Wheeler/Batson
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Wheeler/Batson -- Updated[1]

California Standard
Wheeler & Code of Civil Procedure Section 231.5

In *People v. Wheeler* (1978) 22 Cal.3d 258, 276-277 (overruled in part by *Johnson v. California* (2005) 545 U.S. 162, 168-173 [125 S.Ct. 2410, 162 L.Ed.2d 129], the Supreme Court concluded that:

> the 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.

(Italics added.)

The Court defined "group bias" as being when an attorney "presumes that certain jurors are biased merely because they are members of an identifiable group distinguished on racial, religious, ethnic, or similar grounds..." (*People v. Wheeler, supra,* 22 Cal.3d at p. 276.)

The purpose of eliminating "group bias" from jury selection is "to achieve an overall impartiality by allowing the interaction of the diverse beliefs and values the jurors bring from their group experiences." (*People v. Wheeler, supra,* 22 Cal.3d at p. 276.)

In 2000, the Legislature statutorily adopted *Wheeler* and additionally prohibited discrimination based on sexual orientation. (Sen. Rules Comm., Off. of Floor Analyses, 3d reading analysis of Assem. Bill No. 2418 (1999-2000 Reg. Sess.) as amended May 2, 2000, pp. 1-2.) Code of Civil Procedure section 231.5 states:

> A party may not use a peremptory challenge to remove a prospective juror on the basis of an assumption that the prospective juror is biased merely because of his or her race, color, religion, sex, national origin, sexual orientation, or similar grounds.

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[1] This is an updated outline of the one first presented at the Saturday Seminar on January 28, 2008, and subsequently updated for similar presentations on September 13, 2011 and January 11, 2014. It was most recently updated on January 21, 2014.

Federal Standard
Batson v. Kentucky

In 1986, the United States Supreme Court followed California's lead and held that jury challenges based on group bias violate the Equal Protection Clause of the Fourteenth Amendment. (*Batson v. Kentucky* (1986) 476 U.S. 79, 89 [106 S.Ct. 1712, 90 L.Ed.2d 69].) The Court said:

> the State's privilege to strike individual jurors through peremptory challenges, is subject to the commands of the Equal Protection Clause. Although a prosecutor ordinarily is entitled to exercise permitted peremptory challenges "for any reason at all, as long as that reason is related to his view concerning the outcome" of the case to be tried, [citation], the 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.

Who May Raise a *Wheeler/Batson* Challenge?

Wheeler/Batson applies to both the prosecution and defense, and either party may challenge the exclusion of a member of a protected group even if the party is not a member of that group. (*Georgia v. McCollum* (1992) 505 U.S. 42, 59 [120 L.Ed.2d 33, 112 S.Ct. 2348 [defense counsel sought to exclude African-American jurors]; *People v. Willis* (2002) 27 Cal.4th 811, 813; *Powers v. Ohio* (1991) 499 U.S. 400, 402 [113 L.Ed.2d 411, 111 S.Ct. 1364 [upholding white defendant's challenge of prosecutor's exclusion of African-Americans]; *People v. Farnam* (2002) 28 Cal.4th 107, 135 [accord].)

A judge on his or her own motion may raise a *Wheeler/Batson* challenge. (*People v. Lopez* (1991) 3 Cal.App.4th Supp. 11, 15 [trial court has inherent power to initiate *Wheeler* proceedings to insure an impartial jury panel].) [2]

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[2] Note: *Lopez* has never been cited by any subsequent published opinion for this legal proposition. Consequently, since it is a decision of a superior court appellate department (San Francisco), it is not binding on any higher state appellate court or in Los Angeles County. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) However, given the right at stake, it is unlikely any state appellate court presented with similar facts, a defense attorney's systematic exclusion of Asian-

Cognizable Groups

Race -- "A class or kind of individuals with common characteristics, interests, appearance, or habits as if derived from a common ancestor" or "a division of mankind possessing traits that are transmissible by descent and sufficient to characterize it as a distinct human type." (Webster's 3d New Internat. Dict. (1986) p. 1870.)

African-Americans - *Batson v. Kentucky, supra,* 476 U.S. at p. 89; *People v. Clair* (1992) 2 Cal.4th 629, 652 ["Blacks, of course, are a cognizable group for purposes of . . . *Wheeler* . . . . In addition, Black women are a cognizable subgroup for *Wheeler.*"].)

Hispanics - *People v Harris* (1984) 36 Cal.3d 36, 51 [Hispanics are a cognizable class for purposes of determining whether a defendant has made a prima facie case of constitutionally invalid selection of the jury pool]; *People v. Trevino* (1985) 39 Cal.3d 667, 684, disapproved on other grounds in *People v. Johnson* (1989) 47 Cal.3d 1194, 1219-1221, [a "Spanish surnamed" individual sufficiently describes a person as Hispanic under *Wheeler*]

Note: an individual with a Hispanic last name, which was acquired through marriage, is not a member of this cognizable group. (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1123 [juror on questionnaire described herself as "white" and told trial court she was not Hispanic].)

Asian-Americans - in *People v. Lopez, supra,* 3 Cal.App.4th Supp. 11, the Court held, without a direct finding, that Asian-Americans were a cognizable group. Similarly in *People v. Bell* (2007) 40 Cal.4th 582, 599, the court assumed that "Filipino-Americans are, for purposes of *Wheeler* and *Batson*, a cognizable group distinct from other Asian-Americans..." This is analogous to *People v. Williams* (1994) 26 Cal.App.4th Supp. 1, 6, which held that a defense counsel violated *Wheeler* by excluding a Filipino juror when he

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(Continued...)

