanation of the law applicable to the case as a basis for hypothetical questions to determine whether the jurors would follow the instructions of the court, and to ascertain their state of mind on the issues presented. People v. Wein (1958) 50 C.2d 383

Proper Voir Dire

- Will you follow the judge's instructions? People v. Modell
- May ask about a juror's willingness to apply legal principles. People v. Williams

- **What is your occupation? People v. Boorman (1956) 142 C.A. 2d 85**

Improper Voir Dire

- **What religion do you belong to? People v. Daily (1958) 157 C.A. 2d 649**
- **Questions that seek to ascertain juror's views on death penalty in actual or hypothetical cases not before him (i.e. Hitler) People v. Fields (1983) 35 C.3d 329**
- **Questions that attempts to indoctrinate the jury as to the meaning or applicability of particular Rules of Law**
  - **Example: "Do you have any personal objection to a rule of criminal jurisprudence which provides that those jurors entertaining a reasonable doubt of the defendant's guilt should vote for acquittal?" People v. Parker (1965) 235 C.A. 2d 86**

Voir Dire Objections

- **The question is not related to challenges for cause or to the intelligent exercise of peremptory challenges.**
- **The question attempts to indoctrinate jurors on the law.**
- **The question asks jurors to prejudge the evidence.**
- **The question tests juror's understanding of the law.**
- **Counsel is attempting to prejudice the jury for or against a particular party.**
- **Counsel is attempting to argue the case. People v. Williams (1981) 29 C.3d 392, 408**
- **Counsel is attempting to educate the jury panel to the particular facts of the case. People v. Williams**
- **Question is based on an incorrect statement of the law. People v. Tibbetts (1929) 102 C.A. 787, 789-90**
- **Question is in improper form.**
  - **If question is proper in scope, the court can still require counsel to rephrase the question in a neutral non-argumentative form. People v. Williams**

Batson/Wheeler Rules

- **"The use of peremptory challenges to remove prospective jurors on the sole ground of group bias" Wheeler**
- **"The Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race" Batson**
- **May be raised by either party**
- **Basic rule: There must be "an identifiable group distinguished on racial, religious, ethnic, or similar grounds – we may call this 'group bias'."**

Cognizable Groups

- **Race**
- **Ethnicity – (surnames)**
- **Religion – (sect) caveat: can't judge**
- **Gender**
- **Sexual Orientation**
- **Disability…**

Non Cognizable Groups

- Low income/poor/unemployed
- Less educated
- Blue Collar workers
- Battered Women
- Young Adults
- Age

Batson/Wheeler Three Prong Approach

- Moving party must make Prima Facie "by showing that the totality of the facts gives rise to an *inference* of discriminatory purpose" Johnson 545 U.S. 162
- Once shown the burden shifts to the other party to explain by offering race-neutral justifications
- Trial Court decides whether moving party has proved purposeful racial discrimination

United State v. Collins 9th circuit

- Drug case
- 1st African American juror was struck by defense
- Only remaining African American struck by Prosecutor
- Defense objected
- Prosecutor declined to give reason saying "no pattern:
- Court said no pattern
- 9th Circuit remanded for government to provide justifications

9th Circuit Instruction

- "…encourage prosecutors to state their reasons for peremptory strikes at the time of a Batson challenge…the burden of explaining the reasons for a challenge…is minimal. Judicial economy would be well served…in fact, prosecutors usually have good and permissible reasons for their challenges; refusing to state them can create unnecessary suspicion, as well as unnecessary litigation." Concurring opinion

Comparative Analysis

- "If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar non-black who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at Batson's third step."
- *Miller-El v. Dretke* (2005)545 U.S. 231

Practical Tips

- **Remain Calm**
- **Be thorough in your questioning**
- **Keep notes on each juror and why**
- **Give more than one reason**
- **Think about comparative analysis. Why are you keeping one teacher and not the other?**
- **Make a record of non verbal reasons**
- **"There is more to human communication than mere linguistic content. On appellate review, a voir dire answer sits on a page of transcript. In the trial court, however, advocates and trial judges watch and listen as the answer is delivered. Myriad subtle nuances may shape it, including attitude, attention, interest, body language, facial expression and eye contact." *People v. Lenix* (2008) 44 Cal. 4th 602**

Neutral Justification

- Life experience
- Inability to understand
- Hung Jury
- Hostile Body Language
- Nervous
- Smiled at Defendant
- Good rapport w/ D atty
- Sympathetic looks to D
- Family members arrested

Neutral Justification

- Teachers are liberal
- Clothes/hair
- Non-responsive
- Age—youth is not a class
- Lack of seriousness
- Law Student
- Poor Grooming

Neutral Justification

- Lack of ability to understand legal concepts
- Battered woman
- Anti-death penalty
- Limited education
- Translation—would not follow
- Juror lives close to crime scene
- Hunch/Gut feeling/etc are valid

Penalties and Remedies

Penalties

- B&P 6068© Appellate Court reports you
- B&P 6068(0)(3)—You report you
- B&P 6086.7(b)—reversal for prosecutorial misconduct requires report

Remedies

- Used to be excuse the panel and start again
- “severe” monetary sanctions and/or
- With the consent of moving party, RESEAT the challenged juror *People v. Willis* (2002) 27 Cal.4th 811.
- As to sanctions, Court must make an order first.

Voir Dire

I. LAW

A. The Adoption of Proposition 115 in 1990 Changed Voir Dire. *People v. Edwards* (1991) 54 Cal.3rd 787, 829; *People v. Carpenter* (1997) 15 Cal.4th 312, 353; *People v. Jenkins* (2000) 22 Cal.4th 900, 990.

1. Pre-Proposition 115 Rules

a. The attorneys participated in the questioning process.

b. The purpose of voir dire was to allow the parties to intelligently exercise their peremptory challenges. (*People v. Williams* (1981) 29 Cal.3d 392.)

2. In 1990, the voters passed Proposition 115, which included a new Code of Civil Procedure section 223 regulating voir dire in criminal cases.

> "In a criminal case, the court shall conduct the examination of prospective jurors. However, the court may permit the parties, upon a showing of good cause, to supplement the examination by such further inquiry as it deems proper, or shall itself submit to the prospective jurors upon such a showing, such additional questions by the parties as it deems proper." (Code Civ. Proc., § 223.)

a. The court shall conduct the examination of prospective jurors.

b. Upon a showing of good cause, the court may allow the attorneys to question the jurors.

c. Where practicable, voir dire shall occur in the presence of the other jurors.
d. Questioning shall be conducted only to aid in the exercise of challenges for cause.

3. Section 222 was amended effective January 1, 2001, to again allow attorney questioning.

> "In a criminal case, the court shall conduct an initial examination of prospective jurors. The court may submit to the prospective jurors additional questions requested by the parties as it deems proper. Upon completion of the court's initial examination, counsel for each party shall have the right to examine, by oral and direct questioning, any or all of the prospective jurors. The court may, in the exercise of its discretion, limit the oral and direct questioning of prospective jurors by counsel. The court may specify the maximum amount of time that counsel for each party may question an individual juror, or may specify an aggregate amount of time for each party, which can then be allocated among the prospective jurors by counsel."

a. Amendment become effective January 1, 2001.

b. Court can limit amount of time allotted to the parties.

c. Shall be conducted "only in the aid of the exercise of challenges for cause."

B. Challenges.

1. Challenge for Cause – Because voir dire "shall be conducted only to aid in the exercise of challenges for case," the specific grounds must be known.

a. Unlimited Number

b. Three Types of Challenges for Cause

(1) **General disqualification** – that the juror is disqualified from serving in the action on trial. (Code Civ. Proc., § 225(b)(1)(A).)

(a) Section 203 lists general disqualifications for jurors:

1) Persons who are not citizens of the United States.

2) Persons who are less than 18 years of age.

3) Persons who are not domiciliaries of the State of California, as determined pursuant to Article 2 (commencing with Section 2020) of Chapter 1 of Division 2 of the Elections Code.

4) Persons who are not residents of the jurisdiction wherein they are summoned to serve.

5) Persons who have been convicted of malfeasance in office or a felony, and whose civil rights have not been restored.

6) Persons who are not possessed of sufficient knowledge of the English language, provided that no person shall be deemed incompetent solely because of the loss of sight or hearing in any degree or other disability which impedes the person's ability to communicate or which impairs or interferes with the person's mobility.

7) Persons who are serving as grand or trial jurors in any court of this state.
8) Persons who are the subject of conservatorship.

(b) Section 228(b) lists additional requirements: A loss of hearing, or the existence of any other incapacity which satisfies the court that the challenged person is incapable of performing the duties of a juror in the particular action without prejudice to the substantial right of the challenging party.

(2) **Implied Bias** – Section 229

A challenge for implied bias may be taken for one or more of the following causes, and for no other:

(a) Consanguinity or affinity within the fourth degree to any party, to an officer of a corporation which is a party, or to any alleged witness or victim in the case at bar.

(b) Standing in the relation of, or being the parent, spouse, or child of one who stands in the relation of, business with either party; or surety on any bond or obligation for either party, or being the holder of bonds or shares of capital stock of a corporation which is a party; or having stood within one year previous to the filing of the complaint in the action in the relation of attorney and client with either party or with the attorney for either party. A depositor of a bank or a holder of a savings account in a savings and loan association shall not be deemed a creditor of that bank or savings and loan association for the purpose of this paragraph solely by reason of his or her being a depositor or account holder.

(c) Having served as a trial or grand juror or on a jury of inquest in a civil or criminal action or been a witness on a previous or pending trial between the same parties, or involving the same specific offense or cause of action; or having served as a trial or grand juror or on a jury within one year previously in any criminal or civil action or proceeding in which either party was the plaintiff or defendant or in a criminal action where either party was the defendant.

(d) Interest on the part of the juror in the event of the action, or in the main question involved in the action, except his or her interest as a member or citizen or taxpayer of a county, city and county, incorporated city or town, or other political subdivision of a county, or municipal water district.

(e) Having an unqualified opinion or belief as to the merits of the action founded upon knowledge of its material facts or of some of them.

(f) The existence of a state of mind in the juror evincing enmity against, or bias towards, either party.

(g) That the juror is party to an action pending in the court for which he or she is drawn and which action is set for trial before the panel of which the juror is a member.

(h) If the offense charged is punishable with death, the entertaining of such conscientious opinions as would preclude the juror finding the defendant guilty; in which case the juror

may neither be permitted nor compelled to serve.

(3) **Actual Bias** – Section 225(b)(1)(C)

Actual bias - the existence of a state of mind on the part of the juror in reference to the case, or to any of the parties, which will prevent the juror from acting with entire impartiality, and without prejudice to the substantial rights of any party.

2. Peremptory Challenges

a. No Reason Need be Given – CCP § 226(b).

b. Number of Peremptory Challenges Allowed.

(1) Depends on punishment allowed and number of defendants on trial.

(2) Single defendant case.

(a) 20 – If punishable by death or life imprisonment – CCP § 231(a).

(b) 6 – if punishable with maximum of 90 days or less – CCP § 231(b).

(c) 10 – all other cases – CCP § 231(a).

(3) Multiple defendant case.

(a) Death or life imprisonment case – CCP § 231(a).

1) 20 joint challenges.

2) 5 individual challenges for each defendant.

3) DA gets same total as entire defense team.

(b) 90 days or less – CCP § 231(b).

1) 6 joint challenges.

2) 4 individual challenges for each defendant.

3) DA gets same total as entire defense team.

c) All other cases – CCP § 231(a).

1) 10 joint challenges

2) 5 individual challenges

3) DA gets same total as entire defense team

(4) Alternates – CCP § 234.

(a) Single defendant case – one per number of alternates.

(b) Multiple defendant cases – each defendant gets one per number of alternates.

(c) DA gets same total number as defense team.

(5) A pass does not count as a challenge – CCP § 231(d)(e).

II. APPLICATION OF THE LAW

A. Defense challenge for cause.

1. The standard is "whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Wainright v. Witt* (1985) 469 U.S. 412, 424; *People v. Ghent* (1987) 43 Cal.3rd 739, 767.

2. Erroneous denial of defense challenge is not reversible per se. *Ross v. Oklahoma* (1988) 487 US 81, 87; *People v. Edwards* (1991) 54 Cal.3d 787, 830.)

3. To prevail on appeal, defendant must show prejudice, that is: 1) he used a peremptory challenge on the questioned juror, 2) he exhausted all his peremptory challenges, and 3) he expressed dissatisfaction with the final jury. (*People v. Morris* (1991) 53 Cal.3d 152, 184; *People v. Mickey* (1991) 54 Cal.3d 612, 683: *People v. Crittenden* (1994) 9 Cal.4th 83, 121; *People v. Samayoa* (1997) 15 Cal.3d 795, 821; *People v. Cunningham* (2001) 25 Cal.3d 926, 976.)

4. No prejudice if the juror was not part of the final jury. (*People v. Edwards* (1991) 54 Cal.3d 787, 830; *People v. Clarke* (1992) 3 Cal.4th 41, 155; *People v. Johnson* (1992) 3 Cal.4th 1183, 1210; *People v. Cain* (1995) 10 Cal.4th 1, 61; *People v. Hawkins* (1995) 10 Cal.4th 920, 939; *People v. Horton* (1995) 11 Cal.4th 1068, 1093; *People v. Ramos* (1997) 15 Cal.4th 1133, 1159; *People v. Barnett* (1998) 17 Cal.4th 1044, 1113; *People v. Millwee* (1998) 18 Cal.4th 96, 146.)

5. No prejudice if defendant did not use all peremptory challenges. (*People v. Kelly* (1990) 51 Cal.3d 931, 960; *People v. Morris* (1991) 53 Cal.3d 152, 184; *People v. Price* (1991) 1 Cal.4th 324, 401; *People v. Danielson* (1992) 3 Cal.4th 691, 713; *People v. Mayfield* (1993) 5 Cal.4th 142, 169; *People v. Garceau* (1993) 6 Cal.4th 140, 174; *People v. Cain* (1995) 10 Cal.4th 1, 61; *People v. Lucas* (1995) 12 Cal.4th 415, 480; *People v. Samayoa* (1997) 15 Cal.4th 795, 821; *People v. Ramos* (1997) 15 Cal.4th 1133, 1158; *People v. Williams* (1997) 16 Cal.4th 635, 667; *People v. Barnett* (1998) 17 Cal.4th 1044, 1113; *People v. Millwee* (1998) 18 Cal.4th 96, 146; *People v. Bolin* (1998) 18 Cal.4th 297, 315; *People v. Ochoa* (1998) 19 Cal.4th 353, 444; *People v.*

Waidla (2000) 22 Cal.4th 690, 715; *People v. Bemore* (2000) 22 Cal.4th 809, 837; *People v. Ayala* (2000) 23 Cal.4th 225, 261; *People v. Lewis* (2001) 25 Cal.4th 610, 634.)

6. Being required to use a peremptory challenge on a denied challenge for cause does not establish prejudice. (*People v. Gordon* (1990) 50 Cal.3d 1223, 1247; *People v. Kaurish* (1990) 52 Cal.3d 648, 674.)

7. Did defendant request additional peremptory challenges? (*People v. Edwards* (1991) 54 Cal.3d 787, 831.)

    a. Request for additional challenges denied. (*People v. Pride* (1992) 3 Cal.4th 195, 230; *People v. Ramos* (1997) 15 Cal.4th 1133, 1159; *People v. Williams* (1997) 16 Cal.4th 635, 667.)

8. Defendant must express dissatisfaction with the final jury to prove prejudice. (*People v. Edwards* (1991) 54 Cal.3d 787, 830; *People v. Danielson* (1992) 3 Cal.4th 691, 713; *People v. Lucas* (1995) 12 Cal.4th 415, 830; *People v. Williams* (1997) 16 Cal.4th 635, 667; *People v. Millwee* (1998) 18 Cal.4th 96, 146; *People v. Ochoa* (1998) 19 Cal.4th 353, 444; *People v. Bemore* (2000) 22 Cal.4th 809, 837; *People v. Ayala* (2000) 23 Cal.4th 225, 261; *People v. Lewis* (2001) 25 Cal.4th 610, 634; *People v. Weaver* (2001) 26 Cal.4th 876, 911; *People v. Seaton* (2001) 26 Cal.4th 598, 637.

9. No duty on court sua sponte to excuse juror on its own motion. (*People v. Bolin* (1998) 18 Cal.4th 297, 315; *People v. Lucas* (1995) 12 Cal.4th 415, 481.)

10. Court not required to allow defense opportunity to rehabilitate challenged juror if bias is obvious. (*People v. Bittaker* (1989) 48 Cal.3d 1046, 1085; *People v. Carpenter* (1997) 15 Cal.4th 312, 355; *People v. Samayoa* (1997) 15 Cal.3d 795, 823.)

11. Court not required to tell juror his civic duty requires him to set aside his personal beliefs regarding the death penalty. (*People v. Sanders* (1990) 15 Cal.3d 471, 503; *People v. Miranda* (1987) 44 Cal.3d 57, 96.)

12. Examples of proper denial of defense challenge for cause. (*People v. Stankewitz* (1990) 51 Cal.3d 72, 103; *People v. Kelly* (1990) 51 Cal.3d 931, 960; *People v. Mincey* (1992) 2 Cal.4th 457; *People v. McPeters* (1992) 2 Cal.4th 1148, 1177; *People v. Crittenden* (1994) 9 Cal.4th 83, 122; *People v. Samayoa* (1997) 15 Cal.4th 795, 822; *People v. Williams* (1997) 16 Cal.4th 635, 668; *People v. Jenkins* (2000) 22 Cal.4th 900, 987; *People v. Cunningham* (2001)25 Cal.4th 926, 976; *People v. Weaver* (2001) 26 Cal.4th 876, 911.)

B. DA challenge for cause.

1. Use same standard (*Witt*) as defense challenge for cause. (*People v. Crittenden* (1994) 9 Cal.4th 83, 121; *People v. Pride* (1992) 3 Cal.4th 195, 227; *People v. Mincey* (1992) 2 Cal.4th 408, 456; *People v. Bradford* (1997) 15 Cal.4th 1229, 1318.)

2. Erroneous granting of DA challenge is reversible per se. (G*rey v. Mississippi* (1987) 481 US 648, 666; *People v.* C*ooper* (1991) 53 Cal.3d 771, 809; *People v. Edwards* (1991) 54 Cal.3d 787, 831.)

   a. Reverses penalty verdict, not guilt. (*People v. Ashmus* (1991) 54 Cal.3d 932, 962.)

   b. If juror's answers equivocal, trial judge's ruling will be upheld. (*People v. Ruiz* (1988) 44 Cal.3d 589, 618; *People v. Ghent* (1987) 43 Cal.3d 739, 768; P*eople v. Coleman* (1988) 46 Cal.3d 749, 767.)

C. Peremptory Challenges.

1. It is improper to ask questions intended solely to educate the jury, compel the jurors to commit to vote a certain way, prejudice the jury, argue the case, indoctrinate the jury, instruct the jury on the law, or test the juror's knowledge of the law. (*People v. Edwards* (1912) 163 Cal. 752; *People v. Willams* (1981) 29 Cal.3d 392, 408; *People v. Ashmus* (1991) 54 Cal.3d 932, 959.)

2. It is permissible to ask a juror about his attitude about a particular rule of law only if (1) the rule is relevant or material to the case, and (2) the rule appears to be controversial; e.g., the juror has indicated some hostility toward the rule, or it is commonly known the community harbors strong feelings about it. (*People v. Balderas* (1985) 41 Cal.3d 144, 185; *People v. Williams* (1981) 29 Cal.3d 392, 408.)

3. Examples of Permissible Questions Relating to Murder

    a. Asked jurors whether they would be able to vote guilty if, after deliberations, they were persuaded that the changes had been proved beyond a reasonable doubt. (*People v. Fierro* (1991) 1 Cal.4th 173, 209.)

    b. "[I]f I prove beyond a reasonable doubt each and every element of each of the offenses charged . . . can you assure me that you would be willing to return a verdict of guilty even though you have unanswered questions?" *People v. Riel* (2000) 22 Cal.4th 1153, 1178 fn. 4.

    c. In order to avoid a hung jury the prosecutor observed that each juror must "come to your own conclusion," but also stressed the value of "work[ing] together to try to discover the truth." (*People v. Fierro* (1991) 1 Cal.4th 173, 210, fn 8.)

    d. In questioning a juror, the prosecutor asked her if she believed a person charged with committing a crime such as defendant's must be insane. The prosecutor also asked: Do you feel there could be such a thing as a person who is legally insane? *People v. Fields* (1983) 35 Cal.3rd 329, 358.

    e. Questions designed to determine jurors' views regarding the felony-murder rule. (*People v. Pinholster* (1992) 1 Cal.4th 865, 913; *People v. Ochoa* (2001) 26 Cal.4th 398, 431; *People v. Ervin* (2000) 22 Cal.4th 48, 70.)

f. California's self-defense "no need to retreat in your own home" rule is controversial and was relevant in this case, so conviction is reversed for forbidding questions on attitudes about this rule. (*People v. Williams* (1981) 29 Cal.3d 392, 411.)

g. Whether they would view a person's possession of recently stolen property as circumstantial evidence that the person stole the property, whether they considered rape more of an assaultive than a sexually motivated offense, and whether they thought it was possible for a young man to rape an elderly woman and not be mentally ill. (*People v. Mendoza* (2000) 24 Cal.4th 130, 167.)

4. Examples of Impermissible Questions Relating to Murder (Typically Asked by the Defense):

a. Do you believe in self-defense in the home? (Not controversial; *People v. Williams* (1981) 29 Cal.3d 392, 411.)

b. "Whether, if they believed that a witness was an informant and was testifying 'in exchange for some lesser sentence,' then that 'would have some bearing on the weight or credibility that that witness may have in your mind?' " (*People v. Mason* (1991) 52 Cal.3d 909, 940.)

c. In a death penalty case, the court did not "allow either party to discuss the law – such as the meaning of diminished capacity – or ask questions that required the prospective jurors to pretry the facts of the case." *People v. Rich* (1988) 45 Cal.3rd 1036, 1104.

d. Defense counsel was not permitted to question prospective jurors regarding their ability to view accomplice testimony with suspicion and distrust. *People v. Johnson* (1989) 47 Cal.3rd 1194, 1224.

e. In an eyewitness case where the defense expected to call Dr. Elizabeth Loftus, the defense was prohibited from eliciting opinions of potential jurors concerning the effects of stress on perception. *People v. Sanders* (1990) 51 Cal.3rd 471, 506.

f. Defense counsel stated, "It's clear a girlfriend has an interest to lie. I just want to make sure that the jurors don't automatically, before they hear her testimony, say she's lying because she's the girlfriend." The trial court barred this line of questioning on the ground that the defendant was trying to educate the jurors and induce them to prejudge the evidence. We cannot say that the court abused its discretion in doing so. *People v. Helton* (1984) 162 Cal.App.3rd 1141, 1145.

g. "What do you feel is a proper punishment for someone who has committed a rape or other serious sexually related crime?" (*People v. Ochoa* (1998) 19 Cal.4th 353, 444.)

h. Many detailed questions regarding personal experience with sexual molestation in a child molestation-murder case. (*People v. Earp* (1999) 20 Cal.4th 826, 851, fn 1.)

i. In a capital murder case where one victim was a three year old child, defendant requested that the trial court inquire as to the ages of the prospective jurors' grandchildren. The court denied the request, stating, "Whether you're going to be prejudiced by the fact that a young child is involved in this case doesn't turn upon whether you have one at the moment. It turns upon whether your personality and capacities are such as to be able to deal with the wrench that goes with that. No matter how many or how few grandchildren you have got or what age you are. It's something that jurors are going to have to deal with; they're going to have to be able to set aside." *People v. Box* (2000) 23 Cal.4th 1153, 1178.

j. In a capital murder trial defendant wanted the following questions included on the questionnaire:

> What has been your favorite job and what (do/did) you enjoy about it?"
> "What has been your least favorite job and what (do/did) you dislike most about it?"
>
> "If you were a supervisor or employer, what do you think is the best way to keep workers in line?"
>
> "A person should maintain his or her belief on a subject so long as he or she feels that belief if right. Strongly Agree ___ Agree Somewhat ___ Disagree Somewhat ___ Strongly Disagree ___ Please explain."
>
> *People v. Navarette* (2003) 30 Cal.4th 458, 486.

k. "The court's restriction on questions regarding a prospective juror's birth date, religion and religious service attendance, or voting on the retention of Chief Justice Rose Bird," was not an abuse of discretion. (*People v. Ramos* (1997) 15 Cal.4th 1133, 1158.)

l. Why did you vote as you did on Proposition 8? (Invades juror's privacy) (*People v. Wells* (1983) 149 Cal.App.3d 721, 726.)

m. What was the most important part of Proposition 8? (Unfocused) (*People v. Wells* (1983) 149 Cal.App.3d 721, 726.)

n. Asking a prospective juror whether the Supreme Court's capital opinions under former Chief Justice Rose Bird were "kind of off base" and whether the vote not to retain her or other justices was correct may be error. (*People v. Ochoa* (1998) 19 Cal.4th 353, 428.)

D. Death Qualification Voir Dire.

1. The test.

> "With respect to questions directing the juror's attention to the facts of the case, we have observed that: "The *Witherspoon-Witt* [citations] voir dire seeks to determine only the views of the prospective jurors about capital punishment in the abstract . . . . [Citations.] The inquiry is directed to whether, without knowing the specifics of the case, the juror has an 'open mind' on the penalty determination. There was no error in ruling that questions related to the jurors' attitudes toward evidence that was to be introduced in this trial could not be asked during the sequestered *Witherspoon-Witt* voir dire." (*People v. Clark* (1990) 50 Cal.3rd 583, 597; see also *People v. Sanders* (1995) 11 Cal.4th 475, 539. Nor is it error to preclude counsel from seeking to compel a prospective juror to commit to vote in a particular way (*People v. Rich* (1988) 45 Cal.3rd 1036, 1105, or to preclude counsel from indoctrinating the jury as to a particular view of the facts. *People v. Jenkins* (2000) 22 Cal.4th 900, 990.

2. However, "A challenge for cause may be based on the prospective juror's response when informed of facts or circumstances likely to be present in the case being tried. (*People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1005.) Thus, we have affirmed the principle that either party is entitled to ask prospective jurors questions that are specific enough to determine if those jurors harbor bias, as to some fact or circumstance shown by the trial evidence, that would cause them not to follow an instruction directing them to determine penalty after considering aggravating and mitigating evidence. (*People v. Cash* (2002) 28 Cal.4th 703, 720-721. "Our decisions have explained that death-qualification voir dire must avoid two extremes. On the one hand, it must not be so abstract that it fails to identify those jurors whose death penalty views would prevent or substantially impair the performance of their duties as jurors in the case being tried. On the other hand, it must not be so specific that it requires the prospective jurors to prejudge the penalty issue based on a summary of the mitigating and aggravating evidence likely to be presented. (See *People v. Jenkins* [*supra*, 22 Cal.4th at

3. Compare the following cases:

    a. *People v. Pinholster* (1992) 1 Cal.4th 865, 916-918. The prosecutor was allowed to ask questions about jurors' willingness to impose the death penalty in a burglary-murder case. "Each juror's reluctance to impose the death penalty was based not on an evaluation of the particular facts of the case, but on an abstract inability to impose the death penalty in a felony-murder case." *Id.* at 916.

    "Defendant objects that fact-based voir dire is impermissible under *Witt, supra*, 469 U.S. 412. As we have already noted, we have commented in the past that questions directed to jurors' attitudes toward the particular facts of the case are not relevant to the death-qualification process, so that a trial court that refused to permit such questions did not err. (*People v. Clark, supra*, 50 Cal.3rd at p. 597.) We have also said, however, that "a court may properly excuse a prospective juror who would automatically vote against the death penalty in the case before him, regardless of his willingness to consider the death penalty in other cases." (*People v. Fields, supra*, 35 Cal.3rd at pp. 357-358.) *Id.* at 917-918.

    "Trial courts have broad discretion in determining what questions to permit. (*People v. Johnson, supra*, 47 Cal.3rd at p. 1224.) We see no prejudicial error in allowing questions regarding the particular facts of the case as long as more relevant questions and answers provide the basis for the court's decision." *Id.* at 918.

b. *People v. Medina* (1995) 11 Cal.4th 694, 745-746. Initially, the trial court did not permit defense questions asking jurors' whether they could vote for life imprisonment if the defendant had committed multiple murders.

"The inquiry that defendant sought to make was not relevant to the death qualification process, however . . . . [V]oir dire seeks to determine only the views of the prospective jurors about capital punishment in the abstract, to determine if any, because of opposition to the death penalty, would 'vote *against* the death penalty without regard to the evidence produced at trial.' [Citations.] Such a juror may be excused because he or she would be unable to faithfully and impartially apply the law. The inquiry is directed to whether, without knowing the specifics of the case, the juror has an 'open mind' on the penalty determination. There was no error in ruling that questions related to the jurors' attitudes toward evidence that was to be introduced in this trial could not be asked during the sequestered . . . voir dire." [Fn. omitted.] *Id.* at 746.

c. *People v. Cash* (2002) 28 Cal.4th 703, 718-723. The defendant had prior murders. He wanted to ask jurors "whether there were any particular crimes" or "any facts" that would cause that juror "automatically to vote for the death penalty." The trial court prohibited such questions. The Supreme Court reversed the death verdict.

"Thus, we affirmed the principle that either party is entitled to ask prospective jurors questions that are specific enough to determine if those jurors harbor bias, as to some or circumstance shown by the trial evidence, that would cause them not to follow an instruction directing them to determine a penalty after considering aggravating and mitigating evidence." *Id.* at 720-721.

"Our decisions have explained that death-qualification voir dire must avoid two extremes. On the one hand, it must not be so abstract that it fails to identify those jurors whose

death penalty views would prevent or substantially impair the performance of their duties as jurors in the case being tried. On the other hand, it must not be so specific that it requires the prospective jurors to prejudge the penalty issue based on a summary of the mitigating and aggravating evidence likely to be presented." *Id.* at 721-722.

d. *People v. Burgener* (2003) 29 Cal.4th 833, 865-866. In a penalty phase retrial "the trial court sustained the People's objections when defense counsel asked prospective jurors whether they would impose the death penalty after considering a rather detailed account of some of the facts of this case, and whether a prospective juror could continue to be impartial after hearing a list of defendant's prior crimes. There was no error in ruling that questions related to the jurors attitudes toward evidence that was to be introduced in this trial could not be asked during the sequestered [death-qualification] voir dire.'" (*Jenkins, supra,* 22 Cal.4th at p. 991.) Defendant had no right to ask specific questions that invited prospective jurors to prejudge the penalty issue based on a summary of the aggravating or mitigating evidence (*People v. Cash* (2002) 28 Cal.4th 703, 721-722 [122 Cal.Rptr.2d 545, 50 P.3d 332]), to educate the jury as to the facts of the case (*People v. Sanders* (1995) 11 Cal.4th 475, 538-539 [46 Cal.Rptr.2d 751, 905 P.2d 420]), or to instruct the jury in matters of law (*People v. Ashmus* (1991) 54 Cal.3rd 932, 959 [2 Cal.Rptr. 2d 112, 820 P.2d 214])." *Id.* at 865.

e. *People v. Navarette* (2003) 30 Cal.4th 458, 489-490. The defendant complained because the court limited his oral questioning, relating to the nature of the crimes charged. The Supreme Court rejected the defendant's contentions because his questionnaire did address these issues. The Court addressed *Medina* as compared with *Pinholster* and *Cash*.

"Defendant argues that *Medina* prevented him from asking jurors if they would automatically impose the death

penalty in a double-murder case, whereas under *Pinholster*, the People are free to inquire whether any jurors would automatically refuse to impose the death penalty in a burglary-murder case. This imbalance, he claims, led to a jury that was biased in favor of the death penalty, in violation of his rights under the federal Constitution.

We need not decide the continuing validity of our comment in *Medina*, because here the trial court did not prevent defendant from asking jurors whether they would automatically impose the death penalty in a multiple-murder case, the defendant did ask such a question." *Id.* at 489-490.

f. *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 47-48. "Coffman complains the trial court prevented her counsel from questioning the prospective jurors on their views regarding the circumstances of the case that were likely to be presented in evidence in order to determine how such circumstances might affect their ability to fairly determine the proper penalty in the event of a conviction."

In reality, "the trial court invited counsel to draft a proposed question for prospective jurors eliciting their attitudes toward the death penalty and in fact itself questioned a prospective juror whether he could weigh all the evidence before reaching a penalty determination in a case involving multiple murder."

Citing *Jenkins* and *Cash*, the Court found no abuse of discretion. "Unlike in *People v. Cash, supra,* 28 Cal.4th at pages 720-722, the trial court did not categorically prohibit inquiry into the effect on prospective jurors of the other murders, evidence of which was presented in the course of the trial. Rather, the trial court merely cautioned Coffman's counsel not to recite specific evidence expected to come before the jury in order to induce the juror to commit to voting in a particular way. (See *People v. Burgener* (2003) 29 Cal.4th 833, 865." Id. at 47-48.

g. *People v. Viera* (2005) 35 Cal.4th 264, 283-286. "Prior to the commencement of voir dire, defense counsel submitted a proposed jury questionnaire that contained the following question: "Do you feel you would automatically vote for death instead of life imprisonment with no parole if you found the defendant guilty of two or more murders?" The prosecution objected that the subject areas "should be covered by the Court" in its death qualification voir dire. "The question was not included in the jury questionnaire. Moreover, the judge's questions to prospective jurors did not ask this or a similar question."

Citing *Cash*, the defendant claimed he was entitled to a reversal of the death verdict. After contrasting the facts in *Medina* with those in *Cash*, the Supreme Court found the defendant made no effort to ask this legitimate question during the oral portion of voir dire.

"As our discussion of *Medina* in *Cash* suggests, a trial court's categorical prohibition of an inquiry into whether a prospective juror could vote for life without parole for a defendant convicted of multiple murder would be error. Multiple murder falls into the category of aggravating or mitigating circumstances "likely to be of great significance to prospective jurors." (*Cash, supra,* 28 Cal.4th at p. 721.) The Attorney General does not dispute this point. Rather, the Attorney General argues that defendant was not denied the opportunity to conduct voir dire on the subject of multiple murder. We agree.

Although the trial court did not include the sough-after question on multiple murder in the jury questionnaire, it never suggested that defense counsel could not raise the issue in voir dire." *Id.* at 285. "Although asking the multiple-murder question in the jury questionnaire would not have been improper, refusal to include the question was not error so long as there was an opportunity to ask the question during voir dire. Because defendant did not attempt to have the trial court conduct a multiple murder inquiry during voir dire, and the trial court was given no

opportunity to rule on the propriety of that inquiry, we conclude defendant cannot claim error." *Id.* at 286.

4. Examples of Permissible Death Qualifying Questions

    a. "Court: Both sides are entitled to have 12 jurors that, if necessary, can make that choice and make the choice based on the law that I outlined and make it fair for the defendant, fair for the prosecution, the sides they represent here. Do you believe you are a juror who can do that or do you think that your abilities are substantially impaired by your feelings about the death penalty? *People v. Harris* (2005) 37 Cal.4th 310, 330.

    b. The court asked each individual panel member, out of the presence of other prospective jurors, five questions, which may be paraphrased as follows: (1) Would you automatically refuse to impose the death penalty regardless of the evidence or the law in the case? (2) If defendant were found guilty of first degree murder with special circumstances at the guilt phase, would you automatically vote to impose the death penalty without regard to the evidence or the law? (3) Would your death penalty views prevent you from making an impartial decision as to the defendant's guilt? (4) Are your views such that you would never vote to impose the death penalty? (5) Are your views such that you would refuse to consider imposing the death penalty *in this case? People v. Balderas* (1985) 41 Cal.3rd 144, 187-188.

    c. The prosecutor asked: "[I]f I could prove to you beyond a reasonable doubt and to a moral certainty that he's guilty of murder, first degree murder with special circumstances, and based upon the second phase of this trial, the penalty phase, that you thought the death penalty was appropriate, could you then take that system and say, 'Yes, that man, Gregory Smith, he deserves the death penalty,' and vote accordingly; could you do that?" *People v. Smith* (2003) 30 Cal.4th 581, 603 fn. 3.

d. The defense wanted to ask: "Whether there are any aggravating circumstances which would cause a prospective juror to automatically vote for the death penalty, without considering the alternative of life imprisonment without possibility of parole." *People v. Cash* (2002) 28 Cal.4th 703, 719.

e. "Do you feel you would automatically vote for death instead of life imprisonment with no parole if you found the defendant guilty of two or more murders?" *People v. Viera* (2005) 35 Cal.4th 264, 283.

f. Whether an accomplice to murder should be subject to the death penalty, with or without intent to kill, was a proper subject for voir dire in *People v. Fuentes* (1985) 40 Cal.3rd 629.

g. The trial court permitted the prosecutor to ask each prospective juror whether, in the words of a representative query, the fact that a capital defendant was "18 or 19 at the time of the killing . . . [would] automatically cause you to vote for the lesser punishment of life imprisonment without possibility of parole?" In addition, the prosecutor was permitted to ask each juror in the sequestered voir dire whether "you would be able to consider imposing the death penalty . . . if we have one victim as opposed to requiring that the defendant kill two or more people?" *People v. Noguera* (1992) 4 Cal.4th 599, 645.

h. In an effort to illustrate the difference between "consider" and "chose", the prosecutor asked: "You can walk by Tiffany's and you can look in the window and you can meaningfully consider this $15,000 stone and that gold Rolex watch; right? And you can think, well, I'd rather have this one with the rubies in it or that with the stones in it or this beautiful diamond ring. But there is a difference between considering and choosing. Could you ever possibly choose the death penalty?" *People v. Smith* (2003) 30 Cal.4th 581, 602-603.

i. In describing the penalty phase of trial, the prosecutor gave illustrations of aggravating and mitigating evidence. As an example of aggravating evidence, he often mentioned a hypothetical defendant with a history of many prior felony convictions. To illustrate mitigating evidence, he often mentioned a hypothetical defendant who had received the Congressional Medal of Honor, was a war hero, had saved someone's life, or had no prior criminal history. The illustrations of aggravating evidence used by the prosecutor and the trial court resembled the aggravating evidence actually presented by the prosecution in this case, whereas the illustrations of mitigating evidence were wholly unlike defendant's mitigating evidence. *People v. Seaton* (2001) 26 Cal.4th 598, 635-636.

j. At the outset of voir dire, counsel informed the trial court that he wished to question the prospective jurors as to whether they believed a robbery accomplice who does not kill should be punished as severely as an intentional killer. Accordingly, counsel submitted for the court's approval the following question: "Do you believe that one who only aids and abets the commission of an attempted robbery and does not intentionally aid and abet the actual killing during the commission of said attempted robbery should be treated under the law in the same fashion as the actual killer?" *People v. Fuentes* (1985) 40 Cal.3rd 629, 637.

5. Examples of Impermissible Death Qualifying Questions (Typically asked by the defense)

a. The defense proposed a lengthy, factually detailed question that would have given prospective jurors substantial information about defendant's victims and the manner in which they were killed. He then wanted to ask whether the juror would automatically vote for death. (*People v. Mason* (1991) 52 Cal.3rd 909, 940 fn. 4).

b. In an effort to determine whether the evidence of serious burn injuries suffered by the victims would cause a jury to automatically vote for the death penalty, defendant sought

to inquire about the prospective jurors' attitudes toward such injuries. The People objected and, at that stage of the examination, the court ruled that the jury would not be told of the injuries suffered by Ava Gawronski, and defendant would not be permitted to ask the prospective jurors if knowledge of the extent of those injuries would affect their ability to perform their duties. *People v. Clark* (1990) 50 Cal.3rd 583, 596. But see fn. 3.

c. Defense counsel posed a hypothetical question to a prospective juror as follows. "[T]wo men go into a restaurant in the early morning hours. They herd 11 people, two customers and nine employees, to the back area of the restaurant. The two men are armed with shotguns. They rob all the people and make them lie on the floor and they rob them all. They put them all in a freezer. The people obey all the orders and instructions that the two men give them. They do not fight with them or protest. They are told to get on their knees and face the walls. They do that. No one says anything. And the two men open fire, as you put it, with their shotguns. And they go on firing even though one of the victims begs for her life. They do not stop firing until they run out of ammunition. They pick up the casings that their guns have expended. They leave everybody in this darkened freezer where people are dying and people are moaning. [¶] Now, if those are the facts that you are presented with at the penalty phase, you understand you are entitled to rely on those facts as one of the circumstances in deciding a penalty, do you not?" Defense counsel was also permitted to ask: "Now, don't you believe that that's precisely the kind of case where with your ideas of justice, the death penalty is the only appropriate kind of penalty?" She then asked if various hypothetical aggravating and mitigating factors—such as the defendant's criminal record, age, and background—would make a difference to the juror. *People v. Sanders* (1995) 11 Cal.4th 475, 535.

d. A juror was asked: "So now you're in a penalty phase with the defendant like this one, who has committed

this kind of a crime and I want you to ask yourself, after looking inside yourself whether you could actually vote to put another human being to death for doing a crime like this:

"Let's assume you have a person who decides to commit a robbery because he wants to make some additional money. He goes out and gets himself a loaded handgun to make the odds more in his favor that he'll be successful. And he finds a victim that he thinks has some money and sure enough, the victim has some money when the defendant sticks him up. Sometime about this point the defendant has the brilliant thought that if I let this guy go, he's going to the police and I might get caught and whereas if I don't let him go, don't leave any witnesses, I won't get caught, in other words, I'd better kill him to make myself more certain of getting away.

"That's exactly what he does; he shoots the victim once through the heart and subsequently he's caught and he's been brought before us and you have found beyond any doubt that he's guilty of first degree murder committed during the course of a robbery.

"Do you think it's possible that you could go in the jury room, look the other jurors in the eye and knowing you'll have to come out and look the defendant in the eye also, say I think this crime is so horrendous and the other background facts we've heard are so horrendous, he should be put to death?" *People v. Visciotti* (1992) 2 Cal.4th 1, 46-47. (Defense counsel did not, but should have objected).

e. The prosecutor asked: "If we get to the penalty phase, if we get that far, then you've already found the man guilty of first degree murder. It's a horrible crime. And you found he committed this murder while he was engaged in a robbery, based on facts that would be something like a man decides to commit a robbery, arms himself with a handgun to make sure he's successful, robs his victim. During the course of the robbery it occurs to him that if the

victim is not alive, there won't be anybody going to the police and complain . . . . So, realizing that, the robber points his gun at the victim, pulls the trigger, shoots him once through the heart and kills him.

That's the type of facts we're going to be dealing with, something along those lines, perhaps.

Do you feel just, first of all, theoretically like it's possible you could vote for the death penalty if you're faced with facts such as those?" *People v. Visciotti* (1992) 2 Cal.4th 1, 46. (Defense counsel did not, but should have objected).

f. Defense counsel was precluded from informing the prospective jurors that defendant had been convicted of first degree murder and that the special circumstance of torture murder had been found true, and prohibiting mention of the specific facts surrounding the torture murder, in violation of his Sixth Amendment right to a fair trial. *People v. Davenport* (1995) 11 Cal.4th 1171, 1204.

g. The court curtailed voir dire only when defendant asked her what type of murder case warranted the death penalty. *People v. DeSantis* (1992) 2 Cal.4th 1198, 1218.

h. If Adolf Hitler were on trial charged with murdering six million people . . . ." The court refused to permit the question, saying that "I don't think it is fair to ask a juror to speculate what they might do with Adolf Hitler. We therefore conclude that a court may properly prohibit voir dire which seeks to ascertain a juror's views on the death penalty in actual or hypothetical cases not before him. *People v. Fields* (1983) 35 Cal.3rd 329, 354-357.

i. The defense was precluded from questioning potential jurors regarding factors and circumstances they would deem significant in selecting an appropriate sentence. *People v. Johnson* (1989) 47 Cal.3rd 1194, 1225.

j. "Is life without the possibility of parole an appropriate sentence for someone who robs, rapes and kills an elderly woman?" *People v. Wright* (1990) 52 Cal.3rd 367, 419 fn. 18.

k. "What do you feel is a proper punishment for someone who has committed a rape or other serious sexually related crime?" (*People v. Ochoa* (1998) 19 Cal.4th 353, 444.)

l. The defense extensively questioned the prospective jurors on their understanding of the two possible sentences at the penalty phase, defense counsel declared that life imprisonment without possibility of parole meant life imprisonment *without possibility of parole.* In so doing, they stated or implied that the penalty would inexorably be carried out. They contrasted life imprisonment without possibility of parole, which might be imposed on defendant, with life imprisonment *simpliciter*, which had been imposed on such notorious criminals as Charles Manson and Sirhan Sirhan. *People v. Ashmus* (1991) 54 Cal.3rd 932, 957-960.

m. The prosecutor remarked that it would be proper to consider "sympathetic factors" in defendant's favor, but that defendant would be appearing in court "dressed up and decent" and had "over six years to get ready for today." The prosecutor continued in a similar vein that "[w]hat you're not going to have is the victim appear[ing] in court . . ." (*People v. Montiel* (1993) 5 Cal.4th 877, 914-915, fn. 14.)

n. In penalty re-trial, defense counsel wanted to inform jury the first penalty trial resulted in a hung jury and asked jurors about their knowledge of the first trial. (*People v. Wash* (1993) 6 Cal.4th 215, 252.)

o. Defense counsel wanted to inform jury that penalty reversal was not caused by an appellate reversal of an earlier death verdict. (*People v. Wash* (1993) 6 Cal.4th 215, 254.)

p. Questions regarding Governor's commutation power. (*People v. Pinholster* (1992) 1 Cal.4th 865, 918; *People v. Carpenter* (1997) 15 Cal.4th 312, 359.)

q. Asking a juror whether he had voted for a ballot proposition to enact the death penalty or would vote for such a penalty in a public election may be error. (*People v. Ochoa* (1998) 19 Cal.4th 53, 428.)

r. Asking a prospective juror whether the Supreme Court's capital opinions under former Chief Justice Rose Bird were "kind of off base" and whether the vote not to retain her or other justices was correct may be error. (*People v. Ochoa* (1998) 19 Cal.4th 353, 428.)

CHALLENGE FOR CAUSE

- Actual Bias
  - –Inability to be impartial
- Implied Bias

ACTUAL BIAS

- Related to party or witness
- Legal relationship to party or witness
- Previous relationship
- Bias towards either party
- Interest in financial outcome
- Action pending utilizing same jury
- Death penalty issues

IMPLIED BIAS

- Attitude towards:
  - –Party
  - –Witness (police, doctors, attorneys, victims)
  - –System in general
  - –Subject matter (rape, child molest, date rape)
-

Personal Experience

- A juror in child abuse case did not disclose that she was sexually abused as a child because the abuse was never reported. During deliberations she said that she believed the alleged victim because the same thing had happened to her. When this information came to light after the trial, a new trial was ordered (*State v. Delgado*, 223 Wis.2d 270, 588 N.W. 2d 1, 1999).

JURY SELECTION IN SEX CRIMES CASES;

A. KEYS TO EFFECTIVE JURY SELECTION

1. "Eliminate prospective jurors with ingrained bias."

    a. CHALLENGE FOR CAUSE

        i. Actual Bias/Inability to be impartial

            1. Related to party or witness
            2. Legal relationship to party or witness
            3. Previous relationship
            4. Bias towards either party
            5. Interest in financial outcome
            6. Action pending utilizing same jury
            7. Death penalty issues

        ii. Implied Bias/Attitude Towards

            1. Party
            2. Witness (police, doctors, attorneys, victims)
            3. System in general
            4. Subject matter (rape, child molest, date rape)

HOW TO HANDLE A BATSON/WHEELER MOTION

I. BATSON / WHEELER MOTIONS

a. At some time during their career, every prosecutor will have to deal with the dreaded "*Wheeler*" motion. It usually occurs following the People's use of a peremptory challenge against someone of a particular race, gender or ethnic background.

b. How it works – The defense makes a motion, usually on state and federal grounds, that the prosecutor has excused a juror based on racial, ethnic or other improper grounds (cognizable class) and has therefore violated the defendant's Constitutional right to a fair and impartial jury. **Note**: While the defense usually brings the motion, it may be made by *either party*.

c. *People v. Wheeler* (1978) 22 Cal. 3d 258 – Peremptory challenges based on group bias violates the defendant's right to jury trial in the California Constitution. *Batson v. Kentucky* (1986) 476 U.S. 79 – Race based challenges violate the Equal Protection Clause of the U.S. Constitution.

   i. Cognizable Classes –
      1. RACE
      2. ETHNICITY
      3. RELIGION
      4. GENDER
      5. SEXUAL ORIENTATION

ii. Non-Cognizable Classes
    1. Poor
    2. Less Educated
    3. Battered Women
    4. Young
    5. People over 70
    6. Insufficient English

iii. History

1. *Batson* ***is*** the federal standard and *Wheeler* ***was*** the California standard used to determine whether the peremptory challenge was improper.

    a. Both cases used procedures involving 3 part tests to determine the propriety of the challenge. However, the first prong of the tests in each case was different. *Defendants argued the state burden (Wheeler) was more difficult for them to meet than the federal burden (Batson).*

    b. The California Supreme Court tried to reconcile the two cases in 2003 in *People v. Johnson* (2003) 30 Cal. 4th 1302.

    c. In 2005, the U.S. Supreme Court reversed *Johnson* and "clarified" the *Batson* decision by stating that the first prong of the *Batson* test need only be satisfied by production of evidence sufficient to permit the trial judge to draw an *inference of discrimination*. *Johnson v. California* (2005) 545 U.S. 162.

2. Current State of the Law - Still a 3 prong test based on the holdings of *Batson* and *Johnson.*

    a. STEP 1 – The party objecting to the peremptory challenge must make out a prima facie case "*by showing the totality of the relevant facts gives rise to an inference of a discriminatory purpose.*"

        i. Presumption that challenge was made on a constitutionally permissible ground

ii. Burden is on party making challenge to demonstrate a prima facie case

iii. Rebut the showing of a prima facie case

1. Members of the group allegedly discriminated against were left on the panel.

2. Good faith argument that you didn't know the challenged juror was a member of a cognizable group. *People v. Barber* (1988) 200 Cal.App.3d 378, 389.

3. Consider justifying challenges before you make them if you see a problem coming up. Court can use this as evidence of the prosecutor's sincerity. *U.S. v. Contreras-Contreras* (9th Cir. 1996) 83 F. 3d 1103.

b. STEP 2 – If a prima facie case is made, the "*burden shifts to the [party making the original, objected to juror challenge] to explain adequately the racial [or other cognizable class] exclusion by offering permissible race neutral justifications for the strikes*."

i. "The justification need not support a challenge for cause, and even a 'trivial' reason, if genuine and neutral, will suffice." (*People v. Arias* (1996) 13 Cal. 4th 92, 136 citing *People v. Montiel* (1993) 5 Cal. 4th 877, 910, fn. 9.)

ii. Permissible Reasons

1. Hostility towards law enforcement - (*People v. Turner* (1994) 8 Cal. 4th 137, 171)

2. Nervous - (*People v. Johnson* (1989) 47 Cal. 3d 1194, 1217-1219)

3. Unconventional appearance - (*People v. Ward* (2005) 36 Cal. 4th 186, 202)

4. Too Eager - (*People v. Ervin* (2000) 22 Cal. 4th 48)

5. Sleepy - (*People v. Johnson* (1989) 47 Cal. 3d 1194, 1217-1219)

6. Bilingual Juror Who Won't Defer to Court Translator - (*Hernandez v. New York* (1991) 500 U.S. 352, 356-357)

    a. CAUTION – Be careful when kicking bilingual jurors. (*People v. Gonzales* (2008) 165 Cal.App.4th 620)

7. Hostility – (*People v. Turner* (1994) 8 Cal. 4th 137, 168-172)

8. Intelligence – (*People v. Arias* (1996) 13 Cal. 4th 92, 137-139)

9. Sympathetic to defendant – (*People v. Mayfield* (1997) 14 Cal. 4th 668, 724, 726)

10. Past jury experience - (*People v. Farnam* (2002) 28 Cal. 4th 107, 138)

11. Limited life experience - (*People v. Arias* (1996) 13 Cal. 4th 92, 137-139)

12. Occupation - (*People v. Ervin* (2000) 22 Cal. 4th 48, 75)

13. Desire for next juror - (*People v. Alvarez* (1996) 14 Cal. 4th 155, 194-195)

c. STEP 3 – "*If a race neutral explanation is tendered, the trial court must then decide... whether the opponent of the strike has proved purposeful racial discrimination.*"

i. In analyzing the reason given, the court must make a "sincere and reasoned attempt to evaluate each stated reason as applied to each challenged juror." (*People v. Silva* (2001) 25 Cal. 4th 345, 386)

d. Practical Issues

i. The court raises its own *Batson/Wheeler* motion. (*People v. Lopez* (1991) 3 Cal. App. 4th Supp. 11)

ii. The court asks you to justify challenge(s) *before* finding a prima facie case.

iii. The court finds no prima facie case made, but asks you to justify challenges. (*People v. Cornwell* (2005) 37 Cal 4th 50)

iv. Multiple *Batson/Wheeler* challenges in a single voir dire

1. New prima facie case must be shown with every motion. (*People v. Irvin* (1996) 46 Cal. App. 4th 1340)

2. Court has no duty to request reasons for previously challenged jurors where motion was denied. (*People v. Avila* (2006) 38 Cal 4th 491)

e. Comparative Analysis

i. Comparing the common non-racial characteristics between challenged and non-challenged jurors of different racial backgrounds. (e.g. Prosecutor leaves a white teacher on the jury but challenges an African American teacher.) Argument is that prosecutor is discriminating instead of kicking teachers because a teacher was left on the jury.

ii. History

1. Federal Courts approved of comparative analysis in *Turner v. Marshall* (9th Cir. 1997) 121 F. 3d 1248.

a. California rejected comparative analysis in *People v. Landry* (1996) 49 Cal.App.4th 785. *People v. Jones* (1997) 15 Cal. 4th 119.

b. However, things began to change in 2003 with *Johnson*. Then in 2005, the U.S. Supreme Court decided *Miller-El v. Dretke* (2005) 545 U.S. 231 using comparative analysis in the decision.

c. *Snyder v. Louisiana* (2008) 552 U.S. ___ , 128 S.Ct. 1203.

iii. Current Law – Comparative Analysis is alive in California. *People v. Lenix* (2008) 44 Cal.4th 602.

a. Does not affect the 3 Step Test

b. Comparative Analysis is to be used as a piece of circumstantial evidence to judge credibility in the Third Step.

f. Dealing with *Batson/Wheeler* Motions

i. Realize that a challenge will likely come at some point during jury selection and be ready to deal with it.

ii. It should go without saying, but ***NEVER*** excuse a juror on the basis of race, ethnicity, religion, gender etc…

iii. Question all jurors you plan to challenge.

iv. Be prepared to rebut a prima facie case by arguing applicable factors:

1. Point out any members of the group who were not challenged.

2. If you were honestly not aware the juror was a member of a cognizable group. *People v. Barber* (1988) 200 Cal.App.3d 378, 389. Challenged juror appeared to be a white and non-Hispanic to DA. DA did not recognize

the surname to be Hispanic. Court found DA to be sincere.

3. Possible to justify challenges before you make them if you see a problem coming up. Court can use this as evidence of the prosecutor's sincerity. *U.S. v. Contreras-Contreras* (9th Cir. 1996) 83 F. 3d 1103.

v. Assume that a prima facie case will be made and be prepared to give race neutral reasons for excusing the juror.

vi. If defense counsel fails to make a prima facie case, consider asking the judge to make a record supporting the denial.

1. If judge finds no prima facie case, consider stating your reasons anyway.

2. Do not give reasons unless the court specifically finds no prima facie case. Giving reasons without a specific finding on the first prong will constitute an implied finding of a prima facie case. *People v. Arias* (1996) 13 Cal. 4th 92; *People v. Gutierrez* (2002) 28 Cal. 4th 1083.

vii. Save your notes. If case is reviewed later, voir dire may be an issue. Always save your notes so that if asked, you are better able to recollect why you may have challenged a specific juror.

1. At remand hearing, the prosecutor does NOT have to state reasons under oath. (*People v. Kelly* (2008) 162 Cal.App.4th 797)

2. At remand hearing, the prosecutor does NOT have to turn over original voir dire notes. (*People v. Kelly* (2008) 162 Cal.App.4th 797)

3. At remand hearing, prosecutor cannot be cross-examined by the defense. (*People v. Kelly* (2008) 162 Cal.App.4th 797)

4. "I don't recall" Doesn't Fly - *Paulino v. Harrison* (9th Cir. 2008) 542 F.3d 692.

g. Remedies

i. If a Wheeler motion is granted, the entire venire is dismissed, a new venire is brought in, and jury selection starts over.

ii. *People v. Willis* (2002) 27 Cal. 4th 811 – Allows other remedies for a *Wheeler* violation if offended party agrees.

1. Fines

2. Reseating wrongfully excused juror

3. *Possibly* allowing offended party more challenges

h. Consequences

i. Motion Granted at Trial – Remedies are arguably sanctions

1. B&P 6086.7(a)(3) – Court must notify the bar of any judicial sanctions against an attorney…

2. B&P 6068(o)(3) – Attorney must self report any judicial sanction …

3. However, reporting will likely not be required unless the conduct is egregious.

ii. Motion Erroneously Denied and Case Reversed

1. B&P 6086.7(b)(2) – Court must notify bar whenever there is a reversal..

2. B&P 6068(o)(7) – Attorney must notify bar whenever reversal is based in whole or in part upon misconduct of the attorney.

Voir Dire

- **Examination of jurors for challenges for cause. CCP 223**
- **10 peremptory/20 life cases**
- **Defense questions first/People challenge first. CCP 231(d)**

Voir Dire

- **Cause**
- **Actual Bias**
  - **Inability to be impartial**
- **Implied Bias**

CAUSE

- **Juror related to a party or witness**
- **Legal relationship to party or witness**
- **Previous jury relationship with p or w**
- **Financial outcome—except as taxpayer**
- **Unqualified opinion as to merits**
- **Action pending which would utilize same jury**
- **Death penalty issues**
- **Bias towards either party**

IMPLIED BIAS

- Attitude towards a party
- Witness (cops, shrinks)
- Subject matter (DV, date rape, child)
- Mental health issues or system in general

Batson/Wheeler

- "The use of peremptory challenges to remove prospective jurors on the sole ground of group bias" Wheeler
- "The Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race" Batson
- May be raised by either party
- Basic rule: There must be "an identifiable group distinguished on racial, religious, ethnic, or similar grounds – we may call this 'group bias'."

Cognizable Groups

- Race
- Ethnicity – (surnames)
- Religion – (sect) caveat: can't judge
- Gender
- Sexual Orientation
- Disability…

Non-Cognizable

- **Low income/poor/unemployed**
- **Less educated**
- **Blue Collar workers**
- **Battered Women**
- **Young Adults**
- **Age**

Three Prong Procedure

- **Moving party must make Prima Facie "by showing that the totality of the facts gives rise to an *inference* of discriminatory purpose" Johnson 545 U.S. 162**
- **Once shown the burden shifts to the other party to explain by offering race-neutral justifications**
- **Trial Court decides whether moving party has proved purposeful racial discrimination**

United States v. Collins 9th Circuit

- Drug case
- 1st African American juror was struck by defense
- Only remaining African American struck by Prosecutor
- Defense objected
- Prosecutor declined to give reason saying "no pattern:
- Court said no pattern
- 9th Circuit remanded for government to provide justifications

9th's Instruction

- "…encourage prosecutors to state their reasons for peremptory strikes at the time of a Batson challenge…the burden of explaining the reasons for a challenge…is minimal. Judicial economy would be well served…in fact, prosecutors usually have good and permissible reasons for their challenges; refusing to state them can create unnecessary suspicion, as well as unnecessary litigation." Concurring opinion

Comparative Analysis

- "If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar non-black who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at Batson's third step."
- *Miller-El v. Dretke* (2005)545 U.S. 231

Practical Tips

- Remain Calm
- Be thorough in your questioning
- Keep notes on each juror and why
- Give more than one reason
- Think about comparative analysis. Why are you keeping one teacher and not the other?
- Make a record of non verbal reasons
- "There is more to human communication than mere linguistic content. On appellate review, a voir dire answer sits on a page of transcript. In the trial court, however, advocates and trial judges watch and listen as the answer is delivered. Myriad subtle nuances may shape it, including attitude, attention, interest, body language, facial expression and eye contact." *People v. Lenix* (2008) 44 Cal. 4th 602

NEUTRAL JUSTIFICATIONS

- Life experience
- Inability to understand
- Hung Jury
- Hostile Body Language
- Nervous
- Smiled at Defendant
- Good rapport w/ D atty
- Sympathetic looks to D
- Family members arrested
- No eye contact with P
- Teachers are liberal
- Clothes/hair
- Non-responsive

NEUTRAL JUSTIFICATIONS

- Age—youth is not a class
- Lack of seriousness
- Law Student
- Poor Grooming
- Lack of ability to understand legal concepts
- Battered woman
- Anti-death penalty
- Limited education
- Translation—would not follow
- Juror lives close to crime scene
- Hunch/Gut feeling/etc are valid
- Resident alien

Penalties and Remedies

Penalties

- B&P 6068© Appellate Court reports you
- B&P 6068(0)(3)—You report you
- B&P 6086.7(b)—reversal for prosecutorial misconduct requires report
- Remedies
- Used to be excuse the panel and start again
- "severe" monetary sanctions and/or
- With the consent of moving party, RESEAT the challenged juror *People v. Willis* (2002) 27 Cal.4th 811.
- As to sanctions, Court must make an order first.

Voir Dire Objections

- The question is not related to challenges for cause or to the intelligent exercise of peremptory challenges.
- The question attempts to indoctrinate jurors on the law.
- The question asks jurors to prejudge the evidence.
- The question tests juror's understanding of the law.
- Counsel is attempting to prejudice the jury for or against a particular party.
- Counsel is attempting to argue the case. People v. Williams (1981) 29 C.3d 392, 408
- Counsel is attempting to educate the jury panel to the particular facts of the case. People v. Williams
- Question is based on an incorrect statement of the law. People v. Tibbetts (1929) 102 C.A. 787, 789-90
- Question is in improper form.
  - If question is proper in scope, the court can still require counsel to rephrase the question in a neutral non-argumentative form. People v. Williams

Improper Questions

- What religion do you belong to? People v. Daily (1958) 157 C.A. 2d 649
- Questions that seek to ascertain juror's views on death penalty in actual or hypothetical cases not before him (i.e. Hitler) People v. Fields (1983) 35 C.3d 329
- Questions that attempts to indoctrinate the jury as to the meaning or applicability of particular Rules of Law
  - Example: "Do you have any personal objection to a rule of criminal jurisprudence which provides that those jurors entertaining a reasonable doubt of the defendant's guilt should vote for acquittal?" People v Parker (1965) 235 C A 2d 86

Proper Questions

- **Any question "reasonably designed to assist in the intelligent exercise of peremptory challenges" People v. Williams**
- **Do you belong to any religious sect whose teachings might interfere with the consideration of the case? People v. Daily**
- **Do you have any inherent belief based upon any church's teachings that might interfere with a fair consideration of the case? People v. Daily**
- **Do you belong to any political, religious, social , industrial, fraternal, law enforcement or other organization whose beliefs or teachings would prejudice you for or against either party to the case? People v. Boyle (1937) 22 C.A.2d 143**
- **What is your occupation? People v. Boorman (1956) 142 C.A. 2d 85**
- **May ask about a juror's willingness to apply legal principles. People v. Williams**

More Proper Questions

- **If you were faced with this charge, would you be willing to be tried with jurors who had the same attitude toward the charge and the defendant as you do now? People v. Estorga (1928) 206 C. 81**
  - **Questions that tend to indoctrinate but otherwise are sufficient for the intelligent exercise of peremptory challenges. People v. Williams**
    - **Example: Explanation of the law applicable to the case as a basis for hypothetical questions to determine whether the jurors would follow the instructions of the court, and to ascertain their state of mind on the issues presented. People v. Wein (1958) 50 C.2d 383**
  - **Will you follow the judge's instructions? People v. Modell**
  - **May ask about a juror's willingness to apply legal principles. People v. Williams**

Perfecting the Record To Address Batson/Wheeler Claims

STEP ONE: DID THE DEFENSE MAKE A PRIMA FACIE SHOWING TO GIVE RISE TO A CREDIBLE INFERENCE OF DISCRIMINATORY PURPOSE

- □ **Require Defense to Articulate Their Complaint**
  - Which panelists have been allegedly improperly excluded?
  - Basis for each panelist?
- □ **Identify the Key Players**
  - What is the race of the defendant?
  - What is the current composition of the jury? How many members of the challenged race remain? How many have previously been excused?
  - Refer to jury panelists in a uniform fashion, i.e., only by seat number, juror number, or name, not a combination.
  - What is the race of the prosecutor, defense attorney, judge, court staff if pertinent?
- □ **Put the Obvious On The Record**
  - Attitude or demeanor issues?
  - Inappropriate attire?
  - Bad hygiene?
  - Tardiness?
  - Poor interaction with court staff?
  - Inattentiveness?
- □ **Consider Offering Reasons for the Peremptory Challenge**
- □ **Place Final Composition of Jury on the Record**

STEP TWO: IF THE COURT FINDS THAT A PRIMA FACIE SHOWING HAS BEEN MADE, THE PROSECUTOR MUST ADEQUATELY EXPLAIN THE EXCLUSION BY OFFERING RACE-NEUTRAL REASONS

- □ **Ask The Court To Make Findings on Demeanor When Offered**
  - The jury's demeanor and the prosecutor's demeanor.
- □ **Put Your Reputation To Good Use**
  - Court familiar with you? How many trials together? Reputation of prosecutor? Reputation of office?
- □ **Invite The Defense To Offer Comparisons**

The Law and Rules of Voir Dire and Jury Selection

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- 10 peremptory/20 life cases
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Challenge for Cause

Cause:

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- "The use of peremptory challenges to remove prospective jurors on the sole ground of group bias" Wheeler
- "The Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race" Batson
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- Religion – (sect) caveat: can't judge
- Gender
- Sexual Orientation
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Batson/Wheeler Three Prong Approach

- Moving party must make Prima Facie "by showing that the totality of the facts gives rise to an inference of discriminatory purpose" Johnson 545 U.S. 162
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Neutral Justification

- Life experience
- Inability to understand
- Hung Jury
- Hostile Body Language
- Nervous
- Smiled at Defendant
- Good rapport w/ D atty
- Sympathetic looks to D

Neutral Justification

- Family members arrested
- Teachers are liberal
- Clothes/hair
- Non-responsive
- Age—youth is not a class
- Lack of seriousness
- Law Student
- Poor Grooming

Neutral Justification

- Lack of ability to understand legal concepts
- Battered woman
- Anti-death penalty
- Limited education
- Translation—would not follow
- Juror lives close to crime scene
- Hunch/Gut feeling/etc are valid

Penalties and Remedies

Penalties

- B&P 6068© Appellate Court reports you
- B&P 6068(0)(3)—You report you
- B&P 6086.7(b)—reversal for prosecutorial misconduct requires report

Remedies

- Used to be excuse the panel and start again
- "severe" monetary sanctions and/or
- With the consent of moving party, RESEAT the challenged juror *People v. Willis* (2002) 27 Cal.4th 811.
- As to sanctions, Court must make an order first.

EFFECTIVE JURY SELECTION

A. Guiding Principle

Jury Selection is critical to successful jury trials. Therefore, jury selection deserves thorough preparation and knowledge.

B. Key Components to Effective Jury Selection

- **Know the law and the rules**

You should learn the controlling statutes on this subject and the case law that interprets it. The controlling statutes on jury selection are contained in the Code of Civil Procedure (CCP) sections 190 through 237. CCP 223, 225, and 228 through 231 are regularly

utilized in criminal jury trials and set out the method of voir dire, the requirements for a challenge for cause and the number of preemptory challenges permitted to each side.

CCP 223 provides that in a criminal trial, each party could submit questions for the court to pose to the prospective jurors; it also establishes that each party has "the right to examine, by oral and direct questioning, any or all prospective jurors." It also limits the examination of prospective jurors to be conducted "only in the aid of the exercise of challenges for cause."

An area of implied bias that is outlined under the law is pursuant to CCP 229(f) "The existence of a state of mind in the juror evincing enmity against, or bias towards, either party."

You should also learn the judicial rules regarding jury selection. The San Diego Superior Court's web page includes jury selection information that is very useful. It has the script that the courts are encouraged to read to jurors and it even has an approved questionnaire with many good questions.

In addition, you should learn the particular way that a certain court does jury selection. Courts conduct jury selection differently utilizing their own system of examining 12 jurors at a time or more jurors.

A prosecutor should also know the law of Batson/Wheeler regarding preemptory challenges and know how to make the right

record that supports that a preemptory challenge is made ethically and without bias against a protected class.

VOIR DIRE

I. LAW

A. The Adoption of Proposition 115 in 1990 Changed Voir Dire.

1. Pre-Proposition 115 Rules
   a. The attorneys participated in the questioning process.
   b. The purpose of voir dire was to allow the parties to intelligently exercise their peremptory challenges. (*People v. Williams* (1981) 29 Cal.3d 392.)

2. In 1990, the voters passed Proposition 115, which included a new Code of Civil Procedure section 223 regulating voir dire in criminal cases.

   "In a criminal case, the court shall conduct the examination of prospective jurors. However, the court may permit the parties, upon a showing of good cause, to supplement the examination by such further inquiry as it deems proper, or shall itself submit to the prospective jurors upon such a showing, such additional questions by the parties as it deems proper." (Code of Civ. Proc., §223.)
   a. The court shall conduct the examination of prospective jurors.
   b. Upon a showing of good cause, the court may allow the attorneys to question the jurors.
   c. Where practicable, voir dire shall occur in the presence of the other jurors.
   d. Questioning shall be conducted only to aid in the exercise of challenges for cause.

3. Section 223 was amended effective January 1, 2001, to again allow attorney questioning.

"In a criminal case, the court shall conduct an initial examination of prospective jurors. The court may submit to the prospective jurors additional questions requested by the parties as it deems proper. Upon completion of the court's initial examination, counsel for each party shall have the right to examine, by oral and direct questioning, any or all of the prospective jurors. The court may, in the exercise of its discretion, limit the oral and direct questioning of prospective jurors by counsel. The court may specify the maximum amount of time that counsel for each party may question an individual juror, or may specify an aggregate amount of time for each party, which can then be allocated among the prospective jurors by counsel."

a. Amendment become effective January 1, 2001.
b. Court can limit amount of time allotted to the parties.
c. Shall be conducted "only in the aid of the exercise of challenges for cause."

B. Two Types of Challenges

1. Challenge for Cause – CCP § 225.
   a. General Disqualification – CCP § 225(b)(1)(A).
      - Juror lacks the statutory requirements to be eligible for jury duty – CCP §§ 203, 228(a).
      - Deaf, or any other incapacity – CCP §228(b).
      - Rarely utilized.
   b. Implied Bias – CCP §§ 225(b)(1)(B), 229.
      - Eight statutory grounds.
      - Prejudice is inferred.
   c. Actual Bias – CCP § 225(b)(1)(C).
      - The existence of a state of mind on the part of the juror in reference of the case, or to any of the parties, which will prevent the juror from acting with entire impartiality, and without prejudice to the substantial rights of any party.
   d. Number of challenges – unlimited.

2. Peremptory Challenges
    a. No reason need be given – CCP § 226(b).
    b. Number of peremptory challenges allowed.
        - Depends on punishment allowed and number of defendants on trial.
        - Single defendant case.
            A. 20 – If punishable by death or life imprisonment – CCP § 231(a)
            B. 6 – If punishable with maximum of 90 days or less – CCP § 231(b).
            C. 10 – all other cases – CCP § 231(a).
        - Multiple defendant case.
            A. Death or life imprisonment case – CCP § 231(a).
                - 20 joint challenges.
                - 5 individual challenges for each defendant.
                - DA gets same total as entire defense team.
            B. 90 days or less – CCP § 231 (b).
                - 6 joint challenges
                - 4 individual challenges for each defendant.
                - DA gets same total as entire defense team.
            C. All other cases – CCP § 231 (a).
                - 10 joint challenges.
                - 5 individual challenges for each defendant.
                - DA gets same total number as entire defense team.
        - Alternates – CCP § 234.
            A. Single defendant case – one per number of alternates.
            B. Multiple defendant cases – each defendant gets one per number of alternate.
            C. DA gets same total number as defense team.
        - A pass does not count as a challenge – CCP § 231(d)(e).

C. *Wheeler* motion (*People v. Wheeler* (1978) 22 Cal.3d 258)

The use of peremptory challenges to remove prospective jurors on the basis of a presumed group bias based on membership in a racial, ethnic, religious or gender group violates the state and federal constitution. See also *Batson v. Kentucky* (1986) 476 U.S. 79.

1. A peremptory challenge is presumed to be exercised on constitutionally permissible grounds.

2. The moving party has the burden of establishing a prima facie case that the opposing side has challenged jurors solely on the basis of group bias.
    a. The excused juror must be a member of a cognizable group.
    b. The moving party must "raise an inference" that the challenge was based upon membership in the cognizable group, and not because of specific bias.

3. Upon a judicial finding that a prima facie case exists, the burden shifts to the non-moving party to make a detailed and group-neutral justification for the peremptory challenge.

4. The court must decide whether the peremptory challenge was made for constitutionally permissible reasons.

5. If the *Wheeler* motion is granted several remedies exist, including begin voir dire again with a new panel or seating the challenged juror. The offending attorney may have to self-report to the state bar for disciplinary proceedings.

II. PROCEDURE

A. Pre-Voir Dire Conference – Rule 228.1

1. Establish ground rules.

2. How many jurors will be called into the box?

3. What topics will be addressed by the judge?

4. Time limits.

5. Number of alternates.

6. Give judge voir dire questions.

B. Court clerk will summon a jury panel to courtroom.

C. Clerk will take roll and swear the panel – CCP §232.

D. Questioning the jurors.

1. Judge will question jurors first – CCP §223.
    a. Will typically ask 8 – 10 general questions. See Standard of Judicial Administration, § 8.5
    b. Very limited follow-up.

2. Defense Attorney will question second.
    a. Defense will "challenge for cause" – CCP § 226(d).
    b. "Pass for cause."

3. DA questions last.
    a. "Pass for cause."
    b. "Approach the Bench" to exercise challenge for cause.

E. Exercising peremptory challenges.

1. DA goes first – CCP § 226(d).
    a. "I would ask the court to thank and excuse Juror Number ___, Mr./Mrs. ."

2. Defense goes second.

3. Continues until both sides pass consecutively.
    a. "The People are pleased with the panel. We pass."
    b. 12 jurors will be sworn.

4. Select Alternates – CCP § 234.
    a. Same order as original 12 jurors.
    b. Swear alternates.

5. Court will excuse unused jurors.

CHALLENGE FOR CAUSE

- Actual Bias
  - –Inability to be impartial
- Implied Bias

ACTUAL BIAS

- Related to party or witness
- Legal relationship to party or witness
- Previous relationship
- Bias towards either party
- Interest in financial outcome
- Action pending utilizing same jury
- Death penalty issues

IMPLIED BIAS

- Attitude towards:
  - –Party
  - –Witness (police, doctors, attorneys, victims)
  - –System in general
  - –Subject matter (rape, child molest, date rape)
-

Personal Experience

- A juror in child abuse case did not disclose that she was sexually abused as a child because the abuse was never reported. During deliberations she said that she believed the alleged victim because the same thing had happened to her. When this information came to light after the trial, a new trial was ordered (*State v. Delgado*, 223 Wis.2d 270, 588 N.W. 2d 1, 1999).

JURY SELECTION IN SEX CRIMES CASES

A. KEYS TO EFFECTIVE JURY SELECTION

1. "Eliminate prospective jurors with ingrained bias."

    a. CHALLENGE FOR CAUSE

        i. Actual Bias/Inability to be impartial

            1. Related to party or witness
            2. Legal relationship to party or witness
            3. Previous relationship
            4. Bias towards either party
            5. Interest in financial outcome
            6. Action pending utilizing same jury
            7. Death penalty issues

        ii. Implied Bias/Attitude Towards

            1. Party
            2. Witness (police, doctors, attorneys, victims)
            3. System in general
            4. Subject matter (rape, child molest, date rape)

JURY SELECTION- QUICK REFERENCE AUTHORITY:

Statutory law: CA Code of ***Civil*** Procedure (CCP)

CCP 223- Court conducts initial exam of jurors, followed by parties as it deems proper. Time limits can be imposed and questioning can be via oral inquiry, written, or combination of both. Shall be conducted "only in the aid of the exercise of challenges for cause".

Juror challenges:

1. Challenge for Cause (***UNLIMITED*** **NUMBER OF CHALLENGES**): **CCP 225**
   a. ***General disqualification***: **CCP 225(b)(1)(A)**
      1. Juror lacks statutory requirements to be eligible for jury duty: **CCP 203(a)**
         -Not a citizen of U.S., less than 18 years old, not a "domiciliary" of CA, not resident of jurisdiction where summoned (San Diego County), "convicted of malfeasance in office" or a FELONY (anybody) and whose civil rights not restored, not possessed of sufficient knowledge of English language (but not inability to understand English solely because of disability), currently serving as grand or trial juror in CA, and subjects of conservatorships.
      2. General catch-all for incapacity rendering unable to adequately serve: **CCP 228(b)**
   b. ***Implied bias***: **CCP 225(b)(1)(B)**- Refer to **CCP 229** for actual list
      -Eight statutory grounds (Includes some relationships to the parties and/or bias, opinions towards action)
      -Bias is inferred if juror is within list
   c. ***Actual bias***: **CCP 225(b)(1)(C)**
      -"[T]he existence of a state of mind on the part of the juror in reference of the case, or to any of the parties, which will prevent the juror from acting with entire impartiality, and without prejudice to the substantial rights of any party"
2. Peremptory Challenge
   a. No reason need be given: **CCP 226(b)** [but watch out for *Batson/Wheeler*!]
   b. How many peremptory challenges depends on punishment & # of defts:
      ONE DEFT =
      1. ***20*** if punishable by death or life imprisonment: **CCP 231(a)** [this includes any felony with two prior Strikes alleged due to potential for life imprisonment]
      2. ***6*** if punishable with maximum of 90 days or less: **CCP 231(b)**
      3. ***10*** for all other cases: **CCP 231(a)**

      MULTIPLE DEFTS =
      4. ***DEFENSE GETS 20 "JOINT" + 5 INDIVIDUAL FOR EACH DEFENDANT*** if punishable by death or life imprisonment: **CCP 231(a)** [this includes any felony with two prior Strikes alleged due to potential for life imprisonment]
         DA GETS SAME TOTAL AS ENTIRE DEFENSE TEAM
      5. ***DEFENSE GETS 6 "JOINT" + 4 INDIVIDUAL*** if punishable with maximum of 90 days or less: **CCP 231(b)**

DA GETS SAME TOTAL AS <u>ENTIRE</u> DEFENSE TEAM

6. ***DEFENSE GETS 10 "JOINT" + 5 INDIVIDUAL*** for all other cases: **<u>CCP 231(a)</u>**
   DA GETS SAME TOTAL AS <u>ENTIRE</u> DEFENSE TEAM

c. Alternates: **<u>CCP 234</u>**- Single deft case = one per number of alternates to be seated (i.e. if you're going to have two alternates, you get two challenges). Multi-deft case = each deft gets one per number of alternates, DA gets same total number as entire defense team.

d. A pass does NOT count as a challenge (i.e. you don't burn a challenge by simply passing): **<u>CCP 231(d)(e)</u>**.

<u>Misc.</u>

Defense cannot use prohibited class characteristics (race) to kick jurors:
Georgia v. McCollum (1992) 505 U.S. 42, at p.59 [use *Batson/Wheeler*-type objection?]

<u>Timing</u>

1. Pre- jury selection conference- **<u>Rule 228.1</u>**
   Ground rules? How many jurors in the box? What topics will the judge cover? Time limits? Number of alternates? Any questions parties want judge to ask?
2. Jurors come up and clerk takes roll and panel is sworn: **<u>CCP 232</u>**
3. Judge will question jurors first: **<u>CCP 223</u>**
4. Defense will question second: **<u>CCP 226(d)</u>**
5. DA questions last
6. Peremptory challenges- DA goes first: **<u>CCP 226(d)</u>**
7. Select alternates- **<u>CCP 234</u>**

Voir Dire

I. LAW

A. The Adoption of Proposition 115 in 1990 Changed Voir Dire. *People v. Edwards* (1991) 54 Cal.3rd 787, 829; *People v. Carpenter* (1997) 15 Cal.4th 312, 353; *People v. Jenkins* (2000) 22 Cal.4th 900, 990.

1. Pre-Proposition 115 Rules

a. The attorneys participated in the questioning process.

b. The purpose of voir dire was to allow the parties to intelligently exercise their peremptory challenges. (*People v. Williams* (1981) 29 Cal.3d 392.)

2. In 1990, the voters passed Proposition 115, which included a new Code of Civil Procedure section 223 regulating voir dire in criminal cases.

> "In a criminal case, the court shall conduct the examination of prospective jurors. However, the court may permit the parties, upon a showing of good cause, to supplement the examination by such further inquiry as it deems proper, or shall itself submit to the prospective jurors upon such a showing, such additional questions by the parties as it deems proper." (Code Civ. Proc., § 223.)

a. The court shall conduct the examination of prospective jurors.

b. Upon a showing of good cause, the court may allow the attorneys to question the jurors.

c. Where practicable, voir dire shall occur in the presence of the other jurors.
d. Questioning shall be conducted only to aid in the exercise of challenges for cause.

3. Section 222 was amended effective January 1, 2001, to again allow attorney questioning.

> "In a criminal case, the court shall conduct an initial examination of prospective jurors. The court may submit to the prospective jurors additional questions requested by the parties as it deems proper. Upon completion of the court's initial examination, counsel for each party shall have the right to examine, by oral and direct questioning, any or all of the prospective jurors. The court may, in the exercise of its discretion, limit the oral and direct questioning of prospective jurors by counsel. The court may specify the maximum amount of time that counsel for each party may question an individual juror, or may specify an aggregate amount of time for each party, which can then be allocated among the prospective jurors by counsel."

a. Amendment become effective January 1, 2001.

b. Court can limit amount of time allotted to the parties.

c. Shall be conducted "only in the aid of the exercise of challenges for cause."

B. Challenges.

1. Challenge for Cause – Because voir dire "shall be conducted only to aid in the exercise of challenges for case," the specific grounds must be known.

a. Unlimited Number

b. Three Types of Challenges for Cause

(1) **General disqualification** – that the juror is disqualified from serving in the action on trial. (Code Civ. Proc., § 225(b)(1)(A).)

(a) Section 203 lists general disqualifications for jurors:

1) Persons who are not citizens of the United States.

2) Persons who are less than 18 years of age.

3) Persons who are not domiciliaries of the State of California, as determined pursuant to Article 2 (commencing with Section 2020) of Chapter 1 of Division 2 of the Elections Code.

4) Persons who are not residents of the jurisdiction wherein they are summoned to serve.

5) Persons who have been convicted of malfeasance in office or a felony, and whose civil rights have not been restored.

6) Persons who are not possessed of sufficient knowledge of the English language, provided that no person shall be deemed incompetent solely because of the loss of sight or hearing in any degree or other disability which impedes the person's ability to communicate or which impairs or interferes with the person's mobility.

7) Persons who are serving as grand or trial jurors in any court of this state.
8) Persons who are the subject of conservatorship.

(b) Section 228(b) lists additional requirements: A loss of hearing, or the existence of any other incapacity which satisfies the court that the challenged person is incapable of performing the duties of a juror in the particular action without prejudice to the substantial right of the challenging party.

(2) **Implied Bias** – Section 229

A challenge for implied bias may be taken for one or more of the following causes, and for no other:

(a) Consanguinity or affinity within the fourth degree to any party, to an officer of a corporation which is a party, or to any alleged witness or victim in the case at bar.

(b) Standing in the relation of, or being the parent, spouse, or child of one who stands in the relation of, business with either party; or surety on any bond or obligation for either party, or being the holder of bonds or shares of capital stock of a corporation which is a party; or having stood within one year previous to the filing of the complaint in the action in the relation of attorney and client with either party or with the attorney for either party. A depositor of a bank or a holder of a savings account in a savings and loan association shall not be deemed a creditor of that bank or savings and loan association for the purpose of this paragraph solely by reason of his or her being a depositor or account holder.

(c) Having served as a trial or grand juror or on a jury of inquest in a civil or criminal action or been a witness on a previous or pending trial between the same parties, or involving the same specific offense or cause of action; or having served as a trial or grand juror or on a jury within one year previously in any criminal or civil action or proceeding in which either party was the plaintiff or defendant or in a criminal action where either party was the defendant.

(d) Interest on the part of the juror in the event of the action, or in the main question involved in the action, except his or her interest as a member or citizen or taxpayer of a county, city and county, incorporated city or town, or other political subdivision of a county, or municipal water district.

(e) Having an unqualified opinion or belief as to the merits of the action founded upon knowledge of its material facts or of some of them.

(f) The existence of a state of mind in the juror evincing enmity against, or bias towards, either party.

(g) That the juror is party to an action pending in the court for which he or she is drawn and which action is set for trial before the panel of which the juror is a member.

(h) If the offense charged is punishable with death, the entertaining of such conscientious opinions as would preclude the juror finding the defendant guilty; in which case the juror

may neither be permitted nor compelled to serve.

(3) **Actual Bias** – Section 225(b)(1)(C)

Actual bias - the existence of a state of mind on the part of the juror in reference to the case, or to any of the parties, which will prevent the juror from acting with entire impartiality, and without prejudice to the substantial rights of any party.

2. Peremptory Challenges

a. No Reason Need be Given – CCP § 226(b).

b. Number of Peremptory Challenges Allowed.

(1) Depends on punishment allowed and number of defendants on trial.

(2) Single defendant case.

(a) 20 – If punishable by death or life imprisonment – CCP § 231(a).

(b) 6 – if punishable with maximum of 90 days or less – CCP § 231(b).

(c) 10 – all other cases – CCP § 231(a).

(3) Multiple defendant case.

(a) Death or life imprisonment case – CCP § 231(a).

1) 20 joint challenges.

2) 5 individual challenges for each defendant.

3) DA gets same total as entire defense team.

(b) 90 days or less – CCP § 231(b).

1) 6 joint challenges.

2) 4 individual challenges for each defendant.

3) DA gets same total as entire defense team.

c) All other cases – CCP § 231(a).

1) 10 joint challenges

2) 5 individual challenges

3) DA gets same total as entire defense team

(4) Alternates – CCP § 234.

(a) Single defendant case – one per number of alternates.

(b) Multiple defendant cases – each defendant gets one per number of alternates.

(c) DA gets same total number as defense team.

(5) A pass does not count as a challenge – CCP § 231(d)(e).

II. APPLICATION OF THE LAW

A. Defense challenge for cause.

1. The standard is "whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Wainright v. Witt* (1985) 469 U.S. 412, 424; *People v. Ghent* (1987) 43 Cal.3rd 739, 767.

2. Erroneous denial of defense challenge is not reversible per se. *Ross v. Oklahoma* (1988) 487 US 81, 87; *People v. Edwards* (1991) 54 Cal.3d 787, 830.)

3. To prevail on appeal, defendant must show prejudice, that is: 1) he used a peremptory challenge on the questioned juror, 2) he exhausted all his peremptory challenges, and 3) he expressed dissatisfaction with the final jury. (*People v. Morris* (1991) 53 Cal.3d 152, 184; *People v. Mickey* (1991) 54 Cal.3d 612, 683: *People v. Crittenden* (1994) 9 Cal.4th 83, 121; *People v. Samayoa* (1997) 15 Cal.3d 795, 821; *People v. Cunningham* (2001) 25 Cal.3d 926, 976.)

4. No prejudice if the juror was not part of the final jury. (*People v. Edwards* (1991) 54 Cal.3d 787, 830; *People v. Clarke* (1992) 3 Cal.4th 41, 155; *People v. Johnson* (1992) 3 Cal.4th 1183, 1210; *People v. Cain* (1995) 10 Cal.4th 1, 61; *People v. Hawkins* (1995) 10 Cal.4th 920, 939; *People v. Horton* (1995) 11 Cal.4th 1068, 1093; *People v. Ramos* (1997) 15 Cal.4th 1133, 1159; *People v. Barnett* (1998) 17 Cal.4th 1044, 1113; *People v. Millwee* (1998) 18 Cal.4th 96, 146.)

5. No prejudice if defendant did not use all peremptory challenges. (*People v. Kelly* (1990) 51 Cal.3d 931, 960; *People v. Morris* (1991) 53 Cal.3d 152, 184; *People v. Price* (1991) 1 Cal.4th 324, 401; *People v. Danielson* (1992) 3 Cal.4th 691, 713; *People v. Mayfield* (1993) 5 Cal.4th 142, 169; *People v. Garceau* (1993) 6 Cal.4th 140, 174; *People v. Cain* (1995) 10 Cal.4th 1, 61; *People v. Lucas* (1995) 12 Cal.4th 415, 480; *People v. Samayoa* (1997) 15 Cal.4th 795, 821; *People v. Ramos* (1997) 15 Cal.4th 1133, 1158; *People v. Williams* (1997) 16 Cal.4th 635, 667; *People v. Barnett* (1998) 17 Cal.4th 1044, 1113; *People v. Millwee* (1998) 18 Cal.4th 96, 146; *People v. Bolin* (1998) 18 Cal.4th 297, 315; *People v. Ochoa* (1998) 19 Cal.4th 353, 444; *People v.*

Waidla (2000) 22 Cal.4th 690, 715; *People v. Bemore* (2000) 22 Cal.4th 809, 837; *People v. Ayala* (2000) 23 Cal.4th 225, 261; *People v. Lewis* (2001) 25 Cal.4th 610, 634.)

6. Being required to use a peremptory challenge on a denied challenge for cause does not establish prejudice. (*People v. Gordon* (1990) 50 Cal.3d 1223, 1247; *People v. Kaurish* (1990) 52 Cal.3d 648, 674.)

7. Did defendant request additional peremptory challenges? (*People v. Edwards* (1991) 54 Cal.3d 787, 831.)

    a. Request for additional challenges denied. (*People v. Pride* (1992) 3 Cal.4th 195, 230; *People v. Ramos* (1997) 15 Cal.4th 1133, 1159; *People v. Williams* (1997) 16 Cal.4th 635, 667.)

8. Defendant must express dissatisfaction with the final jury to prove prejudice. (*People v. Edwards* (1991) 54 Cal.3d 787, 830; *People v. Danielson* (1992) 3 Cal.4th 691, 713; *People v. Lucas* (1995) 12 Cal.4th 415, 830; *People v. Williams* (1997) 16 Cal.4th 635, 667; *People v. Millwee* (1998) 18 Cal.4th 96, 146; *People v. Ochoa* (1998) 19 Cal.4th 353, 444; *People v. Bemore* (2000) 22 Cal.4th 809, 837; *People v. Ayala* (2000) 23 Cal.4th 225, 261; *People v. Lewis* (2001) 25 Cal.4th 610, 634; *People v. Weaver* (2001) 26 Cal.4th 876, 911; *People v. Seaton* (2001) 26 Cal.4th 598, 637.

9. No duty on court sua sponte to excuse juror on its own motion. (*People v. Bolin* (1998) 18 Cal.4th 297, 315; *People v. Lucas* (1995) 12 Cal.4th 415, 481.)

10. Court not required to allow defense opportunity to rehabilitate challenged juror if bias is obvious. (*People v. Bittaker* (1989) 48 Cal.3d 1046, 1085; *People v. Carpenter* (1997) 15 Cal.4th 312, 355; *People v. Samayoa* (1997) 15 Cal.3d 795, 823.)

11. Court not required to tell juror his civic duty requires him to set aside his personal beliefs regarding the death penalty. (*People v. Sanders* (1990) 15 Cal.3d 471, 503; *People v. Miranda* (1987) 44 Cal.3d 57, 96.)

12. Examples of proper denial of defense challenge for cause. (*People v. Stankewitz* (1990) 51 Cal.3d 72, 103; *People v. Kelly* (1990) 51 Cal.3d 931, 960; *People v. Mincey* (1992) 2 Cal.4th 457; *People v. McPeters* (1992) 2 Cal.4th 1148, 1177; *People v. Crittenden* (1994) 9 Cal.4th 83, 122; *People v. Samayoa* (1997) 15 Cal.4th 795, 822; *People v. Williams* (1997) 16 Cal.4th 635, 668; *People v. Jenkins* (2000) 22 Cal.4th 900, 987; *People v. Cunningham* (2001)25 Cal.4th 926, 976; *People v. Weaver* (2001) 26 Cal.4th 876, 911.)

B. DA challenge for cause.

1. Use same standard (*Witt*) as defense challenge for cause. (*People v. Crittenden* (1994) 9 Cal.4th 83, 121; *People v. Pride* (1992) 3 Cal.4th 195, 227; *People v. Mincey* (1992) 2 Cal.4th 408, 456; *People v. Bradford* (1997) 15 Cal.4th 1229, 1318.)

2. Erroneous granting of DA challenge is reversible per se. (G*rey v. Mississippi* (1987) 481 US 648, 666; *People v.* C*ooper* (1991) 53 Cal.3d 771, 809; *People v. Edwards* (1991) 54 Cal.3d 787, 831.)

   a. Reverses penalty verdict, not guilt. (*People v. Ashmus* (1991) 54 Cal.3d 932, 962.)

   b. If juror's answers equivocal, trial judge's ruling will be upheld. (*People v. Ruiz* (1988) 44 Cal.3d 589, 618; *People v. Ghent* (1987) 43 Cal.3d 739, 768; P*eople v. Coleman* (1988) 46 Cal.3d 749, 767.)

C. Peremptory Challenges.

1. It is improper to ask questions intended solely to educate the jury, compel the jurors to commit to vote a certain way, prejudice the jury, argue the case, indoctrinate the jury, instruct the jury on the law, or test the juror's knowledge of the law. (*People v. Edwards* (1912) 163 Cal. 752; *People v. Willams* (1981) 29 Cal.3d 392, 408; *People v. Ashmus* (1991) 54 Cal.3d 932, 959.)

2. It is permissible to ask a juror about his attitude about a particular rule of law only if (1) the rule is relevant or material to the case, and (2) the rule appears to be controversial; e.g., the juror has indicated some hostility toward the rule, or it is commonly known the community harbors strong feelings about it. (*People v. Balderas* (1985) 41 Cal.3d 144, 185; *People v. Williams* (1981) 29 Cal.3d 392, 408.)

3. Examples of Permissible Questions Relating to Murder

    a. Asked jurors whether they would be able to vote guilty if, after deliberations, they were persuaded that the changes had been proved beyond a reasonable doubt. (*People v. Fierro* (1991) 1 Cal.4th 173, 209.)

    b. "[I]f I prove beyond a reasonable doubt each and every element of each of the offenses charged . . . can you assure me that you would be willing to return a verdict of guilty even though you have unanswered questions?" *People v. Riel* (2000) 22 Cal.4th 1153, 1178 fn. 4.

    c. In order to avoid a hung jury the prosecutor observed that each juror must "come to your own conclusion," but also stressed the value of "work[ing] together to try to discover the truth." (*People v. Fierro* (1991) 1 Cal.4th 173, 210, fn 8.)

    d. In questioning a juror, the prosecutor asked her if she believed a person charged with committing a crime such as defendant's must be insane. The prosecutor also asked: Do you feel there could be such a thing as a person who is legally insane? *People v. Fields* (1983) 35 Cal.3rd 329, 358.

    e. Questions designed to determine jurors' views regarding the felony-murder rule. (*People v. Pinholster* (1992) 1 Cal.4th 865, 913; *People v. Ochoa* (2001) 26 Cal.4th 398, 431; *People v. Ervin* (2000) 22 Cal.4th 48, 70.)

f. California's self-defense "no need to retreat in your own home" rule is controversial and was relevant in this case, so conviction is reversed for forbidding questions on attitudes about this rule. (*People v. Williams* (1981) 29 Cal.3d 392, 411.)

g. Whether they would view a person's possession of recently stolen property as circumstantial evidence that the person stole the property, whether they considered rape more of an assaultive than a sexually motivated offense, and whether they thought it was possible for a young man to rape an elderly woman and not be mentally ill. (*People v. Mendoza* (2000) 24 Cal.4th 130, 167.)

4. Examples of Impermissible Questions Relating to Murder (Typically Asked by the Defense):

a. Do you believe in self-defense in the home? (Not controversial; *People v. Williams* (1981) 29 Cal.3d 392, 411.)

b. "Whether, if they believed that a witness was an informant and was testifying 'in exchange for some lesser sentence,' then that 'would have some bearing on the weight or credibility that that witness may have in your mind?' " (*People v. Mason* (1991) 52 Cal.3d 909, 940.)

c. In a death penalty case, the court did not "allow either party to discuss the law – such as the meaning of diminished capacity – or ask questions that required the prospective jurors to pretry the facts of the case." *People v. Rich* (1988) 45 Cal.3rd 1036, 1104.

d. Defense counsel was not permitted to question prospective jurors regarding their ability to view accomplice testimony with suspicion and distrust. *People v. Johnson* (1989) 47 Cal.3rd 1194, 1224.

e. In an eyewitness case where the defense expected to call Dr. Elizabeth Loftus, the defense was prohibited from eliciting opinions of potential jurors concerning the effects of stress on perception. *People v. Sanders* (1990) 51 Cal.3rd 471, 506.

f. Defense counsel stated, "It's clear a girlfriend has an interest to lie. I just want to make sure that the jurors don't automatically, before they hear her testimony, say she's lying because she's the girlfriend." The trial court barred this line of questioning on the ground that the defendant was trying to educate the jurors and induce them to prejudge the evidence. We cannot say that the court abused its discretion in doing so. *People v. Helton* (1984) 162 Cal.App.3rd 1141, 1145.

g. "What do you feel is a proper punishment for someone who has committed a rape or other serious sexually related crime?" (*People v. Ochoa* (1998) 19 Cal.4th 353, 444.)

h. Many detailed questions regarding personal experience with sexual molestation in a child molestation-murder case. (*People v. Earp* (1999) 20 Cal.4th 826, 851, fn 1.)

i. In a capital murder case where one victim was a three year old child, defendant requested that the trial court inquire as to the ages of the prospective jurors' grandchildren. The court denied the request, stating, "Whether you're going to be prejudiced by the fact that a young child is involved in this case doesn't turn upon whether you have one at the moment. It turns upon whether your personality and capacities are such as to be able to deal with the wrench that goes with that. No matter how many or how few grandchildren you have got or what age you are. It's something that jurors are going to have to deal with; they're going to have to be able to set aside." *People v. Box* (2000) 23 Cal.4th 1153, 1178.

j. In a capital murder trial defendant wanted the following questions included on the questionnaire:

> What has been your favorite job and what (do/did) you enjoy about it?"
> "What has been your least favorite job and what (do/did) you dislike most about it?"
>
> "If you were a supervisor or employer, what do you think is the best way to keep workers in line?"
>
> "A person should maintain his or her belief on a subject so long as he or she feels that belief if right. Strongly Agree ___ Agree Somewhat ___ Disagree Somewhat ___ Strongly Disagree ___ Please explain."
>
> *People v. Navarette* (2003) 30 Cal.4th 458, 486.

k. "The court's restriction on questions regarding a prospective juror's birth date, religion and religious service attendance, or voting on the retention of Chief Justice Rose Bird," was not an abuse of discretion. (*People v. Ramos* (1997) 15 Cal.4th 1133, 1158.)

l. Why did you vote as you did on Proposition 8? (Invades juror's privacy) (*People v. Wells* (1983) 149 Cal.App.3d 721, 726.)

m. What was the most important part of Proposition 8? (Unfocused) (*People v. Wells* (1983) 149 Cal.App.3d 721, 726.)

n. Asking a prospective juror whether the Supreme Court's capital opinions under former Chief Justice Rose Bird were "kind of off base" and whether the vote not to retain her or other justices was correct may be error. (*People v. Ochoa* (1998) 19 Cal.4th 353, 428.)

D. Death Qualification Voir Dire.

1. The test.

> "With respect to questions directing the juror's attention to the facts of the case, we have observed that: "The *Witherspoon-Witt* [citations] voir dire seeks to determine only the views of the prospective jurors about capital punishment in the abstract . . . . [Citations.] The inquiry is directed to whether, without knowing the specifics of the case, the juror has an 'open mind' on the penalty determination. There was no error in ruling that questions related to the jurors' attitudes toward evidence that was to be introduced in this trial could not be asked during the sequestered *Witherspoon-Witt* voir dire." (*People v. Clark* (1990) 50 Cal.3rd 583, 597; see also *People v. Sanders* (1995) 11 Cal.4th 475, 539. Nor is it error to preclude counsel from seeking to compel a prospective juror to commit to vote in a particular way (*People v. Rich* (1988) 45 Cal.3rd 1036, 1105, or to preclude counsel from indoctrinating the jury as to a particular view of the facts. *People v. Jenkins* (2000) 22 Cal.4th 900, 990.

2. However, "A challenge for cause may be based on the prospective juror's response when informed of facts or circumstances likely to be present in the case being tried. (*People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1005.) Thus, we have affirmed the principle that either party is entitled to ask prospective jurors questions that are specific enough to determine if those jurors harbor bias, as to some fact or circumstance shown by the trial evidence, that would cause them not to follow an instruction directing them to determine penalty after considering aggravating and mitigating evidence. (*People v. Cash* (2002) 28 Cal.4th 703, 720-721. "Our decisions have explained that death-qualification voir dire must avoid two extremes. On the one hand, it must not be so abstract that it fails to identify those jurors whose death penalty views would prevent or substantially impair the performance of their duties as jurors in the case being tried. On the other hand, it must not be so specific that it requires the prospective jurors to prejudge the penalty issue based on a summary of the mitigating and aggravating evidence likely to be presented. (See *People v. Jenkins* [*supra*, 22 Cal.4th at

3. Compare the following cases:

    a. *People v. Pinholster* (1992) 1 Cal.4th 865, 916-918. The prosecutor was allowed to ask questions about jurors' willingness to impose the death penalty in a burglary-murder case. "Each juror's reluctance to impose the death penalty was based not on an evaluation of the particular facts of the case, but on an abstract inability to impose the death penalty in a felony-murder case." *Id.* at 916.

    "Defendant objects that fact-based voir dire is impermissible under *Witt, supra*, 469 U.S. 412. As we have already noted, we have commented in the past that questions directed to jurors' attitudes toward the particular facts of the case are not relevant to the death-qualification process, so that a trial court that refused to permit such questions did not err. (*People v. Clark, supra*, 50 Cal.3rd at p. 597.) We have also said, however, that "a court may properly excuse a prospective juror who would automatically vote against the death penalty in the case before him, regardless of his willingness to consider the death penalty in other cases." (*People v. Fields, supra*, 35 Cal.3rd at pp. 357-358.) *Id.* at 917-918.

    "Trial courts have broad discretion in determining what questions to permit. (*People v. Johnson, supra*, 47 Cal.3rd at p. 1224.) We see no prejudicial error in allowing questions regarding the particular facts of the case as long as more relevant questions and answers provide the basis for the court's decision." *Id.* at 918.

b. *People v. Medina* (1995) 11 Cal.4th 694, 745-746. Initially, the trial court did not permit defense questions asking jurors' whether they could vote for life imprisonment if the defendant had committed multiple murders.

"The inquiry that defendant sought to make was not relevant to the death qualification process, however . . . . [V]oir dire seeks to determine only the views of the prospective jurors about capital punishment in the abstract, to determine if any, because of opposition to the death penalty, would 'vote *against* the death penalty without regard to the evidence produced at trial.' [Citations.] Such a juror may be excused because he or she would be unable to faithfully and impartially apply the law. The inquiry is directed to whether, without knowing the specifics of the case, the juror has an 'open mind' on the penalty determination. There was no error in ruling that questions related to the jurors' attitudes toward evidence that was to be introduced in this trial could not be asked during the sequestered . . . voir dire." [Fn. omitted.] *Id.* at 746.

c. *People v. Cash* (2002) 28 Cal.4th 703, 718-723. The defendant had prior murders. He wanted to ask jurors "whether there were any particular crimes" or "any facts" that would cause that juror "automatically to vote for the death penalty." The trial court prohibited such questions. The Supreme Court reversed the death verdict.

"Thus, we affirmed the principle that either party is entitled to ask prospective jurors questions that are specific enough to determine if those jurors harbor bias, as to some or circumstance shown by the trial evidence, that would cause them not to follow an instruction directing them to determine a penalty after considering aggravating and mitigating evidence." *Id.* at 720-721.

"Our decisions have explained that death-qualification voir dire must avoid two extremes. On the one hand, it must not be so abstract that it fails to identify those jurors whose

death penalty views would prevent or substantially impair the performance of their duties as jurors in the case being tried. On the other hand, it must not be so specific that it requires the prospective jurors to prejudge the penalty issue based on a summary of the mitigating and aggravating evidence likely to be presented." *Id.* at 721-722.

d. *People v. Burgener* (2003) 29 Cal.4th 833, 865-866. In a penalty phase retrial "the trial court sustained the People's objections when defense counsel asked prospective jurors whether they would impose the death penalty after considering a rather detailed account of some of the facts of this case, and whether a prospective juror could continue to be impartial after hearing a list of defendant's prior crimes. There was no error in ruling that questions related to the jurors attitudes toward evidence that was to be introduced in this trial could not be asked during the sequestered [death-qualification] voir dire.'" (*Jenkins, supra,* 22 Cal.4th at p. 991.) Defendant had no right to ask specific questions that invited prospective jurors to prejudge the penalty issue based on a summary of the aggravating or mitigating evidence (*People v. Cash* (2002) 28 Cal.4th 703, 721-722 [122 Cal.Rptr.2d 545, 50 P.3d 332]), to educate the jury as to the facts of the case (*People v. Sanders* (1995) 11 Cal.4th 475, 538-539 [46 Cal.Rptr.2d 751, 905 P.2d 420]), or to instruct the jury in matters of law (*People v. Ashmus* (1991) 54 Cal.3rd 932, 959 [2 Cal.Rptr. 2d 112, 820 P.2d 214])." *Id.* at 865.

e. *People v. Navarette* (2003) 30 Cal.4th 458, 489-490. The defendant complained because the court limited his oral questioning, relating to the nature of the crimes charged. The Supreme Court rejected the defendant's contentions because his questionnaire did address these issues. The Court addressed *Medina* as compared with *Pinholster* and *Cash*.

"Defendant argues that *Medina* prevented him from asking jurors if they would automatically impose the death

penalty in a double-murder case, whereas under *Pinholster*, the People are free to inquire whether any jurors would automatically refuse to impose the death penalty in a burglary-murder case. This imbalance, he claims, led to a jury that was biased in favor of the death penalty, in violation of his rights under the federal Constitution.

We need not decide the continuing validity of our comment in *Medina*, because here the trial court did not prevent defendant from asking jurors whether they would automatically impose the death penalty in a multiple-murder case, the defendant did ask such a question." *Id.* at 489-490.

f. *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 47-48. "Coffman complains the trial court prevented her counsel from questioning the prospective jurors on their views regarding the circumstances of the case that were likely to be presented in evidence in order to determine how such circumstances might affect their ability to fairly determine the proper penalty in the event of a conviction."

In reality, "the trial court invited counsel to draft a proposed question for prospective jurors eliciting their attitudes toward the death penalty and in fact itself questioned a prospective juror whether he could weigh all the evidence before reaching a penalty determination in a case involving multiple murder."

Citing *Jenkins* and *Cash*, the Court found no abuse of discretion. "Unlike in *People v. Cash, supra,* 28 Cal.4th at pages 720-722, the trial court did not categorically prohibit inquiry into the effect on prospective jurors of the other murders, evidence of which was presented in the course of the trial. Rather, the trial court merely cautioned Coffman's counsel not to recite specific evidence expected to come before the jury in order to induce the juror to commit to voting in a particular way. (See *People v. Burgener* (2003) 29 Cal.4th 833, 865." Id. at 47-48.

g. *People v. Viera* (2005) 35 Cal.4th 264, 283-286. "Prior to the commencement of voir dire, defense counsel submitted a proposed jury questionnaire that contained the following question: "Do you feel you would automatically vote for death instead of life imprisonment with no parole if you found the defendant guilty of two or more murders?" The prosecution objected that the subject areas "should be covered by the Court" in its death qualification voir dire. "The question was not included in the jury questionnaire. Moreover, the judge's questions to prospective jurors did not ask this or a similar question."

Citing *Cash*, the defendant claimed he was entitled to a reversal of the death verdict. After contrasting the facts in *Medina* with those in *Cash*, the Supreme Court found the defendant made no effort to ask this legitimate question during the oral portion of voir dire.

"As our discussion of *Medina* in *Cash* suggests, a trial court's categorical prohibition of an inquiry into whether a prospective juror could vote for life without parole for a defendant convicted of multiple murder would be error. Multiple murder falls into the category of aggravating or mitigating circumstances "likely to be of great significance to prospective jurors." (*Cash, supra,* 28 Cal.4th at p. 721.) The Attorney General does not dispute this point. Rather, the Attorney General argues that defendant was not denied the opportunity to conduct voir dire on the subject of multiple murder. We agree.

Although the trial court did not include the sough-after question on multiple murder in the jury questionnaire, it never suggested that defense counsel could not raise the issue in voir dire." *Id.* at 285. "Although asking the multiple-murder question in the jury questionnaire would not have been improper, refusal to include the question was not error so long as there was an opportunity to ask the question during voir dire. Because defendant did not attempt to have the trial court conduct a multiple murder inquiry during voir dire, and the trial court was given no

opportunity to rule on the propriety of that inquiry, we conclude defendant cannot claim error." *Id.* at 286.

4. Examples of Permissible Death Qualifying Questions

    a. "Court: Both sides are entitled to have 12 jurors that, if necessary, can make that choice and make the choice based on the law that I outlined and make it fair for the defendant, fair for the prosecution, the sides they represent here. Do you believe you are a juror who can do that or do you think that your abilities are substantially impaired by your feelings about the death penalty? *People v. Harris* (2005) 37 Cal.4th 310, 330.

    b. The court asked each individual panel member, out of the presence of other prospective jurors, five questions, which may be paraphrased as follows: (1) Would you automatically refuse to impose the death penalty regardless of the evidence or the law in the case? (2) If defendant were found guilty of first degree murder with special circumstances at the guilt phase, would you automatically vote to impose the death penalty without regard to the evidence or the law? (3) Would your death penalty views prevent you from making an impartial decision as to the defendant's guilt? (4) Are your views such that you would never vote to impose the death penalty? (5) Are your views such that you would refuse to consider imposing the death penalty *in this case? People v. Balderas* (1985) 41 Cal.3rd 144, 187-188.

    c. The prosecutor asked: "[I]f I could prove to you beyond a reasonable doubt and to a moral certainty that he's guilty of murder, first degree murder with special circumstances, and based upon the second phase of this trial, the penalty phase, that you thought the death penalty was appropriate, could you then take that system and say, 'Yes, that man, Gregory Smith, he deserves the death penalty,' and vote accordingly; could you do that?" *People v. Smith* (2003) 30 Cal.4th 581, 603 fn. 3.

d. The defense wanted to ask: "Whether there are any aggravating circumstances which would cause a prospective juror to automatically vote for the death penalty, without considering the alternative of life imprisonment without possibility of parole." *People v. Cash* (2002) 28 Cal.4th 703, 719.

e. "Do you feel you would automatically vote for death instead of life imprisonment with no parole if you found the defendant guilty of two or more murders?" *People v. Viera* (2005) 35 Cal.4th 264, 283.

f. Whether an accomplice to murder should be subject to the death penalty, with or without intent to kill, was a proper subject for voir dire in *People v. Fuentes* (1985) 40 Cal.3rd 629.

g. The trial court permitted the prosecutor to ask each prospective juror whether, in the words of a representative query, the fact that a capital defendant was "18 or 19 at the time of the killing . . . [would] automatically cause you to vote for the lesser punishment of life imprisonment without possibility of parole?" In addition, the prosecutor was permitted to ask each juror in the sequestered voir dire whether "you would be able to consider imposing the death penalty . . . if we have one victim as opposed to requiring that the defendant kill two or more people?" *People v. Noguera* (1992) 4 Cal.4th 599, 645.

h. In an effort to illustrate the difference between "consider" and "chose", the prosecutor asked: "You can walk by Tiffany's and you can look in the window and you can meaningfully consider this $15,000 stone and that gold Rolex watch; right? And you can think, well, I'd rather have this one with the rubies in it or that with the stones in it or this beautiful diamond ring. But there is a difference between considering and choosing. Could you ever possibly choose the death penalty?" *People v. Smith* (2003) 30 Cal.4th 581, 602-603.

i. In describing the penalty phase of trial, the prosecutor gave illustrations of aggravating and mitigating evidence. As an example of aggravating evidence, he often mentioned a hypothetical defendant with a history of many prior felony convictions. To illustrate mitigating evidence, he often mentioned a hypothetical defendant who had received the Congressional Medal of Honor, was a war hero, had saved someone's life, or had no prior criminal history. The illustrations of aggravating evidence used by the prosecutor and the trial court resembled the aggravating evidence actually presented by the prosecution in this case, whereas the illustrations of mitigating evidence were wholly unlike defendant's mitigating evidence. *People v. Seaton* (2001) 26 Cal.4th 598, 635-636.

j. At the outset of voir dire, counsel informed the trial court that he wished to question the prospective jurors as to whether they believed a robbery accomplice who does not kill should be punished as severely as an intentional killer. Accordingly, counsel submitted for the court's approval the following question: "Do you believe that one who only aids and abets the commission of an attempted robbery and does not intentionally aid and abet the actual killing during the commission of said attempted robbery should be treated under the law in the same fashion as the actual killer?" *People v. Fuentes* (1985) 40 Cal.3rd 629, 637.

5. Examples of Impermissible Death Qualifying Questions (Typically asked by the defense)

a. The defense proposed a lengthy, factually detailed question that would have given prospective jurors substantial information about defendant's victims and the manner in which they were killed. He then wanted to ask whether the juror would automatically vote for death. (*People v. Mason* (1991) 52 Cal.3rd 909, 940 fn. 4).

b. In an effort to determine whether the evidence of serious burn injuries suffered by the victims would cause a jury to automatically vote for the death penalty, defendant sought

to inquire about the prospective jurors' attitudes toward such injuries. The People objected and, at that stage of the examination, the court ruled that the jury would not be told of the injuries suffered by Ava Gawronski, and defendant would not be permitted to ask the prospective jurors if knowledge of the extent of those injuries would affect their ability to perform their duties. *People v. Clark* (1990) 50 Cal.3rd 583, 596. But see fn. 3.

c. Defense counsel posed a hypothetical question to a prospective juror as follows. "[T]wo men go into a restaurant in the early morning hours. They herd 11 people, two customers and nine employees, to the back area of the restaurant. The two men are armed with shotguns. They rob all the people and make them lie on the floor and they rob them all. They put them all in a freezer. The people obey all the orders and instructions that the two men give them. They do not fight with them or protest. They are told to get on their knees and face the walls. They do that. No one says anything. And the two men open fire, as you put it, with their shotguns. And they go on firing even though one of the victims begs for her life. They do not stop firing until they run out of ammunition. They pick up the casings that their guns have expended. They leave everybody in this darkened freezer where people are dying and people are moaning. [¶] Now, if those are the facts that you are presented with at the penalty phase, you understand you are entitled to rely on those facts as one of the circumstances in deciding a penalty, do you not?" Defense counsel was also permitted to ask: "Now, don't you believe that that's precisely the kind of case where with your ideas of justice, the death penalty is the only appropriate kind of penalty?" She then asked if various hypothetical aggravating and mitigating factors—such as the defendant's criminal record, age, and background—would make a difference to the juror. *People v. Sanders* (1995) 11 Cal.4th 475, 535.

d. A juror was asked: "So now you're in a penalty phase with the defendant like this one, who has committed

this kind of a crime and I want you to ask yourself, after looking inside yourself whether you could actually vote to put another human being to death for doing a crime like this:

"Let's assume you have a person who decides to commit a robbery because he wants to make some additional money. He goes out and gets himself a loaded handgun to make the odds more in his favor that he'll be successful. And he finds a victim that he thinks has some money and sure enough, the victim has some money when the defendant sticks him up. Sometime about this point the defendant has the brilliant thought that if I let this guy go, he's going to the police and I might get caught and whereas if I don't let him go, don't leave any witnesses, I won't get caught, in other words, I'd better kill him to make myself more certain of getting away.

"That's exactly what he does; he shoots the victim once through the heart and subsequently he's caught and he's been brought before us and you have found beyond any doubt that he's guilty of first degree murder committed during the course of a robbery.

"Do you think it's possible that you could go in the jury room, look the other jurors in the eye and knowing you'll have to come out and look the defendant in the eye also, say I think this crime is so horrendous and the other background facts we've heard are so horrendous, he should be put to death?" *People v. Visciotti* (1992) 2 Cal.4th 1, 46-47. (Defense counsel did not, but should have objected).

e. The prosecutor asked: "If we get to the penalty phase, if we get that far, then you've already found the man guilty of first degree murder. It's a horrible crime. And you found he committed this murder while he was engaged in a robbery, based on facts that would be something like a man decides to commit a robbery, arms himself with a handgun to make sure he's successful, robs his victim. During the course of the robbery it occurs to him that if the

victim is not alive, there won't be anybody going to the police and complain . . . . So, realizing that, the robber points his gun at the victim, pulls the trigger, shoots him once through the heart and kills him.

That's the type of facts we're going to be dealing with, something along those lines, perhaps.

Do you feel just, first of all, theoretically like it's possible you could vote for the death penalty if you're faced with facts such as those?" *People v. Visciotti* (1992) 2 Cal.4th 1, 46. (Defense counsel did not, but should have objected).

f. Defense counsel was precluded from informing the prospective jurors that defendant had been convicted of first degree murder and that the special circumstance of torture murder had been found true, and prohibiting mention of the specific facts surrounding the torture murder, in violation of his Sixth Amendment right to a fair trial. *People v. Davenport* (1995) 11 Cal.4th 1171, 1204.

g. The court curtailed voir dire only when defendant asked her what type of murder case warranted the death penalty. *People v. DeSantis* (1992) 2 Cal.4th 1198, 1218.

h. If Adolf Hitler were on trial charged with murdering six million people . . . ." The court refused to permit the question, saying that "I don't think it is fair to ask a juror to speculate what they might do with Adolf Hitler. We therefore conclude that a court may properly prohibit voir dire which seeks to ascertain a juror's views on the death penalty in actual or hypothetical cases not before him. *People v. Fields* (1983) 35 Cal.3rd 329, 354-357.

i. The defense was precluded from questioning potential jurors regarding factors and circumstances they would deem significant in selecting an appropriate sentence. *People v. Johnson* (1989) 47 Cal.3rd 1194, 1225.

j. "Is life without the possibility of parole an appropriate sentence for someone who robs, rapes and kills an elderly woman?" *People v. Wright* (1990) 52 Cal.3rd 367, 419 fn. 18.

k. "What do you feel is a proper punishment for someone who has committed a rape or other serious sexually related crime?" (*People v. Ochoa* (1998) 19 Cal.4th 353, 444.)

l. The defense extensively questioned the prospective jurors on their understanding of the two possible sentences at the penalty phase, defense counsel declared that life imprisonment without possibility of parole meant life imprisonment *without possibility of parole.* In so doing, they stated or implied that the penalty would inexorably be carried out. They contrasted life imprisonment without possibility of parole, which might be imposed on defendant, with life imprisonment *simpliciter*, which had been imposed on such notorious criminals as Charles Manson and Sirhan Sirhan. *People v. Ashmus* (1991) 54 Cal.3rd 932, 957-960.

m. The prosecutor remarked that it would be proper to consider "sympathetic factors" in defendant's favor, but that defendant would be appearing in court "dressed up and decent" and had "over six years to get ready for today." The prosecutor continued in a similar vein that "[w]hat you're not going to have is the victim appear[ing] in court . . ." (*People v. Montiel* (1993) 5 Cal.4th 877, 914-915, fn. 14.)

n. In penalty re-trial, defense counsel wanted to inform jury the first penalty trial resulted in a hung jury and asked jurors about their knowledge of the first trial. (*People v. Wash* (1993) 6 Cal.4th 215, 252.)

o. Defense counsel wanted to inform jury that penalty reversal was not caused by an appellate reversal of an earlier death verdict. (*People v. Wash* (1993) 6 Cal.4th 215, 254.)

p. Questions regarding Governor's commutation power. (*People v. Pinholster* (1992) 1 Cal.4th 865, 918; *People v. Carpenter* (1997) 15 Cal.4th 312, 359.)

q. Asking a juror whether he had voted for a ballot proposition to enact the death penalty or would vote for such a penalty in a public election may be error. (*People v. Ochoa* (1998) 19 Cal.4th 53, 428.)

r. Asking a prospective juror whether the Supreme Court's capital opinions under former Chief Justice Rose Bird were "kind of off base" and whether the vote not to retain her or other justices was correct may be error. (*People v. Ochoa* (1998) 19 Cal.4th 353, 428.)

