Mr. *Wheeler* Goes to Washington

The Full Federalization of Jury Challenge Practice in California

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Author's Preface

In 1998 I had just finished drafting an article titled "*Wheeler* Words Which Work," which summarized various ways we prosecutors could justify our jury challenges if a *Wheeler* motion ever got so far along that we were required to state our justifications. Other "smart minds" in CDAA urged me to fill out that article into an entire monograph on *Wheeler* practice, which I did. Although it became rather comprehensive, I was confident that under then-existing state practice, our justifications would only come late in the game, if at all, once we properly understood the rules of *Wheeler* and its progeny. Federal cases (from the Ninth Circuit only) were quite different and required much more effort on our parts, but they would only affect us in certain rare cases, after habeas litigation many years after our convictions; I counseled to watch that area, but follow California law.

What a difference a decade makes. Though California cases still favor the constitutionality of our conduct, federal law has not only drastically changed for the worse, but changed from on high, such that it is now a clear requirement for all of our trials. In addition to major changes in the burden of proof for a *Wheeler/Batson* objector (pronounced by the United States Supreme Court), the California Supreme Court itself changed the very remedy of *Wheeler*, allowing for the first time sanctions other than dismissal of the entire panel. As a result, major portions of my 1998 monograph have become outmoded. It was time, not just for an update, but an entire overhaul. Here is my up-to-the-minute, state and federal redo. I offer many thanks to Brian Kelberg, Los Angeles County Deputy District Attorney, for his tirelessly thorough and valuable review of this monograph.

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Table of Contents

I. The Basics

A. The rule of *People v. Wheeler* (1978) 22 Cal.3d 258

1. *Wheeler* holds, "[T]he use of peremptory challenges to remove prospective jurors on the sole ground of group bias violates the right to trial by a jury drawn from a representative cross-section of the community under article I, section 16, of the California Constitution." (*Wheeler*, 22 Cal.3d at 276–277; *see also Batson v. Kentucky* (1986) 476 U.S. 79 [for federal constitutional grounds].)

2. Clarifications: "This does not mean that the members of such a group are immune from peremptory challenges: individual members thereof may still be struck on grounds of specific bias, as defined herein. Nor does it mean that a party will be entitled to a petit jury that proportionately represents every group in the community: we adhere to the long-settled rule that no litigant has the right to a jury that mirrors the demographic composition of the population, or necessarily includes members of his own group, or indeed is composed of any particular individuals. [Citations.] [¶] What it does mean, however, is that a party is constitutionally entitled to a petit jury that is as near an approximation of the ideal cross-section of the community as the process of random draw permits." (*Wheeler*, 22 Cal.3d at 277.)

3. Procedural note: Jury questionnaires cannot be protected; public access to judicial proceedings trumps juror privacy. (*Bellas v. Superior Court* (2000) 85 Cal.App.4th 636.) But note Code of Civil Procedure section 237, which allows redaction of identifying information so juror numbers can be used instead of names.

B. The federal rule of *Batson v. Kentucky* (1986) 476 U.S. 79

"[T]he Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant." (*Batson*, 476 U.S. at 89.)

C. Application

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

2. Cognizable groups: the classifications that are constitutionally protected from challenge based solely on group membership is the key initial issue of *Wheeler* jurisprudence.

    a. Basic rule: There must be "an identifiable group distinguished on racial, religious, ethnic, or similar grounds—we may call this 'group bias.'" (*Wheeler*, 22 Cal.3d at 276.)

    b. "The defendant need not be a member of the excluded group in order to complain of a violation of the representative cross-section rule." (*Id.* at 281; *see also Powers v. Ohio* (1991) 499 U.S. 400.)

c. Cognizable groups include the following:

(1) Race

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

(b) Hispanics: *see*, e.g. *People v. Perez* (1996) 48 Cal.App.4th 1310, 1315. But note: Hispanic-surnamed juror, by marriage only, is not an Hispanic for *Wheeler* purposes (at least not as long as the record is clear that the juror is not Hispanic: here she said "white" in questionnaire, and told judge "no" to question if Hispanic). (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1123.)

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

(2) Ethnicity

(a) Dictionary definition: "Of, belonging to, or distinctive of a particular racial, cultural, language division of mankind" (Funk & Wagnalls, 1980; *see also People v. Prince* (2005) 134 Cal.App.4th 786, 794, fn. 13 [definitions of ethnicity and race] cited for illustrative purposes only; review granted March 15, 2006.)

(b) Example: Native Americans: *see*, e.g., *United States v. Bauer* (9th Cir. 1996) 84 F.3d 1549; 20 ALR 5th 398, § 5 [cited cases from Florida, Oklahoma, Utah, and Wisconsin].

(c) Other out-of-state examples from 20 ALR 5th 398, at §§ 6, 6.5: Irish-sounding surnames (Massachusetts), Italian-Americans (dicta, New York).

(d) Potential ethnic groups (no cases): Armenian-Americans, Gypsies, subcontinental Indians.

(3) Religion

(a) Cognizable class; *see*, e.g., *People v. Johnson* (1989) 47 Cal.3d 1194, 1217 [Jewish jurors]. *But see People v. Schmeck* (2005) 37 Cal.4th 240, in which two Jewish jurors were challenged by the prosecutor. Held: the reasons given by the prosecutor were not pretextual. The court noted that the defense asked these jurors their religion, not the prosecutor. Moreover, there was no inquiry made of anyone else on the panel regarding religion, so there is an indeterminable significance of these two challenges relative to the total number, which is unknown.

(b) It is permissible to challenge if there is a valid reason related to religion, but the challenge must not be based on membership in a particular religious sect; *see*, e.g., *People v. Martin* (1998) 64 Cal.App.4th 378 [challenge of Jehovah's Witness upheld based on juror's answer regarding religious principles making it difficult to judge others]; *accord People v. Cash* (2002) 28 Cal.4th 703, 723–726; *People v. Ervin* (2000) 22 Cal.4th 48 [challenge of deeply

religious people who might oppose the death penalty proper, non-discriminatory basis for challenge; however, note that the New Jersey Supreme Court recently ruled against such a blanket challenge of the devout in *State v. Fuller* (2004) 182 N.J. 174; 862 A.2d 1130].

(4) Gender (and race-gender as subclass within gender)

(a) *See People v. Crittenden* (1994) 9 Cal.4th 83, 115 [group bias is distinguished on grounds such as race, religion, ethnicity, or gender]. But *Crittenden* involved an African-American woman, so the rule as to **gender alone** may be dicta.

(b) *People v. Garceau* (1993) 6 Cal.4th 140, 171 [cited in *Crittenden*] similarly involved an Hispanic-surnamed woman.

(c) *Accord People v. Motton* (1985) 39 Cal.3d 596, 605–606 ["'The trial court's comparison of black women as a cognizable group to "men who wear toupees" failed to acknowledge the "concurrence of racial and sexual identity," (as aptly phrased by defense counsel) which informs the attitudes of this group. ... When the court asked: "What function does a black woman fulfill that the white woman doesn't [on a jury]?" the entire thrust of *Wheeler* was overlooked'"].

(d) Note *People v. Cervantes* (1991) 233 Cal.App.3d 323, 334 [domestic violence case where male defendant accused district attorney of dismissing all white males; as counsel argued: "the People have excluded ... members of the male race [sic]." (*Id.* at 328). Although the prosecutor responded to the court that *Wheeler* did not apply to white males as a minority group, the attorney general conceded on appeal that "both men and women constitute cognizable groups"]. (*Id.* at 334.)

(e) *People v. Gray* (2001) 87 Cal.App.4th 781, 788 [African-American males (or females) constitute a cognizable class for *Wheeler* purposes].

(f) "[T]hat African-American women comprise a cognizable class for *Wheeler* purposes is clear." (*People v. Boyette* (2002) 29 Cal.4th 381, 422, citing *People v. Clair* (1992) 2 Cal.4th 629, 652 [*Clair*, in turn, cites back to *Motton*, 39 Cal.3d 596].) Finally, *see People v. Young* (2005) 34 Cal.4th 1149, 1173 (also citing *Motton*). *Young* is most interesting for its concurring opinion by former California Supreme Court Justice Janice Rogers Brown, which regrets the invidious effect of *Motton* as memorializing the very stereotype it is trying to combat (while creating so many cognizable subclasses that peremptory challenges will become nearly impossible to make). *Young* has since been cited by *People v. Cornwell* (2005) 37 Cal.4th 50, fn. 4.

(g) *Cf., J.E.B v. Alabama ex rel. T.B.* (1994) 511 U.S. 127 [plurality opinion, although five justices agreed gender is a cognizable class and so *Batson* was expressly extended to gender; but this case was a civil paternity suit].

(5) Sexual Orientation (new)

(a) *People v. Garcia* (2000) 77 Cal.App.4th 1269, 1272 [gays and lesbians are cognizable groups].

(b) *See also* Code of Civil Proceure section 231.5 (enacted 2000), forbidding peremptory challenges based on sexual orientation, race, color, religion, sex, national origin, "or similar grounds." [Look to the broad language of this statute to fuel *Wheeler* motions for previously non-cognizable groups.]

(6) Disability (possible new class)

U.S. v. Harris (7th Cir. 1999) 197 F.3d 870 suggests that a challenge based on an irrational animosity toward disabled people would not be legitimate. However, such a disability-based challenge was scrutinized under the rationality test and passed muster here because the government's stated reason was that the juror's medication for her disability made her prone to drowsiness (and thus unable to pay attention during trial).

3. Non-cognizable groups

a. Basic rule: a group cannot qualify as a cognizable group for representative cross-section challenge unless both requirements are met:

(1) members share a common perspective arising from life experience in the group, and

(2) no other members of the community are capable of adequately representing the group perspective. (*See Rubio v. Superior Court* (1979) 24 Cal.3d 93, 98 [plurality opinion].)

b. Application: representative cross-section challenges arise in at least four contexts:

(1) compilation of master list from which venires are drawn

(2) disqualification (by judges or court personnel) for hardship, competency

(3) challenges of jurors from the panel who get into the jury box

(4) grand jury selection

c. *Wheeler* suggests the same constitutional analysis applies at all stages. (*Wheeler*, 22 Cal.3d at 272–273.) Most of the case law on cognizable groups involves challenges in situations other than the true *Wheeler* context (i.e., in the compilation of a master list, disqualification for hardship, or grand jury selection). Therefore, the cases may not be fully on point in the context of jury selection at trial. (For the fair cross-section case law, generally, see the

seminal case of *Duren v. Missouri* (1979) 439 U.S. 357, and California cases such as *People v. Bell* (1989) 49 Cal.3d 502 and *People v. Ochoa* (2001) 26 Cal.4th 398 [the constitution forbids exclusion of members of cognizable class, but does not require that jury venires created by neutral selection procedure be supplemented to achieve a representative cross-section of the population]. However, note legislation pending in Pennsylvania and the ruling by the Indiana Supreme Court (in late 2005) to expand sources of potential jurors (e.g., public assistance records, state income-tax records), as the issue of the lack of minority representation in juror pools has become more high profile. *But see In re United States of America* (1st Cir. 2005) 426 F.3d 1, reversing the Massachusetts U.S. District Court ruling to send added jury summons to high-minority-population ZIP codes.

d. Examples of non-cognizable groups

(1) Poor persons/low income: *see*, e.g., *People v. Johnson* (1989) 47 Cal.3d 1194, 1214 [hardship challenge]; *accord People v. Estrada* (1979) 93 Cal.App.3d 76, 91 [grand jury challenge]; *People v. Carpenter (II)* (1997) 15 Cal.4th 312, 352; *People v. Carpenter (III)* (1999) 21 Cal.4th 1016, 1035 [persons excused for hardship based on low income remain a non-cognizable class].

(2) Less educated: *see*, e.g., *Estrada*, 93 Cal.App.3d at 90–91.

(3) Blue collar workers: *see*, e.g., *Estrada*, 93 Cal.App.3d at 92.

(4) Battered women: *see People v. Macioce* (1987) 197 Cal.App.3d 262, 280.

(5) Young adults: *see*, e.g., *Estrada*, 93 Cal.App.3d at 93; *People v. Marbley* (1986) 181 Cal.App.3d 45, 48 [*Wheeler* challenge]; *People v. Ayala* (2000) 23 Cal.4th 225, 257; *People v. Ayala* (2004) 24 Cal.4th 243, 277–278.

(6) People over 70 years of age: *see*, e.g., *People v. McCoy* (1995) 40 Cal.App.4th 778, 783; *U.S. v. Grimmond* (4th Cir. 1998) 137 F.3d 823, 834 [grand jury challenge].

(7) Death penalty skeptics: *see*, e.g., *Johnson*, 47 Cal.3d at 1222 [this part of the opinion concerns a true *Wheeler* challenge]; *see also People v. Davenport* (1995) 11 Cal.4th 1171, 1202–1203.

(8) Ex-felons and resident aliens: *see*, e.g., *People v. Karis* (1988) 46 Cal.3d 612, 631–633 [disqualification challenge].

(9) Naturalized citizens: *see*, e.g., *People v. Gonzalez* (1989) 211 Cal.App.3d 1186, 1202 [dicta]. But be very careful, as that court also held that bias against naturalized citizens can be pretext for an improper Hispanic-based challenge [*see* 1195, noted *infra*.].

(10) "Insufficient" English spoken: *see People v. Lesara* (1988) 206 Cal.App.3d 1304, 1307 [*Wheeler* challenge].