Pacific jurors, would hold that a trial court lacks the ability to initiate its own *Wheeler/Batson* challenge. (*People v. Lopez, supra,* 3 Cal.App.4th Supp. at p. 17.)

explained his preempt by stating that the "Philippines was 'a very law and order country,' and thus [the juror], whose cousin was a judge in the Philippines, might favor the prosecution."

Native Americans - *Kesser v. Cambra* (9th Cir. 2006) 465 F.3d 351, 368 ([California prosecutor violated *Batson* by improperly dismissing Native-American jurors.].)[3] In *Kesser*, the prosecutor employed "blatant racial and cultural stereotypes" to excuse four Native-American jurors from what became an all-white jury. Of one juror the prosecutor said, "'the Native Americans who work for the tribe are troublesome because they are more likely to "associate themselves with the culture and beliefs of the tribe" instead of "our laws," and are likely to be "resistive" and "somewhat suspicious" of the justice system.'"

Ethnicity -- "Relating to community of physical and mental traits possessed by the members of a group as a product of their common heredity and cultural tradition." (Webster's 3d New Internat. Dict. (1986) p. 781.)

Italian-Americans - *United States v. Sgro* (1st Cir. 1987) 816 F.2d 30, 33 defendant failed to show that "'persons bearing

[3] The Ninth Circuit often considers *Wheeler/Batson* claims when exercising its habeas corpus jurisdiction over state trial court. In *Rice v. Collins* (2006) 546 U.S. 333, 338-342 [126 S.Ct. 969, 163 L.Ed. 2d 824], the Court unanimously reversed the 9th Circuit's reversal of a jury selection case. The Court held that for purposes of federal habeas corpus review, a federal court must defer to the state court's finding of credibility. The Court explained: "a federal habeas court can only grant [a petitioner's] petition if it was unreasonable to credit the prosecutor's race-neutral explanations for the *Batson* challenge. State-court factual findings, moreover, are presumed correct; the petitioner has the burden of rebutting the presumption by 'clear and convincing evidence.'" As the Supreme Court has emphasized, "On federal habeas review, [the Antiterrorism and Effective Death Penalty Act of 1996] AEDPA 'imposes a highly deferential standard for evaluating state-court rulings' and 'demands that state-court decisions be given the benefit of the doubt.'" (*Felkner v. Jackson* (2011) ___ U.S. ___, 131 S.Ct. 1305; 179 L. Ed.2d 374 [nanimous reversal of Ninth Circuit jury selection case].)

Italian-American surnames,' or even the designation 'Italian-American' meets the test" establishing a group as a constitutionally cognizable class. *Sgro*, however does not hold that if a proper showing was made, Italian-Americans could not be a cognizable group.

Religion -- *People v. Johnson* (1989) 47 Cal. 3d 1194, 1217, challenge to prosecutor's dismissal of four Jewish jurors. (see also, *People v. Schmeck* (2005) 37 Cal. 4th 240, 266 [assuming without deciding that *Batson*, like *Wheeler*, applies to peremptory challenges based upon bias against religious groups, the court concluded that the prosecution did not purposefully discriminate against Jewish prospective jurors].)

Note: A juror of a particular religious group can be challenged if their individual religious beliefs (e.g. opposition to death penalty) would impact their ability to deliberate. (*People v. Ervin* (2000) 22 Cal.4th 48, 70 [juror who would always vote against death penalty without considering aggravating or mitigating circumstances is subject to challenge for cause]; accord *People v. Cash* (2002) 28 Cal.4th 703, 725 ["Excusing prospective jurors who have a religious bent or bias that would make it difficult for them to impose the death penalty is a proper, nondiscriminatory ground for a peremptory challenge."].)

Gender (including sexual orientation) –

People v. Crittenden (1994) 9 Cal.4th 83, 115-116 [African-American woman]

People v. Williams (2000) 78 Cal.App.4th 1118, 1125 ["Peremptory challenges may not be used to exclude **male** jurors solely because of a presumed group bias."]; see also *People v. Willis, supra* 27 Cal.4th at p. 813-814 [upholding *Wheeler/Batson* challenge where defense attorney representing African-American client excused "White male prospective jurors...."].

People v. Garcia (2000) 77 Cal.App.4th 1269, 1281 [homosexuals], see also Code of Civil Procedure section 231.5 [sexual orientation]; *Smithkline Beechem Corp. v. Abbot Laboratories* (9th Cir. 2014) 11-17357 [Ninth Circuit

holds, in federal civil jury trial, that Equal Protection Clause bars sexual orientation as basis for preemptory challenge] .

Non-cognizable Groups

Two requirements must be met, according to the California Supreme Court, for a group to be considered cognizable. (*Rubio v. Superior Court* (1979) 24 Cal.3d 93, 98, plurality opn.):

> First, its members must share a common perspective arising from their life experience in the group, i.e., a perspective gained precisely because they are members of that group. 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.
>
> Second, no other members of the community are capable of adequately representing the perspective of the group assertedly excluded.

Who's Not In?

Low Income Groups – *People v. Burgener* (2003) 29 Cal.4th 833, 856, see also *People v. Carpenter* (1997) 15 Cal.4th 312, 352 ["persons of low income do not constitute a cognizable class" for selection of jury venire].)

Poorly Educated - *People v. Estrada* (1979) 93 Cal.App.3d 76, 90 [not cognizable group for "the 'less educated" [] those with 12 or less years of formal education."].

