"**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. "Both the state and federal Constitutions prohibit the use of peremptory challenges to exclude prospective jurors based on race or gender. Such a use of peremptories by the prosecution 'violates the right of a criminal defendant to trial by a jury drawn from a representative cross-section of the community under [both the state and federal Constitutions].'" People v. Bonilla (2007) 41 Cal.4th 313, 341. 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.

"*Batson* and *Wheeler* are intended to limit reliance on stereotypes about certain groups on exercising peremptory challenges. ... A party does not offend *Batson* or *Wheeler* when it excuses prospective jurors who have shown orally or in writing, or through their conduct in court, that they personally harbored biased views." People v. Lewis and Oliver (2006) 39 Cal.4th 970, 1016.

"The Constitutional interests *Batson* sought to vindicate are not limited to the rights possess by the defendant on trial, nor to those citizens who desire to participate in the administration of the law, as jurors. . . . Yet the harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded jurors to touch the entire community. Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice." Johnson v. California (2005) 545 U.S.162, 171-172 (162 L.Ed.2d 129; 125 S.Ct. 2410) citing *Batson at p. 87*.

The Supreme Court has stated that [f]irst, the defendant must make out a prima facie case by showing that the totality of the relevant facts gives 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 justification for the strikes (peremptory challenges). Third, 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) 545 U.S. 162, 168 (162 L.Ed.2d 129, 138; 125 S.Ct. 2410, 2416); People v. Cornwell (2005) 37 Cal.4th 50, 67; Batson at pp. 93-94. An "inference" is generally understood to be a "conclusion reached by considering other facts and deducing a logical consequence from them." Johnson, 545 U.S. at p. 168, fn. 4.

"[A] prima face case of discrimination can be made out by a offering *a* wide variety of evidence so long as the sum of the proffered facts gives rise to an inference of discriminatory purpose." Johnson, 545 U.S. at p. 169. "We declined (in *Batson*) to require proof of a pattern or practice because 'a single invidiously discriminatory governmental acts is not immunized by the absence of such discrimination in the

making of other comparable decisions.'" Johnson at p. 169, fn. 5.

"[A] defendant satisfies the requirements of *Batson's* first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred. . . . *Batson* ... explicitly stated that the defendant ultimately carries the burden of persuasion to prove the existence of purposeful discrimination. The burden rests with, and never shifts from the opponent of the strike." Johnson at p. 169-171 "The *Batson* framework is designed to produce actual answers to suspicions and inference that discrimination may infected the jury selection process. The inherent uncertainty present in inquiries of discriminatory purpose counsels against engaging in needless and imperfect speculation when a direct answer can be obtained by asking a simple question. ... The three-step process thus simultaneously serves the public purposes *Batson* is designed to vindicate and encourages prompt rulings on objections to peremptory challenges without substantial disruption of the jury selection process." Johnson at p. 173.

"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. 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 (reversed sub nom in Johnson v.. California (2005) 545 U.S. 162, (162 L.Ed.2d 129; 125 S.Ct. 2410); 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.

"And although a party may exercise a peremptory challenge for any permissible reason or no reason at all, 'implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination' (*Purkett v. Elem (1995) 514 U.S. 765, 768).*" People v. Huggins (2006) 38 Cal.4th 175, 227.

"So long as the trial court makes a sincere and reasoned effort to evaluate the

nondiscriminatory justifications offered, its conclusions are entitled to deference on appeal. In fulfilling this obligation, the trial court is not required to make specific and detailed comments for the record to justify every instance in which a prosecutor's nondiscriminatory reason for exercising a peremptory challenge is being accepted by the court as genuine. This is particularly true where the prosecutor's nondiscriminatory reason for exercising a peremptory challenge is based on the prospective juror's demeanor or similar intangible factors, while in the courtroom." People v. Ward (2005) 36 Cal.4th 186, 200 citing *People v. Reynoso (2003) 31 Cal.4th 903, 919.*

"As for the law, the rule in *Batson* provides an opportunity to the prosecutor to give the reason for striking the juror, and it requires the judge to assess the plausibility of that reason in light of all the evidence with a bearing on it. It is true that peremptories are often the subject of instinct, and it can sometimes be hard to say what the reason is. But when illegitimate grounds like race are in issue, 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. A *Batson* challenge does not call for mere exercise in thinking up any rational basis. If the stated reason does not hold up, it pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false." Miller-El v. Dretke (2005) 545 U.S. 231, 251-252 (162 L.Ed.2d 196; 125 S.Ct. 2317).

Miller-El conducted a comparative juror analysis of those jurors challenged based on other similarly situated non-challenged jurors and the California Supreme Court recently did the same in *People v. Ward (2005) 36 Cal.4th 186, 203-205.*

"The trial judge is best placed to consider the factors that underlie credibility: demeanor, context, and atmosphere. And the trial judge is best placed to determine whether in a borderline case, a prosecutor's hesitation or contradiction reflect (a) deception, or (b) the difficulty of providing a ration reason for an instinctive decision (based on a proper race neutral ground)." Rice v. Collins (2006) 546 U.S. 333, 343-344 (126 S.Ct. 969; 163 L.Ed.2d 824) (Breyer, J., concurring).

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.

- There is a presumption that challenges are being exercised in a constitutional manner. People v. Ward (2005) 36 Cal.4th 186, 200; 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.

This presumption is "suspended when the defendant makes a prima facie showing of the presence of purposeful discrimination but reinstated when the prosecutor makes a showing of its absence." People v. Avila (2006) 38 Cal.4th 491, 552 (quoting *People v. Alvarez (1996) 14 Cal.4th 155, 199).*

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.

