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**SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF**

THE PEOPLE OF THE STATE OF CALIFORNIA

v.

Defendant

Case No.

Date:

Dept.

TO THE HONORABLE _____, JUDGE PRESIDING IN DEPARTMENT __ OF
THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE
COUNTY OF

BENCH MEMORANDUM RE: *BATSON-WHEELER* MOTIONS

I.

WHAT IS A *BATSON-WHEELER* MOTION?

“[T]he use of peremptory challenges to remove prospective jurors on the sole ground of group bias violates the right to trial by jury drawn from a representative cross-section of the community under article I, section 16, of the California Constitution.” (*People v. Wheeler* (1978) 22 Cal.3d 258, 276-277.)

“[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 v. Kentucky* (1986) 476 U.S. 79, 89.)

A *Batson-Wheeler* motion is motion made by one of the parties claiming that the other party has exercised a challenge against a juror based on the juror’s membership in a

1 cognizable group (i.e., “an identifiable group distinguished on racial, religious, ethnic, or
2 similar grounds[.]” (*People v. Wheeler* (1978) 22 Cal.3d 258, 276.) It is an **extremely**
3 **serious** allegation of misconduct that potentially subjects the accused party to sanction and
4 disciplinary action. (See *People v. Willis* (2002) 27 Cal.4th 811, 821; Bus. & Prof. Code, §
5 6086.7(c).) Indeed, the allegation itself can cause irreparable harm to the reputation of the
6 party against whom it is made. If the allegation is true, such misconduct justifiably merits
7 condemnation. On the other hand, if the motion is not made in good faith, but as a litigation
8 tactic, such misuse of the motion merits equal condemnation.

9 II. 10 **BATSON-WHEELER PROCEDURE IN A NUTSHELL**

11 The three-step inquiry governing *Batson-Wheeler* claims is well established. “First,
12 the trial court must determine whether the defendant has made a prima facie showing that the
13 prosecutor exercised a peremptory challenge based on race. Second, if the showing is made,
14 the burden shifts to the prosecutor to demonstrate that the challenges were exercised for a
15 race-neutral reason. Third, the court determines whether the defendant has proven
16 purposeful discrimination. The ultimate burden of persuasion regarding racial motivation
17 rests with, and never shifts from, the opponent of the strike.” (*People v. Lenix* (2008) 44
18 Cal.4th 602, 612-613 citing to *Rice v. Collins* (2006) 546 U.S. 333, 338; accord *People v.*
19 *Manibusan* (2013) 58 Cal.4th 40, 75.)

20 III. 21 **DOES A TRIAL COURT HAVE ANY OBLIGATIONS IT MUST FULFILL IN** 22 **ANTICIPATION OF A BATSON-WHEELER MOTION?**

23 There are three primary obligations imposed on trial judges to help ensure that *if* a
24 *Batson-Wheeler* motion is made, it may properly be addressed.

25 First, the trial court should make an order requiring that any *Batson-Wheeler*
26 challenge be made outside the presence of the jury, i.e., by way of side bar conference. (See
27 *People v. Willis* (2002) 27 Cal.4th 811, 822 [noting to ensure against undue prejudice to the
28 party unsuccessfully making a peremptory challenge, courts may employ the procedure of
29 using sidebar conferences followed by appropriate disclosure in open court as to successful
30 challenges].)

1 Second, the trial court **must** pay close attention during jury selection so as to be able
2 to verify or dispute representations made by counsel regarding their observations of the
3 jurors’ verbal responses, conduct (in and outside of the jury box), attitudes, body language,
4 and other nonverbal behavior that may bear on the propriety of peremptory challenges. (See
5 *Davis v. Ayala* (2015) 135 S.Ct. 2187, 2208 [noting the procedure adopted in *Batson* “places
6 great responsibility in the hands of the trial judge” to determine whether a challenge is based
7 an impermissible factor and that the decision is difficult because peremptory challenges “are
8 often based on subtle impressions and intangible factors”]; *Thaler v. Haynes* (2010) 130
9 S.Ct. 1171, 1174 [“where the explanation for a peremptory challenge is based on a
10 prospective juror's demeanor, the judge should take into account, among other things, *any*
11 *observations of the juror that the judge was able to make during the voir dire*”]; *Snyder v.*
12 *Louisiana* (2008) 128 S.Ct. 1203, 1208 [“race neutral reasons for peremptory challenges
13 often invoke a juror’s demeanor (e.g., nervousness, inattention) making the trial court’s first-
14 hand observations of even greater importance”]; *People v. Lenix* (2008) 44 Cal.4th 602, 625
15 [“trial court bears a ‘pivotal role in evaluating *Batson* claims,’ for the *trial court must*
16 *evaluate* the demeanor of the prosecutor in determining the credibility of proffered
17 explanations, *and the demeanor of the panelist when that factor is a basis for the*
18 *challenge*”], emphases added.)