Age – *People v. McCoy* (1995) 40 Cal.App.4th 778, 783 ["California courts have not been receptive to the argument that age alone identifies a distinctive or cognizable group…."], see also *People v. Marbley* (1986) 181 Cal.App.3d 45, 48 [young adults].)

Ex-Felons - *People v. Karis* (1988) 46 Cal.3d 612, 633-634 [ex-felons may be excluded from representative cross section of community for jury venire].)

Non-citizens - *People v. Karis, supra,* 46 Cal.3d at pp. 633-634.

Jury Nullification Advocate - *Merced v. McGrath* (9th Cir. 2005) 426 F.3d 1076, 1080 [trial court properly excluded juror who left a "'definite impression'" that his views on jury nullification would "'substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'"].)

"People of Color" - *People v. Davis* (2009) 46 Cal.4th 539, 583 ["No California case has ever recognized 'people of color' as a cognizable group. Even if such a group is cognizable, defendant has forfeited this claim, as he fails to identify on appeal the people of color whose excusals he challenged in the trial court, and we cannot discern their identity from the record."]

Limited English Speakers - *People v. Lesara* (1988) 206 Cal.App.3rd 1304, 1309, found there was no showing that non-English speaking citizens were a protected class.

Disabled - *U.S. v. Harris*, (7th Cir. 1999) 197 F.3d 870, 875, ["Unlike race or gender, disability may legitimately affect a person's ability to serve as a juror."]

Obese People - *U.S. v. Santiago-Martinez* (9th Cir. 1995) 58 F.3d 422, 422-423 ["We hold that the equal protection analysis in *Batson v. Kentucky* [citation omitted] does not apply to prohibit peremptory strikes on the basis of obesity.]

Court Procedure

Timely Objection: A timely objection must be made during jury selection. "'[I]t is necessary that a *Wheeler* objection be made at the earliest opportunity during the voir dire process,'" and an objection first raised after the jury and alternates have been sworn is untimely." (*People v. Perez* (1996) 48 Cal.App.4th 1310, 1314, citing *People v. Thompson* (1990) 50 Cal.3d 134, 179, fn. 19; *People v. Ortega* (1984) 156 Cal.App.3d 63, 69.)

A *Wheeler/Batson* challenge to the dismissal of alternate juror reopens the issue as to the empaneled 12-member jury. (*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.'"]; *People v. Rodriguez* (1996) 50 Cal.App.4th 1013, 1023.)

Upon a timely objection, the trial court engages in a three step process which was recently discussed by the United States Supreme Court in *Johnson v. California, supra,* 545 U.S. at page 168:

> First, the defendant must make out a prima facie case "by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose." [Citation.] Second, once the defendant has made out a prima facie case, the "burden shifts to the State to explain adequately the racial exclusion" by offering permissible race-neutral justifications for the strikes. [Citation.] Third, "[i]f a race-neutral explanation is tendered, the trial court must then decide . . . whether the opponent of the strike has proved purposeful racial discrimination." [Citation.]

1. Prima Facie Case –

> **Steps to Establish Prima Facie Case** – Proponent must "make as complete a record of the circumstances as is feasible. Second, he [or she] must establish that the persons excluded are members of a cognizable group within the meaning of the representative cross-section rule. Third, from all the circumstances of the case he must show ~~a strong likelihood~~ [now **inference**[4]] that such persons are being challenged because of their group association rather than because of any specific bias." (*People v. Wheeler, supra*, 22 Cal.3d at p. 280.) The *Wheeler* court set out a number of examples which may be indicative of improper dismissal of a juror. They include:
>
> 1. Striking "most or all of the members of the identified group from the venire[.]"
>
> 2. Using "a disproportionate number of his [or her] peremptories against the group."

[4] See, *Johnson v. California, supra,* 545 U.S. at p. 170.

3. Proponent demonstrates "that the jurors in question share only this one characteristic -- their membership in the group -- and that in all other respects they are as heterogeneous as the community as a whole." However, **it is not enough to for the proponent to simply point out that members of a protected class were excused.** (*People v. Adanandus* (2007) 157 Cal.App.4th 496, 503-505 [merely objecting to dismissal of three African-Americans, without more, "is insufficient as a matter of law to show a prima facie case of discrimination by the prosecutor in his peremptory challenges..."], see also *People v. Yeoman* (2003) 31 Cal.4th 93, 115 [where defense challenged prosecutor's strike of three prospective jurors, "[c]ounsel's cursory reference to prospective jurors by name, number, occupation and race was insufficient" to establish prima facie case].)

4. The proponent may also supplement his or her showing "when appropriate by such circumstances as the failure of his opponent to engage these same jurors in more than desultory voir dire, or indeed to ask them any questions at all."

5. While the proponent does not have to be a member of the excluded group, "if he is, and especially if in addition his alleged victim is a member of the group to which the majority of the remaining jurors belong, these facts may also be called to the court's attention." (*Id.* at pp. 280-281.)

Single Peremptory -- "If a single peremptory challenge of a prospective juror in the subject cognizable group is not justified, the presumption of systematic exclusion is not rebutted." (*People v. Gonzalez* (1989) 211 Cal.App.3d 1186, 1193.)

Proponent's Burden -- The United States Supreme Court has established that the challenging party only needs to produce "evidence sufficient to permit the trial judge to draw *an inference* that discrimination has occurred." (*Johnson v. California, supra,* 545 U.S. 162 at p. 170, emphasis added.) Prior California cases holding the burden to be a "strong likelihood" that preempt was exercised because of group association are no longer good law!!