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

"While the prosecutor did excuse two out of the three members of this group (African-American women), the small size of this sample makes drawing an inference of discrimination from this fact alone impossible. ... As a practical matter, however, the challenge of one or two jurors can rarely suggest a pattern of impermissible exclusion. (*People v. Harvey (1984) 163 Cal.App.3d 90, 111.)*" People v. Bell (2007) 40 Cal.4th 582, 598; see also People v. Bonilla (2007) 41 Cal.4th 313, 342-343.

"To be sure, the ultimate issue to be addressed on a *Wheeler-Batson* motion 'is not whether there is a pattern of systematic exclusion; rather the issue is whether a particular prospective juror has been challenged because of group bias.' (*People v. Avila [2006)] 38 Cal.4th at p. 549.*) But in drawing an inference of discrimination from the fact one party has excused 'most or all' members of a cognizable group (*Wheeler, 22 Cal.3d at p. 280*), a court finding a prima facie case is necessarily relying on an apparent pattern in the party's challenges. Although circumstances may be imagined in which a prima facie case could be shown on the basis of a single excusal, in the ordinary case, including this one, to make a prima face case after the excusal of one or two members of a group is very difficult." (Accord, *Wade v. Terhune (9th Cir. 2000) 202 F.3d 1190, 1198*)." People v. Bell (2007) 40 Cal.4th 582, 599, fn. 3.

"In the context of racial discrimination, we have stated that a *Wheeler* motion may sometimes be based on 'appearances,' without the need to 'establish the true racial identity of the challenged jurors; (*People v. Motton [(1985)] 38 Cal.3d at p. 604*), but sexual orientation is usually not so easily discerned from appearance. Without any definite indication that the challenged prospective jurors either were lesbians or that the prosecutor believed them to be such, no prima facie case of discrimination against lesbians as a group can be made. (See *In re Freeman (2006) 38 Cal.4th 630, 644-645* [*Wheeler-Batson* claim failed for insufficient showing that challenged prospective jurors either were Jewish or were thought to be so by the prosecutor].)'" People v. Bell (2007) 40 Cal.4th 582, 599-600 [defense failed to make a sufficient prima facie shown based defense proffer that "her physical appearance" and the fact that she had participated in

a gay rights march, "is involved with other feminist issues and reads women's literature" as to one juror and the other had a "non-traditional job" as a carpenter and locksmith and "reads women's issues"]

"Though not strictly required, it is the 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 (2007) 41 Cal.4th 313, 343 fn. 13; see also People v. Zambrano (2007) 41 Cal.4th 1082, 1105 fn. 3.

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. Christopher (1991) 1 Cal.App.4th 666; 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.

The standard of establishing a prima facie showing or purposeful discriminatory challenges is by a preponderance of the evidence. People v. Hutchins (2007) 147 Cal.App.4th 992 *(pet.for rev.pend'g).*

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.

"On Appeal, a trial court's ruling of the issue of discriminatory intent must be sustained unless it is clearly erroneous. The trial court has a pivotal role in evaluating *Batson* claims. Step three of the *Batson* inquiry involves an evaluation of the prosecutor's credibility, and the best evidence of discriminatory intent often will be the demeanor of the attorney who exercises the challenge.' In addition, race-neutral reasons for peremptory challenges often invoke a juror's demeanor (e.g., nervousness, inattention), making the trial court's first-hand observations of even greater importance. In this situation, the trial court must evaluate not only whether the prosecutor's demeanor belies a discriminatory intent, but also whether the juror's demeanor can credibly be said to have exhibited the basis for the strike attributed to the jury by the prosecutor. We have recognized that these determinations and credibility and demeanor lie peculiarly within the trial judge's province, and we have stated that in the absence of exceptional circumstances we would deter to the trial court." Snyder v. Louisiana (2008) 552 U.S. ___ (08 DAR 3757, 3759; 128 S.Ct. 1203)

Snyder v. Louisiana (2008) 552 U.S. ___ (08 DAR 3757, 3759; 128 S.Ct. 1203) [in capital trial prosecutor excused all prospective black jurors while leaving white jurors with similar issues on the jury; in excusing challenged juror prosecutor offer race-neutral reasons of nervousness and job issues; as to nervousness the Supreme Court refused to consider this as the trial court made no specific findings and hence the record was silent on this; as to the job issue, the Court noted that the trial court made inquiries and the job issue was resolved and another white juror had a greater job need;

"The implausibility of this explanation is reinforced by the prosecutor's acceptance of while jurors who disclosed conflicted obligations that appear to have been at least as serious as Mr. Brooks (the contested black juror)." (p. ___). "For present purposes, it is enough to recognize that a peremptory strike shown to have been motivated in substantial part by discriminatory intent could not be sustained based on any lesser showing by the prosecution." (p. ___)]

Rice v. Collins (2006) 546 U.S. 333 (163 L.Ed.2d 824, 126 S.Ct. 969)
[trial court's ruling that prosecutor's challenge to African-American juror was race-neutral and not the result of an unreasonable factual determination; prosecutor's reasons of striking African-American female was juror's age and hence might be too tolerant, being single, rolling her eyes in responses were not pretextual and not related to the case and prosecutor failed to strike similarly situated white jurors]

Johnson v. California (2005) 545 U.S.162 (162 L.Ed.2d 129; 125 S.Ct. 2410)
["more likely than not" standard employed by California is contrary to federal standard in determining prima facie showing of discriminatory jury selection (*Batson*); reversing *People v. Johnson (2003) 30 Cal.4th 1302*]