(11) New community residents (less than one year): *see*, e.g., *Adams v. Superior Court* (1974) 12 Cal.3d 55, 60 [disqualification challenge; the statutory one-year residence requirement has since been repealed].

(12) Strong law-and-order believers: *see Wheeler*, 22 Cal.3d at 276 [dicta].

(13) "Men who wear toupees": *see People v. Motton* (1985) 39 Cal.3d 596, 606 [dicta].

(14) Retired correctional officers: *see People v. England* (2000) 83 Cal.App.4th 772.

4. Standard for dealing with new groups

   a. Watch out for grandiose language in *People v. Fujita* (1974) 43 Cal.App.3d 454, 475-476: due process is denied to anyone indicted by a grand jury that systematically and purposefully excludes an "identifiable community group (e.g., one identified by race, sex, age, religious belief, educational attainment, political affiliation, economic status or geographic background." Though this case is still good law, this point has never been cited elsewhere, and would appear to have been overruled, *sub silentio*, by more recent authorities cited above.

   b. Consider using Justice Mosk's (plurality opinion) fleshing out of the two-part "cognizable" test in *Rubio*, 24 Cal.3d at 98 ("It is not enough to find a characteristic possessed by some persons in the community but not by others; the characteristic must also impart to its possessors a common social or psychological outlook on human events."). And note that Justice Brown's concurrence in *Young*, 34 Cal.4th 1149, 1235–1238, suggests that expert testimony or evidentiary studies would be needed to justify new cognizable groups.

   c. Great quote: *Barber v. Ponte* (1st Cir. 1985) 772 F.2d 982, 999: "It is fair to assume that the [U.S. Supreme] court wanted to give heightened scrutiny to groups needing special protection, not to all groups generally. There is nothing to indicate that it meant to take the further step of requiring jury venires to reflect mathematically precise cross sections of the communities from which they are selected. Yet if the age classification is adopted, surely blue-collar workers, yuppies, Rotarians, Eagle Scouts, and an endless variety of other classifications will be entitled to similar treatment. These are not the groups that the court has traditionally sought to protect from under-representation on jury venires."

   d. Related, though not truly a cognizable-group case: challenge for cause of a juror who believed in jury nullification is permissible, since jurors have power to nullify, but no right to, and their duty is to take law from the court. *Merced v. McGrath* (9th Cir. 2005) 426 F.3d 1076.

II. Correct Procedure

A. Historical introduction on burden of proof

Both state (*Wheeler*) and federal (*Batson*) procedures follow three-prong tests, with the party objecting to a peremptory challenge by the opponent having the initial burden of proof of establishing a prima facie case of discrimination. For years, the state burden was a "strong likelihood" that a challenge was based on group association (*Wheeler*, 22 Cal.3d at 280), while the federal burden was a reasonable "inference" of discrimination (*Batson*, 476 U.S. at 80). The Ninth Circuit, in *Wade v. Terhune* (9th Cir. 2000) 202 F.3d 1190, held the state burden was more difficult for defendants to raise than the federal burden, and therefore in error. California cases since then (until 2003) said *Wade v. Terhune* was either in error itself, or not controlling in California. Then, in *People v. Johnson* (2003) 30 Cal.4th 1302, the California Supreme Court tried to reconcile the mess by stating, first, that both state and federal burdens were equal; then it muddied the waters even more by holding that this unified standard should be restated in a new, third way: "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." (*Id.* at 1318.)

On June 12, 2005, the United States Supreme Court reversed *Johnson*, holding that California's strong likelihood standard (and even its modified "more likely than not" standard) find no support in Batson and are therefore inappropriate yardsticks to measure the first prong of a prima facie test. Thus, under *Johnson v. California* (2005) ___ U.S. ___; 125 S.Ct. 2410, 2417, *Batson*'s first prong need only be satisfied by producing evidence sufficient to permit the trial judge to draw an inference of discrimination.

B. Current state of the procedural law: still three prongs

1. The party objecting to a challenge must make out a prima facie case "by showing that the totality of the facts gives rise to an inference of discriminatory purpose." (*Johnson*, ___ U.S. at ___; 125 S.Ct. at 2416).

2. Once a prima facie case is made, the "burden shifts to the [party making the original, objected-to juror challenge] to explain adequately the racial [or other cognizable class] exclusion by offering permissible race-neutral justifications for the strikes." (*Id.*)

3. 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." (*Id.*) (Recall that the burden of proof always rests with the objecting party. *Purkett v. Elem* (1995) 514 U.S. 765, 768.)

C. Current state of the procedural law: more nuances

1. The first two prongs concern the production of evidence to allow the trial court, in the third prong, to determine the persuasiveness *vel non* of the claim (but really, the third prong has the trial court determining the persuasiveness of the justifications for the challenge).

2. So as a practical matter, despite many earlier California cases to the contrary, the prima facie case is almost always going to be made, requiring good justifications to be ready. It takes very little to raise an inference: a challenge to a second juror of the same protected class, and probably a first challenge to such a class member, if done with no voir dire, or if no other class member in jury box or remainder of

panel, will be deemed a prima facie case. So, if the prosecution is the party making the juror challenge, and facing a *Wheeler/Batson* objection, the prosecution must be prepared to question such jurors fully and carefully so as to elicit neutral-basis justifications for every challenge (and then be prepared to enunciate correctly and persuasively from the trial record such justifications). Note the March 28, 2006, Ninth Circuit case *Yee v. Duncan* (9th Cir. 2006) 441 F.3d 851 granting habeas from a California conviction where the district attorney excused eight men from the jury (the defendant was a male dental assistant being tried for sexual battery and lewd acts upon female juvenile patients under anesthesia); the district attorney at the second prong of *Wheeler/Batson* analysis explained seven of her eight challenges but "couldn't recall" her reason for the eighth challenge. The California District Court of Appeal had affirmed the conviction, finding no discrimination and giving deference to the trial judge who noted no discriminatory intent by the district attorney, as well as the presence of four men on the panel. The Ninth Circuit held that the trial judge may not look beyond the district attorney's reasons until the third prong, and the district attorney's failure to justify every single challenge failed to satisfy her burden of production at prong two.

Bottom line: remember that "a single discriminatory exclusion may violate a defendant's right to a representative jury." (*See People v. Fuentes* (1991) 54 Cal.3d 707, 716, fn. 4 [dicta]; *People v. Gonzalez* (1989) 211 Cal.App.3d 1186, 1193, 1202.)

3. Beyond the rejected *Wheeler* burden of proof, the remainder of *Wheeler* is probably still good advice on raising a prima facie case. (*Wheeler*, 22 Cal.3d at 280–282.)

   a. The objecting party must timely raise the point.

   b. The presumption exists that the party exercising the challenge does so on a constitutionally permissible ground.

   c. Thus, the objecting party must make as complete a record of circumstances as feasible, must establish excluded persons as members of a cognizable group, and should cite to the record to show:

      (1) opposing counsel challenged most or all members of an identified group;

      (2) opposing counsel used a disproportionate number of peremptories against this group;

      (3) the challenged jurors show only a single characteristic of group membership; in other respects are heterogeneous;

      (4) opposing counsel asked no questions of challenged jurors or engaged in merely desultory voir dire.

   d. Other circumstances to put on the record that have arisen from post-*Wheeler* cases are the following:

      (1) Number of members of identified group in jury box and panel.

      (2) Challenged juror shares characteristics of one or more unchallenged majority-member jurors, with the exception of the group characteristic in the challenge ["comparative analysis," *see* section E. below].

(3) Disparate questioning of jurors in different identified groups.

(4) Historical record by that counsel or entire office of discriminatory jury selection practice.

e. Though the defendant need not be a member of the excluded group to complain, if he is a member, and if the victim is a member of a group to which the majority of remaining jurors belong, such factors are relevant.

D. Dealing with pending/recent cases since *Johnson v. California*

1. Any California appellate case that affirmed a trial court's finding of no prima facie case (under the strong likelihood standard) has probably been overruled, *sub silentio*, by *Johnson*.

2. Any trial matters of your own, where you were "*Wheeler*-ed" and won, though you never had to state your justifications, and the appeals from your convictions are not yet final, are probably covered retroactively by the *Johnson* rule (hardly a new rule of law, as based on 1986's *Batson*). A suggested strategy here is to seek a two-part remand hearing: first the trial judge re-decides any *Wheeler* issue by applying the proper federal standard, and may still find the prima facie case not met. If that happens, the judgment of conviction should be reinstated. Second, and more likely, the trial court would find a prima facie case, but still allow you to provide justifications for your challenges; if you persuade the trial court that your challenges are for neutral motives, the judgment of conviction should be reinstated.

3. Do not wait for appeal on any matters that you just tried and are awaiting sentencing on, where you won a *Wheeler* challenge without having to provide justifications. Request the sentencing court to do *Wheeler* over, properly, before pronouncing sentence.

4. *People v. Johnson*, the case that started it all, is still back in the California Supreme Court on review, for a single issue (that will settle the topic raised just above): what is the appropriate remedy following a trial court's application of the incorrect *Wheeler/Batson* standard (i.e., whether to order a limited remand or to outright reverse)? Review was granted November 16, 2005.

E. Comparative Analysis

1. Introduction: An attorney might leave a white teacher on the jury but challenge an African-American teacher. Either in making a prima facie case, or in later rebuttal of the challenger's stated justifications, the *Wheeler* objector may argue that the challenge was not based on teacher status but group bias. The objector will point to a majority member left on the jury who shares a non-racial characteristic with the challenged juror, leaving the inference that the sole reason for the challenge was race. Such comparisons of those challenged with those who remain is known as "comparative analysis."

2. Recent history (federal): Federal authority allows comparative analysis. In *Turner v. Marshall* (9th Cir. 1997) 121 F.3d 1248, defendant was convicted of first-degree felony murder, robbery, and burglary on March 21, 1990. The Ninth Circuit, on July 27, 1997, awarded the defendant a new trial after using comparative analysis to find *Batson* error.

a. The case history of *Turner v. Marshall* (9th Cir. 1997) 121 F.3d 1248 is as follows: defense counsel at trial challenged 19 jurors, including two African-American men. The district attorney used nine peremptories, five of which were against African-American men. The final panel included four African-American women, but all African-American men had been challenged or excused. The defendant's *Wheeler* motion was denied by the trial court, which found no pattern of discrimination and declined to inquire into the district attorney's motives (this occurred in early March 1990). The California Court of Appeal affirmed the defendant's conviction, and the California Supreme Court denied review. The defendant next moved to the federal courts, where his habeas corpus writ was denied in United States District Court. However, the Ninth Circuit found a prima facie case but remanded the matter back to the district court for an evidentiary hearing to develop the defendant's *Batson* claim. A magistrate judge held an evidentiary hearing on April 25, 1996, where the original trial deputy district attorney testified that she had no independent recollection of the five challenged jurors (six years prior!), but gave explanations based on the voir dire transcript and "partial" notes. The magistrate judge concluded that no *Batson* violation occurred. Finally, the Ninth Circuit opinion reviewed the magistrate judge's conclusions.

b. The following are worrisome quotes from the *Turner* opinion:

> We believe that a comparative analysis of a challenged and an unchallenged juror indicates racial discrimination in the jury selection process. (*Turner*, 121 F.3d at 1250.)

> Our review is further hindered by the [state] prosecutor's failure to prepare for the evidentiary hearing. Although we do not fault the prosecutor for her diminished memory six years after jury selection, we note that she testified that she had not reviewed the voir dire transcript in preparation for the evidentiary hearing and that she was "caught up" in another trial. We are fully cognizant of the weighty caseload government attorneys carry, but we believe that the federal court's inquiry into a potential constitutional violation deserved the prosecutor's full attention. (*Id.* at 1251.)

The circuit court found a limited record for review to be no problem: "Although both the lack of a contemporaneous explanation and the prosecutor's limited recollection are troubling, we conclude that the transcripts of voir dire and the evidentiary hearing yield a sufficient basis for review." (*Id.*) This would be now the fifth-chance review.

Comparative analysis was appropriately undertaken:

> We conclude that the district court clearly erred in accepting the prosecutor's explanation for striking African-American juror [name]. We believe that the prosecutor's stated reasoning is revealed as pretextual in the light of a comparison between [him] and a nonminority juror who ultimately was empaneled. [¶] A comparative analysis of jurors struck and those remaining is a well-established tool for exploring the possibility that facially race-neutral reasons are a pretext for discrimination. Peremptory

> challenges 'cannot be lawfully exercised against potential jurors of one race unless potential jurors of another race with comparable characteristics are also challenged.' [Citations.]" (*Id.* at 1251–1252.)

Finally, although the fact that the prosecutor accepted four African-Americans on the jury may be considered indicative of a non-discriminatory motive, ... it is not dispositive.... Where the prosecutor's explanation for striking a minority juror is unsupported by the record, empaneling other minority jurors will not salvage her discredited justification. (*Id.* at 1254.)

The ultimate holding:

> Accordingly we conclude that a comparative analysis reveals racial reasons for the prosecutor's dismissal of [juror], and that the district court's finding to the contrary is clearly erroneous.... We are aware that our holding here places a heavy burden on the State to retry or release Turner. However, ... [f]or the foregoing reasons, we vacate the district court's denial of the writ of habeas corpus and remand with instructions to enter an order stating that Turner is entitled to a new trial. (*Id.* at 1255–1256.)

c. On March 2, 1998, the United States Supreme Court denied review in *Turner*.