Words of Advice – "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 justifications to be ready." (Coleman, Mr. *Wheeler* Goes to Washington: The Full-Federalization of Jury Challenge Practice In California (2006), Prosecutor's Notebook Vol. XXXIII (California District Attorneys Association), p. 7.) As the Supreme Court recently noted:

> Even where the trial court has not found a prima facie case of discrimination, which would require the prosecutor to state reasons for the challenged excusals, it is helpful, for purposes of appellate review, to have the prosecutor's explanation. We therefore encourage court and counsel in all *Wheeler/Batson* proceedings to make a full record on the issue. We stress, however, that the prosecutor is not *obliged* to state his reasons before the court has found a prima facie case. Until that time, the defendant carries the sole burden to establish an inference of discrimination. At this early stage, the prosecutor is not compelled to provide information which the defendant might then employ to argue the existence of a prima facie case. [Citation.] Moreover, the prosecutor's voluntary decision to state reasons in advance of a prima facie ruling does not constitute an admission or concession that a prima facie case exists.

(*People v. Zambrano* (2007) 41 Cal.4th 1082, 1105, fn. 3, emphasis in original; see also *People v. Adanandus, supra,* (2007) 157 Cal.App.4th at p. 501.)

2. Reasons for Preempt (Race-Neutral Justification)

"[O]nce the defendant has made out a prima facie case, the 'burden shifts to the State to explain adequately the racial exclusion' by offering permissible race-neutral justifications for the strikes." (*Johnson v. California, supra,* 545 U.S. at p. 168.)

> "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.) "It is true that peremptories are often the subjects of instinct, [citation], and it can sometimes be hard to say what the reason is. But when illegitimate grounds like race are in issue, a prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives." (*Miller-El v. Dretke* (2005) 545 U.S. 231, 252 [125 S.Ct. 2317, 162 L.Ed.2d 196]; *Jamerson v. Runnels* (9th Cir. 2013)713 F.3d 1218, 1232, fn. 7 [prosecutors innocent mistaken memory of juror's remarks regarding relatives in prison did not offer "proof of discriminatory intent."].)
>
> [T]he prosecutor may not rebut the defendant's prima facie case merely by denying that he had a discriminatory motive or affirming his good faith in making individual selections. ..." (*People v. Johnson, supra,* 47 Cal. 3d 1194 at p. 1216.)

Judge Refuses to Let You Articulate Reasons – File an affidavit with court. (See *Kelly v. Withrow* (6th Cir. 1994) 25 F.3d 363, 366 ["Both prosecutors involved in selection of the jury that tried Kelly filed detailed affidavits in which they gave reasons unrelated to the race of the prospective jurors for each of the strikes...."]

Observations About Juror's Demeanor -- Failure of either defense or judge to dispute prosecutor's comments about juror's physical demeanor suggests "prosecutor's description was accurate." (*People v. Adanandus, supra,* 157 Cal.App.4th at p. 510.); but see *Snyder v. Louisana* (2008) 552 U.S. 472, 479 [128 S.Ct. 1203, 1209, 170 L.Ed.2d 175] [trial court's failure to make a determination about prosecutor's claim that juror was nervous does not support DDA's reason for dismissing African-American panel member].)

Beware the Generic Explanation -- The court in *People v. Allen* (2005) 115 Cal.App.4th 542, 546, found the following response from a prosecutor to be meaningless and incomprehensible and therefore found that he or she had not justified the juror's exclusion under *Wheeler/Batson*:

> "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 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."

Adequate Time for Voir Dire -- The California Supreme Court recently warned trial courts that they must allow attorneys substantial time to fully investigate potential panel members during voir dire. (*People v. Lenix* (2008) 44 Cal.4th 602, 625.) The court observed:

> [T]rial courts must give advocates the opportunity to inquire of panelists and make their record. If the trial court truncates the time available or otherwise overly limits voir dire, unfair conclusions might be drawn based on the advocate's perceived failure to follow up or ask sufficient questions. Undue limitations on jury selection also can deprive advocates of the information they need to make informed decisions rather than rely on less demonstrable intuition.

(accord, *People v. Hartsch* (2010) 49 Cal.4th 472, 490, fn. 17.)

Previously Accepted Race-Neutral Reasons

Note: This list, while not comprehensive, includes cases where an appellate court upheld the dismissal of a juror even though the specific individual(s) were members of a cognizable group. However, no mere recitation of these reasons will protect a prosecutor, or any attorney, from *Wheeler/Batson* if these reasons are employed merely to cloak an invidious intent. Never exercise peremptory challenges based on race, color, religion, sex, national origin, sexual orientation or similar grounds.

Hunches -- "A prosecutor may act freely on the basis of 'hunches,' unless and until these acts create a prima facie case of group bias, and even then he [or she] may rebut the inference." (*People v. Hall* (1983) 35 Cal.3d 161, 170; *People v. Gray* (2001) 87 Cal.App.4th 781, 790.); *People v. Davis* (2008) 164 Cal.App.4th 305, 313 [among other reasons prosecutor's personal "prior bad experience with certified

nursing assistants" was a sufficient "'gut instinct'" to support dismissal of African-American panel member]

Opposition to Death Penalty – *People v. McDermott* (2002) 28 Cal.4th 946, 970-971.

Family Member with Criminal Conviction – *People v. Cummings* (1993) 4 Cal.4th 1233, 1282 [juror's "brother had been convicted of a crime and may have been prosecuted by another deputy in the same office."]; but see *Green v. Lamarque* (9th Cir. 2008) 532 F.3d 1028 [case reversed in part where prosecutor struck African-American panel member who visited stepfather in prison, but did not dismiss "six white prospective jurors whose relatives and friends had also been arrested, indicted or convicted of crimes."]