Miller-El v. Dretke (2005) 545 U.S. 231 (162 L.Ed.2d 196; 125 S.Ct. 2317)
[prosecutor's dismissal of potential jurors because there were African-Americans requires new trial; court systematically compared proffered reasons of African-American jurors with those of white jurors; prosecutor excused 9 of 10 seated African-American jurors; "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." (125 S.Ct. at p. 2325; see also People v. Avila (2006) 38 Cal.4th 481, 546[1]; Boyd v. Newland (9th Cir. 2006) 455 F.3d 897 (mod. 467 F.3d 1139) (appellate court should conduct "comparative juror analysis)); court also noted failure to engage in meaningful voir dire on a subject a party claims is important suggests the stated concern is pretextual (fn. 8)]

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

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1 **Watch for** *People v. Lenix (Rev.Gtd. 1-22-07; unpublished opinion) on the limited issue of "Must an appellate court perform a comparative juror analysis for the first time on appeal to evaluate the genuineness of the prosecutor's reasons for peremptorily challenging prospective jurors? (See People v. Avila (2006) 38 Cal.4th 491, 546; People v. Guerra (2006) 37 Cal.4th 1067, 1106.)"*

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; see also Duren v. Missouri (1979) 439 U.S. 357; United States v. Torres-Hernandez (9th Cir. 2006) 447 F.3d 699 (court may consider only jury-eligible Hispanics in determining whether they are underrepresented on grand jury venire)]

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. Howard (2008) 42 Cal.4th 1000,
* [African-American defendant challenged the prosecutor's excusing of two African-American jurors (P.T. a female; D.M. a male) and a Hispanic female juror (A.A.) which was denied as to all but A.A. which the court only implied found no prima facie showing which was upheld on appeal based on the juror's "flippant attitude toward the proceedings and suggesting he was trying to avoid jury service." (p. 1019) fn. 10
"The exercise of even a single challenge based on race is constitutionally proscribed. However, the existence of a discernible pattern in the use of challenges remains a factor a court may consider when determining whether a prima facie showing has been made. ... The challenge of one or two jurors, standing alone, can rarely suggest a pattern of impermissible exclusion. Because defense counsel provided no other basis for inferring discriminatory intent, the absence of a pattern was *

significant here." (p. 1018 fn. 10)]

People v. Kelly (2007) 42 Cal.4th 763, 777-781

[prosecutor originally accepted African-American prospective juror but then excused her and upon *Wheeler* challenge explained that she was a social worker who had indicated show would have difficulty "implementing the use of aggravating, mitigating factors" and that defendant had had early childhood problems without his father being around and prosecutor was concerned she would have empathy for the defendant supported the proper race neutral reason for excusing this juror;

"... the race of the victim, by itself, does not also establish a prima facie case of discrimination. ... The fact that the prosecutor accepted the jury panel once with both African-American jurors on it, and exercised the single challenge only after defense counsel exercised his own challenge, strongly suggests that race was not a motive behind the challenge. Moreover, the prosecutor's questioning of the prospective juror was probing, not desultory" (p. 780))]

People v. Tafoya (2007) 42 Cal.4th 147, 169

[held that trial court's comments about hardship which applied only to "poor" people was not error, noting "Even assuming that only poor persons were given hardship exclusions, a fact not proven here, persons with low incomes do not constitute a cognizable class." (citing *People v. Johnson (1989) 47 Cal.3d 1194, 1214*)]

People v. Zambrano (2007) 41 Cal.4th 1082, 1101-1118

[excusing 5 prospective African-American jurors, all who expressed reservations for imposing the death penalty did not violate *Wheeler*; and "Though they obviously did not hold extreme views, the seated jurors expressed attitudes significantly more favorable to the prosecution than the African-American jurors he excused." (p. 1109)]

People v. Hoyos (2007) 41 Cal.4th 872, 899-903

[prosecutor excusing three female jurors of Hispanic ancestry and the defendant was also Hispanic were supported by race neutral reasons (although the trial court did not find a prima facie showing, the court did not address this finding); "MA" stated she did not speak English well or understand many words; "LH" said she tended to favor LWOP; and "YM" had strong religious beliefs against the death penalty; and fact that most Hispanic women were against the death penalty was properly rejected (see generally *Lewis and Oliver 39 Cal.4th at p. 1016*)]

People v. Thornton (2007) 41 Cal.4th 391, 460-463

[using random selection process (PC §1089) to choose which of the already selected alternates to substitute; nothing required replacing sitting juror with alternate who was a member of the same equal protection group (here it was gender); prosecution was under no obligation to stipulate to a specific alternate and refusal did not raise a *Wheeler-Batson* issue]

People v. Bonilla (2007) 41 Cal.4th 313, 34_-350

[prosecution excusing both African-Americans on the 78 jury panel did not establish a prima facie showing: "... the small absolute size of this sample makes drawing an inference of discrimination from this fact alone

impossible." (p. 343) and race-neutral reasons were present to excuse both; one had a husband who had been convicted of felony offense and here father had been convicted of murdering her brother and the other had expressed hesitancy in imposing the death penalty in his questionnaire and to follow the law when asked by the court; defense also challenged the prosecution excusing three Hispanic female jurors which was rejected, in part because defense statistical argument provided "no basis at all to infer discrimination" (p. 344) and as to one of the women, the prosecutor did not even realize she was Hispanic; "Where a prosecutor is unaware of a prospective juror's group status, it logically follows he cannot have discriminated on the basis of that status." (p. 344); and challenge against striking woman (20 peremptories compared to 10 against men) where the final jury had 7 men and 5 women and court again rejected a statistical argument and noted final jury was very similar in percentage to original jury pool; and race neutral reasons existed included husband's prior felony conviction; evasive and equivocal answers about imposing the death penalty and LWOP; prior service on hung juries and would reserve the death penalty for "mass murderers or children killers"; expressed a greater desire to impose LWOP; described herself as "liberal" and described herself as a "Catholic" and the "Catholic Church stands against the death penalty"; and another's questionnaire was virtually blank on all questions about the criminal justice system and the death penalty (pp. 346-349); and comparative juror analysis not applied to this case (pp. 349-350)]