19 Third, “trial courts must give advocates the opportunity to inquire of panelists and
20 make their record. If the trial court truncates the time available or otherwise overly limits
21 voir dire, unfair conclusions might be drawn based on the advocate’s perceived failure to
22 follow up or ask sufficient questions. Undue limitations on jury selection also can deprive
23 advocates of the information they need to make informed decisions rather than rely on less
24 demonstrable intuition.” (*People v. Lenix* (2008) 44 Cal.4th 602, 625.)

IV.
**RELEVANT PRINCIPLES GOVERNING HOW A TRIAL COURT SHOULD
PROCEED WHEN A *BATSON-WHEELER* MOTION HAS BEEN MADE**

 Under both the federal and state constitutions, there is a **three-step** inquiry whenever
a *Batson-Wheeler* challenge is made. (*People v. Lenix* (2008) 44 Cal.4th 602, 612-613.)

1 **A. First Step**

2 In the first step, the party objecting to the challenge has the burden of making out a
3 prima facie case of discrimination. This is done “by showing that the totality of the relevant
4 facts gives rise to an inference of discriminatory purpose.” (*Johnson v. California* (2005)
5 545 U.S. 162, 168.) In determining whether this burden has been met, courts must keep in
6 mind that “[s]ubject to rebuttal, a *presumption exists that a peremptory challenge is*
7 *properly exercised*, and the burden is upon the opposing party to demonstrate impermissible
8 discrimination against a cognizable group.” (*People v. Salcido* (2008) 44 Cal.4th 93, 136;
9 *People v. Neuman* (2009) 176 Cal.App.4th 571, 579, emphasis added.)

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

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

1. *Does the burden of making a prima facie showing include showing the challenged juror is a member of the cognizable class at issue?*

 The burden is clearly on the party making the *Batson-Wheeler* motion to establish the
juror is a member of cognizable class at issue. (*People v. Wheeler* (1978) 22 Cal.3d 258,
280; see also *People v. Cunningham* (2015) 61 Cal.4th 609, 658, 662 [defendant failed to
show juror was member of cognizable class].)

1 2. *Can a challenge to a single member of a cognizable class establish a prima facie*
2 *case?*

3 Although the term “systematic exclusion” is sometimes used “to describe a
4 discriminatory use of peremptory challenges, . . . [t]he term is not apposite in the *Wheeler*
5 context, for a single discriminatory exclusion may violate a defendant's right to a
6 representative jury.” (*People v. Fuentes* (1990) 54 Cal.3d 707, 716, fn. 4; **accord** *People v.*
7 *Taylor* (2010) 48 Cal.4th 574, 642; *People v. Montiel* (1993) 5 Cal.4th 877, 909; **see also**
8 *People v. Reynoso* (2003) 31 Cal.4th 903, 927, fn. 8 [“the unconstitutional exclusion of even
9 a single juror on improper grounds of racial or group bias requires the commencement of
10 jury selection anew”].) It is **not** necessary that the party making a *Batson-Wheeler* challenge
11 show a “pattern of systematic exclusion.” Rather, one way of making a showing of a prima
12 facie case is by showing a pattern of systematic exclusion. (**See** *People v. Avila* (2006) 38
13 Cal.4th 491, 549.)