Bad Feelings Towards Law Enforcement -- *People v. Johnson, supra,* 47 Cal.3d at page 1217 ["Ms. S.'s ex-husband was a policeman, and she seemed to be prejudiced against policemen."]; *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1125 ["A prospective juror's negative experiences with law enforcement can serve as a valid basis for peremptory challenge."]; *People v. Calvin* (2008) 159 Cal.App.4th 1377, [prosecutor did not violate *Wheeler/Batson* where he dismissed African-American jurors with skeptical attitude towards law enforcement, even though such an attitude may be wide-spread throughout that community];

Undue Reliance on Expert Testimony -- *People v. Gutierrez, supra,* 28 Cal.4th at page 1124 [juror indicated he "might rely too heavily on the expert opinion testimony of psychologists; he stated he could not vote for the death penalty if a psychologist concluded defendant had a mental problem that affected his conduct."]; accord *People v. Clark, supra,* 52 Cal.4th at p. 907.

Pro-defense Juror -- *People v. Gutierrez, supra,* 28 Cal.4th at page 1125 [prosecutor believed juror "was 'in the defense camp' when he seemed to keep agreeing with the defense, and when he related a previous jury experience where he believed some jurors had made up their minds before the defense had presented its case."]

Hostile Looks -- *People v. Gutierrez, supra,* 28 Cal.4th at page 1125 [prosecutor indicated juror "had given him looks that made him uncomfortable. Hostile looks from a prospective juror can themselves support a peremptory challenge."]

Hostility Towards Victim or Witness -- *People v. Gutierrez, supra,* 28 Cal.4th at page 1125 [prosecutor properly excused juror who expressed feeling that transsexuals, the victim's sexual orientation, were "'sick human beings.'"]

Previous Service on Hung Jury or No Prior Jury Service -- *People v. Farnam, supra,* 28 Cal.4th at p. 138 [previous service on hung jury "'constitutes a legitimate concern for the prosecution, which seeks a jury that can reach a unanimous verdict....'"]; see also *People v. Perez* (1994) 29 Cal.App.4th 1313, 1328 ["never served on a jury..."]

Manner of Dress -- *People v. Barber* (1988) 200 Cal.App.3d 378, 396 ["'a prosecutor may fear bias on the part of one juror . . . simply because his clothes [Coors jacket] or hair length suggest an unconventional lifestyle.'"]; *Purkett v. Elem* (1995) 514 U.S. 765, 769, [115 S.Ct. 1769; 131 L.Ed. 2d 834] ["The prosecutor's proffered explanation in this case -- that he struck juror number 22 because he had long, unkempt hair, a mustache, and a beard -- is race neutral and satisfies the prosecution's step two burden of articulating a nondiscriminatory reason for the strike. 'The wearing of beards is not a characteristic that is peculiar to any race.'" [Citation.] And neither is the growing of long, unkempt hair."]; *People v. Ward* (2005) 36 Cal.4th 186, 202 [prosecutor properly excused juror for "her unconventional appearance—i.e., wearing 30 silver chains around her neck and rings on every one of her fingers—which suggested that she might not fit in with the other jurors...."]

Limited English -- *People v. Turner* (1994) 8 Cal.4th 137, 169 [juror appeared to have poor grasp of English consequently, "where a prosecutor's concern for a juror's ability to understand is supported by the record, it is a proper basis for challenge."]; but see *People v. Gonzalez* (2008) 165 Cal.App.4th 620, 630-631 [case reversed where prosecutor

dismisses Spanish speaking jurors, despite their assurances that they will accept interpreter's translation of testimony]

Belief That Juror is Not Being Truthful -- *Kelly v. Withrow, supra* 25 F.3d at pages 366-367 [Michigan prosecutor does not believe juror, a librarian, who claims never to have read anything about insanity defenses]

Lack of Life Experiences -- *Stubbs v. Gomez* (9th Cir. 1999) 189 F.3d 1099, 1106 ["[T]he prosecutor asserted that he did not want ... juror because she lacked employment experience and experience outside of the home."]; *United States v. Murillo* (9th Cir. 2002) 288 F.3d 1126, 1135 [U.S. Attorney properly dismissed juror who said she "never read a book" and "her favorite television show is Judge Judy."]; *People v. Gonzalez, supra,* 165 Cal.App.4th at p. 631-632 [case reversed in part where prosecutor claimed he dismissed young Hispanic juror for lack of life experience, but DDA did not ask him about his employment or whether he was married or had children]

Antipathy Towards Prosecutor or Criminal Justice System -- *People v. Mayfield* (1997) 14 Cal.4th 668, 724 [juror "expressed some suspicion of prosecutors in general, and ... appeared to lack confidence in the ability of the judicial system to 'convict the right people.'"]; *People v. Clark, supra,* 52 Cal.4th at p. 907 [juror said, "facts could be manipulated and anyone could be 'hoodwinked' by corrupt attorneys."].

Juror's Occupation -- *People v. Clark, supra,* 52 Cal.4th at p. 907 [dismissal of administrative law judge as she might exert undue influence during deliberations]; *People v. Semien* (2008) 162 Cal.App.4th 701, 708 [prosecutor dismissal of African-American minister was upheld as he could rightly believe that pastor was in "business of forgiveness" and would not vote guilty despite panel member's assurance that he could]; *People v. Barber, supra,* 200 Cal. App.3d at page 389 [prosecutor's dismissal of teacher was upheld when she stated, "[I]t's been my experience as a prosecuting attorney that many teachers have somewhat of a liberal background and are less prosecution oriented."]; but see *People v. Lopez, supra,* 3 Cal.App.4th at p. Supp. 14 [trial court found defense

attorney's statement that he challenged all computer programmers was a sham excuse].