3. Recent history (California)

California authority was quite clear on its rejection of comparative analysis. *See*, e.g., *People v. Landry* (1996) 49 Cal.App.4th 785, 791: "Furthermore, under authority of the California Supreme Court, an appellate court is not allowed to compare the responses of rejected and accepted jurors to determine the bona fides of the justifications offered (*People v. Montiel* (1993) 5 Cal.4th 877)." The most practical condemnation of comparative analysis was penned by the supreme court in *People v. Johnson* (1989) 47 Cal.3d 1194, 1220–1221. *See also, People v. Jones* (1997) 15 Cal.4th 119, 162, and fn. 12, where the supreme court specifically declined to reconsider *Johnson* or *Montiel* or to follow the Ninth Circuit approach, which allows comparative analysis.

4. Comparative analysis is now alive in California

This sea change began in *People v. Johnson* (2003) 30 Cal.4th 1302 [the same case discussed above on the prima facie case burden], which noted the evils of comparative analysis as unreliable and inconsistent with the deference trial courts deserve on review; yet it held that such analysis was allowed, but only if presented for the first time at trial, not on appellate review. Then came the United States Supreme Court opinion in *Miller-El v. Dretke* (2005) ___ U.S. ___; 125 S.Ct. 2317 [to be discussed in more detail immediately below], which specifically utilized comparative analysis as a factor in the making of a prima facie case (*see* 2325): "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." *Miller-El* literally found such comparative analysis to be "more powerful" than a bare statistical analysis. (*Id.*) The California Supreme Court now appears to have taken the hint that comparative analysis is here to stay, even on the first instance on appeal. (*See People v. Ward* (2005) 36 Cal.4th 186 ["Even assuming that we must conduct

a comparative juror analysis for the first time on appeal (*See Miller-El v. Dretke* ...)"]. However, *Ward* gives us an indication that the comparative analysis battle has become more nuanced; the issue is not whether the concept applies, but how its application may affect the outcome. In *Ward* (to be discussed in more detail below), the California Supreme Court did comparative analysis, but found in its side-by-side comparison that the kept jurors were not similarly situated to the challenged ones, thus comparative analysis did not lead to a conclusion of purposeful discrimination as the true reason for the challenges.

5. Comparative analysis: a practical approach

Make careful notes of your juror questions as well as their answers. You may also wish to note the relevant group characteristic of each juror. (But see full risk of this technique below, at F.2.e). Do your own comparative analysis, informally, such that if a person you want to challenge for a legitimate reason happens to be of a cognizable class, and a person of a different class you want to keep on has given answers similar to the answers of the person you want to challenge, then ask more of each panelist so as to develop the dissimilarities in the record on other points. (Sometimes you may not be able to ask more questions, given the order of jurors to the box; for that reason, consider a jury questionnaire.) Also, when you are forced to justify the challenge of that first juror, don't just state a single reason (which may be susceptible to a comparative analysis rebuttal) but give all applicable reasons.

F. Expansion of factors available to the challenge objector: *Miller-El v. Dretke*

1. Introduction

Miller-El v. Dretke (2005) ___ U.S. ___; 125 S.Ct. 2317 was originally a 1985 Dallas, Texas, murder trial. The prosecution challenged ten of 11 black jurors. Although state and federal courts affirmed the conviction and found the prosecution's challenge justifications credible, over a period of 14 years, the U.S. Supreme Court in June 2005 granted habeas relief, finding (in a 6–3 decision) that the Dallas prosecutors were racially biased, as was their entire office, historically, in its jury-selection procedures and training.

2. *Miller-El*'s factors that may be used to make a prima facie case

a. Statistical evidence (and the numbers are crunched in a number of ways)

(1) Ten of 11 black jurors were challenged, which is 91 percent, a disparity unlikely to be produced by happenstance, said the High Court.

(2) The entire jury venire totaled 108 persons; although 20 of the 108 were black, only one served.

(3) Compare the proportion of blacks challenged (91%) with the proportion of non-blacks challenged (12%).

b. Comparative analysis (*see* above; this factor discussed in detail in the opinion, and later justifications made by the prosecution for new reasons not subject to comparative analysis were dismissed by the High Court as reeking of afterthought). And the Court, in fn. 6, noted that the "similarly situated" concept in comparative analysis does not mean "identically situated."

c. An entirely new factor: **disparate questioning.** Here the Court looked to differences in the ways questions were phrased to blacks and non-blacks as evidence of discriminatory intent by the questioner. (For example: before being asked if they could support the death penalty for a black defendant, 53 percent of blacks were given a detailed factual preamble about how the death penalty would be carried out (as an apparent attempt to get even the least squeamish jurors on the subject of the death penalty to disavow a willingness to oppose it); while 94 percent of non-blacks were given a more limited and neutral preface. The High Court essentially agreed with the defense contention that this giving of either a graphic or a bland script, depending statistically on the race of the jurors, was devised to create hesitation to impose the death penalty among the black jurors as a way to create a plausible, and racially neutral reason to challenge more black jurors.) Such disparate questioning was called trickery by the High Court. *(Miller-El,* 125 S.Ct. at 2334–2337.)

d. Local procedures (here the Court discussed a jury-selection technique perhaps unique to Texas, the "jury shuffle"). (*Id.* at 2332–2333.)

e. Historical evidence of discrimination by the prosecutor's office. Here, the opinion noted a systematic exclusion of blacks in Dallas County for decades, as well as a 1968 manual that advised (in most objectionable language) exclusion of minorities. (The opinion also noted that the trial prosecutors marked the race of each prospective juror on their juror cards. This final fact has prompted the Los Angeles District Attorney's Office to suggest (1) that its deputies' jury notes contain a pre-printed disclaimer that any notations of race, gender, etc. are for the purpose of addressing issues of comparative analysis and disparate questioning in *Wheeler/Batson* litigation), and that (2) if deputies make notes regarding class characteristics of jurors, they do so as to the relevant characteristics for **all** prospective jurors. (*Id.* at 2338–2339.)

3. Practical application of *Miller-El*: not only must you ask questions of all prospective jurors (especially those you think of challenging), but you must ask them in an even-handed manner towards all. And should you personally have a history of *Wheeler* litigation you have lost, or your office has any practices, manuals, or statistical history of excluding certain classes of jurors in certain types of cases, you can expect such matters to be fair game for smart defense counsel in making their prima facie cases, or even earlier, in discovery motions on this issue, or for judicial notice to be taken of other court cases involving the specific deputy or the office itself. Ultimately, be prepared to answer the following question, if propounded by the court to you at the request of defense counsel seeking to make a prima facie case: "Have you ever had a *Wheeler/Batson* motion sustained against you, or had a case reversed for a trial court's erroneous *Wheeler/Batson* ruling in your favor?"

G. California and federal practice, post-*Johnson* and *Miller-El*

1. *People v. Ward* (2005) 36 Cal.4th 186

a. This case did not deal with the prima facie standard issue as the trial court asked for and received prosecution justifications for challenges without expressly finding that a prima facie showing was made.

b. Comparative analysis was done, for the first time on appeal. (Thus conceding this new requirement from *Miller-El.*) However, the supreme court found the empaneled jurors to be not similarly situated to challenged African-American jurors. The supreme court used extensive analysis of the multiple reasons given by the prosecution to justify each challenge, and the extensive voir dire the prosecution conducted, to focus on differences between jurors kept and struck.

c. Among prosecution justifications for challenging one juror were her (1) anti-death penalty responses in her questionnaire, (2) unconventional appearance (30 silver chains around her neck and rings on each finger), which suggested she would not fit in with other jurors, and (3) body language during questioning that suggested she was "uptight" with the prosecutor. The supreme court followed the presumption that the prosecutor used challenges in a constitutional manner; the trial court was not required to make specific, detailed comments on the record to justify its acceptance as genuine of each prosecutorial justification, particularly when based on demeanor. (However, totally subjective reasons, such as "juror is inattentive" deserve careful scrutiny by the trial judge, and acceptance by the trial judge of such reasons, when unsupported by the record, or inherently implausible, will not withstand appeal. *See*, e.g., *People v. Allen* (2004) 115 Cal.App.4th 542, 548–549; *see also, People v. Silva* (2001) 25 Cal.4th 345, 386, discussed below.)

d. Although seven African-American jurors were challenged by the prosecutor (two of them alternates), the fact that five out of 12 sitting jurors were African-American was noted by the supreme court: although not conclusive, it was indicative of good faith in exercising challenges and thus remains a valid factor for the trial court to rule on a *Wheeler* objection.

2. *People v. Young* (2005) 34 Cal.4th 1149, 1170–1174

a. A prosecutor struck three African-American females, but two African-American males remained on the jury. *See* footnote 7, which states that "Nothing in *Wheeler* suggests that removal of all members of a cognizable group, standing alone, is dispositive on the question of whether defendant has established a prima facie case of discrimination." However, the same footnote goes on to cite earlier California Supreme Court authority *(People v. Crittenden* (1994) 9 Cal.4th 83, 119) that "the excusal of all members of a cognizable group may give rise to an inference of impropriety but is not dispositive of whether defendant has shown purposeful discrimination."

b. In light of *Johnson*'s national (*Batson*) standard ("raises an inference of discriminatory purpose"), it would seem that *Young* is no haven for beating back a prima facie challenge at its first prong, but rather shifts the focus to your second-prong justifications, and ultimately to the third prong of the court's acceptance of them as legitimate; therefore, it is here in the third prong that you can cite *Young* to support challenging multiple members of a cognizable group, **so long as you have neutral, sincere, and persuasive reasons for each kickoff.**

3. *People v. Cornwell* (2005) 37 Cal.4th 50

   a. The prosecutor struck one of only two African-Americans from a venire of 117 and passed on the second from the start. That person served on the jury. The supreme court affirmed the trial court's ruling that the defense failed to make a prima facie case (even under the *Batson* "raise an inference" standard). Although the trial court permitted the prosecutor to comment upon defendant's prima facie claim attempt, because the trial court correctly ruled the prima facie case was not met, the supreme court felt it was not required to consider the persuasiveness of the prosecutor's justifications.

   b. On the actual merits of the issue, the record demonstrated that the challenged juror had close relatives who had been arrested, an aunt serving prison time for homicide (a conviction the juror felt was unjustified), and the juror's stated beliefs that the criminal justice system treats citizens unfairly because of race.

   c. The supreme court noted with approval the trial court's finding that the prosecutor challenged the one juror the moment she had sat down (the trial court here having done voir dire, not counsel), but repeatedly passed upon the other African-American left on the panel. Comparative analysis was done for the first time on appeal, but the supreme court found the kept jurors not comparable, as they did not have close relatives wrongfully convicted of homicide, nor view the justice system as being racist.

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

   a. The prosecutor challenged three of four African-Americans on the panel. The trial court denied that there was a prima facie case and wouldn't let the prosecutor give justifications. Although the appellate, California Supreme, and U.S. District Courts (on habeas) found no *Wheeler/Batson* error, the Ninth Circuit **reversed and remanded** (seven years after trial), in light of *Johnson* and *Miller-El*. (And, in a final footnote, it is noted that the trial prosecutor no longer remembered his reasons for his challenges and had lost his jury-selection notes!)

   b. Although *Williams* involves only prima facie analysis, this case serves notice that despite California Supreme Court recent cases just discussed (*Ward, Young, Cornwell*) that help prosecutors who pass cognizable class jurors and leave them on juries, the Ninth Circuit remains a formidably hostile appellate environment to the prosecution in this area. The case held, first, that statistical disparity alone is enough to raise an inference of discrimination (the statistics included the fact that only four of the first 49 potential jurors were African-American and, as noted, the prosecutor challenged three of those four). It went on to hold that while appellate courts may look to "other relevant circumstances" to rebut a statistical disparity, absent actual (believable) justifications by the prosecutor, a higher court cannot simply look to the record for some plausible reasons that could hypothetically support race-neutral reasons for challenges. [*But compare People v. Guerra*, 2006 Daily Journal D.A.R. 2547, 2556–2560, where the California Supreme Court noted that the record disclosed non-racial-bias reasons "for any prosecutor" to challenge particular black and Hispanic jurors.] The Ninth Circuit refused

to find a rebuttal of racism in the deputy district attorney's leaving of an African-American on the jury, or on the deputy's having initially accepted the jury before later exercising challenges. (*But see People v. Reynoso* (2003) 31 Cal.4th 903, where the fact that the prosecutor passed an ultimately challenged juror many times demonstrated that his reasons for the challenge were not pretextual, since if he were truly bent on removing the juror for discriminatory grounds, he would have challenged early on and not risked the defense passing on the panel.)

c. Also troubling was the Ninth Circuit's rejection (at 1109) of the California Court of Appeal's (unpublished) reason for finding no *Wheeler* error, that one of the challenged jurors was a "loner" with no track record as a juror in the past. That ruling somewhat calls into question two of our standard justifiable bases for challenge [*see infra*]: a subjective belief that the juror is out of the mainstream and unable to get along with others, and the juror's lack of life experience, as reflected in no prior jury duty. *Williams* remained an opinion to watch, to see if it was simply a federal anomaly, or the harbinger of a true trend of post-*Johnson/Miller-El* hardening of attitudes; that watch, however, did not take long to bear surprising results, as noted immediately below.