14 That being said, it important to understand why challenging one or two members of a
15 cognizable group will rarely, if ever, ***by itself***, establish a prima facie case of purposeful
16 discrimination ***in the absence of*** any additional evidence of purposeful discrimination. This
17 is because when the party making the *Batson-Wheeler* motion can point to no evidence ***other***
18 ***than*** the fact a party has challenged one or two members of cognizable group, the party is
19 essentially asking the court to draw an inference of discrimination from the fact one party has
20 excused ‘most or all’ members of the cognizable group,” and thus is “necessarily relying on
21 an apparent pattern in the party’s challenges” (*People v. Bell* (2007) 40 Cal.4th 582, 598,
22 fn. 3.) In ***that*** situation, while it is possible to imagine circumstances “in which a prima facie
23 case could be shown on the basis of a single excusal, in the ordinary case . . . to make a
24 prima face case after the excusal of only one or two members of a group is very difficult.”
25 (*Bell*, at p. 598, fn. 3; **see also** *People v. Hamilton* (2009) 45 Cal.4th 863, 899 [agreeing with
26 trial judge that the challenge of the only [African-American] subject to challenge was
27 insufficient *in and of itself* to suggest a pattern]; **accord** *Wade v. Terhune* (9th Cir. 2000)
28 202 F.3d 1190, 1198.) Simply put, as a practical matter, “the challenge of one or two jurors
29 can rarely suggest a pattern of impermissible exclusion.” (*People v. Bell* (2007) 40 Cal.4th
30 582, 598 [and noting that where there is a very small number of panelists falling into the

1 cognizable class, it is impossible to draw an inference of discrimination from the fact that the
2 prosecutor challenged a large percentage of the panelists falling into the class, i.e., two of a
3 total of three]; *People v. Christopher* (1991) 1 Cal.App.4th 666, 672, 673 [challenge of one
4 or two prospective jurors of same racial or ethnic group as defendant, even when panel
5 contains no other members of group, does not establish prima facie case unless there is
significant supporting evidence].)

6 Obviously, the greater the number of members of the cognizable group at issue
7 challenged by the party accused of violating *Batson-Wheeler*, the greater the likelihood an
8 inference of impermissible exclusion will arise. (See e.g., *Miller-El v. Dretke* (2005) 545
9 U.S. 231, 240-241 [fact nine of ten African-Americans struck considered in finding
10 discriminatory use].) However, in the absence of any evidence *other than* sheer numbers,
11 courts routinely reject the argument that the burden of making a prima facie case has been
12 met just because multiple members of a cognizable group have been challenged. (See *People*
13 *v. Taylor* (2010) 48 Cal.4th 574, 643 [fact prosecutor exercised three of ten peremptory
14 challenges to excuse two African-American prospective jurors and one Hispanic prospective
15 juror “without more, is insufficient to create an inference of discrimination, especially where,
16 as here, the number of peremptory challenges at issue is so small”]; *People v. Hawthorne*
17 (2009) 46 Cal.4th 67, 79-80, [no prima facie showing where the defendant’s motion was
18 based solely on the assertion that the prosecutor used three of 11 peremptories to excuse
19 African-American prospective jurors]; *People v. Bonilla* (2007) 41 Cal.4th 313, 343-344
20 [excusal of three out of four Hispanics, in a case where defendant was also Hispanic, did not
21 create a prima facie case]; *People v. Bell* (2007) 40 Cal.4th 582, 598 [excusal of two out of
22 three African-Americans did not create prima facie showing]; *People v. Box* (2000) 23 C.4th
23 1153, 1185 [no prima facie case where basis for claim was that two prospective jurors were
24 both African-American and so was the defendant]; *People v. Jones* (1998) 17 C.4th 279, 293
[evidence supported ruling that there was no prima facie case of group bias in peremptory
challenges of four African-Americans even though challenges left no African-American
jurors on panel]; *People v. Crittenden* (1994) 9 C.4th 83, 119, 120, fn. 3 [excusal of all
members of defendant’s race does not automatically establish prima facie case; declining to
follow contrary holdings of lower federal courts]; *People v. Adanandus* (2007) 157

1 Cal.App.4th 496, 503-504 [no prima facie case despite fact three African-American jurors
2 challenged by prosecution where, inter alia, African-American juror remained on panel];
3 **People v. Allen** (1989) 212 Cal.App.3d 306, 312, 313 [exclusion of disproportionate number
4 of minority jurors does not by itself establish prima facie case; **Wheeler** motion properly
5 denied where record showed specific bias as ground for each of nine peremptory challenges
6 against Blacks and Hispanics]; cf. **Williams v. Runnels** (9th Cir.2006) 432 F.3d 1102, 1103-
7 1107 [use of three of first four peremptories against African-American jurors where only
8 four of the first 49 prospective jurors were African-American was a statistical disparity that
9 alone could create a prima facie showing albeit recognizing other facts could dispel the
10 presumption].)