Juror's Scheduling Conflict -- *Snyder v. Louisana, supra,* 128 S.Ct. 1203, 1210-1211 [case reversed where prosecutor's justification that African-American student-teacher's work conflict might lead him to vote for a lesser offense was not supported where DDA retained white jurors with equally serious scheduling conflicts]

Juror's Counseling or Social Service Experience -- *People v. Clark, supra,* 52 Cal.4th at p. 907 ["preemptory challenge based on a juror's experience in counseling or social services is proper race-neutral reason for excusal."].

Juror's Failure to Register to Vote -- *People v. Arias* (1996) 13 Cal.4th 92, 139 [failure to register to vote is one among many legitimate race neutral reasons]; accord *People v. Taylor* (2010) 48 Cal.4th 574, 616.

Juror's Level of Education -- *Ngo v. Giurbino*, (9th Cir. 2011) 651 F.3d 1112 ["striking a juror who is 'overly educated' is sufficiently race neutral..."]

Practice Tips

Keep Detailed Jury Notes (Forever) -- For example in *In re Freeman* (2006) 38 Cal.4th 630, 644, the Supreme Court relied heavily upon the prosecutor's jury notes to absolve him of the charge that he had improperly dismissed members of the Jewish faith.[5] It is instructive to read their analysis on this issue:

> Moreover, had [the prosecutor] been acting according to a standard or institutional policy of excluding Jews, then he surely would have noted these jurors' religion in his voir dire notes or the rolodex cards he prepared for the big spin. After all, he had noted the race, the appearance, the clothes, and the possible sexual orientation of other jurors. His failure to note the religion (or his suspicions of their religion) in his voir dire

[5] In *Crittenden v. Ayers* (9th Cir. 2010) 624 F.3d 943, 952, the prosecutor employed notes taken *14 years before*, to explain his reason, for dismissing one African-American female juror.

> notes or on his rolodex cards of Jurors Peisker, LaPut, or Mishell further undermines Freeman's claim that [the prosecutor] exercised his peremptory challenges on an impermissible basis. Indeed, the fact that [the prosecutor] *did* write other identifying information on his rolodex cards for these three jurors—for Peisker, that he was a member of the American Civil Liberties Union; for LaPut, that he was unemployed and never recovered from his father's death; and for Mishell, that she was "NO DP," meaning that she would not impose the death penalty—renders [the prosecutor's] assertion that he excused any of these jurors for a *different* and unremarked reason (i.e., their religion) unworthy of belief.

(Emphasis in original.)

Jury Note's Disclaimer -- It has been suggested that to avoid any misunderstanding as to why the race or ethnicity of a juror was included in an attorney's notes, the prosecutor should include in his or her notes a "disclaimer that any notations of race, gender, etc. are for purposes of addressing issues of comparative analysis and disparate questions in *Wheeler/Bartson* litigation..." (Coleman, Mr. *Wheeler* Goes to Washington: The Full-Federalization of Jury Challenge Practice In California (2006), Prosecutor's Notebook Vol. XXXIII (California District Attorneys Association), p. 13.); but see *Green v. LaMarque* (9th Cir. 2008) 532 F.3d 1028, 1033 [prosecutor's noting of racial identity of panel members on notes was evidence of invidious intent in exercising peremptory challenges]; but see *People v. Lenix, supra* 44 Cal.4th at p. 610, fn. 6 ["When a *Wheeler/Batson* motion has been made, it is helpful for the record to reflect the ultimate composition of the jury."; *Id.* at p. 617, fn. 12 ["We emphasize, however, that post-*Batson*, recording the race of each juror is an important tool to be used by the court and counsel in mounting, refuting or analyzing a *Batson* challenge."]

> **Avoid Ex Parte Hearings About Challenges** -- In *Georgia v. McCollum, supra,* 505 U.S. at p. 58, the Supreme Court stated, "In the rare case in which the explanation for a challenge would entail confidential communications or reveal trial strategy, an *in camera* discussion can be arranged." However, the California Supreme Court observed in *People v. Ayala* (2000) 24 Cal.4th 243, 262, "in the main, it is error to conduct" ex parte hearings during *Wheeler/Batson* proceedings. (See also, *Ayala v. Wong* (9th Cir. 2012) 693

F.3d 945, 952 [error for the prosecutor to state his reasons for excusing jurors in an ex parte hearing] .)

3. Trial Court's Decides:

The trial court must decide by a "preponderance of evidence.... whether the neutral reasons offered to justify a peremptory challenge are genuine or pretextual." (*People v. Hutchins* (2007) 147 Cal.App.4th 992, 998.) Since the trial court's decision is one involving credibility it is due great deference on appeal. (*Hernandez v. New York* (1991) 500 U.S. 352, 365 [114 L.Ed.2d 395, 111 S.Ct. 1859] [The best evidence of whether a race-neutral reason should be believed is often "'the demeanor of the attorney who exercises the challenge,' and 'evaluation of the prosecutor's state of mind based on demeanor and credibility lies 'peculiarly within a trial judge's province.'"]; *People v. Ward* (2005) 36 Cal.4th 186, 200 ["We presume that a prosecutor uses peremptory challenges in a constitutional manner and give great deference to the trial court's ability to distinguish bona fide reasons from sham excuses."]; *People v. Reynoso* (2003) 31 Cal.4th 903, 928; *People v. Ervin, supra,* 22 Cal.4th at p. 74 ["[W]e review a trial court's determination regarding the sufficiency of a prosecutor's justifications for exercising peremptory challenges 'with great restraint.'"]; *People v. Johnson, supra,* 47 Cal.3d at p. 1219, fn 6 ["trial judges know the local prosecutors assigned to their courts and are in a better position than appellate courts to evaluate the credibility and the genuineness of reasons given for peremptory challenges."].)