People v. Stevens (2007) 41 Cal.4th 182, 192-198

[excusing three different African-American jurors did not violate *Batson-Wheeler* where each expressed reservations in imposing the death penalty in the numerous killings of drivers on the freeway, many of whom were African-American; and *Miller-El* comparative analysis failed also]

People v. Lancaster (2007) 41 Cal.4th 50, 75-76

["Defendant also contends the trial court was required to seek reasons from the prosecutor for the peremptory challenges at issue, rather than offering its own explanations. ... As we explained in *People v. Cornwell*, 'once the trial concludes that the defendant has produced evidence raising an inference of discrimination, the court should not speculate as to the prosecutor's reasons – it should inquire of the prosecutor, as the high court directed.'"]

People v. Bell (2007) 40 Cal.4th 582, 596-600

[trial court did not err in finding no prima facie showing in prosecution excusing two African-American females, two Filipino-Americans and two women the defense claimed were lesbians]

People v. Williams (2006) 40 Cal.4th 287, 308-313

[prosecutor excusing 2 Hispanic and 1 African American prospective jurors did not violate *Wheeler*; after juror #1 who had "couple of DUIs" and stated in his questionnaire that "cops have attitudes because he feels they have too much power", *Wheeler* motion denied and trial court found no prima facie showing; then after juror #2 who was a 60 year old Black male, Air Force vet who had a large number of stepchildren and relatives

who had been in trouble with the law and been in prison again did not establish a prima facie showing; then #3, a Hispanic male, in his late 50s and was a postal carrier and appeared to be a fair person was excused resulting in the court finding a prima facie showing to which the prosecutor replied that the juror's "demeanor and the manner in which he answers questions struck me as an individual who was indecisive, and perhaps did not understand the questions; were valid race neutral reasons;

"... a trial court has no sua sponte duty to reexamine rulings on previous *Wheeler/Batson* motions once it determines that a prima facie case has been made as to one juror." (p. 311)]

People v. Lewis and Oliver (2006) 39 Cal.4th 970, 1008-1024

[prosecutor excusing 7 African American jurors did not violate *Batson*; #1 "L.W." had a half-brother who had been in and out of jail since age 15 and currently in, LW had been stopped by the police on a pretext and had a negative demeanor during voir dire; #2 "C.W." had trouble hearing and had a disabled daughter who might need help and as a prior crime victim thought the police response was "slow"; #3 "L.T." felt that justice was not served in the Rodney King case and when compared with the Reginald Denny case that the law applied differently based on race; #4 "L.B." had a brother that was currently confined for a pending robbery charge event though the prosecution did not have enough evidence to convict him; #5 "K.B." stated it would be difficult to served on a capital jury and could not be objective; #6 "V.H." had previously served on a rape jury that acquitted the defendant and personally had a son who had trouble with the law since he was 15 year old; and 7 "N.S." had a brother in prison which his brother would not say why and viewed the death penalty as no more serious punishment than LWOP because for a Black person a life sentence to prison would be like death according to what his brother had told him and thought Robert Alton Harris had gotten better treatment because he was white; these were all valid race neutral reasons for excusing the jurors and the court conducted an extensive "comparative analysis" under *Miller-El*]

People v. Stanley (2006) 39 Cal.4th 913, 935-945

[*Wheeler* motion properly denied for excusing African-American jurors in FMR capital case of African-American defendant; prosecutor stated that jurors excused for being "sympathetic to defendant" and court noted that several of these jurors were originally questioned weeks earlier and hence prosecutor's statement although not complete were supplemented by the court's own review of the original voir dire;

"It bears emphasizing that a match in the skin color between a defendant and a prospective juror does *not* preclude a peremptory excusal on grounds that the juror exhibited sympathy or bias either for or against the defendant who is of the same race. What *Batson* and *Wheeler* prohibit is excusal of a juror on the basis of 'group bias,' i.e., the *assumption* that a member of a particular group will, because of such membership, harbor particular attitudes or biases. A party does not offend *Batson* or *Wheeler* when it excuses prospective jurors who have shown orally or in writing, or through their conduct in court, that they

personally harbor biased views." (pp. 939-940)]

People v. Ledesma (2006) 39 Cal.4th 641, 677-681

[excusing 4 Hispanic jurors were supported by valid reasons where 2 were reluctant to impose the death penalty; one had prior convictions for brandishing and DUI and had several family member who were heroin addicts (narcotic use was an issue in this case) and a brother in prison; and the last one lacked "leadership" skills noting a quote from *People v. Johns 47 Cal.3d at p. 1220:* "If the panel as seated appears to contain a sufficient number of jurors who appear strong-willed and favorable to a lawyer's position, the lawyer might be satisfied with a jury that included one or more passive or timid appearing jurors. However, if one or more of the supposed favorable or strong jurors is excused either for cause or peremptory challenge and the replacement jurors appear to be passive or timid types, it would not be unusual or unreasonable for the lawyer to peremptorily challenge one of these apparently less favorable jurors even though other similar types remain."