11 Moreover, while a prosecutor's excusal of **all** members of a cognizable group may
12 establish a prima facie case, even this fact alone is not conclusive to such a showing.
13 (**People v. Hoyos** (2007) 41 Cal.4th 872, 901; **People v. Neuman** (2009) 176 Cal.App.4th
14 571, 575.)

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

17 If the trial court does not find a prima facie of discrimination, it is not necessary to
18 proceed to the second step; there is no obligation on the prosecutor to disclose any reasons
19 for challenging the panelists; and a trial court is not required to evaluate them. (**People v.**
20 **Carasi** (2008) 44 Cal.4th 1263, 1292; **People v. Zambrano** (2007) 41 Cal.4th 1082, 1104-
21 1105 & fn. 3; **People v. Bell** (2007) 40 Cal.4th 582, 596.)

22 However, the California Supreme Court has repeatedly **recommended** that the judge
23 allow the prosecutor to place his reasons for excusing jurors belonging to the cognizable
24 class on the record, notwithstanding the lack of any prima facie finding. (**See People v.**
25 **Cunningham** (2015) 61 Cal.4th 609, 660, fn. 12; **People v. Taylor** (2010) 48 Cal.4th 574,
26 616; **People v. Bonilla** (2007) 41 Cal.4th 313, 343, fn. 13; **People v. Mayfield** (1997) 14
27 Cal.4th 668, 723-724.) Indeed, it is recommended that this be done *even before* the trial
28 judge makes its determination that a prima facie case has not been made out by the defense.
29 (**People v. Bonilla** (2007) 41 Cal.4th 313, 343, fn. 13; **People v. Adanandus** (2007) 157
30 Cal.App.4th 496, 500.) This is because doing so “may assist the trial court in evaluating the

1 challenge and will certainly assist reviewing courts in fairly assessing whether any
2 constitutional violation has been established.” (*People v. Bonilla* (2007) 41 Cal.4th 313,
3 343, fn. 13; *People v. Adanandus* (2007) 157 Cal.App.4th 496, 500.)

4 **B. Second Step**

5 The second step occurs after a finding that the totality of the relevant facts creates an
6 inference of discriminatory purpose. Once a prima facie case is made, the “burden shifts to
7 the [party who originally challenged the juror] to explain adequately the racial [or other
8 cognizable class] exclusion’ by offering permissible . . . neutral justifications for the strikes.”
9 (*Johnson v. California* (2005) 545 U.S. 162, 168 [bracketed portions and other
10 modifications added by author].) The burden in this second step is merely “the burden of
11 production.” (*Paulino v. Harrison* (9th Cir. 2008) 542 F.3d 692, 699.)

12 The party who originally challenged the juror must then provide a “clear and
13 reasonably specific’ explanation of his ‘legitimate reasons’ for exercising the challenges.”
14 (*People v. Lenix* (2008) 44 Cal.4th 602, 613, citing to *Batson v. Kentucky* (1986) 476 U.S.
15 79, 98, fn. 20.) “Certainly a challenge based on racial prejudice would not be supported by a
16 legitimate reason.” (*People v. Lenix* (2008) 44 Cal.4th 602, 613.) On the other hand, a
17 legitimate reason is simply “one that does not deny equal protection” and “a prosecutor may
18 rely on any number of bases to select jurors[.]” (*People v. Lenix* (2008) 44 Cal.4th 602, 613,
19 citing to *Purkett v. Elem* (1995) 514 U.S. 765, 769.)