JURY SELECTION IN SEXUAL ASSAULT CASES

A. Guiding Principle

Jury Selection is important in all trials, but is of critical importance for the successful prosecution of sexual assault cases. Therefore, jury selection deserves thorough preparation and knowledge.

B. Key Components to Effective Jury Selection

- **Know the law and the rules**

You should learn the controlling statutes on this subject and the case law that interprets it. The controlling statutes on jury selection are contained in the Code of Civil Procedure (CCP) sections 190 through 237. CCP 223, 225, and 228 through 231. are regularly utilized in criminal jury trials and set out the method of voir dire, the requirements for a challenge for cause and the number of preemptory challenges permitted to each side. CCP 223 provides that in a criminal trial, each party could submit questions for the court to pose to the prospective jurors; it also establishes that each party has "the right to examine, by oral and direct questioning, any or all prospective jurors." It also limits the examination of prospective jurors to be conducted "only in the aid of the exercise of challenges for cause."

An area of implied bias that is outlined under the law is pursuant to CCP 229(f) "The existence of a state of mind in the juror evincing enmity against, or bias towards, either party."

You should also learn the judicial rules regarding jury selection. The San Diego Superior Court's web page includes jury selection information that is very useful. It has the script that the courts are encouraged to read to jurors and it even has an approved questionnaire with many good questions.

In addition, you should learn the particular way that a certain court does jury selection. Courts conduct jury selection differently utilizing their own system of examining 12 jurors at a time or more jurors.

A prosecutor should also know the law of "Wheeler" regarding preemptory challenges and know how to make the right record that

supports that a preemptory challenge is made ethically and without bias against a protected class.

People v. Wheeler (1978) 22 Cal. 3d 258 – Peremptory challenges based on group bias violates the defendant's right to jury trial in the California Constitution.

Batson v. Kentucky (1986) 476 U.S. 79 – Race based challenges violate the Equal Protection Clause of the U.S. Constitution.

Johnson v. California (2005) 545 U.S. 162 – The U.S. Supreme Court reversed *Johnson* and "clarified" the *Batson* decision by stating that the first prong of the *Batson* test need only be satisfied by production of evidence sufficient to permit the trial judge to draw an *inference of discrimination*.

STEP 1 – "PRIMA FACIE CASE"

The party objecting to the peremptory challenge must make out a prima facie case "*by showing the totality of the relevant facts gives rise to an inference of a discriminatory purpose.*"

REBUT THE PRIMA FACIE CASE IF POSSIBLE

STEP 2 – "RACE NEUTRAL REASONS"

If a prima facie case is made, the "*burden shifts to the [party making the original, objected to juror challenge] to explain adequately the racial [or other cognizable class] exclusion by offering permissible race neutral justifications for the strikes*."

PERMISSIBLE "RACE NEUTRAL" REASONS

STEP 3 – "TRIAL COURT DECIDES IF DISCRIMINATION HAS BEEN PROVEN"

"If a race neutral explanation is tendered, the trial court must then decide… whether the opponent of the strike has proved purposeful racial discrimination."

In analyzing the reason given, the court must make a "*sincere and reasoned attempt* to evaluate each stated reason as applied to each challenged juror."

Cognizable Class

Two requirements:

1) Members share a common perspective arising from life experience in the group and

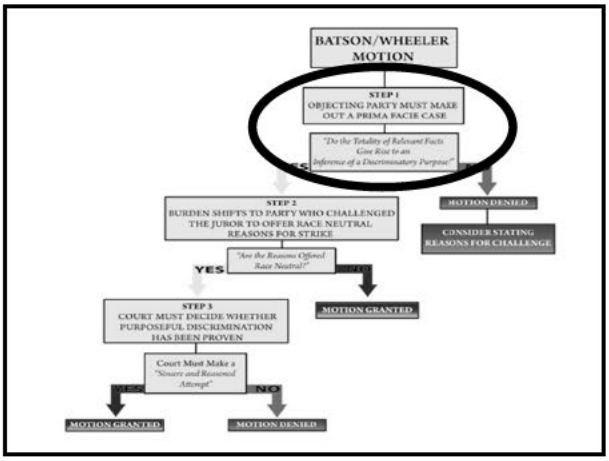
2) No other members of the community are capable of adequately representing the group perspective. (*See, Rubio v. Superior Court* (1979) 24 Cal.3d 93, 98).

Cognizable Classes

1. Race
2. Ethnicity
3. Religion
4. Gender
5. Sexual Orientation

Non-Cognizable Classes

1. Poor
2. Less Educated
3. Battered Women
4. Young
5. People over 70
6. "Insufficient" English
7. Unconventional Hairstyle
8. People who have been arrested or been victims

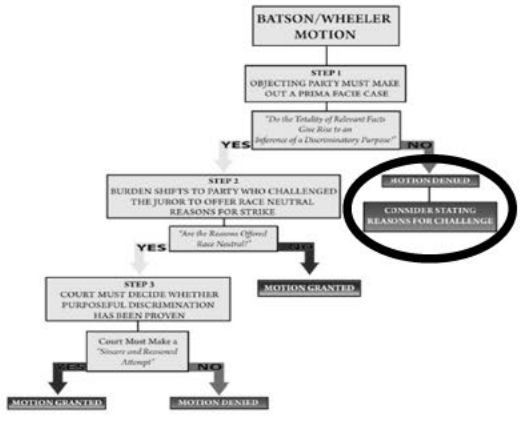


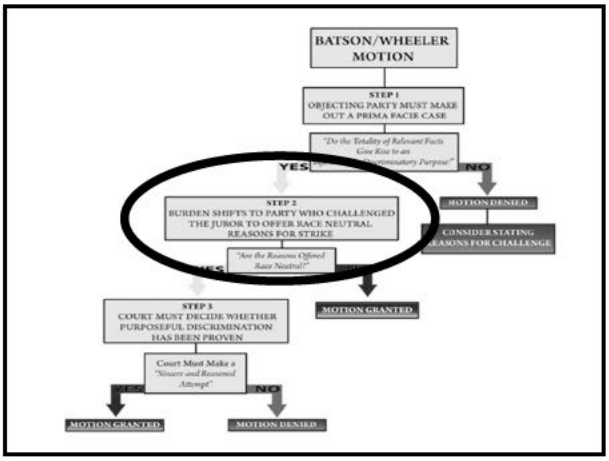
Four Ways to Demonstrate a Prima Facie Case:

1. Striking all or most of the cognizable class members
2. All the excused jurors have only one thing in common, membership in the class
3. "Desultory voir dire" or no questions at all of the excused jurors
4. Defendant is a member of the class of excused jurors

Ways to REBUT a Prima Facie Case:

1. No disproportion in excusal of cognizable class members.
2. Passing once or more with members of the cognizable class on the panel.
3. Rehabilitating cognizable class members sought to be challenged by defense.
4. Pointing out cognizable class members excused by defense.
5. Not aware that excused juror was a member of a cognizable class.



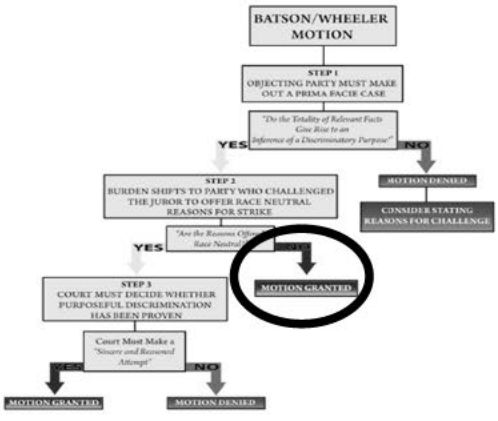


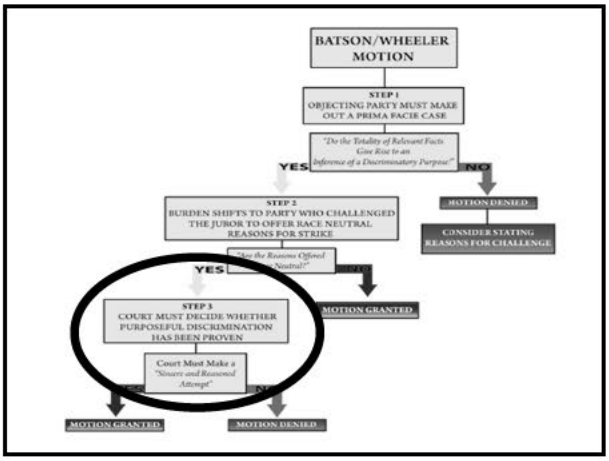
Permissible Race Neutral Reasons:

1. Legal contacts.
2. Served on hung jury before.
3. Views on the legal system.
4. Lack of disclosure.
5. Appearance (i.e., hair, jewelry, tattoos etc.).
6. Lack of life experiences.
7. Occupation.
8. Reluctance to be a juror.
9. Eagerness to be a juror.

Permissible Race Neutral Reasons Cont.:

10. Hesitance in applying the death penalty.
11. Hesitance, Transient Background, and 'Grandmotherly Persona.'
12. Body language can be proper grounds, at least if there is a sufficient record to support the prosecutor's observations.
13. Bilingual Juror Who Won't Defer to Court Translator
14. Intelligence
15. Sympathetic to defendant
16. Desire for next juror
17. Because prosecutor wished to ask the potential juror more questions.
18. Mistake





Step 3 - Trial Judge's Decision

"This demands of the trial judge a sincere and reasoned attempt to evaluate the prosecutor's explanation in light of the circumstances of the case as then known, his knowledge of trial techniques, and his observations of the manner in which the prosecutor has examined members of the venire and has exercised challenges for cause or peremptorily . . . . " (*People v. Hall* (1983) 35 Cal.3d 161, 167-168; See also, *People v. Silva* (2001) 25 Cal. 4th 345, 386)

Step 3 - Trial Judge's Decision

"In assessing credibility, the court draws upon its contemporaneous observations of the voir dire. It may also rely on the court's own experiences as a lawyer and bench officer in the community, and even the common practices of the advocate and the office that employs him or her. [Citation.]" (*People v. Lenix, supra*, 44 Cal.4th at p. 613, fn. omitted, *quoting Miller–El v. Cockrell* (2003) 537 U.S. 322, 339.)

Step 3 - Trial Judge's Decision

It is proper for a trial court, in evaluating the prosecutor's justifications, to consider the prosecutor's actions in excusing jurors in a *previous trial* and whether a prosecutors kept members of the cognizable class at issue on the jury in a *prior trial*. (*People v. DeHoyos* (2013) 57 Cal.4th 79)

Comparative Analysis

The process by which courts will evaluate the reasons given for the challenge of a member of a cognizable class. The courts will look for non-cognizable class jurors who were *not* challenged to see whether the reasons would apply equally.

Miller-El v. Dretke (2005) 545 U.S. 231
Snyder v. Louisiana (2008) 552 U.S. 472
People v. Lenix (2008) 44 Cal. 4th 602

"Positive" Comparative Analysis

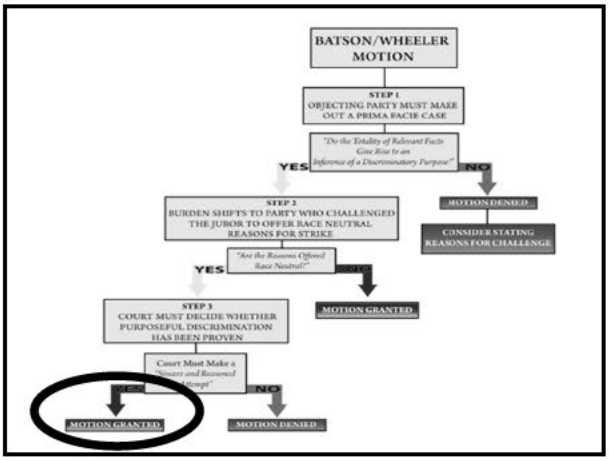
Use comparative analysis to your advantage by pointing out similarly situated *non-cognizable class* jurors who were also challenged.

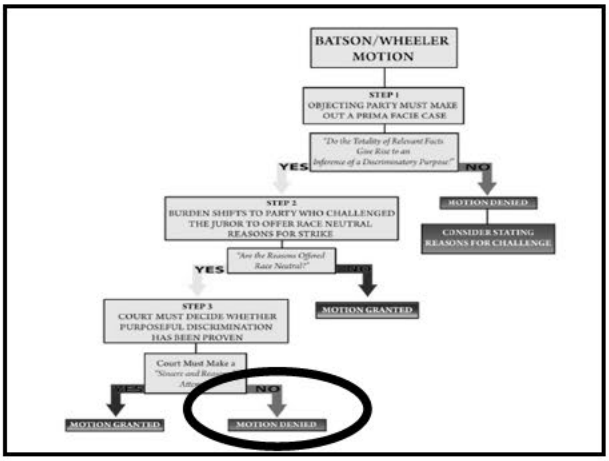
People v. Lenix (2008) 44 Cal. 4th 602

It should be discernible from the record that
1) The trial court considered the prosecutor's reasons for the peremptory challenges at issue and found them to be race-neutral;

2) Those reasons were consistent with the court's observations of what occurred, in terms of the panelist's statements as well as any pertinent nonverbal behavior; and

3) The court made a credibility finding that the prosecutor was truthful in giving race-neutral reasons for the peremptory challenges."





Practical Trial Tips

1. NEVER excuse a juror on the basis of the membership in a cognizable class.
2. Recognize that a you will get "*Wheelered*" and be prepared to deal with it by knowing the law better than the defense attorney and the judge.
3. Do not state your reasons unless and until the judge makes a step one finding.
4. Assume that a prima facie case will be found and be prepared to state your reasons.
5. If no prima facie case found, state your reasons anyway and make it clear why you are doing so.
6. Record the final jury composition.
7. Save your notes.

Remedies & Consequences

1. *Batson/Wheeler* error found on appeal is reversible.
2. Step One error found on appeal.
3. Step Two or Three motion granted at trial.
4. Step Three error found on appeal.
5. Sanctions at trial & Reversal on appeal

THE LAW

CODE OF CIVIL PROCEDURE § 223

In a criminal case, the court shall conduct an initial examination of prospective jurors. The court may submit to the prospective jurors additional questions requested by the parties as it deems proper. Upon completion of the court's initial examination, counsel for each party shall have the right to examine, by oral and direct questioning, any or all of the prospective jurors. The court may, in the exercise of its discretion, limit the oral and direct questioning of prospective jurors by counsel. The court may specify the maximum amount of time that counsel for each party may question an individual juror, or may specify an aggregate amount of time for each party, which can then be allocated among the prospective jurors by counsel. Voir dire of any prospective jurors shall, where practicable, occur in the presence of the other jurors in all criminal cases, including death penalty cases. Examination of prospective jurors shall be conducted only in aid of the exercise of challenges for cause.

The trial court's exercise of its discretion in the manner in which voir dire is conducted, including any limitation on the time which will be allowed for direct questioning of prospective jurors by counsel and any determination that a question is not in aid of the exercise of challenges for cause, shall not cause any conviction to be reversed unless the exercise of that discretion has resulted in a miscarriage of justice, as specified in Section 13 of Article VI of the California Constitution.

BASICS

CODE OF CIVIL PROCEDURE § 223

- The Court *must* question them.
- The Court *may* ask suggested questions.
- Parties have the right to examine.
- Court *may* limit time.
- *Should* be in presence of other jurors.
- **Examination "*ONLY* in aid of the exercise of challenges for cause."**

Handling a *Batson/Wheeler* Motion

I. Overview

A. Every prosecutor will have to deal with the dreaded "*Wheeler"* motion. It usually occurs following the People's use of a peremptory challenge against someone of a particular race, gender or ethnic background.

B. How it works – The defense makes a motion, usually on state and federal grounds, that the prosecutor has excused a juror based on racial, ethnic or other improper grounds and has therefore violated the defendant's Constitutional right to a fair and impartial jury. The defendant does not have to be a member of the excluded group to complain of a violation. *People v. Wheeler* (1978) 22 Cal. 3d 258, 281. (**Note**: While the defense usually brings the motion, it may be made by *either party.*)

C. It goes without saying that, for legal, ethical, and tactical reasons, no prosecutor should exercise a peremptory challenge against a juror based solely on that juror's gender, sexual orientation, or membership in a racial, ethnic, or religious group. But a prosecutor should not refrain from challenging a juror for *permissible* reasons out of a concern that the defense will raise a disingenuous or frivolous *Batson/Wheeler* claim.

D. THREE STEP PROCESS
"First, the defendant must make out a prima facie case 'by showing that the totality of relevant facts give rise to an inference of discriminatory purpose.' Second, once the defendant has made out a prima facie case, the 'burden shifts to the State to explain adequately the racial exclusion' by offering permissible race-neutral justifications for the [peremptory] strikes. Third, '[i]f a race-neutral explanation is tendered, the trial court must decide . . . whether the opponent of the strike has proved purposeful racial discrimination.' " (*Johnson v. California* (2005) 545 U.S. 162)

II. History

A. *Batson* ***is*** the federal standard and *Wheeler* ***was*** the California standard used to determine whether the peremptory challenge was improper.

B. Both cases used procedures involving 3 part tests to determine the propriety of the challenge. However, the first prong of the tests in each case was different.

Defendants argued the state burden (Wheeler) was more difficult for them to meet than the federal burden (Batson).

C. The California Supreme Court tried to reconcile the two cases in 2003 in *People v. Johnson* (2003) 30 Cal. 4th 1302.

D. In 2005, the U.S. Supreme Court reversed *Johnson* and "clarified" the *Batson* decision by stating that the first prong of the *Batson* test need only be satisfied by production of evidence sufficient to permit the trial judge to draw an *inference of discrimination*. (*Johnson v. California* (2005) 545 U.S. 162.)

E. Current State of the Law - Still a 3 prong test based on the holdings of *Batson* and *Johnson.* Although *Wheeler* is still good law, the first step has been replaced by the *Batson* first step. (*Johnson v. California* (2005) 545 U.S. 162.)

III. Analysis

A. *People v. Wheeler* (1978) 22 Cal. 3d 258 – Peremptory challenges based on group bias violates the defendant's right to jury trial in the California Constitution. *Batson v. Kentucky* (1986) 476 U.S. 79 – Race based challenges violate the Equal Protection Clause of the U.S. Constitution. (*See Also, People v. Bonilla* (2007) 41 Cal.4th 313, 341).

B. Objection Made – The claim is waived if the defendant fails to make a timely objection and a record sufficient for appellate review. (*People v. Wheeler* (1978) 22 Cal.3d 258, 280; *People v. Morris* (2003) 107 Cal.App.4th 402, 408-409)

C. Cognizable Class – "An identifiable group distinguished on racial, religious, ethnic, or similar grounds…" *People v. Wheeler* (1978) 22 Cal. 3d 258, 276. Two requirements for a cognizable class:

> 1) Members share a common perspective arising from life experience in the group; and
> 2) No other members of the community are capable of adequately representing the group perspective. (*See, Rubio v. Superior Court* (1979) 24 Cal.3d 93, 98).

Courts have recognized several categories of cognizable classes or groups.

1. Race - (*See, Batson v. Kentucky* (1986) 476 U.S. 79 & *People v. Wheeler* (1978) 22 Cal. 3d 258).

2. Ethnicity – Although there are fewer reported cases regarding ethnicity, be aware that it is a cognizable class. For example, Native Americans were the subject of the violation in *United States v. Bauer* (9th Cir. 1996) 84 F.3d 1549.

3. Religion – *People v. Johnson* (1989) 47 Cal.3d 1194, 1217 [Jewish Jurors]

4. Gender – Gender appears to be a cognizable class and should be treated as such. However, most cases dealing with gender also carry a racial component as well. (*People v. Crittenden* (1994) 9 Cal.4th 83, 115 [African-American woman]; *People v. Garceau* (1993) 6 Cal.4th 140, 171 [Hispanic woman]

5. Sexual Orientation – *People v. Garcia* (2000) 77 Cal.App.4th 1269, 1272. (*See Also,* Code of Civil Procedure §231.5)

D. Non-Cognizable Class

1. Poor – *People v. Carpenter* (1999) 21 Cal.4th 1016, 1035

2. Less Educated – *People v. Estrada* (1979) 93 Cal.App.3d 76, 90-91

3. Battered Women – *People v. Macioce* (1987) 197 Cal.App.3d 262, 280

4. Young – *People v. Ayala* (2000) 24 Cal.4th 243, 277-278; *United States v. Fletcher* (9th Cir. 1992) 965 F.2d 781, 782

5. People over 70 – *People v. McCoy* (1995) 40 Cal.App.4th 778, 783

6. "Insufficient" English – *People v. Lesara* (1998) 206 Cal.App.3d 1304, 1307

7. Unconventional Hairstyle – *Purkett v. Elem* (1995) 514 U.S. 765, 769

8. People who have been arrested *or* been victims – *People v. Fields* (1983) 35 Cal.3d 329, 348

9. "People of Color" – Combining all minority groups does not constitute a "cognizable class". *People v. Davis* (2009) 46 Cal. 4th 539

E. Challenge Exercised Against Member of Cognizable Class

1. Step One – The party objecting to the peremptory challenge must make out a prima facie case "by showing the totality of the relevant facts gives rise to an inference of a discriminatory purpose." *Johnson v. California* (2005) 545 U.S. 162. There is a presumption that that the party exercising the challenge (usually the

prosecution) does so on a constitutionally permissible ground. (*People v. Wheeler* (1978) 22 Cal. 3d 258). Thus, the objecting party (usually the defense) must demonstrate a "prima facie case".

a. Prima Facie Case – The court in *Wheeler* provided four examples of ways to demonstrate a prima facie case:

> 1. "A party may show that his opponent struck most or all of the members of the identified group from the venire."
> 2. "He may also demonstrate that the jurors in question share only this one characteristic—their membership in the group—and that in all other respects they are as heterogenous as the community as a whole."
> 3. "Next, the showing may be supplemented . . . by such circumstances as the failure of the opponent to engage these same jurors in more than desultory voir dire, or indeed to ask them any questions at all."
> 4. "Lastly, . . . the defendant need not be a member of the excluded group in order to complain of a violation of the representative cross-section rule." However, this can be probative in making the determination. (*People v. Wheeler* (1978) 22 Cal. 3d 258, 280-281; *People v. Reynoso* (2003) 31 Cal.4th 903, 914.)

b. "[A] 'pattern' of strikes against black jurors included in the particular venire might give rise to an inference of discrimination. Similarly, the prosecutor's questions and statements during *voir dire* examination and in exercising his challenges may support or refute an inference of discriminatory purpose." (*Batson v. Kentucky* (1986) 476 U.S. 79, 96-97.)

c. Rebut the prima facie case by arguing applicable factors:

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

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

3. The fact that you have <u>not</u> used a disproportionate number of your challenges against members of the cognizable class is a factor that weighs against finding an inference of discrimination. (*People v. Streeter* (2012) 54 Cal.4th 205, 223 [no prima facie case where prosecutor excused three of five African Americans]; *People v. Clark* (2011) 52 Cal.4th 856, 903 [statistical analysis subject to various

interpretations and did not raise an inference of discrimination]; *People* v. *Bell* (2007) 40 Cal.4th 582, 598 [considering fact prosecutor used only two of 16 peremptory challenges against members of the cognizable class at issue in finding the prosecutor's challenges created no inference of discrimination]; *People v. Cornwell* (2005) 37 Cal.4th 50, 70 [no prima facie case where prosecutor challenged one out of two African-American prospective jurors]). However, See *Ayala v. Wong* (9th Cir. 2012) 693 F.3d 945, 964 [Statistical evidence alone established a prima facie case where prosecution struck each of the seven black or Hispanic jurors available for challenge].

4. If you have passed on a panel that includes members of the cognizable class, this fact should be mentioned as it undercuts an inference of discrimination. (*People v. Streeter* (2012) 54 Cal.4th 205, 225 [prosecutor passed five times with up to four African American ins in jury box]; *People v. Clark* (2011) 52 Cal.4th at 856, 906 [no prima facie case where prosecutor passed two African-American jurors during several rounds before finally excusing them].) The prosecutor's acceptance of a panel including African-American prospective jurors, while not conclusive, was " 'an indication of the prosecutor's good faith in exercising his peremptories, and … an appropriate factor for the trial judge to consider in ruling on a *Wheeler* objection … .' " (*People v. Hartsch* (2010) 49 Cal.4th 472, 487). (See also, *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].)

5. Point out any members of the cognizable class who were challenged by the defense. However, be aware that this fact will not carry the day for you. It is simply something you may want to point out on the record. Further rehabilitation of prospective jurors of a cognizable class ought to be challenged can be an important factor in rebutting a prima facie case. (*People v. Streeter* (2012) 54 Cal.4th 205, 225 [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, citing *People v. Hartsch* (2010) 49 Cal.4th 472, 487]).

6. If you were honestly not aware the juror was a member of a cognizable group. *People v. Barber* (1988) 200 Cal.App.3d 378, 389. [Challenged juror appeared to be a white and non-Hispanic to DA. DA did not recognize the surname to be Hispanic. Court found DA to be sincere]

2. Step Two – If a prima facie case is made, the "burden shifts to the [party making the original, objected to juror challenge] to explain adequately the racial [or other cognizable class] exclusion by offering permissible race neutral justifications for the strikes." (*Johnson v. California* (2005) 545 U.S. 162)

"The justification need not support a challenge for cause, and even a 'trivial' reason, if genuine and neutral, will suffice." (*People v. Arias* (1996) 13 Cal. 4th 92, 136 citing *People v. Montiel* (1993) 5 Cal. 4th 877, 910, fn. 9.)

a. Examples of Permissible Reasons

1. Legal contacts. (*People v. Panah* (2005) 35 Cal.4th 395, 441-442 [potential juror was arrested and charged with a crime]; *People v. Young* (2005) 34 Cal.4th 1149, 1174 [counselor had testified before in sex assault cases]; *People v. Cleveland* (2004) 32 Cal.4th 704, 733 [son was in jail]; *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1124 [father was arrested and charged with a crime and the potential juror had been roughed up by officers]; *People v. Farnam* (2002) 28 Cal.4th 107, 137-138; *People v. Williams* (1997) 16 Cal.4th 635, 664-665 [by family member]; *People v. Arias* (1996) 13 Cal.4th 92, 138; *People v. Turner* (1994) 8 Cal.4th 137, 171; *People v. Sims* (1993) 5 Cal.4th 405, 430; *People v. Cummings* (1993) 4 Cal.4th 1233, 1282; *People v. Johnson* (1989) 47 Cal.3d 1194, 1215; *People v.Walker* (1988) 47 Cal.3d 605, 625-626; *People v. Wheeler* (1978) 22 Cal.3d 258, 275 [been a crime victim]; *People v. Douglas* (1995) 36 Cal.App.4th 1681, 1690; *People v. Martinez* (2000) 82 Cal.App.4th 339, 344-345 [family member]; *People v. Martin* (1998) 64 Cal.App.4th 378, 385, fn. 5 [crime victim]; *People v. Buckley* (1997) 53 Cal.App.4th 658, 667; *People v. Barber* (1988) 200 Cal.App.3d 378; *Mitleider v. Hall* (9th Cir. 2004) 391 F.3d 1039, 1041- 045, 1048-1051 [contacts by family members].)

2. Served on hung jury before. (*People v. Farnam* (2002) 28 Cal.4th 107, 137-138.)

3. Views on the legal system. (*People v. Ward* (2005) 36 Cal.4th 186, 201 [unfavorable views toward guilt]; *People v. Cleveland* (2004) 32 Cal.4th 704, 733 [hesitant in answering questions on the death penalty]; *People v. Yeoman* (2003) 31 Cal.4th 93, 116-117 [not strong enough views on the death penalty]; *People v. Burgener* (2003) 29 Cal.4th 833, 864 [skeptical in imposing death penalty]; *People v. Farnam* (2002) 28 Cal.4th 107, 137; *People v. Caitlin* (2001) 26 Cal.4th 81, 118 [skeptical about imposing death penalty]; *People v. Buckley* (1997) 53 Cal.App.4th 658, 666-667 [legal training]; *Boyd v. Newland* (9th Cir. 2004) 393 F.3d 1008, 1013

[ambivalence towards the legal system]; *Tolbert v. Gomez* (9th Cir. 1999) 189 F.3d 1099; *United States v. Fike* (5th Cir. 1996) 82 F.3d 1315, 1320.)

4. The potential juror's lack of disclosure. (*People v. Diaz* (1984) 152 Cal.App.3d 926, 932; see *In re Hitchings* (1993) 6 Cal.4th 97, 112; *Mitleider v. Hall* (9th Cir. 2004) 391 F.3d 1039, 1041-1045, 1048-1051 [potential juror apparently not honest].)

5. The potential juror appeared to be a non-conformer. (*Purkett v. Elem* (1995) 514 U.S. 765, 769 (per curiam) [long hair]; *People v. Ayala* (2000) 24 Cal.4th 243, 261; *People v. Howard* (1992) 1 Cal.4th 1132, 1208; *People v. Wheeler* (1978) 22 Cal.3d 258, 275.) (*People v. Ward* (2005) 36 Cal. 4th 186, 202)

6. Lack of life experiences. (*People v. Sims* (1993) 5 Cal.4th 405, 429; *People v. Perez* (1994) 29 Cal.App.4th 1313, 1328; *Mitleider v. Hall* (9th Cir. 2004) 391 F.3d 1039, 1041-1045, 1048-1051 [and young and immature].)

7. The potential juror's occupation. (*People v. Young* (2005) 34 Cal.4th 1149, 1174 [counselor who has testified before in other sex assault cases and one who was an insurance claims specialist]; *People v. Howard* (1992) 1 Cal.4th 1132, 1155-1156 [non-practicing registered nurse]; *People v. Landry* (1996) 49 Cal.App.4th 785, 790 [youth services]; *People v. Barber* (1988) 200 Cal.App.3d 378, 394; *United States v. Thompson* (9th Cir. 1987) 827 F.2d 1254, 1260.)

8. Reluctance to be a juror. (*People v. Walker* (1998) 64 Cal.App.4th 1062, 1070; *Mitleider v. Hall* (9th Cir. 2004) 391 F.3d 1039, 1041-1045, 1048-1051.) (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].)

9. Eagerness to be a juror. (*People v. Ervin* (2000) 22 Cal.4th 48, 76.)

10. Hesitance in applying the death penalty. (*People v. Panah* (2005) 35 Cal.4th 395, 441; *People v. Smith* (2005) 35 Cal.4th 334, 347.)

11. Hesitance, Transient Background, and Grandmotherly 'Persona.' (*Boyde v. Brown* (9th Cir. 2005) 404 F.3d 1159, 1170.)

12. Body language can be proper grounds, at least if there is a sufficient record to support the prosecutor's observations. (*People v. Elliott* (2012) 53 Cal.4th 535, 569-570 [Juror failed to make eye contact with anyone, dressed informally, and had an unconventional hairstyle]; (*People v. Ward* (2005) 36 Cal.4th 186, 202 [hostility toward prosecutor; though record is silent, other than the prosecutor's assertions, there is no evidence to contradict it]; *People v. Reynoso* (2003) 31 Cal.4th 903, 919; *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1125-1126 [hostile look at prosecutor] *People v. Ervin* (2000) 22 Cal.4th 48 [nervousness during voir dire]; *People v. Turner* (1994) 8 Cal.4th 137, 170 [potential juror won't look prosecutor in the eye]; *People v. Johnson* (1989) 47 Cal.3d 1194, 1220 [shy][sleepy]; *People v. Dunn* (1995) 40 Cal.App.4th 1039, 1047; *People v. Perez* (1994) 27 Cal.App.4th 1313, 1330 [inappropriate laughter]; *Mitleider v. Hall* (9th Cir. 2004) 391 F.3d 1039, 1041-1045, 1048-1051; *Williams v. Rhoades* (9th Cir. 2004) 354 F.3d 1101 [uncorroborated assertion by prosecutor of the potential juror's body language enough for affirmance because of deferential standard of review]; but see *McClain v. Prunty* (9th Cir. 2000) 217 F.3d 1209 [implied body language not enough without the prosecutor stating the reason]; *Turner v. Marshall* (9th Cir. 1997) 121 F.3d 1248, 1254 [cannot infer demeanor when prosecutor never said so]; *United States v. Power* (9th Cir. 1989) 881 F.2d 733, 740 [fidgety and inattention]; *United States v. Changco* (9th Cir. 1993) 1 F.3d 837, 840 [passive and inattentive].) (*Rice v. Collins* 546 U.S. 333 (2006) [rolling of eyes, not seen by trial judge].)

Caution: Body language can be a dangerous area if the record does not support the reasons you are giving for the excuse. Be sure that you make a record of not only what body language or demeanor you observed but *why* this was important to you and how it affected your decision to excuse the juror. Further, try not to rely solely on body language or demeanor when excusing a cognizable class juror. (See, *People v. Long* (2010) 189 Cal.App. 4th 826) [record did not support prosecutors reasons for excusing juror and judge did not make a "sincere and reasoned" attempt to evaluate the prosecutor's reasons]). (*People v. Jones* (2011) 51 Cal.4th 346) [Prosecutor gave specific and detailed reasons for challenges based upon body language and demeanor]).

13. Bilingual Juror Who Won't Defer to Court Translator - (*Hernandez v. New York* (1991) 500 U.S. 352, 356-357) CAUTION – Be careful when kicking bilingual jurors as it could be seen as a cover for discrimination. (*See, People v. Gonzales* (2008) 165 Cal.App.4th 620)

14. Intelligence – (*People v. Arias* (1996) 13 Cal. 4th 92, 137-139)

15. Sympathetic to defendant – (*People v. McKinzie* (2012) 54 Cal.4th 1302, 1321-1322) [fact juror had been arrested for domestic violence was proper basis to challenge because 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. Mayfield* (1997) 14 Cal. 4th 668, 724-726)

16. Desire for next juror - (*People v. Jones* (2011) 51 Cal.4th 346, 367) [challenge upheld where prosecutor believed he had even better potential jurors who had not been called]; (See also, *People v. Alvarez* (1996) 14 Cal. 4th 155, 194-195)

17. Because prosecutor wished to ask the potential juror more questions. (*People v. Cleveland* (2004) 32 Cal.4th 704, 733.)

18. Mistake - (*Aleman* v. *Uribe* (9th Cir. 2013) 2013) [prosecutor mistakenly transposed two jurors' information. Prosecutor helped by making a good record that he was "under the weather"] (See *People v. Williams* (2013) 56 Cal.4th 630, 660-661 [holding that, regardless of whether prosecutor challenged one juror under the mistaken belief she was a different juror, there was no *Batson-Wheeler* violation since the reason given for challenging the juror (hesitancy to impose the death penalty) would have provided valid basis for challenging different juror].) (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1124 [prosecutor misunderstood the juror's answer]; *People v. Williams* (1997) 16 Cal.4th 153, 188-189; *United States v. Lorenzo* (9th Cir. 1993) 995 F.2d 1448, 1454-1455 [time crunch].)

19. Financial Hardship/Work Related Issues - (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]

3. STEP 3 – "If a race neutral explanation is tendered, the trial court must then decide… whether the opponent of the strike has proved purposeful racial discrimination." (*Johnson v. California* (2005) 54 U.S. 162)

a. "It is not until the third step that the persuasiveness of the justification becomes relevant – the step in which the trial court determines whether the opponent of the strike has carried his burden of proving purposeful discrimination." (*Purkett v. Elem* (1995) 514 U.S. 765, 768.) [Burden of proof of is preponderance of the evidence]

b. "[W]e rely on the good judgment of trial courts to distinguish bona fide reasons for such peremptories from sham excuses belatedly contrived to avoid admitting acts of group discrimination." (*People v. Wheeler* (1978) 22 Cal.3d 258, 282; *People v. Johnson* (1989) 47 Cal.3d 1194, 1216; see *Purkett v. Elem* (1995) 514 U.S. 765, 768.)

c. "This demands of the trial judge a sincere and reasoned attempt to evaluate the prosecutor's explanation in light of the circumstances of the case as then known, his knowledge of trial techniques, and his observations of the manner in which the prosecutor has examined members of the venire and has exercised challenges for cause or peremptorily . . . . " (*People v. Hall* (1983) 35 Cal.3d 161, 167-168; See also, *People v. Silva* (2001) 25 Cal. 4th 345, 386)

d. "In assessing credibility, the court draws upon its contemporaneous observations of the voir dire. It may also rely on the court's own experiences as a lawyer and bench officer in the community, and even the common practices of the advocate and the office that employs him or her. [Citation.]" (*People v. Lenix, supra*, 44 Cal.4th at p. 613, fn. omitted, *quoting Miller–El v. Cockrell* (2003) 537 U.S. 322, 339.)

e. It is proper for a trial court, in evaluating the prosecutor's justifications, to consider the prosecutor's actions in excusing jurors in a *previous trial* and whether a prosecutors kept members of the cognizable class at issue on the jury in a *prior trial.* (*People v. DeHoyos* (2013) 57 Cal.4th 79)

F. Comparative Analysis

This term refers to the process by which courts will evaluate the reasons given for the challenge of a member of a cognizable class. The courts will look for non-cognizable class jurors who were *not* challenged to see whether the reasons would apply equally. For example, if a prosecutor challenged an African American juror who was employed as a teacher and gave the reason, "Judge, I always kick

teachers.", the court would then look to see whether the prosecutor failed to challenge any teachers who were not members of a cognizable class.

1. History

Federal Courts approved of comparative analysis in *Turner v. Marshall* (9th Cir. 1997) 121 F. 3d 1248. California rejected comparative analysis in *People v. Landry* (1996) 49 Cal.App.4th 785. *People v. Jones* (1997) 15 Cal. 4th 119. However, things began to change in 2003 with *Johnson*. Then in 2005, the U.S. Supreme Court decided *Miller-El v. Dretke* (2005) 545 U.S. 231 using comparative analysis in the decision.

a. *Snyder v. Louisiana* (2008) 552 U.S. 472 – In *Snyder,* the U.S. Supreme Court found that the prosecutors race neutral reasons for excusing a black juror were implausible and were reinforced by the prosecutor's acceptance of white jurors who disclosed conflicting obligations similar to the excused juror. (*Id.* at 483-484). The Court held that a comparative analysis was appropriate since "the shared characteristic, i.e., concern about serving on the jury due to conflicting obligations, was thoroughly explored by the trial court when the relevant jurors asked to be excused for cause." (*Id.* at p. 483)

b. *People v. Lenix* (2008) 44 Cal. 4th 602 – Comparative Analysis is alive in California.

"If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson's* third step." (*Id.* at p. 621) In reviewing the plausibility of a prosecutor's reasons for striking a juror, an appellate court can consider various kinds of evidence, including a comparison of panelists' responses. (*Id.* at p. 622) Failing to engage in comparative juror analysis for the first time on appeal unduly restricts review based on the entire record." (*Id.* at p. 622) "Thus, evidence of comparative juror analysis must be considered in the trial court and even for the first time on appeal if relied upon by defendant and the record is adequate to permit the urged comparisons." (*Id.* at p. 622)

The trial court has a duty to "assess the plausibility" of the prosecutor's proffered reasons for striking a potential juror, "in light of all evidence with a bearing on it." (*Id.* at p. 625) Trial courts "must evaluate the demeanor of the prosecutor in determining the credibility of proffered explanations, and the demeanor of the panelist when that factor is a basis for the challenge." (*Id.* at p. 625) It should be discernible from the record that "1) the trial court considered the prosecutor's reasons for the peremptory challenges at issue and found them to be race-neutral; 2) those reasons were consistent with the court's observations of what occurred, in

terms of the panelist's statements as well as any pertinent nonverbal behavior; and 3) the court made a credibility finding that the prosecutor was truthful in giving race-neutral reasons for the peremptory challenges. (*Id.* at pp. 625-626)

"As to the second point, the court may not have observed every gesture, expression or interaction relied upon by the prosecutor. The judge has a different vantage point, and may have, for example, been looking at another panelist or making a note when the described behavior occurred. But the court must be satisfied that the specifics offered by the prosecutor are consistent with the answers it heard and the overall behavior of the panelist. The record must reflect the trial court's determination on this point (see *Snyder*, supra, at p. 460), which may be encompassed within the court's general conclusion that it considered the reasons proffered by the prosecution and found them credible." (*Id.* at pp. 625-626)

The court observed that comparative juror analysis is a form of circumstantial evidence (*Id.* at p. 622) and that a reviewing court must be careful not to accept one reasonable interpretation to the exclusion of other reasonable ones when reviewing the circumstantial evidence supporting the trial court's factual findings in a *Batson/Wheeler* holding. "If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also be reasonably reconciled with a contrary finding does not warrant a reversal of the judgment." (*Id.* at pp. 625-626)

2. "Positive" Comparative Analysis

This term refers to the idea of using comparative analysis to support a challenge of a member of a cognizable class by comparing other similarly situated non-cognizable class jurors who were also challenged. (*Rice v. Collins* (2006) 546 U.S. 333, 341 [prosecutor struck a white juror with the same characteristics of a cognizable class juror she struck]; (*Briggs v. Grounds* (2012) 682 F.3d 1165 [prosecutor struck at least on non-African American who indicated they would hold the prosecution to a higher standard of proof]).

IV. Practical Issues in Dealing with *Batson/Wheeler* Motions

A. Realize that a challenge will likely come at some point during jury selection and be ready to deal with it. It should go without saying, but ***NEVER*** excuse a juror on the basis of race, ethnicity, religion, gender etc…Question all jurors you plan to challenge. Desultory questioning does not count.

B. Be prepared to rebut the prima facie case. (See pp. 4-5)

C. Assume that a prima facie case will be made and be prepared to give race neutral reasons for excusing the juror. While peremptory challenges are often based on instinct and it can sometimes be hard to articulate the reason for removing a juror, "a prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives." (*People* v. *Lenix* (2008) 44 Cal.4th 602, 624.) Prosecutors should "provide as complete an explanation for their peremptory challenges as possible." (*People* v. *Lenix* (2008) 44 Cal.4th 602, 624.)

D. If you can't recall specifically why you excused a juror, it is better to ask for a "time out" so that you may review the transcript/recording of the juror's answers. (See *Lewis v. Lewis* (9th Cir. 2003) 321 F.3d 824 [suggesting that counsel can be particularly helpful in assisting the court at the third step of *Batson* "when afforded the opportunity to review a transcript of the jury selection proceedings"].)

E. If judge finds no prima facie case, consider stating your reasons anyway. But, do not give reasons unless the court specifically finds no prima facie case. Giving reasons without a specific finding on the first prong will constitute an implied finding of a prima facie case. *People v. Arias* (1996) 13 Cal. 4th 92; *People v. Gutierrez* (2002) 28 Cal. 4th 1083.

E. Trial Tips

1. Create a Good Record

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.)

2. Obtain a Transcript of Voir Dire Before Making Challenges

In certain situations, a prosecutor may not recall or have accurate notes regarding the responses of a juror he or she wishes to challenge. In those cases, it is appropriate and recommended that the prosecutor ask for read back of the juror's responses. (*See Lewis v. Lewis* (9th Cir. 2003) 321 F.3d 824)

3. Ask Court to Note the Final Jury Composition

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"].)

4. Save your notes. If case is reviewed later, voir dire may be an issue. Always save your notes so that if asked, you are better able to recollect why you may have challenged a specific juror.

a. At remand hearing, the prosecutor does NOT have to state reasons under oath. (*People v. Kelly* (2008) 162 Cal.App.4th 797)

b. At remand hearing, the prosecutor does NOT have to turn over original voir dire notes. (*People v. Kelly* (2008) 162 Cal.App.4th 797)

c. At remand hearing, prosecutor cannot be cross-examined by the defense. (*People v. Kelly* (2008) 162 Cal.App.4th 797)

d. "I don't recall" May or May Not Fly – (*Paulino v. Harrison* (9th Cir. 2008) 542 F.3d 692); (But see, *Yee* v. *Duncan* (9th Cir. 2006) 463 F.3d 893.) [notwithstanding the inability to recall reason for excusing one cognizable class juror, totality of prosecutor's responses regarding other excused jurors did not evidence a discriminatory motive].)

F. Remedies

1. *Wheeler-Batson* error is reversible per se. (*People v. Wheeler* (1978) 22 Cal.3d 258, 283; see *Miller-El v. Dretke* (2005) 545 U.S. 231)

a. Step One Error: When the trial court erroneously finds there was not a prima facie case, the matter is often remanded for prosecutor to state reasons for peremptory challenge. (*Batson v. Kentucky* (1986) 476 U.S. 79, 100; *People v. McGee* (2002) 104 Cal.App.4th 559, 571, 573 [remand to permit prosecutor give reasons].) This remedy has been criticized for two reasons. First, the long passage of time makes it nearly impossible for the prosecutor to genuinely remember the real reason. (*People v. Hall* (1983) 35 Cal.3d 161, 171 [pointless to remand for the prosecutor to give a reason 11 years later]; *People v. Allen* (2004) 115 Cal.App.4th 542, 553-554, fn. 10 [remand for new trial, not for the prosecutor to give reasons, because occurred three years ago]; see also *People v. Ayala* (2000) 24 Cal.4th 243, 297, fn. 8 (conc. opn. of George, C.J.); *People v. Robinson* (2003) 110 Cal.App.4th 1196, 1208 [remand for the prosecutor to give the reason but retrial if it could not recall]; *People v. Williams* (2000) 78 Cal.App.4th 1118, 1130 [on remand, the court must first determine if it can adequately address the issue after the delay]; *United States v. Alcantar* (9th Cir. 1990) 897 F.2d 436, 438-439.) Second, this procedure is subject to a prosecutor trying to invent more legitimate reasons after the fact. (See, e.g., *Miller-El v. Dretke* (2005) 545 U.S. 231 [prosecution's reasons after the fact "reeks of afterthought"]; *Miller-El v. Cockrell* (2003) 537 U.S. 331, 343 [reasons given after trial "was subject to the usual risks of imprecision and distortions from the passage of time"]; see also *Johnson v. California* (2005) 545 U.S. 162, quoting *Paulino v. Castro* (9th Cir. 2004) 371 F.3d 1083, 1090 ["it does not matter that the prosecution might have had good reasons . . . [w]hat matters is the real reason they were stricken"].)

b. Step Three Error: When the trial court fails to sustain motion after the prosecutor gives reason, error normally requires new venire. (*People v. Wheeler* (1978) 22 Cal.3d 258, 283; see *Miller-El v. Dretke* (2005) 545 U.S. 162). However, the defendant in the trial court can stipulate to a different remedy. (*People v. Willis* (2002) 27 Cal.4th 811, 821-824 [with consent of movant, can use other remedies such as sanctions, reinstating removed jurors or doing challenges at sidebar]; *People v. Overby* (2004) 124 Cal.App.4th 1237, 1244-1245 [defendant not objecting to judge re-seating the excused juror indicates consent to this remedy]. (See *People v. Mata* (2013) 57 Cal.4th 178) [holding that the trial court may reseat an improperly challenged juror if affected counsel either expressly or implicity consents]

2. Consequences

a. If the court grants a *Batson/Wheeler* motion at trial and employs one or more of the remedies discussed, that is arguably a "sanction".

1. Court must notify the bar of any judicial sanctions against an attorney (Business & Professions Code §6068(a)(3)).

2. Attorney must self report any judicial sanction (Business & Professions Code §6068(o)(3)).

3. However, reporting will likely not be required unless the conduct is egregious.

b. If the trial court erroneously denies a *Batson/Wheeler* motion at trial and the case is reversed

1. Court must notify bar whenever there is a reversal. (Business & Professions Code §6086.7(b)(2)).

2. Attorney must notify bar whenever reversal is based in whole or in part upon misconduct of the attorney. (Business & Professions Code §6068(o)(7)).

Handling a *Batson/Wheeler* Motion

I. Overview

A. Every prosecutor will have to deal with the dreaded "*Wheeler"* motion. It usually occurs following the People's use of a peremptory challenge against someone of a particular race, gender or ethnic background.

B. How it works – The defense makes a motion, usually on state and federal grounds, that the prosecutor has excused a juror based on racial, ethnic or other improper grounds and has therefore violated the defendant's Constitutional right to a fair and impartial jury. The defendant does not have to be a member of the excluded group to complain of a violation. *People v. Wheeler* (1978) 22 Cal. 3d 258, 281. (**Note**: While the defense usually brings the motion, it may be made by *either party.*)

C. It goes without saying that, for legal, ethical, and tactical reasons, no prosecutor should exercise a peremptory challenge against a juror based solely on that juror's gender, sexual orientation, or membership in a racial, ethnic, or religious group. But a prosecutor should not refrain from challenging a juror for *permissible* reasons out of a concern that the defense will raise a disingenuous or frivolous *Batson/Wheeler* claim.

D. THREE STEP PROCESS
"First, the defendant must make out a prima facie case 'by showing that the totality of relevant facts give rise to an inference of discriminatory purpose.' Second, once the defendant has made out a prima facie case, the 'burden shifts to the State to explain adequately the racial exclusion' by offering permissible race-neutral justifications for the [peremptory] strikes. Third, '[i]f a race-neutral explanation is tendered, the trial court must decide . . . whether the opponent of the strike has proved purposeful racial discrimination.' " (*Johnson v. California* (2005) 545 U.S. 162)

II. History

A. *Batson* ***is*** the federal standard and *Wheeler* ***was*** the California standard used to determine whether the peremptory challenge was improper.

B. Both cases used procedures involving 3 part tests to determine the propriety of the challenge. However, the first prong of the tests in each case was different. *Defendants argued the state burden (Wheeler) was more difficult for them to meet than the federal burden (Batson)*.

C. The California Supreme Court tried to reconcile the two cases in 2003 in *People v. Johnson* (2003) 30 Cal. 4th 1302.

D. In 2005, the U.S. Supreme Court reversed *Johnson* and "clarified" the *Batson* decision by stating that the first prong of the *Batson* test need only be satisfied by production of evidence sufficient to permit the trial judge to draw an *inference of discrimination*. (*Johnson v. California* (2005) 545 U.S. 162.)

E. Current State of the Law - Still a 3 prong test based on the holdings of *Batson* and *Johnson*. Although *Wheeler* is still good law, the first step has been replaced by the *Batson* first step. (*Johnson v. California* (2005) 545 U.S. 162.)

III. Analysis

A. *People v. Wheeler* (1978) 22 Cal. 3d 258 – Peremptory challenges based on group bias violates the defendant's right to jury trial in the California Constitution. *Batson v. Kentucky* (1986) 476 U.S. 79 – Race based challenges violate the Equal Protection Clause of the U.S. Constitution. (*See Also, People v. Bonilla* (2007) 41 Cal.4th 313, 341).

B. Objection Made – The claim is waived if the defendant fails to make a timely objection and a record sufficient for appellate review. (*People v. Wheeler* (1978) 22 Cal.3d 258, 280; *People v. Morris* (2003) 107 Cal.App.4th 402, 408-409)

C. Cognizable Class – "An identifiable group distinguished on racial, religious, ethnic, or similar grounds…" *People v. Wheeler* (1978) 22 Cal. 3d 258, 276. Two requirements for a cognizable class:

> 1) Members share a common perspective arising from life experience in the group; and
> 2) No other members of the community are capable of adequately representing the group perspective. (*See, Rubio v. Superior Court* (1979) 24 Cal.3d 93, 98).

Courts have recognized several categories of cognizable classes or groups.

1. Race - (*See, Batson v. Kentucky* (1986) 476 U.S. 79 & *People v. Wheeler* (1978) 22 Cal. 3d 258).

2. Ethnicity – Although there are fewer reported cases regarding ethnicity, be aware that it is a cognizable class. For example, Native Americans were the subject of the violation in *United States v. Bauer* (9th Cir. 1996) 84 F.3d 1549.

3. Religion – *People v. Johnson* (1989) 47 Cal.3d 1194, 1217 [Jewish Jurors]

4. Gender – Gender appears to be a cognizable class and should be treated as such. However, most cases dealing with gender also carry a racial component as well. (*People v. Crittenden* (1994) 9 Cal.4th 83, 115 [African-American woman]; *People v. Garceau* (1993) 6 Cal.4th 140, 171 [Hispanic woman]

5. Sexual Orientation – *People v. Garcia* (2000) 77 Cal.App.4th 1269, 1272. (*See Also,* Code of Civil Procedure §231.5)

D. Non-Cognizable Class

1. Poor – *People v. Carpenter* (1999) 21 Cal.4th 1016, 1035

2. Less Educated – *People v. Estrada* (1979) 93 Cal.App.3d 76, 90-91

3. Battered Women – *People v. Macioce* (1987) 197 Cal.App.3d 262, 280

4. Young – *People v. Ayala* (2000) 24 Cal.4th 243, 277-278; *United States v. Fletcher* (9th Cir. 1992) 965 F.2d 781, 782

5. People over 70 – *People v. McCoy* (1995) 40 Cal.App.4th 778, 783

6. "Insufficient" English – *People v. Lesara* (1998) 206 Cal.App.3d 1304, 1307

7. Unconventional Hairstyle – *Purkett v. Elem* (1995) 514 U.S. 765, 769

8. People who have been arrested or been victims – *People v. Fields* (1983) 35 Cal.3d 329, 348

E. Challenge Exercised Against Member of Cognizable Class

1. Step One – The party objecting to the peremptory challenge must make out a prima facie case "by showing the totality of the relevant facts gives rise to an inference of a discriminatory purpose." *Johnson v. California* (2005) 545 U.S. 162. There is a presumption that that the party exercising the challenge (usually the prosecution) does so on a constitutionally permissible ground. (*People v. Wheeler* (1978) 22 Cal. 3d 258). Thus, the objecting party (usually the defense) must demonstrate a "prima facie case".

a. Prima Facie Case – The court in *Wheeler* provided four examples of ways to demonstrate a prima facie case:

1. "A party may show that his opponent struck most or all of the members of the identified group from the venire."
2. "He may also demonstrate that the jurors in question share only this one characteristic—their membership in the group—and that in all other respects they are as heterogenous as the community as a whole."
3. "Next, the showing may be supplemented . . . by such circumstances as the failure of the opponent to engage these same jurors in more than desultory voir dire, or indeed to ask them any questions at all."
4. "Lastly, . . . the defendant need not be a member of the excluded group in order to complain of a violation of the representative cross-section rule." However, this can be probative in making the determination. (*People v. Wheeler* (1978) 22 Cal. 3d 258, 280-281; *People v. Reynoso* (2003) 31 Cal.4th 903, 914.)

b. "[A] 'pattern' of strikes against black jurors included in the particular venire might give rise to an inference of discrimination. Similarly, the prosecutor's questions and statements during *voir dire* examination and in exercising his challenges may support or refute an inference of discriminatory purpose." (*Batson v. Kentucky* (1986) 476 U.S. 79, 96-97.)

2. Step Two – If a prima facie case is made, the "burden shifts to the [party making the original, objected to juror challenge] to explain adequately the racial [or other cognizable class] exclusion by offering permissible race neutral justifications for the strikes." (*Johnson v. California* (2005) 545 U.S. 162)

"The justification need not support a challenge for cause, and even a 'trivial' reason, if genuine and neutral, will suffice." (*People v. Arias* (1996) 13 Cal. 4th 92, 136 citing *People v. Montiel* (1993) 5 Cal. 4th 877, 910, fn. 9.)

a. Examples of Permissible Reasons

1. Legal contacts. (*People v. Panah* (2005) 35 Cal.4th 395, 441-442 [potential juror was arrested and charged with a crime]; *People v. Young* (2005) 34 Cal.4th 1149, 1174 [counselor had testified before in sex assault cases]; *People v. Cleveland* (2004) 32 Cal.4th 704, 733 [son was in jail]; *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1124 [father was arrested and charged with a crime and the potential juror had been roughed up by officers]; *People v. Farnam* (2002) 28 Cal.4th 107, 137-138; *People v. Williams* (1997) 16 Cal.4th 635, 664-665 [by family member]; *People v. Arias* (1996) 13 Cal.4th 92, 138; *People v. Turner* (1994) 8 Cal.4th 137, 171; *People v. Sims* (1993) 5 Cal.4th 405, 430; *People v. Cummings* (1993) 4

Cal.4th 1233, 1282; *People v. Johnson* (1989) 47 Cal.3d 1194, 1215; *People v.Walker* (1988) 47 Cal.3d 605, 625-626; *People v. Wheeler* (1978) 22 Cal.3d 258, 275 [been a crime victim]; *People v. Douglas* (1995) 36 Cal.App.4th 1681, 1690; *People v. Martinez* (2000) 82 Cal.App.4th 339, 344-345 [family member]; *People v. Martin* (1998) 64 Cal.App.4th 378, 385, fn. 5 [crime victim]; *People v. Buckley* (1997) 53 Cal.App.4th 658, 667; *People v. Barber* (1988) 200 Cal.App.3d 378; *Mitleider v. Hall* (9th Cir. 2004) 391 F.3d 1039, 1041- 045, 1048-1051 [contacts by family members].)

2. Served on hung jury before. (*People v. Farnam* (2002) 28 Cal.4th 107, 137-138.)

3. Views on the legal system. (*People v. Ward* (2005) 36 Cal.4th 186, 201 [unfavorable views toward guilt]; *People v. Cleveland* (2004) 32 Cal.4th 704, 733 [hesitant in answering questions on the death penalty]; *People v. Yeoman* (2003) 31 Cal.4th 93, 116-117 [not strong enough views on the death penalty]; *People v. Burgener* (2003) 29 Cal.4th 833, 864 [skeptical in imposing death penalty]; *People v. Farnam* (2002) 28 Cal.4th 107, 137; *People v. Caitlin* (2001) 26 Cal.4th 81, 118 [skeptical about imposing death penalty]; *People v. Buckley* (1997) 53 Cal.App.4th 658, 666-667 [legal training]; *Boyd v. Newland* (9th Cir. 2004) 393 F.3d 1008, 1013 [ambivalence towards the legal system]; *Tolbert v. Gomez* (9th Cir. 1999) 189 F.3d 1099; *United States v. Fike* (5th Cir. 1996) 82 F.3d 1315, 1320.)

4. The potential juror's lack of disclosure. (*People v. Diaz* (1984) 152 Cal.App.3d 926, 932; see *In re Hitchings* (1993) 6 Cal.4th 97, 112; *Mitleider v. Hall* (9th Cir. 2004) 391 F.3d 1039, 1041-1045, 1048-1051 [potential juror apparently not honest].)

5. The potential juror appeared to be a non-conformer. (*Purkett v. Elem* (1995) 514 U.S. 765, 769 (per curiam) [long hair]; *People v. Ayala* (2000) 24 Cal.4th 243, 261; *People v. Howard* (1992) 1 Cal.4th 1132, 1208; *People v. Wheeler* (1978) 22 Cal.3d 258, 275.) (*People v. Ward* (2005) 36 Cal. 4th 186, 202)

6. Lack of life experiences. (*People v. Sims* (1993) 5 Cal.4th 405, 429; *People v. Perez* (1994) 29 Cal.App.4th 1313, 1328; *Mitleider v. Hall* (9th Cir. 2004) 391 F.3d 1039, 1041-1045, 1048-1051 [and young and immature].)

7. The potential juror's occupation. (*People v. Young* (2005) 34 Cal.4th 1149, 1174 [counselor who has testified before in other sex assault cases and one who was an insurance claims specialist]; *People v. Howard* (1992) 1

Cal.4th 1132, 1155-1156 [non-practicing registered nurse]; *People v. Landry* (1996) 49 Cal.App.4th 785, 790 [youth services]; *People v. Barber* (1988) 200 Cal.App.3d 378, 394; *United States v. Thompson* (9th Cir. 1987) 827 F.2d 1254, 1260.)

8. Reluctance to be a juror. (*People v. Walker* (1998) 64 Cal.App.4th 1062, 1070; *Mitleider v. Hall* (9th Cir. 2004) 391 F.3d 1039, 1041-1045, 1048-1051.) (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].)

9. Eagerness to be a juror. (*People v. Ervin* (2000) 22 Cal.4th 48, 76.)

10. Hesitance in applying the death penalty. (*People v. Panah* (2005) 35 Cal.4th 395, 441; *People v. Smith* (2005) 35 Cal.4th 334, 347.)

11. Hesitance, Transient Background, and Grandmotherly 'Persona.' (*Boyde v. Brown* (9th Cir. 2005) 404 F.3d 1159, 1170.)

12. Body language can be proper grounds, at least if there is a sufficient record to support the prosecutor's observations. (*People v. Elliott* (2012) 53 Cal.4th 535, 569-570 [Juror failed to make eye contact with anyone, dressed informally, and had an unconventional hairstyle]; (*People v. Ward* (2005) 36 Cal.4th 186, 202 [hostility toward prosecutor; though record is silent, other than the prosecutor's assertions, there is no evidence to contradict it]; *People v. Reynoso* (2003) 31 Cal.4th 903, 919; *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1125-1126 [hostile look at prosecutor] *People v. Ervin* (2000) 22 Cal.4th 48 [nervousness during voir dire]; *People v. Turner* (1994) 8 Cal.4th 137, 170 [potential juror won't look prosecutor in the eye]; *People v. Johnson* (1989) 47 Cal.3d 1194, 1220 [shy][sleepy]; *People v. Dunn* (1995) 40 Cal.App.4th 1039, 1047; *People v. Perez* (1994) 27 Cal.App.4th 1313, 1330 [inappropriate laughter]; *Mitleider v. Hall* (9th Cir. 2004) 391 F.3d 1039, 1041-1045, 1048-1051; *Williams v. Rhoades* (9th Cir. 2004) 354 F.3d 1101 [uncorroborated assertion by prosecutor of the potential juror's body language enough for affirmance because of deferential standard of review]; but see *McClain v. Prunty* (9th Cir. 2000) 217 F.3d 1209 [implied body language not enough without the prosecutor stating the reason]; *Turner v. Marshall* (9th Cir. 1997) 121 F.3d 1248, 1254 [cannot infer demeanor when prosecutor never said so]; *United States v. Power* (9th Cir. 1989) 881 F.2d

733, 740 [fidgety and inattention]; *United States v. Changco* (9th Cir. 1993) 1 F.3d 837, 840 [passive and inattentive].) (*Rice v. Collins* 546 U.S. 333 (2006) [rolling of eyes, not seen by trial judge].)

Caution: Body language can be a dangerous area if the record does not support the reasons you are giving for the excuse. Be sure that you make a record of not only what body language or demeanor you observed but *why* this was important to you and how it affected your decision to excuse the juror. Further, try not to rely solely on body language or demeanor when excusing a cognizable class juror. (See, *People v. Long* (2010) 189 Cal.App. 4th 826) [record did not support prosecutors reasons for excusing juror and judge did not make a "sincere and reasoned" attempt to evaluate the prosecutor's reasons]). (*People v. Jones* (2011) 51 Cal.4th 346) [Prosecutor gave specific and detailed reasons for challenges based upon body language and demeanor]).

13. Bilingual Juror Who Won't Defer to Court Translator - (*Hernandez v. New York* (1991) 500 U.S. 352, 356-357) CAUTION – Be careful when kicking bilingual jurors as it could be seen as a cover for discrimination. (*See, People v. Gonzales* (2008) 165 Cal.App.4th 620)
14. Intelligence – (*People v. Arias* (1996) 13 Cal. 4th 92, 137-139)

15. Sympathetic to defendant – (*People v. MCKinzie* (2012) 54 Cal.4th 1302, 1321-1322) [fact juror had been arrested for domestic violence was proper basis to challenge because 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. Mayfield* (1997) 14 Cal. 4th 668, 724-726)

16. Desire for next juror - (*People v. Jones* (2011) 51 Cal.4th 346, 367) [challenge upheld where prosecutor believed he had even better potential jurors who had not been called]; (See also, *People v. Alvarez* (1996) 14 Cal. 4th 155, 194-195)

17. Because prosecutor wished to ask the potential juror more questions. (*People v. Cleveland* (2004) 32 Cal.4th 704, 733.)

18. Mistake. (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1124 [misunderstood the answer]; *People v. Williams* (1997) 16 Cal.4th 153, 188-189; *United States v. Lorenzo* (9th Cir. 1993) 995 F.2d 1448, 1454-1455 [time crunch].)

3. STEP 3 – "If a race neutral explanation is tendered, the trial court must then decide… whether the opponent of the strike has proved purposeful racial discrimination." (*Johnson v. California* (2005) 54 U.S. 162)

a. "It is not until the third step that the persuasiveness of the justification becomes relevant – the step in which the trial court determines whether the opponent of the strike has carried his burden of proving purposeful discrimination." (*Purkett v. Elem* (1995) 514 U.S. 765, 768.)

b. "[W]e rely on the good judgment of trial courts to distinguish bona fide reasons for such peremptories from sham excuses belatedly contrived to avoid admitting acts of group discrimination." (*People v. Wheeler* (1978) 22 Cal.3d 258, 282; *People v. Johnson* (1989) 47 Cal.3d 1194, 1216; see *Purkett v. Elem* (1995) 514 U.S. 765, 768.)

c. "This demands of the trial judge a sincere and reasoned attempt to evaluate the prosecutor's explanation in light of the circumstances of the case as then known, his knowledge of trial techniques, and his observations of the manner in which the prosecutor has examined members of the venire and has exercised challenges for cause or peremptorily . . . . " (*People v. Hall* (1983) 35 Cal.3d 161, 167-168; See also, *People v. Silva* (2001) 25 Cal. 4th 345, 386)

F. Comparative Analysis

This term refers to the process by which courts will evaluate the reasons given for the challenge of a member of a cognizable class. The courts will look for non-cognizable class jurors who were *not* challenged to see whether the reasons would apply equally. For example, if a prosecutor challenged an African American juror who was employed as a teacher and gave the reason, "Judge, I always kick teachers.", the court would then look to see whether the prosecutor failed to challenge any teachers who were not members of a cognizable class.

1. History

Federal Courts approved of comparative analysis in *Turner v. Marshall* (9th Cir. 1997) 121 F. 3d 1248. California rejected comparative analysis in *People v. Landry* (1996) 49 Cal.App.4th 785. *People v. Jones* (1997) 15 Cal. 4th 119. However, things began to change in 2003 with *Johnson*. Then in 2005, the U.S.

Supreme Court decided *Miller-El v. Dretke* (2005) 545 U.S. 231 using comparative analysis in the decision.

a. *Snyder v. Louisiana* (2008) 552 U.S. 472 – In *Snyder,* the U.S. Supreme Court found that the prosecutors race neutral reasons for excusing a black juror were implausible and were reinforced by the prosecutor's acceptance of white jurors who disclosed conflicting obligations similar to the excused juror. (*Id.* at 483-484). The Court held that a comparative analysis was appropriate since "the shared characteristic, i.e., concern about serving on the jury due to conflicting obligations, was thoroughly explored by the trial court when the relevant jurors asked to be excused for cause." (*Id.* at p. 483)

b. *People v. Lenix* (2008) 44 Cal. 4th 602 – Comparative Analysis is alive in California.

"If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson's* third step." (*Id.* at p. 621) In reviewing the plausibility of a prosecutor's reasons for striking a juror, an appellate court can consider various kinds of evidence, including a comparison of panelists' responses. (*Id.* at p. 622) Failing to engage in comparative juror analysis for the first time on appeal unduly restricts review based on the entire record." (*Id.* at p. 622) "Thus, evidence of comparative juror analysis must be considered in the trial court and even for the first time on appeal if relied upon by defendant and the record is adequate to permit the urged comparisons." (*Id.* at p. 622)

The trial court has a duty to "assess the plausibility" of the prosecutor's proffered reasons for striking a potential juror, "in light of all evidence with a bearing on it." (*Id.* at p. 625) Trial courts "must evaluate the demeanor of the prosecutor in determining the credibility of proffered explanations, and the demeanor of the panelist when that factor is a basis for the challenge." (*Id.* at p. 625) It should be discernible from the record that "1) the trial court considered the prosecutor's reasons for the peremptory challenges at issue and found them to be race-neutral; 2) those reasons were consistent with the court's observations of what occurred, in terms of the panelist's statements as well as any pertinent nonverbal behavior; and 3) the court made a credibility finding that the prosecutor was truthful in giving race-neutral reasons for the peremptory challenges. (*Id.* at pp. 625-626)

"As to the second point, the court may not have observed every gesture, expression or interaction relied upon by the prosecutor. The judge has a different vantage point, and may have, for example, been looking at another panelist or making a note when the described behavior occurred. But the court must be satisfied that the

specifics offered by the prosecutor are consistent with the answers it heard and the overall behavior of the panelist. The record must reflect the trial court's determination on this point (see *Snyder*, supra, at p. 460), which may be encompassed within the court's general conclusion that it considered the reasons proffered by the prosecution and found them credible." (*Id.* at pp. 625-626)

The court observed that comparative juror analysis is a form of circumstantial evidence (*Id.* at p. 622) and that a reviewing court must be careful not to accept one reasonable interpretation to the exclusion of other reasonable ones when reviewing the circumstantial evidence supporting the trial court's factual findings in a *Batson/Wheeler* holding. "If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also be reasonably reconciled with a contrary finding does not warrant a reversal of the judgment." (*Id.* at pp. 625-626)

2. "Positive" Comparative Analysis

This term refers to the idea of using comparative analysis to support a challenge of a member of a cognizable class by comparing other similarly situated non-cognizable class jurors who were also challenged. (*Rice v. Collins* (2006) 546 U.S. 333, 341 [prosecutor struck a white juror with the same characteristics of a cognizable class juror she struck]; (*Briggs v. Grounds* (2012) 682 F.3d 1165 [prosecutor struck at least on non-African American who indicated they would hold the prosecution to a higher standard of proof]).

IV. Practical Issues in Dealing with *Batson/Wheeler* Motions

A. Realize that a challenge will likely come at some point during jury selection and be ready to deal with it. It should go without saying, but ***NEVER*** excuse a juror on the basis of race, ethnicity, religion, gender etc…Question all jurors you plan to challenge. Desultory questioning does not count.

B. Be prepared to rebut a prima facie case by arguing applicable factors:

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

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

3. The fact that a prosecutor has not used a disproportionate number of his or her challenges against members of the cognizable class is a factor that weighs against finding an inference of discrimination. (*People v. Streeter* (2012) 54 Cal.4th 205, 223 [no prima facie case where prosecutor excused three of five African Americans]; *People v. Clark* (2011) 52 Cal.4th 856, 903 [statistical analysis subject to various interpretations and did not raise an inference of discrimination]; *People* v. *Bell* (2007) 40 Cal.4th 582, 598 [considering fact prosecutor used only two of 16 peremptory challenges against members of the cognizable class at issue in finding the prosecutor's challenges created no inference of discrimination]; *People v. Cornwell* (2005) 37 Cal.4th 50, 70 [no prima facie case where prosecutor challenged one out of two African-American prospective jurors]). However, See *Ayala v. Wong* (9th Cir. 2012) 693 F.3d 945, 964 [Statistical evidence alone established a prima facie case where prosecution struck each of the seven black or Hispanic jurors available for challenge].

4. If a prosecutor has passed on a panel that includes members of the cognizable class, this fact should be mentioned as it undercuts an inference of discrimination. (*People v. Streeter* (2012) 54 Cal.4th 205, 225 [prosecutor passed five times with up to four African American ins in jury box]; *People v. Clark* (2011) 52 Cal.4th at 856, 906 [no prima facie case where prosecutor passed two African-American jurors during several rounds before finally excusing them].) The prosecutor's acceptance of a panel including African-American prospective jurors, while not conclusive, was " 'an indication of the prosecutor's good faith in exercising his peremptories, and … an appropriate factor for the trial judge to consider in ruling on a *Wheeler* objection … .' " (*People v. Hartsch* (2010) 49 Cal.4th 472, 487). (See also, *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].)

5. Point out any members of the cognizable class who were challenged by the defense. However, be aware that this fact will not carry the day for you. It is simply something you may want to point out on the record. Further rehabilitation of prospective jurors of a cognizable class ought to be challenged can be an important factor in rebutting a prima facie case. (*People v. Streeter* (2012) 54 Cal.4th 205, 225 [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, citing *People v. Hartsch* (2010) 49 Cal.4th 472, 487]).

6. If you were honestly not aware the juror was a member of a cognizable group. *People v. Barber* (1988) 200 Cal.App.3d 378, 389. [Challenged juror appeared to be a white and non-Hispanic to DA. DA did not recognize the surname to be Hispanic. Court found DA to be sincere]

C. Assume that a prima facie case will be made and be prepared to give race neutral reasons for excusing the juror. While peremptory challenges are often based on instinct and it can sometimes be hard to articulate the reason for removing a juror, "a prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives." (*People* v. *Lenix* (2008) 44 Cal.4th 602, 624.) Prosecutors should "provide as complete an explanation for their peremptory challenges as possible." (*People* v. *Lenix* (2008) 44 Cal.4th 602, 624.)

If you can't recall specifically why you excused a juror, it is better to ask for a "time out" so that you may review the transcript/recording of the juror's answers. (See *Lewis v. Lewis* (9th Cir. 2003) 321 F.3d 824 [suggesting that counsel can be particularly helpful in assisting the court at the third step of *Batson* "when afforded the opportunity to review a transcript of the jury selection proceedings"].)

D. If judge finds no prima facie case, consider stating your reasons anyway. But, do not give reasons unless the court specifically finds no prima facie case. Giving reasons without a specific finding on the first prong will constitute an implied finding of a prima facie case. *People v. Arias* (1996) 13 Cal. 4th 92; *People v. Gutierrez* (2002) 28 Cal. 4th 1083.

E. Trial Tips

1. Create a Good Record

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.)

2. Ask Court to Note the Final Jury Composition

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"].)

3. Save your notes. If case is reviewed later, voir dire may be an issue. Always save your notes so that if asked, you are better able to recollect why you may have challenged a specific juror.

a. At remand hearing, the prosecutor does NOT have to state reasons under oath. (*People v. Kelly* (2008) 162 Cal.App.4th 797)

b. At remand hearing, the prosecutor does NOT have to turn over original voir dire notes. (*People v. Kelly* (2008) 162 Cal.App.4th 797)

c. At remand hearing, prosecutor cannot be cross-examined by the defense. (*People v. Kelly* (2008) 162 Cal.App.4th 797)

d. "I don't recall" May or May Not Fly – (*Paulino v. Harrison* (9th Cir. 2008) 542 F.3d 692); (But see, *Yee* v. *Duncan* (9th Cir. 2006) 463 F.3d 893.) [notwithstanding the inability to recall reason for excusing one cognizable class juror, totality of prosecutor's responses regarding other excused jurors did not evidence a discriminatory motive].)

F. Remedies

1. *Wheeler-Batson* error is reversible per se. (*People v. Wheeler* (1978) 22 Cal.3d 258, 283; see *Miller-El v. Dretke* (2005) 545 U.S. 231)

a. Step One Error: When the trial court erroneously finds there was not a prima facie case, the matter is often remanded for prosecutor to state reasons for

peremptory challenge. (*Batson v. Kentucky* (1986) 476 U.S. 79, 100; *People v. McGee* (2002) 104 Cal.App.4th 559, 571, 573 [remand to permit prosecutor give reasons].) This remedy has been criticized for two reasons. First, the long passage of time makes it nearly impossible for the prosecutor to genuinely remember the real reason. (*People v. Hall* (1983) 35 Cal.3d 161, 171 [pointless to remand for the prosecutor to give a reason 11 years later]; *People v. Allen* (2004) 115 Cal.App.4th 542, 553-554, fn. 10 [remand for new trial, not for the prosecutor to give reasons, because occurred three years ago]; see also *People v. Ayala* (2000) 24 Cal.4th 243, 297, fn. 8 (conc. opn. of George, C.J.); *People v. Robinson* (2003) 110 Cal.App.4th 1196, 1208 [remand for the prosecutor to give the reason but retrial if it could not recall]; *People v. Williams* (2000) 78 Cal.App.4th 1118, 1130 [on remand, the court must first determine if it can adequately address the issue after the delay]; *United States v. Alcantar* (9th Cir. 1990) 897 F.2d 436, 438-439.) Second, this procedure is subject to a prosecutor trying to invent more legitimate reasons after the fact. (See, e.g., *Miller-El v. Dretke* (2005) 545 U.S. 231 [prosecution's reasons after the fact "reeks of afterthought"]; *Miller-El v. Cockrell* (2003) 537 U.S. 331, 343 [reasons given after trial "was subject to the usual risks of imprecision and distortions from the passage of time"]; see also *Johnson v. California* (2005) 545 U.S. 162, quoting *Paulino v. Castro* (9th Cir.
2004) 371 F.3d 1083, 1090 ["it does not matter that the prosecution might have had good reasons . . . [w]hat matters is the real reason they were stricken"].)

b. Step Three Error: When the trial court fails to sustain motion after the prosecutor gives reason, error normally requires new trial. (*People v. Wheeler* (1978) 22 Cal.3d 258, 283; see *Miller-El v. Dretke* (2005) 545 U.S. 162). However, the defendant in the trial court can stipulate to a different remedy. (*People v. Willis* (2002) 27 Cal.4th 811, 821-824 [with consent of movant, can use other remedies such as sanctions, reinstating removed jurors or doing challenges at sidebar]; *People v. Overby* (2004) 124 Cal.App.4th 1237, 1244-1245 [defendant not objecting to judge re-seating the excused juror indicates consent to this remedy].

2. Consequences

a. If the court grants a *Batson/Wheeler* motion at trial and employs one or more of the remedies discussed, that is arguably a "sanction".

1. Court must notify the bar of any judicial sanctions against an attorney (Business & Professions Code §6068(a)(3)).

2. Attorney must self report any judicial sanction (Business & Professions Code §6068(o)(3)).

3. However, reporting will likely not be required unless the conduct is egregious.

b. If the trial court erroneously denies a *Batson/Wheeler* motion at trial and the case is reversed

1. Court must notify bar whenever there is a reversal. (Business & Professions Code §6086.7(b)(2)).

2. Attorney must notify bar whenever reversal is based in whole or in part upon misconduct of the attorney. (Business & Professions Code §6068(o)(7)).

CHALLENGE FOR CAUSE

- Actual Bias
  - –Inability to be impartial
- Implied Bias

ACTUAL BIAS

- Related to party or witness
- Legal relationship to party or witness
- Previous relationship
- Bias towards either party
- Interest in financial outcome
- Action pending utilizing same jury
- Death penalty issues

IMPLIED BIAS

- Attitude towards:
  - –Party
  - –Witness (police, doctors, attorneys, victims)
  - –System in general
  - –Subject matter (rape, child molest, date rape)
-

Personal Experience

- A juror in child abuse case did not disclose that she was sexually abused as a child because the abuse was never reported. During deliberations she said that she believed the alleged victim because the same thing had happened to her. When this information came to light after the trial, a new trial was ordered (*State v. Delgado*, 223 Wis.2d 270, 588 N.W. 2d 1, 1999).

JURY SELECTION

I. Use of Challenges for Cause

A. Actual Bias - Inability to be impartial

1. Related to party or witness
2. Legal relationship to party or witness
3. Previous relationship
4. Bias towards either party
5. Interest in financial outcome
6. Action pending utilizing same jury
7. Death penalty issues

B. Implied Bias or Attitudes towards

1. Party
2. Witness (police, doctors, attorneys, victims)
3. System in general
4. Subject matter (rape, child molest, date rape)

The Law and Rules of Voir Dire and Jury Selection

- Examination of jurors for challenges for cause. CCP 223
- 10 peremptory/20 life cases
- Defense questions first/People challenge first. CCP 231(d)

Challenge for Cause

Cause:

- Actual Bias
  - Inability to be impartial
- Implied Bias

Actual Bias

- Juror related to a party or witness
- Legal relationship to party or witness
- Previous jury relationship with p or w
- Financial outcome—except as taxpayer
- Unqualified opinion as to merits
- Action pending which would utilize same jury
- Death penalty issues
- Bias towards either party

Implied Bias

- Attitude towards a party
- Witness (cops, attorneys, doctors)
- Subject matter (non-stranger rape, child witnesses, domestic violence)
- Mental health issues or system in general

Proper Voir Dire

- Any question "reasonably designed to assist in the intelligent exercise of peremptory challenges" People v. Williams
- Do you belong to any religious sect whose teachings might interfere with the consideration of the case? People v. Daily

Proper Voir Dire

- Do you have any inherent belief based upon any church's teachings that might interfere with a fair consideration of the case? People v. Daily
- Do you belong to any political, religious, social , industrial, fraternal, law enforcement or other organization whose beliefs or teachings would prejudice you for or against either party to the case? People v. Boyle (1937) 22 C.A.2d 143

Proper Voir Dire

- If you were faced with this charge, would you be willing to be tried with jurors who had the same attitude toward the charge and the defendant as you do now? People v. Estorga (1928) 206 C. 81
  - Questions that tend to indoctrinate but otherwise are sufficient for the intelligent exercise of peremptory challenges. People v. Williams
    - Example: Explanation of the law applicable to the case as a basis for hypothetical questions to determine whether the jurors would follow the instructions of the court, and to ascertain their state of mind on the issues presented. People v. Wein (1958) 50 C.2d 383

Proper Voir Dire

- Will you follow the judge's instructions? People v. Modell
- May ask about a juror's willingness to apply legal principles. People v. Williams

- What is your occupation? People v. Boorman (1956) 142 C.A. 2d 85

Improper Voir Dire

- What religion do you belong to? People v. Daily (1958) 157 C.A. 2d 649
- Questions that seek to ascertain juror's views on death penalty in actual or hypothetical cases not before him (i.e. Hitler) People v. Fields (1983) 35 C.3d 329
- Questions that attempts to indoctrinate the jury as to the meaning or applicability of particular Rules of Law
  - Example: "Do you have any personal objection to a rule of criminal jurisprudence which provides that those jurors entertaining a reasonable doubt of the defendant's guilt should vote for acquittal?" People v. Parker (1965) 235 C.A. 2d 86

Voir Dire Objections

- The question is not related to challenges for cause or to the intelligent exercise of peremptory challenges.
- The question attempts to indoctrinate jurors on the law.
- The question asks jurors to prejudge the evidence.
- The question tests juror's understanding of the law.
- Counsel is attempting to prejudice the jury for or against a particular party.
- Counsel is attempting to argue the case. People v. Williams (1981) 29 C.3d 392, 408

Voir Dire Objections

- Counsel is attempting to educate the jury panel to the particular facts of the case. People v. Williams
- Question is based on an incorrect statement of the law. People v. Tibbetts (1929) 102 C.A. 787, 789-90
- Question is in improper form.
  - If question is proper in scope, the court can still require counsel to rephrase the question in a neutral non-argumentative form. People v. Williams

Batson/Wheeler Rules

- "The use of peremptory challenges to remove prospective jurors on the sole ground of group bias" Wheeler
- "The Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race" Batson
- May be raised by either party
- Basic rule: There must be "an identifiable group distinguished on racial, religious, ethnic, or similar grounds – we may call this 'group bias'."

Cognizable Groups

- Race
- Ethnicity – (surnames)
- Religion – (sect) caveat: can't judge
- Gender
- Sexual Orientation
- Disability…

Non Cognizable Groups

- Low income/poor/unemployed
- Less educated
- Blue Collar workers
- Battered Women
- Young Adults
- Age

Batson/Wheeler Three Prong Approach

- Moving party must make Prima Facie "by showing that the totality of the facts gives rise to an inference of discriminatory purpose" Johnson 545 U.S. 162
- Once shown the burden shifts to the other party to explain by offering race-neutral justifications
- Trial Court decides whether moving party has proved purposeful racial discrimination

9th Circuit Instruction- Collins

- "…encourage prosecutors to state their reasons for peremptory strikes at the time of a Batson challenge…the burden of explaining the reasons for a challenge…is minimal. Judicial economy would be well served…in fact, prosecutors usually have good and permissible reasons for their challenges; refusing to state them can create unnecessary suspicion, as well as unnecessary litigation." Concurring opinion

Comparative Analysis

- "If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar non-black who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at Batson's third step."
- *Miller-El v. Dretke* (2005)545 U.S. 231

Practical Tips

- Remain Calm
- Be thorough in your questioning
- Keep notes on each juror and why
- Give more than one reason
- Think about comparative analysis. Why are you keeping one teacher and not the other?
- Make a record of non verbal reasons

Practical Tips

"There is more to human communication than mere linguistic content. On appellate review, a voir dire answer sits on a page of transcript. In the trial court, however, advocates and trial judges watch and listen as the answer is delivered. Myriad subtle nuances may shape it, including attitude, attention, interest, body language, facial expression and eye contact." *People v. Lenix* (2008) 44 Cal. 4th 602

Neutral Justification

- Life experience
- Inability to understand
- Hung Jury
- Hostile Body Language
- Nervous
- Smiled at Defendant
- Good rapport w/ D atty
- Sympathetic looks to D

Neutral Justification

- Family members arrested
- Teachers are liberal
- Clothes/hair
- Non-responsive
- Age—youth is not a class
- Lack of seriousness
- Law Student
- Poor Grooming

Neutral Justification

- Lack of ability to understand legal concepts
- Battered woman
- Anti-death penalty
- Limited education
- Translation—would not follow
- Juror lives close to crime scene
- Hunch/Gut feeling/etc are valid

Penalties and Remedies

Penalties

- B&P 6068© Appellate Court reports you
- B&P 6068(0)(3)—You report you
- B&P 6086.7(b)—reversal for prosecutorial misconduct requires report

Remedies

- Used to be excuse the panel and start again
- "severe" monetary sanctions and/or
- With the consent of moving party, RESEAT the challenged juror *People v. Willis* (2002) 27 Cal.4th 811.
- As to sanctions, Court must make an order first.

People v. Wheeler (1978) 22 Cal. 3d 258 – Peremptory challenges based on group bias violates the defendant's right to jury trial in the California Constitution.

Batson v. Kentucky (1986) 476 U.S. 79 – Race based challenges violate the Equal Protection Clause of the U.S. Constitution.

Johnson v. California (2005) 545 U.S. 162 – The U.S. Supreme Court reversed *Johnson* and "clarified" the *Batson* decision by stating that the first prong of the *Batson* test need only be satisfied by production of evidence sufficient to permit the trial judge to draw an *inference of discrimination*.

STEP 1 – "PRIMA FACIE CASE"

The party objecting to the peremptory challenge must make out a prima facie case "*by showing the totality of the relevant facts gives rise to an inference of a discriminatory purpose.*"

REBUT THE PRIMA FACIE CASE IF POSSIBLE

STEP 2 – "RACE NEUTRAL REASONS"

If a prima facie case is made, the "*burden shifts to the [party making the original, objected to juror challenge] to explain adequately the racial [or other cognizable class] exclusion by offering permissible race neutral justifications for the strikes*."

PERMISSIBLE "RACE NEUTRAL" REASONS

STEP 3 – "TRIAL COURT DECIDES IF DISCRIMINATION HAS BEEN PROVEN"

"If a race neutral explanation is tendered, the trial court must then decide… whether the opponent of the strike has proved purposeful racial discrimination."

In analyzing the reason given, the court must make a "*sincere and reasoned attempt* to evaluate each stated reason as applied to each challenged juror."

Cognizable Class

Two requirements:

1) Members share a common perspective arising from life experience in the group and

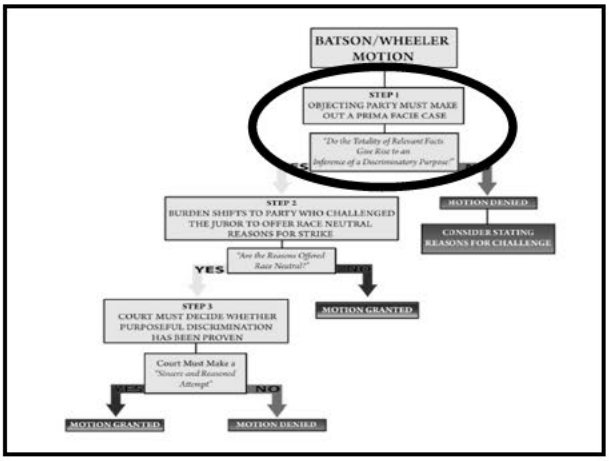
2) No other members of the community are capable of adequately representing the group perspective. (*See, Rubio v. Superior Court* (1979) 24 Cal.3d 93, 98).

Cognizable Classes

1. Race
2. Ethnicity
3. Religion
4. Gender
5. Sexual Orientation

Non-Cognizable Classes

1. Poor
2. Less Educated
3. Battered Women
4. Young
5. People over 70
6. "Insufficient" English
7. Unconventional Hairstyle
8. People who have been arrested or been victims

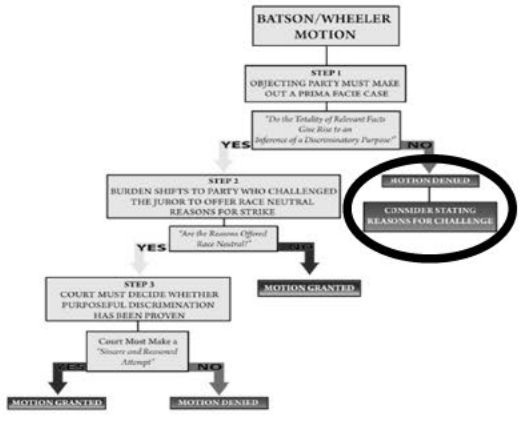


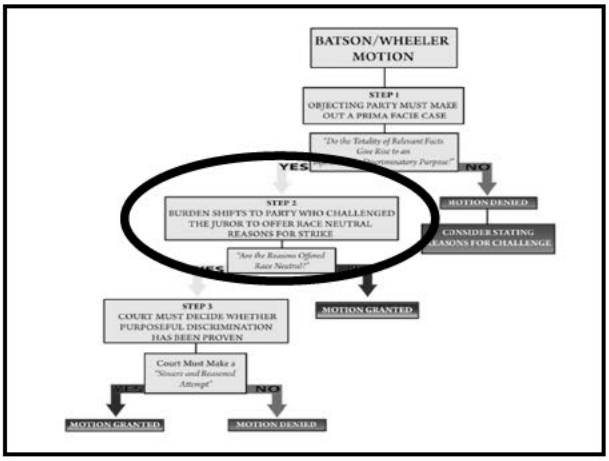
Four Ways to Demonstrate a Prima Facie Case:

1. Striking all or most of the cognizable class members
2. All the excused jurors have only one thing in common, membership in the class
3. "Desultory voir dire" or no questions at all of the excused jurors
4. Defendant is a member of the class of excused jurors

Ways to REBUT a Prima Facie Case:

1. No disproportion in excusal of cognizable class members.
2. Passing once or more with members of the cognizable class on the panel.
3. Rehabilitating cognizable class members sought to be challenged by defense.
4. Pointing out cognizable class members excused by defense.
5. Not aware that excused juror was a member of a cognizable class.



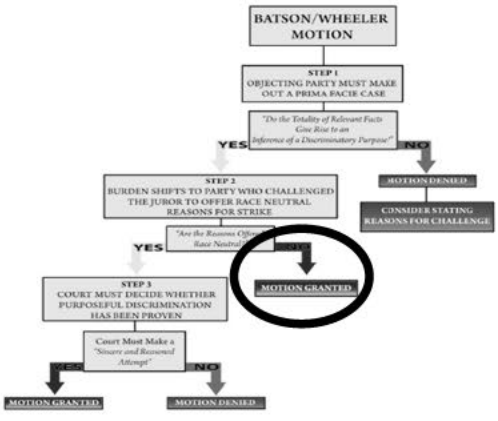


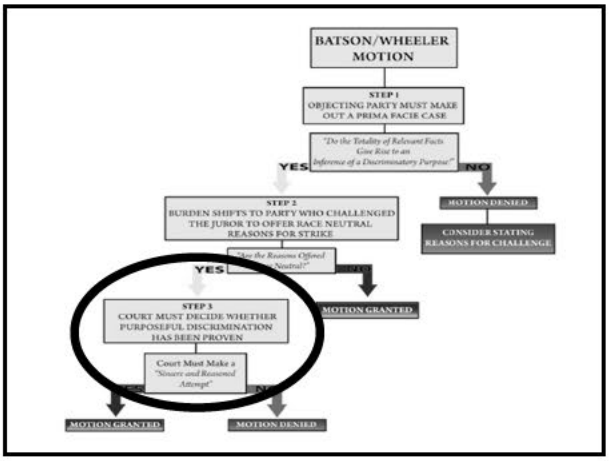
Permissible Race Neutral Reasons:

1. Legal contacts.
2. Served on hung jury before.
3. Views on the legal system.
4. Lack of disclosure.
5. Appearance (i.e., hair, jewelry, tattoos etc.).
6. Lack of life experiences.
7. Occupation.
8. Reluctance to be a juror.
9. Eagerness to be a juror.

Permissible Race Neutral Reasons Cont.:

10. Hesitance in applying the death penalty.
11. Hesitance, Transient Background, and 'Grandmotherly Persona.'
12. Body language can be proper grounds, at least if there is a sufficient record to support the prosecutor's observations.
13. Bilingual Juror Who Won't Defer to Court Translator
14. Intelligence
15. Sympathetic to defendant
16. Desire for next juror
17. Because prosecutor wished to ask the potential juror more questions.
18. Mistake





Step 3 - Trial Judge's Decision

"This demands of the trial judge a sincere and reasoned attempt to evaluate the prosecutor's explanation in light of the circumstances of the case as then known, his knowledge of trial techniques, and his observations of the manner in which the prosecutor has examined members of the venire and has exercised challenges for cause or peremptorily . . . . " (*People v. Hall* (1983) 35 Cal.3d 161, 167-168; See also, *People v. Silva* (2001) 25 Cal. 4th 345, 386)

Step 3 - Trial Judge's Decision

"In assessing credibility, the court draws upon its contemporaneous observations of the voir dire. It may also rely on the court's own experiences as a lawyer and bench officer in the community, and even the common practices of the advocate and the office that employs him or her. [Citation.]" (*People v. Lenix, supra*, 44 Cal.4th at p. 613, fn. omitted, *quoting Miller–El v. Cockrell* (2003) 537 U.S. 322, 339.)

Step 3 - Trial Judge's Decision

It is proper for a trial court, in evaluating the prosecutor's justifications, to consider the prosecutor's actions in excusing jurors in a *previous trial* and whether a prosecutors kept members of the cognizable class at issue on the jury in a *prior trial*. (*People v. DeHoyos* (2013) 57 Cal.4th 79)

Comparative Analysis

The process by which courts will evaluate the reasons given for the challenge of a member of a cognizable class. The courts will look for non-cognizable class jurors who were *not* challenged to see whether the reasons would apply equally.

Miller-El v. Dretke (2005) 545 U.S. 231
Snyder v. Louisiana (2008) 552 U.S. 472
People v. Lenix (2008) 44 Cal. 4th 602

"Positive" Comparative Analysis

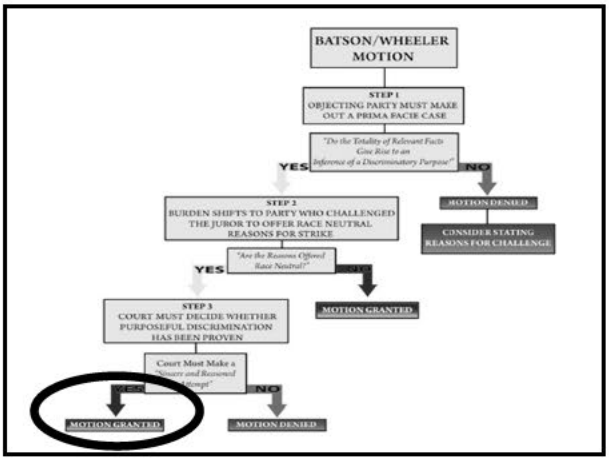
Use comparative analysis to your advantage by pointing out similarly situated *non-cognizable class* jurors who were also challenged.

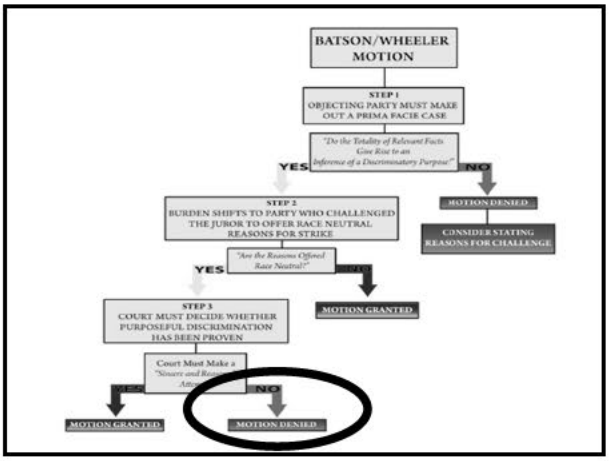
People v. Lenix (2008) 44 Cal. 4th 602

It should be discernible from the record that
1) The trial court considered the prosecutor's reasons for the peremptory challenges at issue and found them to be race-neutral;

2) Those reasons were consistent with the court's observations of what occurred, in terms of the panelist's statements as well as any pertinent nonverbal behavior; and

3) The court made a credibility finding that the prosecutor was truthful in giving race-neutral reasons for the peremptory challenges."





Practical Trial Tips

1. NEVER excuse a juror on the basis of the membership in a cognizable class.
2. Recognize that a you will get "*Wheelered*" and be prepared to deal with it by knowing the law better than the defense attorney and the judge.
3. Do not state your reasons unless and until the judge makes a step one finding.
4. Assume that a prima facie case will be found and be prepared to state your reasons.
5. If no prima facie case found, state your reasons anyway and make it clear why you are doing so.
6. Record the final jury composition.
7. Save your notes.

Remedies & Consequences

1. *Batson/Wheeler* error found on appeal is reversible.
2. Step One error found on appeal.
3. Step Two or Three motion granted at trial.
4. Step Three error found on appeal.
5. Sanctions at trial & Reversal on appeal

THE LAW

CODE OF CIVIL PROCEDURE § 223

In a criminal case, the court shall conduct an initial examination of prospective jurors. The court may submit to the prospective jurors additional questions requested by the parties as it deems proper. Upon completion of the court's initial examination, counsel for each party shall have the right to examine, by oral and direct questioning, any or all of the prospective jurors. The court may, in the exercise of its discretion, limit the oral and direct questioning of prospective jurors by counsel. The court may specify the maximum amount of time that counsel for each party may question an individual juror, or may specify an aggregate amount of time for each party, which can then be allocated among the prospective jurors by counsel. Voir dire of any prospective jurors shall, where practicable, occur in the presence of the other jurors in all criminal cases, including death penalty cases. Examination of prospective jurors shall be conducted only in aid of the exercise of challenges for cause.

The trial court's exercise of its discretion in the manner in which voir dire is conducted, including any limitation on the time which will be allowed for direct questioning of prospective jurors by counsel and any determination that a question is not in aid of the exercise of challenges for cause, shall not cause any conviction to be reversed unless the exercise of that discretion has resulted in a miscarriage of justice, as specified in Section 13 of Article VI of the California Constitution.

BASICS

CODE OF CIVIL PROCEDURE § 223

- The Court *must* question them.
- The Court *may* ask suggested questions.
- Parties have the right to examine.
- Court *may* limit time.
- *Should* be in presence of other jurors.
- **Examination "*ONLY* in aid of the exercise of challenges for cause."**

VOIR DIRE

- § 223 CA Code of Civil Procedure
- *"Counsel for each party shall have the right to examine . . . prospective jurors."*
  - *People v. Balderas* (1985) 41 Cal.3d 144
    - "for cause"

36

BALDERAS

- "We now conclude that reasonable questions [into specific legal prejudices] should have been permitted . . . . Persons who harbor legal prejudices pertinent to the trial display 'actual bias,' since they are unable to act with the 'entire impartiality' required of jurors.' (at 183)

37

BALDERAS

- "Even if a juror has proclaimed his general willingness to follow the law and instructions, the rule should not prohibit further reasonable questioning calculated to elicit a juror's *admission* of *actual unwillingness* to apply a particular rule of law pertinent to the impending trial." (at 184)

39

BALDERAS

- "... the increasing modern awareness that general questions about a prospective juror's willingness to 'follow the law' are not well calculated to reveal specific forms of prejudice and bias. In the first place, general questions about whether a juror will follow instructions have only one 'right' answer --- 'yes.' One who wishes to seem fair-minded in the company of peers is unlikely to give a negative response." (at 163)

38

People v. Wheeler (1978) 22 Cal. 3d 258 – Peremptory challenges based on group bias violates the defendant's right to jury trial in the California Constitution.

Batson v. Kentucky (1986) 476 U.S. 79 – Race based challenges violate the Equal Protection Clause of the U.S. Constitution.

Johnson v. California (2005) 545 U.S. 162 – The U.S. Supreme Court reversed *Johnson* and "clarified" the *Batson* decision by stating that the first prong of the *Batson* test need only be satisfied by production of evidence sufficient to permit the trial judge to draw an *inference of discrimination*.

STEP 1 – "PRIMA FACIE CASE"

The party objecting to the peremptory challenge must make out a prima facie case "*by showing the totality of the relevant facts gives rise to an inference of a discriminatory purpose.*"

REBUT THE PRIMA FACIE CASE IF POSSIBLE

STEP 2 – "RACE NEUTRAL REASONS"

If a prima facie case is made, the "*burden shifts to the [party making the original, objected to juror challenge] to explain adequately the racial [or other cognizable class] exclusion by offering permissible race neutral justifications for the strikes*."

PERMISSIBLE "RACE NEUTRAL" REASONS

STEP 3 – "TRIAL COURT DECIDES IF DISCRIMINATION HAS BEEN PROVEN"

"If a race neutral explanation is tendered, the trial court must then decide… whether the opponent of the strike has proved purposeful racial discrimination."

In analyzing the reason given, the court must make a "*sincere and reasoned attempt* to evaluate each stated reason as applied to each challenged juror."

Cognizable Class

Two requirements:

1) Members share a common perspective arising from life experience in the group and

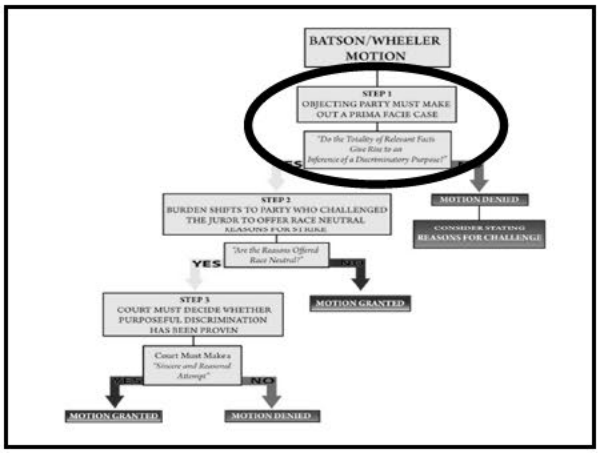
2) No other members of the community are capable of adequately representing the group perspective. (*See, Rubio v. Superior Court* (1979) 24 Cal.3d 93, 98).

Cognizable Classes

1. Race
2. Ethnicity
3. Religion
4. Gender
5. Sexual Orientation

Non-Cognizable Classes

1. Poor
2. Less Educated
3. Battered Women
4. Young
5. People over 70
6. "Insufficient" English
7. Unconventional Hairstyle
8. People who have been arrested or been victims

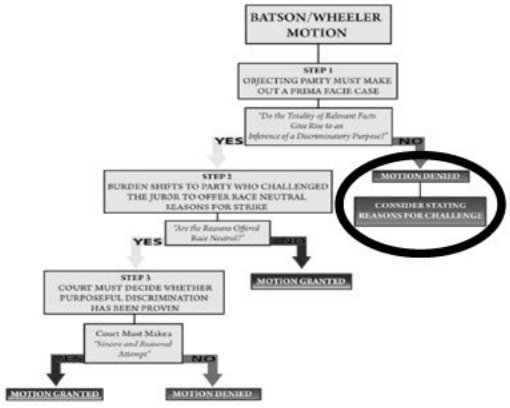


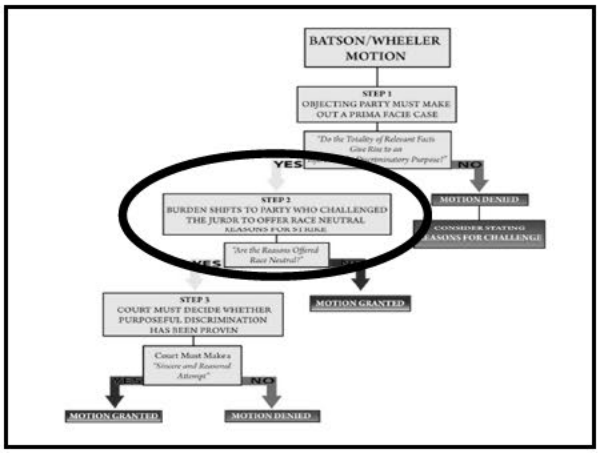
Four Ways to Demonstrate a Prima Facie Case:

1. Striking all or most of the cognizable class members
2. All the excused jurors have only on thing in common, membership in the class
3. "Desultory voir dire" or no questions at all of the excused jurors
4. Defendant is a member of the class of excused jurors

Ways to REBUT a Prima Facie Case:

1. No disproportion in excusal of cognizable class members.
2. Passing once or more with members of the cognizable class on the panel.
3. Rehabilitating cognizable class members sought to be challenged by defense.
4. Pointing out cognizable class members excused by defense.
5. Not aware that excused juror was a member of a cognizable class.



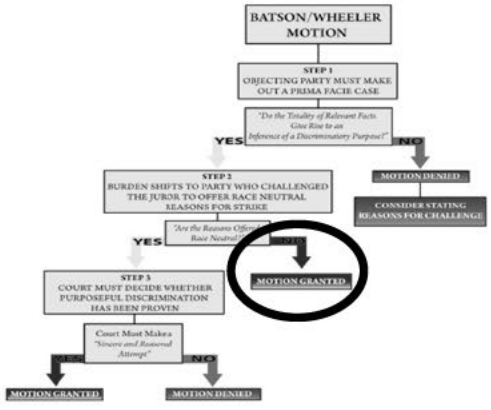


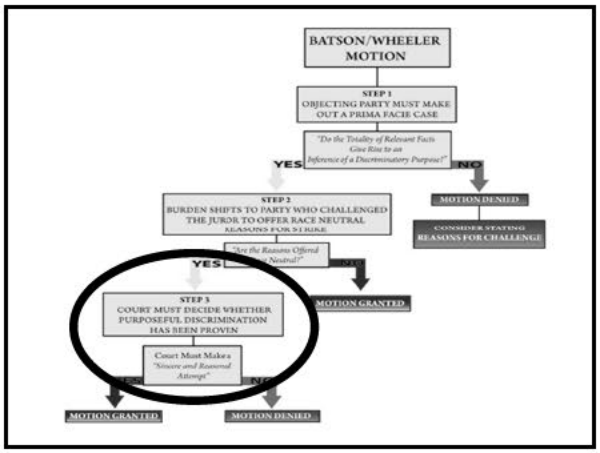
Permissible Race Neutral Reasons:

1. Legal contacts.
2. Served on hung jury before.
3. Views on the legal system.
4. Lack of disclosure.
5. Appearance (i.e., hair, jewelry, tattoos etc.).
6. Lack of life experiences.
7. Occupation.
8. Reluctance to be a juror.
9. Eagerness to be a juror.

Permissible Race Neutral Reasons Cont.:

10 Hesitance in applying the death penalty
11 Hesitance, Transient Background, and 'Grandmotherly Persona '
12 Body language can be proper grounds, at least if there is a sufficient record to support the prosecutor's observations
13 Bilingual Juror Who Won't Defer to Court Translator
14 Intelligence
15 Sympathetic to defendant
16 Desire for next juror
17 Because prosecutor wished to ask the potential juror more questions
18 Mistake





Comparative Analysis

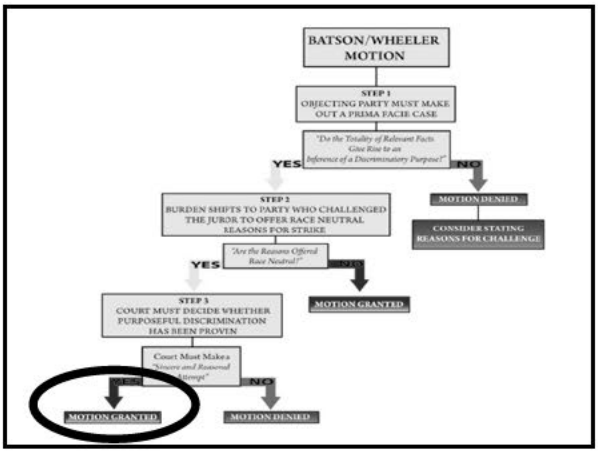
The process by which courts will evaluate the reasons given for the challenge of a member of a cognizable class. The courts will look for non-cognizable class jurors who were *not* challenged to see whether the reasons would apply equally.

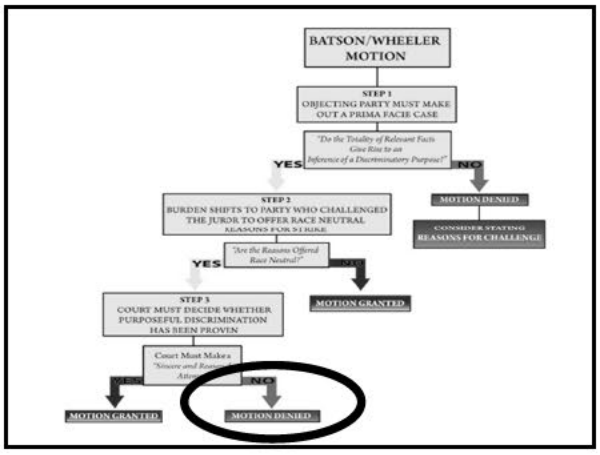
People v. Lenix (2008) 44 Cal. 4th 602

It should be discernible from the record that
1) The trial court considered the prosecutor's reasons for the peremptory challenges at issue and found them to be race-neutral;

2) Those reasons were consistent with the court's observations of what occurred, in terms of the panelist's statements as well as any pertinent nonverbal behavior; and

3) The court made a credibility finding that the prosecutor was truthful in giving race-neutral reasons for the peremptory challenges."





Practical Trial Tips

1. NEVER excuse a juror on the basis of the membership in a cognizable class.
2. Recognize that a you will get "*Wheelered*" and be prepared to deal with it by knowing the law better than the defense attorney and the judge.
3. Do not state your reasons unless and until the judge makes a step one finding.
4. Assume that a prima facie case will be found and be prepared to state your reasons.
5. If no prima facie case found, state your reasons anyway and make it clear why you are doing so.
6. Save your notes.

Jury Selection

Begin by introducing yourself to the court staff. These individuals have lots of knowledge about the judge and the way he or she conducts trials. If you're able to, try and obtain information from them regarding things like voir dire, exhibit marking, and the judge's pet peeves.

Mechanics / Rules – Depending on the judge you are in front of, you may be faced with several different methods of selecting a jury. There are really two main types and variations of either type.

A. "12 Pack", "18 Pack" etc.

1. How it Works

a. *This is the most common type of selection method that you will see*. Usually, the court clerk will call 12 or 18 or 20 names from a random list of all the potential jurors. Those jurors will fill the jury box in the order called and, if more than 12, will fill the front row of the audience. The rest of the potential jurors will then fill the remaining seats in the courtroom.

b. Voir Dire is then conducted by the judge and attorneys of the first 12 or 18 or 20 potential jurors.

c. Once the challenges begin, jurors leave the courtroom when they are challenged until only 11 remain.

d. The clerk then calls jurors to fill the vacant seats and the process starts all over again. This continues until both sides pass or are out of challenges.

B. "Federal Method"

2. How it Works

   a. This method seems to be gaining popularity with judges primarily. It is usually a faster method and avoids excused jurors knowing which side excused them.

   b. In this method, unlike the "12 Pack" method, the attorneys move their chairs to the opposite side of counsel tables so that they are facing the courtroom doors and the audience and their backs are to the judge.

   c. The potential jurors are called in by the clerk according to the order on the random list. All of the potential jurors are assigned a seat and a number in the courtroom.

   d. Voir Dire is then conducted on *ALL* of the potential jurors *ONCE*.

   e. Once challenges begin, they are done silently by the attorneys on a master sheet. The attorneys may challenge anyone they wish from the entire panel. The attorneys pass the sheet back and forth until both pass or run out of challenges.

   f. The judge will then excuse all challenged jurors at once. The ***first 12 unchallenged jurors*** will then make up the jury.

C. Challenges – There are two types of challenges, *challenges for cause* and *peremptory challenges*. The rules regarding juror challenges can be found in the ***Code of Civil Procedure (CCP §§225 -231).***

   1. Challenges for Cause – Challenges for cause can be made by either side generally for either *implied bias* or *actual bias* (***CCP §225(b)***)

      a. Implied Bias – There are nine categories of implied bias listed in ***CCP §229***:

b. Actual Bias – Defined as "*the existence of a state of mind on the part of the juror in reference to the case, or to any of the parties, which will prevent the juror from acting with entire impartiality, and without prejudice to the substantial rights of any party*." (***CCP §225(b)(1)(C)***)

c. The ultimate determination of excusal for cause is made by the court. (***CCP §230***)

2. Peremptory Challenges – A peremptory challenge may be made by either party and is an objection to a juror for which no reason need by given. The court is required to excuse jurors challenged peremptorily. (***CCP §231***)

a. Number – The number of peremptory challenges depends upon the possible sentence of the offense charged and the number of defendants.

b. If the offense is punishable with *maximum term of imprisonment of 90 days or less*, each side gets *6* peremptory challenges. (***CCP §231***)

c. If the offense is punishable with *death or with imprisonment in the state prison for life*, each side gets *20* peremptory challenges. (***CCP §231(a)***). The prosecution of first degree murder without special circumstances which carries a term of 25 years to life, constitutes imprisonment for life within the meaning of CCP §231(a).

d. In *all other cases* each side gets *10* peremptory challenges.

e. Multiple defendant cases

i. Punishment of 90 days or less – The People get *6* challenges and the defendants get *6 challenges jointly*. Each defendant is additionally entitled to *4 separate challenges*. The People get as many challenges as are allowed all defendants. (***CCP §231(b)***)

ii. Life in prison and death cases – The People get *20* challenges and the defendants get *20 challenges jointly*. Each defendant is additionally entitled to *5 separate challenges*. The People get as many challenges as are allowed all defendants. (***CCP §231(a)***)

iii. All other cases – The People get *10* challenges and the defendants get *10 challenges jointly*. Each defendant is additionally entitled to *5 separate challenges*. The People get as many challenges as are allowed all defendants. (***CCP §231(a)***)

D. How do you challenge? - Following the voir dire questioning and any challenges for cause, the process moves on to peremptory challenges. We go first. The judge will usually explain the process to the jurors. The judge will then say something like, "Mr./Ms. Prosecutor, People's first?"

The judge is asking you if you want to use your first peremptory challenge. If you do, you then say, "Thank you your honor, the People would ask the court to thank and excuse Juror #4."

E. Keeping Track of Challenges – There are various methods of keeping track of juror information and challenges. Most court clerks will provide a master courtroom diagram with squares representing each seat. Most people use post it notes or a combination of post it notes and note pad to keep track of jurors and their responses to questions

JURY SELECTION IN SEXUAL ASSAULT CASES

A. Guiding Principle

Jury Selection is important in all trials, but is of critical importance for the successful prosecution of sexual assault cases. Therefore, jury selection deserves thorough preparation and knowledge.

B. Key Components to Effective Jury Selection

- **Know the law and the rules**

You should learn the controlling statutes on this subject and the case law that interprets it. The controlling statutes on jury selection are contained in the Code of Civil Procedure (CCP) sections 190 through 237. CCP 223, 225, and 228 through 231. are regularly utilized in criminal jury

trials and set out the method of voir dire, the requirements for a challenge for cause and the number of preemptory challenges permitted to each side. CCP 223 provides that in a criminal trial, each party could submit questions for the court to pose to the prospective jurors; it also establishes that each party has "the right to examine, by oral and direct questioning, any or all prospective jurors." It also limits the examination of prospective jurors to be conducted "only in the aid of the exercise of challenges for cause."

An area of implied bias that is outlined under the law is pursuant to CCP 229(f) "The existence of a state of mind in the juror evincing enmity against, or bias towards, either party."

You should also learn the judicial rules regarding jury selection. The San Diego Superior Court's web page includes jury selection information that is very useful. It has the script that the courts are encouraged to read to jurors and it even has an approved questionnaire with many good questions.

In addition, you should learn the particular way that a certain court does jury selection. Courts conduct jury selection differently utilizing their own system of examining 12 jurors at a time or more jurors.

A prosecutor should also know the law of "Wheeler" regarding preemptory challenges and know how to make the right record that supports that a preemptory challenge is made ethically and without bias against a protected class.

Handling a *Batson/Wheeler* Motion

I. Overview

A. Every prosecutor will have to deal with the dreaded "*Wheeler"* motion. It usually occurs following the People's use of a peremptory challenge against someone of a particular race, gender or ethnic background.

B. How it works – The defense makes a motion, usually on state and federal grounds, that the prosecutor has excused a juror based on racial, ethnic or other improper grounds and has therefore violated the defendant's Constitutional right to a fair and impartial jury. The defendant does not have to be a member of the excluded group to complain of a violation. *People v. Wheeler* (1978) 22 Cal. 3d 258, 281. (**Note**: While the defense usually brings the motion, it may be made by *either party.*)

C. It goes without saying that, for legal, ethical, and tactical reasons, no prosecutor should exercise a peremptory challenge against a juror based solely on that juror's gender, sexual orientation, or membership in a racial, ethnic, or religious group. But a prosecutor should not refrain from challenging a juror for *permissible* reasons out of a concern that the defense will raise a disingenuous or frivolous *Batson/Wheeler* claim.

D. THREE STEP PROCESS
"First, the defendant must make out a prima facie case 'by showing that the totality of relevant facts give rise to an inference of discriminatory purpose.' Second, once the defendant has made out a prima facie case, the 'burden shifts to the State to explain adequately the racial exclusion' by offering permissible race-neutral justifications for the [peremptory] strikes. Third, '[i]f a race-neutral explanation is tendered, the trial court must decide . . . whether the opponent of the strike has proved purposeful racial discrimination.' " (*Johnson v. California* (2005) 545 U.S. 162)

II. History

A. *Batson* ***is*** the federal standard and *Wheeler* ***was*** the California standard used to determine whether the peremptory challenge was improper.

B. Both cases used procedures involving 3 part tests to determine the propriety of the challenge. However, the first prong of the tests in each case was different. *Defendants argued the state burden (Wheeler) was more difficult for them to meet than the federal burden (Batson)*.

C. The California Supreme Court tried to reconcile the two cases in 2003 in *People v. Johnson* (2003) 30 Cal. 4th 1302.

D. In 2005, the U.S. Supreme Court reversed *Johnson* and "clarified" the *Batson* decision by stating that the first prong of the *Batson* test need only be satisfied by production of evidence sufficient to permit the trial judge to draw an *inference of discrimination*. (*Johnson v. California* (2005) 545 U.S. 162.)

E. Current State of the Law - Still a 3 prong test based on the holdings of *Batson* and *Johnson*. Although *Wheeler* is still good law, the first step has been replaced by the *Batson* first step. (*Johnson v. California* (2005) 545 U.S. 162.)

III. Analysis

A. *People v. Wheeler* (1978) 22 Cal. 3d 258 – Peremptory challenges based on group bias violates the defendant's right to jury trial in the California Constitution. *Batson v. Kentucky* (1986) 476 U.S. 79 – Race based challenges violate the Equal Protection Clause of the U.S. Constitution. (*See Also, People v. Bonilla* (2007) 41 Cal.4th 313, 341).

B. Objection Made – The claim is waived if the defendant fails to make a timely objection and a record sufficient for appellate review. (*People v. Wheeler* (1978) 22 Cal.3d 258, 280; *People v. Morris* (2003) 107 Cal.App.4th 402, 408-409)

C. Cognizable Class – "An identifiable group distinguished on racial, religious, ethnic, or similar grounds…" *People v. Wheeler* (1978) 22 Cal. 3d 258, 276. Two requirements for a cognizable class:

> 1) Members share a common perspective arising from life experience in the group; and
> 2) No other members of the community are capable of adequately representing the group perspective. (*See, Rubio v. Superior Court* (1979) 24 Cal.3d 93, 98).

Courts have recognized several categories of cognizable classes or groups.

1. Race - (*See, Batson v. Kentucky* (1986) 476 U.S. 79 & *People v. Wheeler* (1978) 22 Cal. 3d 258).

2. Ethnicity – Although there are fewer reported cases regarding ethnicity, be aware that it is a cognizable class. For example, Native Americans were the subject of the violation in *United States v. Bauer* (9th Cir. 1996) 84 F.3d 1549.