Court also conduct a comparative analysis under *Miller-El* and did not find improper that other jurors who remained had traffic tickets as compared to the excused juror with brandishing and DUI priors; and challenge that trial court ruling on each of the prosecutor's reasons as they were stated instead of waiting and giving the defense an opportunity to argue against the reasons; "Even if it might have been better practice for the trial court to withhold its ruling until hearing all of the prosecutor's reasons, we find no basis for concluding that its ruling might have been different had it done so." (p. 680)]

People v. Johnson (2006) 38 Cal.4th 1096

[on remand from USSC, remand to trial court to conduct complete *Batson* analysis is appropriate remedy; agreed with remedy employed by Ninth Circuit in *Williams v. Runnels*, *Paulino v. Castro,* and *Fernandez v. Roe*]

People v. Avila (2006) 38 Cal.4th 491, 540-556

["This case raises the following question: once a trial court finds a prima facie case of group bias as to the excusal of one prospective juror, must it require the prosecutor to provide race-neutral explanations for all challenges made thus far to the members of the group in question, including those the court had ruled upon earlier? [W]e ... answer in the negative (and overrule *People v. McGee (2002) 104 Cal.App.4th 559*)." (p. 548) "Admittedly, a prosecutor's use of peremptory challenges to several prospective jurors in a particular racial or ethnic group may appear more suspect than if he or she exercised merely one. Accordingly, even if a defendant's *Batson/Wheeler* motion pertaining to the first prospective juror of a particular cognizable group excused is denied for a lack of a prima facie showing, he is likely to make one or more subsequent *Batson/Wheeler* motions after a prosecutor peremptorily challenges several more prospective jurors of that same group. And if a trial court finds a prima facie showing of group bias at a later point in voir dire, the court need only ask the prosecutor to explain each suspect excusal. Each suspect excusal includes the excusals to which the defendant is objecting and which the court has not yet reviewed." (p. 551; see also People v.

Phillips (2007) 147 Cal.App.4th 810) The presumption that a prosecutor uses his challenges in a constitutional manner is "suspended when the defendant makes a prima facie showing of the presence of purposeful discrimination but reinstated when the prosecutor makes a showing of its absence." (p. 552)]

People v. Huggins (2006) 38 Cal.4th 175, 226-236

[excusing 8 African-American prospective jurors upheld as both prosecutor and trial court engaged in "well-reasoned and sincere effort to evaluate the nondiscriminatory justifications the prosecutor offered" (p. 231); court went on to discuss the impact of *Miller-Eller v. Dretke* has on California appeals:

"In *Miller –El (cite)*, the Supreme Court said of peremptory challenges in state courts that choices to (excuse them are) subject to myriad legitimate influences, whatever the race of the individuals on the panel from which jurors are selected. These influences include matters that are often the subjects of instinct. The court cautioned, however, that 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. It further stated that failure to engage in any meaningful voir dire examination on a subject a party asserts it is concerned about is evidence suggesting that the stated concern is pretextual. In a similar vein, the court stated that the credibility of reasons given can be measured by how reasonable or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy. ... Finally, the *Miller-El* court thought it fitting to consider, albeit as a less significant factor than the side-by-side comparisons it undertook, the statistic that the State had peremptorily challenged 12% of qualified nonblack panel members, but eliminated 91% of the black ones." (p. 233)]

People v. Jurado (2006) 38 Cal.4th 72, 102-108

["By asking the prosecutor to explain the peremptory challenges, the trial court here implicitly found that defendant made a prima facie showing of impermissible discrimination in the exercise of peremptory challenges. Once the trial court ruled on the credibility of the prosecutor's stated reasons, the issue of whether the defense had made a prima showing became moot." (p. 104); here prosecutor's strikes against African-American woman were all supported by race-neutral reasons and trial court waiting until a recess to hearing the explanations which occurred after the jury was sworn was not prejudicial]

People v. Guerra (2006) 37 Cal.4th 1067, 1099-1109

[prosecution challenge of three African-American and Hispanic prospective jurors which were accepted by the trial court did not show a *Batson* violation; one juror (R.M.) was excused based on answer that a person's voluntary intoxication would automatically be considered a defense by him; another (L.B.) had a cousin that was treated unfairly by the police; comparative analysis of other jurors answers under *Miller-El* did not racially motivated when they discussed various aspects of

voluntary intoxication (not as emphatically as "R.M." expressed); Juror E.A. (Hispanic) had a sister in prison for 2nd degree murder and three counts of armed robbery and thus would be offended by the prosecution's theory that defendant was a "monstrous person" and should be put to death, and had also been not been hired by Santa Monica Police and instead works as a park ranger; Juror "O.B." (Hispanic) was a "traveling actor" which the prosecutor assumed meant he was unemployed and believed that minorities were treated unfairly by the criminal justice system and "did not like the thought of death" when asked about the death penalty; Juror "B.B." (African-American) believed "life is a precious gift" and the death penalty should be used "very carefully" and had witnessed a murder at the age of 12 and learned that everyone's life is important (strike upheld despite fact that prosecutor twice accepted the jury with "B.B." as one of the jurors); Juror "H.W." (African-American) stated she was against the death penalty except for the murder of someone close or a child, believed that LWOP was worse than the death penalty; and her religious denomination did not support the death penalty; see also People v. Jurado (2006) 38 Cal.4th 72, 107; Court also distinguished these facts from *Hernandez v. New York* where the court found that by offering an explanation the court must consider that a prima facie showing had been made; here the trial court heard all the factors and expressly found that no prima facie showing had been established (pp. 1103-1104)]