20 The “second step of this process does not demand an explanation that is persuasive,
21 or even plausible’; so long as the reason is not inherently discriminatory, it suffices.” (*Rice*
22 *v. Collins* (2006) 546 U.S. 333, 338.) “The basis for a challenge may range from ‘the
23 virtually certain to the highly speculative’ . . . and “even a ‘trivial’ reason, if genuine and
24 neutral, will suffice.” (*People v. Chism* (2014) 58 Cal.4th 1266, 1316.) “A reason that
makes no sense is nonetheless ‘sincere and legitimate’ as long as it does not deny equal
protection.” (*People v. DeHoyos* (2013) 57 Cal.4th 79, 102; *People v. Stanley* (2006) 39
Cal.4th 913, 936.) “A prospective juror may be excused based upon facial expressions,
gestures, hunches, and even for arbitrary or idiosyncratic reasons.” (*People v. Lenix* (2008)
44 Cal.4th 602, 613.)

1 The types of neutral reasons for excusing a juror are too innumerable to list.
2 However, some typical grounds include: (i) a juror’s relative youth and immaturity (**see Rice**
3 **v. Collins** (2006) 546 U.S. 333, 341; **People v. Salcido** (2008) 44 Cal.4th 93, 140; **People v.**
4 **Cruz** (2008) 44 Cal.4th 636, 657-659; (ii) a juror’s demeanor such as a flippant or informal
5 attitude (**see Thaler v. Haynes** (2010) 130 S.Ct. 1171, 1172; **People v. Howard** (2008) 42
6 Cal.4th 1000, 1017, 1019); (iii) a juror’s reluctance to follow the law (**see People v. Howard**
7 (2008) 42 Cal.4th 1000, 1017; **People v. Watson** (2008) 43 Cal.4th 652, 679-680; (iv) the
8 fact a juror or close relative of the juror has a criminal background or has had a negative
9 experience with the criminal justice system (**see People v. Cruz** (2008) 44 Cal.4th 636, 656,
10 fn. 3; **People v. Avila** (2006) 38 Cal.4th 491, 554-555; **People v. Farnam** (2002) 28 Cal.4th
11 107, 138); (v) the fact the juror has life experiences that might make the juror overly
12 sympathetic to, or biased towards, a person in the defendant’s position (**see People v. Watson**
13 (2008) 43 Cal.4th 652, 676; **People v. Salcido** (2008) 44 Cal.4th 93, 140); (vi) the fact the
14 juror (or close relative of juror) is employed in a job or engages in activities that reflect an
15 orientation toward rehabilitation and sympathy for defendants (**see People v. Ervin** (2000) 22
16 Cal.4th 48, 75; **People v. Neuman** (2009) 176 Cal.App.4th 571, 586; **People v. Barber**
17 (1988) 200 Cal.App.3d 378, 389-394); or (vii) a juror’s belief the criminal justice system is
18 not fair to certain groups (**see People v. Vines** (2011) 51 Cal.4th 830, 849-851; **People v.**
19 **Calvin** (2008) 159 Cal.App.4th 1377, 1381; **People v. Adanandus** (2007) 157 Cal.App.4th
20 496, 507).

- 17 1. *In stating grounds for removing a juror, is the court or the prosecutor required to*
18 *assume the juror’s responses are true?*

19 The fact that a juror provides an answer that “contradicts” the basis for the
20 prosecutor’s challenge does not mean the prosecutor’s reason will be held pretextual. (**See**
21 **e.g., Rice v. Collins** (2006) 546 U.S. 333, 341 [notwithstanding young juror’s oral response
22 she could be impartial, prosecutor entitled to believe juror’s youth and lack of ties to the
23 community would make her a bad juror for the prosecution]; **People v. Cardenas** (2007) 155
24 Cal.App.4th 1468, 1477 [prosecutor had legitimate reasons for removing a bilingual juror on
 grounds the prosecutor believed the juror would refuse to accept an interpreter’s translation
 over the juror’s own translation even though juror ultimately agreed to abide by interpreter’s