3. Religion – *People v. Johnson* (1989) 47 Cal.3d 1194, 1217 [Jewish Jurors]

4. Gender – Gender appears to be a cognizable class and should be treated as such. However, most cases dealing with gender also carry a racial component as well. (*People v. Crittenden* (1994) 9 Cal.4th 83, 115 [African-American woman]; *People v. Garceau* (1993) 6 Cal.4th 140, 171 [Hispanic woman]

5. Sexual Orientation – *People v. Garcia* (2000) 77 Cal.App.4th 1269, 1272. (*See Also,* Code of Civil Procedure §231.5)

D. Non-Cognizable Class

1. Poor – *People v. Carpenter* (1999) 21 Cal.4th 1016, 1035

2. Less Educated – *People v. Estrada* (1979) 93 Cal.App.3d 76, 90-91

3. Battered Women – *People v. Macioce* (1987) 197 Cal.App.3d 262, 280

4. Young – *People v. Ayala* (2000) 24 Cal.4th 243, 277-278; *United States v. Fletcher* (9th Cir. 1992) 965 F.2d 781, 782

5. People over 70 – *People v. McCoy* (1995) 40 Cal.App.4th 778, 783

6. "Insufficient" English – *People v. Lesara* (1998) 206 Cal.App.3d 1304, 1307

7. Unconventional Hairstyle – *Purkett v. Elem* (1995) 514 U.S. 765, 769

8. People who have been arrested *or* been victims – *People v. Fields* (1983) 35 Cal.3d 329, 348

9. "People of Color" – Combining all minority groups does not constitute a "cognizable class". *People v. Davis* (2009) 46 Cal. 4th 539

E. Challenge Exercised Against Member of Cognizable Class

1. Step One – The party objecting to the peremptory challenge must make out a prima facie case "by showing the totality of the relevant facts gives rise to an inference of a discriminatory purpose." *Johnson v. California* (2005) 545 U.S. 162. There is a presumption that that the party exercising the challenge (usually the

prosecution) does so on a constitutionally permissible ground. (*People v. Wheeler* (1978) 22 Cal. 3d 258). Thus, the objecting party (usually the defense) must demonstrate a "prima facie case".

a. Prima Facie Case – The court in *Wheeler* provided four examples of ways to demonstrate a prima facie case:

> 1. "A party may show that his opponent struck most or all of the members of the identified group from the venire."
> 2. "He may also demonstrate that the jurors in question share only this one characteristic—their membership in the group—and that in all other respects they are as heterogenous as the community as a whole."
> 3. "Next, the showing may be supplemented . . . by such circumstances as the failure of the opponent to engage these same jurors in more than desultory voir dire, or indeed to ask them any questions at all."
> 4. "Lastly, . . . the defendant need not be a member of the excluded group in order to complain of a violation of the representative cross-section rule." However, this can be probative in making the determination. (*People v. Wheeler* (1978) 22 Cal. 3d 258, 280-281; *People v. Reynoso* (2003) 31 Cal.4th 903, 914.)

b. "[A] 'pattern' of strikes against black jurors included in the particular venire might give rise to an inference of discrimination. Similarly, the prosecutor's questions and statements during *voir dire* examination and in exercising his challenges may support or refute an inference of discriminatory purpose." (*Batson v. Kentucky* (1986) 476 U.S. 79, 96-97.)

c. Rebut the prima facie case by arguing applicable factors:

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

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

3. The fact that you have <u>not</u> used a disproportionate number of your challenges against members of the cognizable class is a factor that weighs against finding an inference of discrimination. (*People v. Streeter* (2012) 54 Cal.4th 205, 223 [no prima facie case where prosecutor excused three of five African Americans]; *People v. Clark* (2011) 52 Cal.4th 856, 903 [statistical analysis subject to various

interpretations and did not raise an inference of discrimination]; *People* v. *Bell* (2007) 40 Cal.4th 582, 598 [considering fact prosecutor used only two of 16 peremptory challenges against members of the cognizable class at issue in finding the prosecutor's challenges created no inference of discrimination]; *People v. Cornwell* (2005) 37 Cal.4th 50, 70 [no prima facie case where prosecutor challenged one out of two African-American prospective jurors]). However, See *Ayala v. Wong* (9th Cir. 2012) 693 F.3d 945, 964 [Statistical evidence alone established a prima facie case where prosecution struck each of the seven black or Hispanic jurors available for challenge].

4. If you have passed on a panel that includes members of the cognizable class, this fact should be mentioned as it undercuts an inference of discrimination. (*People v. Streeter* (2012) 54 Cal.4th 205, 225 [prosecutor passed five times with up to four African American ins in jury box]; *People v. Clark* (2011) 52 Cal.4th at 856, 906 [no prima facie case where prosecutor passed two African-American jurors during several rounds before finally excusing them].) The prosecutor's acceptance of a panel including African-American prospective jurors, while not conclusive, was " 'an indication of the prosecutor's good faith in exercising his peremptories, and … an appropriate factor for the trial judge to consider in ruling on a *Wheeler* objection … .' " (*People v. Hartsch* (2010) 49 Cal.4th 472, 487). (See also, *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].)

5. Point out any members of the cognizable class who were challenged by the defense. However, be aware that this fact will not carry the day for you. It is simply something you may want to point out on the record. Further rehabilitation of prospective jurors of a cognizable class ought to be challenged can be an important factor in rebutting a prima facie case. (*People v. Streeter* (2012) 54 Cal.4th 205, 225 [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, citing *People v. Hartsch* (2010) 49 Cal.4th 472, 487]).

6. If you were honestly not aware the juror was a member of a cognizable group. *People v. Barber* (1988) 200 Cal.App.3d 378, 389. [Challenged juror appeared to be a white and non-Hispanic to DA. DA did not recognize the surname to be Hispanic. Court found DA to be sincere]

2. Step Two – If a prima facie case is made, the "burden shifts to the [party making the original, objected to juror challenge] to explain adequately the racial [or other cognizable class] exclusion by offering permissible race neutral justifications for the strikes." (*Johnson v. California* (2005) 545 U.S. 162)

"The justification need not support a challenge for cause, and even a 'trivial' reason, if genuine and neutral, will suffice." (*People v. Arias* (1996) 13 Cal. 4th 92, 136 citing *People v. Montiel* (1993) 5 Cal. 4th 877, 910, fn. 9.)

a. Examples of Permissible Reasons

1. Legal contacts. (*People v. Panah* (2005) 35 Cal.4th 395, 441-442 [potential juror was arrested and charged with a crime]; *People v. Young* (2005) 34 Cal.4th 1149, 1174 [counselor had testified before in sex assault cases]; *People v. Cleveland* (2004) 32 Cal.4th 704, 733 [son was in jail]; *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1124 [father was arrested and charged with a crime and the potential juror had been roughed up by officers]; *People v. Farnam* (2002) 28 Cal.4th 107, 137-138; *People v. Williams* (1997) 16 Cal.4th 635, 664-665 [by family member]; *People v. Arias* (1996) 13 Cal.4th 92, 138; *People v. Turner* (1994) 8 Cal.4th 137, 171; *People v. Sims* (1993) 5 Cal.4th 405, 430; *People v. Cummings* (1993) 4 Cal.4th 1233, 1282; *People v. Johnson* (1989) 47 Cal.3d 1194, 1215; *People v.Walker* (1988) 47 Cal.3d 605, 625-626; *People v. Wheeler* (1978) 22 Cal.3d 258, 275 [been a crime victim]; *People v. Douglas* (1995) 36 Cal.App.4th 1681, 1690; *People v. Martinez* (2000) 82 Cal.App.4th 339, 344-345 [family member]; *People v. Martin* (1998) 64 Cal.App.4th 378, 385, fn. 5 [crime victim]; *People v. Buckley* (1997) 53 Cal.App.4th 658, 667; *People v. Barber* (1988) 200 Cal.App.3d 378; *Mitleider v. Hall* (9th Cir. 2004) 391 F.3d 1039, 1041- 045, 1048-1051 [contacts by family members].)

2. Served on hung jury before. (*People v. Farnam* (2002) 28 Cal.4th 107, 137-138.)

3. Views on the legal system. (*People v. Ward* (2005) 36 Cal.4th 186, 201 [unfavorable views toward guilt]; *People v. Cleveland* (2004) 32 Cal.4th 704, 733 [hesitant in answering questions on the death penalty]; *People v. Yeoman* (2003) 31 Cal.4th 93, 116-117 [not strong enough views on the death penalty]; *People v. Burgener* (2003) 29 Cal.4th 833, 864 [skeptical in imposing death penalty]; *People v. Farnam* (2002) 28 Cal.4th 107, 137; *People v. Caitlin* (2001) 26 Cal.4th 81, 118 [skeptical about imposing death penalty]; *People v. Buckley* (1997) 53 Cal.App.4th 658, 666-667 [legal training]; *Boyd v. Newland* (9th Cir. 2004) 393 F.3d 1008, 1013

[ambivalence towards the legal system]; *Tolbert v. Gomez* (9th Cir. 1999) 189 F.3d 1099; *United States v. Fike* (5th Cir. 1996) 82 F.3d 1315, 1320.)

4. The potential juror's lack of disclosure. (*People v. Diaz* (1984) 152 Cal.App.3d 926, 932; see *In re Hitchings* (1993) 6 Cal.4th 97, 112; *Mitleider v. Hall* (9th Cir. 2004) 391 F.3d 1039, 1041-1045, 1048-1051 [potential juror apparently not honest].)

5. The potential juror appeared to be a non-conformer. (*Purkett v. Elem* (1995) 514 U.S. 765, 769 (per curiam) [long hair]; *People v. Ayala* (2000) 24 Cal.4th 243, 261; *People v. Howard* (1992) 1 Cal.4th 1132, 1208; *People v. Wheeler* (1978) 22 Cal.3d 258, 275.) (*People v. Ward* (2005) 36 Cal. 4th 186, 202)

6. Lack of life experiences. (*People v. Sims* (1993) 5 Cal.4th 405, 429; *People v. Perez* (1994) 29 Cal.App.4th 1313, 1328; *Mitleider v. Hall* (9th Cir. 2004) 391 F.3d 1039, 1041-1045, 1048-1051 [and young and immature].)

7. The potential juror's occupation. (*People v. Young* (2005) 34 Cal.4th 1149, 1174 [counselor who has testified before in other sex assault cases and one who was an insurance claims specialist]; *People v. Howard* (1992) 1 Cal.4th 1132, 1155-1156 [non-practicing registered nurse]; *People v. Landry* (1996) 49 Cal.App.4th 785, 790 [youth services]; *People v. Barber* (1988) 200 Cal.App.3d 378, 394; *United States v. Thompson* (9th Cir. 1987) 827 F.2d 1254, 1260.)

8. Reluctance to be a juror. (*People v. Walker* (1998) 64 Cal.App.4th 1062, 1070; *Mitleider v. Hall* (9th Cir. 2004) 391 F.3d 1039, 1041-1045, 1048-1051.) (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].)

9. Eagerness to be a juror. (*People v. Ervin* (2000) 22 Cal.4th 48, 76.)

10. Hesitance in applying the death penalty. (*People v. Panah* (2005) 35 Cal.4th 395, 441; *People v. Smith* (2005) 35 Cal.4th 334, 347.)

11. Hesitance, Transient Background, and Grandmotherly 'Persona.' (*Boyde v. Brown* (9th Cir. 2005) 404 F.3d 1159, 1170.)

12. Body language can be proper grounds, at least if there is a sufficient record to support the prosecutor's observations. (*People v. Elliott* (2012) 53 Cal.4th 535, 569-570 [Juror failed to make eye contact with anyone, dressed informally, and had an unconventional hairstyle]; (*People v. Ward* (2005) 36 Cal.4th 186, 202 [hostility toward prosecutor; though record is silent, other than the prosecutor's assertions, there is no evidence to contradict it]; *People v. Reynoso* (2003) 31 Cal.4th 903, 919; *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1125-1126 [hostile look at prosecutor] *People v. Ervin* (2000) 22 Cal.4th 48 [nervousness during voir dire]; *People v. Turner* (1994) 8 Cal.4th 137, 170 [potential juror won't look prosecutor in the eye]; *People v. Johnson* (1989) 47 Cal.3d 1194, 1220 [shy][sleepy]; *People v. Dunn* (1995) 40 Cal.App.4th 1039, 1047; *People v. Perez* (1994) 27 Cal.App.4th 1313, 1330 [inappropriate laughter]; *Mitleider v. Hall* (9th Cir. 2004) 391 F.3d 1039, 1041-1045, 1048-1051; *Williams v. Rhoades* (9th Cir. 2004) 354 F.3d 1101 [uncorroborated assertion by prosecutor of the potential juror's body language enough for affirmance because of deferential standard of review]; but see *McClain v. Prunty* (9th Cir. 2000) 217 F.3d 1209 [implied body language not enough without the prosecutor stating the reason]; *Turner v. Marshall* (9th Cir. 1997) 121 F.3d 1248, 1254 [cannot infer demeanor when prosecutor never said so]; *United States v. Power* (9th Cir. 1989) 881 F.2d 733, 740 [fidgety and inattention]; *United States v. Changco* (9th Cir. 1993) 1 F.3d 837, 840 [passive and inattentive].) (*Rice v. Collins* 546 U.S. 333 (2006) [rolling of eyes, not seen by trial judge].)

Caution: Body language can be a dangerous area if the record does not support the reasons you are giving for the excuse. Be sure that you make a record of not only what body language or demeanor you observed but *why* this was important to you and how it affected your decision to excuse the juror. Further, try not to rely solely on body language or demeanor when excusing a cognizable class juror. (See, *People v. Long* (2010) 189 Cal.App. 4th 826) [record did not support prosecutors reasons for excusing juror and judge did not make a "sincere and reasoned" attempt to evaluate the prosecutor's reasons]). (*People v. Jones* (2011) 51 Cal.4th 346) [Prosecutor gave specific and detailed reasons for challenges based upon body language and demeanor]).

13. Bilingual Juror Who Won't Defer to Court Translator - (*Hernandez v. New York* (1991) 500 U.S. 352, 356-357) CAUTION – Be careful when kicking bilingual jurors as it could be seen as a cover for discrimination. (*See, People v. Gonzales* (2008) 165 Cal.App.4th 620)

14. Intelligence – (*People v. Arias* (1996) 13 Cal. 4th 92, 137-139)

15. Sympathetic to defendant – (*People v. McKinzie* (2012) 54 Cal.4th 1302, 1321-1322) [fact juror had been arrested for domestic violence was proper basis to challenge because 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. Mayfield* (1997) 14 Cal. 4th 668, 724-726)

16. Desire for next juror - (*People v. Jones* (2011) 51 Cal.4th 346, 367) [challenge upheld where prosecutor believed he had even better potential jurors who had not been called]; (See also, *People v. Alvarez* (1996) 14 Cal. 4th 155, 194-195)

17. Because prosecutor wished to ask the potential juror more questions. (*People v. Cleveland* (2004) 32 Cal.4th 704, 733.)

18. Mistake - (*Aleman* v. *Uribe* (9th Cir. 2013) 2013) [prosecutor mistakenly transposed two jurors' information. Prosecutor helped by making a good record that he was "under the weather"] (See *People v. Williams* (2013) 56 Cal.4th 630, 660-661 [holding that, regardless of whether prosecutor challenged one juror under the mistaken belief she was a different juror, there was no *Batson-Wheeler* violation since the reason given for challenging the juror (hesitancy to impose the death penalty) would have provided valid basis for challenging different juror].) (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1124 [prosecutor misunderstood the juror's answer]; *People v. Williams* (1997) 16 Cal.4th 153, 188-189; *United States v. Lorenzo* (9th Cir. 1993) 995 F.2d 1448, 1454-1455 [time crunch].)

19. Financial Hardship/Work Related Issues - (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]

3. STEP 3 – "If a race neutral explanation is tendered, the trial court must then decide… whether the opponent of the strike has proved purposeful racial discrimination." (*Johnson v. California* (2005) 54 U.S. 162)

a. "It is not until the third step that the persuasiveness of the justification becomes relevant – the step in which the trial court determines whether the opponent of the strike has carried his burden of proving purposeful discrimination." (*Purkett v. Elem* (1995) 514 U.S. 765, 768.) [Burden of proof of is preponderance of the evidence]

b. "[W]e rely on the good judgment of trial courts to distinguish bona fide reasons for such peremptories from sham excuses belatedly contrived to avoid admitting acts of group discrimination." (*People v. Wheeler* (1978) 22 Cal.3d 258, 282; *People v. Johnson* (1989) 47 Cal.3d 1194, 1216; see *Purkett v. Elem* (1995) 514 U.S. 765, 768.)

c. "This demands of the trial judge a sincere and reasoned attempt to evaluate the prosecutor's explanation in light of the circumstances of the case as then known, his knowledge of trial techniques, and his observations of the manner in which the prosecutor has examined members of the venire and has exercised challenges for cause or peremptorily . . . . " (*People v. Hall* (1983) 35 Cal.3d 161, 167-168; See also, *People v. Silva* (2001) 25 Cal. 4th 345, 386)

d. "In assessing credibility, the court draws upon its contemporaneous observations of the voir dire. It may also rely on the court's own experiences as a lawyer and bench officer in the community, and even the common practices of the advocate and the office that employs him or her. [Citation.]" (*People v. Lenix, supra*, 44 Cal.4th at p. 613, fn. omitted, *quoting Miller–El v. Cockrell* (2003) 537 U.S. 322, 339.)

e. It is proper for a trial court, in evaluating the prosecutor's justifications, to consider the prosecutor's actions in excusing jurors in a *previous trial* and whether a prosecutors kept members of the cognizable class at issue on the jury in a *prior trial.* (*People v. DeHoyos* (2013) 57 Cal.4th 79)

F. Comparative Analysis

This term refers to the process by which courts will evaluate the reasons given for the challenge of a member of a cognizable class. The courts will look for non-cognizable class jurors who were *not* challenged to see whether the reasons would apply equally. For example, if a prosecutor challenged an African American juror who was employed as a teacher and gave the reason, "Judge, I always kick

teachers.", the court would then look to see whether the prosecutor failed to challenge any teachers who were not members of a cognizable class.

1. History

Federal Courts approved of comparative analysis in *Turner v. Marshall* (9th Cir. 1997) 121 F. 3d 1248. California rejected comparative analysis in *People v. Landry* (1996) 49 Cal.App.4th 785. *People v. Jones* (1997) 15 Cal. 4th 119. However, things began to change in 2003 with *Johnson*. Then in 2005, the U.S. Supreme Court decided *Miller-El v. Dretke* (2005) 545 U.S. 231 using comparative analysis in the decision.

a. *Snyder v. Louisiana* (2008) 552 U.S. 472 – In *Snyder,* the U.S. Supreme Court found that the prosecutors race neutral reasons for excusing a black juror were implausible and were reinforced by the prosecutor's acceptance of white jurors who disclosed conflicting obligations similar to the excused juror. (*Id.* at 483-484). The Court held that a comparative analysis was appropriate since "the shared characteristic, i.e., concern about serving on the jury due to conflicting obligations, was thoroughly explored by the trial court when the relevant jurors asked to be excused for cause." (*Id.* at p. 483)

b. *People v. Lenix* (2008) 44 Cal. 4th 602 – Comparative Analysis is alive in California.

"If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson's* third step." (*Id.* at p. 621) In reviewing the plausibility of a prosecutor's reasons for striking a juror, an appellate court can consider various kinds of evidence, including a comparison of panelists' responses. (*Id.* at p. 622) Failing to engage in comparative juror analysis for the first time on appeal unduly restricts review based on the entire record." (*Id.* at p. 622) "Thus, evidence of comparative juror analysis must be considered in the trial court and even for the first time on appeal if relied upon by defendant and the record is adequate to permit the urged comparisons." (*Id.* at p. 622)

The trial court has a duty to "assess the plausibility" of the prosecutor's proffered reasons for striking a potential juror, "in light of all evidence with a bearing on it." (*Id.* at p. 625) Trial courts "must evaluate the demeanor of the prosecutor in determining the credibility of proffered explanations, and the demeanor of the panelist when that factor is a basis for the challenge." (*Id.* at p. 625) It should be discernible from the record that "1) the trial court considered the prosecutor's reasons for the peremptory challenges at issue and found them to be race-neutral; 2) those reasons were consistent with the court's observations of what occurred, in

terms of the panelist's statements as well as any pertinent nonverbal behavior; and 3) the court made a credibility finding that the prosecutor was truthful in giving race-neutral reasons for the peremptory challenges. (*Id.* at pp. 625-626)

"As to the second point, the court may not have observed every gesture, expression or interaction relied upon by the prosecutor. The judge has a different vantage point, and may have, for example, been looking at another panelist or making a note when the described behavior occurred. But the court must be satisfied that the specifics offered by the prosecutor are consistent with the answers it heard and the overall behavior of the panelist. The record must reflect the trial court's determination on this point (see *Snyder*, supra, at p. 460), which may be encompassed within the court's general conclusion that it considered the reasons proffered by the prosecution and found them credible." (*Id.* at pp. 625-626)

The court observed that comparative juror analysis is a form of circumstantial evidence (*Id.* at p. 622) and that a reviewing court must be careful not to accept one reasonable interpretation to the exclusion of other reasonable ones when reviewing the circumstantial evidence supporting the trial court's factual findings in a *Batson/Wheeler* holding. "If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also be reasonably reconciled with a contrary finding does not warrant a reversal of the judgment." (*Id.* at pp. 625-626)

2. "Positive" Comparative Analysis

This term refers to the idea of using comparative analysis to support a challenge of a member of a cognizable class by comparing other similarly situated non-cognizable class jurors who were also challenged. (*Rice v. Collins* (2006) 546 U.S. 333, 341 [prosecutor struck a white juror with the same characteristics of a cognizable class juror she struck]; (*Briggs v. Grounds* (2012) 682 F.3d 1165 [prosecutor struck at least on non-African American who indicated they would hold the prosecution to a higher standard of proof]).

IV. Practical Issues in Dealing with *Batson/Wheeler* Motions

A. Realize that a challenge will likely come at some point during jury selection and be ready to deal with it. It should go without saying, but ***NEVER*** excuse a juror on the basis of race, ethnicity, religion, gender etc…Question all jurors you plan to challenge. Desultory questioning does not count.

B. Be prepared to rebut the prima facie case. (See pp. 4-5)

C. Assume that a prima facie case will be made and be prepared to give race neutral reasons for excusing the juror. While peremptory challenges are often based on instinct and it can sometimes be hard to articulate the reason for removing a juror, "a prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives." (*People* v. *Lenix* (2008) 44 Cal.4th 602, 624.) Prosecutors should "provide as complete an explanation for their peremptory challenges as possible." (*People* v. *Lenix* (2008) 44 Cal.4th 602, 624.)

D. If you can't recall specifically why you excused a juror, it is better to ask for a "time out" so that you may review the transcript/recording of the juror's answers. (See *Lewis v. Lewis* (9th Cir. 2003) 321 F.3d 824 [suggesting that counsel can be particularly helpful in assisting the court at the third step of *Batson* "when afforded the opportunity to review a transcript of the jury selection proceedings"].)

E. If judge finds no prima facie case, consider stating your reasons anyway. But, do not give reasons unless the court specifically finds no prima facie case. Giving reasons without a specific finding on the first prong will constitute an implied finding of a prima facie case. *People v. Arias* (1996) 13 Cal. 4th 92; *People v. Gutierrez* (2002) 28 Cal. 4th 1083.

E. Trial Tips

1. Create a Good Record

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.)

2. Obtain a Transcript of Voir Dire Before Making Challenges

In certain situations, a prosecutor may not recall or have accurate notes regarding the responses of a juror he or she wishes to challenge. In those cases, it is appropriate and recommended that the prosecutor ask for read back of the juror's responses. (*See Lewis v. Lewis* (9th Cir. 2003) 321 F.3d 824)

3. Ask Court to Note the Final Jury Composition

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"].)

4. Save your notes. If case is reviewed later, voir dire may be an issue. Always save your notes so that if asked, you are better able to recollect why you may have challenged a specific juror.

a. At remand hearing, the prosecutor does NOT have to state reasons under oath. (*People v. Kelly* (2008) 162 Cal.App.4th 797)

b. At remand hearing, the prosecutor does NOT have to turn over original voir dire notes. (*People v. Kelly* (2008) 162 Cal.App.4th 797)

c. At remand hearing, prosecutor cannot be cross-examined by the defense. (*People v. Kelly* (2008) 162 Cal.App.4th 797)

d. "I don't recall" May or May Not Fly – (*Paulino v. Harrison* (9th Cir. 2008) 542 F.3d 692); (But see, *Yee* v. *Duncan* (9th Cir. 2006) 463 F.3d 893.) [notwithstanding the inability to recall reason for excusing one cognizable class juror, totality of prosecutor's responses regarding other excused jurors did not evidence a discriminatory motive].)

F. Remedies

1. *Wheeler-Batson* error is reversible per se. (*People v. Wheeler* (1978) 22 Cal.3d 258, 283; see *Miller-El v. Dretke* (2005) 545 U.S. 231)

a. Step One Error: When the trial court erroneously finds there was not a prima facie case, the matter is often remanded for prosecutor to state reasons for peremptory challenge. (*Batson v. Kentucky* (1986) 476 U.S. 79, 100; *People v. McGee* (2002) 104 Cal.App.4th 559, 571, 573 [remand to permit prosecutor give reasons].) This remedy has been criticized for two reasons. First, the long passage of time makes it nearly impossible for the prosecutor to genuinely remember the real reason. (*People v. Hall* (1983) 35 Cal.3d 161, 171 [pointless to remand for the prosecutor to give a reason 11 years later]; *People v. Allen* (2004) 115 Cal.App.4th 542, 553-554, fn. 10 [remand for new trial, not for the prosecutor to give reasons, because occurred three years ago]; see also *People v. Ayala* (2000) 24 Cal.4th 243, 297, fn. 8 (conc. opn. of George, C.J.); *People v. Robinson* (2003) 110 Cal.App.4th 1196, 1208 [remand for the prosecutor to give the reason but retrial if it could not recall]; *People v. Williams* (2000) 78 Cal.App.4th 1118, 1130 [on remand, the court must first determine if it can adequately address the issue after the delay]; *United States v. Alcantar* (9th Cir. 1990) 897 F.2d 436, 438-439.) Second, this procedure is subject to a prosecutor trying to invent more legitimate reasons after the fact. (See, e.g., *Miller-El v. Dretke* (2005) 545 U.S. 231 [prosecution's reasons after the fact "reeks of afterthought"]; *Miller-El v. Cockrell* (2003) 537 U.S. 331, 343 [reasons given after trial "was subject to the usual risks of imprecision and distortions from the passage of time"]; see also *Johnson v. California* (2005) 545 U.S. 162, quoting *Paulino v. Castro* (9th Cir. 2004) 371 F.3d 1083, 1090 ["it does not matter that the prosecution might have had good reasons . . . [w]hat matters is the real reason they were stricken"].)

b. Step Three Error: When the trial court fails to sustain motion after the prosecutor gives reason, error normally requires new venire. (*People v. Wheeler* (1978) 22 Cal.3d 258, 283; see *Miller-El v. Dretke* (2005) 545 U.S. 162). However, the defendant in the trial court can stipulate to a different remedy. (*People v. Willis* (2002) 27 Cal.4th 811, 821-824 [with consent of movant, can use other remedies such as sanctions, reinstating removed jurors or doing challenges at sidebar]; *People v. Overby* (2004) 124 Cal.App.4th 1237, 1244-1245 [defendant not objecting to judge re-seating the excused juror indicates consent to this remedy]. (See *People v. Mata* (2013) 57 Cal.4th 178) [holding that the trial court may reseat an improperly challenged juror if affected counsel either expressly or implicity consents]

2. Consequences

a. If the court grants a *Batson/Wheeler* motion at trial and employs one or more of the remedies discussed, that is arguably a "sanction".

1. Court must notify the bar of any judicial sanctions against an attorney (Business & Professions Code §6068(a)(3)).

2. Attorney must self report any judicial sanction (Business & Professions Code §6068(o)(3)).

3. However, reporting will likely not be required unless the conduct is egregious.

b. If the trial court erroneously denies a *Batson/Wheeler* motion at trial and the case is reversed

1. Court must notify bar whenever there is a reversal. (Business & Professions Code §6086.7(b)(2)).

2. Attorney must notify bar whenever reversal is based in whole or in part upon misconduct of the attorney. (Business & Professions Code §6068(o)(7)).

Jury Selection

Mechanics / Rules – Depending on the judge you are in front of, you may be faced with several different methods of selecting a jury. There are really two main types and variations of either type.

A. "12 Pack", "18 Pack" etc.

1. How it Works

a. *This is the most common type of selection method that you will see*. Usually, the court clerk will call 12 or 18 or 20 names from a random list of all the potential jurors. Those jurors will fill the jury box in the order called and, if more than 12, will fill the front row of the audience. The rest of the potential jurors will then fill the remaining seats in the courtroom.

b. Voir Dire is then conducted by the judge and attorneys of the first 12 or 18 or 20 potential jurors.

c. Once the challenges begin, jurors leave the courtroom when they are challenged until only 11 remain.

d. The clerk then calls jurors to fill the vacant seats and the process starts all over again. This continues until both sides pass or are out of challenges.

B. "Federal Method"

2. How it Works

a. This method seems to be gaining popularity with judges primarily. It is usually a faster method and avoids excused jurors knowing which side excused them.

b. In this method, unlike the "12 Pack" method, the attorneys move their chairs to the opposite side of

counsel tables so that they are facing the courtroom doors and the audience and their backs are to the judge.

c. The potential jurors are called in by the clerk according to the order on the random list. All of the potential jurors are assigned a seat and a number in the courtroom.

d. Voir Dire is then conducted on *ALL* of the potential jurors *ONCE*.

e. Once challenges begin, they are done silently by the attorneys on a master sheet. The attorneys may challenge anyone they wish from the entire panel. The attorneys pass the sheet back and forth until both pass or run out of challenges.

f. The judge will then excuse all challenged jurors at once. The ***first 12 unchallenged jurors*** will then make up the jury.

C. Challenges – There are two types of challenges, *challenges for cause* and *peremptory challenges*. The rules regarding juror challenges can be found in the ***Code of Civil Procedure (CCP §§225 -231).***

1. Challenges for Cause – Challenges for cause can be made by either side generally for either *implied bias* or *actual bias* (***CCP §225(b)***)

a. Implied Bias – There are nine categories of implied bias listed in ***CCP §229***:

b. Actual Bias – Defined as "*the existence of a state of mind on the part of the juror in reference to the case, or to any of the parties, which will prevent the juror from acting with entire impartiality, and without prejudice to the substantial rights of any party*." (***CCP §225(b)(1)(C)***)

c. The ultimate determination of excusal for cause is made by the court. (***CCP §230***)

2. Peremptory Challenges – A peremptory challenge may be made by either party and is an objection to a juror for which no reason need by given. The court is required to excuse jurors challenged peremptorily. (***CCP §231***)

a. Number – The number of peremptory challenges depends upon the possible sentence of the offense charged and the number of defendants.

b. If the offense is punishable with *maximum term of imprisonment of 90 days or less*, each side gets *6* peremptory challenges. (***CCP §231***)

c. If the offense is punishable with *death or with imprisonment in the state prison for life*, each side gets *20* peremptory challenges. (***CCP §231(a)***). The prosecution of first degree murder without special circumstances which carries a term of 25 years to life, constitutes imprisonment for life within the meaning of CCP §231(a).

d. In *all other cases* each side gets *10* peremptory challenges.

e. Multiple defendant cases

i. Punishment of 90 days or less – The People get *6* challenges and the defendants get *6 challenges jointly*. Each defendant is additionally entitled to *4 separate challenges*. The People get as many challenges as are allowed all defendants. (***CCP §231(b)***)

ii. Life in prison and death cases – The People get *20* challenges and the defendants get *20 challenges jointly*. Each defendant is additionally entitled to *5 separate challenges*. The People get as many challenges as are allowed all defendants. (***CCP §231(a)***)

iii. All other cases – The People get *10* challenges and the defendants get *10 challenges jointly*. Each defendant is additionally entitled to *5*

separate challenges. The People get as many challenges as are allowed all defendants. (***CCP §231(a)***)

D. How do you challenge? - Following the voir dire questioning and any challenges for cause, the process moves on to peremptory challenges. We go first. The judge will usually explain the process to the jurors. The judge will then say something like, "Mr./Ms. Prosecutor, People's first?"

   The judge is asking you if you want to use your first peremptory challenge. If you do, you then say, "Thank you your honor, the People would ask the court to thank and excuse Juror #4."

E. Keeping Track of Challenges – There are various methods of keeping track of juror information and challenges. Most court clerks will provide a master courtroom diagram with squares representing each seat. Most people use post it notes or a combination of post it notes and note pad to keep track of jurors and their responses to questions

"GO TO" SHEET: VOIR DIRE AND WHEELER

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CCP 223: Examination for cause
CCP 231(d): Defense questions first/People Challenge First
Challenges for Cause include ACTUAL and IMPLIED BIAS

ACTUAL BIAS

Related to a party/witness
Legal Relationship to a party/witness
Previous jury relationship with p/w
Financial outcome-except for taxpayer
Unqualified opinion as to merits
Action pending which would utilize same jury
Bias toward either party

IMPLIED BIAS:

Attitude Towards a Party
Witness (Cops, attorneys, doctors)
Subject Matter (rape, child witnesses, domestic violence)
Mental Health issues or system in general

VOIR DIRE OBJECTIONS

- **The question is not related to challenges for cause or to the intelligent exercise of peremptory challenges**
- The question attempts to indoctrinate jurors on the law
- The question asks jurors to prejudice the evidence
- The question tests jurors understanding or the law
- Counsel is attempting to prejudice the jury for or against a particular party
- Counsel is attempting to argue the case. (P v. Williams (1981) 29 Cal.3d 392, 408)

PROPER QUESTIONS

Questions "reasonably designed to assist in the intelligent exercise of peremptory challenges" (P v. Williams (1981) 29 Cal. 3d 392, 407)

"Do you belong to any religious sect whose teachings might interfere with the consideration of the case?" (P v. Daily (1958) 157 Cal. App. 2d 649, 656)

"Do you have any inherent belief based on any church's teachings that might interfere with a fair consideration of the case? (P v. Daily (1958) 157 Cal. App. 2d 649, 656)

"Do you belong to any political, religious, social industrial, fraternal, law enforcement or other organization whose beliefs or teachings would prejudice you for or against either party to the case?" (P v. Buyle (1937) 22 Cal.App.2d 143, 146)

"If you were faced with this charge, would you be willing to be tried with jurors who had the same attitudes towards the charge and the defendant as you do now?" (P v. Estorga (1928) 206 Cal. 81, 83)

Explanations of the law applicable to the case as a basis for hypotheticals to determine whether the jurors would follow instructions of the court and to ascertain their state of mind on the issues presented. (P v. Wein (1958) 50 Cal.2d 383, 395)

"Will you follow the judge's instructions?" (P v. Modell (1956) 143 Cal.App.2d 724, 731-732)

May ask juror's willingness to apply legal principles (P v. Willams (1981) 29 Cal.3d 392, 411)

JUST GOT WHEELERED?

1) Defense must show that the "**totality of facts gives rise to an "inference of discriminatory purpose**" (Johnson v. CA (2005) 545 U.S. 162, 168) (meaning that there is a reasonable inference that he person is being kicked because of their group association, rather than because of any specific bias)
2) Once this is shown, the **burden shifts to you to explain by offering race-neutral** justification
3) **Trial Court decides** whether defense has proved purposeful discrimination

PRACTICAL TIPS:

State Reasons for your kicks at the time the Wheeler motion is made. We typically have good reasons for our challenges. "Refusing to do so can create unnecessary suspicion and unnecessary litigation." (US v. Collins (9th Cir. 2009) 551 F.3d 914, 928))

Think About Comparative Analysis: Are you kicking a teacher that is (in a cognizable class) but keeping a teacher who is not? "If a prosecutor's proffered reason for striking a Black panelist applies just as well to an otherwise similar non-black who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at Batson's third step." (Miller-El v. Dretke (2005) 545 U.S. 231, 241)

Tell the judge your non verbal reasons for your kicks: "There is more to human communication than mere linguistic content. On appellate review, a voir dire answer sits on a page of transcript. In the trial court, however, advocates and trial judges watch and listen as the answer is delivered. Myriad subtle nuances may shape it, including attitude, attention, interest body language, facial expression, and eye contact." (P v. Lenix (2008) 44 Cal.4th 602, 622)

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DEFENSE: We are making a WHEELER MOTION pursuant to People v. Wheeler (1978) 22 Cal.3d 258 and Batson v. Kentucky (1986) 476 U.S 79, because the DDA denied defendant to his right to a fair trial.

JUDGE: Excuses the jury or calls you to sidebar

DEFENSE: This is a clear violation of group (racial) bias. The DDA has now excused three women, who are members of a cognizable class, and this denies my client's right to a fair trial. It is an equal protection violation plain and simple, and what she is doing is forbidden by the law. As you can see, my client is a woman, and it is our position that these kicks are completely gender-related, and unconstitutional.

DDA: **KNOW YOUR LAW AND YOUR THREE STEP APPROACH**: (Johnson v. California (2005) 545 U.S. 162, 168)

1) The moving party (defense) must first show that the totality of facts gives rise to an "inference of discriminatory purpose" (Johnson 545 U.S. 162) (meaning that there is a reasonable inference that the person is being kicked because of their group association, rather than because of any specific bias.) (Johnson, Wheeler)
2) IF this is shown, the burden shifts to the other party (DA) to explain by offering race-neutral justifications
3) Trial court decides whether defense has proved purposeful discrimination.

- Burden of Proof = preponderance. (*People v. Hutchins* (2007) 147 Cal.App.4th 992)
- The presumption is that the challenge is proper. (*People v. Neuman* (2009) 176 Cal.App.4th 571)
- We suggest stating the reasons for your strikes at the time the Wheeler (Batson) motion is made. The burden of explaining the reasons is minimal, and we typically have good and permissible reasons for our challenges. "Refusing to state them can create unnecessary suspicion, as well as unnecessary litigation." 9th Circuit language: Collins. (CITE)
- Think about Comparative Analysis—Why are you keeping one teacher and not the other? "if a prosecutor's proffered reason for striking a Black panelist applies just as well to an otherwise similar non-black who is permitted to serve,

that is evidence tending to prove purposeful discrimination to be considered at Batson's third step. (*Miller-El v. Dretke*) (2005) 545 U.S. 231)

- Argue your non-verbal reasons: "There is more to human communication than mere linguistic content. On appellate review, a voir dire answer sits on a page of transcript. In the trial court, however, advocates and trial judges watch and listen as the answer is delivered. Myriad subtle nuances may shape it, including attitude, attention, interest, body language, facial expression, and eye contact." (*People v. Lenix* (2008) 44 Cal.4th 602

This motion should be denied. The first step in the analysis is that the defense must show that the totality of facts gives rise to an inference of discriminatory purpose. Sometimes called the "prima facie case" The defense has not made a prima facie case, your honor. People v. Neuman (2009) 176 Cal.app.4th 571 states it is their burden to do so. They have to show that the totality of facts gives rise to an "inference of discriminatory purpose." The Defense has simply not met this burden, and several reasons are in support. First, the defense also challenged women, in their first and 3rd challenges. (P v. Wheeler (1978) 22 Cal.3d 258, 283) Additionally, we passed with juror #24, our latest excused juror on our panel. (P v. Williams (2013) 56 Cal.4th 630). At this point, I realize the law supports that I could stop. The burden has simply not been met. However, your honor, I would at this time like to place my gender-neutral justifications on the record so that the record could be clear.

As the law requires, I will state a reason for each challenge. (P v. Cervantes (1991) 223 Cal.App.3d 323. Here, your honor, I had several neutral reasons other than gender for Juror #1, the first woman we kicked:

- **She was young, single, and had no children. (P v. Perez (1994) 29 Cal.App.4th 1313.**
- **See race-neutral reasons (attached handout)**
- **State reasons for each juror you kicked in the cognizable class. (See Batson/Wheeler Guide Orange County DDA handout)**

JUDGE: (hopefully) Motion denied.

Batson/Wheeler Attacks

- **Make a record if you have any concerns**
- **Comparative Analysis – why this teacher and not that one.**
  - **Last names matter on a record**
  - **Jury venire make-up**
- **Preserve your notes but best if record is perfectly clear**

VETTING OUT THE BAD JUROR

- **"I only need one Pepsi in a 12 pack of Cokes"**(defense quote)
- "**Have you ever been to court before for any reason?"**
- **"Is there anything that you have been thinking about as you sit here that you are glad we didn't ask?" "Well I am asking it now."**
- **Rule in DP cases: *Uttecht v. Brown* (2007) 551 U.S. 1, 6**

"…a juror who is substantially impaired in his or her ability to impose the death penaltyunder the state-law framework can be excused for cause, but if the juror is not substantially impaired, removal for cause is IMPERMISSIBLE"

Jury Selection

a. Time – qualified
b. Case qualified
    i. Often time court gives a mini statement regarding case to jurors.
c. Questionnaires
d. Death Qualifying
    i. Must know the law of Batson/Wheeler
    ii. Comparative Analysis since *Miller-El v. Dretke* (2005)545 U.S. 231
    iii. California – *People v. Lenix* (2008) 44 Cal. 4th 602 – Comparative Analysis is used as circumstantial evidence in determining bias

Batson/Wheeler Violations

a. Protect the record and make it clear – Comparative Analysis

VOIR DIRE

NEW CASE: People v. Chism (2014) 58 Cal.4th 1266, pages 1309-1333:

Court held prosecutor's explanations that challenged African American jurors lacked the decision making skills and the ability to make "high stress" decisions based on their occupations, and having never supervised others deemed to be valid, race-neutral and not due process violations.

"The proper focus of a Batson/Wheeler inquiry, of course, 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 Ca.4th 903, 924 [prosecutor's subjective opinion that a customer service representative lacks educational experience to effectively serve as a juror, while 'of questionable persuasiveness' could properly form the basis of a perepmptory challenge].) Therefore, a prosecutor can challenge potential juror whose occupation, in the prosecutor's subjective 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.

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- **State reasons for each juror you kicked in the cognizable class. (See Batson/Wheeler Guide Orange County DDA handout)**

JUDGE: (hopefully) Motion denied.

What you can do

- 1) questions that go toward **actual** bias
  "state of mind ….that will prevent the juror from acting with entire impartiality, and without prejudice" (CCP §225(b))
- 2) questions that go toward **implied** bias
  "state of mind …evincing enmity [conveying ill will] against or bias toward either party." (CCP § 229(f))

Voir Dire

I. LAW

A. Two Types of Challenges

1. **Challenge for Cause – CCP § 225.**

a. General Disqualification – CCP § 225(b)(1)(A).

1. Juror lacks statutory req'ment to serve – CCP § 203, 228(a).
2. Deaf, or any other incapacity – CCP § 228(b).
3. Rarely utilized.

b. Implied Bias – CCP § 225(b)(1)(B), 229.

1. Eight statutory grounds.
   i. §229(f) allows you to challenge the juror for cause if there is "The existence of a state of mind in the juror evincing enmity [actively opposed or hostile; ill will] against, or bais towards, either party.
2. Prejudice is inferred.

c. Actual Bias – CCP § 225(b)(1)(C).

The existence of a state of mind on the part of the juror in reference of the case, or to any of the parties, which will prevent the juror from acting with entire impartiality, and without prejudice to the substantial rights of any party.

d. Number of challenges – unlimited.

2. **Peremptory Challenges**

a. No reason need be given – CCP § 226(b).

b. Number of peremptory challenges allowed.

1) Depends on punishment allowed and # of defendants
2) Single defendant case.
   a) 20 – If punishable by death or life imprisonment – CCP § 231(a).
   b) 6 – If punishable < 90 days – CCP § 231(b).
   c) 10 – all other cases – CCP § 231(a).
3) Multiple defendant case.
   a) Death or life imprisonment case – CCP § 231(a).
      1) 20 joint challenges.
      2) 5 individual challenges for each defendant.
      3) DA gets same total as entire defense team.
   b) 90 days or less – CCP § 231(b).
   c) All other cases – CCP § 231(a).
      1) 10 joint challenges.
      2) 5 individual challenges for each defendant.
      3) DA gets same total as entire defense team.
4) Alternates – CCP § 234.
   a) Single defendant case – one per number of alternates.
   b) Multiple defendant cases – each defendant gets one per number of alternates.
   c) DA gets same total number as defense team.

5) A pass does not count as a challenge – CCP § 231(d)(e).

II. PROCEDURE

A. Pre-Voir Dire Conference – Rule 228.1.
   1. Establish ground rules.
   2. How many jurors will be called into the box?
   3. Will judge allow attorney questioning?
   4. Time limits.
   5. Number of alternates.
   6. Give judge voir dire questions you want him/her to cover.

B. Court clerk will summon a jury panel to courtroom.

C. Clerk will take roll and swear the panel – CCP § 232.

D. Questioning the jurors.
   1. Judge will question jurors first – CCP § 223.
      a. Will typically ask 8 – 10 general questions.
      b. Very limited follow-up.
   2. Defense Attorney will question second.
      a. Defense will "challenge for cause" – CCP § 226(d).
      b. "Pass for cause."
   3. DA questions last.
      a. "Pass for cause."
      b. "Approach the Bench" to exercise challenge for cause.

E. Challenging the jurors.
   1. DA goes first – CCP § 226(d).
      a. "I would ask the court to thank and excuse Juror Number _____, Mr/Mrs _____."
   2. Defense goes second.
   3. Continues until both sides pass consecutively.
      a. "The People are pleased with the panel. We pass."
      b. 12 jurors will be sworn.
   4. Select Alternates – CCP § 234.
      a. Same order as original 12 jurors.
      b. Swear alternates.
   5. Court will excuse unused jurors.

Murder questions: Held to be permissible.

a. Ok to ask jurors if they would be able to vote guilty, after deliberations, if they were persuaded that the charges had been proven beyond a reasonable doubt. (People v. Fierro (1991) 1 Cal.4th 173, 209.

b. "If I prove beyond a reasonable doubt each and every element of each of the offenses charged, can you assure me that you would be willing to return a verdict of guilty even though you have unanswered questions?" (P v. Riel (2000) 22 Cal.4th 1153, 1178 fn. 4)

c. Questions related to felony murder rule allowed. (P v. Pinholster (1992) 1 Cal.4th 865, 913.)

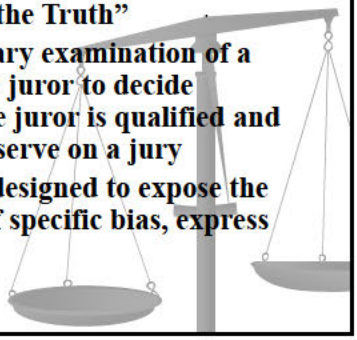
d. Questions related to self-defense, specifically "no need to retreat in your home rule" are permissible and may be inquired into if relevant. (P v. Williams 91981) 29 Cal.3d 392, 411.)

Murder questions: Held to be IMPERMISSIBLE.

a. Do you believe in self-defense in the home? (not controversial)
    i. P v. Williams (1981) 29 Cal.3d 392, 411.
b. If you believed that a witness was an informant, and testified in exchange for a lesser sentence; would that have a bearing on the credibility of that witness in your mind? (P v. Mason (1991) 52 Cal.3d 909, 940.)
c. Would you view accomplice testimony with suspicion and distrust? (P v. Rich (1988) 45 Cal.3d 1036, 1104.)
d. In an eye-witness id murder case, cannot ask jurors if you think stress during an identification affects perception. (P v. Sanders (1990) 51 Cal.3d 471, 506.)

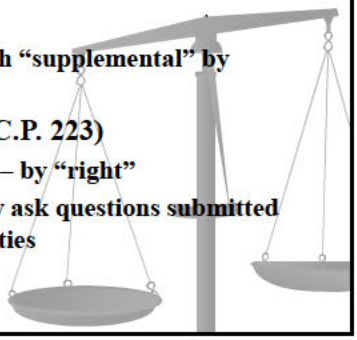
Voir Dire

- "To Speak the Truth"
- A preliminary examination of a prospective juror to decide whether the juror is qualified and suitable to serve on a jury
- Questions designed to expose the existence of specific bias, express or implied



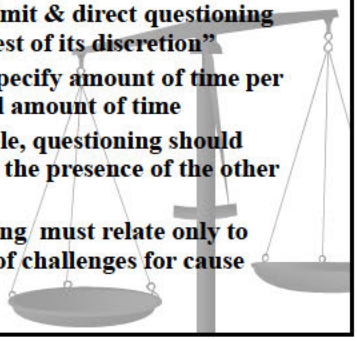
Who Conducts Voir Dire

- Pre-2000
  - Judge, with "supplemental" by attorneys
- Today (C.C.P. 223)
  - Attorneys – by "right"
  - Court may ask questions submitted by the parties



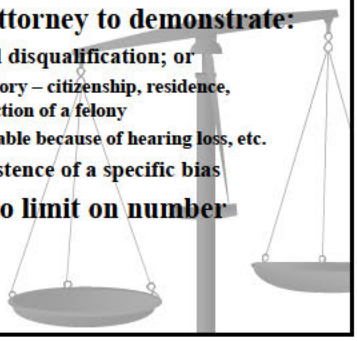
Limitations on Voir Dire

- Court may limit & direct questioning "in the interest of its discretion"
- Court may specify amount of time per juror or total amount of time
- When possible, questioning should take place in the presence of the other jurors
- All questioning must relate only to the exercise of challenges for cause



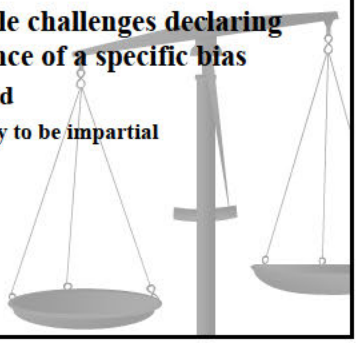
Challenges for Cause

- Require attorney to demonstrate:
  1. General disqualification; or
     1. Statutory – citizenship, residence, conviction of a felony
     2. Incapable because of hearing loss, etc.
  2. The existence of a specific bias
- There is no limit on number



Challenges for Cause

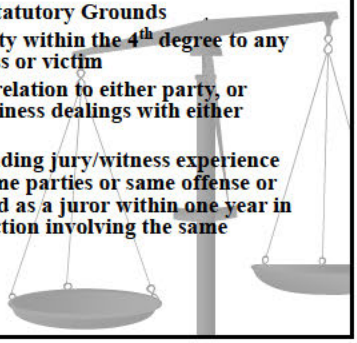
- Permissible challenges declaring the existence of a specific bias
  - Expressed
    - Inability to be impartial
  - Implied



Challenges for Cause

Implied Bias – Statutory Grounds

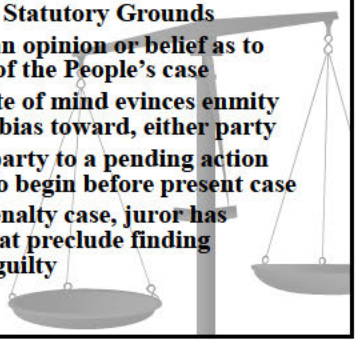
- Consanguinity within the 4th degree to any party, witness or victim
- Standing in relation to either party, or previous business dealings with either party
- Previous/pending jury/witness experience involving same parties or same offense or having served as a juror within one year in a criminal action involving the same defendant



Challenges for Cause

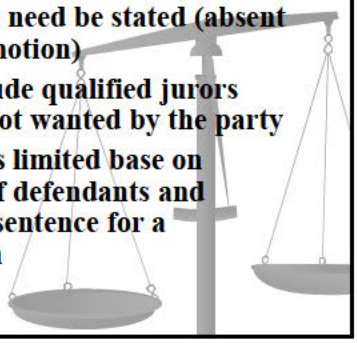
Implied Bias – Statutory Grounds

- Juror has an opinion or belief as to the merits of the People's case
- Juror's state of mind evinces enmity against, or bias toward, either party
- Juror is a party to a pending action that is set to begin before present case
- In death penalty case, juror has opinions that preclude finding defendant guilty



Peremptory Challenges

- No reason need be stated (absent *Wheeler* motion)
- May exclude qualified jurors who are not wanted by the party
- Number is limited base on number of defendants and potential sentence for a conviction

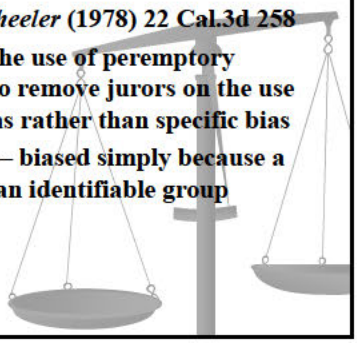


The Voir Dire Process

- The Judge questions jurors first
  - Standard questions
  - Questions submitted by the parties
- The defense questions jurors second
- The People questions jurors last

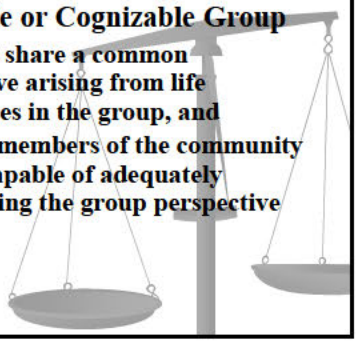
People v. Wheeler

- *People v. Wheeler* (1978) 22 Cal.3d 258
- Dealt with the use of peremptory challenges to remove jurors on the use of group bias rather than specific bias
- Group bias – biased simply because a member of an identifiable group



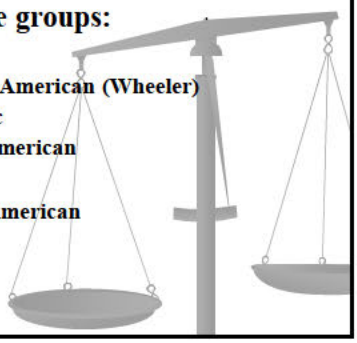
People v. Wheeler

- Identifiable or Cognizable Group
  - Members share a common perspective arising from life experiences in the group, and
  - No other members of the community may be capable of adequately representing the group perspective



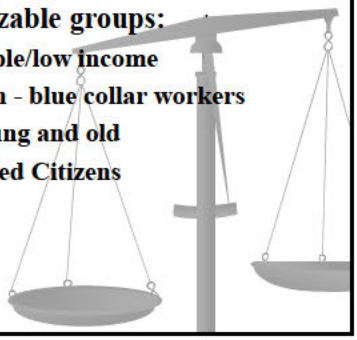
People v. Wheeler

- Cognizable groups:
  - Race
    - African-American (Wheeler)
    - Hispanic
    - Asian-American
  - Ethnicity
    - Native American
  - Religion
    - Jewish



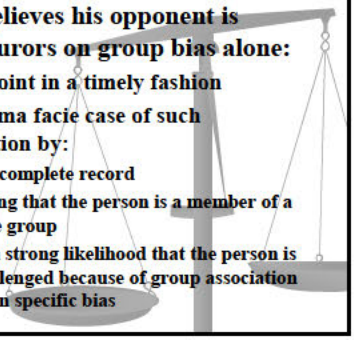
People v. Wheeler

- Non-cognizable groups:
  - Poor people/low income
  - Education - blue collar workers
  - Age – young and old
  - Naturalized Citizens



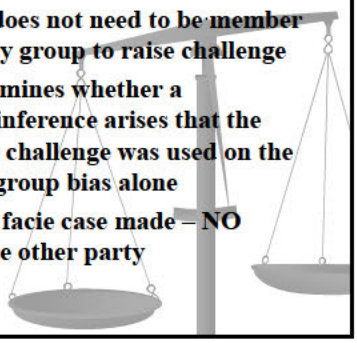
People v. Wheeler

- If a party believes his opponent is dismissing jurors on group bias alone:
  - Raise the point in a timely fashion
  - Make a prima facie case of such discrimination by:
    - Making a complete record
    - Establishing that the person is a member of a cognizable group
    - Showing a strong likelihood that the person is being challenged because of group association rather than specific bias



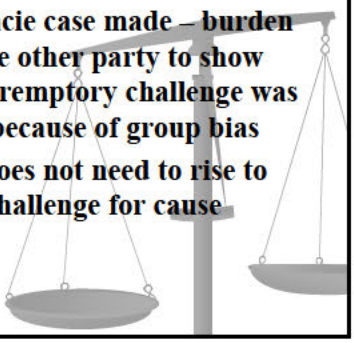
People v. Wheeler

- Defendant does not need to be member of a minority group to raise challenge
- Court determines whether a reasonable inference arises that the peremptory challenge was used on the grounds of group bias alone
- If no prima facie case made – NO action by the other party



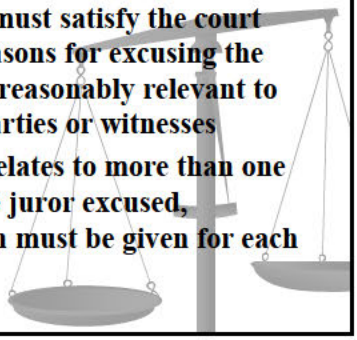
People v. Wheeler

- If prima facie case made – burden shifts to the other party to show that the peremptory challenge was not made because of group bias
- Showing does not need to rise to level of a challenge for cause



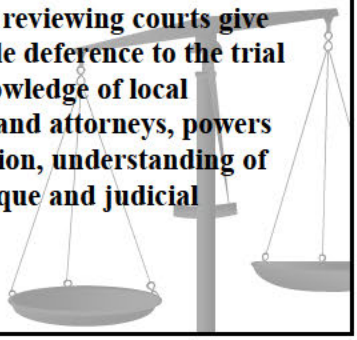
People v. Wheeler

- The party must satisfy the court that the reasons for excusing the juror were reasonably relevant to the case, parties or witnesses
- If motion relates to more than one prospective juror excused, justification must be given for each



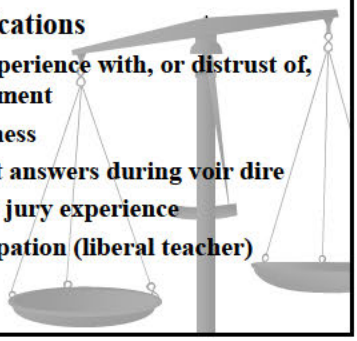
People v. Wheeler

- On appeal, reviewing courts give considerable deference to the trial judge's knowledge of local conditions and attorneys, powers of observation, understanding of trial technique and judicial experience



People v. Wheeler

- Some Justifications
  - Negative experience with, or distrust of, law enforcement
  - Inattentiveness
  - Inconsistent answers during voir dire
  - Other prior jury experience
  - Juror Occupation (liberal teacher)

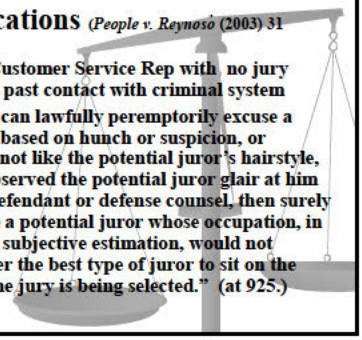


People v. Wheeler

- Some Justifications (*People v. Barber* (1988) 200 Cal. App. 3d. 378)
  - Perceived difficulty understanding complex legal issues in case (*People v. Barber* (1988) 200 Cal. App. 3d. 378)
  - Relatives with past convictions or pending criminal cases

People v. Wheeler

- **Some Justifications** (*People v. Reynoso* (2003) 31 Cal.4th 903)
  - Occupation as Customer Service Rep with no jury experience & no past contact with criminal system
  - "If a prosecutor can lawfully peremptorily excuse a potential juror abased on hunch or suspicion, or because he does not like the potential juror's hairstyle, or because he observed the potential juror glair 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." (at 925.)

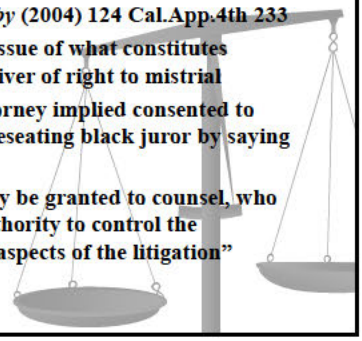


People v. Wheeler

- If there is insufficient justification – the entire panel is excused
- *People v. Willis* (2002) 27 Cal.4th 81
  - If complaining party assents, court may make orders short of excusing panel
    - sanctions
    - reseating improperly discharged jurors

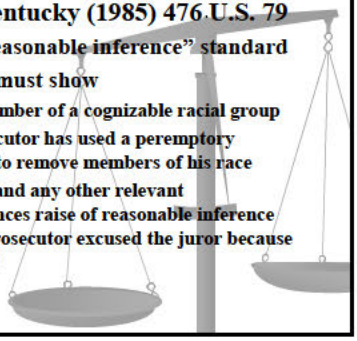
People v. Wheeler

- *People v. Overby* (2004) 124 Cal.App.4th 233
  - Addressed issue of what constitutes effective waiver of right to mistrial
  - Defense attorney implied consented to remedy of reseating black juror by saying "submit"
  - Consent may be granted to counsel, who "has the authority to control the procedural aspects of the litigation"



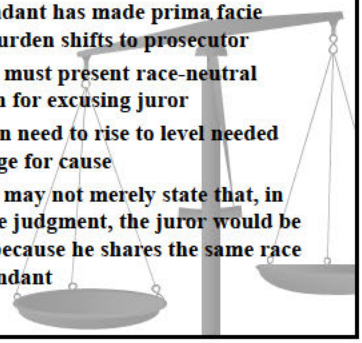
Batson v. Kentucky

- Batson v. Kentucky (1985) 476 U.S. 79
  - Applied "reasonable inference" standard
  - Defendant must show
    - He is a member of a cognizable racial group
    - The prosecutor has used a peremptory challenge to remove members of his race
    - The facts and any other relevant circumstances raise of reasonable inference that the prosecutor excused the juror because of his race



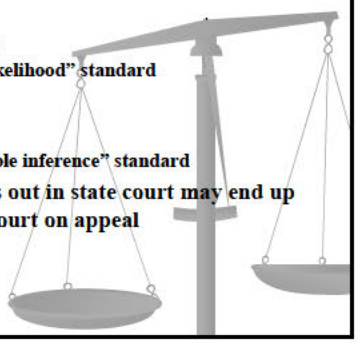
Batson v. Kentucky

- Once defendant has made prima facie showing, burden shifts to prosecutor
- Prosecutor must present race-neutral explanation for excusing juror
- Explanation need to rise to level needed for challenge for cause
- Prosecutor may not merely state that, in his intuitive judgment, the juror would be impartial because he shares the same race as the defendant



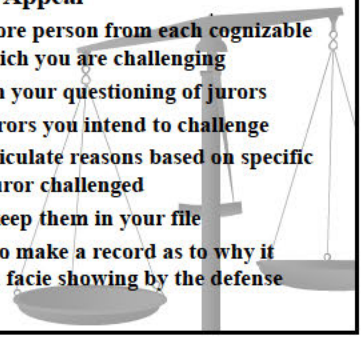
Wheeler vs. Batson

- Wheeler
  - California
  - "Strong likelihood" standard
- Batson
  - Federal
  - "Reasonable inference" standard
- What starts out in state court may end up in federal court on appeal



Wheeler/Batson

- Suggestions for Appeal
  - Keep one or more person from each cognizable group from which you are challenging
  - Be consistent in your questioning of jurors
  - Question all jurors you intend to challenge
  - Be ready to articulate reasons based on specific bias for each juror challenged
  - Take notes & keep them in your file
  - Ask the court to make a record as to why it denied a prima facie showing by the defense



Voir dire

A. **How we begin**

1. Often the court will ask you to introduce yourself to the prospective panel. Stand, say "Good morning Ladies and Gentleman, my name is (insert name) I am a Deputy District Attorney here in San Diego County or I represent the People of the State of California.
2. Defense generally voir dire's first.

B. **Cause Challenges**

1. The purpose of cause challenges is to eliminate jurors who cannot be fair and impartial. A judge will grant a cause strike if the judge has a reasonable doubt about the venire person's ability to be fair. Still, you should use your cause challenges wisely and fairly to avoid sacrificing your credibility with the court.
2. You have an **unlimited** number of cause challenges
3. Challenges for cause to individual jurors can be made by either party on the following grounds: general disqualification, implied bias, or actual bias. General disqualification refers to statutory qualifications for jury service (citizenship, residency, age, and mental competence) Implied bias refers to a prospective juror's relationship to a party; prior service as a grand or petit juror in an action involving a party; an interest in the outcome of the case; or having unqualified opinions or beliefs based on the knowledge of material facts or bias toward a party.
    a) General disqualification includes not being a resident of the county, having been previously convicted of a felony, and having insufficient knowledge of the English language. See Code of Civil Procedure Section 203(a). Implied bias includes being related to

parties or witnesses in the case and having an unqualified opinion based on knowledge of the facts of the case. See Code of Civil Procedure Section 229. Actual bias occurs when a juror's state of mind "will prevent the juror from acting with entire impartiality, and without prejudice to the substantial rights of any party." Code of Civil Procedure Section 225(b)(1)(C).

4. Challenges for cause are exercised before parties exercise their peremptory challenges. 7 CAL. CIV. PROC. CODE § 226(a) (Deering 2004). If the trial court denies a motion for challenge for cause, the moving party must exhaust all peremptory challenges and renew its objection to the composition of the sworn jury panel in order to reserve the basis for appeal.
5. The standard for granting a challenge for cause is whether the views of the prospective juror would "prevent or substantially impair the performance of the juror's duties as defined by the court's instructions and the juror's oath." *California v. Boyette*, 58 P.3d 391, 413-414 (Cal. 2002); *California v. Crittenden*, 885 P.2d 887 (Cal. 1994).
6. Where an adversary wishes to exclude a juror because of bias, ...it is the adversary seeking exclusion who must demonstrate, ***through questioning***, that the potential juror lacks impartiality." Witt, 469 U.S. at 423.

C. **Preemptory Challenges**

1. You have a set number of preemptory challenges With respect to peremptory challenges, defendants in capital felony cases (those punishable by death or by a term of imprisonment for life) are entitled to 20 peremptory challenges and the prosecution is entitled to an equal number as the defense. In other felony and misdemeanor cases for which the offense charged is punishable with a prison term greater than 90 days, each side is entitled to 10 peremptory challenges.
2. You may exercise your peremptory challenges on whomever you wish, provided you do not use them in a discriminatory manner.
3. If multiple defendants are tried jointly their challenges are exercised jointly. However, each defendant is entitled to five additional separate peremptory challenges, and the state is entitled to as many additional peremptory challenges as were granted to the defendants. CAL. CIV. PROC. CODE § 231(a) (Deering 2004).

D. **Batson Wheeler**

1. Whenever you challenge a venire person who is a member of a suspect or protected class, be prepared to provide the court with a logical reason to strike the venire person. The basis for your strike need not rise to the level of cause (or even come close), but it must be articulable and legitimate.

2. Peremptory challenges may not be used to remove a prospective juror on the basis of an assumption that a juror is biased on account of race, color,

religion, sex, national origin, sexual orientation, or similar grounds. CAL. CIV. PROC. CODE § 231.5 (Deering 2004).

E. Topics of Discussion

1. Where to find the rules....
    a) In California, this framework is described in the Trial Jury Management and Selection Act, at Sections 190-237 of the California Code of Civil Procedure. Criminal Section 223 pertaining to voir dire in criminal trials, provides for an initial examination of prospective jurors by the judge. Thereafter, counsel may question prospective jurors directly, but the court retains broad discretion to limit the amount of time allotted for lawyer-conducted voir dire.
    b) The statute is explicit that the only purpose of voir dire is to aid in the exercise of challenges for cause, and interpretative case law emphasizes that voir dire is not properly used for indoctrinating prospective jurors on the lawyers' theories of the case, for questioning about the applicable law, or for exercising peremptory challenges.
    c) The court may specify the maximum amount of time that counsel for each party may question an individual juror, or may specify an aggregate amount of time for each party...." Code of Civil Procedure Section 223.
    d) Examination of prospective jurors shall be conducted only in aid of the exercise of challenges for cause." Code of Civil Procedure Section 223. This is significant because there are only a limited number of reasons that a juror can be excused for cause, including actual or implied biases, yet jurors may be excused through peremptory challenges due to an almost unlimited number of reasons. The scope of permissible questioning is definitely narrower when questions must relate to challenges for cause than if they relate to exercise of peremptory challenges.

K. **The Basics**

1. Under California law, juries for all case types consist of 12 people.
2. How many alternates are up to the judge and attorneys. However many they think are reasonable based on the length and complexity of the trial.
3. The oath: "Do you, and each of you, understand and agree that you will well and truly try the cause now pending before this court, and a true verdict render according only to the evidence presented to you and to the instructions of the court?"
4. Lastly, California Rule of Court 4.200 mandates that trial courts hold a pre-voir dire conference in criminal cases at some point before jury selection begins. Regarding the voir dire process, judges must determine at the conference "[t]he areas of inquiry and specific questions to be asked by the court and by counsel and any time limits on counsel's examination." California Rule of Court 4.200(a)(5). At the pre-voir dire conference, the attorneys should tell the judge what questions they would like the judge to ask, and the judge should tell the attorneys how much time they will be allotted to ask their own questions.

Jury Selection – Nuts & Bolts

Mechanics / Rules – Depending on the judge you are in front of, you may be faced with several different methods of selecting a jury. There are really two main types and variations of either type.

A. "12 Pack", "18 Pack" etc.

1. How it Works

   a. *This is the most common type of selection method that you will see*. Usually, the court clerk will call 12 or 18 or 20 names from a random list of all the potential jurors. Those jurors will fill the jury box in the order called and, if more than 12, will fill the front row of the audience. The rest of the potential jurors will then fill the remaining seats in the courtroom.

   b. Voir Dire is then conducted by the judge and attorneys of the first 12 or 18 or 20 potential jurors.

   c. Once the challenges begin, jurors leave the courtroom when they are challenged until only 11 remain.

   d. The clerk then calls jurors to fill the vacant seats and the process starts all over again. This continues until both sides pass or are out of challenges.

B. "Federal Method"

2. How it Works

a. This method seems to be gaining popularity with judges primarily. It is usually a faster method and avoids excused jurors knowing which side excused them.

b. In this method, unlike the "12 Pack" method, the attorneys move their chairs to the opposite side of counsel tables so that they are facing the courtroom doors and the audience and their backs are to the judge.

c. The potential jurors are called in by the clerk according to the order on the random list. All of the potential jurors are assigned a seat and a number in the courtroom.

d. Voir Dire is then conducted on *ALL* of the potential jurors *ONCE*.

e. Once challenges begin, they are done silently by the attorneys on a master sheet. The attorneys may challenge anyone they wish from the entire panel. The attorneys pass the sheet back and forth until both pass or run out of challenges.

f. The judge will then excuse all challenged jurors at once. The ***first 12 unchallenged jurors*** will then make up the jury.

C. Challenges – There are two types of challenges, *challenges for cause* and *peremptory challenges*. The rules regarding juror challenges can be found in the ***Code of Civil Procedure (CCP §§225 -231).***

1. Challenges for Cause – Challenges for cause can be made by either side generally for either *implied bias* or *actual bias* (***CCP §225(b)***)

a. Implied Bias – There are nine categories of implied bias listed in ***CCP §229***:

b. Actual Bias – Defined as "*the existence of a state of mind on the part of the juror in reference to the case, or to any of the parties, which will prevent the juror from acting with entire impartiality, and without prejudice to the substantial rights of any party.*" (*CCP §225(b)(1)(C)*)

c. The ultimate determination of excusal for cause is made by the court. (*CCP §230*)

2. Peremptory Challenges – A peremptory challenge may be made by either party and is an objection to a juror for which no reason need by given. The court is required to excuse jurors challenged peremptorily. (*CCP §231*)

a. Number – The number of peremptory challenges depends upon the possible sentence of the offense charged and the number of defendants.

b. If the offense is punishable with *maximum term of imprisonment of 90 days or less*, each side gets *6* peremptory challenges. (*CCP §231*)

c. If the offense is punishable with *death or with imprisonment in the state prison for life*, each side gets *20* peremptory challenges. (*CCP §231(a)*). The prosecution of first degree murder without special circumstances which carries a term of 25 years to life, constitutes imprisonment for life within the meaning of CCP §231(a).

d. In *all other cases* each side gets *10* peremptory challenges.

e. Multiple defendant cases

i. Punishment of 90 days or less – The People get *6* challenges and the defendants get *6 challenges jointly*. Each defendant is additionally entitled to *4 separate challenges*. The People get as many challenges as are allowed all defendants. (*CCP §231(b)*)

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO

CENTRAL DIVISION

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, v. JOHNNY CROOK, Defendant.	No. SCD DA **PEOPLE'S MEMORANDUM RE: VOIR DIRE LAW AND THE PROPER *WHEELER* PROCEDURE** Date: Time: Dept.:

Comes now the plaintiff, the People of the State of California, by and through its attorneys, BONNIE M. DUMANIS, District Attorney, and XXX YOUR NAME HERE XXX, Deputy District Attorney, and respectfully submits the following People's Memorandum Re: Voir Dire and the Proper *Wheeler* Procedure.

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ARGUMENT

I

CODE OF CIVIL PROCEDURE SECTION 225 LISTS THE THREE TYPES OF CHALLENGES FOR CAUSE

A challenge for cause is an objection to a prospective trial juror based upon one or more of the following grounds: (1) The juror is generally disqualified, (2) the juror has an implied bias, or (3) the juror has an actual bias. (Code Civ. Proc., § 225, subd. (b).) The number of challenges for cause is unlimited.

I. General Disqualifications

Code of Civil Procedure section 228 sets forth the general qualifications for jurors as follows:

> "(a) A want of any of the qualifications prescribed by this code to render a person competent as a juror.
>
> "(b) A loss of hearing, or the existence of any other incapacity which satisfies the court that the challenged person is incapable of performing the duties of a juror in the particular action without prejudice to the substantial rights of the challenging party."

Code of Civil Procedure section 203 subdivision (a), describes all persons are eligible to be jurors **except**:

(1) Persons who are not U.S. citizens.

(2) Persons who are less than 18 years old.

(3) Persons who are not California domiciliaries per Elections Code section 200 et seq. A person can have only one domicile.

(4) Persons who are not residents of the jurisdiction of the court.

(5) Persons convicted of a felony or malfeasance in office, and whose civil rights have not been restored.

(6) Persons who are not competent in English.

(7) Persons who are serving on a grand jury or other trial jury.

(8) Persons who are under a conservatorship.

II. Implied Bias

The second ground for a challenge for cause is an implied bias. Code of Civil Procedure section 229 sets forth the factors which constitute an implied bias:

(a) Is related by blood or marriage, within the fourth degree, to a party or any alleged witness or victim.

(b) Has a close personal or business relationship to a party, as specified; e.g., guardian and ward, landlord and tenant, etc.; or had a recent attorney-client relationship with the party or party's attorney.

(c) Served as trial juror, grand juror, or witness in the same case or any case involving the same defendant.

(d) Has an interest in the case, other than as a citizen or taxpayer.

(e) Has "an unqualified opinion or belief as to the merits of the action founded upon knowledge of its material facts or of some of them."

(f) Has "a state of mind . . . evincing enmity against, or bias towards, either party."

(g) Is a party to the case which is set for trial before the same jury panel of which he/she is a member.

(h) In a *death penalty* case, has such opinions "as would preclude the juror finding the defendant guilty."

III. Actual Bias

The final ground would be actual bias. Code of Civil Procedure section 225, subdivision(b)(1)(c), defines actual bias as "[t]he existence of a state of mind on the part of the juror in reference to the case, or to any of the parties, which will prevent the juror from acting with ***entire*** *impartiality*, and without prejudice to the substantial rights of any party."

BATSON-WHEELER LAW

II

BOTH THE PEOPLE AND THE DEFENDANT CAN BRING A *WHEELER* MOTION

A peremptory challenge is an objection to a juror for which no reason need be given. Its purpose is to allow either party to exclude prospective jurors which the party believes may consciously or unconsciously be biased against him. *People v. Jackson* (1992) 10 Cal.4th 13, 17. Accordingly, there is a rebuttable presumption that all peremptory challenges are exercised in a constitutionally permissible manner. *People v. Clair* (1992) 2 Cal.4th 629, 652. Challenges based upon "hunches" or even "arbitrary" exclusion is permissible, so long as impermissible group bias does not enter the question. *People v. Hall* (1983) 35 Cal.3d 161, 170.

However, peremptory challenges based solely upon group bias violates a party's right to a jury drawn from a representative cross section of the community. *People v. Wheeler* (1978) 22 Cal.3d 258. Group bias is a presumption that jurors are biased merely because they are members of an identifiable group distinguished on racial, religious, ethnic, or similar grounds. (*People v. Johnson* (1989) 47 Cal.3d 1194, 1215.)

The Court in *Wheeler* went on to clarify its intentions:

> "This does not mean that the members of such a group are immune from peremptory challenges: individual members thereof may still be struck on grounds of specific bias, as defined herein. Nor does it mean that a party will be entitled to a petit jury that proportionately represents every group in the community: we adhere to the long-settled rule that no litigant has the right to a jury that mirrors the demographic composition of the population, or necessarily includes members of his own group, or indeed is composed of any particular individuals. [Citations.] What it does mean, however, is that a party is constitutionally entitled to a petit jury that is as near an approximation of the ideal cross-section of the community as the process of random draw permits." [*Id.* at 276-277.]

It is important to note that both parties enjoy this constitutional right to a fairly selected jury. Both the People and the defendant can bring a *Wheeler* motion. The *Wheeler* Court itself left no doubt the People also enjoyed this protection:

> Although in the present appeal the Attorney General for obvious reasons does not claim the right to object to the same misuse of peremptory challenges on the part of defense counsel, we observe for the guidance of the bench and bar that he has that right under the constitutional theory we adopt herein: the People no less than individual defendants are entitled to a trial by an impartial jury drawn from a representative cross-section of the community. *Id.* at p. 282, fn. 29. See also, *People v. Taylor* (1997) 55 Cal.App.4th 924; *People v. Williams* (1994) 26 Cal.App.4th Supp. 1, 9; *People v. Pagel* (1986) 186 Cal.App.3d Supp. 1, 6.

More recently, the California Supreme Court reiterated the People's right to bring a *Wheeler* motion. In *People v. Willis* (2002) 27 Cal.4th 811, 813 the Supreme Court found defense counsel, representing a black defendant, exhibited group bias in exercising his peremptory challenges to exclude white male prospective jurors. The trial court's granting of the People's *Wheeler* motion was upheld.

II

THE MOTION MUST BE TIMELY

If a party believes an opponent is improperly using peremptory challenges to exclude jurors solely for a discriminatory purpose, that party must make a timely objection. The motion is considered timely if it is made before the jury is sworn. (*People v. Ortega* (1984) 156 Cal.App.3d 63, 67.) In *People v. Gore* (1993) 18 Cal.App.4th 692, 703 the Court explained:

> "[T]o be timely, a *Wheeler* objection or motion must be made, at the latest, before jury selection is completed. 'The general rule is that where a court has indicated that a trial will be conducted with alternate jurors, the impanelment of the jury is not deemed complete until the alternates are selected and sworn.' [Citation.]"]; accord, *People v. Rodriguez* (1996) 50 Cal.App.4th 1013, 1023.

However, in *People v. Crutcher* (1997) 58 Cal.App.4th 1002, defense counsel raised a *Wheeler* objection to the first two challenges exercised by the People. The *Wheeler* objection was not made, however, until the prosecutor's fifth challenge. The Court found this untimely, even though the jury had not yet been sworn. The *Crutcher* Court explained:

> "Such delay thwarts effective consideration of all relevant circumstances and potentially wastes judicial resources." *Id.* at 1013.

III

A PRIMA FACIE SHOWING OF GROUP BIAS MUST BE ESTABLISHED

The moving party has the burden of establishing a prima facie case that the opposing side has challenged jurors solely on the basis of group bias. "Group bias is a presumption that jurors are biased merely because they are members of an identifiable group, distinguished on grounds such as race, religion, ethnicity, or gender." *People v. Crittenden* (1994) 9 Cal.4th 83, 115. Specific bias, on the other hand, "is a bias relating to the particular case on trial or the parties or witnesses thereto." *People v. Johnson* (1989) 47 Cal.3d 1194, 1215.

To establish a prima facie case, the moving party must (1) make as complete a record of the circumstances as is feasible; (2) establish the persons excluded are members of a cognizable group within the meaning of the representative cross-section rule; and (3) from all of the circumstances of the case demonstrate a strong likelihood that such persons are being challenged based solely upon their group association and not because of any specific bias. (*People v. Howard* (1992) 1 Cal.4th 1132, 1153-1154.)

The moving party cannot question the opposing counsel in order to establish a prima facie case. An attorney's statutory right to refuse to give any reason for the exercise of peremptory challenges continues to exist until the court rules that a prima facie showing has

been made by the moving party. (Penal Code Section 1069.) (*People v. Wheeler, supra,* at pp. 280-281, fn. 28. *People v. Granillo* (1987) 197 Cal.App.3d 110, 122.)

The first issue for the court to resolve is whether the challenged juror belongs to a cognizable group. To constitute a cognizable class two requirements must be met: 1) members share a common perspective arising from life experiences in the group, and 2) no other members of the community are capable of adequately representing the group perspective. See *Rubio v. Superior Court* (1979) 24 Cal.3d 93, 98. The following groups have been recognized as cognizable groups:

1. Men. *People v. Cervantes* (1991) 233 Cal.App.3d 323, 334. *People v. Williams* (2000) 78 Cal.App.4th 1118, 1125.

2. Woman. *Didonato v. Santini* (1991) 232 Cal.App.3d 721, 733; *Taylor v. Louisiana* (1975) 419 U.S. 522. *People v. Cervantes* (1991) 233 Cal.App.3d 323, 334. *People v. Macioce* (1986) 197 Cal.App.3d 262, 280.

3. Caucasians. *People v. Snow* (1987) 44 Cal.3d 216, 229, concurring opinion of Eagleson, J., *citing, Bakke v. Regents of University of California* (1976) 18 Cal.3d 34 (affd. in part, revd. in part, *University of California Regents v. Bakke* (1978) 438 U.S. 265.

4. Blacks. *People v. Wheeler, supra* at page 280, fn. 26; see also *People v. Johnson* (1989) 22 Cal.3d 296; *People v. Harris* (1984) 36 Cal.3d 36, 51.

5. Spanish surnamed (Hispanics). *People v. Trevino* (1985) 39 Cal.3d 667, 676, 683-688; *People v. Harris, supra,* 36 Cal.3d 36, 51; *People v. McCaskey* (1989) 207 Cal.App.3d 248, 252.

6. Black women. *People v. Motton* (1985) 39 Cal.3d 596, 605. *People v. Crittenden* (1994) 9 Cal.4th 83, 115.

7. Jewish jurors. *People v. Johnson* (1989) 47 Cal.3d 1194, 1217.

8. Homosexuals. *People v. Garcia* (2000) 77 Cal.App.4th 1269, 1276.

The courts have found the following not to be cognizable groups:

1. Poor persons/low income: see, e.g., *People v. Johnson* (1989) 47 Cal.3d 1194, 1214; *People v. Estrada* (1979) 93 Cal.App.3d 76, 91; *People v. Carpenter (II)* (1997) 15 Cal.4th 312, 352; *People v. Carpenter (III)* (1999) 21 Cal.4th 1016, 1035.

2. Less educated: see, e.g., *Estrada, supra,* at 90-91.

3. Blue collar workers: see, e.g., *Estrada, supra,* at 92.

4. Battered women: see *People v. Macioce* (1986) 197 Cal.App.3d 262, 280.

5. Young adults: see, e.g., *Estrada, supra,* at 93; *People v. Marbley* (1986) 181 Cal.App.3d 45, 48; *People v. Ayala* (2000) 23 Cal.4th 225, 257.

6. People over 70: see, e.g., *People v. McCoy* (1995) 40 Cal.App.4th 778, 783; *U.S. v. Grimmond* (4th Cir. 1998) 137 f.3 823 (over 65).

7. Death penalty skeptics: see, e.g., *People v. Johnson, supra,* at 1222; *People v. Davenport* (1995) 11 Cal.4th 1171, 1202-03.

8. Ex-felons and resident aliens: see, e.g., *People v. Karis* (1988) 46 Cal.3d 612, 631-33.

9. Naturalized citizens: see, e.g., *People v. Gonzalez* (1989) 211 Cal.App.3d 1186, 1202.

10. "Insufficient" English spoken: see, *People v. Lesara* (1988) 206 Cal.App.3d 1304, 1309.

11. New community residents (less than one year): see, e.g., *Adams v. Superior Court* (1974) 12 Cal.3d 55, 60.

12. Strong law and order believers: see *Wheeler*, 22 Cal.3d at 276.

13. "Men who wear toupees": see *People v. Motton* (1985) 39 Cal.3d 596, 606.

14. Retired correctional officers: *People v. England* (2000) 83 Cal.App.4th 772.

The defendant need not be a member of the cognizable group to make a *Wheeler* motion. (*People v. Wheeler, supra.*)

The moving party must next convince the Court that the juror was challenged solely because of group bias. The standard of proof for making a prima facie showing was set out in *Wheeler* as "a strong likelihood that such persons are being challenged because of their group association rather than because of any specific bias." *People v. Wheeler, supra* at 280. Unfortunately, the *Wheeler* Court complicated matters later by stating:

> Upon presentation of this and similar evidence—in the absence, of course, of the jury—the court must determine whether a reasonable inference arises that peremptory challenges are being used on the ground of group bias alone. *Id.* at 281.

Despite the unfortunate use of two different phrases in the same opinion, California courts generally apply the "strong likelihood" language. *People v. Jackson* (1992) 10 Cal.4th 13, 18; *People v. Turner* (1994) 8 Cal.4th 137, 167; *People v. Garceau* (1993) 6 Cal.4th 140, 171.

In 1986, the United States Supreme Court also held that discriminatory challenges violated the Sixth and Fourteenth Amendments of the United States Constitution. *Batson v. Kentucky* (1986) 476 U.S. 79, 90 L.Ed.2 69. In *Batson*, the Supreme Court talked about needing only to raise an inference that venire members were challenged on account of their group association to make out a prima facie case.

The 9th Circuit, in *Wade v. Terhune* (2000) 202 F.3d 1190, held *Batson's* federally mandated standard only requires the moving party to raise a **reasonable inference** of bias, a lower standard than California's "strong likelihood" language. *Terhune* noted that although *Wheeler* itself uses both terms, it really meant to impose only the reasonable inference standard, and all later California cases misinterpreted *Wheeler* on this point. To further confuse matters, California cases since *Terhune* uniformly say it is wrong or not controlling authority and that the

higher California standard is controlling in California (see, e.g., *People v. Martinez* (2000) 81 Cal.App.4th 339); or that *Batson's* **"raise an inference"** standard is actually the same as *Wheeler's* **"strong likelihood"** standard (see, e.g., *People v. Box* (2000) 23 Cal.4th 1153, 1188, fn.7.)

Merely noting that a party has used its challenges to exclude members of a particular group is insufficient to support a prima facie showing of group bias. (See, *People v. Trevino* (1997) 55 Cal.App.4th 396, 406; *People v. Turner* (1994) 8 Cal.4th 137, 167 [mere claim that challenged jurors were Black and had indicated they could be impartial]; *People v. Howard* (1992) 1 Cal.4th 1132, 1154 [fact that DA challenged first two Black jurors "completely inadequate" to meet burden].) Such limited showings are insufficient even when peremptories exclude all members of a cognizable group. (See, e.g., *People v. Rousseau* (1982) 129 Cal.App.3d 526, 536-37 [only two Blacks on panel challenged]; *People v. Christopher* (1991) 1 Cal.App.4th 666, 672-73 [sole Black challenged].)

In *People v. Garceau* (1993) 6 Cal.4th 140, the defendant claimed his prima facie case was established by showing the prosecution had excused six Hispanic women. The Supreme Court disagreed. The Court in *Garceau* explained:

> Nevertheless, defendant failed to show a "strong likelihood" that these prospective jurors were excluded because of a group association. His motions merely reiterated the names of the jurors removed by the prosecution and alleged that, because the removed jurors all were Hispanic-surnamed women, he had made a "prima facie showing." (*Id.*)

Similarly, in *People v. Turner* (1994) 8 Cal.4th 137, the prosecutor used four of his six peremptory challenges to exclude black prospective jurors. He also excused two black prospective alternates. (*Id.* at p. 172.) Moreover, this case was a retrial following the Supreme Court's reversal of a murder conviction caused by the same prosecutor's *Wheeler* violations in the first trial. (See *People v. Turner* (1990) 50 Cal.3d 668.)

Mindful of the above-stated facts, the Supreme Court nevertheless found a prima facie case still had not been established.

> In particular, defendant failed to establish from all the circumstances of the case a strong likelihood that such persons were being challenged because of their group association. (*People v. Howard, supra,* 1 Cal.4th at p. 1154.) Rather, the only basis for establishing a prima facie case cited by defense counsel were that all of the challenged prospective jurors were Black and either had indicated that they could be fair and impartial or in fact favored the prosecution. This is insufficient. (*Id.* at p. 167.)

One factor arguing against the defendant's claimed *Wheeler* violation was the fact the prosecutor had accepted a jury panel including several black members. The Supreme Court stated the obvious:

> While the fact that the jury included members of a group allegedly discriminated against is not conclusive, it 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. (*Id.* p. 168.)

If the moving party cannot establish a prima facie case, the motion must be denied. In *People v. Cervantes* (1991) 233 Cal.App.3d 323, the trial court listened to defense counsel's prima facie presentation, then turned to the district attorney for a response. The Appellate Court explained the trial court erred by not making a finding on the prima facie case before asking the prosecutor to defend the challenges.

> The scenario we have just described could have been avoided had the district attorney demanded a specific finding of the trial judge. Although not an excuse, we understand that trial lawyers, including deputy district attorneys, often are reluctant to make demands of the trial judge for such things as specific findings, etc. However, at least as to *Wheeler* motions, the district attorney need never be put in this position. When defense counsel makes a *Wheeler* motion and states his reasons for the motion, if the trial judge, after weighing the evaluating these reasons, concludes a prima facie showing of discriminatory exclusion of a cognizable group has not been made, then the judge must clearly and succinctly say so, state his or her reasons, and make the necessary finding of no prima facie showing. On the other hand, if the court concludes a prima facie showing has been made, then it must state that finding. Either way, the district attorney knows where he or she stands and what must be done, i.e.,

either respond or not, depending on the court's specific finding. And, of course, had the above-described scenario been followed here, then *Wheeler* error may have been avoided. (233 Cal.App.3d at 336-37, emphasis added.)]

Answering the court's inquiry regarding individual challenge justifications before a prima facie finding will result in an implied prima facie finding. (See, e.g., *People v. Arias* (1996) 13 Cal.4th 92, 135 ["When the trial court solicits an explanation of the challenged excusals without first indicating its views on the prima facie issue, we may infer an implied prima facie finding. [Citations.] . . . Once an implied prima facie finding has been made, that issue becomes moot, and the only question remaining is whether the individual justifications were adequate."]. *People v. Ervin* (2000) 22 Cal.4th 48. Thus the proper response is to speak only to the prima facie case issue, not specific challenge justifications; then a prima facie finding will not be implied. See, *People v. Ferro* (1993) 21 Cal.App.4th 1, 7-8:

> The trial court did not ask for reasons or explanations. It merely asked the prosecutor if she wished to be heard. The prosecutor, wisely or fortuitously, gave not one word of excuse or explanation, but attacked the preliminary question of systematic exclusion, after which the trial court specifically found no pattern of systematic exclusion. In the cases surveyed above, . . . the prosecutors, some eagerly, some reluctantly, gave reasons for excluding the jurors in question. It is easier to conclude that a trial court has impliedly made the prima facie finding when it takes the next step and listens to the justifications offered. . . .
>
> It's much easier for the trial court to just say whether it is making the prima facie finding before it asks the prosecutor to respond, or if limiting the inquiry to whether a prima facie showing has been made, to say so. Any prosecutor who fails to inquire and gushes explanations when the trial court has failed to specify is unwittingly jeopardizing his or her case.

See also, *People v. Bittaker* (1989) 48 Cal.3d 1046, 1091-92.

However, if the trial court finds no prima facie case has been made, but still asks for reasons for the sake of recourt, no prima facie case will be presumed. *People v. Turner*

(1986) 42 Cal.3d 711 [*Turner I*] was a Rose Bird Supreme Court reversal of a robbery-murder special circumstances case based on prosecutorial *Wheeler* error, where all three Blacks on the jury were challenged. "[T]he prosecutor's explanations were either implausible or suggestive of bias." (42 Cal.3d at 728.) The same prosecutor (but with a different trial judge) convicted defendant on retrial, which led to the Malcolm Lucas Court's *People v. Turner* (1994) 8 Cal.4th 137 [*Turner II*]; there, defendant's conviction was affirmed over a *Wheeler* challenge raised but denied in the second trial.

In *Turner II*, the prosecutor used four of six challenges against Black jurors; defendant excused two Blacks, and final jury had five Blacks. After the prosecutor challenged the first two Black jurors, defense counsel objected, claiming only that both jurors had stated they could be fair, but were dismissed because of their race. The trial court replied:

> Let me indicate before I ask the prosecutor to respond that – at this point, I'm not making a prima facie finding that there's been any systematic exclusion of [B]lacks from the jury. But for the record in the case, I'm going to ask the prosecutor to give me – to articulate the reasons why he excused those two jurors. But I want the record to be clear that I'm making that request not as a result of any prima facie finding of exclusion of the prospective jurors on the basis of color. Again, I'm doing it because of the reason that the case was reversed. (8 Cal.4th at 165.)

The prosecutor properly responded, "I think the law is clear that unless a prima facie case is made, there is no response required by the People." (*Id.*) However, the prosecutor then complied with the Court's request and stated reasons for the challenges. After the third Black juror was challenged by the prosecutor, the defense again objected; the Court again stated no prima facie case was found, but nevertheless requested the prosecutor to respond; the prosecutor again complied.

In *Turner II*, the Supreme Court first ruled, "when an appellate court is presented with such a record, and concludes that the trial court properly determined that no prima facie case was made, it need not review the adequacy of counsel's justifications for the peremptory challenges." (*Id.* at 167.) Thus, the High Court found that the trial court correctly ruled no

prima facie case had been made. Although it need not review the adequacy of any justifications in such posture, the Supreme Court did examine the prosecutor's justifications because of the unique procedural history of the case. All reasons given for the challenges were found to be properly race-neutral.

IV

UPON A FINDING OF A PRIMA FACIE CASE, THE BURDEN SHIFTS TO THE NON-MOVING PARTY TO PROVIDE A DETAILED AND NEUTRAL JUSTIFICATION FOR EACH CHALLENGED JUROR

Should the Court find the moving party has established a prima facie case, the burden shifts to the other party to show his challenges were not based solely on a presumed group bias. Stated another way, counsel must demonstrate the challenges were based on specific bias, or a belief the juror may be biased against his side, or for the opposition. To sustain his burden, the allegedly offending party must satisfy the court that he exercised the peremptory challenges on "grounds that were reasonably relevant to the issues, parties, or witnesses in the particular case on trial." (*People v. Jackson* (1992) 10 Cal.App.4th 13, 18.)

Exclusions based upon hunches and other arbitrary reasons are permissible, as long as the reasons are not based upon improper group bias. (*People v. Turner* (1994) 8 Cal.4th 137, 164-165; *People v. Hall* (1983) 35 Cal.3d 161, 170. The reasons need only to be genuine, reasonably specific, and race or group neutral; even trivial reasons may suffice. *People v. Arias* (1996) 13 Cal.4th 92, 136.)

This justification must be done as to each such juror individually and should be done at the time the challenge is exercised rather than waiting until the end of jury selection. The judge must issue a ruling as to each such juror individually. (*People v. Fuentes, supra,* at 718-719.)

The explanations given by the non-moving party need not rise to the level of a challenge for cause. (*People v. Wheeler, supra,* at pp. 281-282.) Subjective observations, such as the prospective juror's body language or manner of answering questions, are acceptable.

(*People v. Johnson, supra,* at p. 1219; *People v. Jackson* (1992) 10 Cal.App.4th 13, 19.) Likewise, a juror's limited life experience, *People v. Sims* (1993) 5 Cal.4th 405, 429; *People v. Perez* (1994) 29 Cal.App.4th 1313, 1328; the inability to understand the proceedings, *People v. Barber* (1988) 200 Cal.App.3d 378, 397, past involvement with a hung jury, *People v. Turner, supra,* at p. 170, negative experiences with law enforcement, *People v. Walker* (1988) 47 Cal.3d 605, 625, and "bare looks and gestures" by a prospective jury that may alienate one party, *People v. Wheeler, supra,* at p. 276, constitute valid grounds for the exercise of peremptory challenges. Also, "the use of peremptory challenges to prospective jurors whose relatives and/or family members have had negative experiences with the criminal justice system is not unconstitutional." *People v. Douglas* (1995) 36 Cal.App.4d 1681, 1690.

V

THE TRIAL COURT MUST DETERMINE WHETHER THE JUSTIFICATION IS GENUINE AND SUFFICIENT

Once the moving party has made a prima facie showing of exclusion of jurors from a protected class and the opposing party has explained its challenges, the trial court must exercise its own judgment as to the propriety of the challenges. The trial court is governed by the following standard:

> [T]he trial court is required to: "satisfy itself that the explanation is genuine. This demands of the trial judge a sincere and reasoned attempt to evaluate the prosecutor's explanation in light of the circumstances of the case as then known, his knowledge of trial techniques, and his observations of the manner in which the prosecutor has examined members of the venire and has exercised challenges for cause or peremptorily, for 'we rely on the good judgment of the trial courts to distinguish bona fide reasons for such peremptories from sham excuses belatedly contrived to avoid admitting acts of group discrimination.' [Citation.]" (*People v. Hall* (1983) 35 Cal.3d 161, 167-168.)

Simply stated, the trial court is obligated to determine not only that a factually supportable reason for the challenge existed, but also that the reason actually prompted the use of the challenge. (*People v. Fuentes* (1991) 54 Cal.3d 707, 720.) The issue presented to the trial court is one of fact. (*People v. Perez, supra.*) Reasons that are genuinely held, valid and non-discriminatory will cause the trial court to deny the motion. Only when there is a reasonable inference based upon all the evidence that the peremptory challenges were used on grounds of group bias alone should the motion be granted. (*People v. Wheeler, supra,* at p. 281.)

In deciding this question of fact, the trial court must not engage in a subjective comparison between the challenged juror and those allowed to remain on the jury. In *People v. Johnson* (1989) 47 Cal.3d 1194, 1219-1220, the Supreme Court stated quite clearly its disapproval of this comparative analysis:

> We disapproved the approach taken earlier in *People v. Trevino* (1985) 39 Cal.3d 667, in which we had disallowed subjective reasons for peremptory challenges and had engaged in a comparative analysis of various jurors' responses to evaluate the bona fides of the prosecutor's stated reasons. We disapproved the *Trevino* approach because nothing in *Wheeler* disallows reliance on the prospective juror's body language or manner of answering questions as a basis for rebutting a prima facie case, and because comparative analysis of jurors unrealistically ignores 'the variety of factors and considerations that go into a lawyer's decision to select certain jurors while challenging others that appear to be similar'.

In *People v. Perez* (1994) 29 Cal.App.4th 1313, 1329, a San Diego case, the Fourth District followed *Johnson's* rejection of the comparative analysis approach. Furthermore, under authority of the California Supreme Court, "an appellate court is not allowed to compare the responses of rejected and accepted jurors to determine the bona fides of the justifications offered." (*People v. Landry* (1996) 49 Cal.App.4th 785, 791.)

Indeed, the Supreme Court has recently, and repeatedly, specifically declined to reconsider *Johnson*. (See *People v. Jones* (1997) 15 Cal.4th 119, 162 & fn. 12; accord *People v. Ervin* (2000) 22 Cal.4th 48; *People v. Box* (2000) 23 Cal.4th 1153, 1190.)

It must be noted, however, that the 9th Circuit approves of the use of comparative analysis when assessing the truthfulness of the reasons given for questionable peremptory challenges. *McClain v. Prunty* (9th Cir. 2000) 217 F.3d 1209.

VI

SEVERAL REMEDIES ARE AVAILABLE FOR *WHEELER* VIOLATIONS

Until 2002, it was generally accepted the only remedy for a *Wheeler* violation was to dismiss the jurors so far selected; quash the remaining venire, draw a new panel and begin jury selection anew. No other remedies were recognized. *People v. Wheeler, supra* at 282. But, see *People v. Williams* (1994) 26 Cal.App.4th Supp. 1. However, in *People v. Willlis* (2002) 27 Cal.4th 811, the California Supreme Court belatedly recognized that alternative remedies were not only appropriate, but necessary.

In *Willis*, defense counsel initially objected to the racial mixture of the entire jury panel. Specifically, he claimed the panel was overwhelmingly Caucasian. After his motion to quash the panel was denied, the defense began to systematically exclude white male jurors, hoping his *Wheeler* violation would force a new jury panel for the trial. Fortunately, both the trial court and the Supreme Court saw through his tactically unconstitutional methods. *Id.* at 816.

Justice Chin, writing for a unanimous Supreme Court, noted the federal Constitution did not compel exclusion of the entire panel as the sole remedy for a violation of *Batson v. Kentucky* (1986) 476 U.S. 79. *Batson* had left implementation to the state courts. While the majority of the states give trial courts discretion to match a violation remedy to the facts and circumstances, to this point California had felt constrained to stick to the sole remedy of panel exclusion.

The *Willis* opinion began by echoing the words of the Massachusetts Supreme Court in *Commonwealth v. Reid* (1981) 384 Mass. 237, 255: "We did not hold that dismissal of

the entire venire was the only appropriate relief. Such a limitation on the trial judge's ability to respond in these circumstances would place in the hands of litigants the unchecked power to have a mistrial declared based on their own misconduct." Then the California high court turned to a fashioning of its own remedies. First, it ruled that the trial court's discretion to depart from the normal *Wheeler* exclusion remedy required the assent of the complaining party. That is, if a party objects on *Wheeler* grounds, and the court ultimately grants the motion, the complaining party has the whip hand: it can insist on exclusion of the panel and reseating of a new one, or it can assent to some other remedy. Then the Supreme Court expressed in some detail possible remedies and the procedural pathways to achieve them.

One remedy to deter illegal stacking of the jury is that suggested by the *Willis* trial court: "assessment of sanctions against counsel whose challenges exhibit group bias." (*Willis, supra,* 27 Cal.4th at 821.) A second remedy, used sparingly in very anomalous lower court situations in California in the past is to reseat "any improperly discharged jurors if they are available to serve." (*Id.*) But if improperly challenged jurors are no longer available (which would typically be the case in all challenges but the last one when the *Wheeler* motion is finally granted), "some cases have suggested that the court might allow the innocent party additional peremptory challenges. [Federal citations omitted.]" (*Id.*)

Willis has significantly changed the *Wheeler* landscape. The People now have the motive and an appropriate remedy to make a *Wheeler* motion to overcome a defense violation of the People's right to a fair trial.

Dated:

Respectfully submitted,

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By:
YOUR NAME HERE
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VOIR DIRE OUTLINE

INTRODUCTION:

1. The right to a trial by jury is guaranteed by the Sixth Amendment of the United States Constitution; applied to the states through the 14th Amendment. (*Duncan v. Louisiana* (1968) 391 U.S. 145.)
2. California law also guarantees a trial by jury:
   a. "In criminal actions in which a felony is charged, the jury shall consist of 12 persons. In criminal actions in which a misdemeanor is charged, the jury shall consist of 12 persons or a lesser number agreed on by the parties in open court." (Cal. Const., Art. I, § 16.)

WHAT IS VOIR DIRE?

1. **Voir dire** (vwahr **deer** *also* vor **deer** *or* vor **dIr**), *n.* [Law French "to speak the truth"] A preliminary examination of a prospective juror by a judge or lawyer to decide whether the prospect is qualified and suitable to serve on a jury. Loosely, the term refers to the jury-selection phase of a trial. (Black's Law Dictionary, 8th Ed. 2004)
2. The term "Voir Dire" refers to the questioning of either a juror or a witness as to competency and qualifications. In the jury selection process, the Voir Dire examination properly consists of questions designed to expose the existence of specific bias, express or implied, in order to aid the attorneys in deciding whether to challenge for cause. (C.C.P § 223.)
3. A criminal jury is formed in the same manner as in civil actions. (P.C. § 1046; see *People v. Visciotti* (1992) 2 Cal.4th 1, 37, 41 [absent statutory authority for departure, trial court should follow procedures established by C.C.P. 222 in selecting prospective jurors].)

WHO CONDUCTS VOIR DIRE

1 Prior to 2000, C.C.P. 223 placed examination of prospective jurors in the hands of the trial court. However, the court was authorized, under a showing of good cause, to permit "supplemental" examination by the parties. (see C.C.P. § 473.)

2. In 2000, C.C.P. 223 was amended to provide that counsel for each party, on completion of the initial examination by the court, "shall have the *right* to examine, by oral and direct questioning, any and all of the prospective jurors." Also, the court may submit to the prospective jurors any additional questions requested by the parties that it deems proper.
3. Attorney Voir Dire is not without limitations. C.C.P. 223 gives trial courts broad discretion in the control attorney voir dire, setting the following limitations:
   a. The court may, in the exercise of its discretion, limit the oral and direct questioning of the prospective jurors by counsel.
   b. The court may specify the maximum amount of time that counsel for each party may question an individual juror.
   c. The court may specify an aggregate amount of time for each party, which can then be allocated among the prospective jurors by counsel.
   d. In all criminal cases, voir dire of prospective jurors shall, where practicable, take place in the presence of the other jurors.
   e. All questioning must relate only to the exercise of challenges for cause.
4. While both the court and attorneys may conduct voir dire, only counsel may challenge a juror. (C.C.P. § 225)

CHALLENGES:

1. There are two types of challenges to individual jurors: 'peremptory' and 'for cause.' (C.C.P. § 225(b).)
   a. 'Peremptory' challenges do not require counsel to state a reason, and permits counsel to exclude jurors who are qualified but are not desired by the party.
   b. 'For cause' challenges require counsel to demonstrate either general disqualification or the existence of specific bias in the challenged juror.

i. A juror may be generally disqualified if he/she lacks the statutory qualifications for a competent juror, (citizenship, residence, conviction of a felony, etc.)(C.C.P. § 203) or if he/she has a loss of hearing or other incapacity rendering the person incapable of performing a juror's duties. (C.C.P. § 228.)

ii. Through voir dire examination, counsel may discover the existence of facts which demonstrate a specific bias, either express or implied. Such facts would prevent or substantially impair the juror from acting with entire impartiality, and without prejudice to the substantial rights of any party. (C.C.P.§225(b)(1)); *People v. Caudillo* (2004) 122 Cal.App.4th 1417, 1429.)

2. Because defendants are guaranteed the right to a fair and impartial jury, and a juror challenged 'for cause' has a demonstrated specific bias, there are no limits on the number of 'for cause' challenges.
3. Because counsel is not required to state a reason for 'peremptory' challenges (unless challenge is objected to through *Wheeler* motion), the number of 'peremptory' challenges is limited, depending on two things:
   a. The number of defendants, and
   b. The potential sentence for a conviction.
      i. If the offense is punishable by a maximum of 90 days or less in the county jail, each side is entitled to six (6) peremptory challenges. (C.C.P. § 231(b).)
         1. When two or more defendants are jointly tried, and the offense is punishable by a maximum of 90 days or less in the county jail, their challenges shall be exercised jointly, but each defendant shall also be entitled to four (4) additional challenges which may be exercised separately, and the state shall also be entitled to additional challenges equal to the number of all the additional separate challenges allowed the defendants. (C.C.P. § 231(b).)
      ii. If the offense is punishable by death or imprisonment for life, each side is entitled to twenty (20) peremptory challenges. (C.C.P. § 231(a).)

iii. In all other cases, each side is entitled to ten (10) peremptory challenges. (C.C.P. § 231(a).)

1. When two or more defendants are jointly tried, and the offense is punishable by death, life imprisonment, or in all other cases, their challenges shall be exercised jointly, but each defendant shall also be entitled to five (5) additional challenges which may be exercised separately, and the people shall also be entitled to additional challenges equal to the number of all the additional separate challenges allowed the defendants. (C.C.P. § 231(a).)

4. To facilitate the intelligent exercise of both peremptory challenges and those for cause, parties may inform prospective jurors of the general facts of the case. (*People v. Ochoa* (2001) 26 Cal. 4th 398, 431; *People v. Ervin* (2000) 22 Cal.4th 48, 70.)

5. **Peremptory:**

   a. A prospective juror's view of the death penalty is a permissible race-neutral and group-neutral basis for exercising a peremptory challenge in a capital case. Such is the case even if that juror represents the only member of a cognizable group. (*People v. McDermott* (2002) 28 Cal. 4th 946, 970.)

   b. Because a peremptory challenge may be used for any reason, a prosecutor legitimately may exercise a peremptory challenge against a juror who is skeptical about imposing the death penalty, when this juror admits that it would be hard for him to impose the death penalty on a defendant who maintains his innocence, even if the jury finds defendant guilty. (*People v. Burgener* (2003) 29 Cal. 4th 833, 864; *People v. Catlin* (2001) 26 Cal.4th 81, 118, 109.)

6. **For Cause:**

   a. Assessing the qualifications of jurors challenged for cause is a matter falling within the broad discretion of the trial court. On appeal, the court will uphold the trial court's decision if it is fairly supported by the record, and accept as binding the trial court's determination as to the prospective juror's true state of

mind when the prospective juror has given conflicting or ambiguous statements. (*People v. Farnam* (2002) 28 Cal.4th 107, 132, opinion modified, 2002 WL 1763061 (Cal. 2002); *People v. Weaver* (2001) 26 Cal.4th 876, 910.)

b. In according deference on appeal to trial court rulings on motions to exclude for cause, appellate courts recognize that a trial judge who observes and speaks with a prospective juror and hears that person's responses (noting, among other things, the person's tone of voice, apparent level of confidence, and demeanor), gleans valuable information that simply does not appear on the record. (*People v. Caudillo* (2004) 122 Cal.App.4th 1417, 1428.)

c. Permissible challenges declaring the existence of a specific bias:

   i. Expressed:

      1. Inability to be impartial. (*People v. Fultz* (1895) 109 Cal. 258; *People v. Owens* (1899) 123 Cal. 482, 488; *People v. Moore* (1923) 64 Cal.App. 328, 329)

   ii. Implied:

      1. Statutory Grounds:

         A. Consanguinity or affinity within the fourth degree to any party, witness, or victim in the case. (C.C.P. § 225(a).)

         B. Standing in the relation of either party, or having previous business dealings with either party. (C.C.P. § 225(b).)

         C. Previous/pending jury/witness experience involving same parties, same specific offense or cause of action; or having served as a juror within one year previously in a criminal action involving the defendant. (C.C.P. § 225(c).)

         D. Juror has an interest in the outcome of the trial. (C.C.P. § 225(d).)

         E. Juror has an opinion or belief as to the merits of the People's case. (C.C.P. § 225(e).)

         F. Juror's state of mind evinces enmity against, or bias towards, either party. (C.C.P. § 225(f).)

G. Juror is party to a pending action that is set to begin before present case. (C.C.P. § 225(g).)

H. In potential death penalty case, juror entertains opinion that precludes finding defendant guilty. (C.C.P. § 225(h); see also, *Death Penalty Cases, infra.*)

2. Death Penalty Cases

A. The trial judge may excuse for cause a prospective juror who on voir dire expresses views about capital punishment, either for or against, that would prevent or substantially impair the performance of the juror's duties as defined by the court's instructions and the juror's oath. (*People v. Bolden* (2002) 29 Cal.4th 515, 537; *People v. Crittenden* (1994) 9 Cal.4th 83, 121, quoting *Wainwright v. Witt* (1985) 469 U.S. 412, 424.)

B. A prospective juror is properly excluded if he or she is unable to conscientiously consider all of the sentencing alternatives, including the death penalty where appropriate. (*People v. Lewis* (2001) 26 Cal. 4th 334, 352-353; *People v. Jenkins* (2000) 22 Cal.4th 900, 987.)

C. However, be alert for prospective jurors who might automatically impose the death penalty upon reaching a verdict of guilty. If the death penalty is imposed by a jury containing even one juror who would vote automatically for the death penalty without considering the mitigating evidence, the state is disentitled to execute the sentence. (*People v. Weaver* (2001) 26 Cal. 4th 876, 910; *Morgan v. Illinois* (1992) 504 U.S. 719, 729.)

d. Keep in mind, for defendant to preserve the right to assert on appeal that the trial court wrongly denied a challenge for cause, defendant must: (1) exercise a peremptory challenge to remove the juror in question; (2) use all of his or her peremptory challenges; and (3) communicate to the court dissatisfaction with

the jury selected. Failure to do any of these steps waives the right to appeal the denial. (*People v. Seaton* (2001) 26 Cal. 4th 598, 637.)

THE EFFECT OF *WHEELER*:

1. *People v. Wheeler* (1978) 22 Cal.3d 258, dealt with the use of peremptory challenges to remove prospective jurors on the basis of group bias, rather than specific bias.
   a. Group bias exists when a party presumes that certain jurors are biased merely because they are members of an identifiable (cognizable) group.
      i. To qualify as a cognizable group, the following requirements must be met:
         1. The members must share a common perspective arising from life experience in the group, and
         2. no other members of the community may be capable of adequately representing the group perspective. (Coleman, *Meeting the Wheeler Challenge*, Vol. XIX, Prosecutor's Notebook, pp. 2-4.)
      ii. Cognizable groups include the following:
         1. Race
            A. African-Americans. (see, e.g. *Wheeler)*
            B. Hispanics. (see, e.g. *People v. Perez* (1996) 48 Cal.App.4th 1310, 1315.)
            C. Asian-Americans. (cf., *People v. Lopez* (1991) 3 Cal.App.4th Supp. 11) [Chinese]; *People v. Williams* (1994) 26 Cal.App.4th Supp. 1 [Filipino].)
         2. Ethnicity
            A. Native Americans. (see, e.g. *United States v. Bauer* (9th Cir. 1996) 75 F.3d 1366.)
         3. Religion
            A. Jewish. (see, e.g. *People v. Johnson* (1989) 47 Cal.3d 1194.)
         4. Gender (unclear)

A. The only California case found on pure gender basis alone is unciteable: *People v. Avitt* (1995) 35 Cal.App.4th 94 was ordered depublished by the Supreme Court on August 24, 1995.

B. Examples of non-cognizable groups include :

1. Poor persons/low income. (see, e.g. *People v. Johnson* (1989) 47 Cal.3d 1194, 1214.)
2. Low education/blue collar workers. (see, e.g. *People v. Estrada* (1979) 93 Cal.App.3d 76, 91.)
3. Age. (see, e.g. *People v. Marbley* (1986) 181 Cal.App.3d 45, 48 [young people]; *People v. McCoy* (1995) 40 Cal.App.4th 778, 783 [people over 70].)
4. Naturalized citizens. (see, e.g. *People v. Gonzalez* (1989) 211 Cal.App.3d 1186, 1202 [dicta])

b. Bias based on association in any of the above cognizable groups is different from specific bias, which relates to the particular case on trial or the parties or witnesses thereto.

2. The law presumes that each party will use that party's challenges for cause and peremptory challenges "to remove those prospective jurors who appear most likely to be biased against him or in favor of his opponent; by so doing, it is hoped, the extremes of potential prejudice on both sides will be eliminated, leaving a jury as impartial as can be obtained from the available venire." (*People v. Wheeler* (1978) 22 Cal.3d 258, 274.)

a. Evidence of potential bias may arise out of mere intuition. 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' upon entering the box the juror may have smiled at the defendant, for instance, or glared at him.

b. Responsive to this reality, the law allows removal of a biased juror by a challenge for which no reason 'need be given,' i.e., publicly stated: in many instances the

party either cannot establish his reason by normal methods of proof or cannot do so without causing embarrassment to the challenged venireman and resentment among the remaining jurors. (*People v. Wheeler* (1978) 22 Cal.3d 258, 275.)

3. The *Wheeler* court held that the right to trial by a jury drawn from a representative cross-section of the community is guaranteed equally and independently by the Sixth Amendment to the federal Constitution and by article I, section 16, of the California Constitution. (*Wheeler*, 22 Cal.3d at p. 272.)
    a. Further authority exists in the statutes: A party may not use a peremptory challenge to remove a prospective juror on the basis of an assumption that the prospective juror is biased merely because of his or her race, color, religion, sex, national origin, sexual orientation, or similar grounds. (C.C.P. § 231.5.)
4. While a party is not entitled to a petit jury that *proportionately* represents every group in the community, a party is constitutionally entitled to a jury that is as near an approximation of the ideal cross-section of the community as the process of random draw permits.
5. The *Wheeler* court explained that the rationale of [Supreme Court] decisions [on this issue], is that "in our heterogeneous society jurors will inevitably belong to diverse and often overlapping groups defined by race, religion, ethnic or national origin, sex, age, education, occupation, economic condition, place of residence, and political affiliation; that it is unrealistic to expect jurors to be devoid of opinions, preconceptions, or even deep-rooted biases derived from their life experiences in such groups; and hence that the only practical way to achieve an overall impartiality is to encourage the representation of a variety of such groups on the jury so that the respective biases of their members, to the extent they are antagonistic, will tend to cancel each other out." (*Wheeler*, 22 Cal.3d at pp 266-267.)
    a. Members of any such group may certainly still be excluded through peremptory challenge, provided that the basis for the challenge is *specific* bias.
    b. The language in *Wheeler* was based on *Thiel v. Southern Pacific Co*. (1946) 328 U.S. 217, 220: "The American tradition of trial by jury, considered in connection

with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community. [Citations.] This does not mean, of course, that every jury must contain representatives of all the economic, social, religious, racial, political and geographical groups of the community; frequently such complete representation would be impossible. But it does mean that prospective jurors shall be selected by court officials without systematic and intentional exclusion of any of these groups." (*Wheeler*, 22 Cal.3d at p. 268.)

THE *WHEELER* SOLUTION:

1. If a party believes his opponent is using his peremptory challenges to strike jurors on the ground of group bias alone, he must:
   a. Raise the point in a timely fashion, and
   b. Make a prima facie case of such discrimination to the satisfaction of the court, by proceeding through a series of steps:
      i. First, he should make as complete a record of the circumstances as is feasible.
      ii. Second, he must establish that the persons excluded are members of a cognizable group within the meaning of the representative cross-section rule.
      iii. Third, from all the circumstances of the case he must show a *strong likelihood* that such persons are being challenged because of their group association rather than because of any specific bias. (*Wheeler*, 22 Cal.3d at p. 280.)
2. Upon presentation of this and similar evidence, and in the absence of the jury, the court must determine whether a *reasonable inference* arises that peremptory challenges are being used on the ground of group bias alone.
3. If the court finds that a prima facie case has been made, the burden shifts to the other party to show (if he can) that the peremptory challenges in question were not predicated on group bias alone.
   a. The showing need not rise to the level of a challenge for cause. But to sustain his burden of justification, the allegedly offending party must satisfy the court that he exercised such peremptories on grounds that were reasonably relevant to the

particular case on trial or its parties or witnesses - i.e., for reasons of specific bias. (*Wheeler*, 22 Cal.3d at pp. 281-82.)

b. Because of the trial judge's knowledge of local conditions and local prosecutors, powers of observation, understanding of trial techniques, and judicial experience, reviewing courts must give *considerable deference* to the determination of whether or not a prima facie case has been established. (*People v. Trevino* (1997) 55 Cal.App.4th 396, 402; *People v. Wimberly* (1992) 5 Cal.App.4th 773.)

c. To ensure against undue prejudice to a party unsuccessfully making a peremptory challenge refused as racially discriminatory, courts may use sidebar conferences for the making of peremptory challenges, followed by appropriate disclosure in open court as to successful challenges. (*People v. Willis* (2002) 27 Cal.4th at p. 821-822; *See also*, *People v. Williams* (1994) 26 Cal.App.4th Supp. 1, 7-8.)

4. If the court finds that the burden of justification is not sustained as to *any* of the questioned peremptory challenges, the presumption of their validity is rebutted.

   a. Accordingly, the court must then conclude that the jury as constituted fails to comply with the representative cross-section requirement, and it must dismiss the jurors thus far selected. (*Wheeler*, 22 Cal.3d at p. 282.)

   b. **The *Willis* Solution:** While the *Wheeler* court held that the remaining venire must also be dismissed, and the jury selection process must begin anew, the *Willis* court held that such consequences would accomplish nothing more than to reward improper voir dire challenges and postpone trial. (*People v. Willis* (2002) 27 Cal.4th 811, 821.)

      1. *Willis* held that as long as the complaining party assents, the trial court has the discretion to issue appropriate orders short of outright dismissal of the remaining jury, including assessment of sanctions against counsel whose challenges exhibit group bias and reseating any improperly discharged jurors if they are available to serve. (*Id.*)

      2. If the complaining party effectively waives its right to a mistrial, preferring to take its chances with the remaining venire, ordinarily, the court should honor

that waiver rather than dismiss the venire and subjecting the parties to additional delay. (*Id.* at 823-824.)