People v. Schmeck (2005) 37 Cal.4th 240, 266-277

[no *Batson* error for excusing Jewish prospective jurors; court assumed religion was a suspect class (citing to *Davis v. Minnesota (1994) 511 U.S. 1115* ("denial of pet. for cert., noting the Minnesota high court's observation that religious affiliation is not as self-evident as race or gender and that ordinary inquiry into a juror's religious affiliation and beliefs is irrelevant and prejudicial."), see also In re Freeman (2006) 38 Cal.4th 630, 643-645, People v. Gutierrez (2002) 28 Cal.4th 1083, 1122; also noted almost impossible to do *Miller-El* comparative analysis by stating "the number of Jewish persons who served on the jury or who were in the jury pool" (p. 274) and deferred to trial court's determination of credibility issues (citing *Hernandez 500 U.S. at p. 365; Batson at fn. 21*)]

People v. Gray (2005) 37 Cal.4th 168, 183-192

[in trial of African-American for the murder of elderly white woman, defendant objected to the removal of one of only 8 African-American of the 100 prospective jurors, the juror was elderly, Republican, Catholic, worked for the Department of Defense and raised in British Guyana and held moderate views on the death penalty, the prosecuted responded that juror's views on the death penalty were equivocal, but the trial court held defendant did not make prima facie showing; defense renewed its *Wheeler* motion when the prosecutor excused an African-American prospective alternates which the trial court again held did not constitute a prima facie showing; "... we conclude the exclusion of two African-American jurors and the retention of two failed to raise an inference of racial discrimination." (pp. 187-188) "Moreover, as noted above, although the prosecutor eventually challenged and had removed from the panel a

total of two African-Americans, two more remained. We conclude the removal of two African-American jurors in these circumstances failed to raise a reasonable inference of racial discrimination. (See *People v. Snow* (1987) 44 Cal.3d 216, 225 [that the prosecutor accepted a jury containing minorities "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, [although] it is not a *conclusive* factor"].)" (p. 188) [See also People v. Stanley (2006) 39 Cal.4th 913, 938 fn. 7)]

Despite the trial court not delineated the standard it applied; the California Supreme Court performed an independent legal review and found no *Batson* error(see *People v. Cornwell (2005) 37 Cal.4th 50, 72-74)*

And the defense argued that the proffered explanations violated *Wheeler* and invited the court to conduct a comparative analysis with other jurors' answers that the prosecutor kept; "*Miller-El* thus did not consider whether an appellate court must conduct a comparative juror analysis in the first instance, when the objector has failed to make a prima facie showing of discrimination, or whether an appellate court must conduct a comparative juror analysis for the first time on appeal, when the objector failed to do so at trial. As we explain, even if we were to compare the challenged jurors with jurors who were not excused, we would not find a prima facie showing of group bias existed. (See *Cornwell, supra*, 37 Cal.4th at pp. 71-72; *People v. Ward* (2005) 36 Cal.4th 186, 203.)" (p. 189); the court noted that the prosecutor had excused non African-American jurors and had passed and eventually left several African-American jurors on the panel; see also People v. Guerra (2006) 37 Cal.4th 1067, 1106-1109]

People v. Ward (2005) 36 Cal.4th 186, 199-205

[*Wheeler/Batson* challenge denied based on jurors hesitancy to impose the death penalty; demeanor of other jurors when answering *Hovey* questions and another jurors "unconventional" dress and demeanor toward the prosecutor; trial court also noted that 5 of the 12 accepted and sitting jurors were African-Americans and four of those five were women; "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, an appropriate factor for the trial court to consider in ruling on a *Wheeler* objection." (p. 203)]

People v. Roldan (2005) 35 Cal.4th 646, 699-703

[*Wheeler/Batson* motion properly denied for two strikes of African-American jurors based on one having a son in prison for non-violent gang activity; and another initially stating he was a juvenile "peace officer" but then admitting he was a group "supervisor" at a juvenile camp]

People v. Panah (2005) 35 Cal.4th 395, 438-442

[no *Wheeler/Batson* error in the prosecution for child murder in excusing #1: opposition to imposing the death penalty for intentional killings and had a negative experience with law enforcement; #2: daughter was the victim of a pending rape prosecution; #3: similar to #1 but gave conflicting statements; #4: religious scruples might make it difficult to impose the

death penalty and was under a doctor's care for stress; #5: expressed skepticism regarding the validity of psychiatric opinions and had pressing business and that "a child is precious"; #6: would never give the death penalty and LWOP would be a living hell and psychological tests who give insight in deciding penalty; #7: degree in psychology and was undergoing therapy for obsessive compulsive disorder, LWOP was better than the death penalty, her brother had been murdered and another brother had been arrested for DUI and theft.

"... each of these prospective jurors expressed some reservations or religious scruples about the death penalty and, while some of them nonetheless stated they could impose the death penalty, 'neither the prosecutor nor the trial court was required to take the jurors' answers at face value.' Even if these reservations or scruples were insufficient to challenge a prospective juror for cause, such skepticism nonetheless constitutes a gender-neutral reason for a peremptory challenge." (p. 441)]

People v. Smith (2005) 35 Cal.4th 334, 346-348

[African-American female juror who stated she felt sorry "a lot" for the defendant sitting in court and hesitated when asked if she could impose the death penalty were race neutral reasons; and other African-American female who opposed the death penalty and was concerned that an innocent man might be executed was also race neutral]