5. *Rice v. Collins* (2006) ___ U.S. ___; 126 S.Ct. 969

a. Once again, the Ninth Circuit took a California deputy district attoney to task for challenging an African-American female juror for reasons it did not deem credible, and granted a habeas reversal on AEDPA grounds, notwithstanding rulings supporting her challenge by the Los Angeles trial court, the California Court of Appeal, and the United States District Court. However, in a stunning development, the United States Supreme Court issued a unanimous reversal of the Ninth Circuit, stating it erred in substituting its judgment for that of the California courts. Its holding should really go a long way towards ending the abuses of the Ninth Circuit in this area:

> Reasonable minds reviewing the record might disagree about the prosecutor's credibility, but on habeas review that does not suffice to supersede the trial court's credibility determination. ... The only question, as we have noted, is whether the trial court's factual determination at *Batson*'s third step was unreasonable. For the reasons discussed above, we conclude it was not. [¶] The panel majority's attempt to use a set of debatable inferences to set aside the conclusion reached by the state court does not satisfy AEDPA's requirements for granting a writ of habeas corpus. (*Id.* at 976).

b. The prosecutor's justifications had included that the juror rolled her eyes in response to a question from the court (which the trial court stated on the record it had not seen), that the juror was young and might be too tolerant of a drug crime (the case was a Three Strikes charge of possession of cocaine with intent to distribute), and that the juror was single and lacked community ties. The trial court gave the deputy the benefit of the doubt, and the United States Supreme Court took positive note, given that the deputy had also challenged a white male juror with the same characteristics. This is an example of what can be termed, "positive comparative analysis"; i.e., using comparative analysis principles defensively, for the benefit of the prosecution, to show non-racial similarities between those we kick off. (In

traditional, or "negative" comparative analysis, the defense tries to show similarities between those challenged and those kept on.)

c. The only ominous note in *Rice v. Collins* is Justice Breyer's concurrence, joined by Justice Souter. He gently chides the prosecutor for explaining her challenges in a less-than-clear way, suggests that such instinctive judgments may be based on stereotyping invisible even to the deputy and, most significantly, posits a rationale for the elimination of peremptory challenges and the entire *Batson* framework, as inherently unworkable. While Justice Breyer's lament on peremptories is not surprising, given his similar concurrence in June 2005 in *Miller-El*, it now has garnered a second vote, in Justice Souter.

d. Notwithstanding *Rice, Williams v. Runnels* remains problematic in its refusal to accept reasonable bases for challenges that were not expressly made by the prosecutor. The best way to make a record would be to state your reasons for challenges even if you win the prima facie case.

H. Putting it all together: practical procedural advice

1. Trial tactics

You should anticipate the possibility of a *Wheeler* challenge. Remember that an appellate court will do a further review of the record even if the trial court finds no prima facie case requiring you to justify your challenges. (And a federal court may well review the entire process years later, so be sure not only to make a good trial record, but keep all your notes.) The following tactics should help you create a record that will justify any challenges you make.

a. If possible, keep on the jury one or more members of each cognizable group from which you are challenging persons.

b. If the court allows voir dire, be consistent in your questioning of the jurors you plan to keep and those you plan to challenge. (Consider the use of questionnaires as the easiest way to be thorough and consistent).

c. To develop specific bias, question all jurors you plan to challenge.

d. Do not be desultory in your questioning.

e. Assume a prima facie case will almost always be made against you, such that you will have to justify all of your challenges. For each person challenged, develop and be ready to articulate all characteristics based on specific bias factors unrelated to group membership. In comparative analysis, it is especially useful if one or more of these characteristics is shared by challenged jurors belonging to the majority group. To this end, make careful notes, and save them in your court file.

f. Do not base any challenge against a member of a cognizable group on a single reason, especially if that reason is weakened when subjected to comparative analysis (i.e., when you keep on the jury a majority member who has the same issue as the person you challenged). If you develop multiple reasons, any one reason susceptible to comparative analysis will not be found wanting on pretextual grounds in light of the other reasons.

g. In those rare cases where defense counsel cannot articulate a proper prima facie case, or (more commonly) on counsel's first *Wheeler/Batson* objection based on only your first challenge of a cognizable-class member, ask the trial court to make a record as to why it denied a prima facie showing by the defense.

h. To rebut a prima facie case at the outset (as opposed to offering your justifications when the court finds the prima facie case made and asks you for them), you can raise certain factors:

(1) Whether members of the group discriminated against were challenged by the moving party also. (Note: this factor alone will not rebut a prima facie case; *see Wheeler*, 22 Cal.3d at 283, fn. 30: "A party does not sustain his burden of justification by attempting to cast a different burden on his opponent." *Accord, People v. Snow* (1987) 44 Cal.3d 216, 225.)

(2) The extent to which a jury includes members of a group allegedly discriminated against (i.e., if the party exercising the peremptory has left members of a minority group on the panel); *People v. Ward* (2005) 36 Cal.4th 186, 203, citing *People v. Turner* (1994) 8 Cal.4th 137, 168: "'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.'"

(3) A prosecutor may argue, if in good faith, that she did not know a challenged juror was even a member of a cognizable group. In *People v. Barber* (1988) 200 Cal.App.3d 378 at 389, the district attorney explained to the trial court regarding the first of four Hispanic jurors challenged: "'... I must point out that I did not recognize that name as a Spanish surname. This juror appeared to be a white nonMexican [sic] juror to myself. In my opinion I still am not convinced that that is necessarily a Spanish surname.'" The trial judge, describing himself as "half-Mexican," found "that lady could have been anything." (*Id.* at 392.) Thus, the district attorney was "completely justified" and "completely sincere" in her statement that she did not recognize the juror as being Hispanic. (*Id.*) The appellate court held, "In our view, a bona fide showing by the prosecutor, reasonably accepted by the trial court, that he or she did not believe or recognize a prospective juror as being a member of a particular cognizable class, i.e., black, Hispanic, Oriental, etc., effectively resolves the issue in favor of the prosecution." (*Id.* at 394.) *See also Hernandez v. New York* (1991) 500 U.S. 352, 369–370.

(4) One tactic used effectively in federal court is to justify your prospective challenges before you even make them. For an example of the technique, *see United States v. Contreras-Contreras* (9th Cir. 1996) 83 F.3d 1103 [Assistant U.S. Attorney informs the judge during voir dire that he has a *Batson* problem because of two intended challenges, then justifies the proposed challenges; the opinion notes that the trial court may use as evidence of the prosecutor's sincerity the fact that he defended his use of his peremptory challenge without being asked to do so].

(5) A final tactic, if it can be done in good faith, is to claim the challenge objected to was in fact mistakenly made by the prosecutor. In *People v. Williams* (1997) 16 Cal.4th 153, 188–190, after the trial court impliedly found a prima facie case, the district attorney was asked to justify the challenge of two African-American jurors. He stated as to one that the challenge was made "in error ... She should be on this jury. I got her confused. She's a police officer, and I made a mistake. I should have kept her on. ... I will be glad to pull my other statements as to the other blacks on the panel, and her guilt rating and death rating are higher than theirs. That was a flat out mistake." The district attorney offered to call her back to the panel if the defense would stipulate but the defense declined.

The opinion states:

> First, ... it is self-evidently possible for counsel to err when exercising peremptory challenges. Second, a genuine "mistake" is a race-neutral reason. Faulty memory, clerical errors, and similar conditions that might engender a "mistake" of the type the prosecutor proffered to explain his peremptory challenge are not necessarily associated with impermissible reliance on presumed group bias. ... [¶]
>
> We realize the possibility always exists that counsel called upon to explain a questionable peremptory challenge will take refuge in a disingenuous claim the challenge was mistakenly made. ... [¶]
>
> Though in making its determination a trial court is not necessarily required affirmatively to make further inquiry of the prosecutor concerning his proffered explanations for disputed peremptory challenges (*People v. Johnson* (1989) 47 Cal.3d 1194 at 1222), the trial court in this instance, where the proffered explanation was of a type particularly susceptible to abuse by overzealous prosecutors, wisely engaged in such inquiry. The trial judge's findings in such a context, largely turning on evaluations of credibility, are entitled to great deference. [Citations.]

i. When it is time for you to justify, remember this point: though not specifically noted in *Wheeler*, subsequent California Supreme Court authority at least notes this basic standard regarding justifying challenges: "The justification need not support a challenge for cause, and even a 'trivial' reason, if genuine and neutral, will suffice." (*People v. Arias* (1996) 13 Cal.4th 92, 136, citing *People v. Montiel* (1993) 5 Cal.4th 877, 910, fn. 9.) However, (and this is the other side of the coin), the trial court in its third-prong analysis of deciding the plausibility and genuineness of your challenge justifications must use good judgment to distinguish bona fide reasons for peremptories from "sham excuses belatedly contrived to avoid admitting acts of group discrimination." (*Wheeler*, 22 Cal.3d at 282.) Ultimately, let your best guide be the still-good and oft-cited maxim from *People v. Silva* (2001) 25 Cal.4th 345, 386: appellate courts will give great deference to a trial court's challenge, but they do so "only when the trial court has made a sincere and reasoned attempt to

evaluate each stated reason as applied to each challenged juror. [Citations.] 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."

III. Problem Procedures in Voir Dire Practice (Court Anomalies)

A. Court asks counsel to justify challenges without even an objection from opposing counsel

1. *See People v. Lopez* (1991) 3 Cal.App.4th Supp. 11 [misdemeanor assault with a deadly weapon prosecution, where the defense challenged two Chinese-Americans from the jury; upon the third defense challenge of a Chinese-American (without objection by the district attorney), the trial court initiated *Wheeler* proceedings on its own motion. Holding: no error for trial court to raise its own motion to a party's use of peremptory challenges].

2. Thoughtful *Lopez* quotes: "While the *Wheeler* court may have contemplated that one or the other of the parties would initiate the process by objecting to the discriminatory use of peremptory challenges, the court noted that the right to an impartial jury drawn from a cross-section of the community is part of the 'American system' or 'American tradition.' (*Wheeler* at 272.) The courts have a responsibility to enforce this guaranty. (*Id.*) Given this posture, the trial court below was inherently empowered to initiate a *Wheeler* proceeding on its own motion when it perceived that one of the litigants appeared to be challenging prospective jurors because of race." (*Lopez*, 3 Cal.App.4th Supp. at 15.) "Additionally, if the court were to permit litigants to use race as a basis for their peremptory challenges, it might well engender disrespect for the judicial process and undermine the credibility and effectiveness of the courts. Given these considerations, we see no reason that a trial court should be required in all cases to sit by unless and until one of the lawyers objects. ... To protect the legitimacy of the judicial system, the courts must ensure that persons are not excluded from jury service based on their race. Thus, the trial court did not err when it initiated *Wheeler* proceedings on its own initiative." (*Id.* at 15–16.)

B. Court asks prosecutor to justify challenges before finding a prima facie case

1. Answering the court's inquiry regarding individual challenge justifications before a no-prima-facie finding will result in an implied prima facie finding. (*See*, e.g., *Arias*, 13 Cal.4th at 135 ["When the trial court solicits an explanation of the challenged excusals without first indicating its views on the prima facie issue, we may infer an implied prima facie finding. [Citations.] ... Once an implied prima facie finding has been made, that issue becomes moot, and the only question remaining is whether the individual justifications were adequate"]. Thus the proper district attorney response is to speak only to the prima facie case issue, not specific challenge justifications; then a prima facie finding will not be implied. (*See People v. Ferro* (1993) 21 Cal.App.4th 1, 7–8.)

   However, in light of the new, lower standard for prima facie case finding, be prepared at outset to state justifications.

2. When court asks for justifications of multiple challenges, you **must** state reasons for each juror challenged; "I honestly don't recall why I challenged the third juror" is fatal. *See People v. Cervantes* (1991) 233 Cal.App.3d 323, 335: case was reversed and remanded for a new trial "because of the prosecution's failure to present *any reasons* for the exercise of two peremptory challenges" (emphasis in original).

3. If you are the one making the prima facie case, and the court will not fully entertain your attempt to meet your burden, file an affidavit stating your grounds before jury selection is completed.

C. Court invites prosecutor to justify challenges even after ruling that a prima facie case was not made

1. If the court expressly finds no prima facie case, but permits you to comment on your justifications, give them, as it will help the record, even if legally unnecessary. (*See People v. Cornwell* (2005) 37 Cal.4th 50.)

2. It is not an implied finding of a prima facie case when the court finds none but allows the prosecutor to state his challenge justifications on the record. However, when the trial court makes no express finding that a prima facie case was not made, then immediately invites the prosecutor to justify challenges, it suggests an implied prima facie finding. (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1122–1123.) *Accord*, no prima facie showing implied when the court acquiesces to both parties' wishes to make a record. (*People v. Farnam* (2002) 28 Cal.4th 107, 136.)

D. Miscellaneous court errors

1. Court asks prosecutor for justifications weeks after voir dire, but never applies specific reasons to specific jurors. (*People v. Fuentes* (1991) 54 Cal.3d 707 [death penalty reversed].)

2. Court holds ex parte hearing in chambers to hear prosecutor's reasons for challenging blacks. (*United States v. Thompson* (9th Cir. 1987) 827 F.2d 1254, 1260 [reversed]; *but see People v. Ayala* (2000) 24 Cal. 4th 243, 259–269 [prosecutor's multiple ex parte hearings for justifications were error, albeit harmless].) Given the weight of federal authority, and Chief Justice George's dissent in *Ayala*, which says ex parte hearings are prejudicial error, avoid them.

3. Court expresses its own view of prosecutor's apparent reasons without having prosecutor state them (*Paulino v. Castro* (9th Cir. 2004) 371 F.3d 1083 [reversed and remanded for prosecutor to state reasons; not for court to speculate; facts: prosecutor had kicked five of six black jurors; defense made *Wheeler* challenge; Los Angeles trial court interrupted defense prima facie showing to say that statistics look bad, but I see why th prosecutor kicked those jurors, and states apparent reasons].