3. The Supreme Court in *Willis* did not specify what constitutes consent to an alternate remedy or an effective waiver of the right to a mistrial. However, the Court in *People v. Overby* (2004) 124 Cal.App.4th 1237, 22 Cal.Rptr. 233, 237 did address this issue.
   i. In *Overby,* the defense attorney immediately asked the court to order a black juror who was excused by the prosecutor to remain in the courtroom. The attorney then made a Batson-Wheeler motion, alleging that the prosecutor improperly used her peremptory challenge to exclude the black juror because of a presumed group bias based on her race. (Note, this was the first black juror that the prosecutor had peremptorily challenged.) (*Id.* at 237-237)
   ii. The defense attorney did not ask for any specific remedy. At a sidebar, the court granted the motion and elected to reseat the juror rather than excuse the entire panel. When the court asked the defense attorney if she wished to be heard on the court's decision, the attorney said "submit". The prosecutor objected. The court reseated the juror and voir dire resumed. (*Id*. at 237.)
   iii. The prosecutor immediately made a Batson-Wheeler motion that was denied. Later that day, the prosecutor asked for reconsideration of both rulings, and argued that the jury venire should be dismissed. At no time did the defense attorney state that she agreed that the venire should be dismissed. (*Id.*)
   iv. The Court found that defendant's counsel impliedly consented to the remedy of reseating a black juror as a remedy for the prosecutor's challenge to a jury in violation of *Batson-Wheeler* and that consent may be granted by counsel, who as a general rule. "has the authority to control the

procedural aspects of the litigation." (*Id*, citing *In re Horton* (1991) 54 Cal.3d. 82, 94.)

5. **Note:** The defendant need not be a member of the excluded group in order to complain of a violation of the representative cross-section rule; yet if he is, and especially if in addition his alleged victim is a member of the group to which the majority of the remaining jurors belong, these facts may also be called to the court's attention. (*Wheeler*, 22 Cal.3d at p. 281.)
6. All claims in California courts that peremptory challenges are being used to strike jurors solely on the ground of group bias are to be governed by Cal. Const., art. I, § 16, and the procedure outlined by the court.
   a. The *Wheeler* court specifically rejected the rules outlined in *Swain v. Alabama*, as they provide less protection to California residents than the rules outlined in *Wheeler*. (*Wheeler*, 22 Cal.3d at p. 285.)

NON-*WHEELER* JUSTIFIABLE REASONS TO CHALLENGE JUROR

1. If the court requests justification for challenging a minority member, the following reasons have been upheld. (Coleman, *Meeting the Wheeler Challenge*, Vol. XIX, Prosecutor's Notebook, pp. 24-30.)
   a. Juror has negative experience with, or distrust of, law enforcement. (*See, e.g., People v. Mayfield* (1997) 14 Cal.4th 668, 724-26; *United States v. Bauer* (9th Cir. 1996) 84 F.3d 1549; *People v. Dunn* (1995) 40 Cal.App.4th 1039, 1046-47.)
   b. Juror is inattentive or provides inconsistent answers during voir dire. (*See, e.g., People v. Arias* (1996) 13 Cal.4th 92, 137-139; *People v. Perez* (1994) 29 Cal.App.4th 1313, 1322-25; *People v. Gonzalez* (1989) 211 Cal.App.3d 1186, 1200.)
   c. Juror behavior may alienate one side. (*See, e.g., Purkett v. Elem* (1995) 514 U.S. 765; *People v. Douglas* (1995) 36 Cal.App.4th 1681, 1690; *People v. Bernard* (1994) 27 Cal.App.4th 458, 467-69.)

d. Other prior jury experience. (*See, e.g., People v. Hayes* (1996) 44 Cal.App.4th 1238, 1245; *People v. Crittenden* (1994) 9 Cal.4th 83, 118; *United States v. Power* (9th Cir. 1989) 881 F.2d 733, 740.)

e. Juror occupation. (*See, e.g., People v. Turner* (1994) 8 Cal.4th 137, 168-72; *People v. Barber* (1988) 200 Cal.App.3d 378, 389-94.)

***WHEELER* MOTIONS ON APPEAL:**

1. The court in *People v. Trevino*, *supra*, noted that the California Supreme Court has had to deal with very poor showings by *Wheeler* objectors, leaving precious little in the record for review.
2. Problems arise because the reviewing court is often forced to speculate on the record, since the party exercising the challenge need not justify the challenge unless a prima facie case of discrimination is shown, and *Wheeler* does not require the trial court to explain its reasons for not finding a prima facie case. (Coleman, *Meeting the Wheeler Challenge*, Vol. XIX, Prosecutor's Notebook, p. 7.)
3. Consequently, attorneys should anticipate the possibility of a *Wheeler* challenge and remember that an appellate court will do a further review of the record even if the trial court does not find a prima facie case. (*Id.*)
4. In anticipation that a *Wheeler* motion will be appealed, the following tactics should help create a record that will justify any challenges you make:
   a. If possible, keep on the jury one or more members of each cognizable group from which you are challenging persons. (Coleman, *Meeting the Wheeler Challenge*, Vol. XIX, Prosecutor's Notebook, p. 7-8.)
   b. If the court allows voir dire, be consistent in your questioning of jurors you plan to keep and those you plan to challenge. (*Id.*)
   c. To develop specific bias, question *all* jurors you plan to challenge. (*Id.*)
   d. For each person challenged, develop, and be ready to articulate, a characteristic based on specific bias factors unrelated to group membership. Make careful notes and save them in your court file. (*Id.*)

e. Finally, ask the trial court to make a record as to why it denied a prima facie showing by the defense, especially if the trial court follows proper procedure and does not require you to make any showing. (*Id.*)

***WHEELER* MISTAKES:**

1. Never assume that because the defense has not objected to your challenges, a *Wheeler* motion cannot be brought. (*See, e.g.*, *People v. Lopez* (1991) 3 Cal.App.4th Supp 11. [trial court initiated *Wheeler* proceedings on its own motion. Holding: No error, as the right to an impartial jury drawn from a cross-section of the community is part of the 'American system.']; Coleman, *Meeting the Wheeler Challenge*, Vol. XIX, Prosecutor's Notebook, p. 13.)
2. Never offer justification for challenges unless the court has made a specific finding, on the record, that defense counsel has made a prima facie showing of discrimination. Doing so may provide the court with unnecessary explanations that may ultimately be used against you. (*See, e.g., People v. Cervantes* (1991) 233 Cal.App.3d 323, 335-337; Coleman, *Meeting the Wheeler Challenge*, Vol. XIX, Prosecutor's Notebook, p. 13.)

COMPARATIVE ANALYSIS:

1. When two or more prospective jurors share a non-cognizable group characteristic, and the minority member is challenged while the majority member remains, the reasonable inference is that the minority member was challenged on the basis of cognizable group bias (violating *Wheeler*). (Coleman, *Meeting the Wheeler Challenge*, Vol. XIX, Prosecutor's Notebook, p. 8.)
2. Such comparisons of those challenged with those who remain is known as *comparative analysis*. (*Id.*)
3. The California courts specifically rejected comparative analysis in *People v. Jones* (1997) 15 Cal.4th 119, 162, *People v. Johnson* (1989) 47 Cal.3d 1194, 1220-21, and in

People v. Landry (1996) 49 Cal.App.4th 785, 791. (Coleman, *Meeting the Wheeler Challenge*, Vol. XIX, Prosecutor's Notebook, pp. 8-9.)

4. Federal courts, however, permit comparative analysis, and cases that start in California state courts may ultimately end up in federal courts. (*See, e.g., Turner v. Marshall* (9th Cir. 1997) 121 F.3d 1248.)
   a. In *Turner*, defendant was convicted in California Superior Court of first degree felony murder, robbery, and burglary on March 21, 1990. Defendant's *Wheeler* motion was denied by the trial court. The California Court of Appeal affirmed defendant's conviction, and the California Supreme Court denied review.
   b. After defendant's habeas corpus writ was denied in the U.S. District Court, the Ninth Circuit found a prima facie case of prosecutorial discrimination and remanded the case back to the District Court to hear a *Batson* motion. The magistrate ultimately concluded that no *Batson* violation had occurred. (Coleman, *Meeting the Wheeler Challenge*, Vol. XIX, Prosecutor's Notebook, pp. 9-10.)
   c. While the United States Supreme Court denied review, the Ninth Circuit remanded the case with instructions entitling Turner to a new trial. The Ninth Circuit further stated: ". . . a comparative analysis of jurors struck and those remaining is a well-established tool for exploring the possibility that facially race-neutral reasons are a pretext for discrimination." (Coleman, *Meeting the Wheeler Challenge*, Vol. XIX, Prosecutor's Notebook, p. 10 citing *Turner v. Marshall* (9th Cir. 1997) 121 F.3d 1248, 1251-1252.
5. Accordingly, attorneys should always use caution when exercising peremptory challenges to exclude minority members that share a non-cognizable characteristic with a majority member.
   a. In addition to the precautionary tactics listed above, try to develop multiple reasons for challenging each member, as any one reason susceptible to comparative analysis will not be found wanting on pretextual grounds in light of the other reasons. (Coleman, *Meeting the Wheeler Challenge*, Vol. XIX, Prosecutor's Notebook, p. 10.)

***WHEELER vs. BATSON*:**

1. *Wheeler* came first, in 1978, then *Batson*, in 1986.
2. *Wheeler* was a California Supreme Court case; *Batson* was a United States Supreme Court case.
3. *Wheeler* held that when making a claim that an opponent is challenging jurors on the basis of group bias, the standard of proof is a "*strong likelihood*." *Batson* held that the standard of proof is a "*reasonable inference*." The courts are divided as to whether the standards are the same, or, if different, which is easier.
4. In Federal courts, the *Batson* standard is followed, whereas in California courts the *Wheeler* standard applies.
5. Attorneys in state courts should exercise caution whenever a *Wheeler*/*Batson* motion arises. The difference between these two standards was litigated in *Wade v. Terhune* (9th Cir.2000) 202 F.3d 1190, 1192, and again in *Cooperwood v. Cambra* (9th Cir. 2001) 245 F.3d 1042, 1047.
    a. The *Cooperwood* court held that "the Wheeler standard ... does not satisfy the constitutional requirement laid down in Batson." (*Cooperwood* (9th Cir. 2001) 245 F.3d at 1046.)
    b. Further, the *Cooperwood* court held that "regardless of the California Supreme Court's 'clarification' of the language used in *Wheeler*, we will continue to apply *Wade's* de novo review requirement whenever state courts use the "strong likelihood" standard, as these courts are applying a lower standard of scrutiny to peremptory strikes than the federal Constitution permits." (*Id.*; *See also, Wade v. Terhune* (9th Cir. 2000) 202 F.3d 1190, 1192.)

THE *BATSON* DECISION:

1. As noted above, *Batson* followed *Wheeler* and addressed the *Wheeler* issue in the federal courts. *Batson* also held that purposeful discrimination on the basis of group bias is illegal, however *Batson* applied the *reasonable inference* standard.

2. The Supreme Court in *Batson* held that:
    a. The 14th Amendment Equal Protection Clause forbids the prosecutor from challenging potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable to impartially consider the State's case against a black defendant, and
    b. To establish a prima facie case of purposeful discrimination in selection of the petit jury, the defendant must show:
        1. That defendant is a member of a cognizable racial group,
        2. The prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race, and
        3. That the facts and any other relevant circumstances raise a reasonable inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race. (*Batson v. Kentucky* (1985) 476 U.S. 79, 94.)
    c. Once the defendant makes a prima facie showing, the burden shifts to the State to come forward with a neutral explanation for challenging black jurors. (*Id.*)
        1. The court emphasized that the prosecutor's explanation need not rise to the level justifying exercise of a challenge for cause. (See *McCray v. Abrams* (1984) 750 F.2d 1113, 1132 [There are any number of bases on which a party may believe, not unreasonably, that a prospective juror may have some slight bias that would not support a challenge for cause but that would make excusing him or her desirable. Such reasons, if they appear to be genuine, should be accepted by the court, which will bear the responsibility of assessing the genuineness of the prosecutor's response and of being alert to reasons that are pre-textual.].)
        2. But the prosecutor may not rebut the defendant's prima facie case of discrimination by stating merely that he challenged jurors of the defendant's race on the assumption--or his intuitive judgment--that they would be partial to the defendant because of their shared race. Nor may the prosecutor rebut the

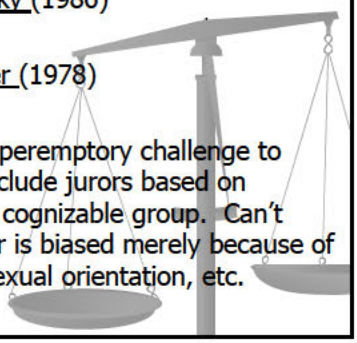
defendant's case merely by denying that he had a discriminatory motive or "affirm[ing] [his] good faith in making individual selections." (*Batson v. Kentucky* (1985) 476 U.S. at 98, citing *Alexander v. Louisiana*, *supra*, 405 U.S., at 632.)

3. The prosecutor therefore must articulate a neutral explanation related to the particular case to be tried.

d. The trial court then will have the duty to determine if the defendant has established purposeful discrimination. (*Batson v. Kentucky* (1985) 476 U.S. at 98.)

Batson/Wheeler

- Batson v. Kentucky (1986) 476 U.S. 79
- People v. Wheeler (1978) 22 Cal.3d 258
- Precludes use of peremptory challenge to systematically exclude jurors based on membership in a cognizable group. Can't assume that juror is biased merely because of race, ethnicity, sexual orientation, etc.



When Do You Exercise Your Challenges?

- A challenge to an individual juror may **only** be made **BEFORE** the jury is sworn
- A challenge to a juror may be taken orally or in writing, but no reason need be given for a **peremptory challenge**
- All challenges for cause **shall** be exercised **BEFORE** any peremptory challenges may be exercised.

When Do You Exercise Your Challenges?

- **Code of Civil Procedure 226:**
- 226(d): All challenges to an individual juror, except a peremptory challenge, shall be taken **first by the defendants**, then by the People.
  Defense goes first on challenges for CAUSE.
- **Code of Civil Procedure 231(d):**
- 231(d) Peremptory challenges are exercised or passed alternately, **People go first**. (10/20-L)
  Must have jury box **FULL** before exercising.
  Passing does not cost you the peremptory.

Removal for Cause

- **CCP 225 Challenge for Cause:** one of the following
- (A): **General Disqualification** (CCP 228)
- (B): **Implied Bias**: the existence of facts disqualify the juror (CCP 229 - READ IT!)
- (C): **Actual Bias**: the existence of **a state of mind** on the part of the juror in reference to the case or to any of the parties, **which will prevent the juror from acting with entire impartiality and without prejudice** to the substantial rights of any party.

IMPROPER CAUSE CHALLENGE

- Just ***one*** improper removal of a juror using a challenge **for cause**, will result in the ***AUTOMATIC*** reversal of the death penalty.
- ***Wainwright v. Witt*** (1985) 469 U.S. 412,424
- ***Gray v. Mississippi*** (1987) 481 U.S. 648; ***Uttecht v. Brown*** (2007) 551 U.S. 1, 6
- "…a juror who is ***substantially impaired*** in his or her ability to impose the death penalty under the state-law framework can be excused for cause, but if the juror is **not** substantially impaired, removal for cause is ***IMPERMISSIBLE***."

IMPROPER CAUSE CHALLENGE

- Just **one** improper removal of a juror using a challenge **for cause**, will result in the ***AUTOMATIC*** reversal of the death penalty.
- *People v. Riccardi* (2012) 54 Cal.4th 758
  DP REVERSED!
  Dismissal of juror **without voir dire** was reversible error when questionnaire had conflicting and uncertain views on the death penalty
- Prospective jurors who express personal opposition to the death penalty are NOT automatically subject to excusal for CAUSE as long as they will set aside their feelings

Improper Cause Challenge

- Just *one* improper removal of a juror using a challenge for cause, will result in the ***AUTOMATIC*** reversal of the death penalty
- ***Wainwright v. Witt*** (1985) 469 U S 412,424
  Lockhart v. McCree (1986) 476 U S 162, 176
- ***Gray v. Mississippi*** (1987) 481 U S 648;
  Uttecht v. Brown (2007) 551 U S 1, 6
- The defense cannot be categorically denied the opportunity to inform the jurors of case-specific factors that could invariably cause them to vote for death
- "I don't believe in the DP"
- "I think we shouldn't have the DP"
- "I would automatically vote LWOP"
- **But** all 3 said they **would** set aside their feelings if instructed they must consider and weigh the evidence – use peremptory!

Proper to Excuse Jurors for Attitudes About Law Enforcement

- A peremptory challenge made on the basis of a prospective juror's **negative experience with law enforcement** (or DA) is **proper**.
  People v. Scott (2015) 61 Cal.4th 363
  People v. Riccardi (2012) 54 Cal.4th 758

- *People v. Cash* (2002) 28 C.4th 703, 718- 723
  "Thus, we affirmed the principal that either party is entitled to ask prospective jurors questions that are specific enough to determine if those jurors harbor bias, **as to some fact or circumstance shown by the trial evidence**, that would cause them not to follow an instruction directing them to determine a penalty **after** considering aggravating and mitigating evidence." (*Cash* citing *Kirkpatrick*)

Asking for a Promise

- Asking a juror to promise to vote for death if the juror determines that death is the appropriate punishment is **NOT improper.**
  People v. Ochoa (1998) 19 C. 4th 353, 428
- "Q. *Will you promise me that if you sit on this jury and you feel that death is the appropriate verdict, that you will come back into this court and render that verdict of death?* "

Proper, seeking a commit from her to do her duty

Asking for a Promise in a non-capital case

- Asking a juror to promise to return a verdict of guilty if they are convinced of the defendant's guilt beyond a reasonable doubt is **NOT improper.**
  (This is about the juror's ability to fulfill their duty, not about the evidence)
  "Q. *Will you promise me that if you sit on this jury and you believe beyond a reasonable doubt that the defendant is guilty of murder, that you will return a verdict finding him guilty of murder?*

Proper, seeking a commit from her to do her duty

Proper Excuse of Jurors

- Peremptory challenges are a historic right, provided "to insure that criminal trials are conducted before **jurors** who not only proclaim their impartiality, but **whose ability to be evenhanded is not seriously questioned by the parties**.
- Peremptory challenges excusing jurors **MUST** be for **genuine**, reasonably specific, **race- or group-neutral** explanation *related to the particular case being tried*
  Hernandez v. New York (1991) 500 U.S. 352
- Reasons **need not** amount to a challenge for cause

Improper Excuse of Jurors

- Peremptory challenges may **not** be used in any case to exclude a cognizable class distinguished on **racial**, **religious**, **ethnic** or **similar** grounds.
  ***Batson v. Kentucky* (1986) 476 U.S. 79, 97**
  ***Miller-El v. Dretke* (2005) 545 U.S. 231**
- Rebuttable presumption that a peremptory challenge is being exercised properly
  Purkett v. Elem (1995) 514 U.S. 765, 768

Proper Excuse of Jurors

- **Making a Complete Record**:
- #1a. The defense must make a prima facie showing, i.e., demonstrate a reasonable inference that prospective jurors are being excluded because of race or group association.
- #1b. The Court **makes an express finding** on whether or not the defense has made a prima facie showing
- #2. Either way, the prosecutor should state ALL of the reasons for excusing the juror - must be a "clear and reasonably specific" race-neutral explanation
- #3. Court makes a finding of **genuine, (credible)** group-neutral reasons - *an evaluation of DA's credibility!* whether D. has shown purposeful racial discrimination
  - *Powers v. Ohio* (1991) 499 U S 400, *Batson v. Kentucky* (1986) 476 U S 79

Proper Excuse of Jurors

- **Making a Complete Record**:
- Court makes a finding of **genuine, (credible)** group-neutral reasons- *Powers v. Ohio* (1991) 499 U.S. 400
  Batson v. Kentucky (1986) 476 U.S. 7
- **GENUINE versus PRETEXT**
  - **COMPARATIVE ANALYSIS**
  - **GENUINE** = *Judge must say on the record* **"I believe the race-neutral reasons given by the prosecutor." (i.e. the prosecutor's reasons are sincere)**
  - **PRETEXT = If you state a reason for excusing a juror that also applies to a juror that ultimately served, your reason will be found to be a pretext for discrimination!**

Proper Excuse of Jurors

- Comparative Analysis:

Batson v. Kentucky (1986) 476 U.S. 79
- *Powers v. Ohio* (1991) 499 U.S. 400
- *Hernandez v. New York* (1991) 500 U.S. 352
- *Kesser v. Cambra* 465 F.3d 351 (9th Cir. 2006)
- *Synder v. Louisiana* 128 S. Ct. 1203 (2008)
- *Ali v. Hickman* 584 F. 3d 1174 (9th Cir. 2009)

GENUINE versus PRETEXT

- **COMPARATIVE ANALYSIS:**
  J. Alito: if the alleged similarities were not discussed at trial, an appellate court must be mindful that had they been, it might have been shown that the jurors were not really comparable!

Proper Excuse of Jurors

COMPARATIVE ANALYSIS:

•Court makes a finding of **genuine, (credible)** group-neutral reasons -
a finding on the prosecutor's credibility
Ct. evaluates the totality of the relevant facts
•Trial court's first hand observations are of great importance!
(regarding both the DA and the juror.)

- *Batson v. Kentucky* 476 U.S. 79 (1986)
- *Powers v. Ohio* 499 U.S. 400 (1991)
- *Hernandez v. New York* 500 U.S. 352 (1991)
- *Kesser v. Cambra* 465 F.3d 351 (9th Cir. 2006)
- *Synder v. Louisiana* 128 S. Ct. 1203 (2008)

GENUINE versus PRETEXT (* examples Teacher and Relative in custody)**

- **GENUINE** = Judge must say on the record
  "I believe the race-neutral reasons given by the prosecutor." (i.e. the prosecutor's reasons are sincere) *Kesser*: "to be believable, a prosecutor's reasons must be related to the particular case to be tried"

Jury Selection

Mechanics / Rules – Depending on the judge you are in front of, you may be faced with several different methods of selecting a jury. There are really two main types and variations of either type.

A. "12 Pack", "18 Pack" etc.

1. How it Works

   a. *This is the most common type of selection method that you will see*. Usually, the court clerk will call 12 or 18 or 20 names from a random list of all the potential jurors. Those jurors will fill the jury box in the order called and, if more than 12, will fill the front row of the audience. The rest of the potential jurors will then fill the remaining seats in the courtroom.

   b. Voir Dire is then conducted by the judge and attorneys of the first 12 or 18 or 20 potential jurors.

   c. Once the challenges begin, jurors leave the courtroom when they are challenged until only 11 remain.

   d. The clerk then calls jurors to fill the vacant seats and the process starts all over again. This continues until both sides pass or are out of challenges.

B. "Federal Method"

2. How it Works

a. This method seems to be gaining popularity with judges primarily. It is usually a faster method and avoids excused jurors knowing which side excused them.

b. In this method, unlike the "12 Pack" method, the attorneys move their chairs to the opposite side of counsel tables so that they are facing the courtroom doors and the audience and their backs are to the judge.

c. The potential jurors are called in by the clerk according to the order on the random list. All of the potential jurors are assigned a seat and a number in the courtroom.

d. Voir Dire is then conducted on *ALL* of the potential jurors *ONCE*.

e. Once challenges begin, they are done silently by the attorneys on a master sheet. The attorneys may challenge anyone they wish from the entire panel. The attorneys pass the sheet back and forth until both pass or run out of challenges.

f. The judge will then excuse all challenged jurors at once. The ***first 12 unchallenged jurors*** will then make up the jury.

C. Challenges – There are two types of challenges, *challenges for cause* and *peremptory challenges*. The rules regarding juror challenges can be found in the ***Code of Civil Procedure (CCP §§225 -231).***

1. Challenges for Cause – Challenges for cause can be made by either side generally for either *implied bias* or *actual bias* (***CCP §225(b)***)

a. Implied Bias – There are nine categories of implied bias listed in ***CCP §229***:

b. Actual Bias – Defined as "*the existence of a state of mind on the part of the juror in reference to the case, or to any of the parties, which will prevent the juror from acting with entire impartiality, and without prejudice to the substantial rights of any party*." (***CCP §225(b)(1)(C)***)

c. The ultimate determination of excusal for cause is made by the court. (***CCP §230***)

2. Peremptory Challenges – A peremptory challenge may be made by either party and is an objection to a juror for which no reason need by given. The court is required to excuse jurors challenged peremptorily. (***CCP §231***)

a. Number – The number of peremptory challenges depends upon the possible sentence of the offense charged and the number of defendants.

b. If the offense is punishable with *maximum term of imprisonment of 90 days or less*, each side gets *6* peremptory challenges. (***CCP §231***)

c. If the offense is punishable with *death or with imprisonment in the state prison for life*, each side gets *20* peremptory challenges. (***CCP §231(a)***). The prosecution of first degree murder without special circumstances which carries a term of 25 years to life, constitutes imprisonment for life within the meaning of CCP §231(a).

d. In *all other cases* each side gets *10* peremptory challenges.

e. Multiple defendant cases

i. Punishment of 90 days or less – The People get *6* challenges and the defendants get *6 challenges jointly*. Each defendant is additionally entitled to *4 separate challenges*. The People get as many challenges as are allowed all defendants. (***CCP §231(b)***)

California Prof. Rule of Conduct 5-320(A)

- A ***member*** connected with a case shall not *communicate* directly or indirectly with anyone the member knows to be a member of the venire from which the jury will be selected for trial of that case.

California Prof. Rule of Conduct 5-320(E)

- An attorney shall not directly or indirectly conduct an out of court investigation of a current or prospective juror in a manner likely to influence their state of mind in connection with the present or future jury service

Classroom Demonstration: Wheeler

DDA
JUDGE
DEFENSE
DEFENDANT
INSTRUCTOR
BAILIFF

JUDGE: Ladies and Gentlemen, welcome back from the break--you have already been asked questions by the attorneys and we are in the peremptory challenge phase and actually selecting the jury. It looks like the prosecution is on its 4th peremptory. Ms. DDA?

DDA: We would like the court to thank and excuse Juror #8 (a woman)

DEFENSE: We are making a WHEELER MOTION.

JUDGE: Ladies and Gentlemen, I am going to need to excuse you for a few minutes. There is a legal issue we need to take care of outside your presence. Please remember the admonition, and be back in 10 minutes. Thank you. (Judge pauses, as if giving time for the jury to leave the courtroom). Okay, counsel, you would like to make a motion?

DEFENSE: This is a clear violation of group bias. They have now excused three women, who are members of a cognizable class, and this denies my client's right to a fair trial. It is an equal protection violation plain and simple, and what she is doing is forbidden by the law. As you can see, my client is a woman, and it is our position that these kicks are completely gender-related, and unconstitutional.

INSTRUCTOR: DDA just got *Wheelered*. What that means is that the defense is saying the prosecutor improperly kicked off a juror based on race or other class characteristic. This would then violate the defendant's right to a fair jury trial. For a DDA who has never been through this before, it can be unnerving. And the mind starts to spin. Let's play through a live demonstration of a Wheeler Motion, and interweave some points of law that sometimes need to be refreshed. First of all—what should DDA be thinking? What is on her checklist to do right now????

1) The moving party (defense) must first show that the totality of facts gives rise to an "inference of discriminatory purpose" (Johnson 545 U.S. 162) (meaning that there is a reasonable inference that the person is being kicked because of their group association, rather than because of any specific bias.) (Johnson, Wheeler)
2) IF this is shown, the burden shifts to the other party (DA) to explain by offering race-neutral justifications
3) Trial court decides whether defense has proved purposeful discrimination.

- Burden of Proof = preponderance. (P v. Hutchins (2007) 147 Cal.App.4th 992)
- The presumption is that the challenge is proper. (P v. Newman (2009) 176 Cal.App.4th 571)
- We suggest stating the reasons for your strikes at the time the Wheeler (Batson) motion is made. The burden of explaining the reasons is minimal, and we typically have good and permissible reasons for our challenges. "Refusing to state them can create unnecessary suspicion, as well as unnecessary litigation." 9th Circuit language: Collins. (CITE)
- Think about Comparative Analysis—Why are you keeping one teacher and not the other? "if a prosecutor's proffered reason for striking a Black panelist applies just as well to an otherwise similar non-black who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at Batson's third step. (*Miller-El v. Dretke*) (2005) 545 U.S. 231)
- Think about your non-verbal reasons: "There is more to human communication than mere linguistic content. On appellate review, a voir dire answer sits on a page of transcript. In the trial court, however, advocates and trial judges watch and listen as the answer is delivered. Myriad subtle nuances may shape it, including attitude, attention, interest, body language, facial expression, and eye contact." (*People v. Lenix* (2008) 44 Cal.4th 602

Let's go back to our demonstration and see how it plays out.

JUDGE: Ms. DDA, the defense is making a motion pursuant to People v. Wheeler (1978) 22 Cal.3d 258 and Batson v. Kentucky (1986) 476 U.S 79, whereby it is alleged that you have denied defendant to his right to a fair trial. Your response?

DDA: This motion should be denied. The first step in the analysis is that the defense must show that the totality of facts gives rise to an inference of discriminatory purpose. Sometimes called the "prima facie case" The defense has not made a prima facie case, your honor. People v. Neuman (2009) 176 Cal.app.4th 571 states t is their burden to do so. They have to show that the totality of facts gives

rise to an "inference of discriminatory purpose." They simply have not met this burden, and several reasons are in support. First, the defense also challenged women, in their first and 3rd challenges. (P v. Wheeler (1978) 22 Cal.3d 258, 283) Additionally, we passed with juror #24, our latest excused juror on our panel. (P v. Williams (2013) 56 Cal.4th 630). At this point, I realize the law supports that I could stop. The burden has simply not been met. However, your honor, I would at this time like to place my gender-neutral justifications on the record so that the record could be clear.

As the law requires, I will state a reason for each challenge. (P v. Cervantes (1991) 223 Cal.App.3d 323. Here, your honor, I had several neutral reasons other than gender for Juror #1, the first woman we kicked:

- She was young, single, and had no children. (P v. Perez (1994) 29 Cal.App.4th 1313.
- Seemed to not understand generally the job of a juror
- Was a member of a hung jury in her past (P v. Turner (1994) 8 Cal.4th 137.
- Seemed too nervous talking in front of others, seemed reluctant. (P v. Arias (1996) 13 Cal.4th 92)
- She had few ties to the community. (Rice v. Collins (2006) 546 US 333)
- And the next juror, which was now juror #45, looked better to me (P v. Alvarez) (1996) 14 Cal.4th 155.

As for Juror #2, the second female we kicked:

- Her family members werearrested and she was "not sure" if treated well by the system (P v. Gutierrez (2002) 28 Cal.4th 1083
- She is a teacher, and used to be a social worker. (P v. Barber (1988) 200 Cal.App.3d 378)
- Her clothes and hair were distracting, wonder if would fit in a larger group (P v. Ward (2005) 36 Cal.4th 186)
- She seemed inattentive (US v. Power) (9th Cir. 1989) 881 F.2d 733

- She also seemed really emotional. (P v. gutierrez (2002) 28 Cal.4th 1083)

As for Juror #3, the last female we kicked:

- She seemed too eager. (P v. Ervin (20000) 22 Cal.4th 48)
- Also, she had no previous jury experience (P v. Perez (1994) 29 Cal.App.4th 1313.

JUDGE: Defense?

DEFENSE: Prosecution has kicked 3 women—all of whom are in cognizable classes, and this denies my client a fair trial. There IS an inference of impermissible bias. There were many other men who also smiled at defendant, seemed nervous, and were members of hung juries who the DA did not kick off. And there were not that many women in this panel to begin with. Nor are there much to choose from at this point. These reasons proffered by the defense seem trivial. We have met our burden.

JUDGE: First, I note that in my ruling, I must take into account the totality of the curcumstances. It is the defense burden by a preponderance of the evidence to show that the District Attorney purposefully discriminated on the basis of here, gender in their challenges. I note that the presumption is that the challenge is proper. I also recognize that I am allowed to take into account the credibility of the prosecutor. I can look at body language and demeanor of both Ms. DDA, in her questioning, and the prospective jurors in their answering. Here, I find defense has not met their burden. Ms. DDA's reasons were not trivial, I find, but rather, each a gender-neutral, and legal basis for a challenge is this kind. I have had Ms. DDA in my courtroom several times, and always found her to be professional and never impermissible. I find the reasons are inherently plausible and supported by this record, and deny the motion. I also find that without Ms. DDA justifying her reasons, the prima facia case would not have been met. The defense also kicked women. The prosecution passed with keeping the latest challenged juror, a woman. The burden simply has not been met., and defendant has not been denied a fair trial. Let's recall the jury.

Batson/Wheeler

Review
Recent Changes
Comparative Analysis
Practical Tips

***People v. Wheeler* (1978) 22 Cal. 3d 258**
Peremptory challenges based on group bias violates the defendant's right to jury trial in the California Constitution.

***Batson v. Kentucky* (1986) 476 U.S. 79**
Race based challenges violate the Equal Protection Clause of the U.S. Constitution.

STEP 1 – "PRIMA FACIE CASE"

STEP 2 – "RACE NEUTRAL REASONS"

STEP 3 – "TRIAL COURT DECIDES IF DISCRIMINATION HAS BEEN PROVEN"

STEP 1

"PRIMA FACIE CASE"

Ways to REBUT a Prima Facie Case:

1. No disproportion in excusal of cognizable class members.
2. Passing once or more with members of the cognizable class on the panel.
3. Rehabilitating cognizable class members sought to be challenged by defense.
4. Pointing out cognizable class members excused by defense.
5. Not aware that excused juror was a member of a cognizable class.

People v. Scott
(June 8, 2015, S094858)

- Facts and Procedural History
- Issue: Where does appellate review begin?

People v. Scott
(June 8, 2015, S094858)

"We therefore take this opportunity to clarify our practice."

(1) Trial court has determined that no prima facie case of discrimination exists
(2) Trial court allows or invites the prosecutor to state his or her reasons for excusing the juror for the record
(3) Prosecutor provides *nondiscriminatory* reasons
(4) Trial court determines that the prosecutor's nondiscriminatory reasons are genuine, an appellate court should begin its analysis of the trial court's denial of the *Batson/Wheeler* motion with a review of the first-stage ruling.

People v. Scott
(June 8, 2015, S094858)

Fn 1: If the court skips the first step or you give your reasons before the court has ruled on the first step, the court will *infer* a prima facie case finding and move to step three.

STEP 3

"TRIAL COURT DECIDES IF DISCRIMINATION HAS BEEN PROVEN"

Comparative Analysis

The process by which courts will evaluate the reasons given for the challenge of a member of a cognizable class. The courts will look for non-cognizable class jurors who were *not* challenged to see whether the reasons would apply equally.

Miller-El v. Dretke (2005) 545 U.S. 231
Snyder v. Louisiana (2008) 552 U.S. 472
People v. Lenix (2008) 44 Cal. 4th 602

"Positive" Comparative Analysis

Use comparative analysis to your advantage by pointing out similarly situated *non-cognizable class* jurors who were also challenged.

Practical Trial Tips

1. NEVER excuse a juror on the basis of the membership in a cognizable class.
2. Recognize that you will likely get "*Wheelered"* and be prepared to deal with it by knowing the law better than the defense attorney and the judge.
3. Do not state your reasons unless and until the judge makes a step one finding.
4. Assume that a prima facie case will be found and be prepared to state your reasons.
5. If no prima facie case found, state your reasons anyway and make it clear why you are doing so.
6. Record the final jury composition.
7. Save your notes.

Handling a *Batson/Wheeler* Motion

I. Overview

A. Every prosecutor will have to deal with the dreaded "*Wheeler"* motion. It usually occurs following the People's use of a peremptory challenge against someone of a particular race, gender or ethnic background.

B. How it works – The defense makes a motion, usually on state and federal grounds, that the prosecutor has excused a juror based on racial, ethnic or other improper grounds and has therefore violated the defendant's Constitutional right to a fair and impartial jury. The defendant does not have to be a member of the excluded group to complain of a violation. *People v. Wheeler* (1978) 22 Cal. 3d 258, 281. (**Note**: While the defense usually brings the motion, it may be made by *either party*.)

C. It goes without saying that no prosecutor should exercise a peremptory challenge against a juror based solely on that juror's gender, sexual orientation, or membership in a racial, ethnic, or religious group. But a prosecutor should not refrain from challenging a juror for *permissible* reasons out of a concern that the defense will raise a disingenuous or frivolous *Batson/Wheeler* claim.

D. THREE STEP PROCESS
"First, the defendant must make out a prima facie case 'by showing that the totality of relevant facts give rise to an inference of discriminatory purpose.' Second, once the defendant has made out a prima facie case, the 'burden shifts to the State to explain adequately the racial exclusion' by offering permissible race-neutral justifications for the [peremptory] strikes. Third, '[i]f a race-neutral explanation is tendered, the trial court must decide . . . whether the opponent of the strike has proved purposeful racial discrimination.' " (*Johnson v. California* (2005) 545 U.S. 162)

II. History

A. *Batson* ***is*** the federal standard and *Wheeler* ***was*** the California standard used to determine whether the peremptory challenge was improper.

B. Both cases used procedures involving 3 part tests to determine the propriety of the challenge. However, the first prong of the tests in each case was different.

Defendants argued the state burden (Wheeler) was more difficult for them to meet than the federal burden (Batson).

C. The California Supreme Court tried to reconcile the two cases in 2003 in *People v. Johnson* (2003) 30 Cal. 4th 1302.

D. In 2005, the U.S. Supreme Court reversed *Johnson* and "clarified" the *Batson* decision by stating that the first prong of the *Batson* test need only be satisfied by production of evidence sufficient to permit the trial judge to draw an *inference of discrimination*. (*Johnson v. California* (2005) 545 U.S. 162.)

E. Current State of the Law - Still a 3 prong test based on the holdings of *Batson* and *Johnson.* Although *Wheeler* is still good law, the first step has been replaced by the *Batson* first step. (*Johnson v. California* (2005) 545 U.S. 162.)

III. Analysis

A. *People v. Wheeler* (1978) 22 Cal. 3d 258 – Peremptory challenges based on group bias violates the defendant's right to jury trial in the California Constitution. *Batson v. Kentucky* (1986) 476 U.S. 79 – Race based challenges violate the Equal Protection Clause of the U.S. Constitution. (*See Also, People v. Bonilla* (2007) 41 Cal.4th 313, 341).

B. Objection Made – The claim is waived if the defendant fails to make a timely objection and a record sufficient for appellate review. (*People v. Wheeler* (1978) 22 Cal.3d 258, 280; *People v. Morris* (2003) 107 Cal.App.4th 402, 408-409) Motion made after jury was sworn but before alternates were sworn was not untimely. Jury empanelment is completed when all jurors, including alternates, are selected and sworn in. *People v. Scott* (June 8, 2015, S094858) __ Cal. 4th __ [2015 WL 3541280]

C. Cognizable Class – "An identifiable group distinguished on racial, religious, ethnic, or similar grounds…" *People v. Wheeler* (1978) 22 Cal. 3d 258, 276. Two requirements for a cognizable class:

> 1) Members share a common perspective arising from life experience in the group; and
> 2) No other members of the community are capable of adequately representing the group perspective. (*See, Rubio v. Superior Court* (1979) 24 Cal.3d 93, 98).

Courts have recognized several categories of cognizable classes or groups.

1. Race - (*See*, *Batson v. Kentucky* (1986) 476 U.S. 79 & *People v. Wheeler* (1978) 22 Cal. 3d 258).

2. Ethnicity – Although there are fewer reported cases regarding ethnicity, be aware that it is a cognizable class. For example, Native Americans were the subject of the violation in *United States v. Bauer* (9th Cir. 1996) 84 F.3d 1549.

3. Religion – *People v. Johnson* (1989) 47 Cal.3d 1194, 1217 [Jewish Jurors]

4. Gender – Gender appears to be a cognizable class and should be treated as such. However, most cases dealing with gender also carry a racial component as well. (*People v. Crittenden* (1994) 9 Cal.4th 83, 115 [African-American woman]; *People v. Garceau* (1993) 6 Cal.4th 140, 171 [Hispanic woman]

5. Sexual Orientation – *People v. Garcia* (2000) 77 Cal.App.4th 1269, 1272. (*See Also,* Code of Civil Procedure §231.5)

D. Non-Cognizable Class

1. Poor – *People v. Carpenter* (1999) 21 Cal.4th 1016, 1035

2. Less Educated – *People v. Estrada* (1979) 93 Cal.App.3d 76, 90-91

3. Battered Women – *People v. Macioce* (1987) 197 Cal.App.3d 262, 280

4. Young – *People v. Ayala* (2000) 24 Cal.4th 243, 277-278; *United States v. Fletcher* (9th Cir. 1992) 965 F.2d 781, 782

5. People over 70 – *People v. McCoy* (1995) 40 Cal.App.4th 778, 783

6. "Insufficient" English – *People v. Lesara* (1998) 206 Cal.App.3d 1304, 1307

7. Unconventional Hairstyle – *Purkett v. Elem* (1995) 514 U.S. 765, 769

8. People who have been arrested *or* been victims – *People v. Fields* (1983) 35 Cal.3d 329, 348

9. "People of Color" – Combining all minority groups does not constitute a "cognizable class". *People v. Davis* (2009) 46 Cal. 4th 539

E. Challenge Exercised Against Member of Cognizable Class

1. Step One – The party objecting to the peremptory challenge must make out a prima facie case "by showing the totality of the relevant facts gives rise to an inference of a discriminatory purpose." *Johnson v. California* (2005) 545 U.S. 162. There is a presumption that that the party exercising the challenge (usually the prosecution) does so on a constitutionally permissible ground. (*People v. Wheeler* (1978) 22 Cal. 3d 258). Thus, the objecting party (usually the defense) must demonstrate a "prima facie case".

a. Prima Facie Case – The court in *Wheeler* provided four examples of ways to demonstrate a prima facie case:

> 1. "A party may show that his opponent struck most or all of the members of the identified group from the venire."
> 2. "He may also demonstrate that the jurors in question share only this one characteristic—their membership in the group—and that in all other respects they are as heterogenous as the community as a whole."
> 3. "Next, the showing may be supplemented . . . by such circumstances as the failure of the opponent to engage these same jurors in more than desultory voir dire, or indeed to ask them any questions at all."
> 4. "Lastly, . . . the defendant need not be a member of the excluded group in order to complain of a violation of the representative cross-section rule." However, this can be probative in making the determination. (*People v. Wheeler* (1978) 22 Cal. 3d 258, 280-281; *People v. Reynoso* (2003) 31 Cal.4th 903, 914.)

b. "[A] 'pattern' of strikes against black jurors included in the particular venire might give rise to an inference of discrimination. Similarly, the prosecutor's questions and statements during *voir dire* examination and in exercising his challenges may support or refute an inference of discriminatory purpose." (*Batson v. Kentucky* (1986) 476 U.S. 79, 96-97.)

c. Rebut the prima facie case by arguing applicable factors:

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

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

3. The fact that you have not used a disproportionate number of your challenges against members of the cognizable class is a factor that weighs against finding an inference of discrimination. (*People v. Streeter* (2012) 54 Cal.4th 205, 223 [no prima facie case where prosecutor excused three of five African Americans]; *People v. Clark* (2011) 52 Cal.4th 856, 903 [statistical analysis subject to various interpretations and did not raise an inference of discrimination]; *People* v. *Bell* (2007) 40 Cal.4th 582, 598 [considering fact prosecutor used only two of 16 peremptory challenges against members of the cognizable class at issue in finding the prosecutor's challenges created no inference of discrimination]; *People v. Cornwell* (2005) 37 Cal.4th 50, 70 [no prima facie case where prosecutor challenged one out of two African-American prospective jurors]). However, See *Ayala v. Wong* (9th Cir. 2012) 693 F.3d 945, 964 [Statistical evidence alone established a prima facie case where prosecution struck each of the seven black or Hispanic jurors available for challenge].

4. If you have passed on a panel that includes members of the cognizable class, this fact should be mentioned as it undercuts an inference of discrimination. (*People v. Streeter* (2012) 54 Cal.4th 205, 225 [prosecutor passed five times with up to four African Americans in jury box]; *People v. Clark* (2011) 52 Cal.4th at 856, 906 [no prima facie case where prosecutor passed two African-American jurors during several rounds before finally excusing them].) The prosecutor's acceptance of a panel including African-American prospective jurors, while not conclusive, was " 'an indication of the prosecutor's good faith in exercising his peremptories, and … an appropriate factor for the trial judge to consider in ruling on a *Wheeler* objection … .' " (*People v. Hartsch* (2010) 49 Cal.4th 472, 487). (See also, *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].)

5. Point out any members of the cognizable class who were challenged by the defense. However, be aware that this fact will not carry the day for you. It is simply something you may want to point out on the record. Further rehabilitation of prospective jurors of a cognizable class ought to be challenged can be an important factor in rebutting a prima facie case. (*People v. Streeter* (2012) 54 Cal.4th 205, 225 [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, citing *People v. Hartsch* (2010) 49 Cal.4th 472, 487]).

6. If you were honestly not aware the juror was a member of a cognizable group. *People v. Barber* (1988) 200 Cal.App.3d 378, 389. [Challenged juror appeared to be a white and non-Hispanic to DA. DA did not recognize the surname to be Hispanic. Court found DA to be sincere]

2. Step Two – If a prima facie case is made, the "burden shifts to the [party making the original, objected to juror challenge] to explain adequately the racial [or other cognizable class] exclusion by offering permissible race neutral justifications for the strikes." (*Johnson v. California* (2005) 545 U.S. 162)

"The justification need not support a challenge for cause, and even a 'trivial' reason, if genuine and neutral, will suffice." (*People v. Arias* (1996) 13 Cal. 4th 92, 136 citing *People v. Montiel* (1993) 5 Cal. 4th 877, 910, fn. 9.)

a. Examples of Permissible Reasons

1. Legal contacts. (*People v. Panah* (2005) 35 Cal.4th 395, 441-442 [potential juror was arrested and charged with a crime]; *People v. Young* (2005) 34 Cal.4th 1149, 1174 [counselor had testified before in sex assault cases]; *People v. Cleveland* (2004) 32 Cal.4th 704, 733 [son was in jail]; *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1124 [father was arrested and charged with a crime and the potential juror had been roughed up by officers]; *People v. Farnam* (2002) 28 Cal.4th 107, 137-138; *People v. Williams* (1997) 16 Cal.4th 635, 664-665 [by family member]; *People v. Arias* (1996) 13 Cal.4th 92, 138; *People v. Turner* (1994) 8 Cal.4th 137, 171; *People v. Sims* (1993) 5 Cal.4th 405, 430; *People v. Cummings* (1993) 4 Cal.4th 1233, 1282; *People v. Johnson* (1989) 47 Cal.3d 1194, 1215; *People v.Walker* (1988) 47 Cal.3d 605, 625-626; *People v. Wheeler* (1978) 22 Cal.3d 258, 275 [been a crime victim]; *People v. Douglas* (1995) 36 Cal.App.4th 1681, 1690; *People v. Martinez* (2000) 82 Cal.App.4th 339, 344-345 [family member]; *People v. Martin* (1998) 64 Cal.App.4th 378, 385, fn. 5 [crime victim]; *People v. Buckley* (1997) 53 Cal.App.4th 658, 667; *People v. Barber* (1988) 200 Cal.App.3d 378; *Mitleider v. Hall* (9th Cir. 2004) 391 F.3d 1039, 1041- 045, 1048-1051 [contacts by family members].)

2. Served on hung jury before. (*People v. Farnam* (2002) 28 Cal.4th 107, 137-138.)

3. Views on the legal system. (*People v. Ward* (2005) 36 Cal.4th 186, 201 [unfavorable views toward guilt]; *People v. Cleveland* (2004) 32 Cal.4th 704, 733 [hesitant in answering questions on the death penalty]; *People v. Yeoman* (2003) 31 Cal.4th 93, 116-117 [not strong enough views on the death penalty]; *People v. Burgener* (2003) 29 Cal.4th 833, 864 [skeptical in imposing death penalty]; *People v. Farnam* (2002) 28 Cal.4th 107, 137; *People v. Caitlin* (2001) 26 Cal.4th 81, 118 [skeptical about imposing death penalty]; *People v. Buckley* (1997) 53 Cal.App.4th 658, 666-667 [legal training]; *Boyd v. Newland* (9th Cir. 2004) 393 F.3d 1008, 1013

[ambivalence towards the legal system]; *Tolbert v. Gomez* (9th Cir. 1999) 189 F.3d 1099; *United States v. Fike* (5th Cir. 1996) 82 F.3d 1315, 1320.)

4. The potential juror's lack of disclosure. (*People v. Diaz* (1984) 152 Cal.App.3d 926, 932; see *In re Hitchings* (1993) 6 Cal.4th 97, 112; *Mitleider v. Hall* (9th Cir. 2004) 391 F.3d 1039, 1041-1045, 1048-1051 [potential juror apparently not honest].)

5. The potential juror appeared to be a non-conformer. (*Purkett v. Elem* (1995) 514 U.S. 765, 769 (per curiam) [long hair]; *People v. Ayala* (2000) 24 Cal.4th 243, 261; *People v. Howard* (1992) 1 Cal.4th 1132, 1208; *People v. Wheeler* (1978) 22 Cal.3d 258, 275.) (*People v. Ward* (2005) 36 Cal. 4th 186, 202)

6. Lack of life experiences. (*People v. Sims* (1993) 5 Cal.4th 405, 429; *People v. Perez* (1994) 29 Cal.App.4th 1313, 1328; *Mitleider v. Hall* (9th Cir. 2004) 391 F.3d 1039, 1041-1045, 1048-1051 [and young and immature].)

7. The potential juror's occupation. (*People v. Young* (2005) 34 Cal.4th 1149, 1174 [counselor who has testified before in other sex assault cases and one who was an insurance claims specialist]; *People v. Howard* (1992) 1 Cal.4th 1132, 1155-1156 [non-practicing registered nurse]; *People v. Landry* (1996) 49 Cal.App.4th 785, 790 [youth services]; *People v. Barber* (1988) 200 Cal.App.3d 378, 394; *United States v. Thompson* (9th Cir. 1987) 827 F.2d 1254, 1260.)

8. Reluctance to be a juror. (*People v. Walker* (1998) 64 Cal.App.4th 1062, 1070; *Mitleider v. Hall* (9th Cir. 2004) 391 F.3d 1039, 1041-1045, 1048-1051.) (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].)

9. Eagerness to be a juror. (*People v. Ervin* (2000) 22 Cal.4th 48, 76.)

10. Hesitance in applying the death penalty. (*People v. Panah* (2005) 35 Cal.4th 395, 441; *People v. Smith* (2005) 35 Cal.4th 334, 347.)

11. Hesitance, Transient Background, and Grandmotherly 'Persona.' (*Boyde v. Brown* (9th Cir. 2005) 404 F.3d 1159, 1170.)

12. Body language can be proper grounds, at least if there is a sufficient record to support the prosecutor's observations. (*People v. Elliott* (2012) 53 Cal.4th 535, 569-570 [Juror failed to make eye contact with anyone, dressed informally, and had an unconventional hairstyle]; (*People v. Ward* (2005) 36 Cal.4th 186, 202 [hostility toward prosecutor; though record is silent, other than the prosecutor's assertions, there is no evidence to contradict it]; *People v. Reynoso* (2003) 31 Cal.4th 903, 919; *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1125-1126 [hostile look at prosecutor] *People v. Ervin* (2000) 22 Cal.4th 48 [nervousness during voir dire]; *People v. Turner* (1994) 8 Cal.4th 137, 170 [potential juror won't look prosecutor in the eye]; *People v. Johnson* (1989) 47 Cal.3d 1194, 1220 [shy][sleepy]; *People v. Dunn* (1995) 40 Cal.App.4th 1039, 1047; *People v. Perez* (1994) 27 Cal.App.4th 1313, 1330 [inappropriate laughter]; *Mitleider v. Hall* (9th Cir. 2004) 391 F.3d 1039, 1041-1045, 1048-1051; *Williams v. Rhoades* (9th Cir. 2004) 354 F.3d 1101 [uncorroborated assertion by prosecutor of the potential juror's body language enough for affirmance because of deferential standard of review]; but see *McClain v. Prunty* (9th Cir. 2000) 217 F.3d 1209 [implied body language not enough without the prosecutor stating the reason]; *Turner v. Marshall* (9th Cir. 1997) 121 F.3d 1248, 1254 [cannot infer demeanor when prosecutor never said so]; *United States v. Power* (9th Cir. 1989) 881 F.2d 733, 740 [fidgety and inattention]; *United States v. Changco* (9th Cir. 1993) 1 F.3d 837, 840 [passive and inattentive].) (*Rice v. Collins* 546 U.S. 333 (2006) [rolling of eyes, not seen by trial judge].)

Caution: Body language can be a dangerous area if the record does not support the reasons you are giving for the excuse. Be sure that you make a record of not only what body language or demeanor you observed but *why* this was important to you and how it affected your decision to excuse the juror. Further, try not to rely solely on body language or demeanor when excusing a cognizable class juror. (See, *People v. Long* (2010) 189 Cal.App. 4th 826) [record did not support prosecutors reasons for excusing juror and judge did not make a "sincere and reasoned" attempt to evaluate the prosecutor's reasons]). (*People v. Jones* (2011) 51 Cal.4th 346) [Prosecutor gave specific and detailed reasons for challenges based upon body language and demeanor]).

13. Bilingual Juror Who Won't Defer to Court Translator - (*Hernandez v. New York* (1991) 500 U.S. 352, 356-357) CAUTION – Be careful when kicking bilingual jurors as it could be seen as a cover for discrimination. (*See, People v. Gonzales* (2008) 165 Cal.App.4th 620)

14. Intelligence – (*People v. Arias* (1996) 13 Cal. 4th 92, 137-139)

15. Sympathetic to defendant – (*People v. McKinzie* (2012) 54 Cal.4th 1302, 1321-1322) [fact juror had been arrested for domestic violence was proper basis to challenge because 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. Mayfield* (1997) 14 Cal. 4th 668, 724-726)

16. Desire for next juror - (*People v. Jones* (2011) 51 Cal.4th 346, 367) [challenge upheld where prosecutor believed he had even better potential jurors who had not been called]; (See also, *People v. Alvarez* (1996) 14 Cal. 4th 155, 194-195).

But see, (*People v. Cisneros* (2015) 234 Cal.App.4th 111) [Holding that preference for next juror *alone* is not enough. You must also articulate reasons for excusing the challenged juror.]

17. Because prosecutor wished to ask the potential juror more questions. (*People v. Cleveland* (2004) 32 Cal.4th 704, 733.)

18. Mistake - (*Aleman* v. *Uribe* (9th Cir. 2013) 2013) [prosecutor mistakenly transposed two jurors' information. Prosecutor helped by making a good record that he was "under the weather"] (See *People v. Williams* (2013) 56 Cal.4th 630, 660-661 [holding that, regardless of whether prosecutor challenged one juror under the mistaken belief she was a different juror, there was no *Batson-Wheeler* violation since the reason given for challenging the juror (hesitancy to impose the death penalty) would have provided valid basis for challenging different juror].) (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1124 [prosecutor misunderstood the juror's answer]; *People v. Williams* (1997) 16 Cal.4th 153, 188-189; *United States v. Lorenzo* (9th Cir. 1993) 995 F.2d 1448, 1454-1455 [time crunch].)

But see, (*Castellanos v. Small* (2014) 766 F.3d 1137) [Prosecutor's stated reason was in error. It survived through the appellate courts as a mistake but the 9th Circuit ultimately found that the prosecutor's error to be pre-textual.]

19. Financial Hardship/Work Related Issues - (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]

3. STEP 3 – "If a race neutral explanation is tendered, the trial court must then decide… whether the opponent of the strike has proved purposeful racial discrimination." (*Johnson v. California* (2005) 54 U.S. 162)

a. "It is not until the third step that the persuasiveness of the justification becomes relevant – the step in which the trial court determines whether the opponent of the strike has carried his burden of proving purposeful discrimination." (*Purkett v. Elem* (1995) 514 U.S. 765, 768.) [Burden of proof of is preponderance of the evidence]

b. "[W]e rely on the good judgment of trial courts to distinguish bona fide reasons for such peremptories from sham excuses belatedly contrived to avoid admitting acts of group discrimination." (*People v. Wheeler* (1978) 22 Cal.3d 258, 282; *People v. Johnson* (1989) 47 Cal.3d 1194, 1216; see *Purkett v. Elem* (1995) 514 U.S. 765, 768.)

c. "This demands of the trial judge a sincere and reasoned attempt to evaluate the prosecutor's explanation in light of the circumstances of the case as then known, his knowledge of trial techniques, and his observations of the manner in which the prosecutor has examined members of the venire and has exercised challenges for cause or peremptorily . . . . " (*People v. Hall* (1983) 35 Cal.3d 161, 167-168; See also, *People v. Silva* (2001) 25 Cal. 4th 345, 386)

d. "In assessing credibility, the court draws upon its contemporaneous observations of the voir dire. It may also rely on the court's own experiences as a lawyer and bench officer in the community, and even the common practices of the advocate and the office that employs him or her. [Citation.]" (*People v. Lenix, supra*, 44 Cal.4th at p. 613, fn. omitted, *quoting Miller–El v. Cockrell* (2003) 537 U.S. 322, 339.)

e. It is proper for a trial court, in evaluating the prosecutor's justifications, to consider the prosecutor's actions in excusing jurors in a *previous trial* and whether a prosecutors kept members of the cognizable class at issue on the jury in a *prior trial.* (*People v. DeHoyos* (2013) 57 Cal.4th 79)

F. Comparative Analysis

This term refers to the process by which courts will evaluate the reasons given for the challenge of a member of a cognizable class. The courts will look for non-cognizable class jurors who were *not* challenged to see whether the reasons would apply equally. For example, if a prosecutor challenged an African American juror who was employed as a teacher and gave the reason, "Judge, I always kick teachers.", the court would then look to see whether the prosecutor failed to challenge any teachers who were not members of a cognizable class.

1. History

Federal Courts approved of comparative analysis in *Turner v. Marshall* (9th Cir. 1997) 121 F. 3d 1248. California rejected comparative analysis in *People v. Landry* (1996) 49 Cal.App.4th 785. *People v. Jones* (1997) 15 Cal. 4th 119. However, things began to change in 2003 with *Johnson*. Then in 2005, the U.S. Supreme Court decided *Miller-El v. Dretke* (2005) 545 U.S. 231 using comparative analysis in the decision.

a. *Snyder v. Louisiana* (2008) 552 U.S. 472 – In *Snyder,* the U.S. Supreme Court found that the prosecutors race neutral reasons for excusing a black juror were implausible and were reinforced by the prosecutor's acceptance of white jurors who disclosed conflicting obligations similar to the excused juror. (*Id.* at 483-484). The Court held that a comparative analysis was appropriate since "the shared characteristic, i.e., concern about serving on the jury due to conflicting obligations, was thoroughly explored by the trial court when the relevant jurors asked to be excused for cause." (*Id.* at p. 483)

b. *People v. Lenix* (2008) 44 Cal. 4th 602 – Comparative Analysis is alive in California.

"If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson's* third step." (*Id.* at p. 621) In reviewing the plausibility of a prosecutor's reasons for striking a juror, an appellate court can consider various kinds of evidence, including a comparison of panelists' responses. (*Id.* at p. 622) Failing to engage in comparative juror analysis for the first time on appeal unduly restricts review based on the entire record." (*Id.* at p. 622) "Thus, evidence of comparative juror analysis must be considered in the trial court and even for the first time on appeal if relied upon by defendant and the record is adequate to permit the urged comparisons." (*Id.* at p. 622)

The trial court has a duty to "assess the plausibility" of the prosecutor's proffered reasons for striking a potential juror, "in light of all evidence with a bearing on it." (*Id.* at p. 625) Trial courts "must evaluate the demeanor of the prosecutor in determining the credibility of proffered explanations, and the demeanor of the panelist when that factor is a basis for the challenge." (*Id.* at p. 625) It should be discernible from the record that "1) the trial court considered the prosecutor's reasons for the peremptory challenges at issue and found them to be race-neutral; 2) those reasons were consistent with the court's observations of what occurred, in terms of the panelist's statements as well as any pertinent nonverbal behavior; and 3) the court made a credibility finding that the prosecutor was truthful in giving race-neutral reasons for the peremptory challenges. (*Id.* at pp. 625-626)

"As to the second point, the court may not have observed every gesture, expression or interaction relied upon by the prosecutor. The judge has a different vantage point, and may have, for example, been looking at another panelist or making a note when the described behavior occurred. But the court must be satisfied that the specifics offered by the prosecutor are consistent with the answers it heard and the overall behavior of the panelist. The record must reflect the trial court's determination on this point (see *Snyder*, supra, at p. 460), which may be encompassed within the court's general conclusion that it considered the reasons proffered by the prosecution and found them credible." (*Id.* at pp. 625-626)

The court observed that comparative juror analysis is a form of circumstantial evidence (*Id.* at p. 622) and that a reviewing court must be careful not to accept one reasonable interpretation to the exclusion of other reasonable ones when reviewing the circumstantial evidence supporting the trial court's factual findings in a *Batson/Wheeler* holding. "If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also be reasonably reconciled with a contrary finding does not warrant a reversal of the judgment." (*Id.* at pp. 625-626)

2. "Positive" Comparative Analysis

This term refers to the idea of using comparative analysis to support a challenge of a member of a cognizable class by comparing other similarly situated non-cognizable class jurors who were also challenged. (*Rice v. Collins* (2006) 546 U.S. 333, 341 [prosecutor struck a white juror with the same characteristics of a cognizable class juror she struck]; (*Briggs v. Grounds* (2012) 682 F.3d 1165 [prosecutor struck at least on non-African American who indicated they would hold the prosecution to a higher standard of proof]).

IV. Practical Issues in Dealing with *Batson/Wheeler* Motions

A. Realize that a challenge will likely come at some point during jury selection and be ready to deal with it. It should go without saying, but ***NEVER*** excuse a juror on the basis of race, ethnicity, religion, gender etc…Question all jurors you plan to challenge. Desultory questioning does not count.

B. Be prepared to rebut the prima facie case. (See pp. 4-5)

C. Assume that a prima facie case will be made and be prepared to give race neutral reasons for excusing the juror. While peremptory challenges are often based on instinct and it can sometimes be hard to articulate the reason for removing a juror, "a prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives." (*People* v. *Lenix* (2008) 44 Cal.4th 602, 624.) Prosecutors should "provide as complete an explanation for their peremptory challenges as possible." (*People* v. *Lenix* (2008) 44 Cal.4th 602, 624.)

D. If you can't recall specifically why you excused a juror, it is better to ask for a "time out" so that you may review the transcript/recording of the juror's answers. (See *Lewis v. Lewis* (9th Cir. 2003) 321 F.3d 824 [suggesting that counsel can be particularly helpful in assisting the court at the third step of *Batson* "when afforded the opportunity to review a transcript of the jury selection proceedings"].)

E. If judge finds no prima facie case, insist that the finding is placed on the record. Then state your reasons anyway. But, DO NOT give reasons unless and until the court specifically finds no prima facie case. Giving reasons without a specific finding on the first prong will constitute an implied finding of a prima facie case. *People v. Arias* (1996) 13 Cal. 4th 92; *People v. Gutierrez* (2002) 28 Cal. 4th 1083. *People v. Scott* (June 8, 2015, S094858) __ Cal. 4th __ [2015 WL 3541280]

F. Trial Tips

1. Create a Good Record

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.)

2. Obtain a Transcript of Voir Dire Before Making Challenges

In certain situations, a prosecutor may not recall or have accurate notes regarding the responses of a juror he or she wishes to challenge. In those cases, it is appropriate and recommended that the prosecutor ask for read back of the juror's responses. (*See Lewis v. Lewis* (9th Cir. 2003) 321 F.3d 824)

3. Ask Court to Note the Final Jury Composition

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"].)

4. Save your notes. If case is reviewed later, voir dire may be an issue. Always save your notes so that if asked, you are better able to recollect why you may have challenged a specific juror.

a. At remand hearing, the prosecutor does NOT have to state reasons under oath. (*People v. Kelly* (2008) 162 Cal.App.4th 797)

b. At remand hearing, the prosecutor does NOT have to turn over original voir dire notes. (*People v. Kelly* (2008) 162 Cal.App.4th 797)

c. At remand hearing, prosecutor cannot be cross-examined by the defense. (*People v. Kelly* (2008) 162 Cal.App.4th 797)

d. “I don’t recall” May or May Not Fly – (*Paulino v. Harrison* (9th Cir. 2008) 542 F.3d 692); (But see, *Yee* v. *Duncan* (9th Cir. 2006) 463 F.3d 893.) [notwithstanding the inability to recall reason for excusing one cognizable class juror, totality of prosecutor’s responses regarding other excused jurors did not evidence a discriminatory motive].)

G. Remedies

1. *Wheeler-Batson* error is reversible per se. (*People v. Wheeler* (1978) 22 Cal.3d 258, 283; see *Miller-El v. Dretke* (2005) 545 U.S. 231)

a. Step One Error: When the trial court erroneously finds there was not a prima facie case, the matter is often remanded for prosecutor to state reasons for peremptory challenge. (*Batson v. Kentucky* (1986) 476 U.S. 79, 100; *People v. McGee* (2002) 104 Cal.App.4th 559, 571, 573 [remand to permit prosecutor give reasons].) This remedy has been criticized for two reasons. First, the long passage of time makes it nearly impossible for the prosecutor to genuinely remember the real reason. (*People v. Hall* (1983) 35 Cal.3d 161, 171 [pointless to remand for the prosecutor to give a reason 11 years later]; *People v. Allen* (2004) 115 Cal.App.4th 542, 553-554, fn. 10 [remand for new trial, not for the prosecutor to give reasons, because occurred three years ago]; see also *People v. Ayala* (2000) 24 Cal.4th 243, 297, fn. 8 (conc. opn. of George, C.J.); *People v. Robinson* (2003) 110 Cal.App.4th 1196, 1208 [remand for the prosecutor to give the reason but retrial if it could not recall]; *People v. Williams* (2000) 78 Cal.App.4th 1118, 1130 [on remand, the court must first determine if it can adequately address the issue after the delay]; *United States v. Alcantar* (9th Cir. 1990) 897 F.2d 436, 438-439.) Second, this procedure is subject to a prosecutor trying to invent more legitimate reasons after the fact. (See, e.g., *Miller-El v. Dretke* (2005) 545 U.S. 231 [prosecution’s reasons after the fact “reeks of afterthought”]; *Miller-El v. Cockrell* (2003) 537 U.S. 331, 343 [reasons given after trial “was subject to the usual risks of imprecision and distortions from the passage of time”]; see also *Johnson v. California* (2005) 545 U.S. 162, quoting *Paulino v. Castro* (9th Cir. 2004) 371 F.3d 1083, 1090 [“it does not matter that the prosecution might have had good reasons . . . [w]hat matters is the real reason they were stricken”].)

b. Step Three Error: When the trial court fails to sustain motion after the prosecutor gives reason, error normally requires new venire. (*People v. Wheeler* (1978) 22 Cal.3d 258, 283; see *Miller-El v. Dretke* (2005) 545 U.S. 162). However, the defendant in the trial court can stipulate to a different remedy. (*People v. Willis* (2002) 27 Cal.4th 811, 821-824 [with consent of movant, can use other remedies such as sanctions, reinstating removed jurors or doing challenges at sidebar]; *People v. Overby* (2004) 124 Cal.App.4th 1237, 1244-1245 [defendant not objecting to judge re-seating the excused juror indicates consent to this remedy]. (See *People*

v. Mata (2013) 57 Cal.4th 178) [holding that the trial court may reseat an improperly challenged juror if affected counsel either expressly or implicitly consents]

2. Consequences

a. If the court grants a *Batson/Wheeler* motion at trial and employs one or more of the remedies discussed, that is arguably a "sanction".

1. Court must notify the bar of any judicial sanctions against an attorney (Business & Professions Code §6068(a)(3)).

2. Attorney must self report any judicial sanction (Business & Professions Code §6068(o)(3)).

3. However, reporting will likely not be required unless the conduct is egregious.

b. If the trial court erroneously denies a *Batson/Wheeler* motion at trial and the case is reversed

1. Court must notify bar whenever there is a reversal. (Business & Professions Code §6086.7(b)(2)).

2. Attorney must notify bar whenever reversal is based in whole or in part upon misconduct of the attorney. (Business & Professions Code §6068(o)(7)).

Jury Selection Quick Reference

CCP§197 – Randomly Selected Panel

CCP§203: Not Qualified to Serve

- Non-citizens
- Minors
- Not domiciled[1] in CA
- Not resident of County
- Felons whose rights have not been restored
- Insufficient English language proficiency
- Sitting as jurors elsewhere (trial or grand)
- Subject to conservatorship

CCP§204 – Undue hardship

- Rule of Court 2.1008

CCP§205 – Permissive use of questionnaires

CCP§219(b)

- Peace officers exempt (PC830.1, 830.2, 830.33)

CCP§220

- Jury consists of 12 jurors (unless parties agree to less)

CCP§223

- Limited right to voir dire
- Voir Dire in presence of all prospective jurors when practicable
- Limited to challenges for cause

CCP§225 – Juror Challenges

- Entire panel
- Individuals
- Not qualified
- Implied bias
- Actual bias
- Peremptory

CCP§226

- Challenges for cause come before peremptories
- Defense exercises peremptories first

CCP§229 – Implied Bias

- Familial relationship to party
- Employment relationship to party
- Prior juror on party's case
- Interest in action
- Unqualified opinion on the merits

Bias towards a party

CCP§231 – Number of Peremptories

- 20 in criminal life eligible case
- 10 in all other criminal cases, except
- 6 for 90 day misdemeanors
- 6 for quasi-civil cases (e.g. MDO, 1368)
- Multiple defendants = number above joint + five individual; People get equal number as total for all defendants
- People use first

CCP§231.5 – Unacceptable Basis

- May not exercise peremptory based on race, color, religion, sex, national origin, sexual orientation

CCP§233 – Discharge of Juror & Substitution of Alternate

CCP§234 – Alternate Juror Selection

- Discretionary number
- Premeptories limited to one per number of alternates

[1] Domiciled based on whether one lives in California for voting purposes as defined by Elections Code §§2020-2022

Jury Selection Quick Reference

General Voir Dire Issues

***People v. Noguera* (1992) 4 Cal.4th 599** – voir dire only goes to establishing challenges for cause overruling the pre-Prop 115 standard of "reasonably designed to assist in the intelligent exercise of a peremptory challenge as stated in People v. Williams (1981) 29 Cal.3d 392.

***People v. Daily* (1958) 157 Cal.App.2d 649** – permissible to inquire if juror belongs to religious sect that would interfere with consideration of case.

***People v. Boyle* (1937) 22 Cal.App.2d 143** – permissible to inquire whether a person belongs to any political, religious, industrial, fraternal, law enforcement or other organization that would prejudice against either party.

***People v. Wein* (1958) 50 Cal.2d 383** – permissible to explain applicable law within hypothetical cases to determine if juror would follow the instructions of the court and the law.

***People v. Mendoza* (2000) 24 Cal.4th 130** – permissible to inquire about ability to draw inferences from circumstantial evidence.

***People v. Modell* (1956) 143 Cal.App.2d 724** – permissible to inquire whether they will follow judge's instructions

***Hutson v. Superior Court* (1962) 203 Cal.App.2d 687** – Jeopardy attaches when jury is sworn.

***In re Mendes* (1979) 23 Cal.3d 847, 853** – Jury is not impaneled until alternates are sworn.

***People v. Bolden* (2002) 29 Cal.4th 515, 538** – Voir dire is critical to fulfill defendant's right to impartial jury.

Batson Issues

***Johnson v. California* (2005) 545 U.S. 162** – Standard of review expressed in People v. Wheeler (1978) 22 Cal.3d 258 is wrong. When the defense raises an objection to prosecution's peremptory challenges, the test, originating in *Batson v. Kentucky* (1986) 476 U.S. 79, is:

1) Defense must make a prima facie case that the totality of the facts gives rise to a discriminatory purpose;
2) Burden shifts to the state to provide race-neutral reasons for excusals; and
3) If race-neutral reason is tendered, the court must decide if opponent of challenge has proved purposeful racial discrimination.

**Wheeler's* "more likely than not" language under first prong is incorrect.

***ExGeorgia v. McCollum* (1992) 505 U.S. 42** – The defense may not discriminate based on race.

***People v. Willis* (2002) 27 Cal.4th 811** – The trial court has discretion to craft a remedy for the defense's *Batson* violation.

***People v. Gutierrez* (2002) 28 Cal.4th 1083** – While not dispositive, the fact that an accepted jury included members of a group against which the defense alleged discrimination assisted in demonstrating good faith in prosecution's peremptories.

People v. Mayfield (1997) 14 Cal.4th 668, 728 – Failure to object to selection process before jury is sworn forfeits the claim.

***People v. Turner* (1994) 8 Cal.4th 137** – Arbitrary use of peremptories is acceptable as long as it is not based on the excusal of a protected class

***US v. Collins* (2009) 551 F.3d 914** – prosecution should state their reasons for use of peremptories at the time to preserve the record

***Miller-El v. Dretke* (2005) 545 US 231** – comparative analysis of basis for use of peremptories my go towards proving [or disproving] purposeful discrimination

***People v. Trinh* (2014) 59 Cal. 4th 216, 241** – The focus is on the subjective genuineness of the prosecutor's reasons, not the objective reasonableness – even a trivial reason, if genuine and neutral, will suffice

California Prof. Rule of Conduct 5-320(A)

- A ***member*** connected with a case shall not *communicate* directly or indirectly with anyone the member knows to be a member of the venire from which the jury will be selected for trial of that case.

California Prof. Rule of Conduct 5-320(E)

- An attorney shall not directly or indirectly conduct an out of court investigation of a current or prospective juror in a manner likely to influence their state of mind in connection with the present or future jury service

Jury Selection & The Ethical Prosecution Team

I. *California Professional Rules of Conduct*

- California Profession Rule of Conduct 5-320(A): A ***member*** connected with a case shall not ***communicate*** directly or indirectly with anyone the member knows to be a member of the venire from which the jury will be selected for trial of that case.

- California Professional Rule of Conduct 5-320(E): An attorney shall ***not directly or indirectly*** conduct an out of court investigation of a current or prospective juror in a manner likely to influence their state of mind in connection with the present or future jury service

- Bottom Line: No ex parte communication with jurors. No exceptions.

II. *Helpful Opinions*

- ABA Ethics Opinion 466 (2014): Opinion provides guidance on researching juror's social media based on ABA Model Rules of Prof. Conduct
  (http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/formal_opinion_466_final_04_23_14.authcheckdam.pdf)

- New York State Bar, New York County Bar and New York City Bar Associations disagree with opinion on "inadvertent" contact with juror. (https://www.nysba.org/Sections/Commercial_Federal_Litigation/Com_Fed_PDFs/Social_Media_Ethics_Guidelines.html)

- An attorney utilizing juror's LinkedIn account is a violation of Calif. Prof. Rules of Conduct 5-320(E)

- California Bar Associations have not offered ethics opinions

III. *Best Practice Guide*

- Cannot "Friend" a juror to gain access to personal information
- Cannot "Friend" a juror to using false information
- Cannot mislead/mis-identify yourself to gain access to private information
- Cannot direct someone else (paralegal/DAI) to "friend" a juror in order to get access to private information/pages
- *Various types of social media are rapidly moving and morphing targets, which means that today's guidelines may be outdated by tomorrow. The ethics opinions are no longer cut and dry.*

Jury Selection – Nuts & Bolts

Mechanics / Rules – Depending on the judge you are in front of, you may be faced with several different methods of selecting a jury. There are really two main types and variations of either type.

A. "12 Pack", "18 Pack" etc.

1. How it Works

a. *This is the most common type of selection method that you will see*. Usually, the court clerk will call 12 or 18 or 20 names from a random list of all the potential jurors. Those jurors will fill the jury box in the order called and, if more than 12, will fill the front row of the audience. The rest of the potential jurors will then fill the remaining seats in the courtroom.

b. Voir Dire is then conducted by the judge and attorneys of the first 12 or 18 or 20 potential jurors.

c. Once the challenges begin, jurors leave the courtroom when they are challenged until only 11 remain.

d. The clerk then calls jurors to fill the vacant seats and the process starts all over again. This continues until both sides pass or are out of challenges.

e. There are variations in this process depending on the courtroom. Sometimes you will question more than 20.

B. "Federal Method"

2. How it Works

a. This method seems to be gaining popularity with judges primarily. It is usually a faster method and avoids excused jurors knowing which side excused them.

b. In this method, unlike the "12 Pack" method, the attorneys move their chairs to the opposite side of counsel tables so that they are facing the courtroom doors and the audience and their backs are to the judge.

c. The potential jurors are called in by the clerk according to the order on the random list. All of the potential jurors are assigned a seat and a number in the courtroom.

d. Voir Dire is then conducted on *ALL* of the potential jurors *ONCE*.

e. Once challenges begin, they are done silently by the attorneys on a master sheet. The attorneys may challenge anyone they wish from the entire panel. The attorneys pass the sheet back and forth until both pass or run out of challenges.

f. The judge will then excuse all challenged jurors at once. The ***first 12 unchallenged jurors*** will then make up the jury.

C. Challenges – There are two types of challenges, *challenges for cause* and *peremptory challenges*. The rules regarding juror challenges can be found in the ***Code of Civil Procedure (CCP §§225 -231).***

1. Challenges for Cause – Challenges for cause can be made by either side generally for either *implied bias* or *actual bias* (***CCP §225(b)***)

a. Implied Bias – There are 8 categories of implied bias listed in ***CCP §229***:

b. Actual Bias – Defined as "*the existence of a state of mind on the part of the juror in reference to the case, or to any of the parties, which will prevent the juror from acting with entire impartiality, and without prejudice to the substantial rights of any party*." (***CCP §225(b)(1)(C)***)

c. The ultimate determination of excusal for cause is made by the court. (***CCP §230***)

2. Peremptory Challenges – A peremptory challenge may be made by either party and is an objection to a juror for which no reason need by given. The court is required to excuse jurors challenged peremptorily. (***CCP §231***)

a. Number – The number of peremptory challenges depends upon the possible sentence of the offense charged and the number of defendants.

b. If the offense is punishable with *maximum term of imprisonment of 90 days or less*, each side gets *6* peremptory challenges. (***CCP §231***)

c. If the offense is punishable with *death or with imprisonment in the state prison for life*, each side gets *20* peremptory challenges. (***CCP §231(a)***).

d. In *all other cases* each side gets *10* peremptory challenges.

e. Multiple defendant cases

i. Punishment of 90 days or less – The People get *6* challenges and the defendants get *6 challenges jointly*. Each defendant is additionally entitled to *4 separate challenges*. The People get as many challenges as are allowed all defendants. (***CCP §231(b)***)

ii. Life in prison and death cases – The People get *20* challenges and the defendants get *20 challenges jointly*. Each defendant is additionally entitled to *5 separate challenges*. The People get

as many challenges as are allowed all defendants. (***CCP §231(a)***)

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D. How do you challenge? - Following the voir dire questioning and any challenges for cause, the process moves on to peremptory challenges. We go first. The judge will usually explain the process to the jurors. The judge will then say something like, "Mr./Ms. Prosecutor, People's first?"

The judge is asking you if you want to use your first peremptory challenge. If you do, you then say, "Thank you your honor, the People would ask the court to thank and excuse Juror #4."

E. Keeping Track of Challenges – There are various methods of keeping track of juror information and challenges. Most court clerks will provide a master courtroom diagram with squares representing each seat. Most people use post it notes or a combination of post it notes and note pad to keep track of jurors and their responses to questions

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CHALLENGES

Peremptory (CCP 231)

- 6 – Ninety days or less
- 20 – life/death cases
- 10 – all others

MULTIPLE Ds

- 90 days or less = 6 joint + 4 individual
- Life/Death = 20 joint + 5 individual
- Other cases =10 joint + 5 ind.
- DA gets # = to total of all Ds' challenges

METHOD

- 12 pack, 18 pack
  - question, challenge, repeat
  - you see who is in the box
- Federal method
  - all questioned/challenged at once – not as visual

VOIR DIRE

- CCP 223
- Judge controls
- Judge can/will limit time
- Questions "shall be conducted only in aid" of cause challenges

CAUSE

- Ability (or inability) to be fair
- questioning the jurors re: bias
  - actual (CCP 225 (b)(1)(C) or
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JURY SELECTION
The Basics

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EXAMPLES

- 3 D Felony Burglary
  - 10 joint + 5 ind. x 3 = **25**
- 2 D murder
  - 20 joint + 5 ind. x 2 = **30**
- 1 D VC 23152 (6 month max)
  - 10

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Jury Selection: Bias

Code Civ. Proc., § 231.5 & Gov. Code, § 11135

Expands (statutory) list of categories for which a peremptory challenge is disallowed from 6 to 10 by cross-referencing jury selection statute with state's general non-discrimination law.

Added to race, color, religion, sex, national origin, and sexual orientation are:

Ethnic group identification, age, genetic information and "disability" (mental & physical) (A.B. 87)

Jury Selection: Bias

Cross-referencing from the Government Code:
Section 11135:

(e) As used in this section, "sex" and "sexual orientation" have the same meanings as those terms are defined in subdivisions (q) and (r) of Section 12926 (gender, gender identity or expression, and pregnancy).

(f) As used in this section, "race, national origin, ethnic group identification, religion, age, sex, sexual orientation, color, or disability" includes a perception that a person has any of those characteristics or that the person is associated with a person who has, or is perceived to have, any of those characteristics.

(g) As used in this section, "genetic information" has the same definition as in paragraph (2) of subdivision (e) of Section 51 of the Civil Code.

But no similar explicit cross-reference or definition for "age"

Purpose of Voir Dire

- Examination of prospective jurors shall be conducted only in aid of the exercise of **challenges for cause**. (CCP 223.)
- **Not for indoctrinating prospective jurors on the lawyers' theories of the case, for questioning about the applicable law, or for exercising peremptory challenges.**

Challenges for Cause (CCP 225(b)

- General Disqualification: Statutory qualifications for jury service (citizenship, residency, age, mental competence). Also includes prior felony conviction and having insufficient knowledge of the English language. (CCP 203.)
- Actual Bias: Defined as "**the existence of a state of mind on the part of the juror in reference to the case, or to any of the parties, which will prevent the juror from acting with entire impartiality, and without prejudice to the substantial rights of any party.**" (CCP § 225(b)(1)(C).)
- Implied Bias: There are 8 categories of implied bias listed in CCP § 229.

Implied Bias (CCP 229)

1. Consanguinity or affinity within the 4th degree to any party, witness or victim
2. Standing in the relation of to either party or attorney
3. Served as a juror or been a witness in a previous or pending trial between same parties or same offense
4. Interest in the event of the action
5. Having an unqualified opinion or belief as to the merits of the action founded upon knowledge of its material facts or some of them.
6. **The existence of a state of mind in the juror evincing enmity against, or bias towards, either party.**
7. Juror is a party to the pending action
8. If offense charged is punishable with death, the entertaining of such conscientious opinions as would preclude the juror finding D guilty

Peremptory Challenges (CCP 231)

- An objection to a juror for which no reason need be given. The court is required to excuse jurors challenged peremptorily. (CCP §231)
- Number – Depends upon the possible sentence of the offense charged (NEW LAW)
  - 6 challenges: If the offense is punishable with maximum term of imprisonment of 1 YEAR or less (CCP §231)
  - 20 challenges: If the offense is punishable with death or with imprisonment in the state prison for life (CCP §231(a)).
  - 10 challenges: All other cases
  - *(See CCP 231 for multiple defendant cases)*

Peremptory Challenges

- Peremptory challenges may not be used to remove a prospective juror on the basis of an assumption that a juror is biased on account of race, color, religion, sex, national origin, sexual orientation, or similar grounds. (CCP 231.5.)
- Batson/Wheeler – 3 Step Process:
  1. Opponent of the challenge must make out a prima face case by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose in the exercise of peremptory challenges.
  2. If the prima facie case is shown, the burden shifts to the proponent of the strike to explain adequately the basis for excusing the juror by offering permissible, nondiscriminatory justifications.
     - *(Give your justifications even if prima facie showing is now made – it is necessary for appellate review.)*
  3. If the party has offered a nondiscriminatory reason, the trial court must decide whether the opponent of the strike has proved the ultimate question of purposeful discrimination.

Voir Dire Procedure (CCP 226)

- A challenge to an individual juror may only be made before the jury is sworn. (CCP 226(a).)
- All challenges for cause shall be exercised before any peremptory challenges may be exercised. (CCP 226(c).)
- All challenges to an individual juror, except a peremptory challenge, shall be taken, first by the defendants, and then by the people or plaintiffs. (CCP 226(d).)
- The ultimate determination of excusal for cause is made by the court. (CCP §230)

Voir dire

How we begin

1. Often the court will ask you to introduce yourself to the prospective panel. Stand, say "Good morning Ladies and Gentleman, my name is (insert name) I am a Deputy District Attorney here in San Diego County or I represent the People of the State of California.
2. Defense generally voir dire's first.

B. Cause Challenges

1. The purpose of cause challenges is to eliminate jurors who cannot be fair and impartial. A judge will grant a cause strike if the judge has a reasonable doubt about the venire person's ability to be fair. Still, you should use your cause challenges wisely and fairly to avoid sacrificing your credibility with the court.

2. You have an **unlimited** number of cause challenges

3. Challenges for cause to individual jurors can be made by either party on the following grounds: general disqualification, implied bias, or actual bias. General disqualification refers to statutory qualifications for jury service (citizenship, residency, age, and mental competence) Implied bias refers to a prospective juror's relationship to a party; prior service as a grand or petit juror in an action involving a party; an interest in the outcome of the case; or having unqualified opinions or beliefs based on the knowledge of material facts or bias toward a party.

   a) General disqualification includes not being a resident of the county, having been previously convicted of a felony, and having insufficient knowledge of the English language. See Code of Civil Procedure Section 203(a). Implied bias includes being related to parties or witnesses in the case and having an unqualified opinion based on knowledge of the facts of the case. See Code of Civil Procedure Section 229. Actual bias occurs when a juror's state of mind "will prevent the juror from acting with entire impartiality, and without prejudice to the substantial rights of any party." Code of Civil Procedure Section 225(b)(1)(C).

4. Challenges for cause are exercised before parties exercise their peremptory challenges. 7 CAL. CIV. PROC. CODE § 226(a) (Deering 2004). If the trial court denies a motion for challenge for cause, the moving party must exhaust all peremptory challenges and renew its objection to the composition of the sworn jury panel in order to reserve the basis for appeal.

5. The standard for granting a challenge for cause is whether the views of the prospective juror would "prevent or substantially impair the performance of the juror's duties as defined by the court's instructions and the juror's oath." *California v. Boyette,* 58 P.3d 391, 413-414 (Cal. 2002); *California v. Crittenden,* 885 P.2d 887 (Cal. 1994).

6. Where an adversary wishes to exclude a juror because of bias, …it is the adversary seeking exclusion who must demonstrate, ***through questioning***, that the potential juror lacks impartiality." Witt, 469 U.S. at 423.

C. **Preemptory Challenges**

1. You have a set number of preemptory challenges With respect to peremptory challenges, defendants in capital felony cases (those punishable by death or by a term of imprisonment for life) are entitled to 20 peremptory challenges and the prosecution is entitled to an equal number as the defense. In other felony and misdemeanor cases for which the offense charged is punishable with a prison term greater than 90 days, each side is entitled to 10 peremptory challenges.

2. You may exercise your peremptory challenges on whomever you wish, provided you do not use them in a discriminatory manner.

3. If multiple defendants are tried jointly their challenges are exercised jointly. However, each defendant is entitled to five additional separate peremptory challenges, and the state is entitled to as many additional peremptory challenges as were granted to the defendants. CAL. CIV. PROC. CODE § 231(a) (Deering 2004).

D. **Batson Wheeler**

1. Whenever you challenge a venire person who is a member of a suspect or protected class, be prepared to provide the court with a logical reason to strike the venire person. The basis for your strike need not rise to the level of cause (or even come close), but it must be articulable and legitimate. *See other materials in binder*.

2. Peremptory challenges may not be used to remove a prospective juror on the basis of an assumption that a juror is biased on account of race, color, religion, sex, national origin, sexual orientation, or similar grounds. CAL. CIV. PROC. CODE § 231.5 (Deering 2004).
3. *See additional handouts in materials.*

E**. Topics of Discussion**

1. Where to find the rules….

a) In California, this framework is described in the Trial Jury Management and Selection Act, at Sections 190-237 of the California Code of Civil Procedure.

Criminal Section 223 pertaining to voir dire in criminal trials, provides for an initial examination of prospective jurors by the judge. Thereafter, counsel may question prospective jurors directly, but the court retains broad discretion to limit the amount of time allotted for lawyer-conducted voir dire.

b) The statute is explicit that the only purpose of voir dire is to aid in the exercise of challenges for cause, and interpretative case law emphasizes that voir dire is not properly used for indoctrinating prospective jurors on the lawyers' theories of the case, for questioning about the applicable law, or for exercising peremptory challenges

c) The court may specify the maximum amount of time that counsel for each party may question an individual juror, or may specify an aggregate amount of time for each party...." Code of Civil Procedure Section 223.

d) Examination of prospective jurors shall be conducted only in aid of the exercise of challenges for cause." Code of Civil Procedure Section 223. This is significant because there are only a limited number of reasons that a juror can be excused for cause, including actual or implied biases, yet jurors may be excused through peremptory challenges due to an almost unlimited number of reasons. The scope of permissible questioning is definitely narrower when questions must relate to challenges for cause than if they relate to exercise of peremptory challenges.

...

K. **The Basics**

1. Under California law, juries for all case types consist of 12 people.

2. How many alternates are up to the judge and attorneys. However many they think are reasonable based on the length and complexity of the trial.

3. The oath: "Do you, and each of you, understand and agree that you will well and truly try the cause now pending before this court, and a true verdict render according only to the evidence presented to you and to the instructions of the court?"

4. Lastly, California Rule of Court 4.200 mandates that trial courts hold a pre-voir dire conference in criminal cases at some point before jury selection begins. Regarding the voir dire process, judges must determine at the conference "[t]he areas of inquiry and specific questions to be asked by the court and by counsel and any time limits on counsel's examination." California Rule of Court 4.200(a)(5). At the pre-voir dire conference, the attorneys should tell the judge what questions they would like the judge to ask, and the judge should tell the attorneys how much time they will be allotted to ask their own questions.

Jury Selection – Nuts & Bolts

Mechanics / Rules – Depending on the judge you are in front of, you may be faced with several different methods of selecting a jury. There are really two main types and variations of either type.

A. "12 Pack", "18 Pack" etc.

1. How it Works

   a. *This is the most common type of selection method that you will see*. Usually, the court clerk will call 12 or 18 or 20 names from a random list of all the potential jurors. Those jurors will fill the jury box in the order called and, if more than 12, will fill the front row of the audience. The rest of the potential jurors will then fill the remaining seats in the courtroom.

   b. Voir Dire is then conducted by the judge and attorneys of the first 12 or 18 or 20 potential jurors.

   c. Once the challenges begin, jurors leave the courtroom when they are challenged until only 11 remain.

   d. The clerk then calls jurors to fill the vacant seats and the process starts all over again. This continues until both sides pass or are out of challenges.

B. "Federal Method"

2. How it Works

a. This method seems to be gaining popularity with judges primarily. It is usually a faster method and avoids excused jurors knowing which side excused them.

b. In this method, unlike the "12 Pack" method, the attorneys move their chairs to the opposite side of counsel tables so that they are facing the courtroom doors and the audience and their backs are to the judge.

c. The potential jurors are called in by the clerk according to the order on the random list. All of the potential jurors are assigned a seat and a number in the courtroom.

d. Voir Dire is then conducted on *ALL* of the potential jurors *ONCE*.

e. Once challenges begin, they are done silently by the attorneys on a master sheet. The attorneys may challenge anyone they wish from the entire panel. The attorneys pass the sheet back and forth until both pass or run out of challenges.

f. The judge will then excuse all challenged jurors at once. The ***first 12 unchallenged jurors*** will then make up the jury.

C. Challenges – There are two types of challenges, *challenges for cause* and *peremptory challenges*. The rules regarding juror challenges can be found in the ***Code of Civil Procedure (CCP §§225 -231).***

1. Challenges for Cause – Challenges for cause can be made by either side generally for either *implied bias* or *actual bias* (***CCP §225(b)***)

a. Implied Bias – There are nine categories of implied bias listed in ***CCP §229***:

b. Actual Bias – Defined as "*the existence of a state of mind on the part of the juror in reference to the case, or to any of the parties, which will prevent the juror from acting with entire impartiality, and without prejudice to the substantial rights of any party.*" (*CCP §225(b)(1)(C)*)

c. The ultimate determination of excusal for cause is made by the court. (*CCP §230*)

2. Peremptory Challenges – A peremptory challenge may be made by either party and is an objection to a juror for which no reason need by given. The court is required to excuse jurors challenged peremptorily. (*CCP §231*)

a. Number – The number of peremptory challenges depends upon the possible sentence of the offense charged and the number of defendants.

b. If the offense is punishable with *maximum term of imprisonment of 90 days or less*, each side gets *6* peremptory challenges. (*CCP §231*)

c. If the offense is punishable with *death or with imprisonment in the state prison for life*, each side gets *20* peremptory challenges. (*CCP §231(a)*). The prosecution of first degree murder without special circumstances which carries a term of 25 years to life, constitutes imprisonment for life within the meaning of CCP §231(a).

d. In *all other cases* each side gets *10* peremptory challenges.

e. Multiple defendant cases

i. Punishment of 90 days or less – The People get *6* challenges and the defendants get *6 challenges jointly*. Each defendant is additionally entitled to *4 separate challenges*. The People get as many challenges as are allowed all defendants. (*CCP §231(b)*)

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO

CENTRAL DIVISION

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, v. JOHNNY CROOK, Defendant.	No. SCD DA **PEOPLE'S MEMORANDUM RE: VOIR DIRE LAW AND THE PROPER *WHEELER* PROCEDURE** Date: Time: Dept.:

Comes now the plaintiff, the People of the State of California, by and through its attorneys, BONNIE M. DUMANIS, District Attorney, and XXX YOUR NAME HERE XXX, Deputy District Attorney, and respectfully submits the following People's Memorandum Re: Voir Dire and the Proper *Wheeler* Procedure.

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ARGUMENT

I

CODE OF CIVIL PROCEDURE SECTION 225 LISTS THE THREE TYPES OF CHALLENGES FOR CAUSE

A challenge for cause is an objection to a prospective trial juror based upon one or more of the following grounds: (1) The juror is generally disqualified, (2) the juror has an implied bias, or (3) the juror has an actual bias. (Code Civ. Proc., § 225, subd. (b).) The number of challenges for cause is unlimited.

I. General Disqualifications

Code of Civil Procedure section 228 sets forth the general qualifications for jurors as follows:

> "(a) A want of any of the qualifications prescribed by this code to render a person competent as a juror.
>
> "(b) A loss of hearing, or the existence of any other incapacity which satisfies the court that the challenged person is incapable of performing the duties of a juror in the particular action without prejudice to the substantial rights of the challenging party."

Code of Civil Procedure section 203 subdivision (a), describes all persons are eligible to be jurors **except**:

(1) Persons who are not U.S. citizens.

(2) Persons who are less than 18 years old.

(3) Persons who are not California domiciliaries per Elections Code section 200 et seq. A person can have only one domicile.

(4) Persons who are not residents of the jurisdiction of the court.

(5) Persons convicted of a felony or malfeasance in office, and whose civil rights have not been restored.

(6) Persons who are not competent in English.

(7) Persons who are serving on a grand jury or other trial jury.

(8) Persons who are under a conservatorship.

II. Implied Bias

The second ground for a challenge for cause is an implied bias. Code of Civil Procedure section 229 sets forth the factors which constitute an implied bias:

(a) Is related by blood or marriage, within the fourth degree, to a party or any alleged witness or victim.

(b) Has a close personal or business relationship to a party, as specified; e.g., guardian and ward, landlord and tenant, etc.; or had a recent attorney-client relationship with the party or party's attorney.

(c) Served as trial juror, grand juror, or witness in the same case or any case involving the same defendant.

(d) Has an interest in the case, other than as a citizen or taxpayer.

(e) Has "an unqualified opinion or belief as to the merits of the action founded upon knowledge of its material facts or of some of them."

(f) Has "a state of mind . . . evincing enmity against, or bias towards, either party."

(g) Is a party to the case which is set for trial before the same jury panel of which he/she is a member.

(h) In a *death penalty* case, has such opinions "as would preclude the juror finding the defendant guilty."

III. Actual Bias

The final ground would be actual bias. Code of Civil Procedure section 225, subdivision(b)(1)(c), defines actual bias as "[t]he existence of a state of mind on the part of the juror in reference to the case, or to any of the parties, which will prevent the juror from acting with ***entire*** *impartiality*, and without prejudice to the substantial rights of any party."

BATSON-WHEELER LAW

II

BOTH THE PEOPLE AND THE DEFENDANT CAN BRING A *WHEELER* MOTION

A peremptory challenge is an objection to a juror for which no reason need be given. Its purpose is to allow either party to exclude prospective jurors which the party believes may consciously or unconsciously be biased against him. *People v. Jackson* (1992) 10 Cal.4th 13, 17. Accordingly, there is a rebuttable presumption that all peremptory challenges are exercised in a constitutionally permissible manner. *People v. Clair* (1992) 2 Cal.4th 629, 652. Challenges based upon "hunches" or even "arbitrary" exclusion is permissible, so long as impermissible group bias does not enter the question. *People v. Hall* (1983) 35 Cal.3d 161, 170.

However, peremptory challenges based solely upon group bias violates a party's right to a jury drawn from a representative cross section of the community. *People v. Wheeler* (1978) 22 Cal.3d 258. Group bias is a presumption that jurors are biased merely because they are members of an identifiable group distinguished on racial, religious, ethnic, or similar grounds. (*People v. Johnson* (1989) 47 Cal.3d 1194, 1215.)

The Court in *Wheeler* went on to clarify its intentions:

> "This does not mean that the members of such a group are immune from peremptory challenges: individual members thereof may still be struck on grounds of specific bias, as defined herein. Nor does it mean that a party will be entitled to a petit jury that proportionately represents every group in the community: we adhere to the long-settled rule that no litigant has the right to a jury that mirrors the demographic composition of the population, or necessarily includes members of his own group, or indeed is composed of any particular individuals. [Citations.] What it does mean, however, is that a party is constitutionally entitled to a petit jury that is as near an approximation of the ideal cross-section of the community as the process of random draw permits." [*Id.* at 276-277.]

It is important to note that both parties enjoy this constitutional right to a fairly selected jury. Both the People and the defendant can bring a *Wheeler* motion. The *Wheeler* Court itself left no doubt the People also enjoyed this protection:

> Although in the present appeal the Attorney General for obvious reasons does not claim the right to object to the same misuse of peremptory challenges on the part of defense counsel, we observe for the guidance of the bench and bar that he has that right under the constitutional theory we adopt herein: the People no less than individual defendants are entitled to a trial by an impartial jury drawn from a representative cross-section of the community. *Id.* at p. 282, fn. 29. See also, *People v. Taylor* (1997) 55 Cal.App.4th 924; *People v. Williams* (1994) 26 Cal.App.4th Supp. 1, 9; *People v. Pagel* (1986) 186 Cal.App.3d Supp. 1, 6.

More recently, the California Supreme Court reiterated the People's right to bring a *Wheeler* motion. In *People v. Willis* (2002) 27 Cal.4th 811, 813 the Supreme Court found defense counsel, representing a black defendant, exhibited group bias in exercising his peremptory challenges to exclude white male prospective jurors. The trial court's granting of the People's *Wheeler* motion was upheld.

II

THE MOTION MUST BE TIMELY

If a party believes an opponent is improperly using peremptory challenges to exclude jurors solely for a discriminatory purpose, that party must make a timely objection. The motion is considered timely if it is made before the jury is sworn. (*People v. Ortega* (1984) 156 Cal.App.3d 63, 67.) In *People v. Gore* (1993) 18 Cal.App.4th 692, 703 the Court explained:

> "[T]o be timely, a *Wheeler* objection or motion must be made, at the latest, before jury selection is completed. 'The general rule is that where a court has indicated that a trial will be conducted with alternate jurors, the impanelment of the jury is not deemed complete until the alternates are selected and sworn.' [Citation.]"]; accord, *People v. Rodriguez* (1996) 50 Cal.App.4th 1013, 1023.

However, in *People v. Crutcher* (1997) 58 Cal.App.4th 1002, defense counsel raised a *Wheeler* objection to the first two challenges exercised by the People. The *Wheeler* objection was not made, however, until the prosecutor's fifth challenge. The Court found this untimely, even though the jury had not yet been sworn. The *Crutcher* Court explained:

> "Such delay thwarts effective consideration of all relevant circumstances and potentially wastes judicial resources." *Id.* at 1013.

III

A PRIMA FACIE SHOWING OF GROUP BIAS MUST BE ESTABLISHED

The moving party has the burden of establishing a prima facie case that the opposing side has challenged jurors solely on the basis of group bias. "Group bias is a presumption that jurors are biased merely because they are members of an identifiable group, distinguished on grounds such as race, religion, ethnicity, or gender." *People v. Crittenden* (1994) 9 Cal.4th 83, 115. Specific bias, on the other hand, "is a bias relating to the particular case on trial or the parties or witnesses thereto." *People v. Johnson* (1989) 47 Cal.3d 1194, 1215.

To establish a prima facie case, the moving party must (1) make as complete a record of the circumstances as is feasible; (2) establish the persons excluded are members of a cognizable group within the meaning of the representative cross-section rule; and (3) from all of the circumstances of the case demonstrate a strong likelihood that such persons are being challenged based solely upon their group association and not because of any specific bias. (*People v. Howard* (1992) 1 Cal.4th 1132, 1153-1154.)

The moving party cannot question the opposing counsel in order to establish a prima facie case. An attorney's statutory right to refuse to give any reason for the exercise of peremptory challenges continues to exist until the court rules that a prima facie showing has

been made by the moving party. (Penal Code Section 1069.) (*People v. Wheeler, supra,* at pp. 280-281, fn. 28. *People v. Granillo* (1987) 197 Cal.App.3d 110, 122.)

The first issue for the court to resolve is whether the challenged juror belongs to a cognizable group. To constitute a cognizable class two requirements must be met: 1) members share a common perspective arising from life experiences in the group, and 2) no other members of the community are capable of adequately representing the group perspective. See *Rubio v. Superior Court* (1979) 24 Cal.3d 93, 98. The following groups have been recognized as cognizable groups:

1. Men. *People v. Cervantes* (1991) 233 Cal.App.3d 323, 334. *People v. Williams* (2000) 78 Cal.App.4th 1118, 1125.

2. Woman. *Didonato v. Santini* (1991) 232 Cal.App.3d 721, 733; *Taylor v. Louisiana* (1975) 419 U.S. 522. *People v. Cervantes* (1991) 233 Cal.App.3d 323, 334. *People v. Macioce* (1986) 197 Cal.App.3d 262, 280.

3. Caucasians. *People v. Snow* (1987) 44 Cal.3d 216, 229, concurring opinion of Eagleson, J., *citing, Bakke v. Regents of University of California* (1976) 18 Cal.3d 34 (affd. in part, revd. in part, *University of California Regents v. Bakke* (1978) 438 U.S. 265.

4. Blacks. *People v. Wheeler, supra* at page 280, fn. 26; see also *People v. Johnson* (1989) 22 Cal.3d 296; *People v. Harris* (1984) 36 Cal.3d 36, 51.

5. Spanish surnamed (Hispanics). *People v. Trevino* (1985) 39 Cal.3d 667, 676, 683-688; *People v. Harris, supra,* 36 Cal.3d 36, 51; *People v. McCaskey* (1989) 207 Cal.App.3d 248, 252.

6. Black women. *People v. Motton* (1985) 39 Cal.3d 596, 605. *People v. Crittenden* (1994) 9 Cal.4th 83, 115.

7. Jewish jurors. *People v. Johnson* (1989) 47 Cal.3d 1194, 1217.

8. Homosexuals. *People v. Garcia* (2000) 77 Cal.App.4th 1269, 1276.

The courts have found the following not to be cognizable groups:

1. Poor persons/low income: see, e.g., *People v. Johnson* (1989) 47 Cal.3d 1194, 1214; *People v. Estrada* (1979) 93 Cal.App.3d 76, 91; *People v. Carpenter (II)* (1997) 15 Cal.4th 312, 352; *People v. Carpenter (III)* (1999) 21 Cal.4th 1016, 1035.

2. Less educated: see, e.g., *Estrada, supra,* at 90-91.

3. Blue collar workers: see, e.g., *Estrada, supra,* at 92.

4. Battered women: see *People v. Macioce* (1986) 197 Cal.App.3d 262, 280.

5. Young adults: see, e.g., *Estrada, supra,* at 93; *People v. Marbley* (1986) 181 Cal.App.3d 45, 48; *People v. Ayala* (2000) 23 Cal.4th 225, 257.

6. People over 70: see, e.g., *People v. McCoy* (1995) 40 Cal.App.4th 778, 783; *U.S. v. Grimmond* (4th Cir. 1998) 137 f.3 823 (over 65).

7. Death penalty skeptics: see, e.g., *People v. Johnson, supra,* at 1222; *People v. Davenport* (1995) 11 Cal.4th 1171, 1202-03.

8. Ex-felons and resident aliens: see, e.g., *People v. Karis* (1988) 46 Cal.3d 612, 631-33.

9. Naturalized citizens: see, e.g., *People v. Gonzalez* (1989) 211 Cal.App.3d 1186, 1202.

10. "Insufficient" English spoken: see, *People v. Lesara* (1988) 206 Cal.App.3d 1304, 1309.

11. New community residents (less than one year): see, e.g., *Adams v. Superior Court* (1974) 12 Cal.3d 55, 60.

12. Strong law and order believers: see *Wheeler*, 22 Cal.3d at 276.

13. "Men who wear toupees": see *People v. Motton* (1985) 39 Cal.3d 596, 606.

14. Retired correctional officers: *People v. England* (2000) 83 Cal.App.4th 772.

The defendant need not be a member of the cognizable group to make a *Wheeler* motion. (*People v. Wheeler, supra.*)

The moving party must next convince the Court that the juror was challenged solely because of group bias. The standard of proof for making a prima facie showing was set out in *Wheeler* as "a strong likelihood that such persons are being challenged because of their group association rather than because of any specific bias." *People v. Wheeler, supra* at 280. Unfortunately, the *Wheeler* Court complicated matters later by stating:

> Upon presentation of this and similar evidence—in the absence, of course, of the jury—the court must determine whether a reasonable inference arises that peremptory challenges are being used on the ground of group bias alone. *Id.* at 281.

Despite the unfortunate use of two different phrases in the same opinion, California courts generally apply the "strong likelihood" language. *People v. Jackson* (1992) 10 Cal.4th 13, 18; *People v. Turner* (1994) 8 Cal.4th 137, 167; *People v. Garceau* (1993) 6 Cal.4th 140, 171.

In 1986, the United States Supreme Court also held that discriminatory challenges violated the Sixth and Fourteenth Amendments of the United States Constitution. *Batson v. Kentucky* (1986) 476 U.S. 79, 90 L.Ed.2 69. In *Batson*, the Supreme Court talked about needing only to raise an inference that venire members were challenged on account of their group association to make out a prima facie case.

The 9th Circuit, in *Wade v. Terhune* (2000) 202 F.3d 1190, held *Batson's* federally mandated standard only requires the moving party to raise a **reasonable inference** of bias, a lower standard than California's "strong likelihood" language. *Terhune* noted that although *Wheeler* itself uses both terms, it really meant to impose only the reasonable inference standard, and all later California cases misinterpreted *Wheeler* on this point. To further confuse matters, California cases since *Terhune* uniformly say it is wrong or not controlling authority and that the

higher California standard is controlling in California (see, e.g., *People v. Martinez* (2000) 81 Cal.App.4th 339); or that *Batson's* **"raise an inference"** standard is actually the same as *Wheeler's* **"strong likelihood"** standard (see, e.g., *People v. Box* (2000) 23 Cal.4th 1153, 1188, fn.7.)

Merely noting that a party has used its challenges to exclude members of a particular group is insufficient to support a prima facie showing of group bias. (See, *People v. Trevino* (1997) 55 Cal.App.4th 396, 406; *People v. Turner* (1994) 8 Cal.4th 137, 167 [mere claim that challenged jurors were Black and had indicated they could be impartial]; *People v. Howard* (1992) 1 Cal.4th 1132, 1154 [fact that DA challenged first two Black jurors "completely inadequate" to meet burden].) Such limited showings are insufficient even when peremptories exclude all members of a cognizable group. (See, e.g., *People v. Rousseau* (1982) 129 Cal.App.3d 526, 536-37 [only two Blacks on panel challenged]; *People v. Christopher* (1991) 1 Cal.App.4th 666, 672-73 [sole Black challenged].)

In *People v. Garceau* (1993) 6 Cal.4th 140, the defendant claimed his prima facie case was established by showing the prosecution had excused six Hispanic women. The Supreme Court disagreed. The Court in *Garceau* explained:

> Nevertheless, defendant failed to show a "strong likelihood" that these prospective jurors were excluded because of a group association. His motions merely reiterated the names of the jurors removed by the prosecution and alleged that, because the removed jurors all were Hispanic-surnamed women, he had made a "prima facie showing." (*Id.*)

Similarly, in *People v. Turner* (1994) 8 Cal.4th 137, the prosecutor used four of his six peremptory challenges to exclude black prospective jurors. He also excused two black prospective alternates. (*Id.* at p. 172.) Moreover, this case was a retrial following the Supreme Court's reversal of a murder conviction caused by the same prosecutor's *Wheeler* violations in the first trial. (See *People v. Turner* (1990) 50 Cal.3d 668.)

Mindful of the above-stated facts, the Supreme Court nevertheless found a prima facie case still had not been established.

> In particular, defendant failed to establish from all the circumstances of the case a strong likelihood that such persons were being challenged because of their group association. (*People v. Howard, supra,* 1 Cal.4th at p. 1154.) Rather, the only basis for establishing a prima facie case cited by defense counsel were that all of the challenged prospective jurors were Black and either had indicated that they could be fair and impartial or in fact favored the prosecution. This is insufficient. (*Id.* at p. 167.)

One factor arguing against the defendant's claimed *Wheeler* violation was the fact the prosecutor had accepted a jury panel including several black members. The Supreme Court stated the obvious:

> While the fact that the jury included members of a group allegedly discriminated against is not conclusive, it 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. (*Id.* p. 168.)

If the moving party cannot establish a prima facie case, the motion must be denied. In *People v. Cervantes* (1991) 233 Cal.App.3d 323, the trial court listened to defense counsel's prima facie presentation, then turned to the district attorney for a response. The Appellate Court explained the trial court erred by not making a finding on the prima facie case before asking the prosecutor to defend the challenges.

> The scenario we have just described could have been avoided had the district attorney demanded a specific finding of the trial judge. Although not an excuse, we understand that trial lawyers, including deputy district attorneys, often are reluctant to make demands of the trial judge for such things as specific findings, etc. However, at least as to *Wheeler* motions, the district attorney need never be put in this position. When defense counsel makes a *Wheeler* motion and states his reasons for the motion, if the trial judge, after weighing the evaluating these reasons, concludes a prima facie showing of discriminatory exclusion of a cognizable group has not been made, then the judge must clearly and succinctly say so, state his or her reasons, and make the necessary finding of no prima facie showing. On the other hand, if the court concludes a prima facie showing has been made, then it must state that finding. Either way, the district attorney knows where he or she stands and what must be done, i.e.,

either respond or not, depending on the court's specific finding. And, of course, had the above-described scenario been followed here, then *Wheeler* error may have been avoided. (233 Cal.App.3d at 336-37, emphasis added.)]

Answering the court's inquiry regarding individual challenge justifications before a prima facie finding will result in an implied prima facie finding. (See, e.g., *People v. Arias* (1996) 13 Cal.4th 92, 135 ["When the trial court solicits an explanation of the challenged excusals without first indicating its views on the prima facie issue, we may infer an implied prima facie finding. [Citations.] . . . Once an implied prima facie finding has been made, that issue becomes moot, and the only question remaining is whether the individual justifications were adequate."]. *People v. Ervin* (2000) 22 Cal.4th 48. Thus the proper response is to speak only to the prima facie case issue, not specific challenge justifications; then a prima facie finding will not be implied. See, *People v. Ferro* (1993) 21 Cal.App.4th 1, 7-8:

> The trial court did not ask for reasons or explanations. It merely asked the prosecutor if she wished to be heard. The prosecutor, wisely or fortuitously, gave not one word of excuse or explanation, but attacked the preliminary question of systematic exclusion, after which the trial court specifically found no pattern of systematic exclusion. In the cases surveyed above, . . . the prosecutors, some eagerly, some reluctantly, gave reasons for excluding the jurors in question. It is easier to conclude that a trial court has impliedly made the prima facie finding when it takes the next step and listens to the justifications offered. . . .
>
> It's much easier for the trial court to just say whether it is making the prima facie finding before it asks the prosecutor to respond, or if limiting the inquiry to whether a prima facie showing has been made, to say so. Any prosecutor who fails to inquire and gushes explanations when the trial court has failed to specify is unwittingly jeopardizing his or her case.

See also, *People v. Bittaker* (1989) 48 Cal.3d 1046, 1091-92.

However, if the trial court finds no prima facie case has been made, but still asks for reasons for the sake of recourt, no prima facie case will be presumed. *People v. Turner*

(1986) 42 Cal.3d 711 [*Turner I*] was a Rose Bird Supreme Court reversal of a robbery-murder special circumstances case based on prosecutorial *Wheeler* error, where all three Blacks on the jury were challenged. "[T]he prosecutor's explanations were either implausible or suggestive of bias." (42 Cal.3d at 728.) The same prosecutor (but with a different trial judge) convicted defendant on retrial, which led to the Malcolm Lucas Court's *People v. Turner* (1994) 8 Cal.4th 137 [*Turner II*]; there, defendant's conviction was affirmed over a *Wheeler* challenge raised but denied in the second trial.

In *Turner II*, the prosecutor used four of six challenges against Black jurors; defendant excused two Blacks, and final jury had five Blacks. After the prosecutor challenged the first two Black jurors, defense counsel objected, claiming only that both jurors had stated they could be fair, but were dismissed because of their race. The trial court replied:

> Let me indicate before I ask the prosecutor to respond that – at this point, I'm not making a prima facie finding that there's been any systematic exclusion of [B]lacks from the jury. But for the record in the case, I'm going to ask the prosecutor to give me – to articulate the reasons why he excused those two jurors. But I want the record to be clear that I'm making that request not as a result of any prima facie finding of exclusion of the prospective jurors on the basis of color. Again, I'm doing it because of the reason that the case was reversed. (8 Cal.4th at 165.)

The prosecutor properly responded, "I think the law is clear that unless a prima facie case is made, there is no response required by the People." (*Id.*) However, the prosecutor then complied with the Court's request and stated reasons for the challenges. After the third Black juror was challenged by the prosecutor, the defense again objected; the Court again stated no prima facie case was found, but nevertheless requested the prosecutor to respond; the prosecutor again complied.

In *Turner II*, the Supreme Court first ruled, "when an appellate court is presented with such a record, and concludes that the trial court properly determined that no prima facie case was made, it need not review the adequacy of counsel's justifications for the peremptory challenges." (*Id.* at 167.) Thus, the High Court found that the trial court correctly ruled no

prima facie case had been made. Although it need not review the adequacy of any justifications in such posture, the Supreme Court did examine the prosecutor's justifications because of the unique procedural history of the case. All reasons given for the challenges were found to be properly race-neutral.

IV

UPON A FINDING OF A PRIMA FACIE CASE, THE BURDEN SHIFTS TO THE NON-MOVING PARTY TO PROVIDE A DETAILED AND NEUTRAL JUSTIFICATION FOR EACH CHALLENGED JUROR

Should the Court find the moving party has established a prima facie case, the burden shifts to the other party to show his challenges were not based solely on a presumed group bias. Stated another way, counsel must demonstrate the challenges were based on specific bias, or a belief the juror may be biased against his side, or for the opposition. To sustain his burden, the allegedly offending party must satisfy the court that he exercised the peremptory challenges on "grounds that were reasonably relevant to the issues, parties, or witnesses in the particular case on trial." (*People v. Jackson* (1992) 10 Cal.App.4th 13, 18.)

Exclusions based upon hunches and other arbitrary reasons are permissible, as long as the reasons are not based upon improper group bias. (*People v. Turner* (1994) 8 Cal.4th 137, 164-165; *People v. Hall* (1983) 35 Cal.3d 161, 170. The reasons need only to be genuine, reasonably specific, and race or group neutral; even trivial reasons may suffice. *People v. Arias* (1996) 13 Cal.4th 92, 136.)

This justification must be done as to each such juror individually and should be done at the time the challenge is exercised rather than waiting until the end of jury selection. The judge must issue a ruling as to each such juror individually. (*People v. Fuentes, supra,* at 718-719.)

The explanations given by the non-moving party need not rise to the level of a challenge for cause. (*People v. Wheeler, supra,* at pp. 281-282.) Subjective observations, such as the prospective juror's body language or manner of answering questions, are acceptable.

(*People v. Johnson, supra,* at p. 1219; *People v. Jackson* (1992) 10 Cal.App.4th 13, 19.) Likewise, a juror's limited life experience, *People v. Sims* (1993) 5 Cal.4th 405, 429; *People v. Perez* (1994) 29 Cal.App.4th 1313, 1328; the inability to understand the proceedings, *People v. Barber* (1988) 200 Cal.App.3d 378, 397, past involvement with a hung jury, *People v. Turner, supra,* at p. 170, negative experiences with law enforcement, *People v. Walker* (1988) 47 Cal.3d 605, 625, and "bare looks and gestures" by a prospective jury that may alienate one party, *People v. Wheeler, supra,* at p. 276, constitute valid grounds for the exercise of peremptory challenges. Also, "the use of peremptory challenges to prospective jurors whose relatives and/or family members have had negative experiences with the criminal justice system is not unconstitutional." *People v. Douglas* (1995) 36 Cal.App.4d 1681, 1690.

V

THE TRIAL COURT MUST DETERMINE WHETHER THE JUSTIFICATION IS GENUINE AND SUFFICIENT

Once the moving party has made a prima facie showing of exclusion of jurors from a protected class and the opposing party has explained its challenges, the trial court must exercise its own judgment as to the propriety of the challenges. The trial court is governed by the following standard:

> [T]he trial court is required to: "satisfy itself that the explanation is genuine. This demands of the trial judge a sincere and reasoned attempt to evaluate the prosecutor's explanation in light of the circumstances of the case as then known, his knowledge of trial techniques, and his observations of the manner in which the prosecutor has examined members of the venire and has exercised challenges for cause or peremptorily, for 'we rely on the good judgment of the trial courts to distinguish bona fide reasons for such peremptories from sham excuses belatedly contrived to avoid admitting acts of group discrimination.' [Citation.]" (*People v. Hall* (1983) 35 Cal.3d 161, 167-168.)

Simply stated, the trial court is obligated to determine not only that a factually supportable reason for the challenge existed, but also that the reason actually prompted the use of the challenge. (*People v. Fuentes* (1991) 54 Cal.3d 707, 720.) The issue presented to the trial court is one of fact. (*People v. Perez, supra.*) Reasons that are genuinely held, valid and non-discriminatory will cause the trial court to deny the motion. Only when there is a reasonable inference based upon all the evidence that the peremptory challenges were used on grounds of group bias alone should the motion be granted. (*People v. Wheeler, supra,* at p. 281.)

In deciding this question of fact, the trial court must not engage in a subjective comparison between the challenged juror and those allowed to remain on the jury. In *People v. Johnson* (1989) 47 Cal.3d 1194, 1219-1220, the Supreme Court stated quite clearly its disapproval of this comparative analysis:

> We disapproved the approach taken earlier in *People v. Trevino* (1985) 39 Cal.3d 667, in which we had disallowed subjective reasons for peremptory challenges and had engaged in a comparative analysis of various jurors' responses to evaluate the bona fides of the prosecutor's stated reasons. We disapproved the *Trevino* approach because nothing in *Wheeler* disallows reliance on the prospective juror's body language or manner of answering questions as a basis for rebutting a prima facie case, and because comparative analysis of jurors unrealistically ignores 'the variety of factors and considerations that go into a lawyer's decision to select certain jurors while challenging others that appear to be similar'.

In *People v. Perez* (1994) 29 Cal.App.4th 1313, 1329, a San Diego case, the Fourth District followed *Johnson's* rejection of the comparative analysis approach. Furthermore, under authority of the California Supreme Court, "an appellate court is not allowed to compare the responses of rejected and accepted jurors to determine the bona fides of the justifications offered." (*People v. Landry* (1996) 49 Cal.App.4th 785, 791.)

Indeed, the Supreme Court has recently, and repeatedly, specifically declined to reconsider *Johnson*. (See *People v. Jones* (1997) 15 Cal.4th 119, 162 & fn. 12; accord *People v. Ervin* (2000) 22 Cal.4th 48; *People v. Box* (2000) 23 Cal.4th 1153, 1190.)