People v. Young (2005) 34 Cal.4th 1149, 1170-1174

[prosecution's excusing of all (3) African-American female prospective jurors was objected to but the trial court did not find a prima facie showing had been made; on appeal defense complained about 2 of the female jurors which the court held had given information that justified their being excused for valid grounds: Juror D.D. was a therapist who had testified for the prosecution in the past and the defense would be presenting "mental" issues in the penalty phase and subject to aggressive cross examination and her statement that crime had increased in part due to an "increase in the double standard of our government system." ; Juror V.S. was an insurance claims specialist who assisted attorney preparing for court

"When a trial court denies a *Wheeler* motion because the movant failed to establish a prima facie case of group bias, the reviewing court examines the entire record of voir dire for evidence to support the trial court's ruling. The ruling is affirmed if the record "suggests grounds upon which the prosecutor might reasonably have challenged the jurors in question." If the reviewing court concludes the trial court properly determined no prima facie case was made, it need not review the adequacy of the prosecutor's justifications, if any, for the peremptory challenges. (*People v. Farnam 28 Cal.4th at p. 135.*)" (pp. 1172-1173 (footnote omitted).)]

People v. Morrison (2004) 34 Cal.4th 698, 709-710

[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

[*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

[*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 Isaac 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

(reversed in part in *Johnson v. California (2005) 545 U.S. 162*, on the limited issue of the appropriate standard of review)

["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)]

<u>People</u> v. <u>Ayala</u> (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]

<u>People</u> v. <u>Box</u> (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)*]

<u>People</u> v. <u>Jenkins</u> (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]

<u>People</u> v. <u>Ervin</u> (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 "run 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; these were held especially race-neutral because both defendant and victims were white; ruling upheld on habeas Sims v. Brown (9th Cir. 2005) 425 F.3d 560 and the court applied a *Miller-El* comparative analysis to other jurors]

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 DDA; DDA 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 DDA 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; People v. Mooton (1985) 39 Cal.3d 596, 605-606; People v. Young (2005) 34 Cal.4th 1149, 1173 (but see conc.opn. of J. Brown, pp. 1236-1237)]

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 for 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, and 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."]

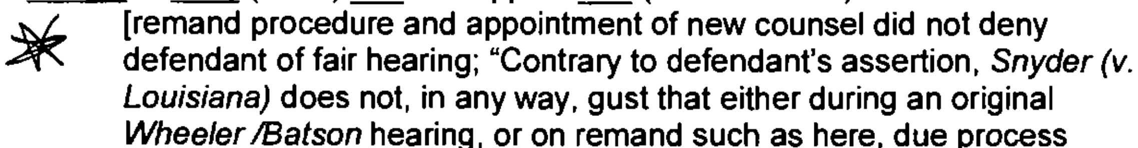
People v. Johnson (1989) 47 Cal.3d 1194, 1218-1219
[upheld subjective reasons such as body language, attitude, or demeanor]

People v. Walker (1988) 47 Cal.3d 605, 625-626
[juror's previous negative experience with police, negative view about police credibility sufficient even when DDA voir dired only perfunctory]

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. Kelly (2008) ___ Cal.App.4th ___ (08 DAR 6331)



[remand procedure and appointment of new counsel did not deny defendant of fair hearing; "Contrary to defendant's assertion, *Snyder (v. Louisiana)* does not, in any way, gust that either during an original *Wheeler /Batson* hearing, or on remand such as here, due process

requires: 10 representation of the defendant by the defense attorney who was present during voir dire, 2) examination and cross-examination of the prosecutor under oath, or 3) production of the prosecutor's voir dire notes." (p. ___)]

People v. Semien (2008) ___ Cal.App.4th ___ (08 DAR 6272)
[on remand, prosecutor excused jurors for race-neutral grounds; "We hold that the prosecutor did not violate the constitutional rights of defendant by using a peremptory challenge to excuse a prospective juror who was an African-American pastor whose spouse worked in the county welfare department." (p. ___)]

People v. Calvin (2008) 159 Cal.App.4th 1377
[prosecutor excusing 4 different African-American jurors because of expressed or perceived skeptical attitudes toward the criminal justice system which was accepted by the trial court were found to be pretextual and defense argument that such skepticism "is so prevalent among African-Americans that it should be considered a proxy for race" was rejected]

People v. Adanandus (2007) 157 Cal.App.4th 496
[prosecutor excusing three African-American jurors while accepting jury with at least one African-American juror was not a prima facie showing per se (see *People v. Box (2000) 23 Cal.4th 1153, 1188-1189; People v. Farnum (2002) 28 Cal.4th 107, 136-137*); "Aside from race, defense counsel made no effort to discuss any 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. 504); one juror lived on the street where the alleged crime took place and had a cousin that had been murdered and a brother doing time for a parole violation; another juror also had a son who had trouble with the law and had served time; and third juror thought drugs should be legalized (this was a drug motivated crime)]

People v. Marks (2007) 152 Cal.App.4th 1325
[defendant's absence during jury selection process including off-the-record conversations with jurors, portions outside defendant's and jurors' presence violated due process; especially where off-the-record conversations conflict with clerk's notes; court reporters notes and neither attorney can agree what occurred]

People v. Phillips (2007) 147 Cal.App.4th 810
[trial court properly found insufficient prima facie showing as to one of the three challenged jurors based on having numerous family members involved with crime and had gone to jail or prison; following *Avila 38 Cal.4th 491, 549*; and other jurors excused for race neutral reasons based on one being a teacher at a religious school and the other juror kept rolling his eyes and body language caused the prosecutor to believe the juror did not want to continue to serve despite being passed several times]