IV. Other Procedural Issues

A. Timeliness of motion

1. A *Wheeler* motion made after the jury is sworn is untimely. (*See People v. Perez* (1996) 48 Cal.App.4th 1310, 1314 [off-record side bar during voir dire; jurors and alternates selected and sworn; remainder of panel dismissed; defense counsel then raises motion before opening statement]; *see also People v. Roldan* (2005) 35 Cal.4th 646, 701.)

2. A *Wheeler* motion made before the selection of alternates is timely as to the entire panel, including the 12 sworn members. (*See People v. Gore* (1993) 18 Cal.App.4th 692, 703: ["[T]o be timely, a *Wheeler* objection or motion must be made, at the latest, before jury selection is completed. 'The general rule is that where a court has indicated that a trial will be conducted with alternate jurors, the impanelment of the jury is not deemed complete until the alternates are selected and sworn.' [Citation.]"]; *accord, People v. Rodriguez* (1996) 50 Cal.App.4th 1013, 1023.)

3. *Batson/Wheeler* motions must be timely made (before jury sworn and panel dismissed), but no requirement that they be made immediately upon exercise of the offending peremptory challenge, and before other challenges made, upon pain of waiver. (*People v. Roldan* (2005) 35 Cal.4th 646, 702.)

4. A defendant cannot complain on appeal of *Batson/Wheeler* violations regarding challenged prospective alternate jurors if no alternates were ever seated on the final jury; any violation as to them could not possibly have prejudiced the defendant. (*Roldan*, 35 Cal.4th at 703.)

5. Obviously, a *Wheeler* motion cannot be raised for the first time on appeal, nor may a change be made to *Wheeler* grounds already raised. (*See People v. Hayes* (1990) 52 Cal.3d 577, 605 [defense objection during voir dire to prosecution challenges to black jurors timely raised; objection to Spanish-surnamed jurors not made until appeal was procedurally barred since it was not raised at trial]; *accord, People v. Howard* (1992) 1 Cal.4th 1132, 1157 [trial challenge on racial grounds was considered but gender-based objection newly raised on appeal was rejected as untimely].)

B. Remedy for the trial court's erroneous denial of (or failure to address) a *Wheeler* motion; the concept of the limited remand

1. Introduction

Wheeler error is normally prejudicial per se; thus, reversal is compelled. However, if the trial court commits error in failing to recognize a prima facie case was made and thus does not require a justification for challenges when it should have, some authority exists to allow a limited remand for the challenging party to explain their reasons for excluding jurors (*see Batson v. Kentucky* (1986) 476 U.S. 79, 100; *People v. Gore* (1993) 18 Cal.App.4th 692, 706; *People v. Tapia* (1994) 25 Cal.App.4th 984, 1031; *Rodriguez*, 50 Cal.App.4th at 1025). A comparison of these cases with authority requiring reversal indicates that the limited remand remedy is only available where the time period from trial to remand is relatively short (less than three years), and the case is extremely serious (typically special-circumstances situations). In such cases, the justifications of the party making the peremptory would likely still be in mind, and the paper record (including, for example, jury questionnaires and

thorough voir dire) would be most complete. Note, however, that the California Supreme Court has declined to accept the limited-remand exception where the lapse of time from trial voir dire to remand would make it unrealistic for the prosecutor to remember details of challenges or for the court to assess the manner in which the challenges were made. (*See*, e.g., *People v. Snow* (1987) 44 Cal.3d 216, 227 [lapse of six years]; *accord*, *People v. Hall* (1983) 35 Cal.3d 161, 171 [lapse of three years].)

2. Procedure on remand (if a limited remand is allowed)

   a. The trial court assumes defendant has established a prima facie case of wrongful exclusion of jurors. (*See Tapia*, 25 Cal.App.4th at 1031.)

   b. Justifications are now required to be given. If the prosecutor's reasons for excusing those jurors are found not racially neutral (or based on another group bias), the trial court grants the *Wheeler* motion and reversal and retrial are required.

   c. If the justifications are found racially neutral, the trial court denies the *Wheeler* motion and defendant's conviction is reinstated. (*See Rodriguez*, 50 Cal.App.4th at 1037.).

   d. Although it is best to have all the original participants from the first trial including the trial judge at the limited remand hearing, the trial judge's unavailability is not fatal so long as the grounds for challenges are objectively verifiable (e.g., juror's participation in prior trial or familial relation to convicted murderer). If, however, the grounds are based only on subjective reasons (e.g., the juror's appearance or body language), you must have the original trial judge to have limited remand. (*People v. Rodriguez* (1999) 76 Cal.App.4th 1093.)

3. Trial tactic on how to obtain a limited remand rather than a retrial: pay close attention to juror questions and answers and keep good voir dire notes of your prima facie case rebuttal and proposed challenge justifications. If the case is serious enough, with juror questionnaires and a thorough voir dire transcript, you might be able to get the Attorney General to win you a limited remand instead of a retrial should an appellate court find that the trial court committed *Wheeler* error.

C. Multiple *Wheeler* motions during a single voir dire

1. New prima facie showing must be made with each objection. (*People v. Irvin* (1996) 46 Cal.App.4th 1340.)

> Although Wheeler motions may be made seriatim, each Wheeler motion is itself separate and discrete and is resolved definitively and independently of each other. ... [¶]
>
> We hold that once a prima facie showing has been refuted, it is incumbent on the moving party to make a new prima facie showing with regard to any subsequent *Wheeler* motion pertaining to different jurors of the identified group from the venire. [The Court's reference to "venire" more properly should be noted as "panel," as "venire" means the jurors called to the courthouse to serve on cases in general, while this monograph has referred to a "panel" as jurors called to a particular courtroom to serve on a specific case.]

> Subsequent *Wheeler* motions, however, may be based on evidence presented in prior *Wheeler* motions, to the extent necessary to establish a discriminatory pattern of peremptory challenges. [Citation.] The rationale behind requiring a prima facie showing to be made anew is the requirement that in making a prima facie showing, the defendant must focus on the particular circumstances of the specific peremptories in question. (*Irvin*, 46 Cal.App.4th at 1351–1352.)

See also, People v. Alvarez (1996) 14 Cal.4th 155, 198–199.

2. A good recent case laying out procedure for handling successive *Wheeler* motions is *People v. McGee* (2002) 104 Cal.App.4th 559. Among the points it makes is that a trial judge cannot ask only for justifications of some of the challenged jurors; once it finds a prima facie case, justifications must be made for all challenges of jurors in the cognizable group. Also, the trial court must not only decide in the third prong, that justification is valid, but that that the stated reason actually prompted the challenger to exercise the challenge. In *McGee*, the trial court made such a poor record, that very complex and multi-layered remand procedure was ordered. A similar issue is currently on review in the California Supreme Court. (*People v. Robinson* (2004) 14 Cal.Rptr.3d 210.)

D. *Wheeler* principles generally apply to judicial challenge under Code of Civil Procedure section 170.6

1. *See People v. Superior Court (Williams)* (1992) 8 Cal.App.4th 688, 707–709.

2. *Williams* holds that while a Code of Civil Procedure section 170.6 peremptory challenge to a judge is not fully analogous to Wheeler jury-challenge jurisprudence, section 170.6 cannot be used to disqualify a judge on racial grounds; thus some inquiry into the racial basis for a judicial challenge may be made.

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V. Remedies for *Wheeler* Violations

A. Introduction

The remedy mandated by *Wheeler* for a finding of impermissible group bias in any challenge is to draw an entirely different jury panel and start selection anew. However, note that *Batson v. Kentucky* (1986) 476 U.S. 79, 100, fn. 24, suggests a possible alternative remedy of disallowing the discriminatory challenge(s) and resuming jury selection with the improperly challenged juror(s) reinstated on the panel. A number of California courts had (until 2002's Supreme Court *Willis* opinion, *see below*) followed this alternative *Batson* suggestion, but with widely varying results. Most have been reversed, as higher courts felt constrained to follow the letter of *Wheeler*; *see*, e.g., *People v. Lopez* (1991) 3 Cal.App.4th Supp. 11; *People v. Smith* (1993) 21 Cal.App.4th 342; *People v. Rodriguez* (1996) 50 Cal.App.4th 1013, 1026.

Other situations (pre-*Willis*) that seated jurors over challenge have been upheld because of unusual facts. The factor common to these latter cases has been the exercise of peremptory challenges at sidebar, rather than in open court, which acts as an implied waiver of the *Wheeler* right to dismissal of the panel. (*See*, e.g., *People v. Williams* (1994) 26 Cal.App.4th Supp. 1.) These creative attempts to circumvent the *Wheeler* inflexible remedy foreshadowed the supreme court's own revamping of this entire area of the law, in 2002.

B. The radical new remedy: *People v. Willis* (2002) 27 Cal.4th 811

1. For the first time, the California Supreme Court expressly allows other remedies for a *Wheeler* violation than simply dismissal of the panel and restarting of the process. The trial court now, with the consent of the aggrieved party, has discretion to impose different sanctions short of outright dismissal of the entire panel (for example, dismissal is not mandated by the federal constitution). (*Willis*, 27 Cal.4th at 818.)

2. Such alternative sanctions include monetary fines against the *Wheeler* violator; reseating the wrongfully excluded juror; and (dicta) allowing the aggrieved party additional peremptory challenges. (*Id.* at 821.)

3. Procedurally, the key is that the aggrieved party (the *Wheeler* objector who has made a prima facie case and convinced the court that the opponent's justifications are insufficient) has the whip hand: the alternative sanctions are to be imposed only with the consent of this party. Thus, if the aggrieved party prefers dismissal of the panel, that must be the remedy utilized; alternatively, if the aggrieved party waives its right to mistrial, preferring to take its chances with the panel at hand, the trial court should honor that waiver rather than dismiss the panel. (*Id.* at 823–824.)

4. In another procedural issue, broached but left tantalizingly unclear, the court suggests that to avoid prejudice to the party making an unsuccessful juror challenge (i.e., where the trial court provides the remedy of reseating the juror), the trial court should handle challenges at sidebar, only announcing in open court those challenges that have successfully passed *Wheeler* muster. That way, the reseated juror will not know that one of the parties tried to kick him or her off. The practical problem is that unless all challenges are done at sidebar, how will the parties and the trial court know that a *Wheeler* objection is forthcoming on any given challenge until it is made? The opinion suggests that trial courts may require

counsel to first privately advise each other of anticipated peremptories, so that if a *Wheeler* objection will be made, it can be heard at sidebar. (*Id.* at 821–822.)

5. Tactical advice in light of *Willis*

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

   b. If your opponent has been found in violation of *Wheeler*, consider asking the court not only to reseat the last juror challenged, but to give you additional challenges for each juror of that cognizable group that the court found was improperly bumped and who has already left the courtroom (and thus cannot now be reseated as well).

   c. If you feel a juror is very hostile to you or your case, you excuse them in open court, and the court immediately thereafter grants a *Wheeler* objection and reseats that hostile juror, consider dismissing the case before the jury is sworn, and refilling. Why try it to get no more than a hung jury? To maximize your chances of avoiding this scenario (where possible), always kick off your most hateful juror earliest on in the process, before your opponent has built up enough steam to make a successful *Wheeler* challenge and possibly reseat the last juror challenged.

C. Post-*Willis* case law

1. *People v. Overby* (2004) 124 Cal.App.4th 1237, 1245–1246: Defense counsel may impliedly, rather than expressly, consent to *Wheeler* remedy of reseating juror, simply by submitting to the trial court's announcement of that remedy (i.e, the defendant has no personal right to express waiver of dismissal of the jury panel). The court suggests that in the future, it is preferable for the trial court to seek express consent of the aggrieved party when an alternative *Wheeler* remedy is to be employed.

2. *People v. Muhammad* (2003) 108 Cal.App.4th 313, 324: The trial court may not impose a monetary sanction under Code of Civil Procedure section 177.5 for a *Wheeler* violation unless the sanction is preceded by a court order not to engage in the discriminatory use of jury challenges.

3. *People v. Boulden* (2005) 126 Cal.App.4th 1305, 1314: The trial court's order before the start of jury selection not to violate *Wheeler* (with implicit threat of monetary sanctions) did not result in infringement of the defendant's right to zealous representation by counsel; such a prophylactic, pre-emptive order was authorized by the judge's statutory power to control trial proceedings, and did no more than tell counsel to obey the law.

VI. *Wheeler* Words That Work: A Primer on Providing Peremptory Challenge Justifications

A. Introduction

The myriad of cases dealing with *Wheeler* objections are frequently rich with quotes from the trial record of the actual justifications given by counsel that have been found permissible. While some present unique, case-specific fact situations, most can be organized into categories of frequently recurring situations where a peremptory challenge is constitutionally justifiable. This section covers such categories and includes case citations and quotations where it would be most useful to know and emulate particular language that has been deemed proper. Before such categories are laid out, it is useful to get a firm grounding in the basic practical tactics of exercising peremptories. Fortunately, *Wheeler* itself, as well as more recent California Supreme Court authority, provides just such extensive tactical discussion. Certain unfortunate cases (perhaps result-oriented) where the justifications were not sufficient to prevent a reversal for *Wheeler* error are also discussed. While the categories of justifiable justifications give a wide variety of good examples to follow, these reversals reveal the errors to avoid. This section concludes with a final trial tactic checklist that applies the principles of all cases discussed.