Comparative Analysis – In making a determination as to whether or not the offered reasons are really neutral, both trial and appellate courts may engage in comparative analysis. Formerly, this procedure was not employed in California, but the United States Supreme Court in *Miller-El v. Dretke* (2005) 545 U.S. 231[125 S.Ct. 2317, 162 L.Ed.2d 196] approved the procedure. Subsequently, the California Supreme Court has held that comparative analysis is appropriate in evaluating the reasons offered after the finding of a prima facie case, but is inappropriate when a trial court has not made a prima facie finding. (*People v. Bell* (2007) 40 Cal.4th 582, 601 ["*Miller-El* does not mandate comparative juror analysis in a first-stage *Wheeler-Batson* case when neither the trial court nor the reviewing courts have been presented with the prosecutor's reasons or have hypothesized any possible reasons."].)

What is Comparative Analysis? --

Trial court may consider:

1.) *Statistical Evidence* -- in *Miller-El* the prosecutor struck 10 of 11 African-American jurors, a 91% disparity; 9 had been dismissed for cause. (*Miller-El v. Dretke, supra,* 545 U.S. at pp. 240-241.) The court noted, "Happenstance is unlikely to produce this disparity." (*Id.* at p. 241.) However, in *People v. Clark* (2011) 52 Cal.4th 856, 905, where the trial court did not find a prima facie case, the supreme court held that statistics alone, where prosecutor dismissed 3 of 4 African-American jurors, did not raise an inference of discrimination. The court noted that "African-Americans comprised 5 percent of the jury pool but represented nearly 10 percent [the one African-American juror] of the selected jury." (*Ibid.*, accord *People v. Garcia* (2011) 52 Cal.4th 706, 748 [no showing where prosecutor initially dismissed 3 of 4 women on panel, final panel 83% female].)

2.) *Comparison of Jurors* -- in *Miller-El* the Court said, "More powerful than these bare statistics, however, are *side-by-side comparisons* of some black venire panelists who were struck and white panelists allowed to serve." (*Miller-El v. Dretke, supra,* 545 U.S. at p. 241, emphasis added.)

3.) *Disparate Questioning* -- in *Miller-El,* the Court faulted the prosecutor for failing to ask questions about area of concern which the prosecutor later used to justify dismissing African-American jurors. (*Miller-El v. Dretke, supra,* 545 U.S. at p. 246, but see *People v. Clark, supra,* 52 Cal.4th at p. 906-907 [use of jury questionnaire may provide basis for asking few questions of potential juror]; accord *People v. Jones* (2011) 51 Cal.4th 346, 364.)

4.) *Past Practice* -- in *Miller-El,* the Court also noted that the Dallas (Texas) County prosecutor's office had for many years had a policy "systematically excluding blacks from juries..." (*Miller-El v. Dretke, supra,* 545 U.S. at p. 263.) Consequently, at least one commentator has warned prosecutors that they could be asked by either defense counsel or the trial court if they have previously been found to have violated *Wheeler/Batson.* (Coleman, Mr. *Wheeler* Goes to

Washington: The Full-Federalization of Jury Challenge Practice In California (2006), Prosecutor's Notebook Vol. XXXIII (California District Attorneys Association), p. 13.)

Similar Jurors Remaining on Panel -- The presence on the final panel of jurors similar to those challenged under *Wheeler/Batson* provides some evidence of the prosecutor's good faith in excusing panel members. (*People v. Clark, supra,* 52 Cal.4th at p. 906 [one African-American served on final panel]; *People v. Davis, supra,* 164 Cal.App.4th at p. 313-314 [African-American jurors served on final panel]; contrast *Green v. LaMarque, supra,* 532 F.3d 1028 [dismissal of all six African-Americans from jury panel is evidence of racial discrimination]; *People v. Watson* (2008) 43 Cal.4th 652, 673 ["Among the seated jurors, four were White, six were Black, one was Hispanic, and one described himself as 'Filipino Afro'; among the alternates, three were White and one was Black. These circumstances further support the inference that the prosecutor acted in good faith and without discriminatory purpose in exercising peremptory challenges.".])

Accepting Panel With Cognizable Group Members -- "The fact that the prosecutor accepted the jury panel once with both African-American jurors on it, and exercised the single challenge only after defense counsel exercised his own challenge, strongly suggests that race was not a motive behind the challenge." (*People v. Kelly* (42 Cal.4th 763, 780, see also *People v. Ward, supra* 36 Cal.4th at page 203 -- [upholding strikes noting among other factors "that five out of the 12 sitting jurors were African-Americans, and four out of those five jurors were women. 'While the fact that the jury included members of a group allegedly discriminated against is not conclusive, it is an indication of good faith in exercising peremptories, and an appropriate factor for the trial judge to consider in ruling on a *Wheeler* objection.'"]