It must be noted, however, that the 9th Circuit approves of the use of comparative analysis when assessing the truthfulness of the reasons given for questionable peremptory challenges. *McClain v. Prunty* (9th Cir. 2000) 217 F.3d 1209.

VI

SEVERAL REMEDIES ARE AVAILABLE FOR *WHEELER* VIOLATIONS

Until 2002, it was generally accepted the only remedy for a *Wheeler* violation was to dismiss the jurors so far selected; quash the remaining venire, draw a new panel and begin jury selection anew. No other remedies were recognized. *People v. Wheeler, supra* at 282. But, see *People v. Williams* (1994) 26 Cal.App.4th Supp. 1. However, in *People v. Willlis* (2002) 27 Cal.4th 811, the California Supreme Court belatedly recognized that alternative remedies were not only appropriate, but necessary.

In *Willis*, defense counsel initially objected to the racial mixture of the entire jury panel. Specifically, he claimed the panel was overwhelmingly Caucasian. After his motion to quash the panel was denied, the defense began to systematically exclude white male jurors, hoping his *Wheeler* violation would force a new jury panel for the trial. Fortunately, both the trial court and the Supreme Court saw through his tactically unconstitutional methods. *Id.* at 816.

Justice Chin, writing for a unanimous Supreme Court, noted the federal Constitution did not compel exclusion of the entire panel as the sole remedy for a violation of *Batson v. Kentucky* (1986) 476 U.S. 79. *Batson* had left implementation to the state courts. While the majority of the states give trial courts discretion to match a violation remedy to the facts and circumstances, to this point California had felt constrained to stick to the sole remedy of panel exclusion.

The *Willis* opinion began by echoing the words of the Massachusetts Supreme Court in *Commonwealth v. Reid* (1981) 384 Mass. 237, 255: "We did not hold that dismissal of

the entire venire was the only appropriate relief. Such a limitation on the trial judge's ability to respond in these circumstances would place in the hands of litigants the unchecked power to have a mistrial declared based on their own misconduct." Then the California high court turned to a fashioning of its own remedies. First, it ruled that the trial court's discretion to depart from the normal *Wheeler* exclusion remedy required the assent of the complaining party. That is, if a party objects on *Wheeler* grounds, and the court ultimately grants the motion, the complaining party has the whip hand: it can insist on exclusion of the panel and reseating of a new one, or it can assent to some other remedy. Then the Supreme Court expressed in some detail possible remedies and the procedural pathways to achieve them.

One remedy to deter illegal stacking of the jury is that suggested by the *Willis* trial court: "assessment of sanctions against counsel whose challenges exhibit group bias." (*Willis, supra,* 27 Cal.4th at 821.) A second remedy, used sparingly in very anomalous lower court situations in California in the past is to reseat "any improperly discharged jurors if they are available to serve." (*Id.*) But if improperly challenged jurors are no longer available (which would typically be the case in all challenges but the last one when the *Wheeler* motion is finally granted), "some cases have suggested that the court might allow the innocent party additional peremptory challenges. [Federal citations omitted.]" (*Id.*)

Willis has significantly changed the *Wheeler* landscape. The People now have the motive and an appropriate remedy to make a *Wheeler* motion to overcome a defense violation of the People's right to a fair trial.

Dated:

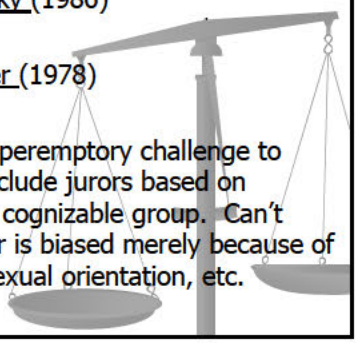
Respectfully submitted,

BONNIE M. DUMANIS
District Attorney

By:
YOUR NAME HERE
Deputy District Attorney
Attorneys for Plaintiff

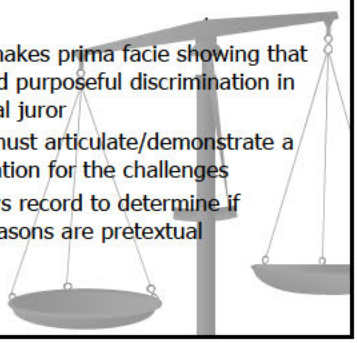
Batson/Wheeler

- Batson v. Kentucky (1986) 476 U.S. 79
- People v. Wheeler (1978) 22 Cal.3d 258
- Precludes use of peremptory challenge to systematically exclude jurors based on membership in a cognizable group. Can't assume that juror is biased merely because of race, ethnicity, sexual orientation, etc.



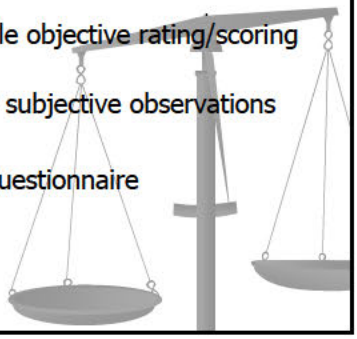
Race/Gender Neutral Reasons

- 3 Part Test
  - 1. Defendant makes prima facie showing that prosecutor used purposeful discrimination in kicking potential juror
  - 2. Prosecutor must articulate/demonstrate a neutral explanation for the challenges
  - 3. Court reviews record to determine if prosecutor's reasons are pretextual



Race/Gender Neutral Indicators

- Develop a simple objective rating/scoring system
- *Then,* add your subjective observations
- Caveat – jury questionnaire



Voir Dire

Jury Selection – Nuts & Bolts

Mechanics / Rules – Depending on the judge you are in front of, you may be faced with several different methods of selecting a jury. There are really two main types and variations of either type.

A. "12 Pack", "18 Pack" etc.

1. How it Works

a. *This is the most common type of selection method that you will see*. Usually, the court clerk will call 12 or 18 or 20 names from a random list of all the potential jurors. Those jurors will fill the jury box in the order called and, if more than 12, will fill the front row of the audience. The rest of the potential jurors will then fill the remaining seats in the courtroom.

b. Voir Dire is then conducted by the judge and attorneys of the first 12 or 18 or 20 potential jurors.

c. Once the challenges begin, jurors leave the courtroom when they are challenged until only 11 remain.

d. The clerk then calls jurors to fill the vacant seats and the process starts all over again. This continues until both sides pass or are out of challenges.

e. There are variations in this process depending on the courtroom. Sometimes you will question more than 20.

Voir Dire

B. "Federal Method"

2. How it Works

a. This method seems to be gaining popularity with judges primarily. It is usually a faster method and avoids excused jurors knowing which side excused them.

b. In this method, unlike the "12 Pack" method, the attorneys move their chairs to the opposite side of counsel tables so that they are facing the courtroom doors and the audience and their backs are to the judge.

c. The potential jurors are called in by the clerk according to the order on the random list. All of the potential jurors are assigned a seat and a number in the courtroom.

d. Voir Dire is then conducted on *ALL* of the potential jurors *ONCE*.

e. Once challenges begin, they are done silently by the attorneys on a master sheet. The attorneys may challenge anyone they wish from the entire panel. The attorneys pass the sheet back and forth until both pass or run out of challenges.

f. The judge will then excuse all challenged jurors at once. The ***first 12 unchallenged jurors*** will then make up the jury.

C. Challenges – There are two types of challenges, *challenges for cause* and *peremptory challenges*. The rules regarding juror challenges can be found in the ***Code of Civil Procedure (CCP §§225 -231).***

1. Challenges for Cause – Challenges for cause can be made by either side generally for either *implied bias* or *actual bias* (***CCP §225(b)***)

a. Implied Bias – There are 8 categories of implied bias listed in ***CCP §229***:

b. Actual Bias – Defined as "*the existence of a state of mind on the part of the juror in reference to the case, or to any of the parties, which will prevent the juror from acting with entire impartiality, and without prejudice to the substantial rights of any party*." (***CCP §225(b)(1)(C)***)

c. The ultimate determination of excusal for cause is made by the court. (***CCP §230***)

2. Peremptory Challenges – A peremptory challenge may be made by either party and is an objection to a juror for which no reason need by given. The court is required to excuse jurors challenged peremptorily. (***CCP §231***)

a. Number – The number of peremptory challenges depends upon the possible sentence of the offense charged and the number of defendants.

b. If the offense is punishable with *maximum term of imprisonment of 90 days or less*, each side gets *6* peremptory challenges. (***CCP §231***)

c. If the offense is punishable with *death or with imprisonment in the state prison for life*, each side gets *20* peremptory challenges. (***CCP §231(a)***).

d. In *all other cases* each side gets *10* peremptory challenges.

e. Multiple defendant cases

i. Punishment of 90 days or less – The People get *6* challenges and the defendants get *6 challenges jointly*. Each defendant is additionally entitled to *4 separate challenges*. The People get as many challenges as are allowed all defendants. (***CCP §231(b)***)

ii. Life in prison and death cases – The People get *20* challenges and the defendants get *20 challenges jointly*. Each defendant is additionally entitled to *5 separate challenges*. The People get

as many challenges as are allowed all defendants. (***CCP §231(a)***)

iii. All other cases – The People get *10* challenges and the defendants get *10 challenges jointly*. Each defendant is additionally entitled to *5 separate challenges*. The People get as many challenges as are allowed all defendants. (***CCP §231(a)***)

D. How do you challenge? - Following the voir dire questioning and any challenges for cause, the process moves on to peremptory challenges. We go first. The judge will usually explain the process to the jurors. The judge will then say something like, "Mr./Ms. Prosecutor, People's first?"

   The judge is asking you if you want to use your first peremptory challenge. If you do, you then say, "Thank you your honor, the People would ask the court to thank and excuse Juror #4."

E. Keeping Track of Challenges – There are various methods of keeping track of juror information and challenges. Most court clerks will provide a master courtroom diagram with squares representing each seat. Most people use post it notes or a combination of post it notes and note pad to keep track of jurors and their responses to questions

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Handling a *Batson/Wheeler* Motion

I. Overview

A. Every prosecutor will have to deal with the dreaded "*Wheeler"* motion. It usually occurs following the People's use of a peremptory challenge against someone of a particular race, gender or ethnic background.

B. How it works – The defense makes a motion, usually on state and federal grounds, that the prosecutor has excused a juror based on racial, ethnic or other improper grounds and has therefore violated the defendant's Constitutional right to a fair and impartial jury. The defendant does not have to be a member of the excluded group to complain of a violation. *People v. Wheeler* (1978) 22 Cal. 3d 258, 281. (**Note**: While the defense usually brings the motion, it may be made by *either party*.)

C. It goes without saying that no prosecutor should exercise a peremptory challenge against a juror based solely on that juror's gender, sexual orientation, or membership in a racial, ethnic, or religious group. But a prosecutor should not refrain from challenging a juror for *permissible* reasons out of a concern that the defense will raise a disingenuous or frivolous *Batson/Wheeler* claim.

D. THREE STEP PROCESS
"First, the defendant must make out a prima facie case 'by showing that the totality of relevant facts give rise to an inference of discriminatory purpose.' Second, once the defendant has made out a prima facie case, the 'burden shifts to the State to explain adequately the racial exclusion' by offering permissible race-neutral justifications for the [peremptory] strikes. Third, '[i]f a race-neutral explanation is tendered, the trial court must decide . . . whether the opponent of the strike has proved purposeful racial discrimination.' " (*Johnson v. California* (2005) 545 U.S. 162)

II. History

A. *Batson* ***is*** the federal standard and *Wheeler* ***was*** the California standard used to determine whether the peremptory challenge was improper.

B. Both cases used procedures involving 3 part tests to determine the propriety of the challenge. However, the first prong of the tests in each case was different.

Defendants argued the state burden (Wheeler) was more difficult for them to meet than the federal burden (Batson).

C. The California Supreme Court tried to reconcile the two cases in 2003 in *People v. Johnson* (2003) 30 Cal. 4th 1302.

D. In 2005, the U.S. Supreme Court reversed *Johnson* and "clarified" the *Batson* decision by stating that the first prong of the *Batson* test need only be satisfied by production of evidence sufficient to permit the trial judge to draw an *inference of discrimination*. (*Johnson v. California* (2005) 545 U.S. 162.)

E. Current State of the Law - Still a 3 prong test based on the holdings of *Batson* and *Johnson.* Although *Wheeler* is still good law, the first step has been replaced by the *Batson* first step. (*Johnson v. California* (2005) 545 U.S. 162.)

III. Analysis

A. *People v. Wheeler* (1978) 22 Cal. 3d 258 – Peremptory challenges based on group bias violates the defendant's right to jury trial in the California Constitution. *Batson v. Kentucky* (1986) 476 U.S. 79 – Race based challenges violate the Equal Protection Clause of the U.S. Constitution. (*See Also, People v. Bonilla* (2007) 41 Cal.4th 313, 341).

B. Objection Made – The claim is waived if the defendant fails to make a timely objection and a record sufficient for appellate review. (*People v. Wheeler* (1978) 22 Cal.3d 258, 280; *People v. Morris* (2003) 107 Cal.App.4th 402, 408-409) Motion made after jury was sworn but before alternates were sworn was not untimely. Jury empanelment is completed when all jurors, including alternates, are selected and sworn in. *People v. Scott* (June 8, 2015, S094858) __ Cal. 4th __ [2015 WL 3541280]

C. Cognizable Class – "An identifiable group distinguished on racial, religious, ethnic, or similar grounds…" *People v. Wheeler* (1978) 22 Cal. 3d 258, 276. Two requirements for a cognizable class:

> 1) Members share a common perspective arising from life experience in the group; and
> 2) No other members of the community are capable of adequately representing the group perspective. (*See, Rubio v. Superior Court* (1979) 24 Cal.3d 93, 98).

Courts and Statutes have recognized several categories of cognizable classes or groups.

1. Race - (*See, Batson v. Kentucky* (1986) 476 U.S. 79 & *People v. Wheeler* (1978) 22 Cal. 3d 258).

2. Ethnicity – Although there are fewer reported cases regarding ethnicity, be aware that it is a cognizable class. For example, Native Americans were the subject of the violation in *United States v. Bauer* (9th Cir. 1996) 84 F.3d 1549.

3. Religion – *People v. Johnson* (1989) 47 Cal.3d 1194, 1217 [Jewish Jurors]

4. Gender – Gender appears to be a cognizable class and should be treated as such. However, most cases dealing with gender also carry a racial component as well. (*People v. Crittenden* (1994) 9 Cal.4th 83, 115 [African-American woman]; *People v. Garceau* (1993) 6 Cal.4th 140, 171 [Hispanic woman]

5. Sexual Orientation – *People v. Garcia* (2000) 77 Cal.App.4th 1269, 1272. (*See Also,* Code of Civil Procedure §231.5)

6. Age – Although not a federally protected class, Code of Civil Procedure §231.5 added "Age" as a protected class in 2016 added by operation of Government Code §11135.

7. Disability – Although not a federally protected class, Code of Civil Procedure §231.5 added "Disability", both mental and physical, as a protected class in 2016 by operation of Government Code §11135**.**

D. Non-Cognizable Class

1. Poor – *People v. Carpenter* (1999) 21 Cal.4th 1016, 1035

2. Less Educated – *People v. Estrada* (1979) 93 Cal.App.3d 76, 90-91

3. Battered Women – *People v. Macioce* (1987) 197 Cal.App.3d 262, 280

4. Young – *People v. Ayala* (2000) 24 Cal.4th 243, 277-278; *United States v. Fletcher* (9th Cir. 1992) 965 F.2d 781, 782 -- (Caveat: See CCP§231.5 & Gov't Code §11135)

5. People over 70 – *People v. McCoy* (1995) 40 Cal.App.4th 778, 783 -- (Caveat: See CCP§231.5 & Gov't Code §11135)

6. "Insufficient" English – *People v. Lesara* (1998) 206 Cal.App.3d 1304, 1307

7. Unconventional Hairstyle – *Purkett v. Elem* (1995) 514 U.S. 765, 769

8. People who have been arrested *or* been victims – *People v. Fields* (1983) 35 Cal.3d 329, 348

9. "People of Color" – Combining all minority groups does not constitute a "cognizable class". *People v. Davis* (2009) 46 Cal. 4th 539

E. Challenge Exercised Against Member of Cognizable Class

1. Step One – The party objecting to the peremptory challenge must make out a prima facie case "by showing the totality of the relevant facts gives rise to an inference of a discriminatory purpose." *Johnson v. California* (2005) 545 U.S. 162. There is a presumption that that the party exercising the challenge (usually the prosecution) does so on a constitutionally permissible ground. (*People v. Wheeler* (1978) 22 Cal. 3d 258). Thus, the objecting party (usually the defense) must demonstrate a "prima facie case".

a. Prima Facie Case – The court in *Wheeler* provided four examples of ways to demonstrate a prima facie case:

1. "A party may show that his opponent struck most or all of the members of the identified group from the venire."
2. "He may also demonstrate that the jurors in question share only this one characteristic—their membership in the group—and that in all other respects they are as heterogenous as the community as a whole."
3. "Next, the showing may be supplemented . . . by such circumstances as the failure of the opponent to engage these same jurors in more than desultory voir dire, or indeed to ask them any questions at all."
4. "Lastly, . . . the defendant need not be a member of the excluded group in order to complain of a violation of the representative cross-section rule." However, this can be probative in making the determination. (*People v. Wheeler* (1978) 22 Cal. 3d 258, 280-281; *People v. Reynoso* (2003) 31 Cal.4th 903, 914.)

b. "[A] 'pattern' of strikes against black jurors included in the particular venire might give rise to an inference of discrimination. Similarly, the prosecutor's questions and statements during *voir dire* examination and in exercising his challenges may support or refute an inference of discriminatory purpose." (*Batson v. Kentucky* (1986) 476 U.S. 79, 96-97.)

c. Rebut the prima facie case by arguing applicable factors:

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

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

3. The fact that you have <u>not</u> used a disproportionate number of your challenges against members of the cognizable class is a factor that weighs against finding an inference of discrimination. (*People v. Streeter* (2012) 54 Cal.4th 205, 223 [no prima facie case where prosecutor excused three of five African Americans]; *People v. Clark* (2011) 52 Cal.4th 856, 903 [statistical analysis subject to various interpretations and did not raise an inference of discrimination]; *People* v. *Bell* (2007) 40 Cal.4th 582, 598 [considering fact prosecutor used only two of 16 peremptory challenges against members of the cognizable class at issue in finding the prosecutor's challenges created no inference of discrimination]; *People v. Cornwell* (2005) 37 Cal.4th 50, 70 [no prima facie case where prosecutor challenged one out of two African-American prospective jurors]). However, See *Ayala v. Wong* (9th Cir. 2012) 693 F.3d 945, 964 [Statistical evidence alone established a prima facie case where prosecution struck each of the seven black or Hispanic jurors available for challenge].

4. If you have passed on a panel that includes members of the cognizable class, this fact should be mentioned as it undercuts an inference of discrimination. (*People v. Streeter* (2012) 54 Cal.4th 205, 225 [prosecutor passed five times with up to four African Americans in jury box]; *People v. Clark* (2011) 52 Cal.4th at 856, 906 [no prima facie case where prosecutor passed two African-American jurors during several rounds before finally excusing them].) The prosecutor's acceptance of a panel including African-American prospective jurors, while not conclusive, was " 'an indication of the prosecutor's good faith in exercising his peremptories, and … an appropriate factor for the trial judge to consider in ruling on a *Wheeler* objection … .' " (*People v. Hartsch* (2010) 49 Cal.4th 472, 487). (See also, *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].)

5. Point out any members of the cognizable class who were challenged by the defense. However, be aware that this fact will not carry the day for you. It is simply something you may want to point out on the record. Further rehabilitation of prospective jurors of a cognizable class ought to be challenged can be an

important factor in rebutting a prima facie case. (*People v. Streeter* (2012) 54 Cal.4th 205, 225 [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, citing *People v. Hartsch* (2010) 49 Cal.4th 472, 487]).

6. If you were honestly not aware the juror was a member of a cognizable group. *People v. Barber* (1988) 200 Cal.App.3d 378, 389. [Challenged juror appeared to be a white and non-Hispanic to DA. DA did not recognize the surname to be Hispanic. Court found DA to be sincere]

2. Step Two – If a prima facie case is made, the "burden shifts to the [party making the original, objected to juror challenge] to explain adequately the racial [or other cognizable class] exclusion by offering permissible race neutral justifications for the strikes." (*Johnson v. California* (2005) 545 U.S. 162)

"The justification need not support a challenge for cause, and even a 'trivial' reason, if genuine and neutral, will suffice." (*People v. Arias* (1996) 13 Cal. 4th 92, 136 citing *People v. Montiel* (1993) 5 Cal. 4th 877, 910, fn. 9.)

a. Examples of Permissible Reasons

1. Legal contacts. (*People v. Panah* (2005) 35 Cal.4th 395, 441-442 [potential juror was arrested and charged with a crime]; *People v. Young* (2005) 34 Cal.4th 1149, 1174 [counselor had testified before in sex assault cases]; *People v. Cleveland* (2004) 32 Cal.4th 704, 733 [son was in jail]; *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1124 [father was arrested and charged with a crime and the potential juror had been roughed up by officers]; *People v. Farnam* (2002) 28 Cal.4th 107, 137-138; *People v. Williams* (1997) 16 Cal.4th 635, 664-665 [by family member]; *People v. Arias* (1996) 13 Cal.4th 92, 138; *People v. Turner* (1994) 8 Cal.4th 137, 171; *People v. Sims* (1993) 5 Cal.4th 405, 430; *People v. Cummings* (1993) 4 Cal.4th 1233, 1282; *People v. Johnson* (1989) 47 Cal.3d 1194, 1215; *People v.Walker* (1988) 47 Cal.3d 605, 625-626; *People v. Wheeler* (1978) 22 Cal.3d 258, 275 [been a crime victim]; *People v. Douglas* (1995) 36 Cal.App.4th 1681, 1690; *People v. Martinez* (2000) 82 Cal.App.4th 339, 344-345 [family member]; *People v. Martin* (1998) 64 Cal.App.4th 378, 385, fn. 5 [crime victim]; *People v. Buckley* (1997) 53 Cal.App.4th 658, 667; *People v. Barber* (1988) 200 Cal.App.3d 378; *Mitleider v. Hall* (9th Cir. 2004) 391 F.3d 1039, 1041- 045, 1048-1051 [contacts by family members].)

2. Served on hung jury before. (*People v. Farnam* (2002) 28 Cal.4th 107, 137-138.)

3. Views on the legal system. (*People v. Ward* (2005) 36 Cal.4th 186, 201 [unfavorable views toward guilt]; *People v. Cleveland* (2004) 32 Cal.4th 704, 733 [hesitant in answering questions on the death penalty]; *People v. Yeoman* (2003) 31 Cal.4th 93, 116-117 [not strong enough views on the death penalty]; *People v. Burgener* (2003) 29 Cal.4th 833, 864 [skeptical in imposing death penalty]; *People v. Farnam* (2002) 28 Cal.4th 107, 137; *People v. Caitlin* (2001) 26 Cal.4th 81, 118 [skeptical about imposing death penalty]; *People v. Buckley* (1997) 53 Cal.App.4th 658, 666-667 [legal training]; *Boyd v. Newland* (9th Cir. 2004) 393 F.3d 1008, 1013 [ambivalence towards the legal system]; *Tolbert v. Gomez* (9th Cir. 1999) 189 F.3d 1099; *United States v. Fike* (5th Cir. 1996) 82 F.3d 1315, 1320.)

4. The potential juror's lack of disclosure. (*People v. Diaz* (1984) 152 Cal.App.3d 926, 932; see *In re Hitchings* (1993) 6 Cal.4th 97, 112; *Mitleider v. Hall* (9th Cir. 2004) 391 F.3d 1039, 1041-1045, 1048-1051 [potential juror apparently not honest].)

5. The potential juror appeared to be a non-conformer. (*Purkett v. Elem* (1995) 514 U.S. 765, 769 (per curiam) [long hair]; *People v. Ayala* (2000) 24 Cal.4th 243, 261; *People v. Howard* (1992) 1 Cal.4th 1132, 1208; *People v. Wheeler* (1978) 22 Cal.3d 258, 275.) (*People v. Ward* (2005) 36 Cal. 4th 186, 202)

6. Lack of life experiences. (*People v. Sims* (1993) 5 Cal.4th 405, 429; *People v. Perez* (1994) 29 Cal.App.4th 1313, 1328; *Mitleider v. Hall* (9th Cir. 2004) 391 F.3d 1039, 1041-1045, 1048-1051 [and young and immature].)

7. The potential juror's occupation. (*People v. Young* (2005) 34 Cal.4th 1149, 1174 [counselor who has testified before in other sex assault cases and one who was an insurance claims specialist]; *People v. Howard* (1992) 1 Cal.4th 1132, 1155-1156 [non-practicing registered nurse]; *People v. Landry* (1996) 49 Cal.App.4th 785, 790 [youth services]; *People v. Barber* (1988) 200 Cal.App.3d 378, 394; *United States v. Thompson* (9th Cir. 1987) 827 F.2d 1254, 1260.)

8. Reluctance to be a juror. (*People v. Walker* (1998) 64 Cal.App.4th 1062, 1070; *Mitleider v. Hall* (9th Cir. 2004) 391 F.3d 1039, 1041-1045, 1048-1051.) (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].)

9. Eagerness to be a juror. (*People v. Ervin* (2000) 22 Cal.4th 48, 76.)

10. Hesitance in applying the death penalty. (*People v. Panah* (2005) 35 Cal.4th 395, 441; *People v. Smith* (2005) 35 Cal.4th 334, 347.)

11. Hesitance, Transient Background, and Grandmotherly 'Persona.' (*Boyde v. Brown* (9th Cir. 2005) 404 F.3d 1159, 1170.)

12. Body language can be proper grounds, at least if there is a sufficient record to support the prosecutor's observations. (*People v. Elliott* (2012) 53 Cal.4th 535, 569-570 [Juror failed to make eye contact with anyone, dressed informally, and had an unconventional hairstyle]; (*People v. Ward* (2005) 36 Cal.4th 186, 202 [hostility toward prosecutor; though record is silent, other than the prosecutor's assertions, there is no evidence to contradict it]; *People v. Reynoso* (2003) 31 Cal.4th 903, 919; *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1125-1126 [hostile look at prosecutor] *People v. Ervin* (2000) 22 Cal.4th 48 [nervousness during voir dire]; *People v. Turner* (1994) 8 Cal.4th 137, 170 [potential juror won't look prosecutor in the eye]; *People v. Johnson* (1989) 47 Cal.3d 1194, 1220 [shy][sleepy]; *People v. Dunn* (1995) 40 Cal.App.4th 1039, 1047; *People v. Perez* (1994) 27 Cal.App.4th 1313, 1330 [inappropriate laughter]; *Mitleider v. Hall* (9th Cir. 2004) 391 F.3d 1039, 1041-1045, 1048-1051; *Williams v. Rhoades* (9th Cir. 2004) 354 F.3d 1101 [uncorroborated assertion by prosecutor of the potential juror's body language enough for affirmance because of deferential standard of review]; but see *McClain v. Prunty* (9th Cir. 2000) 217 F.3d 1209 [implied body language not enough without the prosecutor stating the reason]; *Turner v. Marshall* (9th Cir. 1997) 121 F.3d 1248, 1254 [cannot infer demeanor when prosecutor never said so]; *United States v. Power* (9th Cir. 1989) 881 F.2d 733, 740 [fidgety and inattention]; *United States v. Changco* (9th Cir. 1993) 1 F.3d 837, 840 [passive and inattentive].) (*Rice v. Collins* 546 U.S. 333 (2006) [rolling of eyes, not seen by trial judge].)

Caution: Body language can be a dangerous area if the record does not support the reasons you are giving for the excuse. Be sure that you make a record of not only what body language or demeanor you observed but *why* this was important to you and how it affected your decision to excuse the juror. Further, try not to rely solely on body language or demeanor when excusing a cognizable class juror. (See, *People v. Long* (2010) 189 Cal.App. 4th 826) [record did not support prosecutors reasons for excusing juror and judge did not make a "sincere and reasoned" attempt to evaluate the prosecutor's reasons]). (*People v. Jones* (2011) 51 Cal.4th 346) [Prosecutor

gave specific and detailed reasons for challenges based upon body language and demeanor]).

Practice Tip: If you have a cognizable class juror who is nonverbally communicating in a way that concerns you (ie. Facial expressions, arms folded, sighing, etc.) ask them about it. For example, you might say, "Juror #2, I noticed that while Juror #8 was answering the last question, you had a look on your face that I interpreted as disagreement. Am I correct about that? Would you like to be heard?" If you do this in a respectful way, you accomplish the goal of putting the fact that you noticed it on the record. If you decide to kick this person later and get challenged, you can refer the Court back to this as one of the reasons you kicked the juror.

13. Bilingual Juror Who Won't Defer to Court Translator - (*Hernandez v. New York* (1991) 500 U.S. 352, 356-357) CAUTION – Be careful when kicking bilingual jurors as it could be seen as a cover for discrimination. (*See, People v. Gonzales* (2008) 165 Cal.App.4th 620)

14. Intelligence – (*People v. Arias* (1996) 13 Cal. 4th 92, 137-139)

15. Sympathetic to defendant – (*People v. McKinzie* (2012) 54 Cal.4th 1302, 1321-1322) [fact juror had been arrested for domestic violence was proper basis to challenge because 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. Mayfield* (1997) 14 Cal. 4th 668, 724-726)

16. Desire for next juror - (*People v. Jones* (2011) 51 Cal.4th 346, 367) [challenge upheld where prosecutor believed he had even better potential jurors who had not been called]; (See also, *People v. Alvarez* (1996) 14 Cal. 4th 155, 194-195).

But see, (*People v. Cisneros* (2015) 234 Cal.App.4th 111) [Holding that preference for next juror *alone* is not enough. You must also articulate reasons for excusing the challenged juror.]

17. Because prosecutor wished to ask the potential juror more questions. (*People v. Cleveland* (2004) 32 Cal.4th 704, 733.)

18. Mistake - (*Aleman* v. *Uribe* (9th Cir. 2013) 2013) [prosecutor mistakenly transposed two jurors' information. Prosecutor helped by making a good record that he was "under the weather"] (See *People v. Williams* (2013) 56 Cal.4th 630, 660-661 [holding that, regardless of whether prosecutor challenged one juror under the mistaken belief she was a different juror, there was no *Batson-Wheeler* violation since the reason given for challenging the juror (hesitancy to impose the death penalty) would have provided valid basis for challenging different juror].) (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1124 [prosecutor misunderstood the juror's answer]; *People v. Williams* (1997) 16 Cal.4th 153, 188-189; *United States v. Lorenzo* (9th Cir. 1993) 995 F.2d 1448, 1454-1455 [time crunch].)

But see, (*Castellanos v. Small* (2014) 766 F.3d 1137) [Prosecutor's stated reason was in error. It survived through the appellate courts as a mistake but the 9th Circuit ultimately found that the prosecutor's error to be pre-textual.]

19. Financial Hardship/Work Related Issues - (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]

3. STEP 3 – "If a race neutral explanation is tendered, the trial court must then decide… whether the opponent of the strike has proved purposeful racial discrimination." (*Johnson v. California* (2005) 54 U.S. 162)

a. "It is not until the third step that the persuasiveness of the justification becomes relevant – the step in which the trial court determines whether the opponent of the strike has carried his burden of proving purposeful discrimination." (*Purkett v. Elem* (1995) 514 U.S. 765, 768.) [Burden of proof of is preponderance of the evidence]

b. "[W]e rely on the good judgment of trial courts to distinguish bona fide reasons for such peremptories from sham excuses belatedly contrived to avoid admitting acts of group discrimination." (*People v. Wheeler* (1978) 22 Cal.3d 258, 282; *People v. Johnson* (1989) 47 Cal.3d 1194, 1216; see *Purkett v. Elem* (1995) 514 U.S. 765, 768.)

c. "This demands of the trial judge a sincere and reasoned attempt to evaluate the prosecutor's explanation in light of the circumstances of the case as then known, his knowledge of trial techniques, and his observations of the manner in which the prosecutor has examined members of the venire and has exercised challenges for cause or peremptorily . . . . " (*People v. Hall* (1983) 35 Cal.3d 161, 167-168; See also, *People v. Silva* (2001) 25 Cal. 4th 345, 386)

d. "In assessing credibility, the court draws upon its contemporaneous observations of the voir dire. It may also rely on the court's own experiences as a lawyer and bench officer in the community, and even the common practices of the advocate and the office that employs him or her. [Citation.]" (*People v. Lenix, supra*, 44 Cal.4th at p. 613, fn. omitted, *quoting Miller–El v. Cockrell* (2003) 537 U.S. 322, 339.)

e. It is proper for a trial court, in evaluating the prosecutor's justifications, to consider the prosecutor's actions in excusing jurors in a *previous trial* and whether a prosecutors kept members of the cognizable class at issue on the jury in a *prior trial.* (*People v. DeHoyos* (2013) 57 Cal.4th 79)

F. Comparative Analysis

This term refers to the process by which courts will evaluate the reasons given for the challenge of a member of a cognizable class. The courts will look for non-cognizable class jurors who were *not* challenged to see whether the reasons would apply equally. For example, if a prosecutor challenged an African American juror who was employed as a teacher and gave the reason, "Judge, I always kick teachers." The court would then look to see whether the prosecutor failed to challenge any teachers who were not members of a cognizable class.

1. History

Federal Courts approved of comparative analysis in *Turner v. Marshall* (9th Cir. 1997) 121 F. 3d 1248. California rejected comparative analysis in *People v. Landry* (1996) 49 Cal.App.4th 785. *People v. Jones* (1997) 15 Cal. 4th 119. However, things began to change in 2003 with *Johnson*. Then in 2005, the U.S. Supreme Court decided *Miller-El v. Dretke* (2005) 545 U.S. 231 using comparative analysis in the decision.

a. *Snyder v. Louisiana* (2008) 552 U.S. 472 – In *Snyder,* the U.S. Supreme Court found that the prosecutors race neutral reasons for excusing a black juror were implausible and were reinforced by the prosecutor's acceptance of white jurors who disclosed conflicting obligations similar to the excused juror. (*Id.* at 483-484). The Court held that a comparative analysis was appropriate since "the shared

characteristic, i.e., concern about serving on the jury due to conflicting obligations, was thoroughly explored by the trial court when the relevant jurors asked to be excused for cause." (*Id.* at p. 483)

b. *People v. Lenix* (2008) 44 Cal. 4th 602 – Comparative Analysis is alive in California.

"If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson's* third step." (*Id.* at p. 621) In reviewing the plausibility of a prosecutor's reasons for striking a juror, an appellate court can consider various kinds of evidence, including a comparison of panelists' responses. (*Id.* at p. 622) Failing to engage in comparative juror analysis for the first time on appeal unduly restricts review based on the entire record." (*Id.* at p. 622) "Thus, evidence of comparative juror analysis must be considered in the trial court and even for the first time on appeal if relied upon by defendant and the record is adequate to permit the urged comparisons." (*Id.* at p. 622)

The trial court has a duty to "assess the plausibility" of the prosecutor's proffered reasons for striking a potential juror, "in light of all evidence with a bearing on it." (*Id.* at p. 625) Trial courts "must evaluate the demeanor of the prosecutor in determining the credibility of proffered explanations, and the demeanor of the panelist when that factor is a basis for the challenge." (*Id.* at p. 625) It should be discernible from the record that "1) the trial court considered the prosecutor's reasons for the peremptory challenges at issue and found them to be race-neutral; 2) those reasons were consistent with the court's observations of what occurred, in terms of the panelist's statements as well as any pertinent nonverbal behavior; and 3) the court made a credibility finding that the prosecutor was truthful in giving race-neutral reasons for the peremptory challenges. (*Id.* at pp. 625-626)

"As to the second point, the court may not have observed every gesture, expression or interaction relied upon by the prosecutor. The judge has a different vantage point, and may have, for example, been looking at another panelist or making a note when the described behavior occurred. But the court must be satisfied that the specifics offered by the prosecutor are consistent with the answers it heard and the overall behavior of the panelist. The record must reflect the trial court's determination on this point (see *Snyder*, supra, at p. 460), which may be encompassed within the court's general conclusion that it considered the reasons proffered by the prosecution and found them credible." (*Id.* at pp. 625-626)

The court observed that comparative juror analysis is a form of circumstantial evidence (*Id.* at p. 622) and that a reviewing court must be careful not to accept one

reasonable interpretation to the exclusion of other reasonable ones when reviewing the circumstantial evidence supporting the trial court's factual findings in a *Batson/Wheeler* holding. "If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also be reasonably reconciled with a contrary finding does not warrant a reversal of the judgment." (*Id.* at pp. 625-626)

Comparative Analysis will only be considered for the first time on appeal at the *Third* Step. (*See, People v. Clark* (2016) 63 Cal.4th 522, 568 [Declining the defense invitation to engage in comparative analysis for the first time on appeal at the first step of *Batson*.])

2. "Positive" Comparative Analysis

This term refers to the idea of using comparative analysis to support a challenge of a member of a cognizable class by comparing other similarly situated non-cognizable class jurors who were also challenged. (*Rice v. Collins* (2006) 546 U.S. 333, 341 [prosecutor struck a white juror with the same characteristics of a cognizable class juror she struck]; (*Briggs v. Grounds* (2012) 682 F.3d 1165 [prosecutor struck at least on non-African American who indicated they would hold the prosecution to a higher standard of proof]).

IV. Practical Issues in Dealing with *Batson/Wheeler* Motions

A. Realize that a challenge will likely come at some point during jury selection and be ready to deal with it. It should go without saying, but ***NEVER*** excuse a juror on the basis of race, ethnicity, religion, gender etc…Question all jurors you plan to challenge. Desultory questioning does not count.

B. Be prepared to rebut the prima facie case. (See pp. 4-5)

C. Assume that a prima facie case will be made and be prepared to give race neutral reasons for excusing the juror. While peremptory challenges are often based on instinct and it can sometimes be hard to articulate the reason for removing a juror, "a prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives." (*People* v. *Lenix* (2008) 44 Cal.4th 602, 624.) Prosecutors should "provide as complete an explanation for their peremptory challenges as possible." (*People* v. *Lenix* (2008) 44 Cal.4th 602, 624.)

D. If you can't recall specifically why you excused a juror, it is better to ask for a "time out" so that you may review the transcript/recording of the juror's answers. (See *Lewis v. Lewis* (9th Cir. 2003) 321 F.3d 824 [suggesting that counsel can be

particularly helpful in assisting the court at the third step of *Batson* "when afforded the opportunity to review a transcript of the jury selection proceedings"].)

E. If judge finds no prima facie case, insist that the finding is placed on the record. Then state your reasons anyway. But, DO NOT give reasons unless and until the court specifically finds no prima facie case. Giving reasons without a specific finding on the first prong will constitute an implied finding of a prima facie case. *People v. Arias* (1996) 13 Cal. 4th 92; *People v. Gutierrez* (2002) 28 Cal. 4th 1083. *People v. Scott* (June 8, 2015, S094858) __ Cal. 4th __ [2015 WL 3541280]

F. Trial Tips

1. Create a Good Record

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.)

2. Obtain a Transcript of Voir Dire Before Making Challenges

In certain situations, a prosecutor may not recall or have accurate notes regarding the responses of a juror he or she wishes to challenge. In those cases, it is appropriate and recommended that the prosecutor ask for read back of the juror's responses. (*See Lewis v. Lewis* (9th Cir. 2003) 321 F.3d 824)

3. Ask Court to Note the Final Jury Composition

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"].)

4. Save your notes. If case is reviewed later, voir dire may be an issue. Always save your notes so that if asked, you are better able to recollect why you may have challenged a specific juror.

a. At remand hearing, the prosecutor does NOT have to state reasons under oath. (*People v. Kelly* (2008) 162 Cal.App.4th 797)

b. At remand hearing, the prosecutor does NOT have to turn over original voir dire notes. (*People v. Kelly* (2008) 162 Cal.App.4th 797)

c. At remand hearing, prosecutor cannot be cross-examined by the defense. (*People v. Kelly* (2008) 162 Cal.App.4th 797)

d. "I don't recall" May or May Not Fly – (*Paulino v. Harrison* (9th Cir. 2008) 542 F.3d 692); (But see, *Yee* v. *Duncan* (9th Cir. 2006) 463 F.3d 893.) [notwithstanding the inability to recall reason for excusing one cognizable class juror, totality of prosecutor's responses regarding other excused jurors did not evidence a discriminatory motive].)

e. If you use shorthand, make sure you define your terms. Don't make a reviewing court guess at what you meant. (*See, Foster v. Chatman* (2016) 136 S.Ct. 1737 [Murder conviction reversed for third step *Batson* violation. Very bad facts that we hope to never see. However, it's instructive on the issue of the clarity, or lack thereof, of the prosecutor's notes.])

G. Remedies

1. *Wheeler-Batson* error is reversible per se. (*People v. Wheeler* (1978) 22 Cal.3d 258, 283; see *Miller-El v. Dretke* (2005) 545 U.S. 231)

a. Step One Error: When the trial court erroneously finds there was not a prima facie case, the matter is often remanded for prosecutor to state reasons for

peremptory challenge. (*Batson v. Kentucky* (1986) 476 U.S. 79, 100; *People v. McGee* (2002) 104 Cal.App.4th 559, 571, 573 [remand to permit prosecutor give reasons].) This remedy has been criticized for two reasons. First, the long passage of time makes it nearly impossible for the prosecutor to genuinely remember the real reason. (*People v. Hall* (1983) 35 Cal.3d 161, 171 [pointless to remand for the prosecutor to give a reason 11 years later]; *People v. Allen* (2004) 115 Cal.App.4th 542, 553-554, fn. 10 [remand for new trial, not for the prosecutor to give reasons, because occurred three years ago]; see also *People v. Ayala* (2000) 24 Cal.4th 243, 297, fn. 8 (conc. opn. of George, C.J.); *People v. Robinson* (2003) 110 Cal.App.4th 1196, 1208 [remand for the prosecutor to give the reason but retrial if it could not recall]; *People v. Williams* (2000) 78 Cal.App.4th 1118, 1130 [on remand, the court must first determine if it can adequately address the issue after the delay]; *United States v. Alcantar* (9th Cir. 1990) 897 F.2d 436, 438-439.) Second, this procedure is subject to a prosecutor trying to invent more legitimate reasons after the fact. (See, e.g., *Miller-El v. Dretke* (2005) 545 U.S. 231 [prosecution's reasons after the fact "reeks of afterthought"]; *Miller-El v. Cockrell* (2003) 537 U.S. 331, 343 [reasons given after trial "was subject to the usual risks of imprecision and distortions from the passage of time"]; see also *Johnson v. California* (2005) 545 U.S. 162, quoting *Paulino v. Castro* (9th Cir. 2004) 371 F.3d 1083, 1090 ["it does not matter that the prosecution might have had good reasons . . . [w]hat matters is the real reason they were stricken"].)

b. Step Three Error: When the trial court fails to sustain motion after the prosecutor gives reason, error normally requires new venire. (*People v. Wheeler* (1978) 22 Cal.3d 258, 283; see *Miller-El v. Dretke* (2005) 545 U.S. 162). However, the defendant in the trial court can stipulate to a different remedy. (*People v. Willis* (2002) 27 Cal.4th 811, 821-824 [with consent of movant, can use other remedies such as sanctions, reinstating removed jurors or doing challenges at sidebar]; *People v. Overby* (2004) 124 Cal.App.4th 1237, 1244-1245 [defendant not objecting to judge re-seating the excused juror indicates consent to this remedy]. (See *People v. Mata* (2013) 57 Cal.4th 178) [holding that the trial court may reseat an improperly challenged juror if affected counsel either expressly or implicitly consents]

2. Consequences

a. If the court grants a *Batson/Wheeler* motion at trial and employs one or more of the remedies discussed, that is arguably a "sanction".

1. Court must notify the bar of any judicial sanctions against an attorney (Business & Professions Code §6068(a)(3)).

2. Attorney must self report any judicial sanction (Business & Professions Code §6068(o)(3)).

3. However, reporting will likely not be required unless the conduct is egregious.

b. If the trial court erroneously denies a *Batson/Wheeler* motion at trial and the case is reversed

1. Court must notify bar whenever there is a reversal. (Business & Professions Code §6086.7(b)(2)).

2. Attorney must notify bar whenever reversal is based in whole or in part upon misconduct of the attorney. (Business & Professions Code §6068(o)(7)).

AUTHORITY FOR VOIR DIRE

- CCP223: Voir dire "shall be conducted only in aid of the exercise of challenges for cause."
- CCP225(b): Challenges for cause can be made by either side for either implied bias or actual bias and are unlimited.
- CCP223: Endows the court with broad discretion to control time and subject matter of questioning, limited only to reversal where a ruling resulted in miscarriage of justice.

ACTUAL BIAS: CCP 225(b)

"*The existence of a state of mind on the part of the juror in reference to the case, or to any of the parties, which will prevent the juror from acting with entire impartiality, and without prejudice to the substantial rights of any party.*"

IMPLIED BIAS: CCP 229

- Consanguinity or affinity with party or victim;
- Relationship;
- Prior service in same matter;
- Interest in the action;
- Unqualified opinion or belief as to the merits of the action founded by knowledge of material facts or some of them;
- Enmity or bias towards or against a party;
- Party to an action before same jury; and
- Opposition to death penalty in capital case.

Proper Subject Matter

- Cannot ask questions whose sole purpose is to educate the jury, compel the vote a certain way, prejudice, argue or indoctrinate.
- Cannot instruct on law or test a juror's knowledge of the law.
- Cannot question on attitude about law unless relevant and controversial.
- Limiting questions on race bias may result in reversal.

Peremptory Challenges
CCP 231

Sentence	Prosecution	Defense	Multiple Defendants
<90days	6	6	**Defense** 6 joint, 4 individual **Prosecution** 6, plus 4 per defendant
>90 ~ <Life	10	10	**Defense** 10 joint, 5 individual **Prosecution** 10, plus 5 per defendant
Life or Death	20	20	**Defense** 20 joint, 5 individual **Prosecution** 20, plus 5 per defendant

The problem with your gut...

- It will not save you from Wheeler.
- Practice Inclusivity.
  - There are mechanism's for dealing with rogue jurors
  - It can help your case
  - It will help change the dynamics of exclusion
  - It's the law

Voir Dire Mechanics

Voir Dire should be conducted to assist you in making well-grounded challenges for cause and allow you to identify less suitable jurors subject to peremptory challenges. The rules regarding juror challenges can be found in the *Code of Civil Procedure §§ 225-231.*

In a criminal trial, "[e]xamination of prospective jurors shall be conducted only in aid of the exercise of challenges for cause." *CCP § 223.* Challenges for cause can be made by either side for either *implied bias* or *actual bias CCP §225(b).* The ultimate determination to excuse a juror for cause is made by the court. *CCP §230.* "The trial court's exercise of its discretion in the manner in which voir dire is conducted, including any limitation on the time which will be allowed for direct questioning of prospective jurors by counsel and any determination that a question is not in aid of the exercise of challenges for cause, shall not cause any conviction to be reversed unless the exercise of that discretion has resulted in a miscarriage of justice, as specified in Section 13 of Article VI of the California Constitution." *CCP § 223.*

There are eight categories of implied bias listed in *CCP §229*:

1) Consanguinity or affinity with party or victim;
2) Relationship;
3) Prior service in same matter;
4) Interest in the action;
5) Unqualified opinion or belief as to the merits of the action founded by knowledge of material facts or some of them;
6) Enmity or bias towards or against a party;
7) Party to an action before same jury; and
8) Opposition to death penalty in capital case.

Actual bias is defined as "*the existence of a state of mind on the part of the juror in reference to the case, or to any of the parties, which will prevent the jurorfrom acting with entire impartiality, and without prejudice to the substantial rights of any party*." *CCP§225(b)(1)(C).*

No peace officer, as defined in Section 830.1, subdivision (a-c) of Section 830.2, and subdivisions (a) of Section 830.33, of the Penal Code, shall be selected for voir dire in a criminal matter. *CCP § 219.*

Number of Challenges

There is no limitation on the number of challenges for cause, however, the trial court does not have sua sponte duty to excuse biased jurors when counsel has failed to exercise a peremptory challenge for that purpose. *People v. Bolin* (1998) 18 Cal.4th 297.

The number of peremptory challenges depends upon the possible sentence of the offense charged and the number of defendants. If the offense is punishable with *maximum term of imprisonment of 90 days or less*, each side gets *6* peremptory challenges. *CCP §231*
If the offense is punishable with *death or with imprisonment in the state prison for life*, each side gets *20* peremptory challenges. *CCP §231(a).* In *all other cases* each side gets *10* peremptory challenges.

In multiple defendant cases with sentences under 90 days, the People get *6* challenges and the defendants get *6 challenges jointly*. Each defendant is additionally entitled to *4 separate challenges*. The People get as many challenges as are allowed all defendants. *CCP§231(b)*
In life in prison and death cases – The People get *20* challenges and the defendants get *20 challenges jointly*. Each defendant is additionally entitled to *5 separate challenges*. The People get as many challenges as are allowed all defendants. *CCP §231(a)*

In all other cases, the People get *10* challenges and the defendants get *10 challenges jointly*. Each defendant is additionally entitled to *5 separate challenges*. The People get as many challenges as are allowed all defendants. *CCP§231(a)*

The selection of Alternate jurors is governed by *CCP§234*. Challenges are allotted as follows: In a single defendant case, there is one challenge for each side per the number of alternates. In a multiple defendant case, each defendant gets one challenge per number of alternates and the People get the same total number as the defense team.

Proper Subject Matter For Attorney Inquiry

It is improper to ask questions intended solely to educate the jury, compel the jurors to commit to vote a certain way, prejudice the jury, argue the case, indoctrinate the jury, instruct the jury on the law, or test the juror's knowledge of the law. *People v. Edwards* (1912) 163 Cal. 752; *People v. Willams* (1981) 29 Cal.3d 392, 408; *People v. Ashmus* (1991) 54 Cal.3d 932, 959.

It is permissible to ask a juror about his attitude about a particular rule of law only if (1) the rule is relevant or material to the case, and (2) the rule appears to be controversial; e.g., the juror has indicated some hostility toward the rule, or it is commonly known the community harbors strong feelings about it. *People v. Balderas* (1985) 41 Cal.3d 144, 185; *People v. Williams* (1981) 29 Cal.3d 392, 408.

It is improper to use voir dire questions for the sole purpose of argument by counsel. *People*

v. Mitchell, 61 Cal 2d 353, 366.

A trial judge's refusal to permit any voir dire questions concerning racial bias or prejudice may require reversal. *People v. Wilborn* (1999) 70 Cal.App.4th 339. In a case involving an interracial killing, a trial court during general voir dire is required to question prospective jurors about racial bias on request. *People v. Bolden* (2002) 29 Cal.4th 515. Expect to see broadening of this area of inquiry in response to current events and opposing views on race and policing.

"Any question whose sole purpose is '… to attempt to precondition the prospective jurors to a particular result' should be excluded." Similarly, "any question whose sole purpose is "… to attempt to precondition the prospective jurors to a particular result" should be excluded. [CRC Standards of Jud. Admin., Standard 3.25(f)] *Scope of Permissible Voir Dire—Proper vs. Improper Questions*, Cal. Prac. Guide Civ. Trials & Ev. Ch. 5-G

Examples of Permissible Questions

Asking jurors whether they would be able to vote guilty if, after deliberations, they were persuaded that the changes had been proved beyond a reasonable doubt. *People v. Fierro* (1991) 1 Cal.4th 173, 209)

"[I]f I prove beyond a reasonable doubt each and every element of each of the offenses charged . . . can you assure me that you would be willing to return a verdict of guilty even though you have unanswered questions?" *People v. Riel* (2000) 22 Cal.4th 1153, 1178 fn. 4.

In order to avoid a hung jury the prosecutor observed that each juror must "come to your own conclusion," but also stressed the value of "work[ing] together to try to discover the truth." *People v. Fierro* (1991) 1 Cal.4th 173, 210, fn 8.

Prosecutor's "hypothetical" voir dire illustrations of aggravating and mitigating factors were permissible in capital murder prosecution, even though the prosecutor used examples of aggravating factors closely resembling the facts of the case and used examples of mitigating factors unlike the defendant's mitigating evidence. *People v. Seaton* (2001) 26 Cal.4th 598.

In questioning a juror, the prosecutor asked her if she believed a person charged with committing a crime such as defendant's must be insane. The prosecutor also asked: Do you feel there could be such a thing as a person who is legally insane? *People v. Fields* (1983) 35 Cal.3rd 329, 358.

Whether a juror would view a person's possession of recently stolen property as circumstantial evidence that the person stole the property. (*People v. Mendoza* (2000) 24 Cal.4th 130, 167.)

Whether a juror considered rape more of an assaultive than a sexually motivated offense, and whether they thought it was possible for a young man to rape an elderly woman and not be mentally ill. (*People v. Mendoza* (2000) 24 Cal.4th 130, 167.)

While counsel may ask prospective jurors if they are able to return a verdict in if supported by the evidence, it is not proper to ask for their commitment to do so. *Scope of Permissible Voir Dire—Proper vs. Improper Questions*, Cal. Prac. Guide Civ. Trials & Ev. Ch. 5-G.

Examples of Impermissible Questions

"I had a case a few years ago where three teenage girls were killed in Huntington Beach and [it was a] very emotional case. It was about a three week long trial, very strong evidence against the defendant. At the end of the trial the jury went out and the families were there every single day, the families of [the] three girls and they sat there. The jury didn't come back the first day and the families started getting very upset and crying, you know. They would [ask] me what is wrong, why, how come they didn't make a decision. I don't know. Next day came back same thing, the families are all upset—[¶] ... [¶] ... The jurors came back and we asked them why—what took so long. Oh, we knew he was guilty the first day, but we wanted to figure out this one other issue.... [¶] ... [¶] ... My question is would any of—if you had other questions but they didn't go to the elements, the actual like 1, 2, 3 elements, if you were convinced beyond a reasonable doubt of the elements, even though you might have some question very interesting, but didn't go to that element [,] would you be able to convict?" *People v. Castillo* (2008) 168 Cal.App.4th 364, 380. This contextual question inserted information clearly designed to evoke sympathy for the victims in the case.

"If any of you (prospective jurors) find a question particularly embarrassing, and you would prefer to answer in the judge's chambers rather than here in open court, please let me know and I will be glad to ask the judge to allow you to do so." *Scope of Permissible Voir Dire—Proper vs. Improper Questions*, Cal. Prac. Guide Civ. Trials & Ev. Ch. 5-G. This is an impermissible form of questioning because it is used to "curry favor" since you are the hero. The admonition may be proper if the directive is simply to advise the court if you wish to answer in private.

"Do you agree then that a killing done intentionally should be treated more strongly or more severely than a killing that is accidentally done or unintentionally done?" *People v. Mitchell*, 61 Cal 2d 353, 366.

"Are you sure you haven't seen my client's picture in the paper as coach of the championship Little League baseball team from St. Luke's Church?" *Scope of Permissible Voir Dire—Proper vs. Improper Questions*, Cal. Prac. Guide Civ. Trials & Ev. Ch. 5-G.

Do you believe in self-defense in the home? (Not controversial; *People v. Williams* (1981)

29 Cal.3d 392, 411.)

"Whether, if they believed that a witness was an informant and was testifying 'in exchange for some lesser sentence,' then that 'would have some bearing on the weight or credibility that that witness may have in your mind?' " *People v. Mason* (1991) 52 Cal.3d 909, 940.

In a death penalty case, the court did not "allow either party to discuss the law – such as the meaning of diminished capacity – or ask questions that required the prospective jurors to pre-try the facts of the case." *People v. Rich* (1988) 45 Cal.3rd 1036, 1104.

Defense counsel was not permitted to question prospective jurors regarding their ability to view accomplice testimony with suspicion and distrust. *People v. Johnson* (1989) 47 Cal.3rd 1194, 1224.

In an eyewitness case where the defense expected to call an ID expert, the defense was prohibited from eliciting opinions of potential jurors concerning the effects of stress on perception. *People v. Sanders* (1990) 51 Cal.3rd 471, 506.

Defense counsel stated, "It's clear a girlfriend has an interest to lie. I just want to make sure that the jurors don't automatically, before they hear her testimony, say she's lying because she's the girlfriend." The trial court barred this line of questioning on the ground that the defendant was trying to educate the jurors and induce them to prejudge the evidence. We cannot say that the court abused its discretion in doing so. *People v. Helton* (1984) 162 Cal.App.3rd 1141, 1145.

"What do you feel is a proper punishment for someone who has committed a rape or other serious sexually related crime?" *People v. Ochoa* (1998) 19 Cal.4th 353, 444.

Many detailed questions regarding personal experience with sexual molestation in a child molestation-murder case. *People v. Earp* (1999) 20 Cal.4th 826, 851, fn 1.

Handling a *Batson/Wheeler* Motion

I. Overview

A. Every prosecutor will have to deal with the dreaded "*Wheeler"* motion. It usually occurs following the People's use of a peremptory challenge against someone of a particular race, gender or ethnic background.

B. How it works – The defense makes a motion, usually on state and federal grounds, that the prosecutor has excused a juror based on racial, ethnic or other improper grounds and has therefore violated the defendant's Constitutional right to a fair and impartial jury. The defendant does not have to be a member of the excluded group to complain of a violation. *People v. Wheeler* (1978) 22 Cal. 3d 258, 281. (**Note**: While the defense usually brings the motion, it may be made by *either party*.)

C. It goes without saying that no prosecutor should exercise a peremptory challenge against a juror based solely on that juror's gender, sexual orientation, or membership in a racial, ethnic, or religious group. But a prosecutor should not refrain from challenging a juror for *permissible* reasons out of a concern that the defense will raise a disingenuous or frivolous *Batson/Wheeler* claim.

D. THREE STEP PROCESS
"First, the defendant must make out a prima facie case 'by showing that the totality of relevant facts give rise to an inference of discriminatory purpose.' Second, once the defendant has made out a prima facie case, the 'burden shifts to the State to explain adequately the racial exclusion' by offering permissible race-neutral justifications for the [peremptory] strikes. Third, '[i]f a race-neutral explanation is tendered, the trial court must decide . . . whether the opponent of the strike has proved purposeful racial discrimination.' " (*Johnson v. California* (2005) 545 U.S. 162)

II. History

A. *Batson* ***is*** the federal standard and *Wheeler* ***was*** the California standard used to determine whether the peremptory challenge was improper.

B. Both cases used procedures involving 3 part tests to determine the propriety of the challenge. However, the first prong of the tests in each case was different.

Defendants argued the state burden (Wheeler) was more difficult for them to meet than the federal burden (Batson).

C. The California Supreme Court tried to reconcile the two cases in 2003 in *People v. Johnson* (2003) 30 Cal. 4th 1302.

D. In 2005, the U.S. Supreme Court reversed *Johnson* and "clarified" the *Batson* decision by stating that the first prong of the *Batson* test need only be satisfied by production of evidence sufficient to permit the trial judge to draw an *inference of discrimination*. (*Johnson v. California* (2005) 545 U.S. 162.)

E. Current State of the Law - Still a 3 prong test based on the holdings of *Batson* and *Johnson.* Although *Wheeler* is still good law, the first step has been replaced by the *Batson* first step. (*Johnson v. California* (2005) 545 U.S. 162.)

III. Analysis

A. *People v. Wheeler* (1978) 22 Cal. 3d 258 – Peremptory challenges based on group bias violates the defendant's right to jury trial in the California Constitution. *Batson v. Kentucky* (1986) 476 U.S. 79 – Race based challenges violate the Equal Protection Clause of the U.S. Constitution. (*See Also, People v. Bonilla* (2007) 41 Cal.4th 313, 341).

B. Objection Made – The claim is waived if the defendant fails to make a timely objection and a record sufficient for appellate review. (*People v. Wheeler* (1978) 22 Cal.3d 258, 280; *People v. Morris* (2003) 107 Cal.App.4th 402, 408-409) Motion made after jury was sworn but before alternates were sworn was not untimely. Jury empanelment is completed when all jurors, including alternates, are selected and sworn in. *People v. Scott* (June 8, 2015, S094858) __ Cal. 4th __ [2015 WL 3541280]

C. Cognizable Class – "An identifiable group distinguished on racial, religious, ethnic, or similar grounds…" *People v. Wheeler* (1978) 22 Cal. 3d 258, 276. Two requirements for a cognizable class:

> 1) Members share a common perspective arising from life experience in the group; and
> 2) No other members of the community are capable of adequately representing the group perspective. (*See, Rubio v. Superior Court* (1979) 24 Cal.3d 93, 98).

Courts and Statutes have recognized several categories of cognizable classes or groups.

1. Race - (*See, Batson v. Kentucky* (1986) 476 U.S. 79 & *People v. Wheeler* (1978) 22 Cal. 3d 258).

2. Ethnicity – Although there are fewer reported cases regarding ethnicity, be aware that it is a cognizable class. For example, Native Americans were the subject of the violation in *United States v. Bauer* (9th Cir. 1996) 84 F.3d 1549.

3. Religion – *People v. Johnson* (1989) 47 Cal.3d 1194, 1217 [Jewish Jurors]

4. Gender – Gender appears to be a cognizable class and should be treated as such. However, most cases dealing with gender also carry a racial component as well. (*People v. Crittenden* (1994) 9 Cal.4th 83, 115 [African-American woman]; *People v. Garceau* (1993) 6 Cal.4th 140, 171 [Hispanic woman]

5. Sexual Orientation – *People v. Garcia* (2000) 77 Cal.App.4th 1269, 1272. (*See Also,* Code of Civil Procedure §231.5)

6. Age – Although not a federally protected class, Code of Civil Procedure §231.5 added "Age" as a protected class in 2016 added by operation of Government Code §11135.

7. Disability – Although not a federally protected class, Code of Civil Procedure §231.5 added "Disability", both mental and physical, as a protected class in 2016 by operation of Government Code §11135**.**

D. Non-Cognizable Class

1. Poor – *People v. Carpenter* (1999) 21 Cal.4th 1016, 1035

2. Less Educated – *People v. Estrada* (1979) 93 Cal.App.3d 76, 90-91

3. Battered Women – *People v. Macioce* (1987) 197 Cal.App.3d 262, 280

4. Young – *People v. Ayala* (2000) 24 Cal.4th 243, 277-278; *United States v. Fletcher* (9th Cir. 1992) 965 F.2d 781, 782 -- (Caveat: See CCP§231.5 & Gov't Code §11135)

5. People over 70 – *People v. McCoy* (1995) 40 Cal.App.4th 778, 783 -- (Caveat: See CCP§231.5 & Gov't Code §11135)

6. "Insufficient" English – *People v. Lesara* (1998) 206 Cal.App.3d 1304, 1307

7. Unconventional Hairstyle – *Purkett v. Elem* (1995) 514 U.S. 765, 769

8. People who have been arrested *or* been victims – *People v. Fields* (1983) 35 Cal.3d 329, 348

9. "People of Color" – Combining all minority groups does not constitute a "cognizable class". *People v. Davis* (2009) 46 Cal. 4th 539

E. Challenge Exercised Against Member of Cognizable Class

1. Step One – The party objecting to the peremptory challenge must make out a prima facie case "by showing the totality of the relevant facts gives rise to an inference of a discriminatory purpose." *Johnson v. California* (2005) 545 U.S. 162. There is a presumption that that the party exercising the challenge (usually the prosecution) does so on a constitutionally permissible ground. (*People v. Wheeler* (1978) 22 Cal. 3d 258). Thus, the objecting party (usually the defense) must demonstrate a "prima facie case".

a. Prima Facie Case – The court in *Wheeler* provided four examples of ways to demonstrate a prima facie case:

1. "A party may show that his opponent struck most or all of the members of the identified group from the venire."
2. "He may also demonstrate that the jurors in question share only this one characteristic—their membership in the group—and that in all other respects they are as heterogenous as the community as a whole."
3. "Next, the showing may be supplemented . . . by such circumstances as the failure of the opponent to engage these same jurors in more than desultory voir dire, or indeed to ask them any questions at all."
4. "Lastly, . . . the defendant need not be a member of the excluded group in order to complain of a violation of the representative cross-section rule." However, this can be probative in making the determination. (*People v. Wheeler* (1978) 22 Cal. 3d 258, 280-281; *People v. Reynoso* (2003) 31 Cal.4th 903, 914.)

b. "[A] 'pattern' of strikes against black jurors included in the particular venire might give rise to an inference of discrimination. Similarly, the prosecutor's questions and statements during *voir dire* examination and in exercising his challenges may support or refute an inference of discriminatory purpose." (*Batson v. Kentucky* (1986) 476 U.S. 79, 96-97.)

c. Rebut the prima facie case by arguing applicable factors:

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

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

3. The fact that you have <u>not</u> used a disproportionate number of your challenges against members of the cognizable class is a factor that weighs against finding an inference of discrimination. (*People v. Streeter* (2012) 54 Cal.4th 205, 223 [no prima facie case where prosecutor excused three of five African Americans]; *People v. Clark* (2011) 52 Cal.4th 856, 903 [statistical analysis subject to various interpretations and did not raise an inference of discrimination]; *People* v. *Bell* (2007) 40 Cal.4th 582, 598 [considering fact prosecutor used only two of 16 peremptory challenges against members of the cognizable class at issue in finding the prosecutor's challenges created no inference of discrimination]; *People v. Cornwell* (2005) 37 Cal.4th 50, 70 [no prima facie case where prosecutor challenged one out of two African-American prospective jurors]). However, See *Ayala v. Wong* (9th Cir. 2012) 693 F.3d 945, 964 [Statistical evidence alone established a prima facie case where prosecution struck each of the seven black or Hispanic jurors available for challenge].

4. If you have passed on a panel that includes members of the cognizable class, this fact should be mentioned as it undercuts an inference of discrimination. (*People v. Streeter* (2012) 54 Cal.4th 205, 225 [prosecutor passed five times with up to four African Americans in jury box]; *People v. Clark* (2011) 52 Cal.4th at 856, 906 [no prima facie case where prosecutor passed two African-American jurors during several rounds before finally excusing them].) The prosecutor's acceptance of a panel including African-American prospective jurors, while not conclusive, was " 'an indication of the prosecutor's good faith in exercising his peremptories, and … an appropriate factor for the trial judge to consider in ruling on a *Wheeler* objection … .' " (*People v. Hartsch* (2010) 49 Cal.4th 472, 487). (See also, *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].)

5. Point out any members of the cognizable class who were challenged by the defense. However, be aware that this fact will not carry the day for you. It is simply something you may want to point out on the record. Further rehabilitation of prospective jurors of a cognizable class ought to be challenged can be an

important factor in rebutting a prima facie case. (*People v. Streeter* (2012) 54 Cal.4th 205, 225 [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, citing *People v. Hartsch* (2010) 49 Cal.4th 472, 487]).

6. If you were honestly not aware the juror was a member of a cognizable group. *People v. Barber* (1988) 200 Cal.App.3d 378, 389. [Challenged juror appeared to be a white and non-Hispanic to DA. DA did not recognize the surname to be Hispanic. Court found DA to be sincere]

2. Step Two – If a prima facie case is made, the "burden shifts to the [party making the original, objected to juror challenge] to explain adequately the racial [or other cognizable class] exclusion by offering permissible race neutral justifications for the strikes." (*Johnson v. California* (2005) 545 U.S. 162)

"The justification need not support a challenge for cause, and even a 'trivial' reason, if genuine and neutral, will suffice." (*People v. Arias* (1996) 13 Cal. 4th 92, 136 citing *People v. Montiel* (1993) 5 Cal. 4th 877, 910, fn. 9.)

a. Examples of Permissible Reasons

1. Legal contacts. (*People v. Panah* (2005) 35 Cal.4th 395, 441-442 [potential juror was arrested and charged with a crime]; *People v. Young* (2005) 34 Cal.4th 1149, 1174 [counselor had testified before in sex assault cases]; *People v. Cleveland* (2004) 32 Cal.4th 704, 733 [son was in jail]; *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1124 [father was arrested and charged with a crime and the potential juror had been roughed up by officers]; *People v. Farnam* (2002) 28 Cal.4th 107, 137-138; *People v. Williams* (1997) 16 Cal.4th 635, 664-665 [by family member]; *People v. Arias* (1996) 13 Cal.4th 92, 138; *People v. Turner* (1994) 8 Cal.4th 137, 171; *People v. Sims* (1993) 5 Cal.4th 405, 430; *People v. Cummings* (1993) 4 Cal.4th 1233, 1282; *People v. Johnson* (1989) 47 Cal.3d 1194, 1215; *People v.Walker* (1988) 47 Cal.3d 605, 625-626; *People v. Wheeler* (1978) 22 Cal.3d 258, 275 [been a crime victim]; *People v. Douglas* (1995) 36 Cal.App.4th 1681, 1690; *People v. Martinez* (2000) 82 Cal.App.4th 339, 344-345 [family member]; *People v. Martin* (1998) 64 Cal.App.4th 378, 385, fn. 5 [crime victim]; *People v. Buckley* (1997) 53 Cal.App.4th 658, 667; *People v. Barber* (1988) 200 Cal.App.3d 378; *Mitleider v. Hall* (9th Cir. 2004) 391 F.3d 1039, 1041- 045, 1048-1051 [contacts by family members].)

2. Served on hung jury before. (*People v. Farnam* (2002) 28 Cal.4th 107, 137-138.)

3. Views on the legal system. (*People v. Ward* (2005) 36 Cal.4th 186, 201 [unfavorable views toward guilt]; *People v. Cleveland* (2004) 32 Cal.4th 704, 733 [hesitant in answering questions on the death penalty]; *People v. Yeoman* (2003) 31 Cal.4th 93, 116-117 [not strong enough views on the death penalty]; *People v. Burgener* (2003) 29 Cal.4th 833, 864 [skeptical in imposing death penalty]; *People v. Farnam* (2002) 28 Cal.4th 107, 137; *People v. Caitlin* (2001) 26 Cal.4th 81, 118 [skeptical about imposing death penalty]; *People v. Buckley* (1997) 53 Cal.App.4th 658, 666-667 [legal training]; *Boyd v. Newland* (9th Cir. 2004) 393 F.3d 1008, 1013 [ambivalence towards the legal system]; *Tolbert v. Gomez* (9th Cir. 1999) 189 F.3d 1099; *United States v. Fike* (5th Cir. 1996) 82 F.3d 1315, 1320.)

4. The potential juror's lack of disclosure. (*People v. Diaz* (1984) 152 Cal.App.3d 926, 932; see *In re Hitchings* (1993) 6 Cal.4th 97, 112; *Mitleider v. Hall* (9th Cir. 2004) 391 F.3d 1039, 1041-1045, 1048-1051 [potential juror apparently not honest].)

5. The potential juror appeared to be a non-conformer. (*Purkett v. Elem* (1995) 514 U.S. 765, 769 (per curiam) [long hair]; *People v. Ayala* (2000) 24 Cal.4th 243, 261; *People v. Howard* (1992) 1 Cal.4th 1132, 1208; *People v. Wheeler* (1978) 22 Cal.3d 258, 275.) (*People v. Ward* (2005) 36 Cal. 4th 186, 202)

6. Lack of life experiences. (*People v. Sims* (1993) 5 Cal.4th 405, 429; *People v. Perez* (1994) 29 Cal.App.4th 1313, 1328; *Mitleider v. Hall* (9th Cir. 2004) 391 F.3d 1039, 1041-1045, 1048-1051 [and young and immature].)

7. The potential juror's occupation. (*People v. Young* (2005) 34 Cal.4th 1149, 1174 [counselor who has testified before in other sex assault cases and one who was an insurance claims specialist]; *People v. Howard* (1992) 1 Cal.4th 1132, 1155-1156 [non-practicing registered nurse]; *People v. Landry* (1996) 49 Cal.App.4th 785, 790 [youth services]; *People v. Barber* (1988) 200 Cal.App.3d 378, 394; *United States v. Thompson* (9th Cir. 1987) 827 F.2d 1254, 1260.)

8. Reluctance to be a juror. (*People v. Walker* (1998) 64 Cal.App.4th 1062, 1070; *Mitleider v. Hall* (9th Cir. 2004) 391 F.3d 1039, 1041-1045, 1048-1051.) (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].)

9. Eagerness to be a juror. (*People v. Ervin* (2000) 22 Cal.4th 48, 76.)

10. Hesitance in applying the death penalty. (*People v. Panah* (2005) 35 Cal.4th 395, 441; *People v. Smith* (2005) 35 Cal.4th 334, 347.)

11. Hesitance, Transient Background, and Grandmotherly 'Persona.' (*Boyde v. Brown* (9th Cir. 2005) 404 F.3d 1159, 1170.)

12. Body language can be proper grounds, at least if there is a sufficient record to support the prosecutor's observations. (*People v. Elliott* (2012) 53 Cal.4th 535, 569-570 [Juror failed to make eye contact with anyone, dressed informally, and had an unconventional hairstyle]; (*People v. Ward* (2005) 36 Cal.4th 186, 202 [hostility toward prosecutor; though record is silent, other than the prosecutor's assertions, there is no evidence to contradict it]; *People v. Reynoso* (2003) 31 Cal.4th 903, 919; *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1125-1126 [hostile look at prosecutor] *People v. Ervin* (2000) 22 Cal.4th 48 [nervousness during voir dire]; *People v. Turner* (1994) 8 Cal.4th 137, 170 [potential juror won't look prosecutor in the eye]; *People v. Johnson* (1989) 47 Cal.3d 1194, 1220 [shy][sleepy]; *People v. Dunn* (1995) 40 Cal.App.4th 1039, 1047; *People v. Perez* (1994) 27 Cal.App.4th 1313, 1330 [inappropriate laughter]; *Mitleider v. Hall* (9th Cir. 2004) 391 F.3d 1039, 1041-1045, 1048-1051; *Williams v. Rhoades* (9th Cir. 2004) 354 F.3d 1101 [uncorroborated assertion by prosecutor of the potential juror's body language enough for affirmance because of deferential standard of review]; but see *McClain v. Prunty* (9th Cir. 2000) 217 F.3d 1209 [implied body language not enough without the prosecutor stating the reason]; *Turner v. Marshall* (9th Cir. 1997) 121 F.3d 1248, 1254 [cannot infer demeanor when prosecutor never said so]; *United States v. Power* (9th Cir. 1989) 881 F.2d 733, 740 [fidgety and inattention]; *United States v. Changco* (9th Cir. 1993) 1 F.3d 837, 840 [passive and inattentive].) (*Rice v. Collins* 546 U.S. 333 (2006) [rolling of eyes, not seen by trial judge].)

Caution: Body language can be a dangerous area if the record does not support the reasons you are giving for the excuse. Be sure that you make a record of not only what body language or demeanor you observed but *why* this was important to you and how it affected your decision to excuse the juror. Further, try not to rely solely on body language or demeanor when excusing a cognizable class juror. (See, *People v. Long* (2010) 189 Cal.App. 4th 826) [record did not support prosecutors reasons for excusing juror and judge did not make a "sincere and reasoned" attempt to evaluate the prosecutor's reasons]). (*People v. Jones* (2011) 51 Cal.4th 346) [Prosecutor

gave specific and detailed reasons for challenges based upon body language and demeanor]).

Practice Tip: If you have a cognizable class juror who is nonverbally communicating in a way that concerns you (ie. Facial expressions, arms folded, sighing, etc.) ask them about it. For example, you might say, "Juror #2, I noticed that while Juror #8 was answering the last question, you had a look on your face that I interpreted as disagreement. Am I correct about that? Would you like to be heard?" If you do this in a respectful way, you accomplish the goal of putting the fact that you noticed it on the record. If you decide to kick this person later and get challenged, you can refer the Court back to this as one of the reasons you kicked the juror.

13. Bilingual Juror Who Won't Defer to Court Translator - (*Hernandez v. New York* (1991) 500 U.S. 352, 356-357) CAUTION – Be careful when kicking bilingual jurors as it could be seen as a cover for discrimination. (*See, People v. Gonzales* (2008) 165 Cal.App.4th 620)

14. Intelligence – (*People v. Arias* (1996) 13 Cal. 4th 92, 137-139)

15. Sympathetic to defendant – (*People v. McKinzie* (2012) 54 Cal.4th 1302, 1321-1322) [fact juror had been arrested for domestic violence was proper basis to challenge because 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. Mayfield* (1997) 14 Cal. 4th 668, 724-726)

16. Desire for next juror - (*People v. Jones* (2011) 51 Cal.4th 346, 367) [challenge upheld where prosecutor believed he had even better potential jurors who had not been called]; (See also, *People v. Alvarez* (1996) 14 Cal. 4th 155, 194-195).

But see, (*People v. Cisneros* (2015) 234 Cal.App.4th 111) [Holding that preference for next juror *alone* is not enough. You must also articulate reasons for excusing the challenged juror.]

17. Because prosecutor wished to ask the potential juror more questions. (*People v. Cleveland* (2004) 32 Cal.4th 704, 733.)

18. Mistake - (*Aleman* v. *Uribe* (9th Cir. 2013) 2013) [prosecutor mistakenly transposed two jurors' information. Prosecutor helped by making a good record that he was "under the weather"] (See *People v. Williams* (2013) 56 Cal.4th 630, 660-661 [holding that, regardless of whether prosecutor challenged one juror under the mistaken belief she was a different juror, there was no *Batson-Wheeler* violation since the reason given for challenging the juror (hesitancy to impose the death penalty) would have provided valid basis for challenging different juror].) (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1124 [prosecutor misunderstood the juror's answer]; *People v. Williams* (1997) 16 Cal.4th 153, 188-189; *United States v. Lorenzo* (9th Cir. 1993) 995 F.2d 1448, 1454-1455 [time crunch].)

But see, (*Castellanos v. Small* (2014) 766 F.3d 1137) [Prosecutor's stated reason was in error. It survived through the appellate courts as a mistake but the 9th Circuit ultimately found that the prosecutor's error to be pre-textual.]

19. Financial Hardship/Work Related Issues - (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]

3. STEP 3 – "If a race neutral explanation is tendered, the trial court must then decide… whether the opponent of the strike has proved purposeful racial discrimination." (*Johnson v. California* (2005) 54 U.S. 162)

a. "It is not until the third step that the persuasiveness of the justification becomes relevant – the step in which the trial court determines whether the opponent of the strike has carried his burden of proving purposeful discrimination." (*Purkett v. Elem* (1995) 514 U.S. 765, 768.) [Burden of proof of is preponderance of the evidence]

b. "[W]e rely on the good judgment of trial courts to distinguish bona fide reasons for such peremptories from sham excuses belatedly contrived to avoid admitting acts of group discrimination." (*People v. Wheeler* (1978) 22 Cal.3d 258, 282; *People v. Johnson* (1989) 47 Cal.3d 1194, 1216; see *Purkett v. Elem* (1995) 514 U.S. 765, 768.)

c. "This demands of the trial judge a sincere and reasoned attempt to evaluate the prosecutor's explanation in light of the circumstances of the case as then known, his knowledge of trial techniques, and his observations of the manner in which the prosecutor has examined members of the venire and has exercised challenges for cause or peremptorily . . . . " (*People v. Hall* (1983) 35 Cal.3d 161, 167-168; See also, *People v. Silva* (2001) 25 Cal. 4th 345, 386)

d. "In assessing credibility, the court draws upon its contemporaneous observations of the voir dire. It may also rely on the court's own experiences as a lawyer and bench officer in the community, and even the common practices of the advocate and the office that employs him or her. [Citation.]" (*People v. Lenix, supra*, 44 Cal.4th at p. 613, fn. omitted, *quoting Miller–El v. Cockrell* (2003) 537 U.S. 322, 339.)

e. It is proper for a trial court, in evaluating the prosecutor's justifications, to consider the prosecutor's actions in excusing jurors in a *previous trial* and whether a prosecutors kept members of the cognizable class at issue on the jury in a *prior trial.* (*People v. DeHoyos* (2013) 57 Cal.4th 79)

F. Comparative Analysis

This term refers to the process by which courts will evaluate the reasons given for the challenge of a member of a cognizable class. The courts will look for non-cognizable class jurors who were *not* challenged to see whether the reasons would apply equally. For example, if a prosecutor challenged an African American juror who was employed as a teacher and gave the reason, "Judge, I always kick teachers." The court would then look to see whether the prosecutor failed to challenge any teachers who were not members of a cognizable class.

1. History

Federal Courts approved of comparative analysis in *Turner v. Marshall* (9th Cir. 1997) 121 F. 3d 1248. California rejected comparative analysis in *People v. Landry* (1996) 49 Cal.App.4th 785. *People v. Jones* (1997) 15 Cal. 4th 119. However, things began to change in 2003 with *Johnson*. Then in 2005, the U.S. Supreme Court decided *Miller-El v. Dretke* (2005) 545 U.S. 231 using comparative analysis in the decision.

a. *Snyder v. Louisiana* (2008) 552 U.S. 472 – In *Snyder,* the U.S. Supreme Court found that the prosecutors race neutral reasons for excusing a black juror were implausible and were reinforced by the prosecutor's acceptance of white jurors who disclosed conflicting obligations similar to the excused juror. (*Id.* at 483-484). The Court held that a comparative analysis was appropriate since "the shared

characteristic, i.e., concern about serving on the jury due to conflicting obligations, was thoroughly explored by the trial court when the relevant jurors asked to be excused for cause." (*Id.* at p. 483)

b. *People v. Lenix* (2008) 44 Cal. 4th 602 – Comparative Analysis is alive in California.

"If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson's* third step." (*Id.* at p. 621) In reviewing the plausibility of a prosecutor's reasons for striking a juror, an appellate court can consider various kinds of evidence, including a comparison of panelists' responses. (*Id.* at p. 622) Failing to engage in comparative juror analysis for the first time on appeal unduly restricts review based on the entire record." (*Id.* at p. 622) "Thus, evidence of comparative juror analysis must be considered in the trial court and even for the first time on appeal if relied upon by defendant and the record is adequate to permit the urged comparisons." (*Id.* at p. 622)

The trial court has a duty to "assess the plausibility" of the prosecutor's proffered reasons for striking a potential juror, "in light of all evidence with a bearing on it." (*Id.* at p. 625) Trial courts "must evaluate the demeanor of the prosecutor in determining the credibility of proffered explanations, and the demeanor of the panelist when that factor is a basis for the challenge." (*Id.* at p. 625) It should be discernible from the record that "1) the trial court considered the prosecutor's reasons for the peremptory challenges at issue and found them to be race-neutral; 2) those reasons were consistent with the court's observations of what occurred, in terms of the panelist's statements as well as any pertinent nonverbal behavior; and 3) the court made a credibility finding that the prosecutor was truthful in giving race-neutral reasons for the peremptory challenges. (*Id.* at pp. 625-626)

"As to the second point, the court may not have observed every gesture, expression or interaction relied upon by the prosecutor. The judge has a different vantage point, and may have, for example, been looking at another panelist or making a note when the described behavior occurred. But the court must be satisfied that the specifics offered by the prosecutor are consistent with the answers it heard and the overall behavior of the panelist. The record must reflect the trial court's determination on this point (see *Snyder*, supra, at p. 460), which may be encompassed within the court's general conclusion that it considered the reasons proffered by the prosecution and found them credible." (*Id.* at pp. 625-626)

The court observed that comparative juror analysis is a form of circumstantial evidence (*Id.* at p. 622) and that a reviewing court must be careful not to accept one

reasonable interpretation to the exclusion of other reasonable ones when reviewing the circumstantial evidence supporting the trial court's factual findings in a *Batson/Wheeler* holding. "If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also be reasonably reconciled with a contrary finding does not warrant a reversal of the judgment." (*Id.* at pp. 625-626)

Comparative Analysis will only be considered for the first time on appeal at the *Third* Step. (*See, People v. Clark* (2016) 63 Cal.4th 522, 568 [Declining the defense invitation to engage in comparative analysis for the first time on appeal at the first step of *Batson*.])

2. "Positive" Comparative Analysis

This term refers to the idea of using comparative analysis to support a challenge of a member of a cognizable class by comparing other similarly situated non-cognizable class jurors who were also challenged. (*Rice v. Collins* (2006) 546 U.S. 333, 341 [prosecutor struck a white juror with the same characteristics of a cognizable class juror she struck]; (*Briggs v. Grounds* (2012) 682 F.3d 1165 [prosecutor struck at least on non-African American who indicated they would hold the prosecution to a higher standard of proof]).

IV. Practical Issues in Dealing with *Batson/Wheeler* Motions

A. Realize that a challenge will likely come at some point during jury selection and be ready to deal with it. It should go without saying, but ***NEVER*** excuse a juror on the basis of race, ethnicity, religion, gender etc…Question all jurors you plan to challenge. Desultory questioning does not count.

B. Be prepared to rebut the prima facie case. (See pp. 4-5)

C. Assume that a prima facie case will be made and be prepared to give race neutral reasons for excusing the juror. While peremptory challenges are often based on instinct and it can sometimes be hard to articulate the reason for removing a juror, "a prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives." (*People* v. *Lenix* (2008) 44 Cal.4th 602, 624.) Prosecutors should "provide as complete an explanation for their peremptory challenges as possible." (*People* v. *Lenix* (2008) 44 Cal.4th 602, 624.)

D. If you can't recall specifically why you excused a juror, it is better to ask for a "time out" so that you may review the transcript/recording of the juror's answers. (See *Lewis v. Lewis* (9th Cir. 2003) 321 F.3d 824 [suggesting that counsel can be

particularly helpful in assisting the court at the third step of *Batson* "when afforded the opportunity to review a transcript of the jury selection proceedings"].)

E. If judge finds no prima facie case, insist that the finding is placed on the record. Then state your reasons anyway. But, DO NOT give reasons unless and until the court specifically finds no prima facie case. Giving reasons without a specific finding on the first prong will constitute an implied finding of a prima facie case. *People v. Arias* (1996) 13 Cal. 4th 92; *People v. Gutierrez* (2002) 28 Cal. 4th 1083. *People v. Scott* (June 8, 2015, S094858) __ Cal. 4th __ [2015 WL 3541280]

F. Trial Tips

1. Create a Good Record

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.)

2. Obtain a Transcript of Voir Dire Before Making Challenges

In certain situations, a prosecutor may not recall or have accurate notes regarding the responses of a juror he or she wishes to challenge. In those cases, it is appropriate and recommended that the prosecutor ask for read back of the juror's responses. (*See Lewis v. Lewis* (9th Cir. 2003) 321 F.3d 824)

3. Ask Court to Note the Final Jury Composition

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"].)

4. Save your notes. If case is reviewed later, voir dire may be an issue. Always save your notes so that if asked, you are better able to recollect why you may have challenged a specific juror.

a. At remand hearing, the prosecutor does NOT have to state reasons under oath. (*People v. Kelly* (2008) 162 Cal.App.4th 797)

b. At remand hearing, the prosecutor does NOT have to turn over original voir dire notes. (*People v. Kelly* (2008) 162 Cal.App.4th 797)

c. At remand hearing, prosecutor cannot be cross-examined by the defense. (*People v. Kelly* (2008) 162 Cal.App.4th 797)

d. "I don't recall" May or May Not Fly – (*Paulino v. Harrison* (9th Cir. 2008) 542 F.3d 692); (But see, *Yee* v. *Duncan* (9th Cir. 2006) 463 F.3d 893.) [notwithstanding the inability to recall reason for excusing one cognizable class juror, totality of prosecutor's responses regarding other excused jurors did not evidence a discriminatory motive].)

e. If you use shorthand, make sure you define your terms. Don't make a reviewing court guess at what you meant. (*See, Foster v. Chatman* (2016) 136 S.Ct. 1737 [Murder conviction reversed for third step *Batson* violation. Very bad facts that we hope to never see. However, it's instructive on the issue of the clarity, or lack thereof, of the prosecutor's notes.])

G. Remedies

1. *Wheeler-Batson* error is reversible per se. (*People v. Wheeler* (1978) 22 Cal.3d 258, 283; see *Miller-El v. Dretke* (2005) 545 U.S. 231)

a. Step One Error: When the trial court erroneously finds there was not a prima facie case, the matter is often remanded for prosecutor to state reasons for

peremptory challenge. (*Batson v. Kentucky* (1986) 476 U.S. 79, 100; *People v. McGee* (2002) 104 Cal.App.4th 559, 571, 573 [remand to permit prosecutor give reasons].) This remedy has been criticized for two reasons. First, the long passage of time makes it nearly impossible for the prosecutor to genuinely remember the real reason. (*People v. Hall* (1983) 35 Cal.3d 161, 171 [pointless to remand for the prosecutor to give a reason 11 years later]; *People v. Allen* (2004) 115 Cal.App.4th 542, 553-554, fn. 10 [remand for new trial, not for the prosecutor to give reasons, because occurred three years ago]; see also *People v. Ayala* (2000) 24 Cal.4th 243, 297, fn. 8 (conc. opn. of George, C.J.); *People v. Robinson* (2003) 110 Cal.App.4th 1196, 1208 [remand for the prosecutor to give the reason but retrial if it could not recall]; *People v. Williams* (2000) 78 Cal.App.4th 1118, 1130 [on remand, the court must first determine if it can adequately address the issue after the delay]; *United States v. Alcantar* (9th Cir. 1990) 897 F.2d 436, 438-439.) Second, this procedure is subject to a prosecutor trying to invent more legitimate reasons after the fact. (See, e.g., *Miller-El v. Dretke* (2005) 545 U.S. 231 [prosecution's reasons after the fact "reeks of afterthought"]; *Miller-El v. Cockrell* (2003) 537 U.S. 331, 343 [reasons given after trial "was subject to the usual risks of imprecision and distortions from the passage of time"]; see also *Johnson v. California* (2005) 545 U.S. 162, quoting *Paulino v. Castro* (9th Cir. 2004) 371 F.3d 1083, 1090 ["it does not matter that the prosecution might have had good reasons . . . [w]hat matters is the real reason they were stricken"].)

b. Step Three Error: When the trial court fails to sustain motion after the prosecutor gives reason, error normally requires new venire. (*People v. Wheeler* (1978) 22 Cal.3d 258, 283; see *Miller-El v. Dretke* (2005) 545 U.S. 162). However, the defendant in the trial court can stipulate to a different remedy. (*People v. Willis* (2002) 27 Cal.4th 811, 821-824 [with consent of movant, can use other remedies such as sanctions, reinstating removed jurors or doing challenges at sidebar]; *People v. Overby* (2004) 124 Cal.App.4th 1237, 1244-1245 [defendant not objecting to judge re-seating the excused juror indicates consent to this remedy]. (See *People v. Mata* (2013) 57 Cal.4th 178) [holding that the trial court may reseat an improperly challenged juror if affected counsel either expressly or implicitly consents]

2. Consequences

a. If the court grants a *Batson/Wheeler* motion at trial and employs one or more of the remedies discussed, that is arguably a "sanction".

1. Court must notify the bar of any judicial sanctions against an attorney (Business & Professions Code §6068(a)(3)).

2. Attorney must self report any judicial sanction (Business & Professions Code §6068(o)(3)).

3. However, reporting will likely not be required unless the conduct is egregious.

b. If the trial court erroneously denies a *Batson/Wheeler* motion at trial and the case is reversed

1. Court must notify bar whenever there is a reversal. (Business & Professions Code §6086.7(b)(2)).

2. Attorney must notify bar whenever reversal is based in whole or in part upon misconduct of the attorney. (Business & Professions Code §6068(o)(7)).

ADDENDUM TO *BATSON/WHEELER* OUTLINE
PEOPLE V. GUTIERREZ ET AL (2017) California Supreme Court Case Number S224724

In Gutierrez, the DDA struck ten Hispanic jurors out of sixteen peremptory challenges. Two Hispanic jurors remained and served on the panel. Seven of the ten challenges were determined by the Supreme Court to have been justified. However, their examination of the other three resulted in a finding that one resulted in structural error and reversed the verdict.

The Court opinion illustrates what information they want the record to contain in a Batson challenge:

1) The court may only rule on reasons specifically and actually expressed by the attorney, and may not consider other, even obvious, reasons that the challenge is appropriate. So make sure YOU list all your reasons.

2) If a prima facie finding is made and the court proceeds to the second step of the analysis: the "neutral justification" stage, the issue is facial validity. The court states that the rationale need only be clear and reasonably specific as to legitimate reasons for challenging the juror, but need not detail "why" the prosecutor kicked the juror. However, a deficient record was clearly part of the reason that Gutierrez was reversed.

3) The Court wants a significant record created at step 3: evaluating the credibility of the reasons actually stated.

Here the juror was kicked because she lived in Wasco and was unaware of any gang activity in the area. A key witness for the DDA was a Wasco gang member that would be testifying about Wasco gang activity and the DDA was uncertain how her lack of awareness might bear on her response to his important witness. The DAG posited some explanation for the DDA's concerns, and the Supreme Court even engaged in some "speculation" as to the concerns and their exact logic (which may have been upheld), but ultimately held "[A] prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives." The court faulted the DDA for not being interested in examining whether the juror's lack of awareness of gang activity in Wasco would cause her to be biased against the witness for the People's case.

The court also used the DDA's equivocation as to this juror, given her familial law enforcement ties to show that the proffered reason wasn't credible. "[W]hen it is not self-evident why an advocate would harbor a concern, the question of whether a neutral explanation is genuine and made in good faith becomes more pressing." As to another challenged juror, they faulted the DDA for getting a fact wrong and confusing the juror's answer with another.

They did balance this all against the fact the DDA passed on challenges 5 times while the juror was still on the panel, "But neither that acknowledgement nor the prosecutor's passes themselves wholly preclude a finding that a panelist is struck on account of bias against an identifiable group, when such a strike occurs eventually instead of immediately."

ADDENDUM TO *BATSON/WHEELER* OUTLINE
PEOPLE V. GUTIERREZ ET AL (2017) California Supreme Court Case Number S224724

The Supreme Court also faulted the trial court:

> The court here acknowledged the 'Wasco issue' justification and deemed it neutral and non-pretextual by blanket statements. It never clarified why it accepted the Wasco reason as an honest one. Another tendered basis for this strike, the reference to the prospective juror's other answers, as they related to an expectation of her reaction to Trevino, was not borne out by the record, but the court did not reject this reason or ask the prosecutor to explain further. In addition, the court improperly cited a justification not offered by the prosecutor: a lack of life experience. On this record, we are unable to conclude that the trial court made 'a sincere and reasoned attempt to evaluate the prosecutor's explanation' regarding the strike of Juror 2723471. (*People v. Hall* (1983) 35 Cal.3d 161, 167.) The court may have made a *sincere* attempt to assess the Wasco rationale, but it never explained why it decided this justification was not a pretext for a discriminatory purpose. Because the prosecutor's reason for this strike was not self-evident and the record is void of any explication from the court, we cannot find under these circumstances that the court made a *reasoned* attempt to determine whether the justification was a credible one.

In conclusion, they write:

> Though we exercise great restraint in reviewing a prosecutor's explanations and typically afford deference to a trial court's *Batson*/*Wheeler* rulings, we can only perform a meaningful review when the record contains evidence of solid value. Providing an adequate record may prove onerous, particularly when jury selection extends over several days and involves a significant number of potential jurors. It can be difficult to keep all the panelists and their responses straight. Nevertheless, the obligation to avoid discrimination in jury selection is a pivotal one. It is the duty of courts and counsel to ensure the record is both accurate and adequately developed.

Justice Liu's concurrence attempts to lay out the purpose of the rule established:

> The ultimate issue is "whether it was *more likely than not* that the challenge was improperly motivated." (*Johnson v. California* (2005) 545 U.S. 162, 170, italics added.) This probabilistic standard is not designed to elicit a definitive finding of deceit or racism. Instead, it defines a level of risk that courts cannot tolerate in light of the serious harms that racial discrimination in jury selection causes to the defendant, to the excluded juror, and to —public confidence in the fairness of our system of justice. (*Batson*, *supra*, 476 U.S. at p. 87; see *Miller-El*, *supra*, 545 U.S. at p. 238; *Powers v. Ohio* (1991) 499 U.S. 400, 412–414.)

Batson/Wheeler

Review the law
Recent Case – People v. Gutierrez
Practical Tips

***People v. Wheeler* (1978) 22 Cal.3d 258**
Peremptory challenges based on group bias violates the defendant's right to jury trial in the California Constitution.

***Batson v. Kentucky* (1986) 476 U.S. 79**
Race based challenges violate the Equal Protection Clause of the U.S. Constitution.

STEP 1 – "PRIMA FACIE CASE"

STEP 2 – "RACE NEUTRAL REASONS"

STEP 3 – "TRIAL COURT DECIDES IF DISCRIMINATION HAS BEEN PROVEN"

STEP 1 – "PRIMA FACIE CASE"

The party objecting to the peremptory challenge must make out a prima facie case "*by showing the totality of the relevant facts gives rise to an inference of a discriminatory purpose.*"

REBUT THE PRIMA FACIE CASE IF POSSIBLE!!

STEP 2 – "RACE NEUTRAL REASONS"

If a prima facie case is made, the "*burden shifts to the [party making the original, objected to juror challenge] to explain adequately the racial [or other cognizable class] exclusion by offering permissible race neutral justifications for the strikes*."

PERMISSIBLE "RACE NEUTRAL" REASONS

STEP 3 – "TRIAL COURT DECIDES IF DISCRIMINATION HAS BEEN PROVEN"

"If a race neutral explanation is tendered, the trial court must then decide… whether the opponent of the strike has proved purposeful racial discrimination."

In analyzing the reason given, the court must make a "*sincere and reasoned attempt* to evaluate each stated reason as applied to each challenged juror."

Ways to REBUT a Prima Facie Case:

1. No disproportion in excusal of cognizable class members.
2. Passing once or more with members of the cognizable class on the panel.
3. Rehabilitating cognizable class members sought to be challenged by defense.
4. Pointing out cognizable class members excused by defense.
5. Not aware that excused juror was a member of a cognizable class.

Permissible Race Neutral Reasons:

1. Legal contacts.
2. Served on hung jury before.
3. Views on the legal system.
4. Lack of disclosure.
5. Appearance (i.e., hair, jewelry, tattoos etc.).
6. Lack of life experiences.
7. Occupation.
8. Reluctance to be a juror.
9. Eagerness to be a juror.

Permissible Race Neutral Reasons Cont.:

10. Hesitance in applying the death penalty.
11. Hesitance, Transient Background, and 'Grandmotherly Persona.'
12. Body language can be proper grounds, at least if there is a sufficient record to support the prosecutor's observations.
13. Bilingual Juror Who Won't Defer to Court Translator
14. Intelligence
15. Sympathetic to defendant
16. Desire for next juror
17. Because prosecutor wished to ask the potential juror more questions.
18. Mistake

Step 3 - Trial Judge's Decision

"This demands of the trial judge a sincere and reasoned attempt to evaluate the prosecutor's explanation in light of the circumstances of the case as then known, his knowledge of trial techniques, and his observations of the manner in which the prosecutor has examined members of the venire and has exercised challenges for cause or peremptorily . . . . " (*People v. Hall* (1983) 35 Cal.3d 161, 167-168; See also, *People v. Silva* (2001) 25 Cal.4th 345, 386)

Step 3 - Trial Judge's Decision

"In assessing credibility, the court draws upon its contemporaneous observations of the voir dire. It may also rely on the court's own experiences as a lawyer and bench officer in the community, and even the common practices of the advocate and the office that employs him or her. [Citation.]" (*People v. Lenix* (2008) 44 Cal.4th 602, 613, fn. omitted, *quoting Miller–El v. Cockrell* (2003) 537 U.S. 322, 339.)

Step 3 - Trial Judge's Decision

It is proper for a trial court, in evaluating the prosecutor's justifications, to consider the prosecutor's actions in excusing jurors in a *previous trial* and whether a prosecutors kept members of the cognizable class at issue on the jury in a *prior trial.* (*People v. DeHoyos* (2013) 57 Cal.4th 79)

People v. Gutierrez (2017) 2 Cal.5th 1150

First time in 16 years that the California Supreme Court has found a *Batson Wheeler violation.*

"This case offers us an opportunity to clarify the constitutionally required duties of California lawyers, trial judges, and appellate judges when a party has raised a claim of discriminatory bias in jury selection." (*People v. Gutierrez* (2017) 2 Cal.5th 1150, 1154.)

FACTS:

1. Gutierrez and other defendants were all Sureño gang members in the Bakersfield area.
2. V got into a fight with one of the defendants and then left.
3. Other Ds, including Gutierrez, got in a car and searched for V.
4. When they found V, Gutierrez got out of the car and shot V multiple times.
5. One of the co-Ds from a gang subset in Wasco testified and provided this information.

OVERVIEW:

1. Prosecutor struck ten Hispanic jurors out of sixteen peremptory challenges, four of those challenges to Hispanic jurors coming in a row.
2. The defense made a *Batson/Wheeler* motion.
3. The trial court found the existence of a prima facie case ("inference of discrimination").
4. The prosecutor gave reasons and the trial court found them to be race neutral.
5. Defense motion was denied.
6. The Court of Appeal upheld the denial of the defense motion.
7. Cal Supremes – REVERSED.

Step One:

1. The trial court found that 10 out of 16 challenges to Hispanic jurors established a prima facie case.

Step Two:

1. The prosecutor gave reasons for the 10 strikes.
2. 7 of the 10 were found to be race neutral.
3. The Supreme Court identified error in 3 of the challenges but based the reversal only upon 1and did not determine the other two.

Wasco Juror:

1. Teacher from Wasco.
2. Divorced.
3. No Kids.
4. Ex is a correctional officer.
5. Other relatives in law enforcement.
6. No connection to gangs.

Voir Dire of Wasco Juror:

1. Prosecutor asked the juror whether she was aware of gangs in Wasco.
2. She said “No”.
3. Prosecutor then asked if she lived in the Wasco area and Wasco itself
4. She answered “Yes.”

Prosecutor’s Reason:

Wasco juror was unaware of gangs in Wasco and by some of her other answers.

He wasn’t sure how she’d respond when she hears that the testifying co-D was from a Wasco gang.

The Trial Court tried to help…

The AG tried to help…

Ultimately the Supreme Court rejected the help…

“[A] prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives.” (*Id.* at 1159. *See also*, *Miller-El v. Dretke* (2005) 545 U.S. 231, 252(*Miller-El II*).)

Step Three:

1. The Supreme Court found the prosecutor's reason for kicking all jurors to be neutral on their face.
2. The Court found that the trial court made a *sincere* attempt to evaluate the prosecutor's reason.
3. However, the trial court failed to make a *reasoned* attempt.

The Appellate Court got it wrong too…

Declined to apply comparative analysis for the first time on appeal.

They relied on a statement from *Johnson*

Cal Supremes made it clear in *Lenix* by holding that "evidence of comparative analysis *must* be considered in the trial court and even for the first time on appeal…")

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

It should be discernible from the record that

1) The trial court considered the prosecutor's reasons for the peremptory challenges at issue and found them to be race-neutral;

2) Those reasons were consistent with the court's observations of what occurred, in terms of the panelist's statements as well as any pertinent nonverbal behavior; and

3) The court made a credibility finding that the prosecutor was truthful in giving race-neutral reasons for the peremptory challenges."

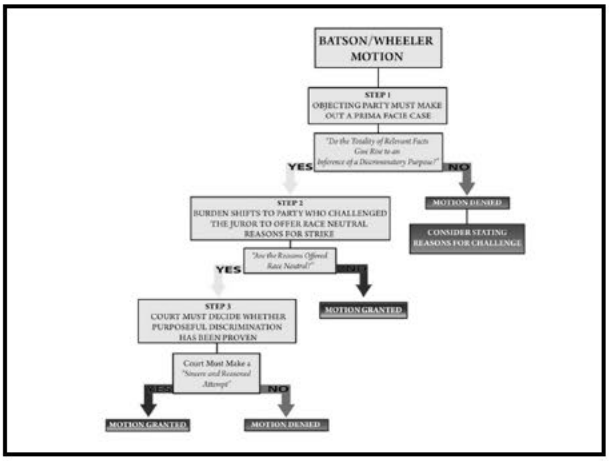
Comparative Analysis

The process by which courts will evaluate the reasons given for the challenge of a member of a cognizable class. The courts will look for non-cognizable class jurors who were *not* challenged to see whether the reasons would apply equally.

Miller-El v. Dretke (2005) 545 U.S. 231
Snyder v. Louisiana (2008) 552 U.S. 472
People v. Lenix (2008) 44 Cal.4th 602

Practical Trial Tips

1. NEVER excuse a juror on the basis of the membership in a cognizable class.
2. Recognize that a you will get "*Wheelered*" and be prepared to deal with it by knowing the law better than the defense attorney and the judge.
3. Take detailed notes.
4. Do not state your reasons unless and until the judge makes a step one finding.
5. If no prima facie case found, state your reasons anyway and make it clear why you are doing so.
6. When a prima facie case is found be prepared to state your reasons.
7. Explain your reasons.
8. Make a thorough record. (Step 2)
9. Make sure the court makes a good record. (Step 3)
10. Record the final jury composition.
11. Save your notes.



Handling a *Batson/Wheeler* Motion

I. Overview
   A. Every prosecutor will have to deal with the dreaded "*Wheeler"* motion. It usually occurs following the prosecutor's use of a peremptory challenge against someone of a particular race, gender or ethnic background.
   B. How it works – The defense makes a motion, usually on state and federal grounds, that the prosecutor has excused a juror based on racial, ethnic or other improper grounds and has therefore violated the defendant's Constitutional right to a fair and impartial jury. The defendant does not have to be a member of the excluded group to complain of a violation. *People v. Wheeler* (1978) 22 Cal. 3d 258, 281. (**Note**: While the defense usually brings the motion, it may be made by *either party.*)
   C. It goes without saying that no prosecutor should exercise a peremptory challenge against a juror based on that juror's gender, sexual orientation, or membership in a racial, ethnic, or religious group. But a prosecutor should not refrain from challenging a juror for *permissible* reasons out of a concern that the defense will raise a disingenuous or frivolous *Batson/Wheeler* claim.

II. THREE STEP PROCESS
   A. "First, the defendant must make out a prima facie case 'by showing that the totality of relevant facts gives rise to an inference of discriminatory purpose.'
   B. Second, once the defendant has made out a prima facie case, the 'burden shifts to the State to explain adequately the racial exclusion' by offering permissible race-neutral justifications for the [peremptory] strikes.
   C. Third, '[i]f a race-neutral explanation is tendered, the trial court must decide…whether the opponent of the strike has proved purposeful racial discrimination.' " (*Johnson v. California* (2005) 545 U.S. 162)

III. History
   A. *Batson* ***is*** the federal standard and *Wheeler* ***was*** the California standard used to determine whether the peremptory challenge was improper.
   B. Both cases used procedures involving 3 part tests to determine the propriety of the challenge.
   C. However, the first prong of the tests in each case was different.
   D. Defendants argued the state burden (*Wheeler*) was more difficult for them to meet than the federal burden (*Batson*).

E. The California Supreme Court tried to reconcile the two cases in 2003 in *People v. Johnson* (2003) 30 Cal. 4th 1302.
F. In 2005, the U.S. Supreme Court reversed *Johnson* and "clarified" the *Batson* decision by stating that the first prong of the *Batson* test need only be satisfied by production of evidence sufficient to permit the trial judge to draw an *inference of discrimination*. (*Johnson v. California* (2005) 545 U.S. 162.)
G. Current State of the Law - Still a 3 prong test based on the holdings of *Batson* and *Johnson.* Although *Wheeler* is still good law, the first step has been replaced by the *Batson* first step. (*Johnson v. California* (2005) 545 U.S. 162.)

IV. Analysis

A. *People v. Wheeler* (1978) 22 Cal. 3d 258 – Peremptory challenges based on group bias violates the defendant's right to jury trial in the California Constitution. *Batson v. Kentucky* (1986) 476 U.S. 79 – Race based challenges violate the Equal Protection Clause of the U.S. Constitution. (*See Also, People v. Bonilla* (2007) 41 Cal.4th 313, 341).
B. Timeliness/Waiver – The claim is waived if the defendant fails to make a timely objection and a record sufficient for appellate review. (*People v. Wheeler* (1978) 22 Cal.3d 258, 280; *People v. Morris* (2003) 107 Cal.App.4th 402, 408-409) Motion made after jury was sworn but before alternates were sworn was not untimely. Jury empanelment is completed when all jurors, including alternates, are selected and sworn in. *People v. Scott* (2015) 61 Cal. 4th 363.
C. Cognizable Class – "An identifiable group distinguished on racial, religious, ethnic, or similar grounds…" *People v. Wheeler* (1978) 22 Cal. 3d 258, 276. Two requirements for a cognizable class:
    1. Members share a common perspective arising from life experience in the group; and
    2. No other members of the community are capable of adequately representing the group perspective. (*See, Rubio v. Superior Court* (1979) 24 Cal.3d 93, 98).
D. Courts and Statutes have recognized several categories of cognizable classes or groups.
    1. Race - (*See, Batson v. Kentucky* (1986) 476 U.S. 79 & *People v. Wheeler* (1978) 22 Cal. 3d 258).
    2. Ethnicity – Although there are fewer reported cases regarding ethnicity, be aware that it is a cognizable class. For example, Native Americans were the subject of the violation in *United States v. Bauer* (9th Cir. 1996) 84 F.3d 1549.
    3. Religion – *People v. Johnson* (1989) 47 Cal.3d 1194, 1217 [Jewish Jurors]

4. Gender – Gender appears to be a cognizable class and should be treated as such. However, most cases dealing with gender also carry a racial component as well. (*People v. Crittenden* (1994) 9 Cal.4th 83, 115 [African-American woman]; *People v. Garceau* (1993) 6 Cal.4th 140, 171 [Hispanic woman]
5. Sexual Orientation – *People v. Garcia* (2000) 77 Cal.App.4th 1269, 1272. (*See Also,* Code of Civil Procedure §231.5)
6. Age – Although not a federally protected class, Code of Civil Procedure §231.5 added "Age" as a protected class in 2016 added by operation of Government Code §11135.
7. Disability – Although not a federally protected class, Code of Civil Procedure §231.5 added "Disability", both mental and physical, as a protected class in 2016 by operation of Government Code §11135**.**

E. Non-Cognizable Class
1. Poor – *People v. Carpenter* (1999) 21 Cal.4th 1016, 1035
2. Less Educated – *People v. Estrada* (1979) 93 Cal.App.3d 76, 90-91
3. Battered Women – *People v. Macioce* (1987) 197 Cal.App.3d 262, 280
4. Young – *People v. Ayala* (2000) 24 Cal.4th 243, 277-278; *United States v. Fletcher* (9th Cir. 1992) 965 F.2d 781, 782 – (Caveat: See CCP§231.5 & Gov't Code §11135)
5. People over 70 – *People v. McCoy* (1995) 40 Cal.App.4th 778, 783 – (Caveat: See CCP§231.5 & Gov't Code §11135)
6. "Insufficient" English – *People v. Lesara* (1998) 206 Cal.App.3d 1304, 1307
7. Unconventional Hairstyle – *Purkett v. Elem* (1995) 514 U.S. 765, 769
8. People who have been arrested *or* been victims – *People v. Fields* (1983) 35 Cal.3d 329, 348
9. "People of Color" – Combining all minority groups does not constitute a "cognizable class". *People v. Davis* (2009) 46 Cal. 4th 539

F. Challenge Exercised Against Member of Cognizable Class
1. **Step One** – The party objecting to the peremptory challenge must make out a prima facie case "by showing the totality of the relevant facts gives rise to an inference of a discriminatory purpose." *Johnson v. California* (2005) 545 U.S. 162. There is a presumption that that the party exercising the challenge (usually the prosecution) does so on a constitutionally permissible ground. (*People v. Wheeler*

(1978) 22 Cal. 3d 258). Thus, the objecting party (usually the defense) must demonstrate a "prima facie case".

a. Prima Facie Case – The court in *Wheeler* provided four examples of ways to demonstrate a prima facie case:
    i. "A party may show that his opponent struck most or all of the members of the identified group from the venire."
    ii. "He may also demonstrate that the jurors in question share only this one characteristic—their membership in the group—and that in all other respects they are as heterogenous as the community as a whole."
    iii. "Next, the showing may be supplemented…by such circumstances as the failure of the opponent to engage these same jurors in more than desultory voir dire, or indeed to ask them any questions at all."
    iv. "Lastly, the defendant need not be a member of the excluded group in order to complain of a violation of the representative cross-section rule." However, this can be probative in making the determination. (*People v. Wheeler* (1978) 22 Cal. 3d 258, 280-281; *People v. Reynoso* (2003) 31 Cal.4th 903, 914.)
b. "[A] 'pattern' of strikes against black jurors included in the particular venire might give rise to an inference of discrimination. Similarly, the prosecutor's questions and statements during *voir dire* examination and in exercising his challenges may support or refute an inference of discriminatory purpose." (*Batson v. Kentucky* (1986) 476 U.S. 79, 96-97.)
c. Rebut the prima facie case by arguing applicable factors:
    i. If the defendant is not a member of the cognizable class at issue, this fact should be reflected in the record. (See *People* v. *Bell* (2007) 40 Cal.4th 582, 599 [considering fact defendant was ***not*** a member of any of the cognizable classes at issue in finding the prosecutor's challenges created no inference of discrimination].
    ii. If the victim was a member of cognizable class at issue, this fact should be reflected in the record. (See *People* v. *Bell* (2007) 40 Cal.4th 582, 599

[considering fact victim was a member of the cognizable class at issue in finding the prosecutor's challenges created no inference of discrimination].)

iii. The fact that you have not used a disproportionate number of your challenges against members of the cognizable class is a factor that weighs against finding an inference of discrimination. (*People v. Streeter* (2012) 54 Cal.4th 205, 223 [no prima facie case where prosecutor excused three of five African Americans]; *People v. Clark* (2011) 52 Cal.4th 856, 903 [statistical analysis subject to various interpretations and did not raise an inference of discrimination]; *People* v. *Bell* (2007) 40 Cal.4th 582, 598 [considering fact prosecutor used only two of 16 peremptory challenges against members of the cognizable class at issue in finding the prosecutor's challenges created no inference of discrimination]; *People v. Cornwell* (2005) 37 Cal.4th 50, 70 [no prima facie case where prosecutor challenged one out of two African-American prospective jurors]). However, See *Ayala v. Wong* (9th Cir. 2012) 693 F.3d 945, 964 [Statistical evidence alone established a prima facie case where prosecution struck each of the seven black or Hispanic jurors available for challenge].

iv. If you have passed on a panel that includes members of the cognizable class, this fact should be mentioned as it undercuts an inference of discrimination. (*People v. Streeter* (2012) 54 Cal.4th 205, 225 [prosecutor passed five times with up to four African Americans in jury box]; *People v. Clark* (2011) 52 Cal.4th at 856, 906 [no prima facie case where prosecutor passed two African-American jurors during several rounds before finally excusing them].) The prosecutor's acceptance of a panel including African-American prospective jurors, while not conclusive, was "'an indication of the prosecutor's good faith in exercising his peremptories, and…an appropriate factor for the trial judge to consider in ruling on a *Wheeler* objection…'" (*People v. Hartsch* (2010)

49 Cal.4th 472, 487). (See also, *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].)

v. Point out any members of the cognizable class who were challenged by the defense. However, be aware that this fact will not carry the day for you. It is simply something you may want to point out on the record. Further rehabilitation of prospective jurors of a cognizable class ought to be challenged can be an important factor in rebutting a prima facie case. (*People v. Streeter* (2012) 54 Cal.4th 205, 225 [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, citing *People v. Hartsch* (2010) 49 Cal.4th 472, 487]).

vi. If you were honestly not aware the juror was a member of a cognizable group. *People v. Barber* (1988) 200 Cal.App.3d 378, 389. [Challenged juror appeared to be a white and non-Hispanic to DA. DA did not recognize the surname to be Hispanic. Court found DA to be sincere]

2. **Step Two** – If a prima facie case is made, the "burden shifts to the [party making the original, objected to juror challenge] to explain adequately the racial [or other cognizable class] exclusion by offering permissible race neutral justifications for the strikes." (*Johnson v. California* (2005) 545 U.S. 162)
    a. "The justification need not support a challenge for cause, and even a 'trivial' reason, if genuine and neutral, will suffice." (*People v. Arias* (1996) 13 Cal. 4th 92, 136 citing *People v. Montiel* (1993) 5 Cal. 4th 877, 910, fn. 9.)
    b. Examples of Permissible Reasons
        i. **Legal contacts**. (*People v. Panah* (2005) 35 Cal.4th 395, 441-442 [**potential juror was arrested and charged with a crime**]; *People v. Young* (2005) 34 Cal.4th 1149, 1174 [**counselor had testified before in sex assault cases**]; *People v. Cleveland* (2004) 32 Cal.4th 704, 733 [**son was in jail**]; *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1124 [**father was arrested and**

charged with a crime and the potential juror had been roughed up by officers]; *People v. Farnam* (2002) 28 Cal.4th 107, 137-138; *People v. Williams* (1997) 16 Cal.4th 635, 664-665 [**by family member**]; *People v. Arias* (1996) 13 Cal.4th 92, 138; *People v. Turner* (1994) 8 Cal.4th 137, 171; *People v. Sims* (1993) 5 Cal.4th 405, 430; *People v. Cummings* (1993) 4 Cal.4th 1233, 1282; *People v. Johnson* (1989) 47 Cal.3d 1194, 1215; *People v. Walker* (1988) 47 Cal.3d 605, 625-626; *People v. Wheeler* (1978) 22 Cal.3d 258, 275 [**been a crime victim**]; *People v. Douglas* (1995) 36 Cal.App.4th 1681, 1690; *People v. Martinez* (2000) 82 Cal.App.4th 339, 344-345 [**family member**]; *People v. Martin* (1998) 64 Cal.App.4th 378, 385, fn. 5 [**crime victim**]; *People v. Buckley* (1997) 53 Cal.App.4th 658, 667; *People v. Barber* (1988) 200 Cal.App.3d 378; *Mitleider v. Hall* (9th Cir. 2004) 391 F.3d 1039, 1041- 045, 1048-1051 [**contacts by family members**].)

ii. **Served on hung jury before**. (*People v. Farnam* (2002) 28 Cal.4th 107, 137-138.)

iii. **Views on the legal system.** (*People v. Ward* (2005) 36 Cal.4th 186, 201 [**unfavorable views toward guilt**]; *People v. Cleveland* (2004) 32 Cal.4th 704, 733 [**hesitant in answering questions on the death penalty**]; *People v. Yeoman* (2003) 31 Cal.4th 93, 116-117 [**not strong enough views on the death penalty**]; *People v. Burgener* (2003) 29 Cal.4th 833, 864 [**skeptical in imposing death penalty**]; *People v. Farnam* (2002) 28 Cal.4th 107, 137; *People v. Caitlin* (2001) 26 Cal.4th 81, 118 [**skeptical about imposing death penalty**]; *People v. Buckley* (1997) 53 Cal.App.4th 658, 666-667 [**legal training**]; *Boyd v. Newland* (9th Cir. 2004) 393 F.3d 1008, 1013 [**ambivalence towards the legal system**]; *Tolbert v. Gomez* (9th Cir. 1999) 189 F.3d 1099; *United States v. Fike* (5th Cir. 1996) 82 F.3d 1315, 1320.)

iv. **The potential juror's lack of disclosure**. (*People v. Diaz* (1984) 152 Cal.App.3d 926, 932; see *In re Hitchings* (1993) 6 Cal.4th 97, 112; *Mitleider v. Hall*

(9th Cir. 2004) 391 F.3d 1039, 1041-1045, 1048-1051 [**potential juror apparently not honest**].)

v. **The potential juror appeared to be a non-conformer**. (*Purkett v. Elem* (1995) 514 U.S. 765, 769 (per curiam) [**long hair**]; *People v. Ayala* (2000) 24 Cal.4th 243, 261; *People v. Howard* (1992) 1 Cal.4th 1132, 1208; *People v. Wheeler* (1978) 22 Cal.3d 258, 275.) (*People v. Ward* (2005) 36 Cal. 4th 186, 202)

vi. **Lack of life experiences**. (*People v. Sims* (1993) 5 Cal.4th 405, 429; *People v. Perez* (1994) 29 Cal.App.4th 1313, 1328; *Mitleider v. Hall* (9th Cir. 2004) 391 F.3d 1039, 1041-1045, 1048-1051 [**young and immature**].)

vii. **The potential juror's occupation**. (*People v. Young* (2005) 34 Cal.4th 1149, 1174 [**counselor who has testified before in other sex assault cases and one who was an insurance claims specialist**]; *People v. Howard* (1992) 1 Cal.4th 1132, 1155-1156 [**non-practicing registered nurse**]; *People v. Landry* (1996) 49 Cal.App.4th 785, 790 [**youth services**]; *People v. Barber* (1988) 200 Cal.App.3d 378, 394; *United States v. Thompson* (9th Cir. 1987) 827 F.2d 1254, 1260.)

viii. **Reluctance to be a juror**. (*People v. Walker* (1998) 64 Cal.App.4th 1062, 1070; *Mitleider v. Hall* (9th Cir. 2004) 391 F.3d 1039, 1041-1045, 1048-1051.) (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**].)

ix. **Eagerness to be a juror**. (*People v. Ervin* (2000) 22 Cal.4th 48, 76.)

x. **Hesitance in applying the death penalty**. (*People v. Panah* (2005) 35 Cal.4th 395, 441; *People v. Smith* (2005) 35 Cal.4th 334, 347.)

xi. **Hesitance, Transient Background, and Grandmotherly 'Persona.'** (*Boyde v. Brown* (9th Cir. 2005) 404 F.3d 1159, 1170.)

xii. **Body language can be proper grounds, at least if there is a sufficient record to support the prosecutor's observations.** (*People v. Elliott* (2012) 53 Cal.4th 535, 569-570 [**Juror failed to make eye contact with anyone, dressed informally, and had an unconventional hairstyle**]; (*People v. Ward* (2005) 36 Cal.4th 186, 202 [**hostility toward prosecutor; though record is silent, other than the prosecutor's assertions, there is no evidence to contradict it**]; *People v. Reynoso* (2003) 31 Cal.4th 903, 919; *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1125-1126 [**hostile look at prosecutor**] *People v. Ervin* (2000) 22 Cal.4th 48 [**nervousness during voir dire**]; *People v. Turner* (1994) 8 Cal.4th 137, 170 [**potential juror won't look prosecutor in the eye**]; *People v. Johnson* (1989) 47 Cal.3d 1194, 1220 [**shy**][**sleepy**]; *People v. Dunn* (1995) 40 Cal.App.4th 1039, 1047; *People v. Perez* (1994) 27 Cal.App.4th 1313, 1330 [**inappropriate laughter**]; *Mitleider v. Hall* (9th Cir. 2004) 391 F.3d 1039, 1041-1045, 1048-1051; *Williams v. Rhoades* (9th Cir. 2004) 354 F.3d 1101 [**uncorroborated assertion by prosecutor of the potential juror's body language enough for affirmance because of deferential standard of review**]; but see *McClain v. Prunty* (9th Cir. 2000) 217 F.3d 1209 [**implied body language not enough without the prosecutor stating the reason**]; *Turner v. Marshall* (9th Cir. 1997) 121 F.3d 1248, 1254 [**cannot infer demeanor when prosecutor never said so**]; *United States v. Power* (9th Cir. 1989) 881 F.2d 733, 740 [**fidgety and inattention**]; *United States v. Changco* (9th Cir. 1993) 1 F.3d 837, 840 [**passive and inattentive**].) (*Rice v. Collins* 546 U.S. 333 (2006) [**rolling of eyes, not seen by trial judge**].)