B. Case quotations reflecting a practical and tactical approach to voir dire

1. *People v. Wheeler* (1978) 22 Cal.3d 258, 275

> For example, a prosecutor may fear bias on the part of one juror because he has a record of prior arrests or has complained of police harassment, and on the part of another simply because his clothes or hair length suggest an unconventional lifestyle. In turn, a defendant may suspect prejudice on the part of one juror because he has been the victim of crime or has relatives in law enforcement, and on the part of another merely because his answers on voir dire evince an excessive respect for authority. Indeed, even less tangible evidence of potential bias may bring forth a peremptory challenge: either party may feel a mistrust of a juror's objectivity on no more than the "sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another" (4 Blackstone, Commentaries *353)—upon entering the box the juror may have smiled at the defendant, for instance, or glared at him.

2. *People v. Johnson* (1989) 47 Cal.3d 1194, 1220–1221

> Trial lawyers recognize that it is a combination of factors rather than any single one which often leads to the exercise of a peremptory challenge. In addition, the particular combination or mix of jurors which a lawyer seeks may, and often does, change as certain jurors are removed or seated in the jury box. It may be acceptable, for example, to have one juror with a particular point of view but unacceptable to have more than one with that view. If the panel as seated appears to contain a sufficient number of jurors who appear strong-willed and favorable to a lawyer's position, the lawyer might be satisfied with a jury that includes one or more passive or timid appearing jurors. However, if one or more of the supposed favorable or strong jurors is excused either for cause or peremptory challenge and the replacement jurors appear to be passive or timid types, it would not be unusual or unreasonable for the lawyer to peremptorily challenge

one of these apparently less favorable jurors even though other similar types remain. These same considerations apply when considering the age, education, training, employment, prior jury service, and experience of the prospective jurors. [¶]

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

C. Categories of reasons for justifiable challenges

1. Negative experience with, or distrust of, law enforcement

   a. "We have repeatedly upheld peremptory challenges made on the basis of a prospective juror's negative experience with law enforcement." [Citations, including *Wheeler*'s fn. 18]. (*People v. Turner* (1994) 8 Cal.4th 137, 171 (*Turner II*).)

   b. Note that a juror who believed in jury nullification was properly challenged **for cause**. (*Merced v. McGrath* (9th Cir. 2005) 426 F.3d 1076.)

   c. Case examples:

      (1) *People v. Farnam* (2002) 28 Cal.4th 107 [OK to challenge juror who visited nephew in Chino State Prison].

      (2) *Hayes v. Woodford* (9th Cir. 2002) 301 F.3d 1054, 1082–1083 [proper to challenge juror who had been refused full-time employment with the police department, so might have had lingering resentment; proper to challenge juror going through a divorce with a police officer].

      (3) *People v. Arias* (1996) 13 Cal.4th 92, 137–139 [black juror's daughter was currently being prosecuted by that district attorney's office, and the juror had testified on her daughter's behalf].

      (4) *United States v. Bauer* (9th Cir. 1996) 84 F.3d 1549 [Rastafarian defendant: challenges to two Native American jurors from Fort Peck Reservation who resided in the same geographical area as a government witness; Assistant U.S. Attorney feared they would be anti-witness or anti-government because of where they lived].

(5) *People v. Dunn* (1995) 40 Cal.App.4th 1039, 1046–1047 [homicide case: four black jurors were challenged, one whose relatives were drug addicts, and one whose uncle was convicted of murder].

(6) *People v. Douglas* (1995) 36 Cal.App.4th 1681, 1690 [two black jurors were excused who had had numerous family members in trouble with the law and had served time].

(7) *People v. Johnson* (1989) 47 Cal.3d 1194, 1217–1218 [Jewish, Asian, and black jurors were challenged for varying hostilities against law enforcement, including one whose ex-husband was a cop].

(8) *People v. Barber* (1988) 200 Cal.App.3d 378, 389–394 [four Hispanic jurors were properly excused, two of whom had relatives involved in theft or drug offenses].

(9) *People v. Mayfield* (1997) 14 Cal.4th 668, 724–726 [juror was challenged because he "had expressed some suspicion of prosecutors in general, and because [he] appeared to lack confidence in the ability of the judicial system to 'convict the right people'"].

2. Stupid/inattentive juror, or inconsistent answers during voir dire

   a. "Of course, where a prosecutor's concern for a juror's ability to understand is supported by the record, it is a proper basis for challenge. [Citation.]" (*People v. Turner* (1994) 8 Cal.4th 137, 169 [*Turner II*].)

   b. Case examples

      (1) *People v. Arias* (1996) 13 Cal.4th 92, 137–139 [black juror's verbal difficulties in discussing death penalty caused prosecutor to note he "did not consider her ... a very bright woman"].

      (2) *People v. Perez* (1994) 29 Cal.App.4th 1313, 1322–1325 [four Hispanic jurors were excused from drug case. The prosecutor on number three:

> When [juror] was asked to answer the judge's ten questions, she answered only two of them. She answered the first and then she went directly to number six and she said that she was a party to a lawsuit and she stopped. Your Honor asked her the other questions and she didn't respond. Your Honor had to ask her each and every individual question. ...
>
> That is not the type of juror that I care to have sit in any trial that I'm having because if she can't follow your orders she certainly is not going to pay attention to the law at a later time period when she is in with a group of jurors. ...
>
> If a person has such a problem with answering such a simple question of where they're employed, this is not an individual who is going to be conducive to reaching a decision with—with 12 other individuals].

(3) *People v. Turner* (1994) 8 Cal.4th 137, 168–172 [black juror was properly excused: "had an extremely poor grasp of the English language. … He had a very poor comprehension"].

(4) *United States v. Power* (9th Cir. 1989) 881 F.2d 733, 740 [challenge of one of two black jurors upheld because juror's fidgety behavior due to recent past jury service made the prosecutor believe that the individual would not be attentive].

(5) *People v. Johnson* (1989) 47 Cal.3d 1194, 1217–1218 [Asian juror was challenged, as she seemed to have some trouble understanding the people questioning her].

(6) *People v. Barber* (1988) 200 Cal.App.3d 378, 389–394 [Four Hispanic jurors were properly excused, two of whom had comprehension problems: one "did not appear to gain a complete grasp of the questions that the Court and counsel were propounding to him. … That … led me to believe that he may not be the type of person that could understand the type of principles that are involved in this case." Juror number three was an "unprofessional" person who "seemed unfamiliar with the legal principles that were being propounded"].

(7) *People v. Alvarez* (1996) 14 Cal.4th 155, 194–195 [juror challenged for "a certain confusion she displayed on voir dire"].

(8) *People v. Mayfield* (1997) 14 Cal.4th 668, 724–726 [Prosecutor unable to determine the death penalty views of one of the many challenged jurors because his responses on voir dire kept shifting].

(9) *But see People v. Gonzalez* (1989) 211 Cal.App.3d 1186, 1200 [Reversal for prosecutorial *Wheeler* error in excusing Hispanic naturalized citizen because "'in my experience, oftentimes first-generation Americans have trouble understanding the law once they get back in the jury room.' … Other than the prosecutor's bald assertion, there is nothing in the record to indicate that Manuel S. would have any trouble understanding the law of his adopted country. The prosecutor's statement of justification was clearly inadequate in that it was nothing more than an admission of bias (naturalized citizens being unable to understand the law) she assumed affected this juror"].

3. Juror's appearance/demeanor/body language/just plain "weirdness" (key attribute is noted in boldface)

   a. "[P]eremptory challenges are properly made in response to "'bare looks and gestures'" by a prospective juror that may alienate one side [*People v. Wheeler*, 22 Cal.3d at 276]," (*People v. Turner* (1994) 8 Cal.4th 137, 171 [*Turner II*].)

   b. Case examples

      (1) *People v. Ward* (2005) 36 Cal.4th 186, 202 [**unconventional appearance**, i.e., 30 silver chains around her neck and rings on every finger suggested she might not fit in with other jurors; body language during questioning suggested she was "uptight with" the prosecutor].

(2) *Hayes v. Woodford* (9th Cir. 2002) 301 F.3d 1054, 1082-1083 [juror prone to exaggerate or lie: claimed he had been accepted for employment with police department when it would have been impossible due to age requirements; also **claimed to have "photostatic mind"**; proper to challenge].

(3) *United States v. Murillo* (9th Cir. 2002) 288 F.3d 1126, 1135-1137 [legitimate ground for challenge was juror's claim that **she never read a book and that her favorite TV show was "Judge Judy"**].

(4) *People v. Ervin* (2000) 22 Cal.4th 48 [prosecutor suspicious of juror's neutrality because defense accepted her without a single question; another juror properly excused as **too eager** to remain on jury despite holding a job and attending classes].

(5) *People v. Arias* (1996) 13 Cal.4th 92, 137–139 [of three jurors who were challenged, one Hispanic juror had "**soft and reluctant responses and considerable ambivalence** about capital punishment. ... Such views, the prosecutor asserted, might make [the juror] unduly susceptible to psychiatric and background defenses at the penalty phase. ... [¶] The prosecutor could also worry that [the juror]'s **soft-spoken demeanor** signaled an inability to discuss or maintain his views during deliberations"].

(6) *Purkett v. Elem* (1995) 514 U.S. 765; 115 S.Ct. 1769, 1770. [Missouri prosecutor:

> I struck [juror] number twenty-two because of his long hair. He had **long curly hair**. He had the longest hair of anybody on the panel by far. He appeared to me to not be a good juror for that fact, the fact that he had long hair hanging down shoulder length, curly, **unkempt hair**. Also, he had a mustache and goatee type beard. And juror number twenty-four also has a **mustache and goatee type beard.** Those are the only two people on the jury ...with the facial hair .... And I don't like the way they looked, with the way the hair is cut, both of them. And the mustaches and the beards look suspicious to me].

These reasons were found to be race-neutral.

(7) *People v. Dunn* (1995) 40 Cal.App.4th 1039, 1046–1047 ["[T]he prosecutor also stated that 'the way [juror] was sitting down, the way she was **frowning**' and her apparent 'lack of ... any sort of interest in the proceedings' suggested she could not be an impartial juror"]. *But see People v. Allen* (2004) 115 Cal.App.4th 542, 546 [trial court's acceptance of prosecutor's demeanor challenge, given in such generic fashion as to provide no specific facts supportable by the record, was error; here was prosecutor's justification: "The first woman, her very response to your answers, and her demeanor, and not only dress but how she took her seat. I don't know if anyone else noticed anything but it's my experience, given the number of trials I've done, that that type of juror, whether it's a personality conflict with me or what have you, but they tend to, in my opinion, disregard their duty as a juror and kind of have

more of an independent thinking." Court of appeal found prosecutor's stated reasons meaningless and incomprehensible]. (*Id.* at 551, 553.)

(8) *People v. Douglas* (1995) 36 Cal.App.4th 1681, 1690 [two black jurors were excused, one of whose responses were **"tentative" and "low-keyed"**].

(9) *People v. Perez* (1994) 29 Cal.App.4th 1313, 1322–1325 [among the factors identified for one of four Hispanics who were challenged, prosecutor noted: "[juror] was seated approximately six feet away from me as I was watching the panel when your Honor read the general questions that you gave the entire group in this second panel. When you asked the question about if the defendant did not take the stand would that necessarily mean that you would find him guilty, [juror]'s **head shook back and forth and he gave a little bit of a laugh out loud"**].

(10) *People v. Turner* (1994) 8 Cal.4th 137, 168–172 [one of the many black jurors challenged drew this reaction: "... the prosecutor noted from [the juror's] body language and way of expressing herself it seemed 'there's a great deal of hostility within her. She seems mad or hostile about something.' ... [The juror] 'said that she didn't think justice was done on the murder of the father of her child.' ... [The prosecutor] got the feeling that 'there was **a pot boiling within her**'"].

(11) *People v. Bernard* (1994) 27 Cal.App.4th 458, 467–469 [trial court finding of no prima facie showing of group bias was affirmed; trial court noted as to first black juror to be excused, "I would only characterize [the juror's] response to be at best, and I don't mean his verbal responses, more his facial responses and his reaction to the responses of other individuals, as **cavalier**"].

(12) *United States v. Childs* (9th Cir. 1993) 5 F.3d 1328, 1337–1338 [sole Native-American juror challenge was upheld after prosecutor explained juror "had appeared **hesitant and seemed to go along with whatever the questions suggested to him**"].

(13) *Hernandez v. New York* (1991) 500 U.S. 352, 356–357 [two Hispanic jurors were challenged by a Brooklyn prosecutor because

> I feel very uncertain that they would be able to listen and follow the interpreter. ... I felt there was a great deal of **uncertainty as to whether they could accept the interpreter** as the final arbiter of what was said by each of the witnesses, especially where there were going to be Spanish-speaking witnesses, and I didn't feel, when I asked them whether or not they could accept the interpreter's translation of it, I didn't feel that they could. They each looked away from me and said with some hesitancy that they would try, not that they could, but that they would try to follow the interpreter, and I feel that in a case where the interpreter will be for the main witnesses, they would have an undue impact upon the jury. ... Each of the complainants is Hispanic. All my witnesses, that is civilian witnesses, are going to be Hispanic. I have absolutely no reason—there's no reason for me to want to exclude Hispanics because all the parties involved are Hispanic, and I certainly would have no reason to do that."