1 translation]; *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1124 [prosecutor justified in
2 removing a juror on grounds the juror might harbor bad feelings toward the police despite the
3 juror’s claim otherwise; prosecutor was entitled to disregard a juror’s claim that her
4 emotional state and stressful circumstances would not interfere with her ability to consider
5 the evidence where the juror repeatedly referred to her “nerves” and to being under
6 considerable stress, cried twice during voir dire, and the unduly “emotional” state of the juror
7 was confirmed by the judge].) Numerous cases, for example, have held that a prosecutor is
8 entitled to dismiss a juror who has had negative contacts with law enforcement the criminal
9 justice system or have close relatives who had such negative contacts, notwithstanding the
10 juror’s assurances that the prior experiences would not impact the juror. (*People v. Avila*
(2006) 38 Cal.4th 491, 554-555; *People v. Farnam* (2002) 28 Cal.4th 107, 138; *People v.*
Adanandus (2007) 157 Cal.App.4th 496, 505.)

11 2. *Should the court ask the prosecutor to list all the reasons for challenging the juror?*

12 While peremptory challenges “are often the subjects of instinct” (see *Davis v. Ayala*
13 (2015) 135 S.Ct. 2187, 2201), and it can sometimes be hard to articulate the reason for
14 removing a juror, “a prosecutor simply has got to state his reasons as best he can and stand or
15 fall on the plausibility of the reasons he gives.” (*People v. Lenix* (2008) 44 Cal.4th 602,
16 624.) Prosecutors should “provide as complete an explanation for their peremptory
17 challenges as possible.” (*People v. Lenix* (2008) 44 Cal.4th 602, 624.)

18 Attempting to comply with this direction sometimes results in a mixture of strong and
19 weak reasons. As noted in *People v. Taylor* (2009) 47 Cal.4th 850, the fact that some
20 reasons are not well supported by the record does not mean a challenge to the juror was
21 motivated by race. (*Id.* at p. 896.) “While an attorney who offers unsupported explanations
22 for excusing a prospective juror may be trying to cover for the fact his or her real motivation
23 is discriminatory, alternatively this may reflect nothing more than a misguided sense that
24 more reasons must be better than fewer or simply a failure of accurate recollection.” (*Ibid*;
see also *Gonzalez v. Brown* (9th Cir. 2009) 585 F.3d 1202, 1208-1210.)

1 **C. Third Step**

2 At the third step, if a “neutral explanation is tendered, the trial court must then decide
3 . . . whether the opponent of the strike has proved purposeful racial discrimination.”
4 (*Johnson v. California* (2005) 545 U.S. 162, 168.) The defendant’s ultimate burden is to
5 demonstrate that “it was more likely than not that the challenge was improperly motivated.”
6 (*Id.* at p. 170; *People v. Trinh* (2014) 59 Cal.4th 216, 241.)

7 The proper focus is on “the *subjective genuineness* of the race-neutral reasons given
8 for the peremptory challenge, not on the objective reasonableness of those reasons.” (*People*
9 *v. Reynoso* (2003) 31 Cal.4th 903, 924; *People v. Adanandus* (2007) 157 Cal.App.4th 496,
10 506, emphasis added.) “[T]he issue comes down to whether the trial court finds the
11 prosecutor’s race-neutral explanations to be credible. Credibility can be measured by, among
12 other factors, the prosecutor’s demeanor; by how reasonable, or how improbable, the
13 explanations are; and by whether the proffered rationale has some basis in accepted trial
14 strategy.” (*People v. Lenix* (2008) 44 Cal.4th 602, 613, citing to *Miller-El v. Cockrell*
15 (2003) 537 U.S. 322, 339; **see also** *Lewis v. Lewis* (9th Cir. 2003) 321 F.3d 824, 830 [“A
16 finding of discriminatory intent turns largely on the court's evaluation of the prosecutor's
17 credibility”].) The trial court has a duty to “assess the plausibility” of the proffered reasons
18 for striking a potential juror, “in light of all evidence with a bearing on it.” (*People v. Lenix*
19 (2008) 44 Cal.4th 602, 625.)