1. Caution: Body language can be a dangerous area if the record does not support the reasons you are giving for the excuse. Be sure that you make a record of not only what body language or demeanor you observed but *why* this was

important to you and how it affected your decision to excuse the juror. Further, try not to rely solely on body language or demeanor when excusing a cognizable class juror. (See, *People v. Long* (2010) 189 Cal.App. 4th 826) [**record did not support prosecutors reasons for excusing juror and judge did not make a "sincere and reasoned" attempt to evaluate the prosecutor's reasons**]). (*People v. Jones* (2011) 51 Cal.4th 346) [**Prosecutor gave specific and detailed reasons for challenges based upon body language and demeanor**]).

2. *Practice Tip*: If you have a cognizable class juror who is nonverbally communicating in a way that concerns you (i.e. facial expressions, arms folded, sighing, etc.) ask them about it. For example, you might say, "Juror #2, I noticed that while Juror #8 was answering the last question, you had a look on your face that I interpreted as disagreement. Am I correct about that? Would you like to be heard?" If you do this in a respectful way, you accomplish the goal of putting the fact that you noticed it on the record. If you decide to kick this person later and get challenged, you can refer the Court back to this as one of the reasons you kicked the juror.

xiii. **Bilingual Juror Who Won't Defer to Court Translator.** (*Hernandez v. New York* (1991) 500 U.S. 352, 356-357) CAUTION – Be careful when kicking bilingual jurors as it could be seen as a cover for discrimination. (*See, People v. Gonzales* (2008) 165 Cal.App.4th 620)

xiv. **Intelligence.** (*People v. Arias* (1996) 13 Cal. 4th 92, 137-139)

xv. **Sympathetic to defendant.** (*People v. McKinzie* (2012) 54 Cal.4th 1302, 1321-1322) [**fact juror had been arrested for domestic violence was proper basis to challenge because 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. Mayfield* (1997) 14 Cal. 4th 668, 724-726)

xvi. **Desire for next juror.** (*People v. Jones* (2011) 51 Cal.4th 346, 367) [**challenge upheld where prosecutor believed he had even better potential jurors who had not been called**]; (See also, *People v. Alvarez* (1996) 14 Cal. 4th 155, 194-195). But see, (*People v. Cisneros* (2015) 234 Cal.App.4th 111) [**Holding that preference for next juror *alone* is not enough. You must also articulate reasons for excusing the challenged juror.**]

xvii. **Because prosecutor wished to ask the potential juror more questions**. (*People v. Cleveland* (2004) 32 Cal.4th 704, 733.)

xviii. **Mistake**. (*Aleman* v. *Uribe* (9th Cir. 2013) 2013) [**prosecutor mistakenly transposed two jurors' information. Prosecutor helped by making a good record that he was "under the weather"**] (See *People v. Williams* (2013) 56 Cal.4th 630, 660-661 [**holding that, regardless of whether prosecutor challenged one juror under the mistaken belief she was a different juror, there was no *Batson-Wheeler* violation since the reason given for challenging the juror (hesitancy to impose the death penalty) would have provided valid basis for challenging different juror**].) (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1124 [**prosecutor misunderstood the juror's answer**]; *People v. Williams* (1997) 16 Cal.4th 153, 188-189; *United States v. Lorenzo* (9th

Cir. 1993) 995 F.2d 1448, 1454-1455 [**time crunch**].) But see, (*Castellanos v. Small* (2014) 766 F.3d 1137) [**Prosecutor's stated reason was in error. It survived through the appellate courts as a mistake but the 9th Circuit ultimately found the prosecutor's error to be pre-textual.**]

xix. **Financial Hardship/Work Related Issues.** (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**]

3. **STEP 3** – "If a race neutral explanation is tendered, the trial court must then decide…whether the opponent of the strike has proved purposeful racial discrimination." (*Johnson v. California* (2005) 54 U.S. 162)
    a. "It is not until the third step that the persuasiveness of the justification becomes relevant – the step in which the trial court determines whether the opponent of the strike has carried his burden of proving purposeful discrimination." (*Purkett v. Elem* (1995) 514 U.S. 765, 768.) [**Burden of proof of is preponderance of the evidence**]
    b. "[W]e rely on the good judgment of trial courts to distinguish bona fide reasons for such peremptories from sham excuses belatedly contrived to avoid admitting acts of group discrimination." (*People v. Wheeler* (1978) 22 Cal.3d 258, 282; *People v. Johnson* (1989) 47 Cal.3d 1194, 1216; see *Purkett v. Elem* (1995) 514 U.S. 765, 768.)
    c. "This demands of the trial judge a sincere and reasoned attempt to evaluate the prosecutor's explanation in light of the circumstances of the case as then known, his knowledge of trial techniques, and his observations of the manner in which the prosecutor has

examined members of the venire and has exercised challenges for cause or peremptorily…" (*People v. Hall* (1983) 35 Cal.3d 161, 167-168; See also, *People v. Silva* (2001) 25 Cal. 4th 345, 386)

d. "In assessing credibility, the court draws upon its contemporaneous observations of the voir dire. It may also rely on the court's own experiences as a lawyer and bench officer in the community, and even the common practices of the advocate and the office that employs him or her. [Citation.]" (*People v. Lenix, supra*, 44 Cal.4th at p. 613, fn. omitted, *quoting Miller–El v. Cockrell* (2003) 537 U.S. 322, 339.)

e. It is proper for a trial court, in evaluating the prosecutor's justifications, to consider the prosecutor's actions in excusing jurors in a *previous trial* and whether a prosecutor has kept members of the cognizable class at issue on the jury in a *prior trial.* (*People v. DeHoyos* (2013) 57 Cal.4th 79)

f. ***People v. Gutierrez* (2017) 2 Cal. 5th 1150**

   i. First time in 16 years that the California Supreme Court has found a *Batson Wheeler violation.*

   ii. "This case offers us an opportunity to clarify the constitutionally required duties of California lawyers, trial judges, and appellate judges when a party has raised a claim of discriminatory bias in jury selection." (*People v. Gutierrez* (2017) 2 Cal. 5th 1150, 1154.

   iii. Facts: Gutierrez and other defendants were all Sureño gang members in the Bakersfield area. V got into a fight with one of the defendants and then left. Other D's, including Gutierrez, got in a car and searched for V. When they found V, Gutierrez got out of the car and shot V multiple times. One of the co-D's from a gang subset in Wasco testified and provided this information. (*Id.* at 1155.)

   iv. Step One – Three Overview: Prosecutor struck ten Hispanic jurors out of sixteen peremptory challenges, four of those challenges to Hispanic jurors coming in a row. The defense made a *Batson/Wheeler* motion. The trial court found the existence of a prima facie case in that there was an inference of discrimination. (*Id.* at 1156.) The

prosecutor gave reasons and the trial court found them to be race neutral. Defense motion was denied. The Court of Appeal upheld the denial of the defense motion. (*Id.* at 1157.)

1. Step One: The trial court found that 10 out of 16 challenges to Hispanic jurors established a prima facia case.
2. Step Two: The prosecutor gave reasons for the 10 strikes. 7 of the 10 were found to be race neutral. The Supreme Court identified error in three of the challenges but based the reversal only upon one and did not determine the other two.
    a. Wasco Juror – Teacher from Wasco. Divorced. No Kids. Ex is a correctional officer. Other relatives in law enforcement. No connection to gangs.
    b. Voir Dire of Wasco Juror by the prosecutor consisted of asking the juror whether she was aware of gangs in Wasco. She said "No". Prosecutor then asked if she lived in the Wasco area and Wasco itself to which she answered "Yes."
    c. Prosecutor's reason for kicking the Wasco juror was that she was unaware of gangs in Wasco and by some of her other answers. He wasn't sure how she'd respond when she hears that the testifying co-D was from a Wasco gang.
    d. The AG gave some reason that would explain the prosecutor's reasons for the kicks. While the Supreme Court agreed that those may have been valid reasons, they made it clear that those reason were NOT given by the prosecutor.
    e. The Court stated, "[A] prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he

gives." (*Id.* at 1159. *See also*, *Miller-El v. Dretke* (2005) 545 U.S. 231, 252(*Miller-El II*).)

3. Step Three: The Supreme Court found the prosecutor's reason for kicking all jurors to be neutral on their face. (*Id.* at 1168.) However, the Court found that although the trial court made a *sincere* attempt to evaluate the prosecutor's reason, it failed to make a *reasoned* attempt. (*Id.* at 1172.)

v. The Supreme Court also found that the Court of Appeal erred by refusing to do comparative analysis for the first time on appeal. (*Id.* at 1174.)

vi. The Court opinion illustrates what information they want the record to contain in a *Batson/Wheeler* challenge:

1. The court may only rule on reasons specifically and actually expressed by the attorney, and may not consider other, even obvious, reasons that the challenge is appropriate. So make sure you list all your reasons.
2. If a prima facie finding is made and the court proceeds to the second step of the analysis: the "neutral justification" stage, the issue is facial validity. The court states that the rationale need only be clear and reasonably specific as to legitimate reasons for challenging the juror, but need not detail "why" the prosecutor kicked the juror. However, a deficient record was clearly part of the reason that Gutierrez was reversed.
3. The Court wants a significant record created at Step 3: evaluating the credibility of the reasons actually stated.

vii. Justice Liu's concurrence attempts to lay out the purpose of the rule established:

1. The ultimate issue is "whether it was *more likely than not* that the challenge was improperly motivated." (*Johnson v. California* (2005) 545 U.S. 162, 170, italics added.) This probabilistic standard is not

> designed to elicit a definitive finding of deceit or racism. Instead, it defines a level of risk that courts cannot tolerate in light of the serious harms that racial discrimination in jury selection causes to the defendant, to the excluded juror, and to public confidence in the fairness of our system of justice. (*Batson*, *supra*, 476 U.S. at p. 87; see *Miller-El*, *supra*, 545 U.S. at p. 238; *Powers v. Ohio* (1991) 499 U.S. 400, 412–414.)

G. Comparative Analysis

1. This term refers to the process by which courts will evaluate the reasons given for the challenge of a member of a cognizable class. The courts will look for non-cognizable class jurors who were *not* challenged to see whether the reasons would apply equally.
2. For example, if a prosecutor challenged an African American juror who was employed as a teacher and gave the reason, "Judge, I always excuse teachers." The court would then look to see whether the prosecutor failed to challenge any teachers who were not members of a cognizable class.
3. History - Federal Courts approved of comparative analysis in *Turner v. Marshall* (9th Cir. 1997) 121 F. 3d 1248. California rejected comparative analysis in *People v. Landry* (1996) 49 Cal.App.4th 785. *People v. Jones* (1997) 15 Cal. 4th 119. However, things began to change in 2003 with *Johnson*. Then in 2005, the U.S. Supreme Court decided *Miller-El v. Dretke* (2005) 545 U.S. 231 using comparative analysis in the decision.
4. ***Snyder v. Louisiana* (2008) 552 U.S. 472** – In *Snyder,* the U.S. Supreme Court found that the prosecutors race neutral reasons for excusing a black juror were implausible and were reinforced by the prosecutor's acceptance of white jurors who disclosed conflicting obligations similar to the excused juror. (*Id.* at 483-484). The Court held that a comparative analysis was appropriate since "the shared characteristic, i.e., concern about serving on the jury due to conflicting obligations, was thoroughly explored by the trial court when the relevant jurors asked to be excused for cause." (*Id.* at p. 483)
5. ***People v. Lenix* (2008) 44 Cal. 4th 602** – Comparative Analysis is alive in California.

a. “If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson’s* third step.” (*Id.* at p. 621)
b. In reviewing the plausibility of a prosecutor’s reasons for striking a juror, an appellate court can consider various kinds of evidence, including a comparison of panelists' responses. (*Id.* at p. 622)
c. Failing to engage in comparative juror analysis for the first time on appeal unduly restricts review based on the entire record.” (*Id.* at p. 622) “Thus, evidence of comparative juror analysis must be considered in the trial court and even for the first time on appeal if relied upon by defendant and the record is adequate to permit the urged comparisons.” (*Id.* at p. 622)
d. The trial court has a duty to “assess the plausibility” of the prosecutor’s proffered reasons for striking a potential juror, “in light of all evidence with a bearing on it.” (*Id.* at p. 625) Trial courts “must evaluate the demeanor of the prosecutor in determining the credibility of proffered explanations, and the demeanor of the panelist when that factor is a basis for the challenge.” (*Id.* at p. 625)
e. It should be discernible from the record that “1) the trial court considered the prosecutor’s reasons for the peremptory challenges at issue and found them to be race-neutral; 2) those reasons were consistent with the court’s observations of what occurred, in terms of the panelist’s statements as well as any pertinent nonverbal behavior; and 3) the court made a credibility finding that the prosecutor was truthful in giving race-neutral reasons for the peremptory challenges. (*Id.* at pp. 625-626)
f. “As to the second point, the court may not have observed every gesture, expression or interaction relied upon by the prosecutor. The judge has a different vantage point, and may have, for example, been looking at another panelist or making a note when the described behavior occurred. But the court must be satisfied that the specifics offered by the prosecutor are consistent with the answers it heard and the overall behavior of the panelist.

g. The record must reflect the trial court's determination on this point (see *Snyder*, supra, at p. 460), which may be encompassed within the court's general conclusion that it considered the reasons proffered by the prosecution and found them credible." (*Id.* at pp. 625-626)
h. The court observed that comparative juror analysis is a form of circumstantial evidence (*Id.* at p. 622) and that a reviewing court must be careful not to accept one reasonable interpretation to the exclusion of other reasonable ones when reviewing the circumstantial evidence supporting the trial court's factual findings in a *Batson/Wheeler* holding. "If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also be reasonably reconciled with a contrary finding does not warrant a reversal of the judgment." (*Id.* at pp. 625-626)
    i. Comparative Analysis will only be considered for the first time on appeal at the *Third* Step. (*See, People v. Clark* (2016) 63 Cal.4th 522, 568 [Declining the defense invitation to engage in comparative analysis for the first time on appeal at the first step of *Batson*.])
i. "Positive" Comparative Analysis
    i. This term refers to the idea of using comparative analysis to support a challenge of a member of a cognizable class by comparing other similarly situated non-cognizable class jurors who were also challenged.
    ii. (*Rice v. Collins* (2006) 546 U.S. 333, 341 [**prosecutor struck a white juror with the same characteristics of a cognizable class juror she struck**]; (*Briggs v. Grounds* (2012) 682 F.3d 1165 [**prosecutor struck at least on non-African American who indicated they would hold the prosecution to a higher standard of proof**]).

V. Practical Issues in Dealing with *Batson/Wheeler* Motions
A. Realize that a challenge will likely come at some point during jury selection and be ready to deal with it. It should go without saying, but ***NEVER*** excuse a juror on the basis of race, ethnicity, religion, gender etc…Question all jurors you plan to challenge. Desultory (non-substantive) questioning does not count.

B. Be prepared to rebut the prima facie case. (*See,* pp. 4-6)
C. Assume that a prima facie case will be made and be prepared to give race neutral reasons for excusing the juror. While peremptory challenges are often based on instinct and it can sometimes be hard to articulate the reason for removing a juror, "a prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives." (*People* v. *Lenix* (2008) 44 Cal.4th 602, 624.) Prosecutors should "provide as complete an explanation for their peremptory challenges as possible." (*People* v. *Lenix* (2008) 44 Cal.4th 602, 624.)
D. If you can't recall specifically why you excused a juror, it is better to ask for a "time out" so that you may review the transcript/recording of the juror's answers. (See *Lewis v. Lewis* (9th Cir. 2003) 321 F.3d 824 [suggesting that counsel can be particularly helpful in assisting the court at the third step of *Batson* "when afforded the opportunity to review a transcript of the jury selection proceedings"].)
E. If judge finds no prima facie case, insist that the finding is placed on the record. Then state your reasons anyway. But, DO NOT give reasons unless and until the court specifically finds no prima facie case. Giving reasons without a specific finding on the first prong will constitute an implied finding of a prima facie case. *People v. Arias* (1996) 13 Cal. 4th 92; *People v. Gutierrez* (2002) 28 Cal. 4th 1083. *People v. Scott* (2015) 61 Cal.4th 363.
F. Trial Tips
    1. Create a Good Record
        a. The prosecutor should make sure the following is discernible from the record:
            i. "1) The trial court considered the prosecutor's reasons for the peremptory challenges at issue and found them to be race-neutral. And the trial court made a sincere and reasoned attempt to evaluate the reasons given;
            ii. 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.)
    2. Obtain a Transcript of Voir Dire Before Making Challenges

a. In certain situations, a prosecutor may not recall or have accurate notes regarding the responses of a juror he or she wishes to challenge.
b. In those cases, it is appropriate and recommended that the prosecutor ask for read back of the juror's responses. (*See Lewis v. Lewis* (9th Cir. 2003) 321 F.3d 824)

3. Ask Court to Note the Final Jury Composition
    a. 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"].)
    b. 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"].)
4. Save your notes. If case is reviewed later, voir dire may be an issue. Always save your notes so that if asked, you are

better able to recollect why you may have challenged a specific juror.

a. At remand hearing, the prosecutor does NOT have to state reasons under oath. (*People v. Kelly* (2008) 162 Cal.App.4th 797)
b. At remand hearing, the prosecutor does NOT have to turn over original voir dire notes. (*People v. Kelly* (2008) 162 Cal.App.4th 797)
c. At remand hearing, prosecutor cannot be cross-examined by the defense. (*People v. Kelly* (2008) 162 Cal.App.4th 797)
d. I don't recall" May or May Not Fly – (*Paulino v. Harrison* (9th Cir. 2008) 542 F.3d 692); (But see, *Yee* v. *Duncan* (9th Cir. 2006) 463 F.3d 893.) [notwithstanding the inability to recall reason for excusing one cognizable class juror, totality of prosecutor's responses regarding other excused jurors did not evidence a discriminatory motive].)
e. If you use shorthand, make sure you define your terms. Don't make a reviewing court guess at what you meant. (*See, Foster v. Chatman* (2016) 136 Sup.Ct. 1737 [Murder conviction reversed for third step *Batson* violation. Very bad facts that we hope to never see. However, it's instructive on the issue of the clarity, or lack thereof, of the prosecutor's notes.])

G. Remedies

1. *Wheeler-Batson* error is reversible per se. (*People v. Wheeler* (1978) 22 Cal.3d 258, 283; see *Miller-El v. Dretke* (2005) 545 U.S. 231)
2. Step One Error: When the trial court erroneously finds there was not a prima facie case, the matter is often remanded for prosecutor to state reasons for peremptory challenge. (*Batson v. Kentucky* (1986) 476 U.S. 79, 100; *People v. McGee* (2002) 104 Cal.App.4th 559, 571, 573 [remand to permit prosecutor give reasons].)
    a. This remedy has been criticized for two reasons. First, the long passage of time makes it nearly impossible for the prosecutor to genuinely remember the real reason. (*People v. Hall* (1983) 35 Cal.3d 161, 171 [pointless to remand for the prosecutor to give a reason 11 years later]; *People v. Allen* (2004) 115 Cal.App.4th 542, 553-554, fn. 10 [remand for new trial, not for the prosecutor to give reasons, because occurred three years ago];

see also *People v. Ayala* (2000) 24 Cal.4th 243, 297, fn. 8 (conc. opn. of George, C.J.); *People v. Robinson* (2003) 110 Cal.App.4th 1196, 1208 [remand for the prosecutor to give the reason but retrial if it could not recall]; *People v. Williams* (2000) 78 Cal.App.4th 1118, 1130 [on remand, the court must first determine if it can adequately address the issue after the delay]; *United States v. Alcantar* (9th Cir. 1990) 897 F.2d 436, 438-439.)

b. Second, this procedure is subject to a prosecutor trying to invent more legitimate reasons after the fact. (See, e.g., *Miller-El v. Dretke* (2005) 545 U.S. 231 [prosecution's reasons after the fact "reeks of afterthought"]; *Miller-El v. Cockrell* (2003) 537 U.S. 331, 343 [reasons given after trial "was subject to the usual risks of imprecision and distortions from the passage of time"]; see also *Johnson v. California* (2005) 545 U.S. 162, quoting *Paulino v. Castro* (9th Cir. 2004) 371 F.3d 1083, 1090 ["it does not matter that the prosecution might have had good reasons . . . [w]hat matters is the real reason they were stricken"].)

3. Step Three Error: When the trial court fails to sustain motion after the prosecutor gives reason, error normally requires new venire. (*People v. Wheeler* (1978) 22 Cal.3d 258, 283; see *Miller-El v. Dretke* (2005) 545 U.S. 162). However, the defendant and the trial court can stipulate to a different remedy. (*People v. Willis* (2002) 27 Cal.4th 811, 821-824 [with consent of movant, can use other remedies such as sanctions, reinstating removed jurors or doing challenges at sidebar]; *People v. Overby* (2004) 124 Cal.App.4th 1237, 1244-1245 [defendant not objecting to judge re-seating the excused juror indicates consent to this remedy]. (See *People v. Mata* (2013) 57 Cal.4th 178) [holding that the trial court may reseat an improperly challenged juror if affected counsel either expressly or implicitly consents]
4. Consequences
    a. If the court grants a *Batson/Wheeler* motion at trial and employs one or more of the remedies discussed, that is arguably a "sanction".
        i. Court must notify the bar of any judicial sanctions against an attorney (Business & Professions Code §6068(a) (3)).

ii. Attorney must self-report any judicial sanction (Business & Professions Code §6068(o) (3)).
iii. However, reporting will likely not be required unless the conduct is egregious.

b. If the trial court erroneously denies a *Batson/Wheeler* motion at trial and the case is reversed.
i. Court must notify bar whenever there is a reversal. (Business & Professions Code §6086.7(b) (2)).
ii. Attorney must notify bar whenever reversal is based in whole or in part upon misconduct of the attorney. (Business & Professions Code §6068(o) (7)).

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO

CENTRAL DIVISION

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, v. JOHNNY CROOK, Defendant.	No. SCD DA **PEOPLE'S MEMORANDUM RE: VOIR DIRE LAW AND THE PROPER *WHEELER* PROCEDURE** Date: Time: Dept.:

Comes now the plaintiff, the People of the State of California, by and through its attorneys, BONNIE M. DUMANIS, District Attorney, and XXX YOUR NAME HERE XXX, Deputy District Attorney, and respectfully submits the following People's Memorandum Re: Voir Dire and the Proper *Wheeler* Procedure.

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ARGUMENT

I

CODE OF CIVIL PROCEDURE SECTION 225 LISTS THE THREE TYPES OF CHALLENGES FOR CAUSE

A challenge for cause is an objection to a prospective trial juror based upon one or more of the following grounds: (1) The juror is generally disqualified, (2) the juror has an implied bias, or (3) the juror has an actual bias. (Code Civ. Proc., § 225, subd. (b).) The number of challenges for cause is unlimited.

I. General Disqualifications

Code of Civil Procedure section 228 sets forth the general qualifications for jurors as follows:

> "(a) A want of any of the qualifications prescribed by this code to render a person competent as a juror.
>
> "(b) A loss of hearing, or the existence of any other incapacity which satisfies the court that the challenged person is incapable of performing the duties of a juror in the particular action without prejudice to the substantial rights of the challenging party."

Code of Civil Procedure section 203 subdivision (a), describes all persons are eligible to be jurors **except**:

(1) Persons who are not U.S. citizens.

(2) Persons who are less than 18 years old.

(3) Persons who are not California domiciliaries per Elections Code section 200 et seq. A person can have only one domicile.

(4) Persons who are not residents of the jurisdiction of the court.

(5) Persons convicted of a felony or malfeasance in office, and whose civil rights have not been restored.

(6) Persons who are not competent in English.

(7) Persons who are serving on a grand jury or other trial jury.

(8) Persons who are under a conservatorship.

II. Implied Bias

The second ground for a challenge for cause is an implied bias. Code of Civil Procedure section 229 sets forth the factors which constitute an implied bias:

(a) Is related by blood or marriage, within the fourth degree, to a party or any alleged witness or victim.

(b) Has a close personal or business relationship to a party, as specified; e.g., guardian and ward, landlord and tenant, etc.; or had a recent attorney-client relationship with the party or party's attorney.

(c) Served as trial juror, grand juror, or witness in the same case or any case involving the same defendant.

(d) Has an interest in the case, other than as a citizen or taxpayer.

(e) Has "an unqualified opinion or belief as to the merits of the action founded upon knowledge of its material facts or of some of them."

(f) Has "a state of mind . . . evincing enmity against, or bias towards, either party."

(g) Is a party to the case which is set for trial before the same jury panel of which he/she is a member.

(h) In a *death penalty* case, has such opinions "as would preclude the juror finding the defendant guilty."

III. Actual Bias

The final ground would be actual bias. Code of Civil Procedure section 225, subdivision(b)(1)(c), defines actual bias as "[t]he existence of a state of mind on the part of the juror in reference to the case, or to any of the parties, which will prevent the juror from acting with ***entire*** *impartiality*, and without prejudice to the substantial rights of any party."

BATSON-WHEELER LAW

II

BOTH THE PEOPLE AND THE DEFENDANT CAN BRING A *WHEELER* MOTION

A peremptory challenge is an objection to a juror for which no reason need be given. Its purpose is to allow either party to exclude prospective jurors which the party believes may consciously or unconsciously be biased against him. *People v. Jackson* (1992) 10 Cal.4th 13, 17. Accordingly, there is a rebuttable presumption that all peremptory challenges are exercised in a constitutionally permissible manner. *People v. Clair* (1992) 2 Cal.4th 629, 652. Challenges based upon "hunches" or even "arbitrary" exclusion is permissible, so long as impermissible group bias does not enter the question. *People v. Hall* (1983) 35 Cal.3d 161, 170.

However, peremptory challenges based solely upon group bias violates a party's right to a jury drawn from a representative cross section of the community. *People v. Wheeler* (1978) 22 Cal.3d 258. Group bias is a presumption that jurors are biased merely because they are members of an identifiable group distinguished on racial, religious, ethnic, or similar grounds. (*People v. Johnson* (1989) 47 Cal.3d 1194, 1215.)

The Court in *Wheeler* went on to clarify its intentions:

> "This does not mean that the members of such a group are immune from peremptory challenges: individual members thereof may still be struck on grounds of specific bias, as defined herein. Nor does it mean that a party will be entitled to a petit jury that proportionately represents every group in the community: we adhere to the long-settled rule that no litigant has the right to a jury that mirrors the demographic composition of the population, or necessarily includes members of his own group, or indeed is composed of any particular individuals. [Citations.] What it does mean, however, is that a party is constitutionally entitled to a petit jury that is as near an approximation of the ideal cross-section of the community as the process of random draw permits." [*Id*. at 276-277.]

It is important to note that both parties enjoy this constitutional right to a fairly selected jury. Both the People and the defendant can bring a *Wheeler* motion. The *Wheeler* Court itself left no doubt the People also enjoyed this protection:

> Although in the present appeal the Attorney General for obvious reasons does not claim the right to object to the same misuse of peremptory challenges on the part of defense counsel, we observe for the guidance of the bench and bar that he has that right under the constitutional theory we adopt herein: the People no less than individual defendants are entitled to a trial by an impartial jury drawn from a representative cross-section of the community. *Id*. at p. 282, fn. 29. See also, *People v. Taylor* (1997) 55 Cal.App.4th 924; *People v. Williams* (1994) 26 Cal.App.4th Supp. 1, 9; *People v. Pagel* (1986) 186 Cal.App.3d Supp. 1, 6.

More recently, the California Supreme Court reiterated the People's right to bring a *Wheeler* motion. In *People v. Willis* (2002) 27 Cal.4th 811, 813 the Supreme Court found defense counsel, representing a black defendant, exhibited group bias in exercising his peremptory challenges to exclude white male prospective jurors. The trial court's granting of the People's *Wheeler* motion was upheld.

II

THE MOTION MUST BE TIMELY

If a party believes an opponent is improperly using peremptory challenges to exclude jurors solely for a discriminatory purpose, that party must make a timely objection. The motion is considered timely if it is made before the jury is sworn. (*People v. Ortega* (1984) 156 Cal.App.3d 63, 67.) In *People v. Gore* (1993) 18 Cal.App.4th 692, 703 the Court explained:

> "[T]o be timely, a *Wheeler* objection or motion must be made, at the latest, before jury selection is completed. 'The general rule is that where a court has indicated that a trial will be conducted with alternate jurors, the impanelment of the jury is not deemed complete until the alternates are selected and sworn.' [Citation.]"]; accord, *People v. Rodriguez* (1996) 50 Cal.App.4th 1013, 1023.

However, in *People v. Crutcher* (1997) 58 Cal.App.4th 1002, defense counsel raised a *Wheeler* objection to the first two challenges exercised by the People. The *Wheeler* objection was not made, however, until the prosecutor's fifth challenge. The Court found this untimely, even though the jury had not yet been sworn. The *Crutcher* Court explained:

> "Such delay thwarts effective consideration of all relevant circumstances and potentially wastes judicial resources." *Id*. at 1013.

III

A PRIMA FACIE SHOWING OF GROUP BIAS MUST BE ESTABLISHED

The moving party has the burden of establishing a prima facie case that the opposing side has challenged jurors solely on the basis of group bias. "Group bias is a presumption that jurors are biased merely because they are members of an identifiable group, distinguished on grounds such as race, religion, ethnicity, or gender." *People v. Crittenden* (1994) 9 Cal.4th 83, 115. Specific bias, on the other hand, "is a bias relating to the particular case on trial or the parties or witnesses thereto." *People v. Johnson* (1989) 47 Cal.3d 1194, 1215.

To establish a prima facie case, the moving party must (1) make as complete a record of the circumstances as is feasible; (2) establish the persons excluded are members of a cognizable group within the meaning of the representative cross-section rule; and (3) from all of the circumstances of the case demonstrate a strong likelihood that such persons are being challenged based solely upon their group association and not because of any specific bias. (*People v. Howard* (1992) 1 Cal.4th 1132, 1153-1154.)

The moving party cannot question the opposing counsel in order to establish a prima facie case. An attorney's statutory right to refuse to give any reason for the exercise of peremptory challenges continues to exist until the court rules that a prima facie showing has

been made by the moving party. (Penal Code Section 1069.) (*People v. Wheeler, supra,* at pp. 280-281, fn. 28. *People v. Granillo* (1987) 197 Cal.App.3d 110, 122.)

The first issue for the court to resolve is whether the challenged juror belongs to a cognizable group. To constitute a cognizable class two requirements must be met: 1) members share a common perspective arising from life experiences in the group, and 2) no other members of the community are capable of adequately representing the group perspective. See *Rubio v. Superior Court* (1979) 24 Cal.3d 93, 98. The following groups have been recognized as cognizable groups:

1. Men. *People v. Cervantes* (1991) 233 Cal.App.3d 323, 334. *People v. Williams* (2000) 78 Cal.App.4th 1118, 1125.

2. Woman. *Didonato v. Santini* (1991) 232 Cal.App.3d 721, 733; *Taylor v. Louisiana* (1975) 419 U.S. 522. *People v. Cervantes* (1991) 233 Cal.App.3d 323, 334. *People v. Macioce* (1986) 197 Cal.App.3d 262, 280.

3. Caucasians. *People v. Snow* (1987) 44 Cal.3d 216, 229, concurring opinion of Eagleson, J., *citing, Bakke v. Regents of University of California* (1976) 18 Cal.3d 34 (affd. in part, revd. in part, *University of California Regents v. Bakke* (1978) 438 U.S. 265.

4. Blacks. *People v. Wheeler, supra* at page 280, fn. 26; see also *People v. Johnson* (1989) 22 Cal.3d 296; *People v. Harris* (1984) 36 Cal.3d 36, 51.

5. Spanish surnamed (Hispanics). *People v. Trevino* (1985) 39 Cal.3d 667, 676, 683-688; *People v. Harris, supra,* 36 Cal.3d 36, 51; *People v. McCaskey* (1989) 207 Cal.App.3d 248, 252.

6. Black women. *People v. Motton* (1985) 39 Cal.3d 596, 605. *People v. Crittenden* (1994) 9 Cal.4th 83, 115.

7. Jewish jurors. *People v. Johnson* (1989) 47 Cal.3d 1194, 1217.

8. Homosexuals. *People v. Garcia* (2000) 77 Cal.App.4th 1269, 1276.

The courts have found the following not to be cognizable groups:

1. Poor persons/low income: see, e.g., *People v. Johnson* (1989) 47 Cal.3d 1194, 1214; *People v. Estrada* (1979) 93 Cal.App.3d 76, 91; *People v. Carpenter (II)* (1997) 15 Cal.4th 312, 352; *People v. Carpenter (III)* (1999) 21 Cal.4th 1016, 1035.

2. Less educated: see, e.g., *Estrada, supra,* at 90-91.

3. Blue collar workers: see, e.g., *Estrada, supra,* at 92.

4. Battered women: see *People v. Macioce* (1986) 197 Cal.App.3d 262, 280.

5. Young adults: see, e.g., *Estrada, supra,* at 93; *People v. Marbley* (1986) 181 Cal.App.3d 45, 48; *People v. Ayala* (2000) 23 Cal.4th 225, 257.

6. People over 70: see, e.g., *People v. McCoy* (1995) 40 Cal.App.4th 778, 783; *U.S. v. Grimmond* (4th Cir. 1998) 137 f.3 823 (over 65).

7. Death penalty skeptics: see, e.g., *People v. Johnson, supra,* at 1222; *People v. Davenport* (1995) 11 Cal.4th 1171, 1202-03.

8. Ex-felons and resident aliens: see, e.g., *People v. Karis* (1988) 46 Cal.3d 612, 631-33.

9. Naturalized citizens: see, e.g., *People v. Gonzalez* (1989) 211 Cal.App.3d 1186, 1202.

10. "Insufficient" English spoken: see, *People v. Lesara* (1988) 206 Cal.App.3d 1304, 1309.

11. New community residents (less than one year): see, e.g., *Adams v. Superior Court* (1974) 12 Cal.3d 55, 60.

12. Strong law and order believers: see *Wheeler*, 22 Cal.3d at 276.

13. "Men who wear toupees": see *People v. Motton* (1985) 39 Cal.3d 596, 606.

14. Retired correctional officers: *People v. England* (2000) 83 Cal.App.4th 772.

The defendant need not be a member of the cognizable group to make a *Wheeler* motion. (*People v. Wheeler, supra.*)

The moving party must next convince the Court that the juror was challenged solely because of group bias. The standard of proof for making a prima facie showing was set out in *Wheeler* as "a strong likelihood that such persons are being challenged because of their group association rather than because of any specific bias." *People v. Wheeler, supra* at 280. Unfortunately, the *Wheeler* Court complicated matters later by stating:

> Upon presentation of this and similar evidence—in the absence, of course, of the jury—the court must determine whether a reasonable inference arises that peremptory challenges are being used on the ground of group bias alone. *Id*. at 281.

Despite the unfortunate use of two different phrases in the same opinion, California courts generally apply the "strong likelihood" language. *People v. Jackson* (1992) 10 Cal.4th 13, 18; *People v. Turner* (1994) 8 Cal.4th 137, 167; *People v. Garceau* (1993) 6 Cal.4th 140, 171.

In 1986, the United States Supreme Court also held that discriminatory challenges violated the Sixth and Fourteenth Amendments of the United States Constitution. *Batson v. Kentucky* (1986) 476 U.S. 79, 90 L.Ed.2 69. In *Batson*, the Supreme Court talked about needing only to raise an inference that venire members were challenged on account of their group association to make out a prima facie case.

The 9th Circuit, in *Wade v. Terhune* (2000) 202 F.3d 1190, held *Batson's* federally mandated standard only requires the moving party to raise a **reasonable inference** of bias, a lower standard than California's "strong likelihood" language. *Terhune* noted that although *Wheeler* itself uses both terms, it really meant to impose only the reasonable inference standard, and all later California cases misinterpreted *Wheeler* on this point. To further confuse matters, California cases since *Terhune* uniformly say it is wrong or not controlling authority and that the

higher California standard is controlling in California (see, e.g., *People v. Martinez* (2000) 81 Cal.App.4th 339); or that *Batson's* **"raise an inference"** standard is actually the same as *Wheeler's* **"strong likelihood"** standard (see, e.g., *People v. Box* (2000) 23 Cal.4th 1153, 1188, fn.7.)

Merely noting that a party has used its challenges to exclude members of a particular group is insufficient to support a prima facie showing of group bias. (See, *People v. Trevino* (1997) 55 Cal.App.4th 396, 406; *People v. Turner* (1994) 8 Cal.4th 137, 167 [mere claim that challenged jurors were Black and had indicated they could be impartial]; *People v. Howard* (1992) 1 Cal.4th 1132, 1154 [fact that DA challenged first two Black jurors "completely inadequate" to meet burden].) Such limited showings are insufficient even when peremptories exclude all members of a cognizable group. (See, e.g., *People v. Rousseau* (1982) 129 Cal.App.3d 526, 536-37 [only two Blacks on panel challenged]; *People v. Christopher* (1991) 1 Cal.App.4th 666, 672-73 [sole Black challenged].)

In *People v. Garceau* (1993) 6 Cal.4th 140, the defendant claimed his prima facie case was established by showing the prosecution had excused six Hispanic women. The Supreme Court disagreed. The Court in *Garceau* explained:

> Nevertheless, defendant failed to show a "strong likelihood" that these prospective jurors were excluded because of a group association. His motions merely reiterated the names of the jurors removed by the prosecution and alleged that, because the removed jurors all were Hispanic-surnamed women, he had made a "prima facie showing." (*Id*.)

Similarly, in *People v. Turner* (1994) 8 Cal.4th 137, the prosecutor used four of his six peremptory challenges to exclude black prospective jurors. He also excused two black prospective alternates. (*Id*. at p. 172.) Moreover, this case was a retrial following the Supreme Court's reversal of a murder conviction caused by the same prosecutor's *Wheeler* violations in the first trial. (See *People v. Turner* (1990) 50 Cal.3d 668.)

Mindful of the above-stated facts, the Supreme Court nevertheless found a prima facie case still had not been established.

> In particular, defendant failed to establish from all the circumstances of the case a strong likelihood that such persons were being challenged because of their group association. (*People v. Howard, supra,* 1 Cal.4th at p. 1154.) Rather, the only basis for establishing a prima facie case cited by defense counsel were that all of the challenged prospective jurors were Black and either had indicated that they could be fair and impartial or in fact favored the prosecution. This is insufficient. (*Id*. at p. 167.)

One factor arguing against the defendant's claimed *Wheeler* violation was the fact the prosecutor had accepted a jury panel including several black members. The Supreme Court stated the obvious:

> While the fact that the jury included members of a group allegedly discriminated against is not conclusive, it 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. (*Id*. p. 168.)

If the moving party cannot establish a prima facie case, the motion must be denied. In *People v. Cervantes* (1991) 233 Cal.App.3d 323, the trial court listened to defense counsel's prima facie presentation, then turned to the district attorney for a response. The Appellate Court explained the trial court erred by not making a finding on the prima facie case before asking the prosecutor to defend the challenges.

> The scenario we have just described could have been avoided had the district attorney demanded a specific finding of the trial judge. Although not an excuse, we understand that trial lawyers, including deputy district attorneys, often are reluctant to make demands of the trial judge for such things as specific findings, etc. However, at least as to *Wheeler* motions, the district attorney need never be put in this position. When defense counsel makes a *Wheeler* motion and states his reasons for the motion, if the trial judge, after weighing the evaluating these reasons, concludes a prima facie showing of discriminatory exclusion of a cognizable group has not been made, then the judge must clearly and succinctly say so, state his or her reasons, and make the necessary finding of no prima facie showing. On the other hand, if the court concludes a prima facie showing has been made, then it must state that finding. Either way, the district attorney knows where he or she stands and what must be done, i.e.,

> either respond or not, depending on the court's specific finding. And, of course, had the above-described scenario been followed here, then *Wheeler* error may have been avoided. (233 Cal.App.3d at 336-37, emphasis added.)]

Answering the court's inquiry regarding individual challenge justifications before a prima facie finding will result in an implied prima facie finding. (See, e.g., *People v. Arias* (1996) 13 Cal.4th 92, 135 ["When the trial court solicits an explanation of the challenged excusals without first indicating its views on the prima facie issue, we may infer an implied prima facie finding. [Citations.] . . . Once an implied prima facie finding has been made, that issue becomes moot, and the only question remaining is whether the individual justifications were adequate."]. *People v. Ervin* (2000) 22 Cal.4th 48. Thus the proper response is to speak only to the prima facie case issue, not specific challenge justifications; then a prima facie finding will not be implied. See, *People v. Ferro* (1993) 21 Cal.App.4th 1, 7-8:

> The trial court did not ask for reasons or explanations. It merely asked the prosecutor if she wished to be heard. The prosecutor, wisely or fortuitously, gave not one word of excuse or explanation, but attacked the preliminary question of systematic exclusion, after which the trial court specifically found no pattern of systematic exclusion. In the cases surveyed above, . . . the prosecutors, some eagerly, some reluctantly, gave reasons for excluding the jurors in question. It is easier to conclude that a trial court has impliedly made the prima facie finding when it takes the next step and listens to the justifications offered. . . .
>
> It's much easier for the trial court to just say whether it is making the prima facie finding before it asks the prosecutor to respond, or if limiting the inquiry to whether a prima facie showing has been made, to say so. Any prosecutor who fails to inquire and gushes explanations when the trial court has failed to specify is unwittingly jeopardizing his or her case.

See also, *People v. Bittaker* (1989) 48 Cal.3d 1046, 1091-92.

However, if the trial court finds no prima facie case has been made, but still asks for reasons for the sake of recourt, no prima facie case will be presumed. *People v. Turner*

(1986) 42 Cal.3d 711 [*Turner I*] was a Rose Bird Supreme Court reversal of a robbery-murder special circumstances case based on prosecutorial *Wheeler* error, where all three Blacks on the jury were challenged. "[T]he prosecutor's explanations were either implausible or suggestive of bias." (42 Cal.3d at 728.) The same prosecutor (but with a different trial judge) convicted defendant on retrial, which led to the Malcolm Lucas Court's *People v. Turner* (1994) 8 Cal.4th 137 [*Turner II*]; there, defendant's conviction was affirmed over a *Wheeler* challenge raised but denied in the second trial.

In *Turner II*, the prosecutor used four of six challenges against Black jurors; defendant excused two Blacks, and final jury had five Blacks. After the prosecutor challenged the first two Black jurors, defense counsel objected, claiming only that both jurors had stated they could be fair, but were dismissed because of their race. The trial court replied:

> Let me indicate before I ask the prosecutor to respond that – at this point, I'm not making a prima facie finding that there's been any systematic exclusion of [B]lacks from the jury. But for the record in the case, I'm going to ask the prosecutor to give me – to articulate the reasons why he excused those two jurors. But I want the record to be clear that I'm making that request not as a result of any prima facie finding of exclusion of the prospective jurors on the basis of color. Again, I'm doing it because of the reason that the case was reversed. (8 Cal.4th at 165.)

The prosecutor properly responded, "I think the law is clear that unless a prima facie case is made, there is no response required by the People." (*Id.*) However, the prosecutor then complied with the Court's request and stated reasons for the challenges. After the third Black juror was challenged by the prosecutor, the defense again objected; the Court again stated no prima facie case was found, but nevertheless requested the prosecutor to respond; the prosecutor again complied.

In *Turner II*, the Supreme Court first ruled, "when an appellate court is presented with such a record, and concludes that the trial court properly determined that no prima facie case was made, it need not review the adequacy of counsel's justifications for the peremptory challenges." (*Id*. at 167.) Thus, the High Court found that the trial court correctly ruled no

prima facie case had been made. Although it need not review the adequacy of any justifications in such posture, the Supreme Court did examine the prosecutor's justifications because of the unique procedural history of the case. All reasons given for the challenges were found to be properly race-neutral.

IV

UPON A FINDING OF A PRIMA FACIE CASE, THE BURDEN SHIFTS TO THE NON-MOVING PARTY TO PROVIDE A DETAILED AND NEUTRAL JUSTIFICATION FOR EACH CHALLENGED JUROR

Should the Court find the moving party has established a prima facie case, the burden shifts to the other party to show his challenges were not based solely on a presumed group bias. Stated another way, counsel must demonstrate the challenges were based on specific bias, or a belief the juror may be biased against his side, or for the opposition. To sustain his burden, the allegedly offending party must satisfy the court that he exercised the peremptory challenges on "grounds that were reasonably relevant to the issues, parties, or witnesses in the particular case on trial." (*People v. Jackson* (1992) 10 Cal.App.4th 13, 18.)

Exclusions based upon hunches and other arbitrary reasons are permissible, as long as the reasons are not based upon improper group bias. (*People v. Turner* (1994) 8 Cal.4th 137, 164-165; *People v. Hall* (1983) 35 Cal.3d 161, 170. The reasons need only to be genuine, reasonably specific, and race or group neutral; even trivial reasons may suffice. *People v. Arias* (1996) 13 Cal.4th 92, 136.)

This justification must be done as to each such juror individually and should be done at the time the challenge is exercised rather than waiting until the end of jury selection. The judge must issue a ruling as to each such juror individually. (*People v. Fuentes, supra,* at 718-719.)

The explanations given by the non-moving party need not rise to the level of a challenge for cause. (*People v. Wheeler, supra,* at pp. 281-282.) Subjective observations, such as the prospective juror's body language or manner of answering questions, are acceptable.

(*People v. Johnson, supra,* at p. 1219; *People v. Jackson* (1992) 10 Cal.App.4th 13, 19.) Likewise, a juror's limited life experience, *People v. Sims* (1993) 5 Cal.4th 405, 429; *People v. Perez* (1994) 29 Cal.App.4th 1313, 1328; the inability to understand the proceedings, *People v. Barber* (1988) 200 Cal.App.3d 378, 397, past involvement with a hung jury, *People v. Turner, supra,* at p. 170, negative experiences with law enforcement, *People v. Walker* (1988) 47 Cal.3d 605, 625, and "bare looks and gestures" by a prospective jury that may alienate one party, *People v. Wheeler, supra,* at p. 276, constitute valid grounds for the exercise of peremptory challenges. Also, "the use of peremptory challenges to prospective jurors whose relatives and/or family members have had negative experiences with the criminal justice system is not unconstitutional." *People v. Douglas* (1995) 36 Cal.App.4d 1681, 1690.

V

THE TRIAL COURT MUST DETERMINE WHETHER THE JUSTIFICATION IS GENUINE AND SUFFICIENT

Once the moving party has made a prima facie showing of exclusion of jurors from a protected class and the opposing party has explained its challenges, the trial court must exercise its own judgment as to the propriety of the challenges. The trial court is governed by the following standard:

> [T]he trial court is required to: "satisfy itself that the explanation is genuine. This demands of the trial judge a sincere and reasoned attempt to evaluate the prosecutor's explanation in light of the circumstances of the case as then known, his knowledge of trial techniques, and his observations of the manner in which the prosecutor has examined members of the venire and has exercised challenges for cause or peremptorily, for 'we rely on the good judgment of the trial courts to distinguish bona fide reasons for such peremptories from sham excuses belatedly contrived to avoid admitting acts of group discrimination.' [Citation.]" (*People v. Hall* (1983) 35 Cal.3d 161, 167-168.)

Simply stated, the trial court is obligated to determine not only that a factually supportable reason for the challenge existed, but also that the reason actually prompted the use of the challenge. (*People v. Fuentes* (1991) 54 Cal.3d 707, 720.) The issue presented to the trial court is one of fact. (*People v. Perez, supra.*) Reasons that are genuinely held, valid and non-discriminatory will cause the trial court to deny the motion. Only when there is a reasonable inference based upon all the evidence that the peremptory challenges were used on grounds of group bias alone should the motion be granted. (*People v. Wheeler, supra,* at p. 281.)

In deciding this question of fact, the trial court must not engage in a subjective comparison between the challenged juror and those allowed to remain on the jury. In *People v. Johnson* (1989) 47 Cal.3d 1194, 1219-1220, the Supreme Court stated quite clearly its disapproval of this comparative analysis:

> We disapproved the approach taken earlier in *People v. Trevino* (1985) 39 Cal.3d 667, in which we had disallowed subjective reasons for peremptory challenges and had engaged in a comparative analysis of various jurors' responses to evaluate the bona fides of the prosecutor's stated reasons. We disapproved the *Trevino* approach because nothing in *Wheeler* disallows reliance on the prospective juror's body language or manner of answering questions as a basis for rebutting a prima facie case, and because comparative analysis of jurors unrealistically ignores 'the variety of factors and considerations that go into a lawyer's decision to select certain jurors while challenging others that appear to be similar'.

In *People v. Perez* (1994) 29 Cal.App.4th 1313, 1329, a San Diego case, the Fourth District followed *Johnson's* rejection of the comparative analysis approach. Furthermore, under authority of the California Supreme Court, "an appellate court is not allowed to compare the responses of rejected and accepted jurors to determine the bona fides of the justifications offered." (*People v. Landry* (1996) 49 Cal.App.4th 785, 791.)

Indeed, the Supreme Court has recently, and repeatedly, specifically declined to reconsider *Johnson*. (See *People v. Jones* (1997) 15 Cal.4th 119, 162 & fn. 12; accord *People v. Ervin* (2000) 22 Cal.4th 48; *People v. Box* (2000) 23 Cal.4th 1153, 1190.)

It must be noted, however, that the 9th Circuit approves of the use of comparative analysis when assessing the truthfulness of the reasons given for questionable peremptory challenges. *McClain v. Prunty* (9th Cir. 2000) 217 F.3d 1209.

VI

SEVERAL REMEDIES ARE AVAILABLE FOR *WHEELER* VIOLATIONS

Until 2002, it was generally accepted the only remedy for a *Wheeler* violation was to dismiss the jurors so far selected; quash the remaining venire, draw a new panel and begin jury selection anew. No other remedies were recognized. *People v. Wheeler, supra* at 282. But, see *People v. Williams* (1994) 26 Cal.App.4th Supp. l. However, in *People v. Willlis* (2002) 27 Cal.4th 811, the California Supreme Court belatedly recognized that alternative remedies were not only appropriate, but necessary.

In *Willis*, defense counsel initially objected to the racial mixture of the entire jury panel. Specifically, he claimed the panel was overwhelmingly Caucasian. After his motion to quash the panel was denied, the defense began to systematically exclude white male jurors, hoping his *Wheeler* violation would force a new jury panel for the trial. Fortunately, both the trial court and the Supreme Court saw through his tactically unconstitutional methods. *Id*. at 816.

Justice Chin, writing for a unanimous Supreme Court, noted the federal Constitution did not compel exclusion of the entire panel as the sole remedy for a violation of *Batson v. Kentucky* (1986) 476 U.S. 79. *Batson* had left implementation to the state courts. While the majority of the states give trial courts discretion to match a violation remedy to the facts and circumstances, to this point California had felt constrained to stick to the sole remedy of panel exclusion.

The *Willis* opinion began by echoing the words of the Massachusetts Supreme Court in *Commonwealth v. Reid* (1981) 384 Mass. 237, 255: "We did not hold that dismissal of

the entire venire was the only appropriate relief. Such a limitation on the trial judge's ability to respond in these circumstances would place in the hands of litigants the unchecked power to have a mistrial declared based on their own misconduct." Then the California high court turned to a fashioning of its own remedies. First, it ruled that the trial court's discretion to depart from the normal *Wheeler* exclusion remedy required the assent of the complaining party. That is, if a party objects on *Wheeler* grounds, and the court ultimately grants the motion, the complaining party has the whip hand: it can insist on exclusion of the panel and reseating of a new one, or it can assent to some other remedy. Then the Supreme Court expressed in some detail possible remedies and the procedural pathways to achieve them.

One remedy to deter illegal stacking of the jury is that suggested by the *Willis* trial court: "assessment of sanctions against counsel whose challenges exhibit group bias." (*Willis, supra,* 27 Cal.4th at 821.) A second remedy, used sparingly in very anomalous lower court situations in California in the past is to reseat "any improperly discharged jurors if they are available to serve." (*Id*.) But if improperly challenged jurors are no longer available (which would typically be the case in all challenges but the last one when the *Wheeler* motion is finally granted), "some cases have suggested that the court might allow the innocent party additional peremptory challenges. [Federal citations omitted.]" (*Id*.)

Willis has significantly changed the *Wheeler* landscape. The People now have the motive and an appropriate remedy to make a *Wheeler* motion to overcome a defense violation of the People's right to a fair trial.

Dated:

Respectfully submitted,

BONNIE M. DUMANIS
District Attorney

By:
YOUR NAME HERE
Deputy District Attorney
Attorneys for Plaintiff

Batson/Wheeler

Three-step process – Johnson v. California (2005) 545 U.S. 162, 168.)

1. Party objecting to the challenges (generally defense) must make a prima facie case showing the totality of the facts gives rise to inference of discriminatory purpose.
2. If prima facie case shown, burden shifts to other party (DDA) who must explain adequately the challenge – give race neutral justification.
3. Once a race-neutral justification is given, the trial court must decide whether the party objecting has proved purposeful discrimination.

Batson/Wheeler

Practice Tip:

- Unless the court finds that there has been a prima facie case at the first step, there is no obligation to disclose reasons for challenge.
- However –
  - Better practice for DDA to put neutral reasons on the record, even if the court finds that there was no prima facie case.
    - Making this record helps for future challenges.

Batson/Wheeler

- Juror's demeanor, attitude, and behavior in V D
- People v Mai (2013) 57 Cal 4th 986
  - First degree murder conviction Sentenced to death
  - Prosecutor excused only three African American jurors from jury pool
  - DDA's reasons for kicking jurors
    - were that one was single, had no children, attitude on death penalty
    - Young, casual attitude and dress, didn't seem interested in proceedings
    - Social worker, views on death penalty
  - Trial court found race-neutral reasons and denied Wheeler
  - Held: CA Supreme Court agreed
  - A juror's overall demeanor can be a neutral reason for challenging a juror
  - This was not confirmed by the record but also not disputed by record

Batson/Wheeler

- *People v. Elliot* (2012) 53 Cal.4th 535, 569.
  - Among other things a prosecutor can legitimately take into account in deciding whether to strike a juror are "juror's attitude, attention, interest, body language, facial expressions, and eye contact.
    - But – verification may be necessary
    - See *People v. Long* (2010) 189 Cal App.4th 826.

Batson/Wheeler

- *People v. Long* (2010) 189 Cal.App.4th 826.
  - Pros. kicked 3 Vietnamese jurors and said she challenged one because he did not participate or make eye contact during voir dire.
  - Pros. did not describe the details of the body language.
  - T.C. denied Batson but COA found that T.C. erred.
    - Transcripts show "lacked participation" was demonstrably false and record didn't reflect what was disturbing about juror's body language.

Batson/Wheeler

- Judge's observations are important!
  - Thaler v. Haynes (2010) 130 S.Ct. 1171, 1174
    - Where the explanation of a peremptory challenge is based on a prospective juror's demeanor, the judge is supposed to take into account their own observations of the juror.
  - People v. Montes (2010) 58 Cal.4th 809.
    - 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 challenge.

Batson/Wheeler

Practice Tips:

- Making a thorough record is everything!
- Be specific and explain significance of behavior you observe.
- If you are relying on demeanor, it is imperative that the court back up your comments.
- Ask the court, once the third stage is reached, to state for the record that the court observed what you did
- If this can't be done, ask the court to make a determination of whether or not you are telling the truth in your observation.

Batson/Wheeler

Practice tip:

- Ask the juror about the "hostile" body language.
  - "Juror 1, I noticed that you rolled your eyes in response to what juror 7 said regarding law enforcement. Is that because you disagree?"
    - This ensures that the hostile body language you observed, is on the record
  - Retain notes in the DDA file for potential habeas petitions that can happen years later.

AUTHORITY

- CCP 223: conducted in the aid of the exercise of challenges for cause
- CCP 225(b): Challenges for cause can be made by either side for either implied or actual bias
- CCP 223: Court has broad discretion to control time and subject matter of questioning

ACTUAL BIAS

- "The existence of a state of mind on the part of the juror in reference to the case, or to any of the parties, which will prevent the juror from acting with entire impartiality, and without prejudice to the substantial rights of any party."
- Unlimited challenges for cause
- CCP 225(b)(1)(C)

IMPLIED BIAS

- CCP 229
  - Consanguinity or affinity w/party or witness
  - Relationship
  - Prior service in same matter
  - Interest in the action
  - Having an unqualified opinion or belief as to the merits of the action founded by knowledge of material facts
  - Existence of a state of mind in the juror evincing enmity against, or bias towards, either party
  - Party to the action
  - Opposition to DP in Capital Case

IMPLIED BIAS

- CCP 225: When the existence of the facts as ascertained, in judgment of law disqualifies the juror

Peremptory Challenges
CCP 231

Sentence	Prosecution	Defense	Multiple Defendants
<90days	6	6	**Defense** 6 joint, 4 individual **Prosecution** 6, plus 4 per defendant
>90 ~ <Life	10	10	**Defense** 10 joint, 5 individual **Prosecution** 10, plus 5 per defendant
Life or Death	20	20	**Defense** 20 joint, 5 individual **Prosecution** 20, plus 5 per defendant

Peremptory Challenges

- Civil – 6
- SVP?
  - Civil commitment
  - Judges generally give more given the unique issues and potential life commitment

AUTHORITY FOR VOIR DIRE

- CCP223: Voir dire "shall be conducted only in aid of the exercise of challenges for cause."
- CCP225(b): Challenges for cause can be made by either side for either implied bias or actual bias and are unlimited.
- CCP223: Endows the court with broad discretion to control time and subject matter of questioning, limited only to reversal where a ruling resulted in miscarriage of justice.

ACTUAL BIAS: CCP 225(b)

"*The existence of a state of mind on the part of the juror in reference to the case, or to any of the parties, which will prevent the juror from acting with entire impartiality, and without prejudice to the substantial rights of any party*."

IMPLIED BIAS: CCP 229

- Consanguinity or affinity with party or victim;
- Relationship;
- Prior service in same matter;
- Interest in the action;
- Unqualified opinion or belief as to the merits of the action founded by knowledge of material facts or some of them;
- Enmity or bias towards or against a party;
- Party to an action before same jury; and
- Opposition to death penalty in capital case.

Proper Subject Matter

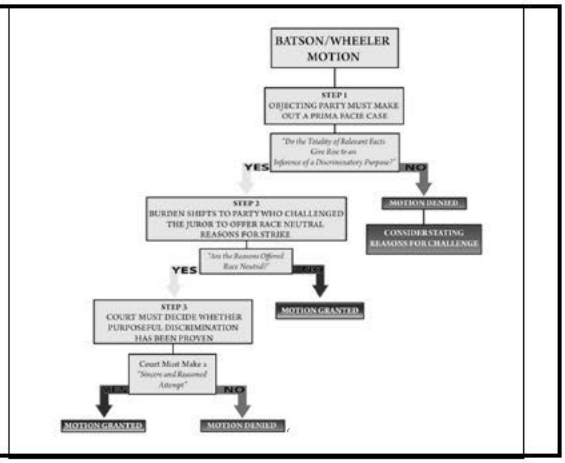
- Cannot ask questions whose sole purpose is to educate the jury, compel the vote a certain way, prejudice, argue or indoctrinate.
- Cannot instruct on law or test a juror's knowledge of the law.
- Cannot question on attitude about law unless relevant and controversial.
- Limiting questions on race bias may result in reversal.

Peremptory Challenges
CCP 231

Sentence	Prosecution	Defense	Multiple Defendants
<90days	6	6	**Defense** 6 joint, 4 individual **Prosecution** 6, plus 4 per defendant
>90 ~ <Life	10	10	**Defense** 10 joint, 5 individual **Prosecution** 10, plus 5 per defendant
Life or Death	20	20	**Defense** 20 joint, 5 individual **Prosecution** 20, plus 5 per defendant

U.S. Constitution

- Guarantees jurors the right to serve on a jury
- Prohibits lawyers from excluding jurors who are members of a "cognizable class"
- When done by prosecutors it also affects the defendant's right to due process



People v. Gutierrez (2017) 2 Cal. 5th 1150

First time in 16 years that the California Supreme Court has found a *Batson/Wheeler violation*.

"This case offers us an opportunity to clarify the constitutionally required duties of California lawyers, trial judges, and appellate judges when a party has raised a claim of discriminatory bias in jury selection." (*People v. Gutierrez* (2017) 2 Cal. 5th 1150, 1154.

FACTS:

Gang related drive by shooting.

D was the shooter.

One of the co-D's from a gang subset in Wasco testified against D.

PROCEDURAL OVERVIEW:

Prosecutor kicks 10 Hispanic jurors out of 16 peremptory challenges with 4 in a row.

The defense made a *Batson/Wheeler* motion.

The trial court found the existence of a prima facie case ("inference of discrimination").

The prosecutor gave reasons and the trial court found them to be race neutral.

Defense motion was denied.

The Court of Appeal upheld the denial of the defense motion.

Cal Supremes – REVERSED.

Step One:

The trial court found that 10 out of 16 challenges to Hispanic jurors established a prima facie case.

Step Two:

The prosecutor gave reasons for the 10 strikes.

7 of the 10 were found to be race neutral.
The Supreme Court identified error in 3 of the challenges but based the reversal only upon 1 (Wasco Juror) and did not determine the other two.

Wasco Juror (Hispanic Female):

Teacher from Wasco.
Divorced.
No Kids.
Ex-husband is a correctional officer.
Other relatives in law enforcement.
No connection to gangs.

Voir Dire of Wasco Juror:

Prosecutor: Are you aware of gangs in Wasco?

Wasco Juror: "No."

Prosecutor: Do you live in the Wasco area and Wasco itself?

Wasco Juror: "Yes."

Step Two:

Prosecutor's Reasons...

Wasco juror was unaware of gangs in Wasco and by some of her other answers.

He wasn't sure how she'd respond when she hears that the testifying co-D was from a Wasco gang.

Step Three:

The Supreme Court found the prosecutor's reason for kicking all jurors to be neutral on their face.

The Court found that the trial court made a ***sincere*** attempt to evaluate the prosecutor's reason.

However, the trial court failed to make a ***reasoned*** attempt.

The Trial Court tried to help...

Court acknowledged the "Wasco Issue" and deemed it neutral.

Court failed to reject prosecutor's reference to "other answers"

Court cited a reason not given by the prosecutor of lack of life experience.

Court failed to probe deeper into the prosecutor's reasoning

The AG tried to help...

Lack of awareness of gangs in Wasco could cause the juror to be biased against the testifying Co-D.

Problem: A tenuous reason and not obvious based on the voir dire.

Ultimately the Supreme Court rejected the help...

"[A] prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives." (*Id.* at 1159. *See also*, *Miller-El v. Dretke (2005) 545 U.S. 231, 252 (Miller-El II)*.)

The Appellate Court got it wrong too...

Declined to apply comparative analysis for the first time on appeal.

Cal Supremes made it clear in *Lenix* by holding that "evidence of comparative analysis *must* be considered in the trial court and even for the first time on appeal...")

Practical Trial Tips

1. NEVER excuse a juror on the basis of the membership in a cognizable class.
2. Recognize that a you will get "*Wheelered"* and be prepared to deal with it by knowing the law better than the defense attorney and the judge.
3. Take detailed notes.
4. Do not state your reasons unless and until the judge makes a step one finding.
5. If no prima facie case found, state your reasons anyway and make it clear why you are doing so.
6. When a prima facie case is found be prepared to state your reasons.
7. Explain your reasons.
8. Make a thorough record. (Step 2)
9. Make sure the court makes a good record. (Step 3)
10. Record the final jury composition.
11. Save your notes.

Post Ferguson World

- Get comfortable talking about problems with our system of justice.
- Be prepared to address any ongoing or recent events involving questioned or questionable LE conduct.
- Acknowledge shortcomings of LE, while questioning a juror's ability to be fair.
- Avoid knee jerk reactions, choose your words wisely, and be a voice of reason and compassion.
- Their perception of your fairness will impact your verdict.

The problem with your gut...

- It will not save you from Wheeler.
- Practice Inclusivity.
  - There are mechanism's for dealing with rogue jurors
  - It can help your case
  - It will help change the dynamics of exclusion
  - It's the law

Jury Selection

Voir Dire Mechanics

Voir Dire should be conducted to assist you in making well-grounded challenges for cause and allow you to identify less suitable jurors subject to peremptory challenges. The rules regarding juror challenges can be found in the *Code of Civil Procedure §§ 225-231.*

In a criminal trial, "[e]xamination of prospective jurors shall be conducted only in aid of the exercise of challenges for cause." *CCP § 223.* Challenges for cause can be made by either side for either *implied bias* or *actual bias CCP §225(b).* The ultimate determination to excuse a juror for cause is made by the court. *CCP §230.* "The trial court's exercise of its discretion in the manner in which voir dire is conducted, including any limitation on the time which will be allowed for direct questioning of prospective jurors by counsel and any determination that a question is not in aid of the exercise of challenges for cause, shall not cause any conviction to be reversed unless the exercise of that discretion has resulted in a miscarriage of justice, as specified in Section 13 of Article VI of the California Constitution." *CCP § 223.*

There are eight categories of implied bias listed in *CCP §229*:

1) Consanguinity or affinity with party or victim;
2) Relationship;
3) Prior service in same matter;
4) Interest in the action;
5) Unqualified opinion or belief as to the merits of the action founded by knowledge of material facts or some of them;
6) Enmity or bias towards or against a party;
7) Party to an action before same jury; and
8) Opposition to death penalty in capital case.

Actual bias is defined as "*the existence of a state of mind on the part of the juror in reference to the case, or to any of the parties, which will prevent the jurorfrom acting with entire impartiality, and without prejudice to the substantial rights of any party*." *CCP§225(b)(1)(C).*

No peace officer, as defined in Section 830.1, subdivision (a-c) of Section 830.2, and subdivisions (a) of Section 830.33, of the Penal Code, shall be selected for voir dire in a criminal matter. *CCP § 219.*

Number of Challenges

There is no limitation on the number of challenges for cause, however, the trial court does not have sua sponte duty to excuse biased jurors when counsel has failed to exercise a peremptory challenge for that purpose. *People v. Bolin* (1998) 18 Cal.4th 297.

The number of peremptory challenges depends upon the possible sentence of the offense charged and the number of defendants. If the offense is punishable with *maximum term of imprisonment of 90 days or less*, each side gets *6* peremptory challenges. *CCP §231*
If the offense is punishable with *death or with imprisonment in the state prison for life*, each side gets *20* peremptory challenges. *CCP §231(a).* In *all other cases* each side gets *10* peremptory challenges.

In multiple defendant cases with sentences under 90 days, the People get *6* challenges and the defendants get *6 challenges jointly*. Each defendant is additionally entitled to *4 separate challenges*. The People get as many challenges as are allowed all defendants. *CCP§231(b)*
In life in prison and death cases – The People get *20* challenges and the defendants get *20 challenges jointly*. Each defendant is additionally entitled to *5 separate challenges*. The People get as many challenges as are allowed all defendants. *CCP §231(a)*

In all other cases, the People get *10* challenges and the defendants get *10 challenges jointly*. Each defendant is additionally entitled to *5 separate challenges*. The People get as many challenges as are allowed all defendants. *CCP§231(a)*

The selection of Alternate jurors is governed by *CCP§234*. Challenges are allotted as follows: In a single defendant case, there is one challenge for each side per the number of alternates. In a multiple defendant case, each defendant gets one challenge per number of alternates and the People get the same total number as the defense team.

Proper Subject Matter For Attorney Inquiry

It is improper to ask questions intended solely to educate the jury, compel the jurors to commit to vote a certain way, prejudice the jury, argue the case, indoctrinate the jury, instruct the jury on the law, or test the juror's knowledge of the law. *People v. Edwards* (1912) 163 Cal. 752; *People v. Willams* (1981) 29 Cal.3d 392, 408; *People v. Ashmus* (1991) 54 Cal.3d 932, 959.

It is permissible to ask a juror about his attitude about a particular rule of law only if (1) the rule is relevant or material to the case, and (2) the rule appears to be controversial; e.g., the juror has indicated some hostility toward the rule, or it is commonly known the community harbors strong feelings about it. *People v. Balderas* (1985) 41 Cal.3d 144, 185; *People v. Williams* (1981) 29 Cal.3d 392, 408.

It is improper to use voir dire questions for the sole purpose of argument by counsel. *People*

v. Mitchell, 61 Cal 2d 353, 366.

A trial judge's refusal to permit any voir dire questions concerning racial bias or prejudice may require reversal. *People v. Wilborn* (1999) 70 Cal.App.4th 339. In a case involving an interracial killing, a trial court during general voir dire is required to question prospective jurors about racial bias on request. *People v. Bolden* (2002) 29 Cal.4th 515. Expect to see broadening of this area of inquiry in response to current events and opposing views on race and policing.

"Any question whose sole purpose is '… to attempt to precondition the prospective jurors to a particular result' should be excluded." Similarly, "any question whose sole purpose is "… to attempt to precondition the prospective jurors to a particular result" should be excluded. [CRC Standards of Jud. Admin., Standard 3.25(f)] *Scope of Permissible Voir Dire—Proper vs. Improper Questions*, Cal. Prac. Guide Civ. Trials & Ev. Ch. 5-G

Examples of Permissible Questions

Asking jurors whether they would be able to vote guilty if, after deliberations, they were persuaded that the changes had been proved beyond a reasonable doubt. *People v. Fierro* (1991) 1 Cal.4th 173, 209)

"[I]f I prove beyond a reasonable doubt each and every element of each of the offenses charged . . . can you assure me that you would be willing to return a verdict of guilty even though you have unanswered questions?" *People v. Riel* (2000) 22 Cal.4th 1153, 1178 fn. 4.

In order to avoid a hung jury the prosecutor observed that each juror must "come to your own conclusion," but also stressed the value of "work[ing] together to try to discover the truth." *People v. Fierro* (1991) 1 Cal.4th 173, 210, fn 8.

Prosecutor's "hypothetical" voir dire illustrations of aggravating and mitigating factors were permissible in capital murder prosecution, even though the prosecutor used examples of aggravating factors closely resembling the facts of the case and used examples of mitigating factors unlike the defendant's mitigating evidence. *People v. Seaton* (2001) 26 Cal.4th 598.

In questioning a juror, the prosecutor asked her if she believed a person charged with committing a crime such as defendant's must be insane. The prosecutor also asked: Do you feel there could be such a thing as a person who is legally insane? *People v. Fields* (1983) 35 Cal.3rd 329, 358.

Whether a juror would view a person's possession of recently stolen property as circumstantial evidence that the person stole the property. (*People v. Mendoza* (2000) 24 Cal.4th 130, 167.)

Whether a juror considered rape more of an assaultive than a sexually motivated offense, and whether they thought it was possible for a young man to rape an elderly woman and not be mentally ill. (*People v. Mendoza* (2000) 24 Cal.4th 130, 167.)

While counsel may ask prospective jurors if they are able to return a verdict in if supported by the evidence, it is not proper to ask for their commitment to do so. *Scope of Permissible Voir Dire—Proper vs. Improper Questions*, Cal. Prac. Guide Civ. Trials & Ev. Ch. 5-G.

Examples of Impermissible Questions

"I had a case a few years ago where three teenage girls were killed in Huntington Beach and [it was a] very emotional case. It was about a three week long trial, very strong evidence against the defendant. At the end of the trial the jury went out and the families were there every single day, the families of [the] three girls and they sat there. The jury didn't come back the first day and the families started getting very upset and crying, you know. They would [ask] me what is wrong, why, how come they didn't make a decision. I don't know. Next day came back same thing, the families are all upset—[¶] ... [¶] ... The jurors came back and we asked them why—what took so long. Oh, we knew he was guilty the first day, but we wanted to figure out this one other issue.... [¶] ... [¶] ... My question is would any of—if you had other questions but they didn't go to the elements, the actual like 1, 2, 3 elements, if you were convinced beyond a reasonable doubt of the elements, even though you might have some question very interesting, but didn't go to that element [,] would you be able to convict?" *People v. Castillo* (2008) 168 Cal.App.4th 364, 380. This contextual question inserted information clearly designed to evoke sympathy for the victims in the case.

"If any of you (prospective jurors) find a question particularly embarrassing, and you would prefer to answer in the judge's chambers rather than here in open court, please let me know and I will be glad to ask the judge to allow you to do so." *Scope of Permissible Voir Dire—Proper vs. Improper Questions*, Cal. Prac. Guide Civ. Trials & Ev. Ch. 5-G. This is an impermissible form of questioning because it is used to "curry favor" since you are the hero. The admonition may be proper if the directive is simply to advise the court if you wish to answer in private.

"Do you agree then that a killing done intentionally should be treated more strongly or more severely than a killing that is accidentally done or unintentionally done?" *People v. Mitchell*, 61 Cal 2d 353, 366.

"Are you sure you haven't seen my client's picture in the paper as coach of the championship Little League baseball team from St. Luke's Church?" *Scope of Permissible Voir Dire—Proper vs. Improper Questions*, Cal. Prac. Guide Civ. Trials & Ev. Ch. 5-G.

Do you believe in self-defense in the home? (Not controversial; *People v. Williams* (1981)

29 Cal.3d 392, 411.)

"Whether, if they believed that a witness was an informant and was testifying 'in exchange for some lesser sentence,' then that 'would have some bearing on the weight or credibility that that witness may have in your mind?' " *People v. Mason* (1991) 52 Cal.3d 909, 940.

In a death penalty case, the court did not "allow either party to discuss the law – such as the meaning of diminished capacity – or ask questions that required the prospective jurors to pre-try the facts of the case." *People v. Rich* (1988) 45 Cal.3rd 1036, 1104.

Defense counsel was not permitted to question prospective jurors regarding their ability to view accomplice testimony with suspicion and distrust. *People v. Johnson* (1989) 47 Cal.3rd 1194, 1224.

In an eyewitness case where the defense expected to call an ID expert, the defense was prohibited from eliciting opinions of potential jurors concerning the effects of stress on perception. *People v. Sanders* (1990) 51 Cal.3rd 471, 506.

Defense counsel stated, "It's clear a girlfriend has an interest to lie. I just want to make sure that the jurors don't automatically, before they hear her testimony, say she's lying because she's the girlfriend." The trial court barred this line of questioning on the ground that the defendant was trying to educate the jurors and induce them to prejudge the evidence. We cannot say that the court abused its discretion in doing so. *People v. Helton* (1984) 162 Cal.App.3rd 1141, 1145.

"What do you feel is a proper punishment for someone who has committed a rape or other serious sexually related crime?" *People v. Ochoa* (1998) 19 Cal.4th 353, 444.

Many detailed questions regarding personal experience with sexual molestation in a child molestation-murder case. *People v. Earp* (1999) 20 Cal.4th 826, 851, fn 1.

Handling a *Batson/Wheeler* Motion

I. Overview
   A. Every prosecutor will have to deal with the dreaded "*Wheeler"* motion. It usually occurs following the prosecutor's use of a peremptory challenge against someone of a particular race, gender or ethnic background.
   B. How it works – The defense makes a motion, usually on state and federal grounds, that the prosecutor has excused a juror based on racial, ethnic or other improper grounds and has therefore violated the defendant's Constitutional right to a fair and impartial jury. The defendant does not have to be a member of the excluded group to complain of a violation. *People v. Wheeler* (1978) 22 Cal. 3d 258, 281. (**Note**: While the defense usually brings the motion, it may be made by *either party.*)
   C. It goes without saying that no prosecutor should exercise a peremptory challenge against a juror based on that juror's gender, sexual orientation, or membership in a racial, ethnic, or religious group. But a prosecutor should not refrain from challenging a juror for *permissible* reasons out of a concern that the defense will raise a disingenuous or frivolous *Batson/Wheeler* claim.

II. THREE STEP PROCESS
   A. "First, the defendant must make out a prima facie case 'by showing that the totality of relevant facts gives rise to an inference of discriminatory purpose.'
   B. Second, once the defendant has made out a prima facie case, the 'burden shifts to the State to explain adequately the racial exclusion' by offering permissible race-neutral justifications for the [peremptory] strikes.
   C. Third, '[i]f a race-neutral explanation is tendered, the trial court must decide…whether the opponent of the strike has proved purposeful racial discrimination.' " (*Johnson v. California* (2005) 545 U.S. 162)

III. History
   A. *Batson* ***is*** the federal standard and *Wheeler* ***was*** the California standard used to determine whether the peremptory challenge was improper.
   B. Both cases used procedures involving 3 part tests to determine the propriety of the challenge.
   C. However, the first prong of the tests in each case was different.
   D. Defendants argued the state burden (*Wheeler*) was more difficult for them to meet than the federal burden (*Batson*).

E. The California Supreme Court tried to reconcile the two cases in 2003 in *People v. Johnson* (2003) 30 Cal. 4th 1302.
F. In 2005, the U.S. Supreme Court reversed *Johnson* and "clarified" the *Batson* decision by stating that the first prong of the *Batson* test need only be satisfied by production of evidence sufficient to permit the trial judge to draw an *inference of discrimination*. (*Johnson v. California* (2005) 545 U.S. 162.)
G. Current State of the Law - Still a 3 prong test based on the holdings of *Batson* and *Johnson.* Although *Wheeler* is still good law, the first step has been replaced by the *Batson* first step. (*Johnson v. California* (2005) 545 U.S. 162.)

IV. Analysis

A. *People v. Wheeler* (1978) 22 Cal. 3d 258 – Peremptory challenges based on group bias violates the defendant's right to jury trial in the California Constitution. *Batson v. Kentucky* (1986) 476 U.S. 79 – Race based challenges violate the Equal Protection Clause of the U.S. Constitution. (*See Also, People v. Bonilla* (2007) 41 Cal.4th 313, 341).
B. Timeliness/Waiver – The claim is waived if the defendant fails to make a timely objection and a record sufficient for appellate review. (*People v. Wheeler* (1978) 22 Cal.3d 258, 280; *People v. Morris* (2003) 107 Cal.App.4th 402, 408-409) Motion made after jury was sworn but before alternates were sworn was not untimely. Jury empanelment is completed when all jurors, including alternates, are selected and sworn in. *People v. Scott* (2015) 61 Cal. 4th 363.
C. Cognizable Class – "An identifiable group distinguished on racial, religious, ethnic, or similar grounds…" *People v. Wheeler* (1978) 22 Cal. 3d 258, 276. Two requirements for a cognizable class:
    1. Members share a common perspective arising from life experience in the group; and
    2. No other members of the community are capable of adequately representing the group perspective. (*See, Rubio v. Superior Court* (1979) 24 Cal.3d 93, 98).
D. Courts and Statutes have recognized several categories of cognizable classes or groups.
    1. Race - (*See, Batson v. Kentucky* (1986) 476 U.S. 79 & *People v. Wheeler* (1978) 22 Cal. 3d 258).
    2. Ethnicity – Although there are fewer reported cases regarding ethnicity, be aware that it is a cognizable class. For example, Native Americans were the subject of the violation in *United States v. Bauer* (9th Cir. 1996) 84 F.3d 1549.
    3. Religion – *People v. Johnson* (1989) 47 Cal.3d 1194, 1217 [Jewish Jurors]

4. Gender – Gender appears to be a cognizable class and should be treated as such. However, most cases dealing with gender also carry a racial component as well. (*People v. Crittenden* (1994) 9 Cal.4th 83, 115 [African-American woman]; *People v. Garceau* (1993) 6 Cal.4th 140, 171 [Hispanic woman]
5. Sexual Orientation – *People v. Garcia* (2000) 77 Cal.App.4th 1269, 1272. (*See Also,* Code of Civil Procedure §231.5)
6. Age – Although not a federally protected class, Code of Civil Procedure §231.5 added "Age" as a protected class in 2016 added by operation of Government Code §11135.
7. Disability – Although not a federally protected class, Code of Civil Procedure §231.5 added "Disability", both mental and physical, as a protected class in 2016 by operation of Government Code §11135**.**

E. Non-Cognizable Class
1. Poor – *People v. Carpenter* (1999) 21 Cal.4th 1016, 1035
2. Less Educated – *People v. Estrada* (1979) 93 Cal.App.3d 76, 90-91
3. Battered Women – *People v. Macioce* (1987) 197 Cal.App.3d 262, 280
4. Young – *People v. Ayala* (2000) 24 Cal.4th 243, 277-278; *United States v. Fletcher* (9th Cir. 1992) 965 F.2d 781, 782 – (Caveat: See CCP§231.5 & Gov't Code §11135)
5. People over 70 – *People v. McCoy* (1995) 40 Cal.App.4th 778, 783 – (Caveat: See CCP§231.5 & Gov't Code §11135)
6. "Insufficient" English – *People v. Lesara* (1998) 206 Cal.App.3d 1304, 1307
7. Unconventional Hairstyle – *Purkett v. Elem* (1995) 514 U.S. 765, 769
8. People who have been arrested *or* been victims – *People v. Fields* (1983) 35 Cal.3d 329, 348
9. "People of Color" – Combining all minority groups does not constitute a "cognizable class". *People v. Davis* (2009) 46 Cal. 4th 539

F. Challenge Exercised Against Member of Cognizable Class
1. **Step One** – The party objecting to the peremptory challenge must make out a prima facie case "by showing the totality of the relevant facts gives rise to an inference of a discriminatory purpose." *Johnson v. California* (2005) 545 U.S. 162. There is a presumption that that the party exercising the challenge (usually the prosecution) does so on a constitutionally permissible ground. (*People v. Wheeler*

(1978) 22 Cal. 3d 258). Thus, the objecting party (usually the defense) must demonstrate a "prima facie case".

a. Prima Facie Case – The court in *Wheeler* provided four examples of ways to demonstrate a prima facie case:
    i. "A party may show that his opponent struck most or all of the members of the identified group from the venire."
    ii. "He may also demonstrate that the jurors in question share only this one characteristic—their membership in the group—and that in all other respects they are as heterogenous as the community as a whole."
    iii. "Next, the showing may be supplemented…by such circumstances as the failure of the opponent to engage these same jurors in more than desultory voir dire, or indeed to ask them any questions at all."
    iv. "Lastly, the defendant need not be a member of the excluded group in order to complain of a violation of the representative cross-section rule." However, this can be probative in making the determination. (*People v. Wheeler* (1978) 22 Cal. 3d 258, 280-281; *People v. Reynoso* (2003) 31 Cal.4th 903, 914.)
b. "[A] 'pattern' of strikes against black jurors included in the particular venire might give rise to an inference of discrimination. Similarly, the prosecutor's questions and statements during *voir dire* examination and in exercising his challenges may support or refute an inference of discriminatory purpose." (*Batson v. Kentucky* (1986) 476 U.S. 79, 96-97.)
c. Rebut the prima facie case by arguing applicable factors:
    i. If the defendant is not a member of the cognizable class at issue, this fact should be reflected in the record. (See *People* v. *Bell* (2007) 40 Cal.4th 582, 599 [considering fact defendant was ***not*** a member of any of the cognizable classes at issue in finding the prosecutor's challenges created no inference of discrimination].
    ii. If the victim was a member of cognizable class at issue, this fact should be reflected in the record. (See *People* v. *Bell* (2007) 40 Cal.4th 582, 599

[considering fact victim was a member of the cognizable class at issue in finding the prosecutor's challenges created no inference of discrimination].)

iii. The fact that you have not used a disproportionate number of your challenges against members of the cognizable class is a factor that weighs against finding an inference of discrimination. (*People v. Streeter* (2012) 54 Cal.4th 205, 223 [no prima facie case where prosecutor excused three of five African Americans]; *People v. Clark* (2011) 52 Cal.4th 856, 903 [statistical analysis subject to various interpretations and did not raise an inference of discrimination]; *People* v. *Bell* (2007) 40 Cal.4th 582, 598 [considering fact prosecutor used only two of 16 peremptory challenges against members of the cognizable class at issue in finding the prosecutor's challenges created no inference of discrimination]; *People v. Cornwell* (2005) 37 Cal.4th 50, 70 [no prima facie case where prosecutor challenged one out of two African-American prospective jurors]). However, See *Ayala v. Wong* (9th Cir. 2012) 693 F.3d 945, 964 [Statistical evidence alone established a prima facie case where prosecution struck each of the seven black or Hispanic jurors available for challenge].

iv. If you have passed on a panel that includes members of the cognizable class, this fact should be mentioned as it undercuts an inference of discrimination. (*People v. Streeter* (2012) 54 Cal.4th 205, 225 [prosecutor passed five times with up to four African Americans in jury box]; *People v. Clark* (2011) 52 Cal.4th at 856, 906 [no prima facie case where prosecutor passed two African-American jurors during several rounds before finally excusing them].) The prosecutor's acceptance of a panel including African-American prospective jurors, while not conclusive, was "'an indication of the prosecutor's good faith in exercising his peremptories, and…an appropriate factor for the trial judge to consider in ruling on a *Wheeler* objection…'" (*People v. Hartsch* (2010)

49 Cal.4th 472, 487). (See also, *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].)

v. Point out any members of the cognizable class who were challenged by the defense. However, be aware that this fact will not carry the day for you. It is simply something you may want to point out on the record. Further rehabilitation of prospective jurors of a cognizable class ought to be challenged can be an important factor in rebutting a prima facie case. (*People v. Streeter* (2012) 54 Cal.4th 205, 225 [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, citing *People v. Hartsch* (2010) 49 Cal.4th 472, 487]).

vi. If you were honestly not aware the juror was a member of a cognizable group. *People v. Barber* (1988) 200 Cal.App.3d 378, 389. [Challenged juror appeared to be a white and non-Hispanic to DA. DA did not recognize the surname to be Hispanic. Court found DA to be sincere]

2. **Step Two** – If a prima facie case is made, the "burden shifts to the [party making the original, objected to juror challenge] to explain adequately the racial [or other cognizable class] exclusion by offering permissible race neutral justifications for the strikes." (*Johnson v. California* (2005) 545 U.S. 162)
   a. "The justification need not support a challenge for cause, and even a 'trivial' reason, if genuine and neutral, will suffice." (*People v. Arias* (1996) 13 Cal. 4th 92, 136 citing *People v. Montiel* (1993) 5 Cal. 4th 877, 910, fn. 9.)
   b. Examples of Permissible Reasons
      i. **Legal contacts**. (*People v. Panah* (2005) 35 Cal.4th 395, 441-442 [**potential juror was arrested and charged with a crime**]; *People v. Young* (2005) 34 Cal.4th 1149, 1174 [**counselor had testified before in sex assault cases**]; *People v. Cleveland* (2004) 32 Cal.4th 704, 733 [**son was in jail**]; *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1124 [**father was arrested and**

charged with a crime and the potential juror had been roughed up by officers]; *People v. Farnam* (2002) 28 Cal.4th 107, 137-138; *People v. Williams* (1997) 16 Cal.4th 635, 664-665 [**by family member**]; *People v. Arias* (1996) 13 Cal.4th 92, 138; *People v. Turner* (1994) 8 Cal.4th 137, 171; *People v. Sims* (1993) 5 Cal.4th 405, 430; *People v. Cummings* (1993) 4 Cal.4th 1233, 1282; *People v. Johnson* (1989) 47 Cal.3d 1194, 1215; *People v. Walker* (1988) 47 Cal.3d 605, 625-626; *People v. Wheeler* (1978) 22 Cal.3d 258, 275 [**been a crime victim**]; *People v. Douglas* (1995) 36 Cal.App.4th 1681, 1690; *People v. Martinez* (2000) 82 Cal.App.4th 339, 344-345 [**family member**]; *People v. Martin* (1998) 64 Cal.App.4th 378, 385, fn. 5 [**crime victim**]; *People v. Buckley* (1997) 53 Cal.App.4th 658, 667; *People v. Barber* (1988) 200 Cal.App.3d 378; *Mitleider v. Hall* (9th Cir. 2004) 391 F.3d 1039, 1041- 045, 1048-1051 [**contacts by family members**].)

ii. **Served on hung jury before**. (*People v. Farnam* (2002) 28 Cal.4th 107, 137-138.)

iii. **Views on the legal system.** (*People v. Ward* (2005) 36 Cal.4th 186, 201 [**unfavorable views toward guilt**]; *People v. Cleveland* (2004) 32 Cal.4th 704, 733 [**hesitant in answering questions on the death penalty**]; *People v. Yeoman* (2003) 31 Cal.4th 93, 116-117 [**not strong enough views on the death penalty**]; *People v. Burgener* (2003) 29 Cal.4th 833, 864 [**skeptical in imposing death penalty**]; *People v. Farnam* (2002) 28 Cal.4th 107, 137; *People v. Caitlin* (2001) 26 Cal.4th 81, 118 [**skeptical about imposing death penalty**]; *People v. Buckley* (1997) 53 Cal.App.4th 658, 666-667 [**legal training**]; *Boyd v. Newland* (9th Cir. 2004) 393 F.3d 1008, 1013 [**ambivalence towards the legal system**]; *Tolbert v. Gomez* (9th Cir. 1999) 189 F.3d 1099; *United States v. Fike* (5th Cir. 1996) 82 F.3d 1315, 1320.)

iv. **The potential juror's lack of disclosure**. (*People v. Diaz* (1984) 152 Cal.App.3d 926, 932; see *In re Hitchings* (1993) 6 Cal.4th 97, 112; *Mitleider v. Hall*

(9th Cir. 2004) 391 F.3d 1039, 1041-1045, 1048-1051 [**potential juror apparently not honest**].)

v. **The potential juror appeared to be a non-conformer**. (*Purkett v. Elem* (1995) 514 U.S. 765, 769 (per curiam) [**long hair**]; *People v. Ayala* (2000) 24 Cal.4th 243, 261; *People v. Howard* (1992) 1 Cal.4th 1132, 1208; *People v. Wheeler* (1978) 22 Cal.3d 258, 275.) (*People v. Ward* (2005) 36 Cal. 4th 186, 202)

vi. **Lack of life experiences**. (*People v. Sims* (1993) 5 Cal.4th 405, 429; *People v. Perez* (1994) 29 Cal.App.4th 1313, 1328; *Mitleider v. Hall* (9th Cir. 2004) 391 F.3d 1039, 1041-1045, 1048-1051 [**young and immature**].)

vii. **The potential juror's occupation**. (*People v. Young* (2005) 34 Cal.4th 1149, 1174 [**counselor who has testified before in other sex assault cases and one who was an insurance claims specialist**]; *People v. Howard* (1992) 1 Cal.4th 1132, 1155-1156 [**non-practicing registered nurse**]; *People v. Landry* (1996) 49 Cal.App.4th 785, 790 [**youth services**]; *People v. Barber* (1988) 200 Cal.App.3d 378, 394; *United States v. Thompson* (9th Cir. 1987) 827 F.2d 1254, 1260.)

viii. **Reluctance to be a juror**. (*People v. Walker* (1998) 64 Cal.App.4th 1062, 1070; *Mitleider v. Hall* (9th Cir. 2004) 391 F.3d 1039, 1041-1045, 1048-1051.) (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**].)

ix. **Eagerness to be a juror**. (*People v. Ervin* (2000) 22 Cal.4th 48, 76.)

x. **Hesitance in applying the death penalty**. (*People v. Panah* (2005) 35 Cal.4th 395, 441; *People v. Smith* (2005) 35 Cal.4th 334, 347.)

xi. **Hesitance, Transient Background, and Grandmotherly 'Persona.'** (*Boyde v. Brown* (9th Cir. 2005) 404 F.3d 1159, 1170.)

xii. **Body language can be proper grounds, at least if there is a sufficient record to support the prosecutor's observations.** (*People v. Elliott* (2012) 53 Cal.4th 535, 569-570 [**Juror failed to make eye contact with anyone, dressed informally, and had an unconventional hairstyle**]; (*People v. Ward* (2005) 36 Cal.4th 186, 202 [**hostility toward prosecutor; though record is silent, other than the prosecutor's assertions, there is no evidence to contradict it**]; *People v. Reynoso* (2003) 31 Cal.4th 903, 919; *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1125-1126 [**hostile look at prosecutor**] *People v. Ervin* (2000) 22 Cal.4th 48 [**nervousness during voir dire**]; *People v. Turner* (1994) 8 Cal.4th 137, 170 [**potential juror won't look prosecutor in the eye**]; *People v. Johnson* (1989) 47 Cal.3d 1194, 1220 [**shy**][**sleepy**]; *People v. Dunn* (1995) 40 Cal.App.4th 1039, 1047; *People v. Perez* (1994) 27 Cal.App.4th 1313, 1330 [**inappropriate laughter**]; *Mitleider v. Hall* (9th Cir. 2004) 391 F.3d 1039, 1041-1045, 1048-1051; *Williams v. Rhoades* (9th Cir. 2004) 354 F.3d 1101 [**uncorroborated assertion by prosecutor of the potential juror's body language enough for affirmance because of deferential standard of review**]; but see *McClain v. Prunty* (9th Cir. 2000) 217 F.3d 1209 [**implied body language not enough without the prosecutor stating the reason**]; *Turner v. Marshall* (9th Cir. 1997) 121 F.3d 1248, 1254 [**cannot infer demeanor when prosecutor never said so**]; *United States v. Power* (9th Cir. 1989) 881 F.2d 733, 740 [**fidgety and inattention**]; *United States v. Changco* (9th Cir. 1993) 1 F.3d 837, 840 [**passive and inattentive**].) (*Rice v. Collins* 546 U.S. 333 (2006) [**rolling of eyes, not seen by trial judge**].)

1. Caution: Body language can be a dangerous area if the record does not support the reasons you are giving for the excuse. Be sure that you make a record of not only what body language or demeanor you observed but *why* this was

important to you and how it affected your decision to excuse the juror. Further, try not to rely solely on body language or demeanor when excusing a cognizable class juror. (See, *People v. Long* (2010) 189 Cal.App. 4th 826) [**record did not support prosecutors reasons for excusing juror and judge did not make a "sincere and reasoned" attempt to evaluate the prosecutor's reasons**]). (*People v. Jones* (2011) 51 Cal.4th 346) [**Prosecutor gave specific and detailed reasons for challenges based upon body language and demeanor**]).

2. *Practice Tip*: If you have a cognizable class juror who is nonverbally communicating in a way that concerns you (i.e. facial expressions, arms folded, sighing, etc.) ask them about it. For example, you might say, "Juror #2, I noticed that while Juror #8 was answering the last question, you had a look on your face that I interpreted as disagreement. Am I correct about that? Would you like to be heard?" If you do this in a respectful way, you accomplish the goal of putting the fact that you noticed it on the record. If you decide to kick this person later and get challenged, you can refer the Court back to this as one of the reasons you kicked the juror.

xiii. **Bilingual Juror Who Won't Defer to Court Translator.** (*Hernandez v. New York* (1991) 500 U.S. 352, 356-357) CAUTION – Be careful when kicking bilingual jurors as it could be seen as a cover for discrimination. (*See, People v. Gonzales* (2008) 165 Cal.App.4th 620)

xiv. **Intelligence.** (*People v. Arias* (1996) 13 Cal. 4th 92, 137-139)

xv. **Sympathetic to defendant.** (*People v. McKinzie* (2012) 54 Cal.4th 1302, 1321-1322) [**fact juror had been arrested for domestic violence was proper basis to challenge because 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. Mayfield* (1997) 14 Cal. 4th 668, 724-726)

xvi. **Desire for next juror.** (*People v. Jones* (2011) 51 Cal.4th 346, 367) [**challenge upheld where prosecutor believed he had even better potential jurors who had not been called**]; (See also, *People v. Alvarez* (1996) 14 Cal. 4th 155, 194-195). But see, (*People v. Cisneros* (2015) 234 Cal.App.4th 111) [**Holding that preference for next juror *alone* is not enough. You must also articulate reasons for excusing the challenged juror.**]

xvii. **Because prosecutor wished to ask the potential juror more questions**. (*People v. Cleveland* (2004) 32 Cal.4th 704, 733.)

xviii. **Mistake**. (*Aleman* v. *Uribe* (9th Cir. 2013) 2013) [**prosecutor mistakenly transposed two jurors' information. Prosecutor helped by making a good record that he was "under the weather"**] (See *People v. Williams* (2013) 56 Cal.4th 630, 660-661 [**holding that, regardless of whether prosecutor challenged one juror under the mistaken belief she was a different juror, there was no *Batson-Wheeler* violation since the reason given for challenging the juror (hesitancy to impose the death penalty) would have provided valid basis for challenging different juror**].) (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1124 [**prosecutor misunderstood the juror's answer**]; *People v. Williams* (1997) 16 Cal.4th 153, 188-189; *United States v. Lorenzo* (9th

Cir. 1993) 995 F.2d 1448, 1454-1455 [**time crunch**].) But see, (*Castellanos v. Small* (2014) 766 F.3d 1137) [**Prosecutor's stated reason was in error. It survived through the appellate courts as a mistake but the 9th Circuit ultimately found the prosecutor's error to be pre-textual.**]

xix. **Financial Hardship/Work Related Issues.** (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**]

3. **STEP 3** – "If a race neutral explanation is tendered, the trial court must then decide…whether the opponent of the strike has proved purposeful racial discrimination." (*Johnson v. California* (2005) 54 U.S. 162)
    a. "It is not until the third step that the persuasiveness of the justification becomes relevant – the step in which the trial court determines whether the opponent of the strike has carried his burden of proving purposeful discrimination." (*Purkett v. Elem* (1995) 514 U.S. 765, 768.) [**Burden of proof of is preponderance of the evidence**]
    b. "[W]e rely on the good judgment of trial courts to distinguish bona fide reasons for such peremptories from sham excuses belatedly contrived to avoid admitting acts of group discrimination." (*People v. Wheeler* (1978) 22 Cal.3d 258, 282; *People v. Johnson* (1989) 47 Cal.3d 1194, 1216; see *Purkett v. Elem* (1995) 514 U.S. 765, 768.)
    c. "This demands of the trial judge a sincere and reasoned attempt to evaluate the prosecutor's explanation in light of the circumstances of the case as then known, his knowledge of trial techniques, and his observations of the manner in which the prosecutor has

examined members of the venire and has exercised challenges for cause or peremptorily…" (*People v. Hall* (1983) 35 Cal.3d 161, 167-168; See also, *People v. Silva* (2001) 25 Cal. 4th 345, 386)

d. "In assessing credibility, the court draws upon its contemporaneous observations of the voir dire. It may also rely on the court's own experiences as a lawyer and bench officer in the community, and even the common practices of the advocate and the office that employs him or her. [Citation.]" (*People v. Lenix, supra*, 44 Cal.4th at p. 613, fn. omitted, *quoting Miller–El v. Cockrell* (2003) 537 U.S. 322, 339.)
e. It is proper for a trial court, in evaluating the prosecutor's justifications, to consider the prosecutor's actions in excusing jurors in a *previous trial* and whether a prosecutor has kept members of the cognizable class at issue on the jury in a *prior trial.* (*People v. DeHoyos* (2013) 57 Cal.4th 79)
f. ***People v. Gutierrez* (2017) 2 Cal. 5th 1150**
    i. First time in 16 years that the California Supreme Court has found a *Batson Wheeler violation.*
    ii. "This case offers us an opportunity to clarify the constitutionally required duties of California lawyers, trial judges, and appellate judges when a party has raised a claim of discriminatory bias in jury selection." (*People v. Gutierrez* (2017) 2 Cal. 5th 1150, 1154.
    iii. Facts: Gutierrez and other defendants were all Sureño gang members in the Bakersfield area. V got into a fight with one of the defendants and then left. Other D's, including Gutierrez, got in a car and searched for V. When they found V, Gutierrez got out of the car and shot V multiple times. One of the co-D's from a gang subset in Wasco testified and provided this information. (*Id.* at 1155.)
    iv. Step One – Three Overview: Prosecutor struck ten Hispanic jurors out of sixteen peremptory challenges, four of those challenges to Hispanic jurors coming in a row. The defense made a *Batson/Wheeler* motion. The trial court found the existence of a prima facie case in that there was an inference of discrimination. (*Id.* at 1156.) The

prosecutor gave reasons and the trial court found them to be race neutral. Defense motion was denied. The Court of Appeal upheld the denial of the defense motion. (*Id.* at 1157.)

1. Step One: The trial court found that 10 out of 16 challenges to Hispanic jurors established a prima facia case.
2. Step Two: The prosecutor gave reasons for the 10 strikes. 7 of the 10 were found to be race neutral. The Supreme Court identified error in three of the challenges but based the reversal only upon one and did not determine the other two.
    a. Wasco Juror – Teacher from Wasco. Divorced. No Kids. Ex is a correctional officer. Other relatives in law enforcement. No connection to gangs.
    b. Voir Dire of Wasco Juror by the prosecutor consisted of asking the juror whether she was aware of gangs in Wasco. She said "No". Prosecutor then asked if she lived in the Wasco area and Wasco itself to which she answered "Yes."
    c. Prosecutor's reason for kicking the Wasco juror was that she was unaware of gangs in Wasco and by some of her other answers. He wasn't sure how she'd respond when she hears that the testifying co-D was from a Wasco gang.
    d. The AG gave some reason that would explain the prosecutor's reasons for the kicks. While the Supreme Court agreed that those may have been valid reasons, they made it clear that those reason were NOT given by the prosecutor.
    e. The Court stated, "[A] prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he

gives." (*Id.* at 1159. *See also*, *Miller-El v. Dretke* (2005) 545 U.S. 231, 252(*Miller-El II*).)

3. Step Three: The Supreme Court found the prosecutor's reason for kicking all jurors to be neutral on their face. (*Id.* at 1168.) However, the Court found that although the trial court made a *sincere* attempt to evaluate the prosecutor's reason, it failed to make a *reasoned* attempt. (*Id.* at 1172.)

v. The Supreme Court also found that the Court of Appeal erred by refusing to do comparative analysis for the first time on appeal. (*Id.* at 1174.)

vi. The Court opinion illustrates what information they want the record to contain in a *Batson/Wheeler* challenge:

1. The court may only rule on reasons specifically and actually expressed by the attorney, and may not consider other, even obvious, reasons that the challenge is appropriate. So make sure you list all your reasons.
2. If a prima facie finding is made and the court proceeds to the second step of the analysis: the "neutral justification" stage, the issue is facial validity. The court states that the rationale need only be clear and reasonably specific as to legitimate reasons for challenging the juror, but need not detail "why" the prosecutor kicked the juror. However, a deficient record was clearly part of the reason that Gutierrez was reversed.
3. The Court wants a significant record created at Step 3: evaluating the credibility of the reasons actually stated.

vii. Justice Liu's concurrence attempts to lay out the purpose of the rule established:

1. The ultimate issue is "whether it was *more likely than not* that the challenge was improperly motivated." (*Johnson v. California* (2005) 545 U.S. 162, 170, italics added.) This probabilistic standard is not

designed to elicit a definitive finding of deceit or racism. Instead, it defines a level of risk that courts cannot tolerate in light of the serious harms that racial discrimination in jury selection causes to the defendant, to the excluded juror, and to public confidence in the fairness of our system of justice. (*Batson*, *supra*, 476 U.S. at p. 87; see *Miller-El*, *supra*, 545 U.S. at p. 238; *Powers v. Ohio* (1991) 499 U.S. 400, 412–414.)

G. Comparative Analysis

1. This term refers to the process by which courts will evaluate the reasons given for the challenge of a member of a cognizable class. The courts will look for non-cognizable class jurors who were *not* challenged to see whether the reasons would apply equally.
2. For example, if a prosecutor challenged an African American juror who was employed as a teacher and gave the reason, "Judge, I always excuse teachers." The court would then look to see whether the prosecutor failed to challenge any teachers who were not members of a cognizable class.
3. History - Federal Courts approved of comparative analysis in *Turner v. Marshall* (9th Cir. 1997) 121 F. 3d 1248. California rejected comparative analysis in *People v. Landry* (1996) 49 Cal.App.4th 785. *People v. Jones* (1997) 15 Cal. 4th 119. However, things began to change in 2003 with *Johnson*. Then in 2005, the U.S. Supreme Court decided *Miller-El v. Dretke* (2005) 545 U.S. 231 using comparative analysis in the decision.
4. ***Snyder v. Louisiana* (2008) 552 U.S. 472** – In *Snyder,* the U.S. Supreme Court found that the prosecutors race neutral reasons for excusing a black juror were implausible and were reinforced by the prosecutor's acceptance of white jurors who disclosed conflicting obligations similar to the excused juror. (*Id.* at 483-484). The Court held that a comparative analysis was appropriate since "the shared characteristic, i.e., concern about serving on the jury due to conflicting obligations, was thoroughly explored by the trial court when the relevant jurors asked to be excused for cause." (*Id.* at p. 483)
5. ***People v. Lenix* (2008) 44 Cal. 4th 602** – Comparative Analysis is alive in California.

a. “If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson's* third step.” (*Id.* at p. 621)
b. In reviewing the plausibility of a prosecutor’s reasons for striking a juror, an appellate court can consider various kinds of evidence, including a comparison of panelists' responses. (*Id.* at p. 622)
c. Failing to engage in comparative juror analysis for the first time on appeal unduly restricts review based on the entire record.” (*Id.* at p. 622) “Thus, evidence of comparative juror analysis must be considered in the trial court and even for the first time on appeal if relied upon by defendant and the record is adequate to permit the urged comparisons.” (*Id.* at p. 622)
d. The trial court has a duty to “assess the plausibility” of the prosecutor’s proffered reasons for striking a potential juror, “in light of all evidence with a bearing on it.” (*Id.* at p. 625) Trial courts “must evaluate the demeanor of the prosecutor in determining the credibility of proffered explanations, and the demeanor of the panelist when that factor is a basis for the challenge.” (*Id.* at p. 625)
e. It should be discernible from the record that “1) the trial court considered the prosecutor’s reasons for the peremptory challenges at issue and found them to be race-neutral; 2) those reasons were consistent with the court’s observations of what occurred, in terms of the panelist’s statements as well as any pertinent nonverbal behavior; and 3) the court made a credibility finding that the prosecutor was truthful in giving race-neutral reasons for the peremptory challenges. (*Id.* at pp. 625-626)
f. “As to the second point, the court may not have observed every gesture, expression or interaction relied upon by the prosecutor. The judge has a different vantage point, and may have, for example, been looking at another panelist or making a note when the described behavior occurred. But the court must be satisfied that the specifics offered by the prosecutor are consistent with the answers it heard and the overall behavior of the panelist.

g. The record must reflect the trial court's determination on this point (see *Snyder*, supra, at p. 460), which may be encompassed within the court's general conclusion that it considered the reasons proffered by the prosecution and found them credible." (*Id.* at pp. 625-626)
h. The court observed that comparative juror analysis is a form of circumstantial evidence (*Id.* at p. 622) and that a reviewing court must be careful not to accept one reasonable interpretation to the exclusion of other reasonable ones when reviewing the circumstantial evidence supporting the trial court's factual findings in a *Batson/Wheeler* holding. "If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also be reasonably reconciled with a contrary finding does not warrant a reversal of the judgment." (*Id.* at pp. 625-626)
    i. Comparative Analysis will only be considered for the first time on appeal at the *Third* Step. (*See, People v. Clark* (2016) 63 Cal.4th 522, 568 [Declining the defense invitation to engage in comparative analysis for the first time on appeal at the first step of *Batson*.])
i. "Positive" Comparative Analysis
    i. This term refers to the idea of using comparative analysis to support a challenge of a member of a cognizable class by comparing other similarly situated non-cognizable class jurors who were also challenged.
    ii. (*Rice v. Collins* (2006) 546 U.S. 333, 341 [**prosecutor struck a white juror with the same characteristics of a cognizable class juror she struck**]; (*Briggs v. Grounds* (2012) 682 F.3d 1165 [**prosecutor struck at least on non-African American who indicated they would hold the prosecution to a higher standard of proof**]).

V. Practical Issues in Dealing with *Batson/Wheeler* Motions
    A. Realize that a challenge will likely come at some point during jury selection and be ready to deal with it. It should go without saying, but ***NEVER*** excuse a juror on the basis of race, ethnicity, religion, gender etc…Question all jurors you plan to challenge. Desultory (non-substantive) questioning does not count.

B. Be prepared to rebut the prima facie case. (*See,* pp. 4-6)
C. Assume that a prima facie case will be made and be prepared to give race neutral reasons for excusing the juror. While peremptory challenges are often based on instinct and it can sometimes be hard to articulate the reason for removing a juror, "a prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives." (*People* v. *Lenix* (2008) 44 Cal.4th 602, 624.) Prosecutors should "provide as complete an explanation for their peremptory challenges as possible." (*People* v. *Lenix* (2008) 44 Cal.4th 602, 624.)
D. If you can't recall specifically why you excused a juror, it is better to ask for a "time out" so that you may review the transcript/recording of the juror's answers. (See *Lewis v. Lewis* (9th Cir. 2003) 321 F.3d 824 [suggesting that counsel can be particularly helpful in assisting the court at the third step of *Batson* "when afforded the opportunity to review a transcript of the jury selection proceedings"].)
E. If judge finds no prima facie case, insist that the finding is placed on the record. Then state your reasons anyway. But, DO NOT give reasons unless and until the court specifically finds no prima facie case. Giving reasons without a specific finding on the first prong will constitute an implied finding of a prima facie case. *People v. Arias* (1996) 13 Cal. 4th 92; *People v. Gutierrez* (2002) 28 Cal. 4th 1083. *People v. Scott* (2015) 61 Cal.4th 363.
F. Trial Tips
    1. Create a Good Record
        a. The prosecutor should make sure the following is discernible from the record:
            i. "1) The trial court considered the prosecutor's reasons for the peremptory challenges at issue and found them to be race-neutral. And the trial court made a sincere and reasoned attempt to evaluate the reasons given;
            ii. 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.)
    2. Obtain a Transcript of Voir Dire Before Making Challenges

   a. In certain situations, a prosecutor may not recall or have accurate notes regarding the responses of a juror he or she wishes to challenge.
   b. In those cases, it is appropriate and recommended that the prosecutor ask for read back of the juror's responses. (*See Lewis v. Lewis* (9th Cir. 2003) 321 F.3d 824)
3. Ask Court to Note the Final Jury Composition
   a. 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"].)
   b. 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"].)
4. Save your notes. If case is reviewed later, voir dire may be an issue. Always save your notes so that if asked, you are

better able to recollect why you may have challenged a specific juror.

a. At remand hearing, the prosecutor does NOT have to state reasons under oath. (*People v. Kelly* (2008) 162 Cal.App.4th 797)
b. At remand hearing, the prosecutor does NOT have to turn over original voir dire notes. (*People v. Kelly* (2008) 162 Cal.App.4th 797)
c. At remand hearing, prosecutor cannot be cross-examined by the defense. (*People v. Kelly* (2008) 162 Cal.App.4th 797)
d. I don't recall" May or May Not Fly – (*Paulino v. Harrison* (9th Cir. 2008) 542 F.3d 692); (But see, *Yee* v. *Duncan* (9th Cir. 2006) 463 F.3d 893.) [notwithstanding the inability to recall reason for excusing one cognizable class juror, totality of prosecutor's responses regarding other excused jurors did not evidence a discriminatory motive].)
e. If you use shorthand, make sure you define your terms. Don't make a reviewing court guess at what you meant. (*See, Foster v. Chatman* (2016) 136 Sup.Ct. 1737 [Murder conviction reversed for third step *Batson* violation. Very bad facts that we hope to never see. However, it's instructive on the issue of the clarity, or lack thereof, of the prosecutor's notes.])

G. Remedies

1. *Wheeler-Batson* error is reversible per se. (*People v. Wheeler* (1978) 22 Cal.3d 258, 283; see *Miller-El v. Dretke* (2005) 545 U.S. 231)
2. Step One Error: When the trial court erroneously finds there was not a prima facie case, the matter is often remanded for prosecutor to state reasons for peremptory challenge. (*Batson v. Kentucky* (1986) 476 U.S. 79, 100; *People v. McGee* (2002) 104 Cal.App.4th 559, 571, 573 [remand to permit prosecutor give reasons].)
    a. This remedy has been criticized for two reasons. First, the long passage of time makes it nearly impossible for the prosecutor to genuinely remember the real reason. (*People v. Hall* (1983) 35 Cal.3d 161, 171 [pointless to remand for the prosecutor to give a reason 11 years later]; *People v. Allen* (2004) 115 Cal.App.4th 542, 553-554, fn. 10 [remand for new trial, not for the prosecutor to give reasons, because occurred three years ago];

see also *People v. Ayala* (2000) 24 Cal.4th 243, 297, fn. 8 (conc. opn. of George, C.J.); *People v. Robinson* (2003) 110 Cal.App.4th 1196, 1208 [remand for the prosecutor to give the reason but retrial if it could not recall]; *People v. Williams* (2000) 78 Cal.App.4th 1118, 1130 [on remand, the court must first determine if it can adequately address the issue after the delay]; *United States v. Alcantar* (9th Cir. 1990) 897 F.2d 436, 438-439.)

b. Second, this procedure is subject to a prosecutor trying to invent more legitimate reasons after the fact. (See, e.g., *Miller-El v. Dretke* (2005) 545 U.S. 231 [prosecution's reasons after the fact "reeks of afterthought"]; *Miller-El v. Cockrell* (2003) 537 U.S. 331, 343 [reasons given after trial "was subject to the usual risks of imprecision and distortions from the passage of time"]; see also *Johnson v. California* (2005) 545 U.S. 162, quoting *Paulino v. Castro* (9th Cir. 2004) 371 F.3d 1083, 1090 ["it does not matter that the prosecution might have had good reasons . . . [w]hat matters is the real reason they were stricken"].)

3. Step Three Error: When the trial court fails to sustain motion after the prosecutor gives reason, error normally requires new venire. (*People v. Wheeler* (1978) 22 Cal.3d 258, 283; see *Miller-El v. Dretke* (2005) 545 U.S. 162). However, the defendant and the trial court can stipulate to a different remedy. (*People v. Willis* (2002) 27 Cal.4th 811, 821-824 [with consent of movant, can use other remedies such as sanctions, reinstating removed jurors or doing challenges at sidebar]; *People v. Overby* (2004) 124 Cal.App.4th 1237, 1244-1245 [defendant not objecting to judge re-seating the excused juror indicates consent to this remedy]. (See *People v. Mata* (2013) 57 Cal.4th 178) [holding that the trial court may reseat an improperly challenged juror if affected counsel either expressly or implicitly consents]
4. Consequences
    a. If the court grants a *Batson/Wheeler* motion at trial and employs one or more of the remedies discussed, that is arguably a "sanction".
        i. Court must notify the bar of any judicial sanctions against an attorney (Business & Professions Code §6068(a) (3)).

ii. Attorney must self-report any judicial sanction (Business & Professions Code §6068(o) (3)).
iii. However, reporting will likely not be required unless the conduct is egregious.

b. If the trial court erroneously denies a *Batson/Wheeler* motion at trial and the case is reversed.
i. Court must notify bar whenever there is a reversal. (Business & Professions Code §6086.7(b) (2)).
ii. Attorney must notify bar whenever reversal is based in whole or in part upon misconduct of the attorney. (Business & Professions Code §6068(o) (7)).

Voir Dire

Amends Code of Civ. Proc., § 223:

Expands voir dire in criminal cases by requiring the court to permit "liberal and probing examination calculated to discover bias or prejudice with regard to the circumstances of the particular case or the parties before the court"

For the first time makes reference to discretion to permit jury questionnaires

Requires the court to provide the parties with a list of the prospective jurors in the order they will be called

Voir Dire

Requires supplemental time to be provided if an individual juror's response "may evince attitudes inconsistent with suitability"

Defines an improper question as "any question that, as its dominant purpose, attempts to precondition the prospective jurors to a particular result or indoctrinate the jury."

Retains the "abuse of discretion" and *Watson* [resulted in a miscarriage of justice] standards upon appellate review (A.B. 1541)

AUTHORITY FOR VOIR DIRE

- CCP 223: Voir dire "shall be conducted only in aid of the exercise of challenges for cause."
- CCP 225(b): Challenges for cause can be made by either side for either implied bias or actual bias and are unlimited.
- CCP 223: Endows the court with broad discretion to control time and subject matter of questioning, limited only to reversal where a ruling resulted in miscarriage of justice.

ACTUAL BIAS: CCP 225(b)

"*The existence of a state of mind on the part of the juror in reference to the case, or to any of the parties, which will prevent the juror from acting with entire impartiality, and without prejudice to the substantial rights of any party*."

IMPLIED BIAS: CCP 229

- Consanguinity or affinity with party or victim;
- Relationship;
- Prior service in same matter;
- Interest in the action;
- Unqualified opinion or belief as to the merits of the action founded by knowledge of material facts or some of them;
- Enmity or bias towards or against a party;
- Party to an action before same jury; and
- Opposition to death penalty in capital case.

Proper Subject Matter

- Cannot ask questions whose sole purpose is to educate the jury, compel the vote a certain way, prejudice, argue or indoctrinate.
- Cannot instruct on law or test a juror's knowledge of the law.
- Cannot question on attitude about law unless relevant and controversial.
- Limiting questions on race bias may result in reversal.

Peremptory Challenges
CCP 231

Sentence	Prosecution	Defense	Multiple Defendants
<90days	6	6	**Defense** 6 joint, 4 individual **Prosecution** 6, plus 4 per defendant
>90 ~ <Life	10	10	**Defense** 10 joint, 5 individual **Prosecution** 10, plus 5 per defendant
Life or Death	20	20	**Defense** 20 joint, 5 individual **Prosecution** 20, plus 5 per defendant

Post Ferguson World

- Get comfortable talking about problems with our system of justice.
- Be prepared to address any ongoing or recent events involving questioned or questionable LE conduct.
- Acknowledge shortcomings of LE, while questioning a juror's ability to be fair.
- Avoid knee jerk reactions, choose your words wisely, and be a voice of reason and compassion.
- Their perception of your fairness will impact your verdict.

The problem with your gut...

- It will not save you from Wheeler.
- Practice Inclusivity.
  - There are mechanism's for dealing with rogue jurors
  - It can help your case
  - It will help change the dynamics of exclusion
  - It's the law

Batson/Wheeler

- Don't panic!
- Just BE prepared to lay a good record and have reasons for your kicks
- Follow the steps

Batson/Wheeler

- Lay out reasons for the excused jurors.
  - Looks, uninterested, not talkative, appeared to not get along with others, life experience, answers to questions (court can usually forget if it came up during your/defense voir dire)
- Explain how they may be similar to those [illegible] kicked (INCLUDE the race, gender previously kicked person)
- Explain how they are different th (INCLDE the race, gender, etc. o

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- It will not save you from Wheeler.
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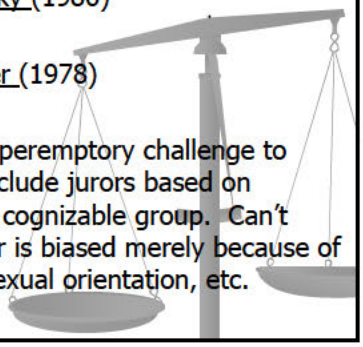
  - There are mechanism's for dealing with rogue jurors
  - It can help your case
  - It will help change the dynamics of exclusion
  - It's the law

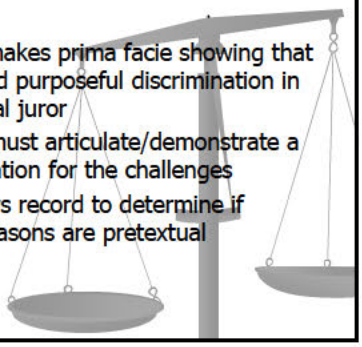
Batson/Wheeler

- Batson v. Kentucky (1986) 476 U.S. 79
- People v. Wheeler (1978) 22 Cal.3d 258
- Precludes use of peremptory challenge to systematically exclude jurors based on membership in a cognizable group. Can't assume that juror is biased merely because of race, ethnicity, sexual orientation, etc.