In accepting this explanation as race-neutral, the Supreme Court cautioned, "Our decision today does not imply that exclusion of bilinguals from jury service is wise, or even that it is constitutional in all cases." (500 U.S. at 371) *Cf., People v. Lesara* (1988) 206 Cal.App.3d 1304, 1309 [insufficient English-speaking citizens not cognizable group; personal interpreters for individual jurors too burdensome for rest of jury].

(14) *United States v. Power* (9th Cir. 1989) 881 F.2d 733, 740 [challenge of one of two black jurors was upheld, inter alia, "because juror had recently completed service on another jury and was **fidgeting and looking around** as he sat in the jury box"].

(15) *People v. Johnson* (1989) 47 Cal.3d 1194, 1217–1219 [numerous jurors challenged for demeanor reasons such as **"nervous," smiling at defendant, "looked tired," "very tired appearance," juror "weird," "overweight," "poorly groomed," and "defensive body position"**].

(16) *People v. Barber* (1988) 200 Cal.App.3d 378, 389–394 [juror was challenged because he "'appeared in the courtroom **wearing a Coors jacket**'"].

(17) *People v. Alvarez* (1996) 14 Cal.4th 155, 194–195 [juror in murder trial **exhibited substantial upset** during voir dire resulting from a recent death in her family].

(18) *People v. Mayfield* (1997) 14 Cal.4th 668, 724–726 [juror who stated he ignored 55-mile-per hour speed limit displayed a "**cavalier** attitude" toward the law. Voir dire exchange: "[Prosecutor]: Have you ever found a law that you didn't like? [Juror]: No. [Prosecutor]: What about the 55 mile an hour speed limit? [Juror]: Didn't bother me any. [Prosecutor]: Did you go 55? [Juror]: No. [Prosecutor]: So there was a law you were willing to ignore? [Juror]: Yeah. [Prosecutor]: In this courtroom, you're not going to be able to ignore the judge's law. If he says it's 55 it's 55. [Juror]: I understand that." The court stated, "We question whether these responses, by themselves, would provide adequate basis for a challenge for cause. But, when considered in conjunction with the equivocal answers about death views, they might legitimately lead the prosecutor to conclude that there was an unacceptable risk that [juror] would not follow the instructions at the penalty phase"].

(19) *But see People v. Gonzalez* (1989) 211 Cal.App.3d 1186, 1199, 1201 [reversal for prosecutor *Wheeler* error in excusing an Hispanic juror because, as a naturalized citizen, he would be unable to understand the law, and because he "had his arms folded across his chest, 'and it looked like he'd already made up his mind either way ... '"; "We conclude from a review of the record that the prosecutor primarily relied on [the juror]'s **naturalized citizenship** in exercising the challenge. The court made no effort to question the prosecutor on the reasons given. To conclude from the record that the prosecutor would have excused [juror] solely because of his 'body language' would require undue speculation on our part"].

(20) *Cf.: Rice v. Collins* (2006) ___ U.S. ___; 126 S.Ct. 969 [juror **rolled eyes**, among other factors].

4. Other prior jury experience

   a. Case examples

      (1) *People v. Farnam* (2002) 28 Cal.4th 107, 138 [juror on past hung jury OK to challenge].

      (2) *People v. Crittenden* (1994) 9 Cal.4th 83, 118 [challenge to black juror based on race-neutral grounds of her fear of serving on a jury for the first time, her opposition—and contradictory responses—to the death penalty, and her lack of dependable transportation to court; note that this dismissal of the sole black juror seated from entire venire was upheld]. *But see Williams v. Runnels* (9th Cir. 2006) 432 F.3d 1102, 1109, fn. 12 [in finding a prima facie case showing made, the court held 'loner' juror with no track record as juror in past insufficient reason to rebut inference of discrimination].

      (3) *People v. Perez* (1994) 29 Cal.App.4th 1313, 1322–1325 [four Hispanic jurors excused from drug case; when questioned individually about jury service, one juror stated that he had been tried for DUI; he volunteered that he was found not guilty].

      (4) *People v. Turner* (1994) 8 Cal.4th 137, 168–172 [black juror who had a poor grasp of English and sat on a hung jury was properly excused].

      (5) *United States v. Power* (9th Cir. 1989) 881 F.2d 733, 740 [challenge of one of two black jurors was upheld "because juror had recently completed service on another jury and was fidgeting and looking around as he sat in the jury box. ... The prosecutor stated that she feared the juror might be hostile to the government for calling him to serve again so soon after his service as a juror in a long prior trial"].

5. Limited life experience

   a. Case examples

      (1) *People v. Arias* (1996) 13 Cal.4th 92, 137–139 [challenge of Hispanic juror whose responses and age (25) "suggested her lack of involvement in society and apparent distrust of the system"; juror had a child though she was unmarried, was not registered to vote, and agreed the police should not have been called when her boyfriend suffered burglaries].

      (2) *People v. Perez* (1994) 29 Cal.App.4th 1313, 1322–1325 [four Hispanic jurors excused from drug case, two for limited life experience, which the court held was a race-neutral explanation (*Id.* at 1328); here is how the San Diego prosecutor stated her challenges: "...the reason why I exclude her: that she is young. She is single. She has no jury experience. She has no life experience in my opinion. [¶] And I believe that as to [second juror] that was one of the same reasons I kicked her in that she has no children. She is not married. She hasn't been around ... I'm kicking people who have no life experience. And if they haven't

been around the block, I don't think that they can sit on a jury and participate with jury deliberations and listen to attorneys"].

(3) *Cf, Boyde v. Brown* (9th Cir. 2005) 404 F.3d 1159 [opposite end of life spectrum: **juror's "grandmotheriless,"** along with her hesitations, transient background, and her "persona," sufficient race-neutral reasons for challenge].

(4) *Rice v. Collins* (2006) ___U.S. ___, ___; 126 S.Ct. 969. ["It is not unreasonable to believe the prosecutor remained worried {despite juror's rote answer re: impartiality toward drug prosecution} that a young person with few ties to the community might be less willing than an older, more permanent resident to impose a lengthy sentence for possessing a small amount of a controlled substance"].

6. Juror's occupation (in boldface)

   a. Case examples

      (1) *People v. Reynoso* (2003) 31 Cal.4th 903, 911 [**customer service representative**, with no jury experience and considered inattentive, properly challenged from multi-defendant murder trial; 4–3 opinion].

      (2) *People v. Ervin* (2000) 22 Cal.4th 48, 75 [**juvenile counselor**'s belief in rehabilitation, which might induce her to reject the death penalty, was adequate basis for challenge].

      (3) *People v. Turner* (1994) 8 Cal.4th 137, 168–172 [second black juror was excused because "the prosecutor also expressed concern that [the juror] had **trained with the Department of Social Services**"].

      (4) *People v. Barber* (1988) 200 Cal.App.3d 378, 389–394 [first challenged juror "'indicated that her profession was that of a teacher, and it's been my experience as a prosecuting attorney that many **teachers** have somewhat of a liberal background and are less prosecution oriented.'" The Court of Appeal added, "Peremptory challenges are often exercised against teachers by prosecutors on the belief that they are deemed to be rather liberal." Second juror was challenged because he was an assembly plant worker whose wife worked for a liberal attorney; third juror was challenged as an "unprofessional" person].

      (5) *But see People v. Lopez* (1991) 3 Cal.App.4th Supp. 11, 17 [affirming trial court finding of sham excuse when defense attorney challenged Chinese **computer programmer** on basis that he never allows computer programmers on criminal juries].

7. Next at bat looks better

   a. Recall quote, above, from *People v. Johnson* (1989) 47 Cal.3d 1194, 1220–1221 regarding the dynamics of jury selection.

b. Case example

(1) *People v. Alvarez* (1996) 14 Cal.4th 155, 194–195 [multiple challenges were justified on the basis of prosecutor's reason that "at the time of the strike, ... there were more favorable prospective jurors about to called into the jury box"].

c. Use of questionnaire and computerized draw list will lend great support to this "next at bat" approach.

8. A recent California Supreme Court case summarizing many such factors is *People v. Gutierrez* (2002) 28 Cal.4th 1083

a. Jurors' view about applying death penalty

b. Relatives involved in crime

c. Prior bad experience with police

d. Tendency to rely too heavily on expert opinion

e. Inability to concentrate or undue emotionality

f. Appearance of favoring defense

g. Hostile looks

h. Bias against group to which victim belongs

i. Close-mindedness to other's opinions

9. Final case examples of proper, creative voir dire (*see, e.g., People v. Barber* (1988) 200 Cal.App.3d 378, 389–394, and *People v. Johnson* (1989) 47 Cal.3d 1194, 1217–1218 [Summary: Santa Clara County Deputy District Attorney excused a variety of jurors: three black, four Jewish, and two Asian; the following explanations were given.

> As to the Jewish jurors, the prosecutor stated that one was a "very nervous person," gave the defendants "a very noticeable smile," was opposed to the death penalty or leaned that way. The second person was 71 years old, looked tired, had a relative who was a lawyer, and felt the death penalty was not a deterrent. He seemed to have a great deal of rapport with defense counsel and appeared more friendly to the defendant than the average juror. The third person was 61 years old and was a "very tired appearing person." She was critical of a police department she had dealt with and she felt an officer had lied. She also gave defendants a very sympathetic look. The prosecutor thought the fourth person was "weird," that sympathy for the defendants might be a problem for him, and that he "didn't seem to be willing to commit to promises to make a decision based on the facts or the evidence." The prosecutor also stated he felt totally unable to relate to him. [¶]
>
> As to the Asian jurors, one did not approve of the death penalty and said she could not pass judgment. She seemed to have some trouble understanding the people questioning her. The other person said she preferred life without possibility of parole over the death penalty and was

concerned that the case be proven without any doubt. She had also contested a speeding ticket and had lost and had some feelings about that. [¶]

Regarding the three black jurors, Ms. S's ex-husband was a policeman, and she seemed to be prejudiced against policemen. She had a brother-in-law who had been arrested and had known others who had gone to jail. She had a very defensive body position when the prosecutor questioned her and would not look at him when introduced. Her pulse seemed to race when the death penalty was mentioned. ... Ms. T. ... was overweight and poorly groomed, indicating that she might not have been in the mainstream of people's thinking. She was very nervous about the death penalty and kept her hand over her mouth when talking about it. She didn't approve of the death penalty. She did not relate to the prosecutor and seemed not to trust him. Mr. F.S. had been arrested numerous times and had been in and out of jail and court many times as a defendant. "He talked about police officers abusing people and juries treating blacks differently, police treating blacks differently." He would not state a position on the death penalty and said he would require proof beyond a shadow of doubt. He did not come to court twice when asked to by the clerk].)

D. *Wheeler/Batson* reversals reflecting improper (and potentially unethical) voir dire

1. *People v. Gonzalez* (1989) 211 Cal.App.3d 1186, 1195. Prosecutor justified second challenge because "first-generation Americans have trouble understanding the law once they get back in the jury room." The court held this assertion about first-generation Americans reflects bias against naturalized citizens (especially because nothing existed in the record to support the prosecutor's position, since the juror said he had no problem with the concept of reasonable doubt. Though naturalized citizens were not necessarily construed to be a cognizable class, the prosecutor's admitted bias against naturalized citizens did not rebut a group bias against Hispanics. Since there was no proper justification found for this challenge, the court did not even assess the stated justifications for the other challenge. Note the harsh footnote: "It is interesting to consider whether the prosecutor's blanket characterization of naturalized citizens and their inability to deal with the law would have resulted in the peremptory challenge of recently confirmed Supreme Court Justice Joyce Kennard, a naturalized citizen." (*Id.* at 1200.)

2. *United States v. Bishop* (9th Cir. 1992) 959 F.2d 820, 825–826. Reversal due to Assistant U.S. Attorney's challenge of black juror on basis that she lived in poorer, more violent neighborhood (South Central Los Angeles), and thus likely to believe police pick on blacks. The court held that stereotypical thinking is prohibited by the Equal Protection Clause; residence can be used as a reason to challenge, but only as a link between the specific juror and the facts of the case—not as a "discriminatory racial proxy"; *accord, United States v. Thompson* (9th Cir. 1987) 827 F.2d 1254, 1260 [opinion cautions that certain reasons, seemingly neutral, shade quite close to *Batson* error; e.g., a juror "lived in the [defendant's] neighborhood—he's black, too, and he was dressed casually, and I thought he might identify with him too much...."]; *accord, People v. Turner* (2001) 90 Cal.App.4th 413, 420–421, [reason for challenge—being place of residence in Inglewood, where residents have a different attitude towards drug culture—is just as stereotypical as race reasons

given in *Bishop* (above), since City of Inglewood is approximately 50% African-American; court held juror excluded for group bias, and conviction reversed]. *Cf., People v. Johnson* (1978) 22 Cal.3d 296, 299 [rape prosecution of black defendant with white victim, where prosecutor openly stated an intention to exclude black jurors; his reason was that trial witnesses had made racially offensive statements, which the prosecutor believed "would make it very difficult for any black person to be totally objective. ..." Held:

> We find the reason to be insufficient as a matter of law. The prosecutor knew that one or more of his key witnesses had referred to defendant as "the nigger," and that such testimony would in all probability come out at trial. In fact, the incident in question could well be viewed as an important link in the chain of identification tying defendant to the offenses charged. The prosecutor was apparently concerned that a black juror might not be able to weigh objectively the testimony of witnesses who had used so derogatory a racial epithet. However, rather than trying to determine by voir dire which individual black juror was likely to be thus affected, the prosecutor simply elected to exercise a blanket challenge against all of them. This is decision-making by racial stereotype, a technique that should be anathema in our courts"].