20 “In assessing credibility, the court draws upon its contemporaneous observations of
21 the voir dire. It may also rely on the court’s own experiences as a lawyer and bench officer in
22 the community, and even the common practices of the advocate and the office who employs
23 him or her.” (*People v. Lenix* (2008) 44 Cal.4th 602, 613, citing to *People v. Wheeler*
24 (1978) 22 Cal.3d 258, 282.)¹

¹ The training provided by the _____ County District Attorney’s office on jury selection **unequivocally** condemns the discriminatory use of peremptory challenges. New prosecutors are informed that using peremptory challenges in a discriminatory manner in selecting jurors is not only immoral and unethical; it is self-defeating to remove an otherwise favorable juror for the prosecution based on racial or ethnic stereotypes. On the other hand, prosecutors are also cautioned that if they are properly motivated, they must not be dissuaded from exercising a challenge out of fear that they will be subjected to a *Batson-Wheeler* challenge (and the attendant possibility that it will be erroneously granted). *Batson-Wheeler* motions

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

8 As noted before, “[t]he ultimate burden of persuasion regarding racial motivation
9 rests with, *and never shifts from, the opponent of the strike.*” (*People v. Lenix* (2008) 44
10 Cal.4th 602, citing to *Rice v. Collins* (2006) 546 U.S. 333, 338; *see also Purkett v. Elem*
11 (1995) 514 U.S. 765, 768, emphasis added.) “The burden of proof at step three is a
12 preponderance of the evidence.” (*Crittenden v. Ayers* (9th Cir. 2010) 624 F.3d 943, 954-
13 955.)

14 This necessarily means that if a court is unsure whether a juror has been removed for
15 discriminatory purposes, or if the reasons for believing a challenge was exercised in a
16 discriminatory fashion do not outweigh the reasons for believing the challenge was made for
17 a non-discriminatory purpose, no finding of a discriminatory purpose should be made.

18 In making the determination of whether the defendant has proven purposeful
19 discrimination at the third step, the court may take into consideration all the factors it can
20 take into consideration at the prima facie level. (*See* this bench memo at p. 4; *People v.*
21 *Wheeler* (1978) 22 Cal.3d 258, 282.)

22 A trial court may also conduct a comparative analysis in deciding whether purposeful
23 discrimination has been shown. A comparative juror analysis involves comparing “panelists
24 who were struck with those who were allowed to serve or were passed by the prosecution

may arise based on a genuine difference in perspective: a juror who appears to the prosecutor
to obviously be a “bad juror” for the prosecution may appear to the defense counsel as a juror
who the prosecutor should, but for the juror’s membership in a cognizable group, want to
keep on the jury and vice versa. However, occasionally attorneys use challenges improperly
as a strategic weapon in order to distract the opposing attorney or render the opposing
attorney “gun shy” in exercising peremptory challenges against jurors who are unfavorably
disposed to the opposing attorney but belong to the cognizable class at issue. (*See e.g.,*
People v. Cunningham (2015) 61 Cal.4th 609, 659.)

1 before being ultimately struck by the defense.” (*People v. Lomax* (2010) 49 Cal.4th 530,
2 571, fn. 14.) If the proffered reason for striking a member of the cognizable class at issue
3 applies just as well to an otherwise-similar juror who is not a member of the cognizable class
4 and that only the latter is permitted to serve, that is evidence tending to prove purposeful
discrimination to be considered at the third step. (*Id.* at pp. 571-572.)

5 However, courts must avoid simplistic or superficial comparisons: “overlapping
6 responses alone are not enough to demonstrate purposeful discrimination.” (*People v. Calvin*
7 (2008) 159 Cal.App.4th 1377, 1389, citing to *People v. Lewis and Oliver* (2006) 39 Cal.4th
8 970, 1020.) “To prove such a claim, a defendant must engage in a careful side-by-side
9 comparative analysis to demonstrate that the dismissed and retained jurors were “similarly
10 situated.” (*People v. Calvin* (2008) 159 Cal.App.4th 1377, 1389, citing to *People v. Lewis*
11 *and Oliver* (2006) 39 Cal.4th 970, 1016-1024; see also *People v. Watson* (2008) 43 Cal.4th
12 652, 672-682 [rejecting numerous claims that jurors were similarly situated for comparative
analysis purposes where both booted and seated jurors were similar in some aspects but
different in others].)