People v. Jordan (2007) 146 Cal.App.4th 232
[prosecution excusing 3 prospective jurors in robbery case did not violate *Wheeler*; #1 had a uncle who had been in prison in Texas in 1963 for "probably theft" and later in California for drugs, her sister's boyfriend

worked internal affairs for Oakland PD (the arresting agency here) and when asked about her first thought about police she replied "racial profiling"; #2 had been physically and mentally abused by her former husband for 10 years and had called Oakland PD about 5 times and one of them resulted in his arrest and conviction and felt they were not always supportive or sympathetic; #3 brother had been convicted for drugs in Oakland in the 80s; her son had been convicted of assault in Oakland in the 90s and served about a year and her sister was convicted of drugs and prostitution in Oakland (all 3 people juror stated she thought were treated fairly) and stated that some police officer create trouble; *Wheeler* motion after prosecutor had excused the third African-American juror leaving only one on the jury and trial court found a prima facie case and heard explanations from the prosecutor which were found to be race-neutral; the appellate court upheld the denial of the *Wheeler* motion and noted the trial court was not required to review the questionnaires of all jurors (including unchallenged jurors) when ruling; and a comparative analysis under *Miller-El* was conducted]

People v. Buchanan (2006) 143 Cal.App.4th 139

[*Batson* motion properly denied for prosecutor excusing 2 Hispanic surnamed jurors while approximately 1/3 of remaining jurors were Hispanic surnamed; several such jurors still remained and several replacement jurors were Hispanic surnamed; court distinguished these facts from *United States v. Alanis (9th Cir. 2003) 335 F.3d 965*, and found the facts more akin to *People v. Gray (2005) 37 Cal.4th 168*; court also noted the incomplete record and that it was defense counsel's obligation to make as complete a record as possible (*Wheeler 22 Cal.3d at p. 280*)]

People v. Boulden (2005) 126 Cal.App.4th 1305

[trial court order for counsel not to misuse peremptory challenges was reasonable in light of *Willis* and *Muhammad*]

People v. Overby (2004) 124 Cal.App.4th 1237

[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. Allen (2004) 115 Cal.App.4th 542

[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 instructing 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)]

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 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; questionable after *Miller-El*]

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; cited with approval in *People v. Willis (2002) 27 Cal.4th 811*]

United States v. Mitchell (9th Cir. 2007) 502 F.3d 931

[prosecutor excusing the only African-American on the jury (in a capital murder case where both defendant and victims were members of the Navajo Nation) was proper where prosecutor stated reason was the juror had previously served on a jury that acquitted a defendant (20 years ago)]

United States v. Cruz-Escoto (9th Cir. 2007) 476 F.3d 1081

[*Batson* motion properly denied for striking 2 Hispanic jurors based on prosecutor's stated reason of their unemployment while two other Hispanics did serve on the jury]

Yee v. Duncan (9th Cir. 2006) 463 F.3d 893 (op'n 441 F.3d 851 withdrawn)

[despite prosecutor's failure to remember and thus offer gender neutral explanation for strikes, state court reasonably found defendant did not meet ultimate burden under *Batson*]

Kesser v. Cambra (9th Cir. 2006) 465 F.3d 351 **(en banc)**

[peremptory challenge against Native American prospective juror was not justified by both improper and proper grounds did not violate *Batson* and the 4 other Native American prospective jurors who were excused by the prosecution was for also for possibly race reasons; prosecutor's reason was because Native Americans are "anti-establishment" as well as the juror "pretentious," were "emotional about the criminal justice system," and came from a "dysfunctional family"]

Williams v. Runnels (9th Cir. 2006) 432 F.3d 1102

[district court failing to consider defendant's showing of statistical disparity requires remand based on *Miller-El* and *California v. Johnson; the defense* established that the defendant was African-American and that the prosecutor used three of his first four peremptory challenges to remove African-Americans from the jury; and there were only four of the first 49 potential jurors were African-American; "Accordingly, to rebut an inference of discriminatory purpose based on statistical disparity, the 'other relevant circumstances' must do more than indicate that the record would support race-neutral reasons for the questioned challenges."; and state appellate court may not examine the record on its own to search for plausible explanations for excusing the jurors]

United States v. Esparza-Gonzalez (9th Cir. 2005) 422 F.3d 987

[prosecutor "striking" only two jurors with Latino names raised *a* prima facie showing under *Batson*; and required remand for justification]

Boyde v. Brown (9th Cir. 2005) 404 F.3d 1159

[prosecution peremptory challenge to African-American woman (Perdue) were supported by race neutral reasons that based on her age, community and church work would ultimately have a hard time imposing the death penalty and showed reluctance in answering the *Witherspoon* questions in the California death penalty case on habeas review; "Four of the prosecutor's reasons are plainly race neutral: Perdue's grandmotherliness, her hesitations, her transient background, and her persona. The prosecutor stated he was 'distrustful with certain areas' of Perris. We have recognized that residence can be used as a proxy for race.... A defendant cannot satisfy his 'ultimate burden' if he does not offer any evidence to rebut the prosecutor's race neutral explanation."]

Boyd v. Newland (9th Cir. 2004) 393 F.3d 1008 (amended opinion 455 F.3d 897) ["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 but in new amended opinion, application of incorrect standard (*Johnson v.* California) violated clearly established federal law entitling defendant to habeas relief]

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]

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 "potentially 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 prosecutor's 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 facie 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 only "inference" of racial bias, not "strong likelihood" (as California uses) to establish evidence of *Batson* error; see also Fernandez v. Roe (9th Cir. 2002) 286 F.3d 1073 (remanded due to standard uncertainty); issue resolved in favor of "inference" standard in *Johnson v. California (2005) 545 U.S. 162 (162 L.Ed.2d 129, 125 S.Ct. 241)*]

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) **(reversal)**
[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 1366/84 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]