Moral: any justification that even hints at racism must be avoided, as it may color the entire appellate analysis; if it sounds at all offensive, do not say it. But contrast *United States v. Bishop, supra,* with an example of a challenge being upheld where residence was indeed a link between the specific juror and the facts of the case, not a discriminatory racial proxy: *People v. Williams* (1997) 16 Cal.4th 153, 191 [defendant was a South Central Los Angeles "Blood" gang member on trial for capital homicide of a rival "Crip" gang member; prosecutor's challenge of an African-American juror because he was sympathetic to the defendant and his gang because the juror went to high school with Blood gang members and stated that "the whole school would get together and run [the Crips] out" was upheld]. *Accord,* in upholding prosecutor challenge, is *United States v. Steele* (9th Cir. 2002) 298 F.3d 906, 913–914: juror's belief that racial discrimination taints criminal justice system is race-**neutral** reason to challenge]. *See also Tolbert v. Gomez* (9th Cir. 1999) 190 F.3d 985 [challenging juror on basis of opinion about the judicial system, specifically as that opinion relates to race, does **not** violate *Batson;* race, and an opinion on race, are separate concepts, and to think otherwise is the very racial stereotyping *Batson* forbids].

E. Final trial tactics

1. Consider possible use of juror questionnaire to avoid claim of disparate questioning and to support challenge on basis of "next at bat looks better."

2. If you list cognizable-group characteristic(s) of any prospective juror [to prepare for comparative analysis and disparate questioning attacks] be sure you list characteristics of **all prospective jurors.**

3. Make notes of demeanor attributes, looking for differences between those of potential challengees and potential keepers; this is especially important where the court allows limited or no attorney voir dire.

4. Be prepared to give detailed verbal expression to such subjective instincts when a prima facie case is found. Recall the list of acceptable attributes for demeanor challenges:

   a. Soft-spoken

   b. Long hair

   c. Unkempt/poorly groomed

   d. Frowning

   e. Tentative/low-keyed

   f. Inappropriate laughter

   g. Hostile

   h. Hesitant

   i. Cavalier

   j. Looked away from prosecutor

   k. Smiled at defendant

   l. Fidgety

   m. Nervous

   n. Upset

   o. Defensive

   p. Tired

   q. Overweight

   r. Weird

5. Make notes of jurors' answers to questions that you will rely on in making challenges. If a keeper from the majority group shares any such answer to a potential challengee from a cognizable group, make note of other answers by that challengee that can serve to set the two jurors apart.

6. When you have multiple reasons for a challenge, be prepared to articulate evidence in the record **for each one**, so a result-oriented reviewing court will not ignore any reasons as "speculative," and leave you only with a reason the court can find "pretextual."

7. Do not forget tactical voir dire dynamics reasons, as noted by the supreme court in *People v. Johnson* (1989) 47 Cal.3d 1194, 1220–1221:

   a. Changing ratio of strong-willed to passive jurors as defense challenges are made over the course of voir dire;

   b. Decreasing use of prosecution challenges for minor factors as fewer precious challenges remain; and

c. Desire to seat more favorable-looking members of the venire;

8. Even when the trial court rules no prima facie case exists, urge the court to make a record to support its ruling and help the court by noting the following factors, if present:

   a. How many members of cognizable group you have passed or who remain on the panel;

   b. How many members of same group your opponent challenged;

   c. Your good-faith belief that a challenged person was not even a member of such a group.

   d. **URGE THE COURT TO ALLOW YOU TO MAKE A RECORD OF YOUR JUSTIFICATIONS, EVEN THOUGH NOT REQUIRED** (since the prima facie standard is now so low, if the trial court is wrong in denying the prima facie case, the record will have reasons to support prongs two and three of the *Wheeler* analysis.)

VII. Ethical Consequences of a *Wheeler* Violation (Other Than Just a New Venire, a Fine, or Reseating a Juror)

A. If a *Wheeler* motion is granted at trial, it might have to be reported to the State Bar. Business and Professions Code section 6086.7(a)(3) requires the court to notify the State Bar of the imposition of "any judicial sanctions against an attorney, except monetary sanctions of less than one thousand dollars ($1,000)." Business and Professions Code section 6068(o)(3) requires a sanctioned attorney to self-report to the Bar the imposition of "any judicial sanctions against the attorney, except for ... monetary sanctions of less than one thousand dollars ($1,000)." Moreover, *People v. Wheeler* (1978) 22 Cal.3d 258, 282 and fn. 29 notes: "Upon such dismissal a different venire shall be drawn and the jury selection process may begin anew. [Fn] Additional sanctions are proposed in the literature ... but we have no present grounds to believe that the above procedure will be ineffective to deter such abuses of the peremptory challenge." Therefore, if additional sanctions to calling in a new venire theoretically exist, then that existing remedy is itself a sanction; as such, the law arguably requires both court and counsel to report it to the Bar. Certainly a *Willis* fine of $1,000 or more under Code of Civil Procedure section 177.5 would be a sanction requiring Bar reporting.

B. If a *Wheeler* motion is denied erroneously and the case is reversed, reporting to the State Bar is even more likely to occur. Business and Professions Code section 6086.7(b)(2) requires the court to notify the State Bar "[w]henever a ... reversal of a judgment in a judicial proceeding is based in whole or in part on the misconduct ... of an attorney." Business and Professions Code section 6068(o)(7) requires an attorney to self-report to the Bar whenever a "[r]eversal of judgment in a proceeding [is] based in whole or in part upon misconduct." *Wheeler* error is "prejudicial per se: 'The right to a fair and impartial jury is one of the most sacred and important of the guaranties of the constitution. Where it has been infringed, no inquiry as to the sufficiency of the evidence to show guilt is indulged and a conviction by a jury so selected must be set aside.' [Citations.]" (*Wheeler*, 22 Cal.3d at 283); *cf., People v. Espinoza* (1992) 3 Cal.4th 806, 820 [non-*Wheeler* case involving claim of prosecutorial misconduct: "[c]onduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves 'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.' [Citations.]" Thus, a reversal based on *Wheeler* error would seem to be attorney conduct rendering the trial fundamentally unfair. At the very least, if the reversal is predicated upon an appellate court finding the attorney's reasons to be sham or pretextual, that means counsel was deceptive in stating justifications, and therefore has committed misconduct. Since either way the reversal was caused by attorney misconduct, it must be reported to the Bar by both court and counsel.

State Bar disciplinary attorneys and investigators have informally told me that they have indeed done investigations of attorneys based on *Wheeler* appellate reversals. Formal referrals based solely on having a granted *Wheeler* motion are rare, but informal complaints in this context by court or opposing counsel will be investigated. Predicting the outcome of such investigations is impossible, but misconduct based on misrepresentations to the court clearly involves moral turpitude and is potentially subject to suspension. The moral is clear: committing *Wheeler* error could cost you more than a trial delay; if a sense of constitutional fair play isn't sufficient motivation, consider your license to practice.

C. Final note: a *Wheeler* reversal does not require recusal of the same prosecutor on retrial under Penal Code section 1424. (*See People v. Turner* (1994) 8 Cal.4th 137, 163.)

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Table of Cases

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v. Karaman (1992) 4 Cal.4th 335.) When a defendant is sentenced to probation with a suspended prison sentence, the court is precluded from increasing the sentence. The court must impose the exact sentence that was ordered. (Penal Code § 1203.2(c), *People v. Howard* (1997) 16 Cal.4th 1081.) Thus, in general, defendants can appeal increases in their sentences based upon probation violations.

b. The court's failure to heed the statute precluding it from modifying the probationer's sentence was an action in excess of the court's jurisdiction. During a probationary period, the court has continuing jurisdiction over a defendant and the subject matter. (See *Howard, supra.*) Thus, the court retains fundamental jurisdiction over a defendant. However, the court here simply exceeded its jurisdiction by increasing defendant's sentence. Thus, in general, when a court exceeds its jurisdiction by failing to heed to the statutes, a defendant can appeal the sentence.

c. Probationer's failure to appeal from an order modifying his sentence forfeited his subsequent challenge to the validity of such an order. While the court exceeded its jurisdiction by increasing defendant's sentence, his challenge is untimely because he did not appeal from the order imposing the increased sentence. A criminal appeal must generally be filed within 60 days of the making of the order being appealed. (Cal. Rules of Court, rule 8.308(a).) The December 17, 2004 order was plainly an appealable order. But because defendant should have raised his claims in a timely appeal from that December 17, 2004 order, he is now untimely. He forfeited his challenge to the December 2004 order by failing to seek a timely appeal. The fact that he raised this issue in his August 2006 appeal is not helpful to his cause because the court still had fundamental jurisdiction over his matter in 2004. He should have raised the issue within the appeal period after December 17, 2004.

d. Defendant was estopped from complaining that the revocation court exceeded its jurisdiction in imposing the sentence set forth in the December 17, 2004 plea agreement. (*In re Griffin* (1967) 67 Cal.2d 343.) Defendant entertained a plea bargain on December 17, 2004, that reinstated the terms of his probation and increased his suspended sentence by one year. He availed himself of that bargain and was subsequently released from jail on a reinstated grant of probation. He willingly entered into an agreement that increased his prison sentence, irrespective of the fact that statutorily, the court could not do so. Because he agreed to the five-year sentence as part of the plea deal, in which he also admitted his violation of probation, he is estopped to complain that the court exceeded its jurisdiction. By agreeing to the increased sentence, he necessarily waived the right to assert the defense of double jeopardy.

The judgment is affirmed.

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SKEPTICISM ABOUT THE FAIRNESS OF THE CRIMINAL JUSTICE SYSTEM MAY CONSTITUTE A VALID, RACE-NEUTRAL REASON UNDER *BATSON* FOR EXERCISING PEREMPTORY CHALLENGES TO EXCUSE POTENTIAL JURORS

PEOPLE V. CALVIN
159 Cal.App.4th 1377 (1DCA, Div. 1)
[2008 Daily Journal D.A.R. 2202]
(A111633) (02-11-08) (Marguiles)

FACTS: Defendant pistol-whipped another man, inflicting disabling head injuries. He was charged with Penal Code § 245(a)(2) (assault with a firearm), § 12021(a)(1) (felon in possession of a firearm), and § 243(d) (battery with serious bodily injury), along with enhancements on the first count for Penal Code § 12022.5(a) (using a firearm) and § 12022.7(b) (personally inflicting great bodily injury).

During jury selection, the prosecutor excused four out of six African-American potential jurors based upon their responses to a questionnaire and various answers to the prosecutor's questions during voir dire. Responses included, among other things, statements that the criminal justice system was unfair to black people sometimes, that the criminal justice system was not fair unless you had the means to hire a good defense lawyer, that blacks get wrongfully accused and convicted, expressed bias against the police, giving less credibility to persons who used drugs (the victim in this case had used marijuana the day of the

crime), and credibility concerns about people in the music industry (both defendant and victim were musicians). The trial court denied defendant's motion to replace the entire jury panel due to systematic discrimination by the prosecutor after the prosecutor justified the challenges based upon the responses made. The court found the challenges were exercised for race-neutral reasons.

Defendant was convicted of all charges and enhancements and the court found true his prior convictions and prison term. He appealed contending error occurred during trial when his motion for a new jury panel was denied.

HOLDING: A peremptory challenge exercised for a discriminatory purpose violates the California Constitution's guarantee of a trial by a jury drawn from a venire representative of the community and also violates the Equal Protection Clause of the Fourteenth Amendment. (*People v. Wheeler* (1978) 22 Cal.3d 258; *Batson v. Kentucky* (1986) 476 U.S. 79.)

At the outset, a prosecutor is presumed to have exercised peremptory challenges in a constitutional manner. A defendant seeking to challenge them must first raise a timely objection and show that the circumstances involved give rise to an inference that the challenges were purposefully discriminatory. Second, if this prima facie showing is made, the burden shifts to the prosecutor to provide race-neutral reasons for the peremptory challenge. Third, the trial court must then decide whether the defendant has proved that, in exercising the challenge, purposeful discrimination actually occurred or not. While a prosecutor may exercise a peremptory challenge for any permissible reason or for no reason at all, if the reason provided is "implausible or fantastic," the trial court may find the justification to be a pretext for purposeful discrimination. (*People v. Huggins* (2006) 38 Cal.4th 175, 226.)

In this case, defendant argued that skepticism of the criminal justice system within the African-American community is so widespread that using it to justify a peremptory challenge is the same as basing it upon race, and therefore unconstitutional. Defendant used the responses to the jury questionnaires to support his claim. The court of appeal noted that the relatively small sample size and lack of statistical validity of the jury questionnaires was insufficient to show that the specific attitude was more widely held by the African-American community as compared to any other racial group. The court also noted the prosecutor had additional race-neutral reasons for excusing the jurors—their stated attitudes towards doubting the credibility of drug-users and musicians.

Merely having some reason for excusing a potential juror that is tangentially related to race does not violate the Constitution if the reason is not motivated solely by race. (*Hernandez v. New York* (1991) 500 U.S. 352 —bilingual Hispanic potential jurors properly excused after expressing doubt whether they could accept the court-intrepreter's translation as authoritative.) Expressing skepticism about the fairness of the criminal justice system is also a valid reason for excusing potential jurors. (*People v. Gray* (2005) 37 Cal.4th 168, 192.) Since at least one African-American juror in defendant's case did not express such skepticism, there is nothing "inherent" in the criterion that suggests **intentional** racial discrimination. (*Hernandez, supra,* 500 U.S. at 360.)

The judgment is affirmed.

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