13 Two jurors may give similar answers on a given point but whether they are, in fact,
14 comparable in the eyes of the attorneys will depend on “other answers, behavior, attitudes or
15 experiences” make each more or less desirable. (*People v. Lenix* (2008) 44 Cal.4th 602,
16 624.) “‘Myriad subtle nuances’ not reflected on the record may shape an attorney’s jury
17 selection strategy, ‘including attitude, attention, interest, body language, facial expression
and eye contact.’” (*People v. Hartsch* (2010) 49 Cal.4th 472, 489, fn. 16].)

18 The manner of a juror is often “more indicative of the real character of his opinion
19 that his words.” (*People v. Lenix* (2008) 44 Cal.4th 602, 622.) The differences in the
20 manner in how a juror answers a question “may legitimately impact the prosecutor’s decision
21 to strike or retain the prospective juror.” (*Id.* at p. 623.) Moreover, “[w]hile an advocate
22 may be concerned about a particular answer, another answer may provide a reason to have
greater confidence in the overall thinking and experience of the panelist. Advocates do not
evaluate panelists based on a single answer.” (*Id.* at p. 631.)

23 Finally, whether a juror is acceptable or not acceptable will change over the course of
24 jury selection because a lawyer is not only seeking a particular kind of juror but a particular

1 mix of jurors. “It may be acceptable, for example, to have one juror with a particular point
2 of view but unacceptable to have more than one with that view. If the panel as seated
3 appears to contain a sufficient number of jurors who appear strong-willed and favorable to a
4 lawyer’s position, the lawyer might be satisfied with a jury that includes one or more passive
5 or timid appearing jurors. However, if one or more of the supposed favorable or strong
6 jurors is excused either for cause or [by] peremptory challenge and the replacement jurors
7 appear to be passive or timid types, it would not be unusual or unreasonable for the lawyer to
8 peremptorily challenge one of these apparently less favorable jurors even though other
9 similar types remain. These same considerations apply when considering the age, education,
10 training, employment, prior jury service, and experience of the prospective jurors.” (*Id.* at p.
11 623.)

12 “Both court and counsel bear responsibility for creating a record that allows for
13 meaningful review.” (*People v. Lenix* (2008) 44 Cal.4th 602, 621.) “When the prosecutor’s
14 stated reasons are both inherently plausible and supported by the record, the trial court need
15 not question the prosecutor or make detailed findings. But when the prosecutor’s stated
16 reasons are either unsupported by the record, inherently implausible, or both, more is
17 required of the trial court than a global finding that the reasons appear sufficient.” (*People v.*
18 *Stevens* (2007) 41 Cal.4th 182, 193; *People v. Silva* (2001) 25 Cal.4th 345, 386.)

19 A judge may not be in a position to observe every gesture, expression or interaction
20 relied upon by the prosecutor. Moreover, a judge’s impression of a juror’s demeanor might
21 be different than the prosecutor’s without that difference reflecting any pretext on the part of
22 the prosecution as “it is not at all unusual for individuals to come to different conclusions in
23 attempting to read another person's attitude or mood.” (*Davis v. Ayala* (2015) 135 S.Ct.
24 2187, 2207-2208.) However, the trial “court must be satisfied that the specifics offered by
the prosecutor are consistent with the answers it heard and the overall behavior of the
panelist.” (*People v. Lenix* (2008) 44 Cal.4th 602, 625.) “The record must reflect the trial
court's determination on this point . . . which may be encompassed within the court’s general
conclusion that it considered the reasons proffered by the prosecution and found them
credible.” (*People v. Lenix* (2008) 44 Cal.4th 602, 625-626.)

1 If the court is going to deny the challenge, it “should be discernable from the record
2 that “1) the trial court considered the prosecutor’s reasons for the peremptory challenges at
3 issue and found them to be race-neutral; 2) those reasons were consistent with the court's
4 observations of what occurred, in terms of the panelist’s statements as well as any pertinent
5 nonverbal behavior; and 3) the court made a credibility finding that the prosecutor was
6 truthful in giving race-neutral reasons for the peremptory challenges.” (*People v. Lenix*
(2008) 44 Cal.4th 602, 621.)

7 Dated:

8 Respectfully submitted,

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10 DISTRICT ATTORNEY

11 By: _____

12 Deputy District Attorney

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