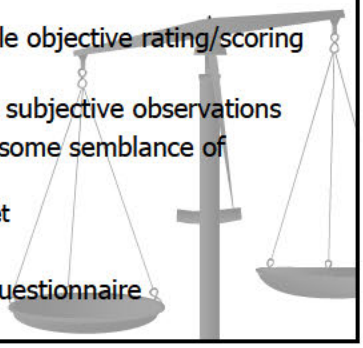
Race/Gender Neutral Reasons

- 3 Part Test
  - 1. Defendant makes prima facie showing that prosecutor used purposeful discrimination in kicking potential juror
  - 2. Prosecutor must articulate/demonstrate a neutral explanation for the challenges
  - 3. Court reviews record to determine if prosecutor's reasons are pretextual



Race/Gender Neutral Indicators

- Develop a simple objective rating/scoring system
- *Then,* add your subjective observations
- There must be some semblance of consistency
  - Save your sheet
- Caveat – jury questionnaire



Handling a *Batson/Wheeler* Motion

San Diego County District Attorney's Office

I. Overview
   A. Every prosecutor will have to deal with the dreaded "*Wheeler"* motion. It usually occurs following the prosecutor's use of a peremptory challenge against someone of a particular race, gender or ethnic background.
   B. How it works – The defense makes a motion, usually on state and federal grounds, that the prosecutor has excused a juror based on racial, ethnic or other improper grounds and has therefore violated the defendant's Constitutional right to a fair and impartial jury. The defendant does not have to be a member of the excluded group to complain of a violation. *People v. Wheeler* (1978) 22 Cal. 3d 258, 281. (**Note**: While the defense usually brings the motion, it may be made by *either party.*)
   C. It goes without saying that no prosecutor should exercise a peremptory challenge against a juror based on that juror's gender, sexual orientation, or membership in a racial, ethnic, or religious group. But a prosecutor should not refrain from challenging a juror for *permissible* reasons out of a concern that the defense will raise a disingenuous or frivolous *Batson/Wheeler* claim.

II. THREE STEP PROCESS
   A. "First, the defendant must make out a prima facie case 'by showing that the totality of relevant facts gives rise to an inference of discriminatory purpose.'
   B. Second, once the defendant has made out a prima facie case, the 'burden shifts to the State to explain adequately the racial exclusion' by offering permissible race-neutral justifications for the [peremptory] strikes.
   C. Third, '[i]f a race-neutral explanation is tendered, the trial court must decide…whether the opponent of the strike has proved purposeful racial discrimination.' " (*Johnson v. California* (2005) 545 U.S. 162)

III. History
   A. *Batson* ***is*** the federal standard and *Wheeler* ***was*** the California standard used to determine whether the peremptory challenge was improper.
   B. Both cases used procedures involving 3 part tests to determine the propriety of the challenge.
   C. However, the first prong of the tests in each case was different.
   D. Defendants argued the state burden (*Wheeler*) was more difficult for them to meet than the federal burden (*Batson*).
   E. The California Supreme Court tried to reconcile the two cases in 2003 in *People v. Johnson* (2003) 30 Cal. 4th 1302.
   F. In 2005, the U.S. Supreme Court reversed *Johnson* and "clarified" the *Batson* decision by stating that the first prong of the *Batson* test need only be satisfied by

production of evidence sufficient to permit the trial judge to draw an ***inference of discrimination***. (*Johnson v. California* (2005) 545 U.S. 162.)

G. Current State of the Law - Still a 3 prong test based on the holdings of *Batson* and *Johnson.* Although *Wheeler* is still good law, the first step has been replaced by the *Batson* first step. (*Johnson v. California* (2005) 545 U.S. 162.)

IV. Analysis

A. *People v. Wheeler* (1978) 22 Cal. 3d 258 – Peremptory challenges based on group bias violates the defendant's right to jury trial in the California Constitution. *Batson v. Kentucky* (1986) 476 U.S. 79 – Race based challenges violate the Equal Protection Clause of the U.S. Constitution. (*See Also, People v. Bonilla* (2007) 41 Cal.4th 313, 341).

B. Timeliness/Waiver – The claim is waived if the defendant fails to make a timely objection and a record sufficient for appellate review. (*People v. Wheeler* (1978) 22 Cal.3d 258, 280; *People v. Morris* (2003) 107 Cal.App.4th 402, 408-409) Motion made after jury was sworn but before alternates were sworn was not untimely. Jury empanelment is completed when all jurors, including alternates, are selected and sworn in. *People v. Scott* (2015) 61 Cal. 4th 363.

C. Cognizable Class – "An identifiable group distinguished on racial, religious, ethnic, or similar grounds…" *People v. Wheeler* (1978) 22 Cal. 3d 258, 276. Two requirements for a cognizable class:

1. Members share a common perspective arising from life experience in the group; and
2. No other members of the community are capable of adequately representing the group perspective. (*See, Rubio v. Superior Court* (1979) 24 Cal.3d 93, 98).

D. Courts and Statutes have recognized several categories of cognizable classes or groups.

1. Race - (*See, Batson v. Kentucky* (1986) 476 U.S. 79 & *People v. Wheeler* (1978) 22 Cal. 3d 258).
2. Ethnicity – Although there are fewer reported cases regarding ethnicity, be aware that it is a cognizable class. For example, Native Americans were the subject of the violation in *United States v. Bauer* (9th Cir. 1996) 84 F.3d 1549.
3. Religion – *People v. Johnson* (1989) 47 Cal.3d 1194, 1217 [Jewish Jurors]
4. Gender – Gender appears to be a cognizable class and should be treated as such. However, most cases dealing with gender also carry a racial component as well. (*People v. Crittenden* (1994) 9 Cal.4th 83, 115 [African-American woman]; *People v. Garceau* (1993) 6 Cal.4th 140, 171 [Hispanic woman]
5. Sexual Orientation – *People v. Garcia* (2000) 77 Cal.App.4th 1269, 1272. (*See Also,* Code of Civil Procedure §231.5)

6. Age – Although not a federally protected class, Code of Civil Procedure §231.5 added "Age" as a protected class in 2016 added by operation of Government Code §11135.
7. Disability – Although not a federally protected class, Code of Civil Procedure §231.5 added "Disability", both mental and physical, as a protected class in 2016 by operation of Government Code §11135**.**

E. Non-Cognizable Class
1. Poor – *People v. Carpenter* (1999) 21 Cal.4th 1016, 1035
2. Less Educated – *People v. Estrada* (1979) 93 Cal.App.3d 76, 90-91
3. Battered Women – *People v. Macioce* (1987) 197 Cal.App.3d 262, 280
4. Young – *People v. Ayala* (2000) 24 Cal.4th 243, 277-278; *United States v. Fletcher* (9th Cir. 1992) 965 F.2d 781, 782 –
(Caveat: See CCP§231.5 & Gov't Code §11135)
5. People over 70 – *People v. McCoy* (1995) 40 Cal.App.4th 778, 783 –
(Caveat: See CCP§231.5 & Gov't Code §11135)
6. "Insufficient" English – *People v. Lesara* (1998) 206 Cal.App.3d 1304, 1307
7. Unconventional Hairstyle – *Purkett v. Elem* (1995) 514 U.S. 765, 769
8. People who have been arrested *or* been victims – *People v. Fields* (1983) 35 Cal.3d 329, 348
9. "People of Color" – Combining all minority groups does not constitute a "cognizable class". *People v. Davis* (2009) 46 Cal. 4th 539

F. Challenge Exercised Against Member of Cognizable Class
1. **Step One** – The party objecting to the peremptory challenge must make out a prima facie case "by showing the totality of the relevant facts gives rise to an inference of a discriminatory purpose." *Johnson v. California* (2005) 545 U.S. 162. There is a presumption that that the party exercising the challenge (usually the prosecution) does so on a constitutionally permissible ground. (*People v. Wheeler* (1978) 22 Cal. 3d 258). Thus, the objecting party (usually the defense) must demonstrate a "prima facie case".
    a. Prima Facie Case – The court in *Wheeler* provided four examples of ways to demonstrate a prima facie case:
        i. "A party may show that his opponent struck most or all of the members of the identified group from the venire."
        ii. "He may also demonstrate that the jurors in question share only this one characteristic—their membership in the group—and that in all other respects they are as heterogenous as the community as a whole."
        iii. "Next, the showing may be supplemented…by such circumstances as the failure of the opponent to engage these same jurors in more than desultory voir dire, or indeed to ask them any questions at all."

iv. "Lastly, the defendant need not be a member of the excluded group in order to complain of a violation of the representative cross-section rule." However, this can be probative in making the determination. (*People v. Wheeler* (1978) 22 Cal. 3d 258, 280-281; *People v. Reynoso* (2003) 31 Cal.4th 903, 914.)

b. "[A] 'pattern' of strikes against black jurors included in the particular venire might give rise to an inference of discrimination. Similarly, the prosecutor's questions and statements during *voir dire* examination and in exercising his challenges may support or refute an inference of discriminatory purpose." (*Batson v. Kentucky* (1986) 476 U.S. 79, 96-97.)

c. Rebut the prima facie case by arguing applicable factors:

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

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

iii. The fact that you have <u>not</u> used a disproportionate number of your challenges against members of the cognizable class is a factor that weighs against finding an inference of discrimination. (*People v. Streeter* (2012) 54 Cal.4th 205, 223 [no prima facie case where prosecutor excused three of five African Americans]; *People v. Clark* (2011) 52 Cal.4th 856, 903 [statistical analysis subject to various interpretations and did not raise an inference of discrimination]; *People* v. *Bell* (2007) 40 Cal.4th 582, 598 [considering fact prosecutor used only two of 16 peremptory challenges against members of the cognizable class at issue in finding the prosecutor's challenges created no inference of discrimination]; *People v. Cornwell* (2005) 37 Cal.4th 50, 70 [no prima facie case where prosecutor challenged one out of two African-American prospective jurors]). However, See *Ayala v. Wong* (9th Cir. 2012) 693 F.3d 945, 964 [Statistical evidence alone established a prima facie case where prosecution struck each of the seven black or Hispanic jurors available for challenge].

iv. If you have passed on a panel that includes members of the cognizable class, this fact should be mentioned as it undercuts

an inference of discrimination. (*People v. Streeter* (2012) 54 Cal.4th 205, 225 [prosecutor passed five times with up to four African Americans in jury box]; *People v. Clark* (2011) 52 Cal.4th at 856, 906 [no prima facie case where prosecutor passed two African-American jurors during several rounds before finally excusing them].) The prosecutor's acceptance of a panel including African-American prospective jurors, while not conclusive, was "'an indication of the prosecutor's good faith in exercising his peremptories, and…an appropriate factor for the trial judge to consider in ruling on a *Wheeler* objection…'" (*People v. Hartsch* (2010) 49 Cal.4th 472, 487). (See also, *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].)

v. Point out any members of the cognizable class who were challenged by the defense. However, be aware that this fact will not carry the day for you. It is simply something you may want to point out on the record. Further rehabilitation of prospective jurors of a cognizable class ought to be challenged can be an important factor in rebutting a prima facie case. (*People v. Streeter* (2012) 54 Cal.4th 205, 225 [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, citing *People v. Hartsch* (2010) 49 Cal.4th 472, 487]).

vi. If you were honestly not aware the juror was a member of a cognizable group. *People v. Barber* (1988) 200 Cal.App.3d 378, 389. [Challenged juror appeared to be a white and non-Hispanic to DA. DA did not recognize the surname to be Hispanic. Court found DA to be sincere]

2. **Step Two** – If a prima facie case is made, the "burden shifts to the [party making the original, objected to juror challenge] to explain adequately the racial [or other cognizable class] exclusion by offering permissible race neutral justifications for the strikes." (*Johnson v. California* (2005) 545 U.S. 162)
   a. "The justification need not support a challenge for cause, and even a 'trivial' reason, if genuine and neutral, will suffice." (*People v. Arias* (1996) 13 Cal. 4th 92, 136 citing *People v. Montiel* (1993) 5 Cal. 4th 877, 910, fn. 9.)
   b. Examples of Permissible Reasons
      i. **Legal contacts**. (*People v. Panah* (2005) 35 Cal.4th 395, 441-442 [**potential juror was arrested and charged with a crime**];

People v. Young (2005) 34 Cal.4th 1149, 1174 [**counselor had testified before in sex assault cases**]; *People v. Cleveland* (2004) 32 Cal.4th 704, 733 [**son was in jail**]; *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1124 [**father was arrested and charged with a crime and the potential juror had been roughed up by officers**]; *People v. Farnam* (2002) 28 Cal.4th 107, 137-138; *People v. Williams* (1997) 16 Cal.4th 635, 664-665 [**by family member**]; *People v. Arias* (1996) 13 Cal.4th 92, 138; *People v. Turner* (1994) 8 Cal.4th 137, 171; *People v. Sims* (1993) 5 Cal.4th 405, 430; *People v. Cummings* (1993) 4 Cal.4th 1233, 1282; *People v. Johnson* (1989) 47 Cal.3d 1194, 1215; *People v. Walker* (1988) 47 Cal.3d 605, 625-626; *People v. Wheeler* (1978) 22 Cal.3d 258, 275 [**been a crime victim**]; *People v. Douglas* (1995) 36 Cal.App.4th 1681, 1690; *People v. Martinez* (2000) 82 Cal.App.4th 339, 344-345 [**family member**]; *People v. Martin* (1998) 64 Cal.App.4th 378, 385, fn. 5 [**crime victim**]; *People v. Buckley* (1997) 53 Cal.App.4th 658, 667; *People v. Barber* (1988) 200 Cal.App.3d 378; *Mitleider v. Hall* (9th Cir. 2004) 391 F.3d 1039, 1041- 045, 1048-1051 [**contacts by family members**].)

ii. **Served on hung jury before**. (*People v. Farnam* (2002) 28 Cal.4th 107, 137-138.)

iii. **Views on the legal system.** (*People v. Ward* (2005) 36 Cal.4th 186, 201 [**unfavorable views toward guilt**]; *People v. Cleveland* (2004) 32 Cal.4th 704, 733 [**hesitant in answering questions on the death penalty**]; *People v. Yeoman* (2003) 31 Cal.4th 93, 116-117 [**not strong enough views on the death penalty**]; *People v. Burgener* (2003) 29 Cal.4th 833, 864 [**skeptical in imposing death penalty**]; *People v. Farnam* (2002) 28 Cal.4th 107, 137; *People v. Caitlin* (2001) 26 Cal.4th 81, 118 [**skeptical about imposing death penalty**]; *People v. Buckley* (1997) 53 Cal.App.4th 658, 666-667 [**legal training**]; *Boyd v. Newland* (9th Cir. 2004) 393 F.3d 1008, 1013 [**ambivalence towards the legal system**]; *Tolbert v. Gomez* (9th Cir. 1999) 189 F.3d 1099; *United States v. Fike* (5th Cir. 1996) 82 F.3d 1315, 1320.)

iv. **The potential juror's lack of disclosure**. (*People v. Diaz* (1984) 152 Cal.App.3d 926, 932; see *In re Hitchings* (1993) 6 Cal.4th 97, 112; *Mitleider v. Hall* (9th Cir. 2004) 391 F.3d 1039, 1041-1045, 1048-1051 [**potential juror apparently not honest**].)

v. **The potential juror appeared to be a non-conformer**. (*Purkett v. Elem* (1995) 514 U.S. 765, 769 (per curiam) [**long**

hair]; *People v. Ayala* (2000) 24 Cal.4th 243, 261; *People v. Howard* (1992) 1 Cal.4th 1132, 1208; *People v. Wheeler* (1978) 22 Cal.3d 258, 275.) (*People v. Ward* (2005) 36 Cal. 4th 186, 202)

vi. **Lack of life experiences**. (*People v. Sims* (1993) 5 Cal.4th 405, 429; *People v. Perez* (1994) 29 Cal.App.4th 1313, 1328; *Mitleider v. Hall* (9th Cir. 2004) 391 F.3d 1039, 1041-1045, 1048-1051 [**young and immature**].)

vii. **The potential juror's occupation**. (*People v. Young* (2005) 34 Cal.4th 1149, 1174 [**counselor who has testified before in other sex assault cases and one who was an insurance claims specialist**]; *People v. Howard* (1992) 1 Cal.4th 1132, 1155-1156 [**non-practicing registered nurse**]; *People v. Landry* (1996) 49 Cal.App.4th 785, 790 [**youth services**]; *People v. Barber* (1988) 200 Cal.App.3d 378, 394; *United States v. Thompson* (9th Cir. 1987) 827 F.2d 1254, 1260.)

viii. **Reluctance to be a juror**. (*People v. Walker* (1998) 64 Cal.App.4th 1062, 1070; *Mitleider v. Hall* (9th Cir. 2004) 391 F.3d 1039, 1041-1045, 1048-1051.) (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**].)

ix. **Eagerness to be a juror**. (*People v. Ervin* (2000) 22 Cal.4th 48, 76.)

x. **Hesitance in applying the death penalty**. (*People v. Panah* (2005) 35 Cal.4th 395, 441; *People v. Smith* (2005) 35 Cal.4th 334, 347.)

xi. **Hesitance, Transient Background, and Grandmotherly 'Persona.'** (*Boyde v. Brown* (9th Cir. 2005) 404 F.3d 1159, 1170.)

xii. **Body language can be proper grounds, at least if there is a sufficient record to support the prosecutor's observations.** (*People v. Elliott* (2012) 53 Cal.4th 535, 569-570 [**Juror failed to make eye contact with anyone, dressed informally, and had an unconventional hairstyle**]; (*People v. Ward* (2005) 36 Cal.4th 186, 202 [**hostility toward prosecutor; though record is silent, other than the prosecutor's assertions, there is no evidence to contradict it**]; *People v. Reynoso* (2003) 31 Cal.4th 903, 919; *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1125-1126 [**hostile look at prosecutor**] *People v. Ervin* (2000)

22 Cal.4th 48 [**nervousness during voir dire**]; *People v. Turner* (1994) 8 Cal.4th 137, 170 [**potential juror won't look prosecutor in the eye**]; *People v. Johnson* (1989) 47 Cal.3d 1194, 1220 [**shy**][**sleepy**]; *People v. Dunn* (1995) 40 Cal.App.4th 1039, 1047; *People v. Perez* (1994) 27 Cal.App.4th 1313, 1330 [**inappropriate laughter**]; *Mitleider v. Hall* (9th Cir. 2004) 391 F.3d 1039, 1041-1045, 1048-1051; *Williams v. Rhoades* (9th Cir. 2004) 354 F.3d 1101 [**uncorroborated assertion by prosecutor of the potential juror's body language enough for affirmance because of deferential standard of review**]; but see *McClain v. Prunty* (9th Cir. 2000) 217 F.3d 1209 [**implied body language not enough without the prosecutor stating the reason**]; *Turner v. Marshall* (9th Cir. 1997) 121 F.3d 1248, 1254 [**cannot infer demeanor when prosecutor never said so**]; *United States v. Power* (9th Cir. 1989) 881 F.2d 733, 740 [**fidgety and inattention**]; *United States v. Changco* (9th Cir. 1993) 1 F.3d 837, 840 [**passive and inattentive**].) (*Rice v. Collins* 546 U.S. 333 (2006) [**rolling of eyes, not seen by trial judge**].)

1. Caution: Body language can be a dangerous area if the record does not support the reasons you are giving for the excuse. Be sure that you make a record of not only what body language or demeanor you observed but *why* this was important to you and how it affected your decision to excuse the juror. Further, try not to rely solely on body language or demeanor when excusing a cognizable class juror. (See, *People v. Long* (2010) 189 Cal.App. 4th 826) [**record did not support prosecutors reasons for excusing juror and judge did not make a "sincere and reasoned" attempt to evaluate the prosecutor's reasons**]). (*People v. Jones* (2011) 51 Cal.4th 346) [**Prosecutor gave specific and detailed reasons for challenges based upon body language and demeanor**]).
2. *Practice Tip*: If you have a cognizable class juror who is nonverbally communicating in a way that concerns you (i.e. facial expressions, arms folded, sighing, etc.) ask them about it. For example, you might say, "Juror #2, I noticed that while Juror #8 was answering the last question, you had a look on your face that I interpreted as disagreement. Am I correct about that? Would you like to be heard?" If you do this in a respectful way, you accomplish the goal of putting the fact that you noticed it

on the record. If you decide to kick this person later and get challenged, you can refer the Court back to this as one of the reasons you kicked the juror.

xiii. **Bilingual Juror Who Won't Defer to Court Translator.** (*Hernandez v. New York* (1991) 500 U.S. 352, 356-357) CAUTION – Be careful when kicking bilingual jurors as it could be seen as a cover for discrimination. (*See, People v. Gonzales* (2008) 165 Cal.App.4th 620)

xiv. **Intelligence.** (*People v. Arias* (1996) 13 Cal. 4th 92, 137-139)

xv. **Sympathetic to defendant.** (*People v. McKinzie* (2012) 54 Cal.4th 1302, 1321-1322) [**fact juror had been arrested for domestic violence was proper basis to challenge because 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. Mayfield* (1997) 14 Cal. 4th 668, 724-726)

xvi. **Desire for next juror.** (*People v. Jones* (2011) 51 Cal.4th 346, 367) [**challenge upheld where prosecutor believed he had even better potential jurors who had not been called**]; (See also, *People v. Alvarez* (1996) 14 Cal. 4th 155, 194-195). But see, (*People v. Cisneros* (2015) 234 Cal.App.4th 111) [**Holding that preference for next juror *alone* is not enough. You must also articulate reasons for excusing the challenged juror.**]

xvii. **Because prosecutor wished to ask the potential juror more questions**. (*People v. Cleveland* (2004) 32 Cal.4th 704, 733.)

xviii. **Mistake**. (*Aleman* v. *Uribe* (9th Cir. 2013) 2013) [**prosecutor mistakenly transposed two jurors' information. Prosecutor helped by making a good record that he was "under the weather"**] (See *People v. Williams* (2013) 56 Cal.4th 630, 660-661 [**holding that, regardless of whether prosecutor challenged one juror under the mistaken belief she was a different juror, there was no *Batson-Wheeler* violation since the reason given for challenging the juror (hesitancy to impose the death penalty) would have provided valid basis for challenging different juror**].) (*People v. Gutierrez* (2002)

28 Cal.4th 1083, 1124 [**prosecutor misunderstood the juror's answer**]; *People v. Williams* (1997) 16 Cal.4th 153, 188-189; *United States v. Lorenzo* (9th Cir. 1993) 995 F.2d 1448, 1454-1455 [**time crunch**].) But see, (*Castellanos v. Small* (2014) 766 F.3d 1137) [**Prosecutor's stated reason was in error. It survived through the appellate courts as a mistake but the 9th Circuit ultimately found the prosecutor's error to be pre-textual.**]

xix. **Financial Hardship/Work Related Issues.** (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**]

3. **STEP 3** – "If a race neutral explanation is tendered, the trial court must then decide…whether the opponent of the strike has proved purposeful racial discrimination." (*Johnson v. California* (2005) 54 U.S. 162)
   a. "It is not until the third step that the persuasiveness of the justification becomes relevant – the step in which the trial court determines whether the opponent of the strike has carried his burden of proving purposeful discrimination." (*Purkett v. Elem* (1995) 514 U.S. 765, 768.) [**Burden of proof of is preponderance of the evidence**]
   b. "[W]e rely on the good judgment of trial courts to distinguish bona fide reasons for such peremptories from sham excuses belatedly contrived to avoid admitting acts of group discrimination." (*People v. Wheeler* (1978) 22 Cal.3d 258, 282; *People v. Johnson* (1989) 47 Cal.3d 1194, 1216; see *Purkett v. Elem* (1995) 514 U.S. 765, 768.)
   c. "This demands of the trial judge a sincere and reasoned attempt to evaluate the prosecutor's explanation in light of the circumstances of the case as then known, his knowledge of trial techniques, and his observations of the manner in which the prosecutor has examined members of the venire and has exercised challenges for cause or peremptorily…" (*People v. Hall* (1983) 35 Cal.3d 161, 167-168; See also, *People v. Silva* (2001) 25 Cal. 4th 345, 386)
   d. "In assessing credibility, the court draws upon its contemporaneous observations of the voir dire. It may also rely on the court's own experiences as a lawyer and bench officer in the community, and even the common practices of the advocate and the office that

employs him or her. [Citation.]" (*People v. Lenix, supra*, 44 Cal.4th at p. 613, fn. omitted, *quoting Miller–El v. Cockrell* (2003) 537 U.S. 322, 339.)

e. It is proper for a trial court, in evaluating the prosecutor's justifications, to consider the prosecutor's actions in excusing jurors in a *previous trial* and whether a prosecutor has kept members of the cognizable class at issue on the jury in a *prior trial.* (*People v. DeHoyos* (2013) 57 Cal.4th 79)

f. ***People v. Gutierrez* (2017) 2 Cal. 5th 1150**

   i. First time in 16 years that the California Supreme Court has found a *Batson Wheeler violation.*

   ii. "This case offers us an opportunity to clarify the constitutionally required duties of California lawyers, trial judges, and appellate judges when a party has raised a claim of discriminatory bias in jury selection." (*People v. Gutierrez* (2017) 2 Cal. 5th 1150, 1154.

   iii. Facts: Gutierrez and other defendants were all Sureño gang members in the Bakersfield area. V got into a fight with one of the defendants and then left. Other D's, including Gutierrez, got in a car and searched for V. When they found V, Gutierrez got out of the car and shot V multiple times. One of the co-D's from a gang subset in Wasco testified and provided this information. (*Id.* at 1155.)

   iv. Step One – Three Overview: Prosecutor struck ten Hispanic jurors out of sixteen peremptory challenges, four of those challenges to Hispanic jurors coming in a row. The defense made a *Batson/Wheeler* motion. The trial court found the existence of a prima facie case in that there was an inference of discrimination. (*Id.* at 1156.) The prosecutor gave reasons and the trial court found them to be race neutral. Defense motion was denied. The Court of Appeal upheld the denial of the defense motion. (*Id.* at 1157.)

      1. Step One: The trial court found that 10 out of 16 challenges to Hispanic jurors established a prima facia case.
      2. Step Two: The prosecutor gave reasons for the 10 strikes. 7 of the 10 were found to be race neutral. The Supreme Court identified error in three of the challenges but based the reversal only upon one and did not determine the other two.
         a. Wasco Juror – Teacher from Wasco. Divorced. No Kids. Ex is a correctional officer. Other

relatives in law enforcement. No connection to gangs.

b. Voir Dire of Wasco Juror by the prosecutor consisted of asking the juror whether she was aware of gangs in Wasco. She said "No". Prosecutor then asked if she lived in the Wasco area and Wasco itself to which she answered "Yes."
c. Prosecutor's reason for kicking the Wasco juror was that she was unaware of gangs in Wasco and by some of her other answers. He wasn't sure how she'd respond when she hears that the testifying co-D was from a Wasco gang.
d. The AG gave some reason that would explain the prosecutor's reasons for the kicks. While the Supreme Court agreed that those may have been valid reasons, they made it clear that those reason were NOT given by the prosecutor.
e. The Court stated, "[A] prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives." (*Id.* at 1159. *See also*, *Miller-El v. Dretke* (2005) 545 U.S. 231, 252(*Miller-El II*).)

3. Step Three: The Supreme Court found the prosecutor's reason for kicking all jurors to be neutral on their face. (*Id.* at 1168.) However, the Court found that although the trial court made a *sincere* attempt to evaluate the prosecutor's reason, it failed to make a *reasoned* attempt. (*Id.* at 1172.)

v. The Supreme Court also found that the Court of Appeal erred by refusing to do comparative analysis for the first time on appeal. (*Id.* at 1174.)

vi. The Court opinion illustrates what information they want the record to contain in a *Batson/Wheeler* challenge:

1. The court may only rule on reasons specifically and actually expressed by the attorney, and may not consider other, even obvious, reasons that the challenge is appropriate. So make sure you list all your reasons.
2. If a prima facie finding is made and the court proceeds to the second step of the analysis: the "neutral justification" stage, the issue is facial validity. The court states that the rationale need only be clear and

reasonably specific as to legitimate reasons for challenging the juror, but need not detail "why" the prosecutor kicked the juror. However, a deficient record was clearly part of the reason that Gutierrez was reversed.

3. The Court wants a significant record created at Step 3: evaluating the credibility of the reasons actually stated.

vii. Justice Liu's concurrence attempts to lay out the purpose of the rule established:

1. The ultimate issue is "whether it was *more likely than not* that the challenge was improperly motivated." (*Johnson v. California* (2005) 545 U.S. 162, 170, italics added.) This probabilistic standard is not designed to elicit a definitive finding of deceit or racism. Instead, it defines a level of risk that courts cannot tolerate in light of the serious harms that racial discrimination in jury selection causes to the defendant, to the excluded juror, and to public confidence in the fairness of our system of justice. (*Batson*, *supra*, 476 U.S. at p. 87; see *Miller-El*, *supra*, 545 U.S. at p. 238; *Powers v. Ohio* (1991) 499 U.S. 400, 412–414.)

G. Comparative Analysis

1. This term refers to the process by which courts will evaluate the reasons given for the challenge of a member of a cognizable class. The courts will look for non-cognizable class jurors who were *not* challenged to see whether the reasons would apply equally.
2. For example, if a prosecutor challenged an African American juror who was employed as a teacher and gave the reason, "Judge, I always excuse teachers." The court would then look to see whether the prosecutor failed to challenge any teachers who were not members of a cognizable class.
3. History - Federal Courts approved of comparative analysis in *Turner v. Marshall* (9th Cir. 1997) 121 F. 3d 1248. California rejected comparative analysis in *People v. Landry* (1996) 49 Cal.App.4th 785. *People v. Jones* (1997) 15 Cal. 4th 119. However, things began to change in 2003 with *Johnson*. Then in 2005, the U.S. Supreme Court decided *Miller-El v. Dretke* (2005) 545 U.S. 231 using comparative analysis in the decision.
4. ***Snyder v. Louisiana* (2008) 552 U.S. 472** – In *Snyder,* the U.S. Supreme Court found that the prosecutors race neutral reasons for excusing a black juror were implausible and were reinforced by the prosecutor's acceptance of white jurors who disclosed conflicting obligations similar to the excused juror. (*Id.* at 483-484). The Court held that a comparative analysis was appropriate since "the shared characteristic, i.e., concern about serving on the jury due to conflicting obligations, was thoroughly explored by the trial

court when the relevant jurors asked to be excused for cause." (*Id.* at p. 483)

5. ***People v. Lenix* (2008) 44 Cal. 4th 602** – Comparative Analysis is alive in California.
    a. "If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson's* third step." (*Id.* at p. 621)
    b. In reviewing the plausibility of a prosecutor's reasons for striking a juror, an appellate court can consider various kinds of evidence, including a comparison of panelists' responses. (*Id.* at p. 622)
    c. Failing to engage in comparative juror analysis for the first time on appeal unduly restricts review based on the entire record." (*Id.* at p. 622) "Thus, evidence of comparative juror analysis must be considered in the trial court and even for the first time on appeal if relied upon by defendant and the record is adequate to permit the urged comparisons." (*Id.* at p. 622)
    d. The trial court has a duty to "assess the plausibility" of the prosecutor's proffered reasons for striking a potential juror, "in light of all evidence with a bearing on it." (*Id.* at p. 625) Trial courts "must evaluate the demeanor of the prosecutor in determining the credibility of proffered explanations, and the demeanor of the panelist when that factor is a basis for the challenge." (*Id.* at p. 625)
    e. It should be discernible from the record that "1) the trial court considered the prosecutor's reasons for the peremptory challenges at issue and found them to be race-neutral; 2) those reasons were consistent with the court's observations of what occurred, in terms of the panelist's statements as well as any pertinent nonverbal behavior; and 3) the court made a credibility finding that the prosecutor was truthful in giving race-neutral reasons for the peremptory challenges. (*Id.* at pp. 625-626)
    f. "As to the second point, the court may not have observed every gesture, expression or interaction relied upon by the prosecutor. The judge has a different vantage point, and may have, for example, been looking at another panelist or making a note when the described behavior occurred. But the court must be satisfied that the specifics offered by the prosecutor are consistent with the answers it heard and the overall behavior of the panelist.
    g. The record must reflect the trial court's determination on this point (see *Snyder*, supra, at p. 460), which may be encompassed within the court's general conclusion that it considered the reasons proffered by the prosecution and found them credible." (*Id.* at pp. 625-626)

h. The court observed that comparative juror analysis is a form of circumstantial evidence (*Id.* at p. 622) and that a reviewing court must be careful not to accept one reasonable interpretation to the exclusion of other reasonable ones when reviewing the circumstantial evidence supporting the trial court's factual findings in a *Batson/Wheeler* holding. "If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also be reasonably reconciled with a contrary finding does not warrant a reversal of the judgment." (*Id.* at pp. 625-626)
    i. Comparative Analysis will only be considered for the first time on appeal at the *Third* Step. (*See, People v. Clark* (2016) 63 Cal.4th 522, 568 [Declining the defense invitation to engage in comparative analysis for the first time on appeal at the first step of *Batson*.])
i. "Positive" Comparative Analysis
    i. This term refers to the idea of using comparative analysis to support a challenge of a member of a cognizable class by comparing other similarly situated non-cognizable class jurors who were also challenged.
    ii. (*Rice v. Collins* (2006) 546 U.S. 333, 341 [**prosecutor struck a white juror with the same characteristics of a cognizable class juror she struck**]; (*Briggs v. Grounds* (2012) 682 F.3d 1165 [**prosecutor struck at least on non-African American who indicated they would hold the prosecution to a higher standard of proof**]).

V. Practical Issues in Dealing with *Batson/Wheeler* Motions
A. Realize that a challenge will likely come at some point during jury selection and be ready to deal with it. It should go without saying, but ***NEVER*** excuse a juror on the basis of race, ethnicity, religion, gender etc…Question all jurors you plan to challenge. Desultory (non-substantive) questioning does not count.
B. Be prepared to rebut the prima facie case. (*See,* pp. 4-6)
C. Assume that a prima facie case will be made and be prepared to give race neutral reasons for excusing the juror. While peremptory challenges are often based on instinct and it can sometimes be hard to articulate the reason for removing a juror, "a prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives." (*People* v. *Lenix* (2008) 44 Cal.4th 602, 624.) Prosecutors should "provide as complete an explanation for their peremptory challenges as possible." (*People* v. *Lenix* (2008) 44 Cal.4th 602, 624.)
D. If you can't recall specifically why you excused a juror, it is better to ask for a "time out" so that you may review the transcript/recording of the juror's answers. (See *Lewis v. Lewis* (9th Cir. 2003) 321 F.3d 824 [suggesting that counsel can be

particularly helpful in assisting the court at the third step of *Batson* "when afforded the opportunity to review a transcript of the jury selection proceedings"].)

E. If judge finds no prima facie case, insist that the finding is placed on the record. Then state your reasons anyway. But, DO NOT give reasons unless and until the court specifically finds no prima facie case. Giving reasons without a specific finding on the first prong will constitute an implied finding of a prima facie case. *People v. Arias* (1996) 13 Cal. 4th 92; *People v. Gutierrez* (2002) 28 Cal. 4th 1083. *People v. Scott* (2015) 61 Cal.4th 363.

F. Mixed Motive – This term is used to refer to the situation that arises when a prosecutor give several reasons for the kick. Some might be legitimate neutral reasons and at least one is based on a cognizable class. *People v. Douglas* (2018) 22 Cal. App. 5th 1162. **[Case reversed where prosecutor kicked only two openly gay jurors and gave both neutral and discriminatory reasons for the kicks].** Although there is a split of authority where using mixed motives are per se reversible, the better practice is to not, under any circumstances, use race as a determining factor in your jury selection.

G. Trial Tips
    1. Create a Good Record
        a. The prosecutor should make sure the following is discernible from the record:
            i. "1) The trial court considered the prosecutor's reasons for the peremptory challenges at issue and found them to be race-neutral. And the trial court made a sincere and reasoned attempt to evaluate the reasons given;
            ii. 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.)
    2. Obtain a Transcript of Voir Dire Before Making Challenges
        a. In certain situations, a prosecutor may not recall or have accurate notes regarding the responses of a juror he or she wishes to challenge.
        b. In those cases, it is appropriate and recommended that the prosecutor ask for read back of the juror's responses. (*See Lewis v. Lewis* (9th Cir. 2003) 321 F.3d 824)
    3. Ask Court to Note the Final Jury Composition
        a. 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"].)

   b. 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"].)

4. Save your notes. If case is reviewed later, voir dire may be an issue. Always save your notes so that if asked, you are better able to recollect why you may have challenged a specific juror.
   a. At remand hearing, the prosecutor does NOT have to state reasons under oath. (*People v. Kelly* (2008) 162 Cal.App.4th 797)
   b. At remand hearing, the prosecutor does NOT have to turn over original voir dire notes. (*People v. Kelly* (2008) 162 Cal.App.4th 797)
   c. At remand hearing, prosecutor cannot be cross-examined by the defense. (*People v. Kelly* (2008) 162 Cal.App.4th 797)
   d. "I don't recall" May or May Not Fly – (*Paulino v. Harrison* (9th Cir. 2008) 542 F.3d 692); (But see, *Yee* v. *Duncan* (9th Cir. 2006) 463 F.3d 893.) [Notwithstanding the inability to recall reason for excusing one cognizable class juror, totality of prosecutor's responses regarding other excused jurors did not evidence a discriminatory motive].)
   e. If you use shorthand, make sure you define your terms. Don't make a reviewing court guess at what you meant. (*See, Foster v. Chatman* (2016) 136 Sup.Ct. 1737 [Murder conviction reversed for third step *Batson* violation. Very bad facts that we hope to never see. However, it's instructive on the issue of the clarity, or lack thereof, of the prosecutor's notes.])

H. Remedies

1. *Wheeler-Batson* error is reversible per se. (*People v. Wheeler* (1978) 22 Cal.3d 258, 283; see *Miller-El v. Dretke* (2005) 545 U.S. 231)
2. Step One Error: When the trial court erroneously finds there was not a prima facie case, the matter is often remanded for prosecutor to state reasons for peremptory challenge. (*Batson v. Kentucky* (1986) 476 U.S. 79, 100; *People v. McGee* (2002) 104 Cal.App.4th 559, 571, 573 [remand to permit prosecutor give reasons].)
    a. This remedy has been criticized for two reasons. First, the long passage of time makes it nearly impossible for the prosecutor to genuinely remember the real reason. (*People v. Hall* (1983) 35 Cal.3d 161, 171 [pointless to remand for the prosecutor to give a reason 11 years later]; *People v. Allen* (2004) 115 Cal.App.4th 542, 553-554, fn. 10 [remand for new trial, not for the prosecutor to give reasons, because occurred three years ago]; see also *People v. Ayala* (2000) 24 Cal.4th 243, 297, fn. 8 (conc. opn. of George, C.J.); *People v. Robinson* (2003) 110 Cal.App.4th 1196, 1208 [remand for the prosecutor to give the reason but retrial if it could not recall]; *People v. Williams* (2000) 78 Cal.App.4th 1118, 1130 [on remand, the court must first determine if it can adequately address the issue after the delay]; *United States v. Alcantar* (9th Cir. 1990) 897 F.2d 436, 438-439.)
    b. Second, this procedure is subject to a prosecutor trying to invent more legitimate reasons after the fact. (See, e.g., *Miller-El v. Dretke* (2005) 545 U.S. 231 [prosecution's reasons after the fact "reeks of afterthought"]; *Miller-El v. Cockrell* (2003) 537 U.S. 331, 343 [reasons given after trial "was subject to the usual risks of imprecision and distortions from the passage of time"]; see also *Johnson v. California* (2005) 545 U.S. 162, quoting *Paulino v. Castro* (9th Cir. 2004) 371 F.3d 1083, 1090 ["it does not matter that the prosecution might have had good reasons . . . [w]hat matters is the real reason they were stricken"].)
3. Step Three Error: When the trial court fails to sustain motion after the prosecutor gives reason, error normally requires new venire. (*People v. Wheeler* (1978) 22 Cal.3d 258, 283; see *Miller-El v. Dretke* (2005) 545 U.S. 162). However, the defendant and the trial court can stipulate to a different remedy. (*People v. Willis* (2002) 27 Cal.4th 811, 821-824 **[with consent of movant, can use other remedies such as sanctions, reinstating removed jurors or doing challenges at sidebar];** *People v. Overby* (2004) 124 Cal.App.4th 1237, 1244-1245 **[defendant not objecting to judge re-seating the excused juror indicates consent to this remedy].** (See *People v. Mata* (2013) 57 Cal.4th 178) **[holding that**

the trial court may reseat an improperly challenged juror if affected counsel either expressly or implicitly consents]

4. Consequences
    a. If the court grants a *Batson/Wheeler* motion at trial and employs one or more of the remedies discussed, that is arguably a “sanction”.
        i. Court must notify the bar of any judicial sanctions against an attorney (Business & Professions Code §6068(a) (3)).
        ii. Attorney must self-report any judicial sanction (Business & Professions Code §6068(o) (3)).
        iii. However, reporting will likely not be required unless the conduct is egregious.
    b. If the trial court erroneously denies a *Batson/Wheeler* motion at trial and the case is reversed.
        i. Court must notify bar whenever there is a reversal. (Business & Professions Code §6086.7(b) (2)).
        ii. Attorney must notify bar whenever reversal is based in whole or in part upon misconduct of the attorney. (Business & Professions Code §6068(o) (7)).

Wheeler SCRIPT

DEFENSE: We are making a WHEELER MOTION pursuant to People v. Wheeler (1978) 22 Cal.3d 258 and Batson v. Kentucky (1986) 476 U.S 79, because the DDA denied defendant to his right to a fair trial.

JUDGE: Excuses the jury or calls you to sidebar

DEFENSE: This is a clear violation of group (racial) bias. The DDA has now excused three women, who are members of a cognizable class, and this denies my client's right to a fair trial. It is an equal protection violation plain and simple, and what she is doing is forbidden by the law. As you can see, my client is a woman, and it is our position that these kicks are completely gender-related, and unconstitutional.

DDA: **KNOW YOUR LAW AND YOUR THREE-STEP STEP APPROACH**: (Johnson v. California (2005) 545 U.S. 162, 168 and Gutierrez (2017) 2 Cal.5th 1150)

1) **The moving party (defense) must first show that the totality of facts gives rise to an "inference of discriminatory purpose"** (*Johnson* 545 U.S. 162) (meaning that there is a reasonable inference that the person is being kicked because of their group association, rather than because of any specific bias.) (*Johnson, Wheeler*). **This is called the "prima facie case" where movant must "produce evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred." (*Johnson,* at 170)**
    - **If trial court finds there is NO prima facie case, prosecutor <u>should state their neutral justifications for each excusal</u> and the composition of the venire. This is not required, but done as a precaution should the reviewing court disagree with the original finding and determine that the prima facie case *was* shown.**
    - **<u>We suggest stating the reasons for your strikes at the time the Wheeler (Batson) motion is made.</u> The burden of explaining the reasons is minimal, and we typically have good and permissible reasons for our challenges. "Refusing to state them can create unnecessary suspicion, as well as unnecessary litigation." (U.S. v. Collins (9th Cir. 2009) 551 F.3d 914, 928)**

2) **If trial court finds prima facie case, burden shifts to you to explain by offering "clear and reasonably specific" race-neutral justification.**

- **Think about Comparative Analysis**—Why are you keeping one teacher and not the other? "if a prosecutor's proffered reason for striking a Black panelist applies just as well to an otherwise similar non-black who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at Batson's third step. (*Miller-El v. Dretke*) (2005) 545 U.S. 231). This comparative analysis will and should be considered on appeal. (Gutierrez (2017) 2 Cal.5th 1150)

- **Think about your non-verbal reasons:** "There is more to human communication than mere linguistic content. On appellate review, a voir dire answer sits on a page of transcript. In the trial court, however, advocates and trial judges watch and listen as the answer is delivered. Myriad subtle nuances may shape it, including attitude, attention, interest, body language, facial expression, and eye contact." (*People v. Lenix* (2008) 44 Cal.4th 602

3) **Trial court must decide whether purposeful discrimination has been proven by preponderance of evidence standard. (*P v. Mai* (2013) 57 Cal.4th 986)**
   - Burden of Proof = preponderance. (*P v. Hutchins* (2007) 147 Cal.App.4th 992)
   - The presumption is that the challenge is proper. (*P v. Newman* (2009) 176 Cal.App.4th 571)

DDA:

> ***This motion should be denied. The first step in the analysis is that the defense must show that the totality of facts gives rise to an inference of discriminatory purpose. Sometimes called the "prima facie case" The defense has not made a prima facie case, your honor. People v. Neuman (2009) 176 Cal.app.4th 571 states it is their burden to do so. They have to show that the totality of facts gives rise to an "inference of discriminatory purpose." The Defense has simply not met this burden, and several reasons are in support. First, the defense also challenged women, in their first and 3rd challenges. (P v. Wheeler (1978) 22 Cal.3d 258, 283) Additionally, we passed with juror #24, also a woman, our latest excused juror on our panel. (P v. Williams (2013) 56 Cal.4th 630).***

If judge rules NO prima facie case has been established DDA should request permission to lay out neutral justifications:

At this point, I realize the law does not require me to place my gender-neutral justifications on the record, but I would like to do so for protection of the record and any appellate litigation.

If judge rules that a prima facie case HAS BEEN ESTABLISHED, DDA must lay out neutral justifications to overcome the inference of discriminatory purpose:

***As the law requires, I will state a reason for each challenge. (P v. Cervantes (1991) 223 Cal.App.3d 323. Here, your honor, I had several neutral reasons other than gender for Juror #1, the first woman we kicked*:**

- **She was young, single, and had no children. (P v. Perez (1994) 29 Cal.App.4th 1313.**
- **See race-neutral reasons (attached handout)**
- **State reasons for each juror you kicked in the cognizable class. (See Batson/Wheeler Guide Orange County DDA handout**)

JUDGE: (hopefully) Motion denied.

Avoiding Appellate Error

[D.A. Training Material]

Preserving the Record

…

Batson Challenges

Claims of racial bias in jury selection fall under:

Batson v. Kentucky (1986) 476 U.S. 79
People v. Wheeler (1978) 22 Cal.3d 258

The way it works is the defense objects to the prosecutor's use of a peremptory challenge, alleging it was racially motivated. The court must determine whether the defense has made a prima facie showing that the peremptory challenge may have been racially motivated. If the court so finds, the burden shifts to the prosecutor to provide a race-neutral basis for exercising the peremptory challenge. The court then must determine whether the defense has proven purposeful racial discrimination. (*Johnson v. California* (2005) 545 U.S. 162, 168.)

If a *Batson* claim is raised, do not respond immediately with your reasons. Let the court first rule whether there has been a prima facie showing of invidious discrimination. If court asks for your response without first finding a prima facie showing, specify that you are responding solely to the lack of a prima facie case

If court does not find a prima facie case, you can explain the challenge for the record if you so choose

Protect the record. Racial makeup will not be evident on appeal. Save notes to file in the event of a later evidentiary hearing (on collateral attack)

Be prepared to address comparisons among challenged & non-challenged jurors

Wheelered? 3 STEPS:

1) **Moving party must make out a prima facie case by showing "that the totality of relevant facts gives rise to an inference of discriminatory purpose"**

2) **If judge finds prima facie case shown, *Burden shifts to you to explain* by offering race-neutral justifications.**

3) **If race-neutral justifications given, trial court must decide whether "purposeful discrimination has been proven by a preponderance of the evidence."**

Held to be proper justifications:

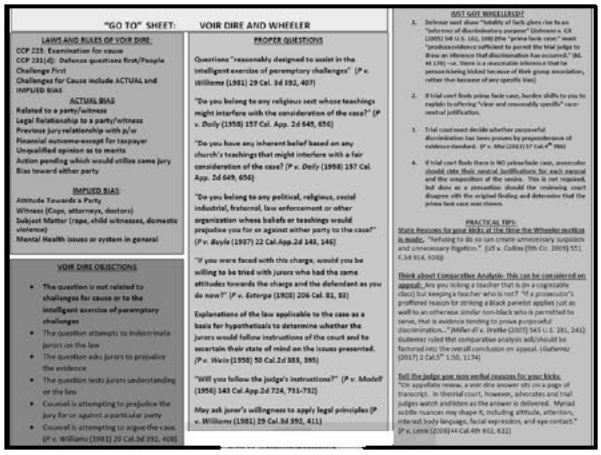
- Young, single and had no children (*People v Perez* (1994) 29 Cal App.4th 1313)
- Seemed like a follower (*People v Duff* (2014) 58 Cal.4th 527)
- Member of hung jury in past (*People v Turner* (1994) 8 Cal.4th 137)
- Seemed too nervous talking in front of others, reluctant (*People v Arias* (1996) 13 Cal.4th 92)
- She had too few ties to the community. (*Rice v Collins* (2006) 546 U.S. 333)

Held to be proper justifications:

- Family members arrested, "not sure" if treated well by the system (*People v Gutierrez* (2002) 28 Cal.4th 1083)
- Teacher, and used to be social worker (*People v Barber* (1988) 200 Cal.App.3d 378)
- Her clothes and hair were distracting. Fit into larger group? (People v. Ward (2005) 36 Cal.4th 186)
- Seemed inattentive (*US v Power* (9th Cir. 1989) 881 F.2d 733)
- Really emotional (*People v Gutierrez* (2002) 28 Cal.4th 1083)

Held to be proper justifications:

- Too eager (*People v. Ervin* (2000) 22 Cal.4th 48)
- No previous jury experience (*People v. Perez* (1994) 29 Cal.App.4th 1313)
- Answered only 2 out of 10 questions at first in the questionnaire (*People v. Perez* (1994) 29 Cal.App.4th 1313)
- Defensive body language (*People v. Johnson* (1989) 47 Cal.3d 1194)



"GO TO" SHEET: VOIR DIRE AND WHEELER

LAWS AND RULES OF VOIR DIRE:
CCP 223: Examination for cause
CCP 231(d): Defense questions first/People Challenge First
Challenges for Cause include ACTUAL and IMPLIED BIAS

ACTUAL BIAS
Related to a party/witness
Legal Relationship to a party/witness
Previous jury relationship with p/w
Financial outcome-except for taxpayer
Unqualified opinion as to merits
Action pending which would utilize same jury
Bias toward either party

IMPLIED BIAS:
Attitude Towards a Party
Witness (Cops, attorneys, doctors)
Subject Matter (rape, child witnesses, domestic violence)
Mental Health issues or system in general

VOIR DIRE OBJECTIONS
- The question is not related to challenges for cause or to the intelligent exercise of peremptory challenges
- The question attempts to indoctrinate jurors on the law
- The question asks jurors to prejudice the evidence
- The question tests jurors understanding or the law
- Counsel is attempting to prejudice the jury for or against a particular party
- Counsel is attempting to argue the case. (P v. Williams (1981) 29 Cal.3d 392, 408)

PROPER QUESTIONS

Questions "reasonably designed to assist in the intelligent exercise of peremptory challenges" (*P v. Williams* (1981) 29 Cal. 3d 392, 407)

"Do you belong to any religious sect whose teachings might interfere with the consideration of the case?" (*P v. Daily* (1958) 157 Cal. App. 2d 645, 656)

"Do you have any inherent belief based on any church's teachings that might interfere with a fair consideration of the case? (*P v. Daily* (1958) 157 Cal. App. 2d 649, 656)

"Do you belong to any political, religious, social industrial, fraternal, law enforcement or other organization whose beliefs or teachings would prejudice you for or against either party to the case?" (*P v. Boyle* (1937) 22 Cal.App.2d 140, 146)

"If you were faced with this charge, would you be willing to be tried with jurors who had the same attitudes towards the charge and the defendant as you do now?" (*P v. Estorga* (1928) 206 Cal. 81, 83)

Explanations of the law applicable to the case as a basis for hypotheticals to determine whether the jurors would follow instructions of the court and to ascertain their state of mind on the issues presented. (*P v. Wein* (1958) 50 Cal.2d 383, 395)

"Will you follow the judge's instructions?" (*P v. Modell* (1956) 143 Cal.App.2d 724, 731-732)

May ask juror's willingness to apply legal principles (*P v. Williams* (1981) 29 Cal.3d 392, 411)

JUST GOT WHEELERED?

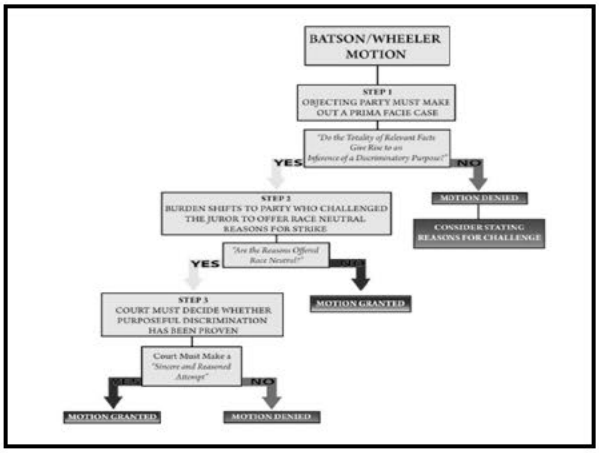
1. Defense must show "totality of facts gives rise to an "inference of discriminatory purpose" (Johnson v. CA (2005) 58 U.S. 162, 168) (the "prima facie case" must "produce evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred." (Id. at 170) –i.e. there is a reasonable inference that he person is being kicked because of their group association, rather than because of any specific bias)
2. If trial court finds prima facie case, burden shifts to you to explain by offering "clear and reasonably specific" race-neutral justification.
3. Trial court must decide whether purposeful discrimination has been proven by preponderance of evidence standard. (*P v. Bell* (2018) 57 Cal.4th 986)
4. If trial court finds there is NO prima facie case, prosecutor should cite their neutral justifications for each excusal and the composition of the venire. This is not required, but done as a precaution should the reviewing court disagree with the original finding and determine that the prima facie case was shown.

PRACTICAL TIPS:

State Reasons for your kicks at the time the Wheeler motion is made. "Refusing to do so can create unnecessary suspicion and unnecessary litigation." (*US v. Collins* (9th Cir. 2003) 551 F.3d 914, 920)

Think about Comparative Analysis- this can be considered on appeal. Are you kicking a teacher that is (in a cognizable class) but keeping a teacher who is not? "If a prosecutor's proffered reason for striking a Black panelist applies just as well to an otherwise similar non-black who is permitted to serve, that is evidence tending to prove purposeful discrimination…" (*Miller-El v. Dretke* (2005) 545 U.S. 231, 241) Gutierrez ruled that comparative analysis will/should be factored into the overall conclusion on appeal. (Gutierrez (2017) 2 Cal.5th 1150, 1174)

Tell the judge your non-verbal reasons for your kicks. "On appellate review, a voir dire answer sits on a page of transcript. In the trial court, however, advocates and trial judges watch and listen as the answer is delivered. Myriad subtle nuances may shape it, including attitude, attention, interest, body language, facial expression, and eye contact." (*P v. Lenix* (2008) 44 Cal.4th 602, 622)



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Classroom Demonstration: Wheeler
2018 All-DDA Training

DDA
JUDGE
DEFENSE
DEFENDANT
BAILIFF
NARRATOR/TEACHER

BAILIFF: Goes to the back of the courtroom and opens the door, and calls the jurors to their seats.

Ladies and Gentlemen of the jury you may take your seats. (waits while they take seats)

The Presiding Department of the Superior Court of San Diego is back in session. The Honorable Judge, presiding.

JUDGE: Ladies and Gentlemen, welcome back from the break--you have already been asked questions by the attorneys and we are in the peremptory challenge phase and actually selecting the jury. It looks like the prosecution is on its 4th peremptory. Ms. DDA?

DDA: We would like the court to thank and excuse Juror #8, Mrs. Smith.

DEFENSE: We are making a WHEELER MOTION.

JUDGE: Ladies and Gentlemen, I am going to need to excuse you for a few minutes. There is a legal issue we need to take care of outside your presence. Please remember the admonition, and be back in 10 minutes. Thank you. (Judge pauses, as if giving time for the jury to leave the courtroom, and Bailiff acts like he is ushering them out).

BAILIFF: Ladies and Gentlemen, back to the comfortable benches.

JUDGE: Okay, counsel, you would like to make a motion?

DEENSE: This is a clear violation of group bias. They have now excused two women, who are members of a cognizable class, and this denies my

client's right to a fair trial. It is an equal protection violation plain and simple, and what she is doing is forbidden by the law. As you can see, my client is a woman, and it is our position that these kicks are completely gender-related, and unconstitutional.

NARRATOR: DDA just got *Wheelered*. What that means is that the defense is saying the prosecutor improperly kicked off a juror based on race or other class characteristic. This would then violate the defendant's right to a fair jury trial. For a DDA who has never been through this before, it can be unnerving. And the mind starts to spin. Let's play through a live demonstration of a Wheeler Motion, and interweave some points of law that sometimes need to be refreshed. First of all—what should the DDA be thinking? What is on her checklist to do right now????

(on powerpoint screen) THERE IS A THREE-STEP APPROACH: (*Johnson v. California* (2005) 545 U.S. 162, 168, *People v. Gutierrez* (2017) 2 Cal. 5th 1150.)

1) **The moving party (defense) must first show that the totality of facts gives rise to an "inference of discriminatory purpose"** (*Johnson* 545 U.S. 162) (meaning that there is a reasonable inference that the person is being kicked because of their group association, rather than because of any specific bias.) (*Johnson, Wheeler*). **This is called the "prima facie case" where movant must "produce evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred." (*Johnson,* at 170)**

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    - The presumption is that the challenge is proper. (*P v. Newman* (2009) 176 Cal.App.4th 571)
    - Think about Comparative Analysis—Why are you keeping one teacher and not the other? "if a prosecutor's proffered reason for striking a Black panelist applies just as well to an otherwise similar non-black who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at Batson's third step. (*Miller-El v. Dretke*) (2005) 545 U.S. 231)

- Think about your non-verbal reasons: "There is more to human communication than mere linguistic content. On appellate review, a voir dire answer sits on a page of transcript. In the trial court, however, advocates and trial judges watch and listen as the answer is delivered. Myriad subtle nuances may shape it, including attitude, attention, interest, body language, facial expression, and eye contact." (*People v. Lenix* (2008) 44 Cal.4th 602

3) Trial court must decide whether purposeful discrimination has been proven by preponderance of evidence standard. (*P v. Mai* (2013) 57 Cal.4th 986)

Let's go back to our demonstration and see how it plays out.

JUDGE: Ms. DDA, the defense is making a motion pursuant to *People v. Wheeler* (1978) 22 Cal.3d 258 and *Batson v. Kentucky* (1986) 476 U.S 79, whereby it is alleged that you have denied defendant to his right to a fair trial. Your response?

DDA: This motion should be denied. The first step in the analysis is that the defense must show that the totality of facts gives rise to an inference of discriminatory purpose. Sometimes called the "prima facie case" The defense has not made a prima facie case, your honor. *People v. Neuman* (2009) 176 Cal.app.4th 571 states it is their burden to do so. They have to show that the totality of facts gives rise to an "inference of discriminatory purpose." They simply have not met this burden, and several reasons are in support. First, the defense also challenged women, in their first and 3rd challenges. (*P v. Wheeler* (1978) 22 Cal.3d 258, 283) Additionally, we passed with juror #24, also a woman, who was the latest excused juror on our panel. (*P v. Williams* (2013) 56 Cal.4th 630).

JUDGE: Defense? Anything further?

DEFENSE: …Ms. DDA is showing her true spirit and discriminating against her very own gender…. This shocks my conscious…

JUDGE: Are you finished? (not really letting him finish) I find <u>no prima facie case</u> giving rise to a discriminatory purpose has been made based on the totality of the circumstances.

DDA: Your Honor, may I have permission to complete the record?

JUDGE: Go ahead, Ms. DDA.

DDA: At this point, I realize the law supports does not require me to do so, but at this time like to state my gender-neutral justifications for challenging the jurors so there is a complete record for a reviewing court.

As the law requires, I will state a reason for each challenge. (*P v. Cervantes* (1991) 223 Cal.App.3d 323. Here, your honor, I had several neutral reasons other than gender for Juror #1, the first woman we kicked:

- She was young, single, and had no children. (P v. Perez (1994) 29 Cal.App.4th 1313.
- She seemed like a follower. (People v. Duff (2014 58 Cal. 4th 527)
- Was a member of a hung jury in her past (P v. Turner (1994) 8 Cal.4th 137.
- Seemed too nervous talking in front of others, seemed reluctant. (P v. Arias (1996) 13 Cal.4th 92)
- She had few ties to the community. (Rice v. Collins (2006) 546 US 333)
- And the next juror, which was now juror #45, looked better to me (P v. Alvarez) (1996) 14 Cal.4th 155.

As for Juror #2, the second female we kicked:

- Her family members were arrested and she was "not sure" if treated well by the system (*P v. Gutierrez* (2002) 28 Cal.4th 1083
- She is a teacher, and used to be a social worker. (*P v. Barber* (1988) 200 Cal.App.3d 378)
- Her clothes and hair were distracting, wonder if would fit in a larger group (*P v. Ward* (2005) 36 Cal.4th 186)
- She seemed inattentive (*US v. Power*) (9th Cir. 1989) 881 F.2d 733
- She also seemed really emotional. (*P v. Gutierrez* (2002) 28 Cal.4th 1083)

JUDGE: Thank you, Ms. DDA. Deputy you may now bring the jurors back inside the courtroom.

BAILIFF: (Go stand back by the door) Back in, ladies and gentlemen.

JUDGE: Okay, ladies and gentlemen, we are going to resume jury selection. Defense, you're up.

DEFENSE: Defense passes, Your Honor.

DDA : The People thank and excuse juror #3, Mrs. Jones.

DEFENSE: Can we approach side bar?

JUDGE: Yes. Ladies and Gentlemen, talk among yourselves.

(DEFENSE AND DDA GO UP TO BENCH)

DEFENSE: I want to renew my *Wheeler* objection. The prosecution has now kicked 3 women—all of whom are in cognizable classes, and this denies my client a fair trial. There IS an inference of impermissible bias. There were many other men who also seemed inattentive and emotional, and were members of hung juries who the DA did not kick off. And there were not that many women in this panel to begin with. Nor are there much to choose from at this point. Now there is a third woman being excused. The reasons proffered by the prosecution seem trivial and we believe we have made a prima facie case. Unbelievable, Your Honor.

JUDGE: Ms. DDA?

DDA: Your honor has already made a determination that the defense failed to make a prima facie case and that should not be affected by the current challenge for all of the reasons previously stated.

JUDGE: Well, I think this last kick tips the scale and Ms. DDA, I am finding that based on the totality of the circumstances, there is an inference of discriminatory purpose and a prima facie case has been established. Ms. DDA, please state your reasons for excusing this most recent juror.

DDA: As for Juror #3, the last female we kicked:

- She seemed too eager. (*P v. Ervin* (2000) 22 Cal.4th 48)
- Also, she had no previous jury experience (*P v. Perez* (1994) 29 Cal.App.4th 1313.
- She only answered 2 out of 10 questions that were posed to her. People v. Perez (1994) 29 Cal.App. 4th 1313)
- Her body language was defensive. (People v. Johnson (1989)) 47 Cal.3d 1194)

JUDGE: Defense, do you want to be heard?

DEFENSE: Yes, and No, Your Honor… You must grant my motion so we can all fight fairly in this important case…

JUDGE: First, I note that in my ruling, I must take into account the totality of the circumstances. It is the defense burden by a preponderance of the evidence to show that the District Attorney purposefully discriminated on the basis of here, gender in their challenges. I note that the presumption is that the challenge is proper. I also recognize that I am allowed to take into account the credibility of the prosecutor. I can look at body language and demeanor of both Ms. DDA, in her questioning, and the prospective jurors in their answering. Here, I find defense has not met their burden. Ms. DDA's reasons were not trivial, I find, but rather, each a gender-neutral, and legal basis for a challenge is this kind. I have had Ms. DDA in my courtroom several times, and always found her to be professional and never impermissible. I find the reasons are inherently plausible and supported by this record, and deny the motion. The defense also kicked women. The prosecution passed with keeping the latest challenged juror, a woman. The burden simply has not been met and defendant has not been denied a fair trial. Let's recall the jury.

BAILIFF: (steps to the back of the room to the door, opens door and yells, "Jurors for the Presiding Department please resume your seats.")

Jury Selection

Voir Dire Mechanics

Voir Dire should be conducted to assist you in making well-grounded challenges for cause and allow you to identify less suitable jurors subject to peremptory challenges. The rules regarding juror challenges can be found in the *Code of Civil Procedure §§ 225-231.*

In a criminal trial, "[e]xamination of prospective jurors shall be conducted only in aid of the exercise of challenges for cause." *CCP § 223.* Challenges for cause can be made by either side for either *implied bias* or *actual bias CCP §225(b).* The ultimate determination to excuse a juror for cause is made by the court. *CCP §230.* "The trial court's exercise of its discretion in the manner in which voir dire is conducted, including any limitation on the time which will be allowed for direct questioning of prospective jurors by counsel and any determination that a question is not in aid of the exercise of challenges for cause, shall not cause any conviction to be reversed unless the exercise of that discretion has resulted in a miscarriage of justice, as specified in Section 13 of Article VI of the California Constitution." *CCP § 223.*

There are eight categories of implied bias listed in *CCP §229*:

1) Consanguinity or affinity with party or victim;
2) Relationship;
3) Prior service in same matter;
4) Interest in the action;
5) Unqualified opinion or belief as to the merits of the action founded by knowledge of material facts or some of them;
6) Enmity or bias towards or against a party;
7) Party to an action before same jury; and
8) Opposition to death penalty in capital case.

Actual bias is defined as "*the existence of a state of mind on the part of the juror in reference to the case, or to any of the parties, which will prevent the jurorfrom acting with entire impartiality, and without prejudice to the substantial rights of any party*." *CCP§225(b)(1)(C).*

No peace officer, as defined in Section 830.1, subdivision (a-c) of Section 830.2, and subdivisions (a) of Section 830.33, of the Penal Code, shall be selected for voir dire in a criminal matter. *CCP § 219.*

Number of Challenges

There is no limitation on the number of challenges for cause, however, the trial court does not have sua sponte duty to excuse biased jurors when counsel has failed to exercise a peremptory challenge for that purpose. *People v. Bolin* (1998) 18 Cal.4th 297.

The number of peremptory challenges depends upon the possible sentence of the offense charged and the number of defendants. If the offense is punishable with *maximum term of imprisonment of 90 days or less*, each side gets *6* peremptory challenges. *CCP §231*
If the offense is punishable with *death or with imprisonment in the state prison for life*, each side gets *20* peremptory challenges. *CCP §231(a)*. In *all other cases* each side gets *10* peremptory challenges.

In multiple defendant cases with sentences under 90 days, the People get *6* challenges and the defendants get *6 challenges jointly*. Each defendant is additionally entitled to *4 separate challenges*. The People get as many challenges as are allowed all defendants. *CCP§231(b)*
In life in prison and death cases – The People get *20* challenges and the defendants get *20 challenges jointly*. Each defendant is additionally entitled to *5 separate challenges*. The People get as many challenges as are allowed all defendants. *CCP §231(a)*

In all other cases, the People get *10* challenges and the defendants get *10 challenges jointly*. Each defendant is additionally entitled to *5 separate challenges*. The People get as many challenges as are allowed all defendants. *CCP§231(a)*

The selection of Alternate jurors is governed by *CCP§234*. Challenges are allotted as follows: In a single defendant case, there is one challenge for each side per the number of alternates. In a multiple defendant case, each defendant gets one challenge per number of alternates and the People get the same total number as the defense team.

Proper Subject Matter For Attorney Inquiry

It is improper to ask questions intended solely to educate the jury, compel the jurors to commit to vote a certain way, prejudice the jury, argue the case, indoctrinate the jury, instruct the jury on the law, or test the juror's knowledge of the law. *People v. Edwards* (1912) 163 Cal. 752; *People v. Willams* (1981) 29 Cal.3d 392, 408; *People v. Ashmus* (1991) 54 Cal.3d 932, 959.

It is permissible to ask a juror about his attitude about a particular rule of law only if (1) the rule is relevant or material to the case, and (2) the rule appears to be controversial; e.g., the juror has indicated some hostility toward the rule, or it is commonly known the community harbors strong feelings about it. *People v. Balderas* (1985) 41 Cal.3d 144, 185; *People v. Williams* (1981) 29 Cal.3d 392, 408.

It is improper to use voir dire questions for the sole purpose of argument by counsel. *People*

v. Mitchell, 61 Cal 2d 353, 366.

A trial judge's refusal to permit any voir dire questions concerning racial bias or prejudice may require reversal. *People v. Wilborn* (1999) 70 Cal.App.4th 339. In a case involving an interracial killing, a trial court during general voir dire is required to question prospective jurors about racial bias on request. *People v. Bolden* (2002) 29 Cal.4th 515. Expect to see broadening of this area of inquiry in response to current events and opposing views on race and policing.

"Any question whose sole purpose is '… to attempt to precondition the prospective jurors to a particular result' should be excluded." Similarly, "any question whose sole purpose is "… to attempt to precondition the prospective jurors to a particular result" should be excluded. [CRC Standards of Jud. Admin., Standard 3.25(f)] *Scope of Permissible Voir Dire—Proper vs. Improper Questions*, Cal. Prac. Guide Civ. Trials & Ev. Ch. 5-G

Examples of Permissible Questions

Asking jurors whether they would be able to vote guilty if, after deliberations, they were persuaded that the changes had been proved beyond a reasonable doubt. *People v. Fierro* (1991) 1 Cal.4th 173, 209)

"[I]f I prove beyond a reasonable doubt each and every element of each of the offenses charged . . . can you assure me that you would be willing to return a verdict of guilty even though you have unanswered questions?" *People v. Riel* (2000) 22 Cal.4th 1153, 1178 fn. 4.

In order to avoid a hung jury the prosecutor observed that each juror must "come to your own conclusion," but also stressed the value of "work[ing] together to try to discover the truth." *People v. Fierro* (1991) 1 Cal.4th 173, 210, fn 8.

Prosecutor's "hypothetical" voir dire illustrations of aggravating and mitigating factors were permissible in capital murder prosecution, even though the prosecutor used examples of aggravating factors closely resembling the facts of the case and used examples of mitigating factors unlike the defendant's mitigating evidence. *People v. Seaton* (2001) 26 Cal.4th 598.

In questioning a juror, the prosecutor asked her if she believed a person charged with committing a crime such as defendant's must be insane. The prosecutor also asked: Do you feel there could be such a thing as a person who is legally insane? *People v. Fields* (1983) 35 Cal.3rd 329, 358.

Whether a juror would view a person's possession of recently stolen property as circumstantial evidence that the person stole the property. (*People v. Mendoza* (2000) 24 Cal.4th 130, 167.)

Whether a juror considered rape more of an assaultive than a sexually motivated offense, and whether they thought it was possible for a young man to rape an elderly woman and not be mentally ill. (*People v. Mendoza* (2000) 24 Cal.4th 130, 167.)

While counsel may ask prospective jurors if they are able to return a verdict in if supported by the evidence, it is not proper to ask for their commitment to do so. *Scope of Permissible Voir Dire—Proper vs. Improper Questions*, Cal. Prac. Guide Civ. Trials & Ev. Ch. 5-G.

Examples of Impermissible Questions

"I had a case a few years ago where three teenage girls were killed in Huntington Beach and [it was a] very emotional case. It was about a three week long trial, very strong evidence against the defendant. At the end of the trial the jury went out and the families were there every single day, the families of [the] three girls and they sat there. The jury didn't come back the first day and the families started getting very upset and crying, you know. They would [ask] me what is wrong, why, how come they didn't make a decision. I don't know. Next day came back same thing, the families are all upset—[¶] ... [¶] ... The jurors came back and we asked them why—what took so long. Oh, we knew he was guilty the first day, but we wanted to figure out this one other issue.... [¶] ... [¶] ... My question is would any of—if you had other questions but they didn't go to the elements, the actual like 1, 2, 3 elements, if you were convinced beyond a reasonable doubt of the elements, even though you might have some question very interesting, but didn't go to that element [,] would you be able to convict?" *People v. Castillo* (2008) 168 Cal.App.4th 364, 380. This contextual question inserted information clearly designed to evoke sympathy for the victims in the case.

"If any of you (prospective jurors) find a question particularly embarrassing, and you would prefer to answer in the judge's chambers rather than here in open court, please let me know and I will be glad to ask the judge to allow you to do so." *Scope of Permissible Voir Dire—Proper vs. Improper Questions*, Cal. Prac. Guide Civ. Trials & Ev. Ch. 5-G. This is an impermissible form of questioning because it is used to "curry favor" since you are the hero. The admonition may be proper if the directive is simply to advise the court if you wish to answer in private.

"Do you agree then that a killing done intentionally should be treated more strongly or more severely than a killing that is accidentally done or unintentionally done?" *People v. Mitchell*, 61 Cal 2d 353, 366.

"Are you sure you haven't seen my client's picture in the paper as coach of the championship Little League baseball team from St. Luke's Church?" *Scope of Permissible Voir Dire—Proper vs. Improper Questions*, Cal. Prac. Guide Civ. Trials & Ev. Ch. 5-G.

Do you believe in self-defense in the home? (Not controversial; *People v. Williams* (1981)

29 Cal.3d 392, 411.)

"Whether, if they believed that a witness was an informant and was testifying 'in exchange for some lesser sentence,' then that 'would have some bearing on the weight or credibility that that witness may have in your mind?' " *People v. Mason* (1991) 52 Cal.3d 909, 940.

In a death penalty case, the court did not "allow either party to discuss the law – such as the meaning of diminished capacity – or ask questions that required the prospective jurors to pre-try the facts of the case." *People v. Rich* (1988) 45 Cal.3rd 1036, 1104.

Defense counsel was not permitted to question prospective jurors regarding their ability to view accomplice testimony with suspicion and distrust. *People v. Johnson* (1989) 47 Cal.3rd 1194, 1224.

In an eyewitness case where the defense expected to call an ID expert, the defense was prohibited from eliciting opinions of potential jurors concerning the effects of stress on perception. *People v. Sanders* (1990) 51 Cal.3rd 471, 506.

Defense counsel stated, "It's clear a girlfriend has an interest to lie. I just want to make sure that the jurors don't automatically, before they hear her testimony, say she's lying because she's the girlfriend." The trial court barred this line of questioning on the ground that the defendant was trying to educate the jurors and induce them to prejudge the evidence. We cannot say that the court abused its discretion in doing so. *People v. Helton* (1984) 162 Cal.App.3rd 1141, 1145.

"What do you feel is a proper punishment for someone who has committed a rape or other serious sexually related crime?" *People v. Ochoa* (1998) 19 Cal.4th 353, 444.

Many detailed questions regarding personal experience with sexual molestation in a child molestation-murder case. *People v. Earp* (1999) 20 Cal.4th 826, 851, fn 1.

Handling a *Batson/Wheeler* Motion

I. Overview

A. Every prosecutor will have to deal with the dreaded "*Wheeler"* motion. It usually occurs following the People's use of a peremptory challenge against someone of a particular race, gender or ethnic background.

B. How it works – The defense makes a motion, usually on state and federal grounds, that the prosecutor has excused a juror based on racial, ethnic or other improper grounds and has therefore violated the defendant's Constitutional right to a fair and impartial jury. The defendant does not have to be a member of the excluded group to complain of a violation. *People v. Wheeler* (1978) 22 Cal. 3d 258, 281. (**Note**: While the defense usually brings the motion, it may be made by *either party*.)

C. It goes without saying that no prosecutor should exercise a peremptory challenge against a juror based solely on that juror's gender, sexual orientation, or membership in a racial, ethnic, or religious group. But a prosecutor should not refrain from challenging a juror for *permissible* reasons out of a concern that the defense will raise a disingenuous or frivolous *Batson/Wheeler* claim.

D. THREE STEP PROCESS
"First, the defendant must make out a prima facie case 'by showing that the totality of relevant facts give rise to an inference of discriminatory purpose.' Second, once the defendant has made out a prima facie case, the 'burden shifts to the State to explain adequately the racial exclusion' by offering permissible race-neutral justifications for the [peremptory] strikes. Third, '[i]f a race-neutral explanation is tendered, the trial court must decide . . . whether the opponent of the strike has proved purposeful racial discrimination.' " (*Johnson v. California* (2005) 545 U.S. 162)

II. History

A. *Batson* ***is*** the federal standard and *Wheeler* ***was*** the California standard used to determine whether the peremptory challenge was improper.

B. Both cases used procedures involving 3 part tests to determine the propriety of the challenge. However, the first prong of the tests in each case was different.

Defendants argued the state burden (Wheeler) was more difficult for them to meet than the federal burden (Batson).

C. The California Supreme Court tried to reconcile the two cases in 2003 in *People v. Johnson* (2003) 30 Cal. 4th 1302.

D. In 2005, the U.S. Supreme Court reversed *Johnson* and "clarified" the *Batson* decision by stating that the first prong of the *Batson* test need only be satisfied by production of evidence sufficient to permit the trial judge to draw an *inference of discrimination*. (*Johnson v. California* (2005) 545 U.S. 162.)

E. Current State of the Law - Still a 3 prong test based on the holdings of *Batson* and *Johnson.* Although *Wheeler* is still good law, the first step has been replaced by the *Batson* first step. (*Johnson v. California* (2005) 545 U.S. 162.)

III. Analysis

A. *People v. Wheeler* (1978) 22 Cal. 3d 258 – Peremptory challenges based on group bias violates the defendant's right to jury trial in the California Constitution. *Batson v. Kentucky* (1986) 476 U.S. 79 – Race based challenges violate the Equal Protection Clause of the U.S. Constitution. (*See Also, People v. Bonilla* (2007) 41 Cal.4th 313, 341).

B. Objection Made – The claim is waived if the defendant fails to make a timely objection and a record sufficient for appellate review. (*People v. Wheeler* (1978) 22 Cal.3d 258, 280; *People v. Morris* (2003) 107 Cal.App.4th 402, 408-409) Motion made after jury was sworn but before alternates were sworn was not untimely. Jury empanelment is completed when all jurors, including alternates, are selected and sworn in. *People v. Scott* (June 8, 2015, S094858) __ Cal. 4th __ [2015 WL 3541280]

C. Cognizable Class – "An identifiable group distinguished on racial, religious, ethnic, or similar grounds…" *People v. Wheeler* (1978) 22 Cal. 3d 258, 276. Two requirements for a cognizable class:

> 1) Members share a common perspective arising from life experience in the group; and
> 2) No other members of the community are capable of adequately representing the group perspective. (*See, Rubio v. Superior Court* (1979) 24 Cal.3d 93, 98).

Courts and Statutes have recognized several categories of cognizable classes or groups.

1. Race - (*See, Batson v. Kentucky* (1986) 476 U.S. 79 & *People v. Wheeler* (1978) 22 Cal. 3d 258).

2. Ethnicity – Although there are fewer reported cases regarding ethnicity, be aware that it is a cognizable class. For example, Native Americans were the subject of the violation in *United States v. Bauer* (9th Cir. 1996) 84 F.3d 1549.

3. Religion – *People v. Johnson* (1989) 47 Cal.3d 1194, 1217 [Jewish Jurors]

4. Gender – Gender appears to be a cognizable class and should be treated as such. However, most cases dealing with gender also carry a racial component as well. (*People v. Crittenden* (1994) 9 Cal.4th 83, 115 [African-American woman]; *People v. Garceau* (1993) 6 Cal.4th 140, 171 [Hispanic woman]

5. Sexual Orientation – *People v. Garcia* (2000) 77 Cal.App.4th 1269, 1272. (*See Also,* Code of Civil Procedure §231.5)

6. Age – Although not a federally protected class, Code of Civil Procedure §231.5 added "Age" as a protected class in 2016 added by operation of Government Code §11135.

7. Disability – Although not a federally protected class, Code of Civil Procedure §231.5 added "Disability", both mental and physical, as a protected class in 2016 by operation of Government Code §11135**.**

D. Non-Cognizable Class

1. Poor – *People v. Carpenter* (1999) 21 Cal.4th 1016, 1035

2. Less Educated – *People v. Estrada* (1979) 93 Cal.App.3d 76, 90-91

3. Battered Women – *People v. Macioce* (1987) 197 Cal.App.3d 262, 280

4. Young – *People v. Ayala* (2000) 24 Cal.4th 243, 277-278; *United States v. Fletcher* (9th Cir. 1992) 965 F.2d 781, 782 -- (Caveat: See CCP§231.5 & Gov't Code §11135)

5. People over 70 – *People v. McCoy* (1995) 40 Cal.App.4th 778, 783 -- (Caveat: See CCP§231.5 & Gov't Code §11135)

6. "Insufficient" English – *People v. Lesara* (1998) 206 Cal.App.3d 1304, 1307

7. Unconventional Hairstyle – *Purkett v. Elem* (1995) 514 U.S. 765, 769

8. People who have been arrested *or* been victims – *People v. Fields* (1983) 35 Cal.3d 329, 348

9. "People of Color" – Combining all minority groups does not constitute a "cognizable class". *People v. Davis* (2009) 46 Cal. 4th 539

E. Challenge Exercised Against Member of Cognizable Class

1. Step One – The party objecting to the peremptory challenge must make out a prima facie case "by showing the totality of the relevant facts gives rise to an inference of a discriminatory purpose." *Johnson v. California* (2005) 545 U.S. 162. There is a presumption that that the party exercising the challenge (usually the prosecution) does so on a constitutionally permissible ground. (*People v. Wheeler* (1978) 22 Cal. 3d 258). Thus, the objecting party (usually the defense) must demonstrate a "prima facie case".

a. Prima Facie Case – The court in *Wheeler* provided four examples of ways to demonstrate a prima facie case:

1. "A party may show that his opponent struck most or all of the members of the identified group from the venire."
2. "He may also demonstrate that the jurors in question share only this one characteristic—their membership in the group—and that in all other respects they are as heterogenous as the community as a whole."
3. "Next, the showing may be supplemented . . . by such circumstances as the failure of the opponent to engage these same jurors in more than desultory voir dire, or indeed to ask them any questions at all."
4. "Lastly, . . . the defendant need not be a member of the excluded group in order to complain of a violation of the representative cross-section rule." However, this can be probative in making the determination. (*People v. Wheeler* (1978) 22 Cal. 3d 258, 280-281; *People v. Reynoso* (2003) 31 Cal.4th 903, 914.)

b. "[A] 'pattern' of strikes against black jurors included in the particular venire might give rise to an inference of discrimination. Similarly, the prosecutor's questions and statements during *voir dire* examination and in exercising his challenges may support or refute an inference of discriminatory purpose." (*Batson v. Kentucky* (1986) 476 U.S. 79, 96-97.)

c. Rebut the prima facie case by arguing applicable factors:

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

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

3. The fact that you have <u>not</u> used a disproportionate number of your challenges against members of the cognizable class is a factor that weighs against finding an inference of discrimination. (*People v. Streeter* (2012) 54 Cal.4th 205, 223 [no prima facie case where prosecutor excused three of five African Americans]; *People v. Clark* (2011) 52 Cal.4th 856, 903 [statistical analysis subject to various interpretations and did not raise an inference of discrimination]; *People* v. *Bell* (2007) 40 Cal.4th 582, 598 [considering fact prosecutor used only two of 16 peremptory challenges against members of the cognizable class at issue in finding the prosecutor's challenges created no inference of discrimination]; *People v. Cornwell* (2005) 37 Cal.4th 50, 70 [no prima facie case where prosecutor challenged one out of two African-American prospective jurors]). However, See *Ayala v. Wong* (9th Cir. 2012) 693 F.3d 945, 964 [Statistical evidence alone established a prima facie case where prosecution struck each of the seven black or Hispanic jurors available for challenge].

4. If you have passed on a panel that includes members of the cognizable class, this fact should be mentioned as it undercuts an inference of discrimination. (*People v. Streeter* (2012) 54 Cal.4th 205, 225 [prosecutor passed five times with up to four African Americans in jury box]; *People v. Clark* (2011) 52 Cal.4th at 856, 906 [no prima facie case where prosecutor passed two African-American jurors during several rounds before finally excusing them].) The prosecutor's acceptance of a panel including African-American prospective jurors, while not conclusive, was " 'an indication of the prosecutor's good faith in exercising his peremptories, and … an appropriate factor for the trial judge to consider in ruling on a *Wheeler* objection … .' " (*People v. Hartsch* (2010) 49 Cal.4th 472, 487). (See also, *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].)

5. Point out any members of the cognizable class who were challenged by the defense. However, be aware that this fact will not carry the day for you. It is simply something you may want to point out on the record. Further rehabilitation of prospective jurors of a cognizable class ought to be challenged can be an

important factor in rebutting a prima facie case. (*People v. Streeter* (2012) 54 Cal.4th 205, 225 [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, citing *People v. Hartsch* (2010) 49 Cal.4th 472, 487]).

6. If you were honestly not aware the juror was a member of a cognizable group. *People v. Barber* (1988) 200 Cal.App.3d 378, 389. [Challenged juror appeared to be a white and non-Hispanic to DA. DA did not recognize the surname to be Hispanic. Court found DA to be sincere]

2. Step Two – If a prima facie case is made, the "burden shifts to the [party making the original, objected to juror challenge] to explain adequately the racial [or other cognizable class] exclusion by offering permissible race neutral justifications for the strikes." (*Johnson v. California* (2005) 545 U.S. 162)

"The justification need not support a challenge for cause, and even a 'trivial' reason, if genuine and neutral, will suffice." (*People v. Arias* (1996) 13 Cal. 4th 92, 136 citing *People v. Montiel* (1993) 5 Cal. 4th 877, 910, fn. 9.)

a. Examples of Permissible Reasons

1. Legal contacts. (*People v. Panah* (2005) 35 Cal.4th 395, 441-442 [potential juror was arrested and charged with a crime]; *People v. Young* (2005) 34 Cal.4th 1149, 1174 [counselor had testified before in sex assault cases]; *People v. Cleveland* (2004) 32 Cal.4th 704, 733 [son was in jail]; *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1124 [father was arrested and charged with a crime and the potential juror had been roughed up by officers]; *People v. Farnam* (2002) 28 Cal.4th 107, 137-138; *People v. Williams* (1997) 16 Cal.4th 635, 664-665 [by family member]; *People v. Arias* (1996) 13 Cal.4th 92, 138; *People v. Turner* (1994) 8 Cal.4th 137, 171; *People v. Sims* (1993) 5 Cal.4th 405, 430; *People v. Cummings* (1993) 4 Cal.4th 1233, 1282; *People v. Johnson* (1989) 47 Cal.3d 1194, 1215; *People v.Walker* (1988) 47 Cal.3d 605, 625-626; *People v. Wheeler* (1978) 22 Cal.3d 258, 275 [been a crime victim]; *People v. Douglas* (1995) 36 Cal.App.4th 1681, 1690; *People v. Martinez* (2000) 82 Cal.App.4th 339, 344-345 [family member]; *People v. Martin* (1998) 64 Cal.App.4th 378, 385, fn. 5 [crime victim]; *People v. Buckley* (1997) 53 Cal.App.4th 658, 667; *People v. Barber* (1988) 200 Cal.App.3d 378; *Mitleider v. Hall* (9th Cir. 2004) 391 F.3d 1039, 1041- 045, 1048-1051 [contacts by family members].)

2. Served on hung jury before. (*People v. Farnam* (2002) 28 Cal.4th 107, 137-138.)

3. Views on the legal system. (*People v. Ward* (2005) 36 Cal.4th 186, 201 [unfavorable views toward guilt]; *People v. Cleveland* (2004) 32 Cal.4th 704, 733 [hesitant in answering questions on the death penalty]; *People v. Yeoman* (2003) 31 Cal.4th 93, 116-117 [not strong enough views on the death penalty]; *People v. Burgener* (2003) 29 Cal.4th 833, 864 [skeptical in imposing death penalty]; *People v. Farnam* (2002) 28 Cal.4th 107, 137; *People v. Caitlin* (2001) 26 Cal.4th 81, 118 [skeptical about imposing death penalty]; *People v. Buckley* (1997) 53 Cal.App.4th 658, 666-667 [legal training]; *Boyd v. Newland* (9th Cir. 2004) 393 F.3d 1008, 1013 [ambivalence towards the legal system]; *Tolbert v. Gomez* (9th Cir. 1999) 189 F.3d 1099; *United States v. Fike* (5th Cir. 1996) 82 F.3d 1315, 1320.)

4. The potential juror's lack of disclosure. (*People v. Diaz* (1984) 152 Cal.App.3d 926, 932; see *In re Hitchings* (1993) 6 Cal.4th 97, 112; *Mitleider v. Hall* (9th Cir. 2004) 391 F.3d 1039, 1041-1045, 1048-1051 [potential juror apparently not honest].)

5. The potential juror appeared to be a non-conformer. (*Purkett v. Elem* (1995) 514 U.S. 765, 769 (per curiam) [long hair]; *People v. Ayala* (2000) 24 Cal.4th 243, 261; *People v. Howard* (1992) 1 Cal.4th 1132, 1208; *People v. Wheeler* (1978) 22 Cal.3d 258, 275.) (*People v. Ward* (2005) 36 Cal. 4th 186, 202)

6. Lack of life experiences. (*People v. Sims* (1993) 5 Cal.4th 405, 429; *People v. Perez* (1994) 29 Cal.App.4th 1313, 1328; *Mitleider v. Hall* (9th Cir. 2004) 391 F.3d 1039, 1041-1045, 1048-1051 [and young and immature].)

7. The potential juror's occupation. (*People v. Young* (2005) 34 Cal.4th 1149, 1174 [counselor who has testified before in other sex assault cases and one who was an insurance claims specialist]; *People v. Howard* (1992) 1 Cal.4th 1132, 1155-1156 [non-practicing registered nurse]; *People v. Landry* (1996) 49 Cal.App.4th 785, 790 [youth services]; *People v. Barber* (1988) 200 Cal.App.3d 378, 394; *United States v. Thompson* (9th Cir. 1987) 827 F.2d 1254, 1260.)

8. Reluctance to be a juror. (*People v. Walker* (1998) 64 Cal.App.4th 1062, 1070; *Mitleider v. Hall* (9th Cir. 2004) 391 F.3d 1039, 1041-1045, 1048-1051.) (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].)

9. Eagerness to be a juror. (*People v. Ervin* (2000) 22 Cal.4th 48, 76.)

10. Hesitance in applying the death penalty. (*People v. Panah* (2005) 35 Cal.4th 395, 441; *People v. Smith* (2005) 35 Cal.4th 334, 347.)

11. Hesitance, Transient Background, and Grandmotherly 'Persona.' (*Boyde v. Brown* (9th Cir. 2005) 404 F.3d 1159, 1170.)

12. Body language can be proper grounds, at least if there is a sufficient record to support the prosecutor's observations. (*People v. Elliott* (2012) 53 Cal.4th 535, 569-570 [Juror failed to make eye contact with anyone, dressed informally, and had an unconventional hairstyle]; (*People v. Ward* (2005) 36 Cal.4th 186, 202 [hostility toward prosecutor; though record is silent, other than the prosecutor's assertions, there is no evidence to contradict it]; *People v. Reynoso* (2003) 31 Cal.4th 903, 919; *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1125-1126 [hostile look at prosecutor] *People v. Ervin* (2000) 22 Cal.4th 48 [nervousness during voir dire]; *People v. Turner* (1994) 8 Cal.4th 137, 170 [potential juror won't look prosecutor in the eye]; *People v. Johnson* (1989) 47 Cal.3d 1194, 1220 [shy][sleepy]; *People v. Dunn* (1995) 40 Cal.App.4th 1039, 1047; *People v. Perez* (1994) 27 Cal.App.4th 1313, 1330 [inappropriate laughter]; *Mitleider v. Hall* (9th Cir. 2004) 391 F.3d 1039, 1041-1045, 1048-1051; *Williams v. Rhoades* (9th Cir. 2004) 354 F.3d 1101 [uncorroborated assertion by prosecutor of the potential juror's body language enough for affirmance because of deferential standard of review]; but see *McClain v. Prunty* (9th Cir. 2000) 217 F.3d 1209 [implied body language not enough without the prosecutor stating the reason]; *Turner v. Marshall* (9th Cir. 1997) 121 F.3d 1248, 1254 [cannot infer demeanor when prosecutor never said so]; *United States v. Power* (9th Cir. 1989) 881 F.2d 733, 740 [fidgety and inattention]; *United States v. Changco* (9th Cir. 1993) 1 F.3d 837, 840 [passive and inattentive].) (*Rice v. Collins* 546 U.S. 333 (2006) [rolling of eyes, not seen by trial judge].)

Caution: Body language can be a dangerous area if the record does not support the reasons you are giving for the excuse. Be sure that you make a record of not only what body language or demeanor you observed but *why* this was important to you and how it affected your decision to excuse the juror. Further, try not to rely solely on body language or demeanor when excusing a cognizable class juror. (See, *People v. Long* (2010) 189 Cal.App. 4th 826) [record did not support prosecutors reasons for excusing juror and judge did not make a "sincere and reasoned" attempt to evaluate the prosecutor's reasons]). (*People v. Jones* (2011) 51 Cal.4th 346) [Prosecutor

gave specific and detailed reasons for challenges based upon body language and demeanor]).

Practice Tip: If you have a cognizable class juror who is nonverbally communicating in a way that concerns you (ie. Facial expressions, arms folded, sighing, etc.) ask them about it. For example, you might say, "Juror #2, I noticed that while Juror #8 was answering the last question, you had a look on your face that I interpreted as disagreement. Am I correct about that? Would you like to be heard?" If you do this in a respectful way, you accomplish the goal of putting the fact that you noticed it on the record. If you decide to kick this person later and get challenged, you can refer the Court back to this as one of the reasons you kicked the juror.

13. Bilingual Juror Who Won't Defer to Court Translator - (*Hernandez v. New York* (1991) 500 U.S. 352, 356-357) CAUTION – Be careful when kicking bilingual jurors as it could be seen as a cover for discrimination. (*See, People v. Gonzales* (2008) 165 Cal.App.4th 620)

14. Intelligence – (*People v. Arias* (1996) 13 Cal. 4th 92, 137-139)

15. Sympathetic to defendant – (*People v. McKinzie* (2012) 54 Cal.4th 1302, 1321-1322) [fact juror had been arrested for domestic violence was proper basis to challenge because 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. Mayfield* (1997) 14 Cal. 4th 668, 724-726)

16. Desire for next juror - (*People v. Jones* (2011) 51 Cal.4th 346, 367) [challenge upheld where prosecutor believed he had even better potential jurors who had not been called]; (See also, *People v. Alvarez* (1996) 14 Cal. 4th 155, 194-195).

But see, (*People v. Cisneros* (2015) 234 Cal.App.4th 111) [Holding that preference for next juror *alone* is not enough. You must also articulate reasons for excusing the challenged juror.]

17. Because prosecutor wished to ask the potential juror more questions. (*People v. Cleveland* (2004) 32 Cal.4th 704, 733.)

18. Mistake - (*Aleman* v. *Uribe* (9th Cir. 2013) 2013) [prosecutor mistakenly transposed two jurors' information. Prosecutor helped by making a good record that he was "under the weather"] (See *People v. Williams* (2013) 56 Cal.4th 630, 660-661 [holding that, regardless of whether prosecutor challenged one juror under the mistaken belief she was a different juror, there was no *Batson-Wheeler* violation since the reason given for challenging the juror (hesitancy to impose the death penalty) would have provided valid basis for challenging different juror].) (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1124 [prosecutor misunderstood the juror's answer]; *People v. Williams* (1997) 16 Cal.4th 153, 188-189; *United States v. Lorenzo* (9th Cir. 1993) 995 F.2d 1448, 1454-1455 [time crunch].)

But see, (*Castellanos v. Small* (2014) 766 F.3d 1137) [Prosecutor's stated reason was in error. It survived through the appellate courts as a mistake but the 9th Circuit ultimately found that the prosecutor's error to be pre-textual.]

19. Financial Hardship/Work Related Issues - (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]

3. STEP 3 – "If a race neutral explanation is tendered, the trial court must then decide… whether the opponent of the strike has proved purposeful racial discrimination." (*Johnson v. California* (2005) 54 U.S. 162)

a. "It is not until the third step that the persuasiveness of the justification becomes relevant – the step in which the trial court determines whether the opponent of the strike has carried his burden of proving purposeful discrimination." (*Purkett v. Elem* (1995) 514 U.S. 765, 768.) [Burden of proof of is preponderance of the evidence]

b. "[W]e rely on the good judgment of trial courts to distinguish bona fide reasons for such peremptories from sham excuses belatedly contrived to avoid admitting acts of group discrimination." (*People v. Wheeler* (1978) 22 Cal.3d 258, 282; *People v. Johnson* (1989) 47 Cal.3d 1194, 1216; see *Purkett v. Elem* (1995) 514 U.S. 765, 768.)

c. "This demands of the trial judge a sincere and reasoned attempt to evaluate the prosecutor's explanation in light of the circumstances of the case as then known, his knowledge of trial techniques, and his observations of the manner in which the prosecutor has examined members of the venire and has exercised challenges for cause or peremptorily . . . . " (*People v. Hall* (1983) 35 Cal.3d 161, 167-168; See also, *People v. Silva* (2001) 25 Cal. 4th 345, 386)

d. "In assessing credibility, the court draws upon its contemporaneous observations of the voir dire. It may also rely on the court's own experiences as a lawyer and bench officer in the community, and even the common practices of the advocate and the office that employs him or her. [Citation.]" (*People v. Lenix, supra*, 44 Cal.4th at p. 613, fn. omitted, *quoting Miller–El v. Cockrell* (2003) 537 U.S. 322, 339.)

e. It is proper for a trial court, in evaluating the prosecutor's justifications, to consider the prosecutor's actions in excusing jurors in a *previous trial* and whether a prosecutors kept members of the cognizable class at issue on the jury in a *prior trial.* (*People v. DeHoyos* (2013) 57 Cal.4th 79)

F. Comparative Analysis

This term refers to the process by which courts will evaluate the reasons given for the challenge of a member of a cognizable class. The courts will look for non-cognizable class jurors who were *not* challenged to see whether the reasons would apply equally. For example, if a prosecutor challenged an African American juror who was employed as a teacher and gave the reason, "Judge, I always kick teachers." The court would then look to see whether the prosecutor failed to challenge any teachers who were not members of a cognizable class.

1. History

Federal Courts approved of comparative analysis in *Turner v. Marshall* (9th Cir. 1997) 121 F. 3d 1248. California rejected comparative analysis in *People v. Landry* (1996) 49 Cal.App.4th 785. *People v. Jones* (1997) 15 Cal. 4th 119. However, things began to change in 2003 with *Johnson*. Then in 2005, the U.S. Supreme Court decided *Miller-El v. Dretke* (2005) 545 U.S. 231 using comparative analysis in the decision.

a. *Snyder v. Louisiana* (2008) 552 U.S. 472 – In *Snyder,* the U.S. Supreme Court found that the prosecutors race neutral reasons for excusing a black juror were implausible and were reinforced by the prosecutor's acceptance of white jurors who disclosed conflicting obligations similar to the excused juror. (*Id.* at 483-484). The Court held that a comparative analysis was appropriate since "the shared

characteristic, i.e., concern about serving on the jury due to conflicting obligations, was thoroughly explored by the trial court when the relevant jurors asked to be excused for cause." (*Id.* at p. 483)

b. *People v. Lenix* (2008) 44 Cal. 4th 602 – Comparative Analysis is alive in California.

"If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson's* third step." (*Id.* at p. 621) In reviewing the plausibility of a prosecutor's reasons for striking a juror, an appellate court can consider various kinds of evidence, including a comparison of panelists' responses. (*Id.* at p. 622) Failing to engage in comparative juror analysis for the first time on appeal unduly restricts review based on the entire record." (*Id.* at p. 622) "Thus, evidence of comparative juror analysis must be considered in the trial court and even for the first time on appeal if relied upon by defendant and the record is adequate to permit the urged comparisons." (*Id.* at p. 622)

The trial court has a duty to "assess the plausibility" of the prosecutor's proffered reasons for striking a potential juror, "in light of all evidence with a bearing on it." (*Id.* at p. 625) Trial courts "must evaluate the demeanor of the prosecutor in determining the credibility of proffered explanations, and the demeanor of the panelist when that factor is a basis for the challenge." (*Id.* at p. 625) It should be discernible from the record that "1) the trial court considered the prosecutor's reasons for the peremptory challenges at issue and found them to be race-neutral; 2) those reasons were consistent with the court's observations of what occurred, in terms of the panelist's statements as well as any pertinent nonverbal behavior; and 3) the court made a credibility finding that the prosecutor was truthful in giving race-neutral reasons for the peremptory challenges. (*Id.* at pp. 625-626)

"As to the second point, the court may not have observed every gesture, expression or interaction relied upon by the prosecutor. The judge has a different vantage point, and may have, for example, been looking at another panelist or making a note when the described behavior occurred. But the court must be satisfied that the specifics offered by the prosecutor are consistent with the answers it heard and the overall behavior of the panelist. The record must reflect the trial court's determination on this point (see *Snyder*, supra, at p. 460), which may be encompassed within the court's general conclusion that it considered the reasons proffered by the prosecution and found them credible." (*Id.* at pp. 625-626)

The court observed that comparative juror analysis is a form of circumstantial evidence (*Id.* at p. 622) and that a reviewing court must be careful not to accept one

reasonable interpretation to the exclusion of other reasonable ones when reviewing the circumstantial evidence supporting the trial court's factual findings in a *Batson/Wheeler* holding. "If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also be reasonably reconciled with a contrary finding does not warrant a reversal of the judgment." (*Id.* at pp. 625-626)

Comparative Analysis will only be considered for the first time on appeal at the *Third* Step. (*See, People v. Clark* (2016) 63 Cal.4th 522, 568 [Declining the defense invitation to engage in comparative analysis for the first time on appeal at the first step of *Batson*.])

2. "Positive" Comparative Analysis

This term refers to the idea of using comparative analysis to support a challenge of a member of a cognizable class by comparing other similarly situated non-cognizable class jurors who were also challenged. (*Rice v. Collins* (2006) 546 U.S. 333, 341 [prosecutor struck a white juror with the same characteristics of a cognizable class juror she struck]; (*Briggs v. Grounds* (2012) 682 F.3d 1165 [prosecutor struck at least on non-African American who indicated they would hold the prosecution to a higher standard of proof]).

IV. Practical Issues in Dealing with *Batson/Wheeler* Motions

A. Realize that a challenge will likely come at some point during jury selection and be ready to deal with it. It should go without saying, but ***NEVER*** excuse a juror on the basis of race, ethnicity, religion, gender etc…Question all jurors you plan to challenge. Desultory questioning does not count.

B. Be prepared to rebut the prima facie case. (See pp. 4-5)

C. Assume that a prima facie case will be made and be prepared to give race neutral reasons for excusing the juror. While peremptory challenges are often based on instinct and it can sometimes be hard to articulate the reason for removing a juror, "a prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives." (*People* v. *Lenix* (2008) 44 Cal.4th 602, 624.) Prosecutors should "provide as complete an explanation for their peremptory challenges as possible." (*People* v. *Lenix* (2008) 44 Cal.4th 602, 624.)

D. If you can't recall specifically why you excused a juror, it is better to ask for a "time out" so that you may review the transcript/recording of the juror's answers. (See *Lewis v. Lewis* (9th Cir. 2003) 321 F.3d 824 [suggesting that counsel can be

particularly helpful in assisting the court at the third step of *Batson* "when afforded the opportunity to review a transcript of the jury selection proceedings"].)

E. If judge finds no prima facie case, insist that the finding is placed on the record. Then state your reasons anyway. But, DO NOT give reasons unless and until the court specifically finds no prima facie case. Giving reasons without a specific finding on the first prong will constitute an implied finding of a prima facie case. *People v. Arias* (1996) 13 Cal. 4th 92; *People v. Gutierrez* (2002) 28 Cal. 4th 1083. *People v. Scott* (June 8, 2015, S094858) __ Cal. 4th __ [2015 WL 3541280]

F. Trial Tips

1. Create a Good Record

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.)

2. Obtain a Transcript of Voir Dire Before Making Challenges

In certain situations, a prosecutor may not recall or have accurate notes regarding the responses of a juror he or she wishes to challenge. In those cases, it is appropriate and recommended that the prosecutor ask for read back of the juror's responses. (*See Lewis v. Lewis* (9th Cir. 2003) 321 F.3d 824)

3. Ask Court to Note the Final Jury Composition

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"].)

4. Save your notes. If case is reviewed later, voir dire may be an issue. Always save your notes so that if asked, you are better able to recollect why you may have challenged a specific juror.

a. At remand hearing, the prosecutor does NOT have to state reasons under oath. (*People v. Kelly* (2008) 162 Cal.App.4th 797)

b. At remand hearing, the prosecutor does NOT have to turn over original voir dire notes. (*People v. Kelly* (2008) 162 Cal.App.4th 797)

c. At remand hearing, prosecutor cannot be cross-examined by the defense. (*People v. Kelly* (2008) 162 Cal.App.4th 797)

d. "I don't recall" May or May Not Fly – (*Paulino v. Harrison* (9th Cir. 2008) 542 F.3d 692); (But see, *Yee* v. *Duncan* (9th Cir. 2006) 463 F.3d 893.) [notwithstanding the inability to recall reason for excusing one cognizable class juror, totality of prosecutor's responses regarding other excused jurors did not evidence a discriminatory motive].)

e. If you use shorthand, make sure you define your terms. Don't make a reviewing court guess at what you meant. (*See, Foster v. Chatman* (2016) 136 S.Ct. 1737 [Murder conviction reversed for third step *Batson* violation. Very bad facts that we hope to never see. However, it's instructive on the issue of the clarity, or lack thereof, of the prosecutor's notes.])

G. Remedies

1. *Wheeler-Batson* error is reversible per se. (*People v. Wheeler* (1978) 22 Cal.3d 258, 283; see *Miller-El v. Dretke* (2005) 545 U.S. 231)

a. Step One Error: When the trial court erroneously finds there was not a prima facie case, the matter is often remanded for prosecutor to state reasons for

peremptory challenge. (*Batson v. Kentucky* (1986) 476 U.S. 79, 100; *People v. McGee* (2002) 104 Cal.App.4th 559, 571, 573 [remand to permit prosecutor give reasons].) This remedy has been criticized for two reasons. First, the long passage of time makes it nearly impossible for the prosecutor to genuinely remember the real reason. (*People v. Hall* (1983) 35 Cal.3d 161, 171 [pointless to remand for the prosecutor to give a reason 11 years later]; *People v. Allen* (2004) 115 Cal.App.4th 542, 553-554, fn. 10 [remand for new trial, not for the prosecutor to give reasons, because occurred three years ago]; see also *People v. Ayala* (2000) 24 Cal.4th 243, 297, fn. 8 (conc. opn. of George, C.J.); *People v. Robinson* (2003) 110 Cal.App.4th 1196, 1208 [remand for the prosecutor to give the reason but retrial if it could not recall]; *People v. Williams* (2000) 78 Cal.App.4th 1118, 1130 [on remand, the court must first determine if it can adequately address the issue after the delay]; *United States v. Alcantar* (9th Cir. 1990) 897 F.2d 436, 438-439.) Second, this procedure is subject to a prosecutor trying to invent more legitimate reasons after the fact. (See, e.g., *Miller-El v. Dretke* (2005) 545 U.S. 231 [prosecution's reasons after the fact "reeks of afterthought"]; *Miller-El v. Cockrell* (2003) 537 U.S. 331, 343 [reasons given after trial "was subject to the usual risks of imprecision and distortions from the passage of time"]; see also *Johnson v. California* (2005) 545 U.S. 162, quoting *Paulino v. Castro* (9th Cir. 2004) 371 F.3d 1083, 1090 ["it does not matter that the prosecution might have had good reasons . . . [w]hat matters is the real reason they were stricken"].)

b. Step Three Error: When the trial court fails to sustain motion after the prosecutor gives reason, error normally requires new venire. (*People v. Wheeler* (1978) 22 Cal.3d 258, 283; see *Miller-El v. Dretke* (2005) 545 U.S. 162). However, the defendant in the trial court can stipulate to a different remedy. (*People v. Willis* (2002) 27 Cal.4th 811, 821-824 [with consent of movant, can use other remedies such as sanctions, reinstating removed jurors or doing challenges at sidebar]; *People v. Overby* (2004) 124 Cal.App.4th 1237, 1244-1245 [defendant not objecting to judge re-seating the excused juror indicates consent to this remedy]. (See *People v. Mata* (2013) 57 Cal.4th 178) [holding that the trial court may reseat an improperly challenged juror if affected counsel either expressly or implicitly consents]

2. Consequences

a. If the court grants a *Batson/Wheeler* motion at trial and employs one or more of the remedies discussed, that is arguably a "sanction".

1. Court must notify the bar of any judicial sanctions against an attorney (Business & Professions Code §6068(a)(3)).

2. Attorney must self report any judicial sanction (Business & Professions Code §6068(o)(3)).

3. However, reporting will likely not be required unless the conduct is egregious.

b. If the trial court erroneously denies a *Batson/Wheeler* motion at trial and the case is reversed

1. Court must notify bar whenever there is a reversal. (Business & Professions Code §6086.7(b)(2)).

2. Attorney must notify bar whenever reversal is based in whole or in part upon misconduct of the attorney. (Business & Professions Code §6068(o)(7)).

ADDENDUM TO *BATSON/WHEELER* OUTLINE
PEOPLE V. GUTIERREZ ET AL (2017) California Supreme Court Case Number S224724

In Gutierrez, the DDA struck ten Hispanic jurors out of sixteen peremptory challenges. Two Hispanic jurors remained and served on the panel. Seven of the ten challenges were determined by the Supreme Court to have been justified. However, their examination of the other three resulted in a finding that one resulted in structural error and reversed the verdict.

The Court opinion illustrates what information they want the record to contain in a Batson challenge:

1) The court may only rule on reasons specifically and actually expressed by the attorney, and may not consider other, even obvious, reasons that the challenge is appropriate. So make sure YOU list all your reasons.

2) If a prima facie finding is made and the court proceeds to the second step of the analysis: the "neutral justification" stage, the issue is facial validity. The court states that the rationale need only be clear and reasonably specific as to legitimate reasons for challenging the juror, but need not detail "why" the prosecutor kicked the juror. However, a deficient record was clearly part of the reason that Gutierrez was reversed.

3) The Court wants a significant record created at step 3: evaluating the credibility of the reasons actually stated.

Here the juror was kicked because she lived in Wasco and was unaware of any gang activity in the area. A key witness for the DDA was a Wasco gang member that would be testifying about Wasco gang activity and the DDA was uncertain how her lack of awareness might bear on her response to his important witness. The DAG posited some explanation for the DDA's concerns, and the Supreme Court even engaged in some "speculation" as to the concerns and their exact logic (which may have been upheld), but ultimately held "[A] prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives." The court faulted the DDA for not being interested in examining whether the juror's lack of awareness of gang activity in Wasco would cause her to be biased against the witness for the People's case.

The court also used the DDA's equivocation as to this juror, given her familial law enforcement ties to show that the proffered reason wasn't credible. "[W]hen it is not self-evident why an advocate would harbor a concern, the question of whether a neutral explanation is genuine and made in good faith becomes more pressing." As to another challenged juror, they faulted the DDA for getting a fact wrong and confusing the juror's answer with another.

They did balance this all against the fact the DDA passed on challenges 5 times while the juror was still on the panel, "But neither that acknowledgement nor the prosecutor's passes themselves wholly preclude a finding that a panelist is struck on account of bias against an identifiable group, when such a strike occurs eventually instead of immediately."

ADDENDUM TO *BATSON/WHEELER* OUTLINE
PEOPLE V. GUTIERREZ ET AL (2017) California Supreme Court Case Number S224724

The Supreme Court also faulted the trial court:

> The court here acknowledged the 'Wasco issue' justification and deemed it neutral and non-pretextual by blanket statements. It never clarified why it accepted the Wasco reason as an honest one. Another tendered basis for this strike, the reference to the prospective juror's other answers, as they related to an expectation of her reaction to Trevino, was not borne out by the record, but the court did not reject this reason or ask the prosecutor to explain further. In addition, the court improperly cited a justification not offered by the prosecutor: a lack of life experience. On this record, we are unable to conclude that the trial court made 'a sincere and reasoned attempt to evaluate the prosecutor's explanation' regarding the strike of Juror 2723471. (*People v. Hall* (1983) 35 Cal.3d 161, 167.) The court may have made a *sincere* attempt to assess the Wasco rationale, but it never explained why it decided this justification was not a pretext for a discriminatory purpose. Because the prosecutor's reason for this strike was not self-evident and the record is void of any explication from the court, we cannot find under these circumstances that the court made a *reasoned* attempt to determine whether the justification was a credible one.

In conclusion, they write:

> Though we exercise great restraint in reviewing a prosecutor's explanations and typically afford deference to a trial court's *Batson*/*Wheeler* rulings, we can only perform a meaningful review when the record contains evidence of solid value. Providing an adequate record may prove onerous, particularly when jury selection extends over several days and involves a significant number of potential jurors. It can be difficult to keep all the panelists and their responses straight. Nevertheless, the obligation to avoid discrimination in jury selection is a pivotal one. It is the duty of courts and counsel to ensure the record is both accurate and adequately developed.

Justice Liu's concurrence attempts to lay out the purpose of the rule established:

> The ultimate issue is "whether it was *more likely than not* that the challenge was improperly motivated." (*Johnson v. California* (2005) 545 U.S. 162, 170, italics added.) This probabilistic standard is not designed to elicit a definitive finding of deceit or racism. Instead, it defines a level of risk that courts cannot tolerate in light of the serious harms that racial discrimination in jury selection causes to the defendant, to the excluded juror, and to —public confidence in the fairness of our system of justice. (*Batson*, *supra*, 476 U.S. at p. 87; see *Miller-El*, *supra*, 545 U.S. at p. 238; *Powers v. Ohio* (1991) 499 U.S. 400, 412–414.)

AUTHORITY FOR VOIR DIRE

- CCP223: Voir dire "shall be conducted only in aid of the exercise of challenges for cause."
- CCP225(b): Challenges for cause can be made by either side for either implied bias or actual bias and are unlimited.
- CCP223: Endows the court with broad discretion to control time and subject matter of questioning, limited only to reversal where a ruling resulted in miscarriage of justice.

ACTUAL BIAS: CCP 225(b)

"*The existence of a state of mind on the part of the juror in reference to the case, or to any of the parties, which will prevent the juror from acting with entire impartiality, and without prejudice to the substantial rights of any party*."

IMPLIED BIAS: CCP 229

- Consanguinity or affinity with party or victim;
- Relationship;
- Prior service in same matter;
- Interest in the action;
- Unqualified opinion or belief as to the merits of the action founded by knowledge of material facts or some of them;
- Enmity or bias towards or against a party;
- Party to an action before same jury; and
- Opposition to death penalty in capital case.

Proper Subject Matter

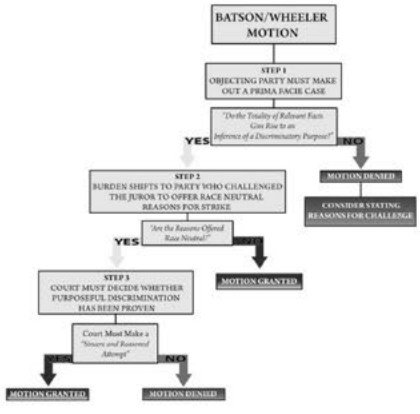
- Cannot ask questions whose sole purpose is to educate the jury, compel the vote a certain way, prejudice, argue or indoctrinate.
- Cannot instruct on law or test a juror's knowledge of the law.
- Cannot question on attitude about law unless relevant and controversial.
- Limiting questions on race bias may result in reversal.

Peremptory Challenges
CCP 231

Sentence	Prosecution	Defense	Multiple Defendants
<365 days	6	6	**Defense** 6 joint, 4 individual **Prosecution** 6, plus 4 per defendant
>365 ~ <Life	10	10	**Defense** 10 joint, 5 individual **Prosecution** 10, plus 5 per defendant
Life or Death	20	20	**Defense** 20 joint, 5 individual **Prosecution** 20, plus 5 per defendant

U.S. Constitution

- Guarantees jurors the right to serve on a jury
- Prohibits lawyers from excluding jurors who are members of a "cognizable class"
- When done by prosecutors it also affects the defendant's right to due process



People v. Gutierrez (2017) 2 Cal. 5th 1150

First time in 16 years that the California Supreme Court has found a *Batson/Wheeler violation*.

"This case offers us an opportunity to clarify the constitutionally required duties of California lawyers, trial judges, and appellate judges when a party has raised a claim of discriminatory bias in jury selection." (*People v. Gutierrez* (2017) 2 Cal. 5th 1150, 1154.

FACTS

- Gang related drive by shooting.
- D was the shooter.
- One of the co-D's from a gang subset in Wasco testified against D.

PROCEDURAL OVERVIEW

- Prosecutor kicks 10 Hispanic jurors out of 16 peremptory challenges with 4 in a row.
- The defense made a *Batson/Wheeler* motion.
- The trial court found the existence of a prima facie case ("inference of discrimination").
- The prosecutor gave reasons and the trial court found them to be race neutral.
- Defense motion was denied.
- The Court of Appeal upheld the denial of the defense motion.
- Cal Supremes – REVERSED.

Step One: The trial court found that 10 out of 16 challenges to Hispanic jurors established a prima facie case.

Step Two: The prosecutor gave reasons for the 10 strikes.

- 7 of the 10 were found to be race neutral.
- The Supreme Court identified error in 3 of the challenges but based the reversal only upon 1 (Wasco Juror) and did not determine the other two.

Wasco Juror: Hispanic Female

- Teacher
- From Wasco
- Divorced
- No kids
- Ex was corrections officer
- Other LE relatives
- No connection to gangs

Voir Dire of Wasco Juror

Prosecutor: Are you aware of gangs in Wasco?

Wasco Juror: "No."

Prosecutor: Do you live in the Wasco area and Wasco itself?

Wasco Juror: "Yes."

Step Two

Prosecutor's Reasons...

- Wasco juror was unaware of gangs in Wasco and by some of her other answers.
- He wasn't sure how she'd respond when she hears that the testifying co-D was from a Wasco gang.

Step Three

- The Supreme Court found the prosecutor's reason for kicking all jurors to be neutral on their face.
- The Court found that the trial court made a sincere attempt to evaluate the prosecutor's reason.
- However, the trial court failed to make a reasoned attempt.

The Trial Court tried to help...

- Court acknowledged the "Wasco Issue" and deemed it neutral.
- Court failed to reject prosecutor's reference to "other answers"
- Court cited a reason not given by the prosecutor of lack of life experience.
- Court failed to probe deeper into the prosecutor's reasoning

The AG tried to help...

- Lack of awareness of gangs in Wasco could cause the juror to be biased against the testifying Co-D.
- Problem: A tenuous reason and not obvious based on the voir dire.

Ultimately the Supreme Court rejected the help...

"[A] prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives." (Id. at 1159. See also, Miller-El v. Dretke (2005) 545 U.S. 231, 252 (Miller-El II).)

The Appellate Court got it wrong too...

- Declined to apply comparative analysis for the first time on appeal.
-
- Cal Supremes made it clear in Lenix by holding that "evidence of comparative analysis must be considered in the trial court and even for the first time on appeal...")

Practical Trial Tips

1. NEVER excuse a juror on the basis of the membership in a cognizable class.
2. Recognize that a you will get "Wheelered" and be prepared to deal with it by knowing the law better than the defense attorney and the judge.
3. Take detailed notes.
4. Do not state your reasons unless and until the judge makes a step one finding.
5. If no prima facie case found, state your reasons anyway and make it clear why you are doing so.
6. When a prima facie case is found be prepared to state your reasons.
7. Explain your reasons.
8. Make a thorough record. (Step 2)
9. Make sure the court makes a good record. (Step 3)
10. Record the final jury composition.
11. Save your notes.

The problem with your gut…

- It will not save you from Wheeler.
- Practice Inclusivity.
  - There are mechanism's for dealing with rogue jurors
  - It can help your case
  - It will help change the dynamics of exclusion
  - It's the law

Post Ferguson World

- Get comfortable talking about problems with our system of justice.
- Be prepared to address any ongoing or recent events involving questioned or questionable LE conduct.
- Acknowledge shortcomings of LE, while questioning a juror's ability to be fair.
- Avoid knee jerk reactions, choose your words wisely, and be a voice of reason and compassion.
- Their perception of your fairness will impact your verdict.

Batson/Wheeler

Batson/Wheeler

- Don't panic!
- Just BE prepared to lay a good record and have reasons for your kicks
- Follow the steps

Batson/Wheeler

- Lay out reasons for the excused jurors.
  - Looks, uninterested, not talkative, appeared to not get along with others, life experience, answers to questions (court can usually forget if it came up during your/defense voir dire)
- Explain how they may be similar to those [illegible] kicked (INCLUDE the race, gender previously kicked person)
- Explain how they are different th (INCLDE the race, gender, etc. o

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- Consanguinity or affinity with party or victim;
- Relationship;
- Prior service in same matter;
- Interest in the action;
- Unqualified opinion or belief as to the merits of the action founded by knowledge of material facts or some of them;
- Enmity or bias towards or against a party;
- Party to an action before same jury; and
- Opposition to death penalty in capital case.

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- Cannot ask questions whose sole purpose is to educate the jury, compel the vote a certain way, prejudice, argue or indoctrinate.
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- Practice Inclusivity.
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Jury Selection

Voir Dire Mechanics

Voir Dire should be conducted to assist you in making well-grounded challenges for cause and allow you to identify less suitable jurors subject to peremptory challenges. The rules regarding juror challenges can be found in the *Code of Civil Procedure §§ 225-231.*

In a criminal trial, "[e]xamination of prospective jurors shall be conducted only in aid of the exercise of challenges for cause." *CCP § 223.* Challenges for cause can be made by either side for either *implied bias* or *actual bias CCP §225(b).* The ultimate determination to excuse a juror for cause is made by the court. *CCP §230.* "The trial court's exercise of its discretion in the manner in which voir dire is conducted, including any limitation on the time which will be allowed for direct questioning of prospective jurors by counsel and any determination that a question is not in aid of the exercise of challenges for cause, shall not cause any conviction to be reversed unless the exercise of that discretion has resulted in a miscarriage of justice, as specified in Section 13 of Article VI of the California Constitution." *CCP § 223.*

There are eight categories of implied bias listed in *CCP §229*:

1) Consanguinity or affinity with party or victim;
2) Relationship;
3) Prior service in same matter;
4) Interest in the action;
5) Unqualified opinion or belief as to the merits of the action founded by knowledge of material facts or some of them;
6) Enmity or bias towards or against a party;
7) Party to an action before same jury; and
8) Opposition to death penalty in capital case.

Actual bias is defined as "*the existence of a state of mind on the part of the juror in reference to the case, or to any of the parties, which will prevent the jurorfrom acting with entire impartiality, and without prejudice to the substantial rights of any party*." *CCP§225(b)(1)(C).*

No peace officer, as defined in Section 830.1, subdivision (a-c) of Section 830.2, and subdivisions (a) of Section 830.33, of the Penal Code, shall be selected for voir dire in a criminal matter. *CCP § 219.*

Number of Challenges

There is no limitation on the number of challenges for cause, however, the trial court does not have sua sponte duty to excuse biased jurors when counsel has failed to exercise a peremptory challenge for that purpose. *People v. Bolin* (1998) 18 Cal.4th 297.

The number of peremptory challenges depends upon the possible sentence of the offense charged and the number of defendants. If the offense is punishable with *maximum term of imprisonment of 90 days or less*, each side gets *6* peremptory challenges. *CCP §231*
If the offense is punishable with *death or with imprisonment in the state prison for life*, each side gets *20* peremptory challenges. *CCP §231(a).* In *all other cases* each side gets *10* peremptory challenges.

In multiple defendant cases with sentences under 90 days, the People get *6* challenges and the defendants get *6 challenges jointly*. Each defendant is additionally entitled to *4 separate challenges*. The People get as many challenges as are allowed all defendants. *CCP§231(b)*
In life in prison and death cases – The People get *20* challenges and the defendants get *20 challenges jointly*. Each defendant is additionally entitled to *5 separate challenges*. The People get as many challenges as are allowed all defendants. *CCP §231(a)*

In all other cases, the People get *10* challenges and the defendants get *10 challenges jointly*. Each defendant is additionally entitled to *5 separate challenges*. The People get as many challenges as are allowed all defendants. *CCP§231(a)*

The selection of Alternate jurors is governed by *CCP§234*. Challenges are allotted as follows: In a single defendant case, there is one challenge for each side per the number of alternates. In a multiple defendant case, each defendant gets one challenge per number of alternates and the People get the same total number as the defense team.

Proper Subject Matter For Attorney Inquiry

It is improper to ask questions intended solely to educate the jury, compel the jurors to commit to vote a certain way, prejudice the jury, argue the case, indoctrinate the jury, instruct the jury on the law, or test the juror's knowledge of the law. *People v. Edwards* (1912) 163 Cal. 752; *People v. Willams* (1981) 29 Cal.3d 392, 408; *People v. Ashmus* (1991) 54 Cal.3d 932, 959.

It is permissible to ask a juror about his attitude about a particular rule of law only if (1) the rule is relevant or material to the case, and (2) the rule appears to be controversial; e.g., the juror has indicated some hostility toward the rule, or it is commonly known the community harbors strong feelings about it. *People v. Balderas* (1985) 41 Cal.3d 144, 185; *People v. Williams* (1981) 29 Cal.3d 392, 408.

It is improper to use voir dire questions for the sole purpose of argument by counsel. *People*

v. Mitchell, 61 Cal 2d 353, 366.

A trial judge's refusal to permit any voir dire questions concerning racial bias or prejudice may require reversal. *People v. Wilborn* (1999) 70 Cal.App.4th 339. In a case involving an interracial killing, a trial court during general voir dire is required to question prospective jurors about racial bias on request. *People v. Bolden* (2002) 29 Cal.4th 515. Expect to see broadening of this area of inquiry in response to current events and opposing views on race and policing.

"Any question whose sole purpose is '… to attempt to precondition the prospective jurors to a particular result' should be excluded." Similarly, "any question whose sole purpose is "… to attempt to precondition the prospective jurors to a particular result" should be excluded. [CRC Standards of Jud. Admin., Standard 3.25(f)] *Scope of Permissible Voir Dire—Proper vs. Improper Questions*, Cal. Prac. Guide Civ. Trials & Ev. Ch. 5-G

Examples of Permissible Questions

Asking jurors whether they would be able to vote guilty if, after deliberations, they were persuaded that the changes had been proved beyond a reasonable doubt. *People v. Fierro* (1991) 1 Cal.4th 173, 209)

"[I]f I prove beyond a reasonable doubt each and every element of each of the offenses charged . . . can you assure me that you would be willing to return a verdict of guilty even though you have unanswered questions?" *People v. Riel* (2000) 22 Cal.4th 1153, 1178 fn. 4.

In order to avoid a hung jury the prosecutor observed that each juror must "come to your own conclusion," but also stressed the value of "work[ing] together to try to discover the truth." *People v. Fierro* (1991) 1 Cal.4th 173, 210, fn 8.

Prosecutor's "hypothetical" voir dire illustrations of aggravating and mitigating factors were permissible in capital murder prosecution, even though the prosecutor used examples of aggravating factors closely resembling the facts of the case and used examples of mitigating factors unlike the defendant's mitigating evidence. *People v. Seaton* (2001) 26 Cal.4th 598.

In questioning a juror, the prosecutor asked her if she believed a person charged with committing a crime such as defendant's must be insane. The prosecutor also asked: Do you feel there could be such a thing as a person who is legally insane? *People v. Fields* (1983) 35 Cal.3rd 329, 358.

Whether a juror would view a person's possession of recently stolen property as circumstantial evidence that the person stole the property. (*People v. Mendoza* (2000) 24 Cal.4th 130, 167.)

Whether a juror considered rape more of an assaultive than a sexually motivated offense, and whether they thought it was possible for a young man to rape an elderly woman and not be mentally ill. (*People v. Mendoza* (2000) 24 Cal.4th 130, 167.)

While counsel may ask prospective jurors if they are able to return a verdict in if supported by the evidence, it is not proper to ask for their commitment to do so. *Scope of Permissible Voir Dire—Proper vs. Improper Questions*, Cal. Prac. Guide Civ. Trials & Ev. Ch. 5-G.

Examples of Impermissible Questions

"I had a case a few years ago where three teenage girls were killed in Huntington Beach and [it was a] very emotional case. It was about a three week long trial, very strong evidence against the defendant. At the end of the trial the jury went out and the families were there every single day, the families of [the] three girls and they sat there. The jury didn't come back the first day and the families started getting very upset and crying, you know. They would [ask] me what is wrong, why, how come they didn't make a decision. I don't know. Next day came back same thing, the families are all upset—[¶] ... [¶] ... The jurors came back and we asked them why—what took so long. Oh, we knew he was guilty the first day, but we wanted to figure out this one other issue.... [¶] ... [¶] ... My question is would any of—if you had other questions but they didn't go to the elements, the actual like 1, 2, 3 elements, if you were convinced beyond a reasonable doubt of the elements, even though you might have some question very interesting, but didn't go to that element [,] would you be able to convict?" *People v. Castillo* (2008) 168 Cal.App.4th 364, 380. This contextual question inserted information clearly designed to evoke sympathy for the victims in the case.

"If any of you (prospective jurors) find a question particularly embarrassing, and you would prefer to answer in the judge's chambers rather than here in open court, please let me know and I will be glad to ask the judge to allow you to do so." *Scope of Permissible Voir Dire—Proper vs. Improper Questions*, Cal. Prac. Guide Civ. Trials & Ev. Ch. 5-G. This is an impermissible form of questioning because it is used to "curry favor" since you are the hero. The admonition may be proper if the directive is simply to advise the court if you wish to answer in private.

"Do you agree then that a killing done intentionally should be treated more strongly or more severely than a killing that is accidentally done or unintentionally done?" *People v. Mitchell*, 61 Cal 2d 353, 366.

"Are you sure you haven't seen my client's picture in the paper as coach of the championship Little League baseball team from St. Luke's Church?" *Scope of Permissible Voir Dire—Proper vs. Improper Questions*, Cal. Prac. Guide Civ. Trials & Ev. Ch. 5-G.

Do you believe in self-defense in the home? (Not controversial; *People v. Williams* (1981)

29 Cal.3d 392, 411.)

"Whether, if they believed that a witness was an informant and was testifying 'in exchange for some lesser sentence,' then that 'would have some bearing on the weight or credibility that that witness may have in your mind?' " *People v. Mason* (1991) 52 Cal.3d 909, 940.

In a death penalty case, the court did not "allow either party to discuss the law – such as the meaning of diminished capacity – or ask questions that required the prospective jurors to pre-try the facts of the case." *People v. Rich* (1988) 45 Cal.3rd 1036, 1104.

Defense counsel was not permitted to question prospective jurors regarding their ability to view accomplice testimony with suspicion and distrust. *People v. Johnson* (1989) 47 Cal.3rd 1194, 1224.

In an eyewitness case where the defense expected to call an ID expert, the defense was prohibited from eliciting opinions of potential jurors concerning the effects of stress on perception. *People v. Sanders* (1990) 51 Cal.3rd 471, 506.

Defense counsel stated, "It's clear a girlfriend has an interest to lie. I just want to make sure that the jurors don't automatically, before they hear her testimony, say she's lying because she's the girlfriend." The trial court barred this line of questioning on the ground that the defendant was trying to educate the jurors and induce them to prejudge the evidence. We cannot say that the court abused its discretion in doing so. *People v. Helton* (1984) 162 Cal.App.3rd 1141, 1145.

"What do you feel is a proper punishment for someone who has committed a rape or other serious sexually related crime?" *People v. Ochoa* (1998) 19 Cal.4th 353, 444.

Many detailed questions regarding personal experience with sexual molestation in a child molestation-murder case. *People v. Earp* (1999) 20 Cal.4th 826, 851, fn 1.

Handling a *Batson/Wheeler* Motion

I. Overview

A. Every prosecutor will have to deal with the dreaded "*Wheeler"* motion. It usually occurs following the People's use of a peremptory challenge against someone of a particular race, gender or ethnic background.

B. How it works – The defense makes a motion, usually on state and federal grounds, that the prosecutor has excused a juror based on racial, ethnic or other improper grounds and has therefore violated the defendant's Constitutional right to a fair and impartial jury. The defendant does not have to be a member of the excluded group to complain of a violation. *People v. Wheeler* (1978) 22 Cal. 3d 258, 281. (**Note**: While the defense usually brings the motion, it may be made by *either party*.)

C. It goes without saying that no prosecutor should exercise a peremptory challenge against a juror based solely on that juror's gender, sexual orientation, or membership in a racial, ethnic, or religious group. But a prosecutor should not refrain from challenging a juror for *permissible* reasons out of a concern that the defense will raise a disingenuous or frivolous *Batson/Wheeler* claim.

D. THREE STEP PROCESS
"First, the defendant must make out a prima facie case 'by showing that the totality of relevant facts give rise to an inference of discriminatory purpose.' Second, once the defendant has made out a prima facie case, the 'burden shifts to the State to explain adequately the racial exclusion' by offering permissible race-neutral justifications for the [peremptory] strikes. Third, '[i]f a race-neutral explanation is tendered, the trial court must decide . . . whether the opponent of the strike has proved purposeful racial discrimination.' " (*Johnson v. California* (2005) 545 U.S. 162)

II. History

A. *Batson* ***is*** the federal standard and *Wheeler* ***was*** the California standard used to determine whether the peremptory challenge was improper.

B. Both cases used procedures involving 3 part tests to determine the propriety of the challenge. However, the first prong of the tests in each case was different.

Defendants argued the state burden (Wheeler) was more difficult for them to meet than the federal burden (Batson).

C. The California Supreme Court tried to reconcile the two cases in 2003 in *People v. Johnson* (2003) 30 Cal. 4th 1302.

D. In 2005, the U.S. Supreme Court reversed *Johnson* and "clarified" the *Batson* decision by stating that the first prong of the *Batson* test need only be satisfied by production of evidence sufficient to permit the trial judge to draw an *inference of discrimination*. (*Johnson v. California* (2005) 545 U.S. 162.)

E. Current State of the Law - Still a 3 prong test based on the holdings of *Batson* and *Johnson.* Although *Wheeler* is still good law, the first step has been replaced by the *Batson* first step. (*Johnson v. California* (2005) 545 U.S. 162.)

III. Analysis

A. *People v. Wheeler* (1978) 22 Cal. 3d 258 – Peremptory challenges based on group bias violates the defendant's right to jury trial in the California Constitution. *Batson v. Kentucky* (1986) 476 U.S. 79 – Race based challenges violate the Equal Protection Clause of the U.S. Constitution. (*See Also, People v. Bonilla* (2007) 41 Cal.4th 313, 341).

B. Objection Made – The claim is waived if the defendant fails to make a timely objection and a record sufficient for appellate review. (*People v. Wheeler* (1978) 22 Cal.3d 258, 280; *People v. Morris* (2003) 107 Cal.App.4th 402, 408-409) Motion made after jury was sworn but before alternates were sworn was not untimely. Jury empanelment is completed when all jurors, including alternates, are selected and sworn in. *People v. Scott* (June 8, 2015, S094858) __ Cal. 4th __ [2015 WL 3541280]

C. Cognizable Class – "An identifiable group distinguished on racial, religious, ethnic, or similar grounds…" *People v. Wheeler* (1978) 22 Cal. 3d 258, 276. Two requirements for a cognizable class:

> 1) Members share a common perspective arising from life experience in the group; and
> 2) No other members of the community are capable of adequately representing the group perspective. (*See, Rubio v. Superior Court* (1979) 24 Cal.3d 93, 98).

Courts and Statutes have recognized several categories of cognizable classes or groups.

1. Race - (*See, Batson v. Kentucky* (1986) 476 U.S. 79 & *People v. Wheeler* (1978) 22 Cal. 3d 258).

2. Ethnicity – Although there are fewer reported cases regarding ethnicity, be aware that it is a cognizable class. For example, Native Americans were the subject of the violation in *United States v. Bauer* (9th Cir. 1996) 84 F.3d 1549.

3. Religion – *People v. Johnson* (1989) 47 Cal.3d 1194, 1217 [Jewish Jurors]

4. Gender – Gender appears to be a cognizable class and should be treated as such. However, most cases dealing with gender also carry a racial component as well. (*People v. Crittenden* (1994) 9 Cal.4th 83, 115 [African-American woman]; *People v. Garceau* (1993) 6 Cal.4th 140, 171 [Hispanic woman]

5. Sexual Orientation – *People v. Garcia* (2000) 77 Cal.App.4th 1269, 1272. (*See Also,* Code of Civil Procedure §231.5)

6. Age – Although not a federally protected class, Code of Civil Procedure §231.5 added "Age" as a protected class in 2016 added by operation of Government Code §11135.

7. Disability – Although not a federally protected class, Code of Civil Procedure §231.5 added "Disability", both mental and physical, as a protected class in 2016 by operation of Government Code §11135**.**

D. Non-Cognizable Class

1. Poor – *People v. Carpenter* (1999) 21 Cal.4th 1016, 1035

2. Less Educated – *People v. Estrada* (1979) 93 Cal.App.3d 76, 90-91

3. Battered Women – *People v. Macioce* (1987) 197 Cal.App.3d 262, 280

4. Young – *People v. Ayala* (2000) 24 Cal.4th 243, 277-278; *United States v. Fletcher* (9th Cir. 1992) 965 F.2d 781, 782 -- (Caveat: See CCP§231.5 & Gov't Code §11135)

5. People over 70 – *People v. McCoy* (1995) 40 Cal.App.4th 778, 783 -- (Caveat: See CCP§231.5 & Gov't Code §11135)

6. "Insufficient" English – *People v. Lesara* (1998) 206 Cal.App.3d 1304, 1307

7. Unconventional Hairstyle – *Purkett v. Elem* (1995) 514 U.S. 765, 769

8. People who have been arrested *or* been victims – *People v. Fields* (1983) 35 Cal.3d 329, 348

9. "People of Color" – Combining all minority groups does not constitute a "cognizable class". *People v. Davis* (2009) 46 Cal. 4th 539

E. Challenge Exercised Against Member of Cognizable Class

1. Step One – The party objecting to the peremptory challenge must make out a prima facie case "by showing the totality of the relevant facts gives rise to an inference of a discriminatory purpose." *Johnson v. California* (2005) 545 U.S. 162. There is a presumption that that the party exercising the challenge (usually the prosecution) does so on a constitutionally permissible ground. (*People v. Wheeler* (1978) 22 Cal. 3d 258). Thus, the objecting party (usually the defense) must demonstrate a "prima facie case".

a. Prima Facie Case – The court in *Wheeler* provided four examples of ways to demonstrate a prima facie case:

1. "A party may show that his opponent struck most or all of the members of the identified group from the venire."
2. "He may also demonstrate that the jurors in question share only this one characteristic—their membership in the group—and that in all other respects they are as heterogenous as the community as a whole."
3. "Next, the showing may be supplemented . . . by such circumstances as the failure of the opponent to engage these same jurors in more than desultory voir dire, or indeed to ask them any questions at all."
4. "Lastly, . . . the defendant need not be a member of the excluded group in order to complain of a violation of the representative cross-section rule." However, this can be probative in making the determination. (*People v. Wheeler* (1978) 22 Cal. 3d 258, 280-281; *People v. Reynoso* (2003) 31 Cal.4th 903, 914.)

b. "[A] 'pattern' of strikes against black jurors included in the particular venire might give rise to an inference of discrimination. Similarly, the prosecutor's questions and statements during *voir dire* examination and in exercising his challenges may support or refute an inference of discriminatory purpose." (*Batson v. Kentucky* (1986) 476 U.S. 79, 96-97.)

c. Rebut the prima facie case by arguing applicable factors:

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

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

3. The fact that you have <u>not</u> used a disproportionate number of your challenges against members of the cognizable class is a factor that weighs against finding an inference of discrimination. (*People v. Streeter* (2012) 54 Cal.4th 205, 223 [no prima facie case where prosecutor excused three of five African Americans]; *People v. Clark* (2011) 52 Cal.4th 856, 903 [statistical analysis subject to various interpretations and did not raise an inference of discrimination]; *People* v. *Bell* (2007) 40 Cal.4th 582, 598 [considering fact prosecutor used only two of 16 peremptory challenges against members of the cognizable class at issue in finding the prosecutor's challenges created no inference of discrimination]; *People v. Cornwell* (2005) 37 Cal.4th 50, 70 [no prima facie case where prosecutor challenged one out of two African-American prospective jurors]). However, See *Ayala v. Wong* (9th Cir. 2012) 693 F.3d 945, 964 [Statistical evidence alone established a prima facie case where prosecution struck each of the seven black or Hispanic jurors available for challenge].

4. If you have passed on a panel that includes members of the cognizable class, this fact should be mentioned as it undercuts an inference of discrimination. (*People v. Streeter* (2012) 54 Cal.4th 205, 225 [prosecutor passed five times with up to four African Americans in jury box]; *People v. Clark* (2011) 52 Cal.4th at 856, 906 [no prima facie case where prosecutor passed two African-American jurors during several rounds before finally excusing them].) The prosecutor's acceptance of a panel including African-American prospective jurors, while not conclusive, was " 'an indication of the prosecutor's good faith in exercising his peremptories, and … an appropriate factor for the trial judge to consider in ruling on a *Wheeler* objection … .' " (*People v. Hartsch* (2010) 49 Cal.4th 472, 487). (See also, *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].)

5. Point out any members of the cognizable class who were challenged by the defense. However, be aware that this fact will not carry the day for you. It is simply something you may want to point out on the record. Further rehabilitation of prospective jurors of a cognizable class ought to be challenged can be an

important factor in rebutting a prima facie case. (*People v. Streeter* (2012) 54 Cal.4th 205, 225 [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, citing *People v. Hartsch* (2010) 49 Cal.4th 472, 487]).

6. If you were honestly not aware the juror was a member of a cognizable group. *People v. Barber* (1988) 200 Cal.App.3d 378, 389. [Challenged juror appeared to be a white and non-Hispanic to DA. DA did not recognize the surname to be Hispanic. Court found DA to be sincere]

2. Step Two – If a prima facie case is made, the "burden shifts to the [party making the original, objected to juror challenge] to explain adequately the racial [or other cognizable class] exclusion by offering permissible race neutral justifications for the strikes." (*Johnson v. California* (2005) 545 U.S. 162)

"The justification need not support a challenge for cause, and even a 'trivial' reason, if genuine and neutral, will suffice." (*People v. Arias* (1996) 13 Cal. 4th 92, 136 citing *People v. Montiel* (1993) 5 Cal. 4th 877, 910, fn. 9.)

a. Examples of Permissible Reasons

1. Legal contacts. (*People v. Panah* (2005) 35 Cal.4th 395, 441-442 [potential juror was arrested and charged with a crime]; *People v. Young* (2005) 34 Cal.4th 1149, 1174 [counselor had testified before in sex assault cases]; *People v. Cleveland* (2004) 32 Cal.4th 704, 733 [son was in jail]; *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1124 [father was arrested and charged with a crime and the potential juror had been roughed up by officers]; *People v. Farnam* (2002) 28 Cal.4th 107, 137-138; *People v. Williams* (1997) 16 Cal.4th 635, 664-665 [by family member]; *People v. Arias* (1996) 13 Cal.4th 92, 138; *People v. Turner* (1994) 8 Cal.4th 137, 171; *People v. Sims* (1993) 5 Cal.4th 405, 430; *People v. Cummings* (1993) 4 Cal.4th 1233, 1282; *People v. Johnson* (1989) 47 Cal.3d 1194, 1215; *People v.Walker* (1988) 47 Cal.3d 605, 625-626; *People v. Wheeler* (1978) 22 Cal.3d 258, 275 [been a crime victim]; *People v. Douglas* (1995) 36 Cal.App.4th 1681, 1690; *People v. Martinez* (2000) 82 Cal.App.4th 339, 344-345 [family member]; *People v. Martin* (1998) 64 Cal.App.4th 378, 385, fn. 5 [crime victim]; *People v. Buckley* (1997) 53 Cal.App.4th 658, 667; *People v. Barber* (1988) 200 Cal.App.3d 378; *Mitleider v. Hall* (9th Cir. 2004) 391 F.3d 1039, 1041- 045, 1048-1051 [contacts by family members].)

2. Served on hung jury before. (*People v. Farnam* (2002) 28 Cal.4th 107, 137-138.)

3. Views on the legal system. (*People v. Ward* (2005) 36 Cal.4th 186, 201 [unfavorable views toward guilt]; *People v. Cleveland* (2004) 32 Cal.4th 704, 733 [hesitant in answering questions on the death penalty]; *People v. Yeoman* (2003) 31 Cal.4th 93, 116-117 [not strong enough views on the death penalty]; *People v. Burgener* (2003) 29 Cal.4th 833, 864 [skeptical in imposing death penalty]; *People v. Farnam* (2002) 28 Cal.4th 107, 137; *People v. Caitlin* (2001) 26 Cal.4th 81, 118 [skeptical about imposing death penalty]; *People v. Buckley* (1997) 53 Cal.App.4th 658, 666-667 [legal training]; *Boyd v. Newland* (9th Cir. 2004) 393 F.3d 1008, 1013 [ambivalence towards the legal system]; *Tolbert v. Gomez* (9th Cir. 1999) 189 F.3d 1099; *United States v. Fike* (5th Cir. 1996) 82 F.3d 1315, 1320.)

4. The potential juror's lack of disclosure. (*People v. Diaz* (1984) 152 Cal.App.3d 926, 932; see *In re Hitchings* (1993) 6 Cal.4th 97, 112; *Mitleider v. Hall* (9th Cir. 2004) 391 F.3d 1039, 1041-1045, 1048-1051 [potential juror apparently not honest].)

5. The potential juror appeared to be a non-conformer. (*Purkett v. Elem* (1995) 514 U.S. 765, 769 (per curiam) [long hair]; *People v. Ayala* (2000) 24 Cal.4th 243, 261; *People v. Howard* (1992) 1 Cal.4th 1132, 1208; *People v. Wheeler* (1978) 22 Cal.3d 258, 275.) (*People v. Ward* (2005) 36 Cal. 4th 186, 202)

6. Lack of life experiences. (*People v. Sims* (1993) 5 Cal.4th 405, 429; *People v. Perez* (1994) 29 Cal.App.4th 1313, 1328; *Mitleider v. Hall* (9th Cir. 2004) 391 F.3d 1039, 1041-1045, 1048-1051 [and young and immature].)

7. The potential juror's occupation. (*People v. Young* (2005) 34 Cal.4th 1149, 1174 [counselor who has testified before in other sex assault cases and one who was an insurance claims specialist]; *People v. Howard* (1992) 1 Cal.4th 1132, 1155-1156 [non-practicing registered nurse]; *People v. Landry* (1996) 49 Cal.App.4th 785, 790 [youth services]; *People v. Barber* (1988) 200 Cal.App.3d 378, 394; *United States v. Thompson* (9th Cir. 1987) 827 F.2d 1254, 1260.)

8. Reluctance to be a juror. (*People v. Walker* (1998) 64 Cal.App.4th 1062, 1070; *Mitleider v. Hall* (9th Cir. 2004) 391 F.3d 1039, 1041-1045, 1048-1051.) (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].)

9. Eagerness to be a juror. (*People v. Ervin* (2000) 22 Cal.4th 48, 76.)

10. Hesitance in applying the death penalty. (*People v. Panah* (2005) 35 Cal.4th 395, 441; *People v. Smith* (2005) 35 Cal.4th 334, 347.)

11. Hesitance, Transient Background, and Grandmotherly 'Persona.' (*Boyde v. Brown* (9th Cir. 2005) 404 F.3d 1159, 1170.)

12. Body language can be proper grounds, at least if there is a sufficient record to support the prosecutor's observations. (*People v. Elliott* (2012) 53 Cal.4th 535, 569-570 [Juror failed to make eye contact with anyone, dressed informally, and had an unconventional hairstyle]; (*People v. Ward* (2005) 36 Cal.4th 186, 202 [hostility toward prosecutor; though record is silent, other than the prosecutor's assertions, there is no evidence to contradict it]; *People v. Reynoso* (2003) 31 Cal.4th 903, 919; *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1125-1126 [hostile look at prosecutor] *People v. Ervin* (2000) 22 Cal.4th 48 [nervousness during voir dire]; *People v. Turner* (1994) 8 Cal.4th 137, 170 [potential juror won't look prosecutor in the eye]; *People v. Johnson* (1989) 47 Cal.3d 1194, 1220 [shy][sleepy]; *People v. Dunn* (1995) 40 Cal.App.4th 1039, 1047; *People v. Perez* (1994) 27 Cal.App.4th 1313, 1330 [inappropriate laughter]; *Mitleider v. Hall* (9th Cir. 2004) 391 F.3d 1039, 1041-1045, 1048-1051; *Williams v. Rhoades* (9th Cir. 2004) 354 F.3d 1101 [uncorroborated assertion by prosecutor of the potential juror's body language enough for affirmance because of deferential standard of review]; but see *McClain v. Prunty* (9th Cir. 2000) 217 F.3d 1209 [implied body language not enough without the prosecutor stating the reason]; *Turner v. Marshall* (9th Cir. 1997) 121 F.3d 1248, 1254 [cannot infer demeanor when prosecutor never said so]; *United States v. Power* (9th Cir. 1989) 881 F.2d 733, 740 [fidgety and inattention]; *United States v. Changco* (9th Cir. 1993) 1 F.3d 837, 840 [passive and inattentive].) (*Rice v. Collins* 546 U.S. 333 (2006) [rolling of eyes, not seen by trial judge].)

Caution: Body language can be a dangerous area if the record does not support the reasons you are giving for the excuse. Be sure that you make a record of not only what body language or demeanor you observed but *why* this was important to you and how it affected your decision to excuse the juror. Further, try not to rely solely on body language or demeanor when excusing a cognizable class juror. (See, *People v. Long* (2010) 189 Cal.App. 4th 826) [record did not support prosecutors reasons for excusing juror and judge did not make a "sincere and reasoned" attempt to evaluate the prosecutor's reasons]). (*People v. Jones* (2011) 51 Cal.4th 346) [Prosecutor

gave specific and detailed reasons for challenges based upon body language and demeanor]).

Practice Tip: If you have a cognizable class juror who is nonverbally communicating in a way that concerns you (ie. Facial expressions, arms folded, sighing, etc.) ask them about it. For example, you might say, "Juror #2, I noticed that while Juror #8 was answering the last question, you had a look on your face that I interpreted as disagreement. Am I correct about that? Would you like to be heard?" If you do this in a respectful way, you accomplish the goal of putting the fact that you noticed it on the record. If you decide to kick this person later and get challenged, you can refer the Court back to this as one of the reasons you kicked the juror.

13. Bilingual Juror Who Won't Defer to Court Translator - (*Hernandez v. New York* (1991) 500 U.S. 352, 356-357) CAUTION – Be careful when kicking bilingual jurors as it could be seen as a cover for discrimination. (*See, People v. Gonzales* (2008) 165 Cal.App.4th 620)

14. Intelligence – (*People v. Arias* (1996) 13 Cal. 4th 92, 137-139)

15. Sympathetic to defendant – (*People v. McKinzie* (2012) 54 Cal.4th 1302, 1321-1322) [fact juror had been arrested for domestic violence was proper basis to challenge because 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. Mayfield* (1997) 14 Cal. 4th 668, 724-726)

16. Desire for next juror - (*People v. Jones* (2011) 51 Cal.4th 346, 367) [challenge upheld where prosecutor believed he had even better potential jurors who had not been called]; (See also, *People v. Alvarez* (1996) 14 Cal. 4th 155, 194-195).

But see, (*People v. Cisneros* (2015) 234 Cal.App.4th 111) [Holding that preference for next juror *alone* is not enough. You must also articulate reasons for excusing the challenged juror.]

17. Because prosecutor wished to ask the potential juror more questions. (*People v. Cleveland* (2004) 32 Cal.4th 704, 733.)

18. Mistake - (*Aleman* v. *Uribe* (9th Cir. 2013) 2013) [prosecutor mistakenly transposed two jurors' information. Prosecutor helped by making a good record that he was "under the weather"] (See *People v. Williams* (2013) 56 Cal.4th 630, 660-661 [holding that, regardless of whether prosecutor challenged one juror under the mistaken belief she was a different juror, there was no *Batson-Wheeler* violation since the reason given for challenging the juror (hesitancy to impose the death penalty) would have provided valid basis for challenging different juror].) (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1124 [prosecutor misunderstood the juror's answer]; *People v. Williams* (1997) 16 Cal.4th 153, 188-189; *United States v. Lorenzo* (9th Cir. 1993) 995 F.2d 1448, 1454-1455 [time crunch].)

But see, (*Castellanos v. Small* (2014) 766 F.3d 1137) [Prosecutor's stated reason was in error. It survived through the appellate courts as a mistake but the 9th Circuit ultimately found that the prosecutor's error to be pre-textual.]

19. Financial Hardship/Work Related Issues - (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]

3. STEP 3 – "If a race neutral explanation is tendered, the trial court must then decide… whether the opponent of the strike has proved purposeful racial discrimination." (*Johnson v. California* (2005) 54 U.S. 162)

a. "It is not until the third step that the persuasiveness of the justification becomes relevant – the step in which the trial court determines whether the opponent of the strike has carried his burden of proving purposeful discrimination." (*Purkett v. Elem* (1995) 514 U.S. 765, 768.) [Burden of proof of is preponderance of the evidence]

b. "[W]e rely on the good judgment of trial courts to distinguish bona fide reasons for such peremptories from sham excuses belatedly contrived to avoid admitting acts of group discrimination." (*People v. Wheeler* (1978) 22 Cal.3d 258, 282; *People v. Johnson* (1989) 47 Cal.3d 1194, 1216; see *Purkett v. Elem* (1995) 514 U.S. 765, 768.)

c. "This demands of the trial judge a sincere and reasoned attempt to evaluate the prosecutor's explanation in light of the circumstances of the case as then known, his knowledge of trial techniques, and his observations of the manner in which the prosecutor has examined members of the venire and has exercised challenges for cause or peremptorily . . . . " (*People v. Hall* (1983) 35 Cal.3d 161, 167-168; See also, *People v. Silva* (2001) 25 Cal. 4th 345, 386)

d. "In assessing credibility, the court draws upon its contemporaneous observations of the voir dire. It may also rely on the court's own experiences as a lawyer and bench officer in the community, and even the common practices of the advocate and the office that employs him or her. [Citation.]" (*People v. Lenix, supra*, 44 Cal.4th at p. 613, fn. omitted, *quoting Miller–El v. Cockrell* (2003) 537 U.S. 322, 339.)

e. It is proper for a trial court, in evaluating the prosecutor's justifications, to consider the prosecutor's actions in excusing jurors in a *previous trial* and whether a prosecutors kept members of the cognizable class at issue on the jury in a *prior trial.* (*People v. DeHoyos* (2013) 57 Cal.4th 79)

F. Comparative Analysis

This term refers to the process by which courts will evaluate the reasons given for the challenge of a member of a cognizable class. The courts will look for non-cognizable class jurors who were *not* challenged to see whether the reasons would apply equally. For example, if a prosecutor challenged an African American juror who was employed as a teacher and gave the reason, "Judge, I always kick teachers." The court would then look to see whether the prosecutor failed to challenge any teachers who were not members of a cognizable class.

1. History

Federal Courts approved of comparative analysis in *Turner v. Marshall* (9th Cir. 1997) 121 F. 3d 1248. California rejected comparative analysis in *People v. Landry* (1996) 49 Cal.App.4th 785. *People v. Jones* (1997) 15 Cal. 4th 119. However, things began to change in 2003 with *Johnson*. Then in 2005, the U.S. Supreme Court decided *Miller-El v. Dretke* (2005) 545 U.S. 231 using comparative analysis in the decision.

a. *Snyder v. Louisiana* (2008) 552 U.S. 472 – In *Snyder,* the U.S. Supreme Court found that the prosecutors race neutral reasons for excusing a black juror were implausible and were reinforced by the prosecutor's acceptance of white jurors who disclosed conflicting obligations similar to the excused juror. (*Id.* at 483-484). The Court held that a comparative analysis was appropriate since "the shared

characteristic, i.e., concern about serving on the jury due to conflicting obligations, was thoroughly explored by the trial court when the relevant jurors asked to be excused for cause." (*Id.* at p. 483)

b. *People v. Lenix* (2008) 44 Cal. 4th 602 – Comparative Analysis is alive in California.

"If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson's* third step." (*Id.* at p. 621) In reviewing the plausibility of a prosecutor's reasons for striking a juror, an appellate court can consider various kinds of evidence, including a comparison of panelists' responses. (*Id.* at p. 622) Failing to engage in comparative juror analysis for the first time on appeal unduly restricts review based on the entire record." (*Id.* at p. 622) "Thus, evidence of comparative juror analysis must be considered in the trial court and even for the first time on appeal if relied upon by defendant and the record is adequate to permit the urged comparisons." (*Id.* at p. 622)

The trial court has a duty to "assess the plausibility" of the prosecutor's proffered reasons for striking a potential juror, "in light of all evidence with a bearing on it." (*Id.* at p. 625) Trial courts "must evaluate the demeanor of the prosecutor in determining the credibility of proffered explanations, and the demeanor of the panelist when that factor is a basis for the challenge." (*Id.* at p. 625) It should be discernible from the record that "1) the trial court considered the prosecutor's reasons for the peremptory challenges at issue and found them to be race-neutral; 2) those reasons were consistent with the court's observations of what occurred, in terms of the panelist's statements as well as any pertinent nonverbal behavior; and 3) the court made a credibility finding that the prosecutor was truthful in giving race-neutral reasons for the peremptory challenges. (*Id.* at pp. 625-626)

"As to the second point, the court may not have observed every gesture, expression or interaction relied upon by the prosecutor. The judge has a different vantage point, and may have, for example, been looking at another panelist or making a note when the described behavior occurred. But the court must be satisfied that the specifics offered by the prosecutor are consistent with the answers it heard and the overall behavior of the panelist. The record must reflect the trial court's determination on this point (see *Snyder*, supra, at p. 460), which may be encompassed within the court's general conclusion that it considered the reasons proffered by the prosecution and found them credible." (*Id.* at pp. 625-626)

The court observed that comparative juror analysis is a form of circumstantial evidence (*Id.* at p. 622) and that a reviewing court must be careful not to accept one

reasonable interpretation to the exclusion of other reasonable ones when reviewing the circumstantial evidence supporting the trial court's factual findings in a *Batson/Wheeler* holding. "If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also be reasonably reconciled with a contrary finding does not warrant a reversal of the judgment." (*Id.* at pp. 625-626)

Comparative Analysis will only be considered for the first time on appeal at the *Third* Step. (*See, People v. Clark* (2016) 63 Cal.4th 522, 568 [Declining the defense invitation to engage in comparative analysis for the first time on appeal at the first step of *Batson*.])

2. "Positive" Comparative Analysis

This term refers to the idea of using comparative analysis to support a challenge of a member of a cognizable class by comparing other similarly situated non-cognizable class jurors who were also challenged. (*Rice v. Collins* (2006) 546 U.S. 333, 341 [prosecutor struck a white juror with the same characteristics of a cognizable class juror she struck]; (*Briggs v. Grounds* (2012) 682 F.3d 1165 [prosecutor struck at least on non-African American who indicated they would hold the prosecution to a higher standard of proof]).

IV. Practical Issues in Dealing with *Batson/Wheeler* Motions

A. Realize that a challenge will likely come at some point during jury selection and be ready to deal with it. It should go without saying, but ***NEVER*** excuse a juror on the basis of race, ethnicity, religion, gender etc…Question all jurors you plan to challenge. Desultory questioning does not count.

B. Be prepared to rebut the prima facie case. (See pp. 4-5)

C. Assume that a prima facie case will be made and be prepared to give race neutral reasons for excusing the juror. While peremptory challenges are often based on instinct and it can sometimes be hard to articulate the reason for removing a juror, "a prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives." (*People* v. *Lenix* (2008) 44 Cal.4th 602, 624.) Prosecutors should "provide as complete an explanation for their peremptory challenges as possible." (*People* v. *Lenix* (2008) 44 Cal.4th 602, 624.)

D. If you can't recall specifically why you excused a juror, it is better to ask for a "time out" so that you may review the transcript/recording of the juror's answers. (See *Lewis v. Lewis* (9th Cir. 2003) 321 F.3d 824 [suggesting that counsel can be

particularly helpful in assisting the court at the third step of *Batson* "when afforded the opportunity to review a transcript of the jury selection proceedings"].)

E. If judge finds no prima facie case, insist that the finding is placed on the record. Then state your reasons anyway. But, DO NOT give reasons unless and until the court specifically finds no prima facie case. Giving reasons without a specific finding on the first prong will constitute an implied finding of a prima facie case. *People v. Arias* (1996) 13 Cal. 4th 92; *People v. Gutierrez* (2002) 28 Cal. 4th 1083. *People v. Scott* (June 8, 2015, S094858) __ Cal. 4th __ [2015 WL 3541280]

F. Trial Tips

1. Create a Good Record

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.)

2. Obtain a Transcript of Voir Dire Before Making Challenges

In certain situations, a prosecutor may not recall or have accurate notes regarding the responses of a juror he or she wishes to challenge. In those cases, it is appropriate and recommended that the prosecutor ask for read back of the juror's responses. (*See Lewis v. Lewis* (9th Cir. 2003) 321 F.3d 824)

3. Ask Court to Note the Final Jury Composition

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"].)

4. Save your notes. If case is reviewed later, voir dire may be an issue. Always save your notes so that if asked, you are better able to recollect why you may have challenged a specific juror.

a. At remand hearing, the prosecutor does NOT have to state reasons under oath. (*People v. Kelly* (2008) 162 Cal.App.4th 797)

b. At remand hearing, the prosecutor does NOT have to turn over original voir dire notes. (*People v. Kelly* (2008) 162 Cal.App.4th 797)

c. At remand hearing, prosecutor cannot be cross-examined by the defense. (*People v. Kelly* (2008) 162 Cal.App.4th 797)

d. "I don't recall" May or May Not Fly – (*Paulino v. Harrison* (9th Cir. 2008) 542 F.3d 692); (But see, *Yee* v. *Duncan* (9th Cir. 2006) 463 F.3d 893.) [notwithstanding the inability to recall reason for excusing one cognizable class juror, totality of prosecutor's responses regarding other excused jurors did not evidence a discriminatory motive].)

e. If you use shorthand, make sure you define your terms. Don't make a reviewing court guess at what you meant. (*See, Foster v. Chatman* (2016) 136 S.Ct. 1737 [Murder conviction reversed for third step *Batson* violation. Very bad facts that we hope to never see. However, it's instructive on the issue of the clarity, or lack thereof, of the prosecutor's notes.])

G. Remedies

1. *Wheeler-Batson* error is reversible per se. (*People v. Wheeler* (1978) 22 Cal.3d 258, 283; see *Miller-El v. Dretke* (2005) 545 U.S. 231)

a. Step One Error: When the trial court erroneously finds there was not a prima facie case, the matter is often remanded for prosecutor to state reasons for

peremptory challenge. (*Batson v. Kentucky* (1986) 476 U.S. 79, 100; *People v. McGee* (2002) 104 Cal.App.4th 559, 571, 573 [remand to permit prosecutor give reasons].) This remedy has been criticized for two reasons. First, the long passage of time makes it nearly impossible for the prosecutor to genuinely remember the real reason. (*People v. Hall* (1983) 35 Cal.3d 161, 171 [pointless to remand for the prosecutor to give a reason 11 years later]; *People v. Allen* (2004) 115 Cal.App.4th 542, 553-554, fn. 10 [remand for new trial, not for the prosecutor to give reasons, because occurred three years ago]; see also *People v. Ayala* (2000) 24 Cal.4th 243, 297, fn. 8 (conc. opn. of George, C.J.); *People v. Robinson* (2003) 110 Cal.App.4th 1196, 1208 [remand for the prosecutor to give the reason but retrial if it could not recall]; *People v. Williams* (2000) 78 Cal.App.4th 1118, 1130 [on remand, the court must first determine if it can adequately address the issue after the delay]; *United States v. Alcantar* (9th Cir. 1990) 897 F.2d 436, 438-439.) Second, this procedure is subject to a prosecutor trying to invent more legitimate reasons after the fact. (See, e.g., *Miller-El v. Dretke* (2005) 545 U.S. 231 [prosecution's reasons after the fact "reeks of afterthought"]; *Miller-El v. Cockrell* (2003) 537 U.S. 331, 343 [reasons given after trial "was subject to the usual risks of imprecision and distortions from the passage of time"]; see also *Johnson v. California* (2005) 545 U.S. 162, quoting *Paulino v. Castro* (9th Cir. 2004) 371 F.3d 1083, 1090 ["it does not matter that the prosecution might have had good reasons . . . [w]hat matters is the real reason they were stricken"].)

b. Step Three Error: When the trial court fails to sustain motion after the prosecutor gives reason, error normally requires new venire. (*People v. Wheeler* (1978) 22 Cal.3d 258, 283; see *Miller-El v. Dretke* (2005) 545 U.S. 162). However, the defendant in the trial court can stipulate to a different remedy. (*People v. Willis* (2002) 27 Cal.4th 811, 821-824 [with consent of movant, can use other remedies such as sanctions, reinstating removed jurors or doing challenges at sidebar]; *People v. Overby* (2004) 124 Cal.App.4th 1237, 1244-1245 [defendant not objecting to judge re-seating the excused juror indicates consent to this remedy]. (See *People v. Mata* (2013) 57 Cal.4th 178) [holding that the trial court may reseat an improperly challenged juror if affected counsel either expressly or implicitly consents]

2. Consequences

a. If the court grants a *Batson/Wheeler* motion at trial and employs one or more of the remedies discussed, that is arguably a "sanction".

1. Court must notify the bar of any judicial sanctions against an attorney (Business & Professions Code §6068(a)(3)).

2. Attorney must self report any judicial sanction (Business & Professions Code §6068(o)(3)).

3. However, reporting will likely not be required unless the conduct is egregious.

b. If the trial court erroneously denies a *Batson/Wheeler* motion at trial and the case is reversed

1. Court must notify bar whenever there is a reversal. (Business & Professions Code §6086.7(b)(2)).

2. Attorney must notify bar whenever reversal is based in whole or in part upon misconduct of the attorney. (Business & Professions Code §6068(o)(7)).

ADDENDUM TO *BATSON/WHEELER* OUTLINE
PEOPLE V. GUTIERREZ ET AL (2017) California Supreme Court Case Number S224724

In Gutierrez, the DDA struck ten Hispanic jurors out of sixteen peremptory challenges. Two Hispanic jurors remained and served on the panel. Seven of the ten challenges were determined by the Supreme Court to have been justified. However, their examination of the other three resulted in a finding that one resulted in structural error and reversed the verdict.

The Court opinion illustrates what information they want the record to contain in a Batson challenge:

1) The court may only rule on reasons specifically and actually expressed by the attorney, and may not consider other, even obvious, reasons that the challenge is appropriate. So make sure YOU list all your reasons.

2) If a prima facie finding is made and the court proceeds to the second step of the analysis: the "neutral justification" stage, the issue is facial validity. The court states that the rationale need only be clear and reasonably specific as to legitimate reasons for challenging the juror, but need not detail "why" the prosecutor kicked the juror. However, a deficient record was clearly part of the reason that Gutierrez was reversed.

3) The Court wants a significant record created at step 3: evaluating the credibility of the reasons actually stated.

Here the juror was kicked because she lived in Wasco and was unaware of any gang activity in the area. A key witness for the DDA was a Wasco gang member that would be testifying about Wasco gang activity and the DDA was uncertain how her lack of awareness might bear on her response to his important witness. The DAG posited some explanation for the DDA's concerns, and the Supreme Court even engaged in some "speculation" as to the concerns and their exact logic (which may have been upheld), but ultimately held "[A] prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives." The court faulted the DDA for not being interested in examining whether the juror's lack of awareness of gang activity in Wasco would cause her to be biased against the witness for the People's case.

The court also used the DDA's equivocation as to this juror, given her familial law enforcement ties to show that the proffered reason wasn't credible. "[W]hen it is not self-evident why an advocate would harbor a concern, the question of whether a neutral explanation is genuine and made in good faith becomes more pressing." As to another challenged juror, they faulted the DDA for getting a fact wrong and confusing the juror's answer with another.

They did balance this all against the fact the DDA passed on challenges 5 times while the juror was still on the panel, "But neither that acknowledgement nor the prosecutor's passes themselves wholly preclude a finding that a panelist is struck on account of bias against an identifiable group, when such a strike occurs eventually instead of immediately."

ADDENDUM TO *BATSON/WHEELER* OUTLINE
PEOPLE V. GUTIERREZ ET AL (2017) California Supreme Court Case Number S224724

The Supreme Court also faulted the trial court:

> The court here acknowledged the 'Wasco issue' justification and deemed it neutral and non-pretextual by blanket statements. It never clarified why it accepted the Wasco reason as an honest one. Another tendered basis for this strike, the reference to the prospective juror's other answers, as they related to an expectation of her reaction to Trevino, was not borne out by the record, but the court did not reject this reason or ask the prosecutor to explain further. In addition, the court improperly cited a justification not offered by the prosecutor: a lack of life experience. On this record, we are unable to conclude that the trial court made 'a sincere and reasoned attempt to evaluate the prosecutor's explanation' regarding the strike of Juror 2723471. (*People v. Hall* (1983) 35 Cal.3d 161, 167.) The court may have made a *sincere* attempt to assess the Wasco rationale, but it never explained why it decided this justification was not a pretext for a discriminatory purpose. Because the prosecutor's reason for this strike was not self-evident and the record is void of any explication from the court, we cannot find under these circumstances that the court made a *reasoned* attempt to determine whether the justification was a credible one.

In conclusion, they write:

> Though we exercise great restraint in reviewing a prosecutor's explanations and typically afford deference to a trial court's *Batson*/*Wheeler* rulings, we can only perform a meaningful review when the record contains evidence of solid value. Providing an adequate record may prove onerous, particularly when jury selection extends over several days and involves a significant number of potential jurors. It can be difficult to keep all the panelists and their responses straight. Nevertheless, the obligation to avoid discrimination in jury selection is a pivotal one. It is the duty of courts and counsel to ensure the record is both accurate and adequately developed.

Justice Liu's concurrence attempts to lay out the purpose of the rule established:

> The ultimate issue is "whether it was *more likely than not* that the challenge was improperly motivated." (*Johnson v. California* (2005) 545 U.S. 162, 170, italics added.) This probabilistic standard is not designed to elicit a definitive finding of deceit or racism. Instead, it defines a level of risk that courts cannot tolerate in light of the serious harms that racial discrimination in jury selection causes to the defendant, to the excluded juror, and to —public confidence in the fairness of our system of justice. (*Batson*, *supra*, 476 U.S. at p. 87; see *Miller-El*, *supra*, 545 U.S. at p. 238; *Powers v. Ohio* (1991) 499 U.S. 400, 412–414.)

VOIR DIRE

CAL CIVIL PROCEDURE § 223

CAL CIVIL PROCEDURE § 223

(a) To select a fair and impartial jury in a criminal jury trial, the trial judge shall conduct an initial examination of prospective jurors. At the first practical opportunity prior to voir dire, the trial judge shall consider the form and subject matter of voir dire questions. Before voir dire by the trial judge, the parties may submit questions to the trial judge. The trial judge may include additional questions requested by the parties as the trial judge deems proper.

CAL CIVIL PROCEDURE § 223

(b)(1) Upon completion of the trial judge's initial examination, counsel for each party shall have the right to examine, by oral and direct questioning, any of the prospective jurors. The scope of the examination conducted by counsel shall be within reasonable limits prescribed by the trial judge in the judge's sound discretion subject to the provisions of this chapter. During any examination conducted by counsel for the parties, the trial judge shall permit liberal and probing examination calculated to discover bias or prejudice with regard to the circumstances of the particular case or the parties before the court. The fact that a topic has been included in the trial judge's examination shall not preclude appropriate follow up questioning in the same area by counsel. The trial judge should permit counsel to conduct voir dire examination without requiring prior submission of the questions unless a particular counsel engages in improper questioning.

CAL CIVIL PROCEDURE § 223

(2) The trial judge shall not impose specific unreasonable or arbitrary time limits or establish an inflexible time limit policy for voir dire. As voir dire proceeds, the trial judge shall permit supplemental time for questioning based on individual responses or conduct of jurors that may evince attitudes inconsistent with suitability to serve as a fair and impartial juror in the particular case.

CAL CIVIL PROCEDURE § 223

(3) For purposes of this section, an "improper question" is any question that, as its dominant purpose, attempts to precondition the prospective jurors to a particular result or indoctrinate the jury.

VOIR DIRE

The primary purpose of voir dire of a jury panel is that of selection of a fair and impartial jury through a process of examination to determine if there is a ground for challenging any prospective jurors **for cause**.

Kelly v. Trans Globe Travel Bureau Inc. (App. 2 Dist. 1976) 131 Cal.Rptr. 488 60 Cal.App.3d 195.

Handling a *Batson/Wheeler* Motion

San Diego County District Attorney's Office

I. Overview
   A. Every prosecutor will have to deal with the dreaded "*Wheeler"* motion. It usually occurs following the prosecutor's use of a peremptory challenge against someone of a particular race, gender or ethnic background.
   B. How it works – The defense makes a motion, usually on state and federal grounds, that the prosecutor has excused a juror based on racial, ethnic or other improper grounds and has therefore violated the defendant's Constitutional right to a fair and impartial jury. The defendant does not have to be a member of the excluded group to complain of a violation. *People v. Wheeler* (1978) 22 Cal. 3d 258, 281. (**Note**: While the defense usually brings the motion, it may be made by *either party.*)
   C. It goes without saying that no prosecutor should exercise a peremptory challenge against a juror based on that juror's gender, sexual orientation, or membership in a racial, ethnic, or religious group. But a prosecutor should not refrain from challenging a juror for *permissible* reasons out of a concern that the defense will raise a disingenuous or frivolous *Batson/Wheeler* claim.

II. THREE STEP PROCESS
   A. "First, the defendant must make out a prima facie case 'by showing that the totality of relevant facts gives rise to an inference of discriminatory purpose.'
   B. Second, once the defendant has made out a prima facie case, the 'burden shifts to the State to explain adequately the racial exclusion' by offering permissible race-neutral justifications for the [peremptory] strikes.
   C. Third, '[i]f a race-neutral explanation is tendered, the trial court must decide…whether the opponent of the strike has proved purposeful racial discrimination.' " (*Johnson v. California* (2005) 545 U.S. 162)

III. History
   A. *Batson* ***is*** the federal standard and *Wheeler* ***was*** the California standard used to determine whether the peremptory challenge was improper.
   B. Both cases used procedures involving 3 part tests to determine the propriety of the challenge.
   C. However, the first prong of the tests in each case was different.
   D. Defendants argued the state burden (*Wheeler*) was more difficult for them to meet than the federal burden (*Batson*).
   E. The California Supreme Court tried to reconcile the two cases in 2003 in *People v. Johnson* (2003) 30 Cal. 4th 1302.
   F. In 2005, the U.S. Supreme Court reversed *Johnson* and "clarified" the *Batson* decision by stating that the first prong of the *Batson* test need only be satisfied by

production of evidence sufficient to permit the trial judge to draw an ***inference of discrimination***. (*Johnson v. California* (2005) 545 U.S. 162.)

G. Current State of the Law - Still a 3 prong test based on the holdings of *Batson* and *Johnson.* Although *Wheeler* is still good law, the first step has been replaced by the *Batson* first step. (*Johnson v. California* (2005) 545 U.S. 162.)

IV. Analysis

A. *People v. Wheeler* (1978) 22 Cal. 3d 258 – Peremptory challenges based on group bias violates the defendant's right to jury trial in the California Constitution. *Batson v. Kentucky* (1986) 476 U.S. 79 – Race based challenges violate the Equal Protection Clause of the U.S. Constitution. (*See Also, People v. Bonilla* (2007) 41 Cal.4th 313, 341).

B. Timeliness/Waiver – The claim is waived if the defendant fails to make a timely objection and a record sufficient for appellate review. (*People v. Wheeler* (1978) 22 Cal.3d 258, 280; *People v. Morris* (2003) 107 Cal.App.4th 402, 408-409) Motion made after jury was sworn but before alternates were sworn was not untimely. Jury empanelment is completed when all jurors, including alternates, are selected and sworn in. *People v. Scott* (2015) 61 Cal. 4th 363.

C. Cognizable Class – "An identifiable group distinguished on racial, religious, ethnic, or similar grounds…" *People v. Wheeler* (1978) 22 Cal. 3d 258, 276. Two requirements for a cognizable class:

1. Members share a common perspective arising from life experience in the group; and
2. No other members of the community are capable of adequately representing the group perspective. (*See, Rubio v. Superior Court* (1979) 24 Cal.3d 93, 98).

D. Courts and Statutes have recognized several categories of cognizable classes or groups.

1. Race - (*See, Batson v. Kentucky* (1986) 476 U.S. 79 & *People v. Wheeler* (1978) 22 Cal. 3d 258).
2. Ethnicity – Although there are fewer reported cases regarding ethnicity, be aware that it is a cognizable class. For example, Native Americans were the subject of the violation in *United States v. Bauer* (9th Cir. 1996) 84 F.3d 1549.
3. Religion – *People v. Johnson* (1989) 47 Cal.3d 1194, 1217 [Jewish Jurors]
4. Gender – Gender appears to be a cognizable class and should be treated as such. However, most cases dealing with gender also carry a racial component as well. (*People v. Crittenden* (1994) 9 Cal.4th 83, 115 [African-American woman]; *People v. Garceau* (1993) 6 Cal.4th 140, 171 [Hispanic woman]
5. Sexual Orientation – *People v. Garcia* (2000) 77 Cal.App.4th 1269, 1272. (*See Also,* Code of Civil Procedure §231.5)

6. Age – Although not a federally protected class, Code of Civil Procedure §231.5 added "Age" as a protected class in 2016 added by operation of Government Code §11135.
7. Disability – Although not a federally protected class, Code of Civil Procedure §231.5 added "Disability", both mental and physical, as a protected class in 2016 by operation of Government Code §11135**.**

E. Non-Cognizable Class
1. Poor – *People v. Carpenter* (1999) 21 Cal.4th 1016, 1035
2. Less Educated – *People v. Estrada* (1979) 93 Cal.App.3d 76, 90-91
3. Battered Women – *People v. Macioce* (1987) 197 Cal.App.3d 262, 280
4. Young – *People v. Ayala* (2000) 24 Cal.4th 243, 277-278; *United States v. Fletcher* (9th Cir. 1992) 965 F.2d 781, 782 –
(Caveat: See CCP§231.5 & Gov't Code §11135)
5. People over 70 – *People v. McCoy* (1995) 40 Cal.App.4th 778, 783 –
(Caveat: See CCP§231.5 & Gov't Code §11135)
6. "Insufficient" English – *People v. Lesara* (1998) 206 Cal.App.3d 1304, 1307
7. Unconventional Hairstyle – *Purkett v. Elem* (1995) 514 U.S. 765, 769
8. People who have been arrested *or* been victims – *People v. Fields* (1983) 35 Cal.3d 329, 348
9. "People of Color" – Combining all minority groups does not constitute a "cognizable class". *People v. Davis* (2009) 46 Cal. 4th 539

F. Challenge Exercised Against Member of Cognizable Class
1. **Step One** – The party objecting to the peremptory challenge must make out a prima facie case "by showing the totality of the relevant facts gives rise to an inference of a discriminatory purpose." *Johnson v. California* (2005) 545 U.S. 162. There is a presumption that that the party exercising the challenge (usually the prosecution) does so on a constitutionally permissible ground. (*People v. Wheeler* (1978) 22 Cal. 3d 258). Thus, the objecting party (usually the defense) must demonstrate a "prima facie case".
    a. Prima Facie Case – The court in *Wheeler* provided four examples of ways to demonstrate a prima facie case:
        i. "A party may show that his opponent struck most or all of the members of the identified group from the venire."
        ii. "He may also demonstrate that the jurors in question share only this one characteristic—their membership in the group—and that in all other respects they are as heterogenous as the community as a whole."
        iii. "Next, the showing may be supplemented…by such circumstances as the failure of the opponent to engage these same jurors in more than desultory voir dire, or indeed to ask them any questions at all."

iv. "Lastly, the defendant need not be a member of the excluded group in order to complain of a violation of the representative cross-section rule." However, this can be probative in making the determination. (*People v. Wheeler* (1978) 22 Cal. 3d 258, 280-281; *People v. Reynoso* (2003) 31 Cal.4th 903, 914.)

b. "[A] 'pattern' of strikes against black jurors included in the particular venire might give rise to an inference of discrimination. Similarly, the prosecutor's questions and statements during *voir dire* examination and in exercising his challenges may support or refute an inference of discriminatory purpose." (*Batson v. Kentucky* (1986) 476 U.S. 79, 96-97.)

c. Rebut the prima facie case by arguing applicable factors:

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

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

iii. The fact that you have <u>not</u> used a disproportionate number of your challenges against members of the cognizable class is a factor that weighs against finding an inference of discrimination. (*People v. Streeter* (2012) 54 Cal.4th 205, 223 [no prima facie case where prosecutor excused three of five African Americans]; *People v. Clark* (2011) 52 Cal.4th 856, 903 [statistical analysis subject to various interpretations and did not raise an inference of discrimination]; *People* v. *Bell* (2007) 40 Cal.4th 582, 598 [considering fact prosecutor used only two of 16 peremptory challenges against members of the cognizable class at issue in finding the prosecutor's challenges created no inference of discrimination]; *People v. Cornwell* (2005) 37 Cal.4th 50, 70 [no prima facie case where prosecutor challenged one out of two African-American prospective jurors]). However, See *Ayala v. Wong* (9th Cir. 2012) 693 F.3d 945, 964 [Statistical evidence alone established a prima facie case where prosecution struck each of the seven black or Hispanic jurors available for challenge].

iv. If you have passed on a panel that includes members of the cognizable class, this fact should be mentioned as it undercuts

an inference of discrimination. (*People v. Streeter* (2012) 54 Cal.4th 205, 225 [prosecutor passed five times with up to four African Americans in jury box]; *People v. Clark* (2011) 52 Cal.4th at 856, 906 [no prima facie case where prosecutor passed two African-American jurors during several rounds before finally excusing them].) The prosecutor's acceptance of a panel including African-American prospective jurors, while not conclusive, was "'an indication of the prosecutor's good faith in exercising his peremptories, and…an appropriate factor for the trial judge to consider in ruling on a *Wheeler* objection…'" (*People v. Hartsch* (2010) 49 Cal.4th 472, 487). (See also, *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].)

v. Point out any members of the cognizable class who were challenged by the defense. However, be aware that this fact will not carry the day for you. It is simply something you may want to point out on the record. Further rehabilitation of prospective jurors of a cognizable class ought to be challenged can be an important factor in rebutting a prima facie case. (*People v. Streeter* (2012) 54 Cal.4th 205, 225 [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, citing *People v. Hartsch* (2010) 49 Cal.4th 472, 487]).

vi. If you were honestly not aware the juror was a member of a cognizable group. *People v. Barber* (1988) 200 Cal.App.3d 378, 389. [Challenged juror appeared to be a white and non-Hispanic to DA. DA did not recognize the surname to be Hispanic. Court found DA to be sincere]

2. **Step Two** – If a prima facie case is made, the "burden shifts to the [party making the original, objected to juror challenge] to explain adequately the racial [or other cognizable class] exclusion by offering permissible race neutral justifications for the strikes." (*Johnson v. California* (2005) 545 U.S. 162)
   a. "The justification need not support a challenge for cause, and even a 'trivial' reason, if genuine and neutral, will suffice." (*People v. Arias* (1996) 13 Cal. 4th 92, 136 citing *People v. Montiel* (1993) 5 Cal. 4th 877, 910, fn. 9.)
   b. Examples of Permissible Reasons
      i. **Legal contacts**. (*People v. Panah* (2005) 35 Cal.4th 395, 441-442 [**potential juror was arrested and charged with a crime**];

People v. Young (2005) 34 Cal.4th 1149, 1174 [**counselor had testified before in sex assault cases**]; *People v. Cleveland* (2004) 32 Cal.4th 704, 733 [**son was in jail**]; *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1124 [**father was arrested and charged with a crime and the potential juror had been roughed up by officers**]; *People v. Farnam* (2002) 28 Cal.4th 107, 137-138; *People v. Williams* (1997) 16 Cal.4th 635, 664-665 [**by family member**]; *People v. Arias* (1996) 13 Cal.4th 92, 138; *People v. Turner* (1994) 8 Cal.4th 137, 171; *People v. Sims* (1993) 5 Cal.4th 405, 430; *People v. Cummings* (1993) 4 Cal.4th 1233, 1282; *People v. Johnson* (1989) 47 Cal.3d 1194, 1215; *People v. Walker* (1988) 47 Cal.3d 605, 625-626; *People v. Wheeler* (1978) 22 Cal.3d 258, 275 [**been a crime victim**]; *People v. Douglas* (1995) 36 Cal.App.4th 1681, 1690; *People v. Martinez* (2000) 82 Cal.App.4th 339, 344-345 [**family member**]; *People v. Martin* (1998) 64 Cal.App.4th 378, 385, fn. 5 [**crime victim**]; *People v. Buckley* (1997) 53 Cal.App.4th 658, 667; *People v. Barber* (1988) 200 Cal.App.3d 378; *Mitleider v. Hall* (9th Cir. 2004) 391 F.3d 1039, 1041- 045, 1048-1051 [**contacts by family members**].)

ii. **Served on hung jury before**. (*People v. Farnam* (2002) 28 Cal.4th 107, 137-138.)

iii. **Views on the legal system.** (*People v. Ward* (2005) 36 Cal.4th 186, 201 [**unfavorable views toward guilt**]; *People v. Cleveland* (2004) 32 Cal.4th 704, 733 [**hesitant in answering questions on the death penalty**]; *People v. Yeoman* (2003) 31 Cal.4th 93, 116-117 [**not strong enough views on the death penalty**]; *People v. Burgener* (2003) 29 Cal.4th 833, 864 [**skeptical in imposing death penalty**]; *People v. Farnam* (2002) 28 Cal.4th 107, 137; *People v. Caitlin* (2001) 26 Cal.4th 81, 118 [**skeptical about imposing death penalty**]; *People v. Buckley* (1997) 53 Cal.App.4th 658, 666-667 [**legal training**]; *Boyd v. Newland* (9th Cir. 2004) 393 F.3d 1008, 1013 [**ambivalence towards the legal system**]; *Tolbert v. Gomez* (9th Cir. 1999) 189 F.3d 1099; *United States v. Fike* (5th Cir. 1996) 82 F.3d 1315, 1320.)

iv. **The potential juror's lack of disclosure**. (*People v. Diaz* (1984) 152 Cal.App.3d 926, 932; see *In re Hitchings* (1993) 6 Cal.4th 97, 112; *Mitleider v. Hall* (9th Cir. 2004) 391 F.3d 1039, 1041-1045, 1048-1051 [**potential juror apparently not honest**].)

v. **The potential juror appeared to be a non-conformer**. (*Purkett v. Elem* (1995) 514 U.S. 765, 769 (per curiam) [**long**

hair]; *People v. Ayala* (2000) 24 Cal.4th 243, 261; *People v. Howard* (1992) 1 Cal.4th 1132, 1208; *People v. Wheeler* (1978) 22 Cal.3d 258, 275.) (*People v. Ward* (2005) 36 Cal. 4th 186, 202)

vi. **Lack of life experiences**. (*People v. Sims* (1993) 5 Cal.4th 405, 429; *People v. Perez* (1994) 29 Cal.App.4th 1313, 1328; *Mitleider v. Hall* (9th Cir. 2004) 391 F.3d 1039, 1041-1045, 1048-1051 [**young and immature**].)

vii. **The potential juror's occupation**. (*People v. Young* (2005) 34 Cal.4th 1149, 1174 [**counselor who has testified before in other sex assault cases and one who was an insurance claims specialist**]; *People v. Howard* (1992) 1 Cal.4th 1132, 1155-1156 [**non-practicing registered nurse**]; *People v. Landry* (1996) 49 Cal.App.4th 785, 790 [**youth services**]; *People v. Barber* (1988) 200 Cal.App.3d 378, 394; *United States v. Thompson* (9th Cir. 1987) 827 F.2d 1254, 1260.)

viii. **Reluctance to be a juror**. (*People v. Walker* (1998) 64 Cal.App.4th 1062, 1070; *Mitleider v. Hall* (9th Cir. 2004) 391 F.3d 1039, 1041-1045, 1048-1051.) (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**].)

ix. **Eagerness to be a juror**. (*People v. Ervin* (2000) 22 Cal.4th 48, 76.)

x. **Hesitance in applying the death penalty**. (*People v. Panah* (2005) 35 Cal.4th 395, 441; *People v. Smith* (2005) 35 Cal.4th 334, 347.)

xi. **Hesitance, Transient Background, and Grandmotherly 'Persona.'** (*Boyde v. Brown* (9th Cir. 2005) 404 F.3d 1159, 1170.)

xii. **Body language can be proper grounds, at least if there is a sufficient record to support the prosecutor's observations.** (*People v. Elliott* (2012) 53 Cal.4th 535, 569-570 [**Juror failed to make eye contact with anyone, dressed informally, and had an unconventional hairstyle**]; (*People v. Ward* (2005) 36 Cal.4th 186, 202 [**hostility toward prosecutor; though record is silent, other than the prosecutor's assertions, there is no evidence to contradict it**]; *People v. Reynoso* (2003) 31 Cal.4th 903, 919; *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1125-1126 [**hostile look at prosecutor**] *People v. Ervin* (2000)

22 Cal.4th 48 [**nervousness during voir dire**]; *People v. Turner* (1994) 8 Cal.4th 137, 170 [**potential juror won't look prosecutor in the eye**]; *People v. Johnson* (1989) 47 Cal.3d 1194, 1220 [**shy**][**sleepy**]; *People v. Dunn* (1995) 40 Cal.App.4th 1039, 1047; *People v. Perez* (1994) 27 Cal.App.4th 1313, 1330 [**inappropriate laughter**]; *Mitleider v. Hall* (9th Cir. 2004) 391 F.3d 1039, 1041-1045, 1048-1051; *Williams v. Rhoades* (9th Cir. 2004) 354 F.3d 1101 [**uncorroborated assertion by prosecutor of the potential juror's body language enough for affirmance because of deferential standard of review**]; but see *McClain v. Prunty* (9th Cir. 2000) 217 F.3d 1209 [**implied body language not enough without the prosecutor stating the reason**]; *Turner v. Marshall* (9th Cir. 1997) 121 F.3d 1248, 1254 [**cannot infer demeanor when prosecutor never said so**]; *United States v. Power* (9th Cir. 1989) 881 F.2d 733, 740 [**fidgety and inattention**]; *United States v. Changco* (9th Cir. 1993) 1 F.3d 837, 840 [**passive and inattentive**].) (*Rice v. Collins* 546 U.S. 333 (2006) [**rolling of eyes, not seen by trial judge**].)

1. Caution: Body language can be a dangerous area if the record does not support the reasons you are giving for the excuse. Be sure that you make a record of not only what body language or demeanor you observed but *why* this was important to you and how it affected your decision to excuse the juror. Further, try not to rely solely on body language or demeanor when excusing a cognizable class juror. (See, *People v. Long* (2010) 189 Cal.App. 4th 826) [**record did not support prosecutors reasons for excusing juror and judge did not make a "sincere and reasoned" attempt to evaluate the prosecutor's reasons**]). (*People v. Jones* (2011) 51 Cal.4th 346) [**Prosecutor gave specific and detailed reasons for challenges based upon body language and demeanor**]).
2. *Practice Tip*: If you have a cognizable class juror who is nonverbally communicating in a way that concerns you (i.e. facial expressions, arms folded, sighing, etc.) ask them about it. For example, you might say, "Juror #2, I noticed that while Juror #8 was answering the last question, you had a look on your face that I interpreted as disagreement. Am I correct about that? Would you like to be heard?" If you do this in a respectful way, you accomplish the goal of putting the fact that you noticed it

on the record. If you decide to kick this person later and get challenged, you can refer the Court back to this as one of the reasons you kicked the juror.

xiii. **Bilingual Juror Who Won't Defer to Court Translator.** (*Hernandez v. New York* (1991) 500 U.S. 352, 356-357) CAUTION – Be careful when kicking bilingual jurors as it could be seen as a cover for discrimination. (*See, People v. Gonzales* (2008) 165 Cal.App.4th 620)

xiv. **Intelligence.** (*People v. Arias* (1996) 13 Cal. 4th 92, 137-139)

xv. **Sympathetic to defendant.** (*People v. McKinzie* (2012) 54 Cal.4th 1302, 1321-1322) [**fact juror had been arrested for domestic violence was proper basis to challenge because 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. Mayfield* (1997) 14 Cal. 4th 668, 724-726)

xvi. **Desire for next juror.** (*People v. Jones* (2011) 51 Cal.4th 346, 367) [**challenge upheld where prosecutor believed he had even better potential jurors who had not been called**]; (See also, *People v. Alvarez* (1996) 14 Cal. 4th 155, 194-195). But see, (*People v. Cisneros* (2015) 234 Cal.App.4th 111) [**Holding that preference for next juror *alone* is not enough. You must also articulate reasons for excusing the challenged juror.**]

xvii. **Because prosecutor wished to ask the potential juror more questions**. (*People v. Cleveland* (2004) 32 Cal.4th 704, 733.)

xviii. **Mistake**. (*Aleman* v. *Uribe* (9th Cir. 2013) 2013) [**prosecutor mistakenly transposed two jurors' information. Prosecutor helped by making a good record that he was "under the weather"**] (See *People v. Williams* (2013) 56 Cal.4th 630, 660-661 [**holding that, regardless of whether prosecutor challenged one juror under the mistaken belief she was a different juror, there was no *Batson-Wheeler* violation since the reason given for challenging the juror (hesitancy to impose the death penalty) would have provided valid basis for challenging different juror**].) (*People v. Gutierrez* (2002)

28 Cal.4th 1083, 1124 [**prosecutor misunderstood the juror's answer**]; *People v. Williams* (1997) 16 Cal.4th 153, 188-189; *United States v. Lorenzo* (9th Cir. 1993) 995 F.2d 1448, 1454-1455 [**time crunch**].) But see, (*Castellanos v. Small* (2014) 766 F.3d 1137) [**Prosecutor's stated reason was in error. It survived through the appellate courts as a mistake but the 9th Circuit ultimately found the prosecutor's error to be pre-textual.**]

xix. **Financial Hardship/Work Related Issues.** (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**]

3. **STEP 3** – "If a race neutral explanation is tendered, the trial court must then decide…whether the opponent of the strike has proved purposeful racial discrimination." (*Johnson v. California* (2005) 54 U.S. 162)
   a. "It is not until the third step that the persuasiveness of the justification becomes relevant – the step in which the trial court determines whether the opponent of the strike has carried his burden of proving purposeful discrimination." (*Purkett v. Elem* (1995) 514 U.S. 765, 768.) [**Burden of proof of is preponderance of the evidence**]
   b. "[W]e rely on the good judgment of trial courts to distinguish bona fide reasons for such peremptories from sham excuses belatedly contrived to avoid admitting acts of group discrimination." (*People v. Wheeler* (1978) 22 Cal.3d 258, 282; *People v. Johnson* (1989) 47 Cal.3d 1194, 1216; see *Purkett v. Elem* (1995) 514 U.S. 765, 768.)
   c. "This demands of the trial judge a sincere and reasoned attempt to evaluate the prosecutor's explanation in light of the circumstances of the case as then known, his knowledge of trial techniques, and his observations of the manner in which the prosecutor has examined members of the venire and has exercised challenges for cause or peremptorily…" (*People v. Hall* (1983) 35 Cal.3d 161, 167-168; See also, *People v. Silva* (2001) 25 Cal. 4th 345, 386)
   d. "In assessing credibility, the court draws upon its contemporaneous observations of the voir dire. It may also rely on the court's own experiences as a lawyer and bench officer in the community, and even the common practices of the advocate and the office that

employs him or her. [Citation.]" (*People v. Lenix, supra*, 44 Cal.4th at p. 613, fn. omitted, *quoting Miller–El v. Cockrell* (2003) 537 U.S. 322, 339.)

e. It is proper for a trial court, in evaluating the prosecutor's justifications, to consider the prosecutor's actions in excusing jurors in a *previous trial* and whether a prosecutor has kept members of the cognizable class at issue on the jury in a *prior trial.* (*People v. DeHoyos* (2013) 57 Cal.4th 79)

f. ***People v. Gutierrez* (2017) 2 Cal. 5th 1150**

   i. First time in 16 years that the California Supreme Court has found a *Batson Wheeler violation.*

   ii. "This case offers us an opportunity to clarify the constitutionally required duties of California lawyers, trial judges, and appellate judges when a party has raised a claim of discriminatory bias in jury selection." (*People v. Gutierrez* (2017) 2 Cal. 5th 1150, 1154.

   iii. Facts: Gutierrez and other defendants were all Sureño gang members in the Bakersfield area. V got into a fight with one of the defendants and then left. Other D's, including Gutierrez, got in a car and searched for V. When they found V, Gutierrez got out of the car and shot V multiple times. One of the co-D's from a gang subset in Wasco testified and provided this information. (*Id.* at 1155.)

   iv. Step One – Three Overview: Prosecutor struck ten Hispanic jurors out of sixteen peremptory challenges, four of those challenges to Hispanic jurors coming in a row. The defense made a *Batson/Wheeler* motion. The trial court found the existence of a prima facie case in that there was an inference of discrimination. (*Id.* at 1156.) The prosecutor gave reasons and the trial court found them to be race neutral. Defense motion was denied. The Court of Appeal upheld the denial of the defense motion. (*Id.* at 1157.)

      1. Step One: The trial court found that 10 out of 16 challenges to Hispanic jurors established a prima facia case.
      2. Step Two: The prosecutor gave reasons for the 10 strikes. 7 of the 10 were found to be race neutral. The Supreme Court identified error in three of the challenges but based the reversal only upon one and did not determine the other two.
         a. Wasco Juror – Teacher from Wasco. Divorced. No Kids. Ex is a correctional officer. Other

relatives in law enforcement. No connection to gangs.

b. Voir Dire of Wasco Juror by the prosecutor consisted of asking the juror whether she was aware of gangs in Wasco. She said "No". Prosecutor then asked if she lived in the Wasco area and Wasco itself to which she answered "Yes."
c. Prosecutor's reason for kicking the Wasco juror was that she was unaware of gangs in Wasco and by some of her other answers. He wasn't sure how she'd respond when she hears that the testifying co-D was from a Wasco gang.
d. The AG gave some reason that would explain the prosecutor's reasons for the kicks. While the Supreme Court agreed that those may have been valid reasons, they made it clear that those reason were NOT given by the prosecutor.
e. The Court stated, "[A] prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives." (*Id.* at 1159. *See also*, *Miller-El v. Dretke* (2005) 545 U.S. 231, 252(*Miller-El II*).)

3. Step Three: The Supreme Court found the prosecutor's reason for kicking all jurors to be neutral on their face. (*Id.* at 1168.) However, the Court found that although the trial court made a *sincere* attempt to evaluate the prosecutor's reason, it failed to make a *reasoned* attempt. (*Id.* at 1172.)

v. The Supreme Court also found that the Court of Appeal erred by refusing to do comparative analysis for the first time on appeal. (*Id.* at 1174.)

vi. The Court opinion illustrates what information they want the record to contain in a *Batson/Wheeler* challenge:

1. The court may only rule on reasons specifically and actually expressed by the attorney, and may not consider other, even obvious, reasons that the challenge is appropriate. So make sure you list all your reasons.
2. If a prima facie finding is made and the court proceeds to the second step of the analysis: the "neutral justification" stage, the issue is facial validity. The court states that the rationale need only be clear and

reasonably specific as to legitimate reasons for challenging the juror, but need not detail "why" the prosecutor kicked the juror. However, a deficient record was clearly part of the reason that Gutierrez was reversed.

3. The Court wants a significant record created at Step 3: evaluating the credibility of the reasons actually stated.

vii. Justice Liu's concurrence attempts to lay out the purpose of the rule established:

1. The ultimate issue is "whether it was *more likely than not* that the challenge was improperly motivated." (*Johnson v. California* (2005) 545 U.S. 162, 170, italics added.) This probabilistic standard is not designed to elicit a definitive finding of deceit or racism. Instead, it defines a level of risk that courts cannot tolerate in light of the serious harms that racial discrimination in jury selection causes to the defendant, to the excluded juror, and to public confidence in the fairness of our system of justice. (*Batson*, *supra*, 476 U.S. at p. 87; see *Miller-El*, *supra*, 545 U.S. at p. 238; *Powers v. Ohio* (1991) 499 U.S. 400, 412–414.)

G. Comparative Analysis

1. This term refers to the process by which courts will evaluate the reasons given for the challenge of a member of a cognizable class. The courts will look for non-cognizable class jurors who were *not* challenged to see whether the reasons would apply equally.
2. For example, if a prosecutor challenged an African American juror who was employed as a teacher and gave the reason, "Judge, I always excuse teachers." The court would then look to see whether the prosecutor failed to challenge any teachers who were not members of a cognizable class.
3. History - Federal Courts approved of comparative analysis in *Turner v. Marshall* (9th Cir. 1997) 121 F. 3d 1248. California rejected comparative analysis in *People v. Landry* (1996) 49 Cal.App.4th 785. *People v. Jones* (1997) 15 Cal. 4th 119. However, things began to change in 2003 with *Johnson*. Then in 2005, the U.S. Supreme Court decided *Miller-El v. Dretke* (2005) 545 U.S. 231 using comparative analysis in the decision.
4. ***Snyder v. Louisiana* (2008) 552 U.S. 472** – In *Snyder,* the U.S. Supreme Court found that the prosecutors race neutral reasons for excusing a black juror were implausible and were reinforced by the prosecutor's acceptance of white jurors who disclosed conflicting obligations similar to the excused juror. (*Id.* at 483-484). The Court held that a comparative analysis was appropriate since "the shared characteristic, i.e., concern about serving on the jury due to conflicting obligations, was thoroughly explored by the trial

court when the relevant jurors asked to be excused for cause." (*Id.* at p. 483)

5. ***People v. Lenix* (2008) 44 Cal. 4th 602** – Comparative Analysis is alive in California.
    a. "If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson's* third step." (*Id.* at p. 621)
    b. In reviewing the plausibility of a prosecutor's reasons for striking a juror, an appellate court can consider various kinds of evidence, including a comparison of panelists' responses. (*Id.* at p. 622)
    c. Failing to engage in comparative juror analysis for the first time on appeal unduly restricts review based on the entire record." (*Id.* at p. 622) "Thus, evidence of comparative juror analysis must be considered in the trial court and even for the first time on appeal if relied upon by defendant and the record is adequate to permit the urged comparisons." (*Id.* at p. 622)
    d. The trial court has a duty to "assess the plausibility" of the prosecutor's proffered reasons for striking a potential juror, "in light of all evidence with a bearing on it." (*Id.* at p. 625) Trial courts "must evaluate the demeanor of the prosecutor in determining the credibility of proffered explanations, and the demeanor of the panelist when that factor is a basis for the challenge." (*Id.* at p. 625)
    e. It should be discernible from the record that "1) the trial court considered the prosecutor's reasons for the peremptory challenges at issue and found them to be race-neutral; 2) those reasons were consistent with the court's observations of what occurred, in terms of the panelist's statements as well as any pertinent nonverbal behavior; and 3) the court made a credibility finding that the prosecutor was truthful in giving race-neutral reasons for the peremptory challenges. (*Id.* at pp. 625-626)
    f. "As to the second point, the court may not have observed every gesture, expression or interaction relied upon by the prosecutor. The judge has a different vantage point, and may have, for example, been looking at another panelist or making a note when the described behavior occurred. But the court must be satisfied that the specifics offered by the prosecutor are consistent with the answers it heard and the overall behavior of the panelist.
    g. The record must reflect the trial court's determination on this point (see *Snyder*, supra, at p. 460), which may be encompassed within the court's general conclusion that it considered the reasons proffered by the prosecution and found them credible." (*Id.* at pp. 625-626)

h. The court observed that comparative juror analysis is a form of circumstantial evidence (*Id.* at p. 622) and that a reviewing court must be careful not to accept one reasonable interpretation to the exclusion of other reasonable ones when reviewing the circumstantial evidence supporting the trial court's factual findings in a *Batson/Wheeler* holding. "If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also be reasonably reconciled with a contrary finding does not warrant a reversal of the judgment." (*Id.* at pp. 625-626)
    i. Comparative Analysis will only be considered for the first time on appeal at the *Third* Step. (*See, People v. Clark* (2016) 63 Cal.4th 522, 568 [Declining the defense invitation to engage in comparative analysis for the first time on appeal at the first step of *Batson*.])
i. "Positive" Comparative Analysis
    i. This term refers to the idea of using comparative analysis to support a challenge of a member of a cognizable class by comparing other similarly situated non-cognizable class jurors who were also challenged.
    ii. (*Rice v. Collins* (2006) 546 U.S. 333, 341 [**prosecutor struck a white juror with the same characteristics of a cognizable class juror she struck**]; (*Briggs v. Grounds* (2012) 682 F.3d 1165 [**prosecutor struck at least on non-African American who indicated they would hold the prosecution to a higher standard of proof**]).

V. Practical Issues in Dealing with *Batson/Wheeler* Motions
A. Realize that a challenge will likely come at some point during jury selection and be ready to deal with it. It should go without saying, but ***NEVER*** excuse a juror on the basis of race, ethnicity, religion, gender etc…Question all jurors you plan to challenge. Desultory (non-substantive) questioning does not count.
B. Be prepared to rebut the prima facie case. (*See,* pp. 4-6)
C. Assume that a prima facie case will be made and be prepared to give race neutral reasons for excusing the juror. While peremptory challenges are often based on instinct and it can sometimes be hard to articulate the reason for removing a juror, "a prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives." (*People* v. *Lenix* (2008) 44 Cal.4th 602, 624.) Prosecutors should "provide as complete an explanation for their peremptory challenges as possible." (*People* v. *Lenix* (2008) 44 Cal.4th 602, 624.)
D. If you can't recall specifically why you excused a juror, it is better to ask for a "time out" so that you may review the transcript/recording of the juror's answers. (See *Lewis v. Lewis* (9th Cir. 2003) 321 F.3d 824 [suggesting that counsel can be

particularly helpful in assisting the court at the third step of *Batson* "when afforded the opportunity to review a transcript of the jury selection proceedings"].)

E. If judge finds no prima facie case, insist that the finding is placed on the record. Then state your reasons anyway. But, DO NOT give reasons unless and until the court specifically finds no prima facie case. Giving reasons without a specific finding on the first prong will constitute an implied finding of a prima facie case. *People v. Arias* (1996) 13 Cal. 4th 92; *People v. Gutierrez* (2002) 28 Cal. 4th 1083. *People v. Scott* (2015) 61 Cal.4th 363.

F. Mixed Motive – This term is used to refer to the situation that arises when a prosecutor give several reasons for the kick. Some might be legitimate neutral reasons and at least one is based on a cognizable class. *People v. Douglas* (2018) 22 Cal. App. 5th 1162. **[Case reversed where prosecutor kicked only two openly gay jurors and gave both neutral and discriminatory reasons for the kicks].** Although there is a split of authority where using mixed motives are per se reversible, the better practice is to not, under any circumstances, use race as a determining factor in your jury selection.

G. Trial Tips
    1. Create a Good Record
        a. The prosecutor should make sure the following is discernible from the record:
            i. "1) The trial court considered the prosecutor's reasons for the peremptory challenges at issue and found them to be race-neutral. And the trial court made a sincere and reasoned attempt to evaluate the reasons given;
            ii. 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.)
    2. Obtain a Transcript of Voir Dire Before Making Challenges
        a. In certain situations, a prosecutor may not recall or have accurate notes regarding the responses of a juror he or she wishes to challenge.
        b. In those cases, it is appropriate and recommended that the prosecutor ask for read back of the juror's responses. (*See Lewis v. Lewis* (9th Cir. 2003) 321 F.3d 824)
    3. Ask Court to Note the Final Jury Composition
        a. 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"].)

   b. 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"].)

4. Save your notes. If case is reviewed later, voir dire may be an issue. Always save your notes so that if asked, you are better able to recollect why you may have challenged a specific juror.
   a. At remand hearing, the prosecutor does NOT have to state reasons under oath. (*People v. Kelly* (2008) 162 Cal.App.4th 797)
   b. At remand hearing, the prosecutor does NOT have to turn over original voir dire notes. (*People v. Kelly* (2008) 162 Cal.App.4th 797)
   c. At remand hearing, prosecutor cannot be cross-examined by the defense. (*People v. Kelly* (2008) 162 Cal.App.4th 797)
   d. "I don't recall" May or May Not Fly – (*Paulino v. Harrison* (9th Cir. 2008) 542 F.3d 692); (But see, *Yee* v. *Duncan* (9th Cir. 2006) 463 F.3d 893.) [Notwithstanding the inability to recall reason for excusing one cognizable class juror, totality of prosecutor's responses regarding other excused jurors did not evidence a discriminatory motive].)
   e. If you use shorthand, make sure you define your terms. Don't make a reviewing court guess at what you meant. (*See, Foster v. Chatman* (2016) 136 Sup.Ct. 1737 [Murder conviction reversed for third step *Batson* violation. Very bad facts that we hope to never see. However, it's instructive on the issue of the clarity, or lack thereof, of the prosecutor's notes.])

H. Remedies

1. *Wheeler-Batson* error is reversible per se. (*People v. Wheeler* (1978) 22 Cal.3d 258, 283; see *Miller-El v. Dretke* (2005) 545 U.S. 231)
2. Step One Error: When the trial court erroneously finds there was not a prima facie case, the matter is often remanded for prosecutor to state reasons for peremptory challenge. (*Batson v. Kentucky* (1986) 476 U.S. 79, 100; *People v. McGee* (2002) 104 Cal.App.4th 559, 571, 573 [remand to permit prosecutor give reasons].)
    a. This remedy has been criticized for two reasons. First, the long passage of time makes it nearly impossible for the prosecutor to genuinely remember the real reason. (*People v. Hall* (1983) 35 Cal.3d 161, 171 [pointless to remand for the prosecutor to give a reason 11 years later]; *People v. Allen* (2004) 115 Cal.App.4th 542, 553-554, fn. 10 [remand for new trial, not for the prosecutor to give reasons, because occurred three years ago]; see also *People v. Ayala* (2000) 24 Cal.4th 243, 297, fn. 8 (conc. opn. of George, C.J.); *People v. Robinson* (2003) 110 Cal.App.4th 1196, 1208 [remand for the prosecutor to give the reason but retrial if it could not recall]; *People v. Williams* (2000) 78 Cal.App.4th 1118, 1130 [on remand, the court must first determine if it can adequately address the issue after the delay]; *United States v. Alcantar* (9th Cir. 1990) 897 F.2d 436, 438-439.)
    b. Second, this procedure is subject to a prosecutor trying to invent more legitimate reasons after the fact. (See, e.g., *Miller-El v. Dretke* (2005) 545 U.S. 231 [prosecution's reasons after the fact "reeks of afterthought"]; *Miller-El v. Cockrell* (2003) 537 U.S. 331, 343 [reasons given after trial "was subject to the usual risks of imprecision and distortions from the passage of time"]; see also *Johnson v. California* (2005) 545 U.S. 162, quoting *Paulino v. Castro* (9th Cir. 2004) 371 F.3d 1083, 1090 ["it does not matter that the prosecution might have had good reasons . . . [w]hat matters is the real reason they were stricken"].)
3. Step Three Error: When the trial court fails to sustain motion after the prosecutor gives reason, error normally requires new venire. (*People v. Wheeler* (1978) 22 Cal.3d 258, 283; see *Miller-El v. Dretke* (2005) 545 U.S. 162). However, the defendant and the trial court can stipulate to a different remedy. (*People v. Willis* (2002) 27 Cal.4th 811, 821-824 **[with consent of movant, can use other remedies such as sanctions, reinstating removed jurors or doing challenges at sidebar];** *People v. Overby* (2004) 124 Cal.App.4th 1237, 1244-1245 **[defendant not objecting to judge re-seating the excused juror indicates consent to this remedy].** (See *People v. Mata* (2013) 57 Cal.4th 178) **[holding that**

the trial court may reseat an improperly challenged juror if affected counsel either expressly or implicitly consents]

4. Consequences
    a. If the court grants a *Batson/Wheeler* motion at trial and employs one or more of the remedies discussed, that is arguably a “sanction”.
        i. Court must notify the bar of any judicial sanctions against an attorney (Business & Professions Code §6068(a) (3)).
        ii. Attorney must self-report any judicial sanction (Business & Professions Code §6068(o) (3)).
        iii. However, reporting will likely not be required unless the conduct is egregious.
    b. If the trial court erroneously denies a *Batson/Wheeler* motion at trial and the case is reversed.
        i. Court must notify bar whenever there is a reversal. (Business & Professions Code §6086.7(b) (2)).
        ii. Attorney must notify bar whenever reversal is based in whole or in part upon misconduct of the attorney. (Business & Professions Code §6068(o) (7)).

VOIR DIRE IN DOMESTIC VIOLENCE AND STALKING CASES

Definition

- "Voir Dire" is a legal phrase from the Anglo Norman language (Latin: verum dicere), meaning "to say what is true, what is objectively accurate or subjectively honest in content or both."

The Law

The procedures for jury selection are set out in:

California Code of Civil Procedure §§ 223 et seq.

California Rules of Court §§ 4.200 et seq.

Case Law

CA Rule of Court § 4.200(a)

- The Court must conduct a conference with counsel to discuss:
  - A brief outline of the case
  - Names of witnesses
  - Plaintiff's theory of culpability
  - Defense theory (though the defense can decline to reveal their theory)
  - The procedures for deciding hardships and challenges for cause
  - Areas of inquiry during voir dire by the court and counsel and any time limits that the court is setting on voir dire
  - Number of alternates and the method of selection (traditional vs. six pack, etc.)
  - Procedure for making Wheeler-Batson objections

Code of Civ Proc § 223 and CA Rule of Court § 4.201

- The Court ***shall*** conduct an initial examination of prospective jurors.
- This examination may be conducted:
- Orally
- By written questionnaire; or
- By both methods

Code of Civ Proc § 223

- Each party has the right to question any and all prospective jurors by oral and direct questioning
- The Court still may limit such questioning by:
- Specifying the maximum time for the questioning of an individual juror and/or specifying the maximum aggregate time for each party's voir dire

Express Legal Purpose of Voir Dire

- "Examination of prospective jurors shall be conducted only in aid of the exercise of challenges for cause."
  - CA Code of Civil Procedure § 223

Grounds to Challenge a Juror for Cause

- General disqualification
- Actual Bias
- Implied Bias

General Disqualification

- Code of Civ Pro § 225(b)(1)(a)
- Examples
  - Residence
  - Convicted felon
  - Incompetent (i.e. crazy)
  - Cannot speak English
  - Not an American citizen

Actual Bias

- Code of Civ Pro § 225(b)(1)(c)
- defined as "the existence of the state of mind on the part of the juror in reference to the case, or to any of the parties, which will prevent the juror from acting with entire impartiality, and without prejudice to the substantial rights of any party."
- In other words, they can't be fair on domestic violence or stalking cases, or they can't be fair to the District Attorney's Office

Implied Bias

- Code of Civ Pro § 229(f)
- Defined as "The existence of a state of mind in the juror evincing enmity against, or bias towards, either party."

Nuts and Bolts

- Cause Challenges
  - The purpose of cause challenges is to eliminate jurors who cannot be fair and impartial. A judge will grant a cause strike if the judge has a reasonable doubt about the venire person's ability to be fair.

  - You have an **unlimited** number of cause challenges.

Nuts and Bolts

- Challenges for cause are exercised before parties exercise their peremptory challenges
- The standard for granting a challenge for cause is whether the views of the prospective juror would "prevent or substantially impair the performance of the juror's duties as defined by the court's instructions and the juror's oath." *California v. Boyette,* 58 P.3d 391, 413-414 (Cal. 2002); *California v. Crittenden,* 885 P.2d 887 (Cal. 1994).

Wheeler

- Whenever you challenge a venire person who is a member of a suspect or protected class, be prepared to provide the court with a logical reason to strike the venire person. The basis for your strike need not rise to the level of cause (or even come close), but it must be articulable and legitimate

Wheeler

- Peremptory challenges may not be used to remove a prospective juror on the basis of an assumption that a juror is biased on account of race, color, religion, sex, national origin, sexual orientation, or similar grounds.
  - CAL. CIV. PROC. CODE § 231.5 (Deering 2004).

The oath

- "Do you, and each of you, understand and agree that you will well and truly try the cause now pending before this court, and a true verdict render according only to the evidence presented to you and to the instructions of the court?"

Your turn to talk….

- **The statute is explicit that the only purpose of voir dire is to aid in the exercise of challenges for cause, and interpretative case law emphasizes that voir**

- **Voir dire is not properly used for indoctrinating prospective jurors on the lawyers' theories of the case, for questioning about the applicable law, or for exercising peremptory challenges**

Kicks

- You have a set number of preemptory challenges
- With respect to peremptory challenges, defendants in capital felony cases (those punishable by death or by a term of imprisonment for life) are entitled to 20 peremptory challenges and the prosecution is entitled to an equal number as the defense.
- In other felony and misdemeanor cases for which the offense charged is punishable with a prison term greater than 90 days, each side is entitled to 10 peremptory challenges (felony or misdemeanor.)

Kicks

- You may exercise your peremptory challenges on whomever you wish, provided you do not use them in a discriminatory manner.

JURY SELECTION- QUICK REFERENCE AUTHORITY:

Statutory law: CA Code of ***Civil*** Procedure (CCP)

CCP 223- Court conducts initial exam of jurors, followed by parties as it deems proper. Time limits can be imposed and questioning can be via oral inquiry, written, or combination of both. Shall be conducted "only in the aid of the exercise of challenges for cause".

Juror challenges:

1. Challenge for Cause **(*UNLIMITED* NUMBER OF CHALLENGES)**: **CCP 225**
   a. ***General disqualification***: **CCP 225(b)(1)(A)**
      1. Juror lacks statutory requirements to be eligible for jury duty: **CCP 203(a)**
         -Not a citizen of U.S., less than 18 years old, not a "domiciliary" of CA, not resident of jurisdiction where summoned (San Diego County), "convicted of malfeasance in office" or a FELONY (anybody) and whose civil rights not restored, not possessed of sufficient knowledge of English language (but not inability to understand English solely because of disability), currently serving as grand or trial juror in CA, and subjects of conservatorships.
      2. General catch-all for incapacity rendering unable to adequately serve: **CCP 228(b)**
   b. ***Implied bias***: **CCP 225(b)(1)(B**)- Refer to **CCP 229** for actual list
      -Eight statutory grounds (Includes some relationships to the parties and/or bias, opinions towards action)
      -Bias is inferred if juror is within list
   c. ***Actual bias***: **CCP 225(b)(1)(C)**
      -"[T]he existence of a state of mind on the part of the juror in reference of the case, or to any of the parties, which will prevent the juror from acting with entire impartiality, and without prejudice to the substantial rights of any party"
2. Peremptory Challenge
   a. No reason need be given: **CCP 226(b)** [but watch out for *Batson/Wheeler*!]
   b. How many peremptory challenges depends on punishment & # of defts:
      ONE DEFT =
      1. ***20*** if punishable by death or life imprisonment: **CCP 231(a)**
      2. ***6*** if punishable with maximum of one year or less: **CCP 231(b)**
      3. ***10*** for all other cases: **CCP 231(a)**

      MULTIPLE DEFTS =
      4. ***DEFENSE GETS 20 "JOINT" + 5 INDIVIDUAL FOR EACH DEFENDANT*** if punishable by death or life imprisonment: **CCP 231(a)**
         DA GETS SAME TOTAL AS ENTIRE DEFENSE TEAM
      5. ***DEFENSE GETS 6 "JOINT" + 2 INDIVIDUAL*** if punishable with maximum of one year or less: **CCP 231(b)**
         DA GETS SAME TOTAL AS ENTIRE DEFENSE TEAM
      6. ***DEFENSE GETS 10 "JOINT" + 5 INDIVIDUAL*** for all other cases: **CCP 231(a)**

DA GETS SAME TOTAL AS <u>ENTIRE</u> DEFENSE TEAM

c. Alternates: **<u>CCP 234</u>**- Single deft case = one per number of alternates to be seated (i.e. if you're going to have two alternates, you get two challenges). Multi-deft case = each deft gets one per number of alternates, DA gets same total number as entire defense team.
d. A pass does NOT count as a challenge (i.e. you don't burn a challenge by simply passing): **<u>CCP 231(d)(e)</u>**.

<u>Misc.</u>

Defense cannot use prohibited class characteristics (race) to kick jurors:
Georgia v. McCollum (1992) 505 U.S. 42, at p.59 [use *Batson/Wheeler*-type objection?]

<u>Timing</u>

1. Pre- jury selection conference- **<u>Rule 228.1</u>**
   Ground rules? How many jurors in the box? What topics will the judge cover? Time limits? Number of alternates? Any questions parties want judge to ask?
2. Jurors come up and clerk takes roll and panel is sworn: **<u>CCP 232</u>**
3. Judge will question jurors first: **<u>CCP 223</u>**
4. Defense will question second: **<u>CCP 226(d)</u>**
5. DA questions last
6. Peremptory challenges- DA goes first: **<u>CCP 226(d)</u>**
7. Select alternates- **<u>CCP 234</u>**

The Law and Rules of Voir Dire and Jury Selection

- Examination of jurors for challenges for cause- **UNLIMITED NUMBER**
- 10 non-life penalty/20 life cases
- Multiple defts?
- 10 or 20 "joint" + 5 for each deft
- *DA always gets same total as entire defense team*
- Defense questions first/People challenge first

Challenge for Cause

NOT QUALIFIED

- Not a U.S. citizen
- Under 18 years old
- Does not live in San Diego County (no vacation homesteaders)
- A convicted felon
- Not sufficient understanding of English
- Currently serving as grand/trial juror
- Subject of a conservatorship
- General catch-all for disability: CCP 228(b)

Challenge for Cause

Cause:

- Actual Bias
  - Inability to be impartial
- Implied Bias

Actual Bias

- Juror related to a party or witness
- Legal relationship to party or witness
- Previous jury relationship with p or w
- Financial outcome—except as taxpayer
- Unqualified opinion as to merits
- Death penalty issues
- Bias towards either party

Implied Bias

- Attitude towards a party
- Witness (cops, attorneys, doctors)
- Subject matter (DV, date rape, child)
- Mental health issues or system in general

Objections- CAN I OBJECT?

- **The question is not related to challenges for cause or to the intelligent exercise of peremptory challenges.**
- **The question attempts to indoctrinate jurors on the law.**
- **The question asks jurors to prejudge the evidence.**
- **The question tests juror's understanding of the law.**
- **Counsel is attempting to prejudice the jury for or against a particular party.**
- **Counsel is attempting to argue the case.**
- **Counsel is attempting to educate the jury panel to the particular facts of the case.**
- **Question is based on an incorrect statement of the law.**
- **Question is in improper form.**

Batson/Wheeler Rules

- "The use of peremptory challenges to remove prospective jurors on the sole ground of group bias" ***Wheeler***
- "The Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race" ***Batson***
- May be raised by either party
- Basic rule: There must be "an identifiable group distinguished on racial, religious, ethnic, or similar grounds – we may call this 'group bias'."

Cognizable Groups

- Race
- Ethnicity – (surnames)
- Religion –caveat: ***can't judge***
- Gender
- Sexual Orientation
- Disability…

Non Cognizable Groups

- Low income/poor/unemployed
- Less educated
- Blue Collar workers
- Battered Women
- Young Adults
- Age

Batson/Wheeler Three Prong Approach

- Moving party must make prima facie by showing that the totality of the facts gives rise to an ***inference*** of discriminatory purpose
- Once shown- the burden shifts to the other party to explain by offering race-neutral justifications
- ***Trial Court*** decides whether moving party has proved purposeful racial discrimination

United States v. Collins
9th circuit

- Drug case
- 1st African American juror was struck by defense
- Only remaining African American struck by Prosecutor
- Defense objected
- Prosecutor declined to give reason saying "no pattern:
- Court said no pattern
- 9th Circuit remanded for government to provide justifications

9th Circuit Instruction

- "…encourage prosecutors to state their reasons for peremptory strikes at the time of a Batson challenge…the burden of explaining the reasons for a challenge…is minimal. Judicial economy would be well served…in fact, prosecutors usually have good and permissible reasons for their challenges; refusing to state them can create unnecessary suspicion, as well as unnecessary litigation."

Comparative Analysis

- “If a prosecutor’s proffered reason for striking a black panelist applies just as well to an otherwise-similar non-black who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson’s* third step.”

Practical Tips

- Usually done at side-bar
- ***Professional*** defense attorney: "Your Honor, prior to Juror #2 leaving, can we discuss something at side-bar?"
- Unprofessional? Who knows…roll with it!
- Remain Calm
- Be thorough in your questioning
- Keep notes on each juror and why
- Give more than one reason
- Think about comparative analysis. Why are you keeping one teacher and not the other?

Practical tips

- **Make a record of non verbal reasons**
- **"There is more to human communication than mere linguistic content. On appellate review, a voir dire answer sits on a page of transcript. In the trial court, however, advocates and trial judges watch and listen as the answer is delivered. Myriad subtle nuances may shape it, including attitude, attention, interest, body language, facial expression and eye contact."** ***People v. Lenix*** **(2008) 44 Cal. 4th 602**

Neutral Justification

- Life experience
- Inability to understand
- Hung Jury
- Hostile Body Language
- Nervous
- Smiled at Defendant
- Good rapport w/ D atty
- Sympathetic looks to D
- Family members arrested

Neutral Justification

- Teachers are liberal
- Clothes/hair
- Non-responsive
- Age—youth is not a class
- Lack of seriousness
- Law Student
- Poor Grooming

Neutral Justification

- Lack of ability to understand legal concepts
- Battered woman
- Anti-death penalty
- Limited education
- Translation—would not follow
- Juror lives close to crime scene
- Hunch/Gut feeling/etc are valid- ***BUT WATCH OUT!***

Penalties and Remedies

Penalties

- B&P 6068© Appellate Court reports you
- B&P 6068(0)(3)—You report you
- B&P 6086.7(b)—reversal for prosecutorial misconduct requires report

Remedies

- Excuse the entire panel and start again?
- "Severe" monetary sanctions and/or
- With the consent of moving party, RESEAT the challenged juror *People v. Willis* (2002) 27 Cal.4th 811.

IF THIS IS HAPPENING TO YOU- CALL A TIME-OUT!

Wheeler/Batson vs. The Defense?!

- *Georgia v. McCollum* (1992) 505 U.S. 42
- p.59: "We hold the Constitution prohibits a criminal defendant from engaging in purposeful discrimination on the ground of race in the exercise of peremptory challeges."
- State demonstrates prima facie case…
- Defense must articulate racially neutral reasons…

Voir Dire

Applicable Law

Code of Civil Procedure section 190 et seq.

Rules of Court
4.200 Pre Voir Dire Conference

Judges shall meet with lawyers from both sides to:

i) understand the nature of the case and charges
ii) names of witnesses to be called at trial
iii) People's theories of culpability and defense theories
iv) Procedures for determining hardship and cause challenges
v) Areas that court will cover in VD

The California Rules of Court anticipate that the Court will conduct VD prior to either attorney questioning. The loose script is Rule of Court 8.5.

Request the Court to supplement VD to include personal questions to the jury.
e.g.: Has anyone or a family member or close friend been the victim of a sexual assault? Would they like to answer at side bar or in chambers?

4.201 Supplemental Examination of Jurors
i) In criminal trial, after completion of the initial examination, the court shall permit counsel to conduct supplemental questioning as provided in CCP 223.

Voir Dire By Attorneys

It is an abuse of discretion for a court not to conduct some VD or to limit the scope of VD so that an attorney could not reasonably ascertain prejudice in a venire member. *People* v. *Chapman* (1993) 15 Cal.App.4th 136.

CCP 223

1. Each attorney SHALL have the right to oral and direct questioning, BUT
2. Court MAY limit time given to attorneys for juror examination.
3. VD of any juror shall, where practicable, occur in the presence of the other jurors in all criminal cases, including capital cases.
4. Examination for CAUSE challenges

Definition of Challenge for Cause CCP 229

8 categories

1. Juror related to party or witness
2. Legal relationship with party or witness
3. Previous jury relationship with party or witness
4. Financial outcome (except as taxpayer)
5. Unqualified opinion as to merits of case based on knowledge of some facts of case. Eg.: Newspaper article formed basis of opinion in case. (*People* v. *Bittaker* (1989) 48 Cal.3d 1026.)
6. Enmity against, bias towards, either party.
   DDA previously prosecute prospective juror for misdemeanors. (*People* v. *Morris* (1991) 53 Cal.3d 152.)
7. Juror has an action pending which would utilize same jury.
8. Objection to death penalty.

Unlimited number of challenges for cause (CCP 230) and in cases where penalty is death or life 20 challenges per party, all other criminal matters 10. (CCP 231.)

JURY SELECTION---Death Penalty Views

A juror maybe excluded if his views would prevent or substantially impair the performance of his or her duties as a juror in accordance with his instructions and his oath. *Wainwright* v. *Witt* (1985) 469 U.S. 412, 424 , *People* v. *Ochoa* (1998) 19 Cal.4th 353, 443.

Specifically, the determinant is whether the juror's views about capital punishment would prevent or impair the juror's ability to return a verdict of death in the case before the juror. (*People* v. *Earp* (1999) 20 Cal.4th 1229, 1318.)

The court has discretion to deny all questioning by counsel when a prospective juror gives "unequivocally disqualifying answers," and may subject to reasonable limitation further VD of a juror who has expressed disqualifying answers. (*People* v. *Samayoa* (1997) 15 Cal.4th 1068, 1093.)

The juror's bias need not be proven with "unmistakable clarity." (*People* v. *Cummings* (1993) 4 Cal.4th 1233.

It is enough that the court be left with the definite impression that a juror could be unable to faithfully and impartially apply the law. (*People* v. *Rodrigues* (1994) 8 Cal.4th 1060, 1147.)

WHEELER MOTIONS

In *People* v. *Wheeler* (1978) 22 Cal.3d 258, the court held even pursuant to C.C.P. section 226(b) where no reason need be given for the exercise of a peremptory challenge, attorneys may not exclude a cognizable class of persons through the use of peremptory challenges, based solely on class membership.

Because this motions implicates your bar card, may require you to self report to the State Bar, may result in reversal of your hard-won conviction, it is extremely important to know the law and procedure related to this area.

The U.S. Supremes similarly held in *Batson* v. *Kentucky* (1986) 476 U.S. 79, that the equal protection clause forbids peremptory challenges of potential jurors solely on account of their race when defendant is a member of that race.

This situation is not triggered based upon "systematic" exclusion of a cognizable class. It may be triggered by one challenge. *People* v. *Fuentes* (1991) 54 Cal.3d 707, 716, fn 4. It is NEVER acceptable to base peremptory challenges on group bias.

PROCEDURE

The Motion must occur prior to the jury being sworn. If the jury is sworn, the motion is untimely. (*People* v. *Perez* (1996) 48 Cal.App.4th 1310. A motion prior to swearing alternates is timely as to the entire panel. (*People* v. *Rodriguez* (1996) 50 Cal.App.4th 1013.

The following procedure was set forth in WHEELER,

1. Proponent needs to make a complete record of the circumstances demonstrating the opponent's improper exercise of peremptory challenges.
2. Proponent must establish that the persons excluded are members of "cognizable group within the meaning of the representative cross-section rule.
3. The proponent must establish that there is a strong likelihood that such persons are being challenged because of their group association, rather than because of specific bias.
4. The court must then determine whether a "prima facie" case has been made (whether a reasonable inference arises that peremptory challenges are being used on the ground of group bias alone.

   a. If there is no finding of a prima facie showing, the motion is denied and jury selection continues.
5. If the court finds that a showing has been made, the burden shifts to the opposing party to rebut the inference and justify the exercise of the alleged offending peremptory challenges and show that those jurors were excused based on a perceived specific bias of the individual juror.
   a. If the court is satisfied with explanation, the motion is denied and jury selection continues.
6. If the court finds the justification unsatisfactory, the motion is granted and we have a problem.

WHAT IS A "GROUP"

The definition of a cognizable group has expanded to include the following associated people:

African-Americans---*People* v. *Wheeler* 22 Cal.3d 258

Hispanics---*Hernandez* v. *New York* (1991) 111 S.Ct. 1859

Mexican-American—*Castaneda* v. *Partida* (1977) 430 U.S. 482

Spanish surname—*People* v. *Sanders* (1990) 51 Cal.3d 471

Native Americans—*U.S. v. Roan Eagle* (1989) 867 F.2d 436, Cert denied 490 U.S. 1028

Italian Americans—*U.S. v. Biaggi* (1989) 673 F. Supp. At 101 Contra *U.S. v. Bucci* Bucci 839 F.2d 825

Caucasians—*People* v. *Williams* (1994) 26 Cal.App.4th Supp.1.

Religious Affiliation (Jews)—*People* v. *Johnson* (1989) 47 Cal.3d 1194

Gender—*J.E.B. v. Alabama* (1994) 511 U.S. 127,

Men—*People* v. *Cervantes* (1991) 223 Cal.App.3d 323

Women—*DiDanato* v. *Santini* (1991) 232 Cal.App.3d 721

Gays and Lesbians—*People* v. *Garcia* (1999) 77 Cal.App.4th 1269; Cal.Code Civ. Proc. 231.5

NOT A GROUP

Over 70—*People* v. *McCoy* (1995) 40 Cal.App.4th 778

Youth—*People* v. Marbley (1986) 181 Cal.App.3d 45

Uneducated—*People* v. *Estrada* (1979) 93 Cal.App.3d 76; N.B. Other jurisdictions have viewed education and economic status to be intertwined with group bias and viewed more cautiously by the courts in evaluating your justification.

Poor English—*People* v. *Lesara* (1988) 206 Cal.App.3d 1304

Low Income—*People* v. *Johnson* (1989) 47 Cal.3d 1194

Ex-felon—*People* v. *Karis* (1988) 9 Cal.4th 612

Resident Alien—*People* v. *Beeler* (1995) 9 Cal.4th 953

Battered Women—*People* v. *Macioce* (1987) 197 Cal.App.3d 262

Anti-death penalty—*People* v. *Monteil* (1985) 39 Cal.3d 910

Doubts re: Death Penalty—*People* v. *Turner* (1984) 37 Cal.3d 302

NEUTRAL JUSTIFICATIONS

Inability to understand—*People* v. *Barber* (1988) 200 Cal.App.3d 378

Hung Jury—*People* v. *Turner* (1994) 8 Cal.4th 137

Hostile body Language—*People* v. *Walker* (1988) 47 Cal.3d 605; N.B. in People v. Allen 104 Cal.App.4th review granted. Body Language was not found to be a valid explanation.

Juror appeared nervous, gave noticeable smile to D, rapport with defense counsel, gave sympathetic looks to D, would not look at prosecutor was o.k. to get rid of. *People* v. *Johnson* 47 Cal.3d 1194

Teachers are liberal—*People* v. *Barber* (1988) 200 Cal.App.3d 378

Not paying attention—*People* v. *Granillo* (1987) 197 Cal.App.3d 110

Laughing and joking around—*People* v. *Davis* (1987) 189 Cal.App.3d 1177

Law student—*People* v. *Chambie* (1987) 189 Cal.App.3d 149

Poor grooming—*Purkett* v. *Elem* (1995) 514 U.S. 765

Difficulty following instructions of court, accomplice liability—*People* v. *Allen* (1989) 212 Cal.App.3d 286

Rejected by P.D., traffic tix, divorce from cop husband—*People* v. *Hayes* (1990) 52 Cal.3d 577

Limited education and sophistication(complex case)—*People* v. *Charron* (1987) 193 Cal.App.3d 981

"Coors jacket" to court indicating lack of respect—*People* v. *Barber* (1988) 200 Cal.App.3d 378

Interpreter issues—*People* v. *Ortega* (1984) 156 Cal.App. 3d 63

Juror lived close to crime scene—*People* v. *Harvey* (1984) 163 Cal.App.3d 90

PRIMA FACIE SHOWING

The following factors are to be considered by the court at the time of a Wheeler motion:

1. Makeup of venire
2. Number of jurors who are members of group excused
3. Whether the 12 seated jurors include members of the group
4. Whether jurors share only one characteristic, group membership
5. Was juror questioned beyond basic info.

Determined on a case-by-case basis and great deference is given to trial court. It is presumed that the challenge exercised in proper manner. (*People* v.*Turner* (1994) 8 Cal.4th 137.)

NO SHOWING

Prima facie not shown where only offer was three of six challenged jurors by prosecutor had Hispanic surnames, but number of Hispanics remaining in venire. *People* v. *Davenport* (1995) 11 Cal.4th 1171.

No showing when only claim was prosecutor used two challenges on African-Americans and nothing in responses suggested they would not be suitable jurors. *People* v. *Buckley* (1997) 53 Cal.App.4th 658.

No showing where prosecutor excused one of two African-Americans on venire. *People* v. *Walker* (1998) 64 Cal.App.4th 1062.

SHOWING

Prosecutor challenged six black jurors, two black jurors were sworn on jury. The trial court denied the first four Wheeler motion and denied the fifth without prejudice. The court never ruled on the motion. The Supremes said that the trial court should have made a finding of a prima facie case and asked the prosecutor to justify. (*People* v. *Snow* (1987) 44 Cal.3d 216)

ADDRESSING THE MOTION

Observe and scrutinize all jurors.

Ask questions of every juror about whom you have suspicions.

KEEP NOTES ON EACH JUROR

a. Attitudes towards proceedings
b. Verbal and non verbal reactions to questioning
c. Attitudes toward the attorneys, judge, defendant.
d. Any factor relevant to being a member of a cognizable group.

These notes apply to all jurors. You may also wish to make a Wheeler motion.

When asked to justify your challenges, ARTICULATE exactly why you excused certain jurors.

Make sure there is a record as to why you excused jurors. There is some confusion as to whether you should make a record when the court does not find a prima facie case has been made. It is my opinion that you should attempt to get in the record evidence that is neutral. The appellate courts give great deference to the trial court on review. That deference is not absolute however. (See *People* v. *Allen* (2002) 101 Cal.App.4th 263, review granted.)

COMPARATIVE ANALYSIS

Comparative analysis is the practice of an appellate court comparing jurors left on the panel with jurors who were excused to determine whether they were "similarly situated." In other words, if they appear to share non-racial characteristics they the sole basis for challenge must be race. California case law clearly rejects this comparison. But the Ninth Circuit does not.

The U.S. Supreme Court has recently altered the framework of Wheeler challenges. In *Miller-El v. Cockrell* (123 S.Ct 1029.) Prosecutor excluded 10 of 11 African American jurors. The trial court, in post-trial proceedings found that the excuses were sufficiently credible and race-neutral; no disparate questioning of jurors was found, and the primary reason for exclusion was the jurors reservations about the death penalty.

On habeas, the federal district court deferred to the trial court. The Fifth Circuit denied his habeas. The U.S. Supremes then reversed and remanded for further proceedings. Why is this important? The types of analysis in this opinion are not followed in California. Most specifically the comparative analysis and disparate questioning.

The Court pointed to statistics in the jury selection. Over 90% of black jurors excused vs. 13% of nonblack jurors were struck. Comparative analysis of these jurors, (the questions asked and answers given) found that four nonblack jurors who were seated expressed almost the same concern about the death penalty as black jurors excused. Also, family background was examined and found that black jurors with the same family history as white jurors were excused. THIS WILL HAVE AN IMPACT IN CALIFORNIA.

The Court also looked to see whether the questioning of jurors was different. 53% of black jurors were read an explicit preamble of the death penalty procedure. 6% of white jurors were read the same preamble.

It is clear from the decision that there is a new day dawning in *Wheeler* litigation.

REMEDY

The former remedy for a grant of a Wheeler motion was dismissal of the entire venire. Jury selection would then start again. Now, with the agreement of the moving party, the juror who was struck may be reseated. *People* v. *Willis* (2002) 27 Cal.4th 811.

As if that remedy were not bad enough for the side that challenged the juror, the Supreme Court recommends "severe" monetary sanctions against the attorney who challenged the juror.

ETHICAL CONSEQUENCES

If the Appellate Court reverses your case, the court is required to report ANY judicial sanctions to the attorney to the State Bar. Business and Professions Code section 6086.7© You are also required to self report under section 6068(o)(3). A Wheeler motion granted at trial does not appear to require a report to the Bar.