4. Trial Court Remedies

a. Dismiss Entire Panel and Commence Again -- Initially, the sole remedy for a trial court's finding of invidious conduct was to dismiss the entire panel and start jury selection over again. (*People v. Wheeler, supra,* 22 Cal.3d at p. 282; but see *People v. Willis, supra,* 27 Cal.4th at page 821 [trial court has discretion to impose sanctions other than dismissal of entire panel].)

b. Keep Improperly Challenged Juror on Panel -- *People v. Willis, supra,*, 27 Cal.4th at page 811[authorizing "reseating any improperly discharged jurors if they are available to serve."]; *People v. Overby* (2004) 124 Cal.App. 4th 1237, 1243 [trial court properly reseated juror dismissed by prosecution]

c. Sanctions Against Attorney -- Trial court may impose a monetary sanction, consistent with Code of Civil Procedure section 177.5, but only if it first orders attorneys to comply with *Wheeler/Batson*. (*People v. Muhammad* (2003) 108 Cal.App.4th 313, 324-325.) A trial court's order to counsel to comply with *Wheeler/Batson* does not infringe on a defendant's right to zealous representation. (*People v. Boulden* (2005) 126 Cal.App.4th 1305, 1314.)

d. Additional Preemptory Challenges for Innocent Party

Limit on Remedies b - d -- Trial court may only adopt remedies b through d, if the aggrieved party consents to that remedy. (*People v. Willis, supra,* 27 Cal.4th at pp. 823-824.) As the Court stated, "trial courts lack discretion to impose alternative procedures in the absence of consent or waiver by the complaining party. On the other hand, if the complaining party does effectively waive its right to mistrial, preferring to take its chances with the remaining venire, ordinarily the court should honor that waiver rather than dismiss the venire and subject the parties to additional delay." (*Ibid.*) However, an aggrieved party may impliedly, not expressly, waive the reseating of a challenged juror by simply acceding to the trial court's action. (*People v. Overby* (2004) 124 Cal.App.4th 1237, 1245-1246.)

Consent may be implied, where a party fails to object to the trial court's proposed alternative remedy (e.g. reseating a dismissed juror) "when the opportunity" occurs and then proceeds with jury selection. (*People v. Mata* (2013) 57 Cal. 4th 178, 181.)

Sidebar for Challenges -- A trial court has *discretion* to permit sidebar conferences for challenges to limit any "undue prejudice to the party unsuccessfully making the preemptory challenge..." (*People v. Willis, supra,* 27 Cal.4th at pp. 821-

822.) The American Bar Association recommends this approach in its Criminal Justice Trial by Jury Standards. (*Id.* at p. 822.)

Ethical Consequences -- Self Reporting

Monetary Sanction -- Business and Professions Code section 6068, subdivision (o) states in relevant part that an attorney must:

> [R]eport to the agency charged with attorney discipline, in writing, within 30 days of the time the attorney has knowledge of any of the following: **(3)** The imposition of judicial sanctions against the attorney, except for sanctions for failure to make discovery or monetary sanctions of less than one thousand dollars ($1,000).

Under that provision an attorney fined more than $1,000 arising from a violation of *Wheeler/Batson* would be required to self report to the State Bar.

Trial Court Finding of Violation of *Wheeler/Batson* -- Business and Professions Code section 6068, subdivision (o) (7) provides that an attorney must report the:

> Reversal of judgment in a proceeding based in whole or in part upon misconduct, grossly incompetent representation, or willful misrepresentation by an attorney.

Is there an obligation to report a *trial court's* finding of *Wheeler/Batson* under either the provisions of subdivision (o) (3) and (o) (7) of Business and Professions Code section 6068? That issue was recently discussed at length in the February 2007 issue of LADA's Ethicsline. The article stated:

> Some prosecutors have believed that a DDA must report the granting of a *Wheeler/Batson* motion because it is a sanction under subdivision (3). However, a representative from the California State Bar Ethics Hotline recently stated that there was no legal authority supporting that contention. Confirmation of that fact was provided from the State Bar attorney in charge of Reportable Actions, who stated that in the last 15 month period no prosecutor or defense counsel self-reported the granting [by a trial court] of a

Wheeler/Batson motion. However, be aware that in *People v. Muhammad* (2003) 108 Cal. App. 4th 313, 324, the court approved the imposition of monetary sanctions as a remedy for a *Wheeler/Batson* violation. If the amount of that sanction was in excess of $1,000, then that would trigger the need to self-report.

There is also no self-reporting duty under subdivision (7) because there has been no "reversal of [a] judgment". This is because the word "judgment" is a term of art meaning, "the final determination of the rights of the parties in an action or proceeding." (40A Cal.Jur.3d (2006) Judgment, § 1, p. 17, citing Code of Civ. Proc., § 577.) This contrasts with the granting of a *Wheeler/Batson* motion, which is a decision during trial about some collateral issue that must be resolved before a final decision can be entered. (*Id.* at § 2, pp. 18-19, citing Code of Civ. Proc., § 1003.) Since the judgment was not reversed, there is no need to self-report. However, this would not be the situation where an appellate court reversed a conviction on the basis of *Wheeler/Batson* misconduct, as such a finding would need to be reported.

Appellate Court Reversing for *Wheeler/Batson* -- Under Business and Professions Code section 6068, subdivision (o) (7), a prosecutor would need to report the reversal of a conviction, based in whole or in part, on the granting of a *Wheeler/Batson* motion.

Recusal -- If a prosecutor is found to have violated *Wheeler/Batson*, there is no need to remove him or her from a subsequent or continuing prosecution of the same defendant. (*People v. Turner* (1994) 8 Cal.4th 137, 163 [earlier *Wheeler* error did not mean "that the district attorney would not 'exercise [his] discretionary function [in making peremptory challenges] in an evenhanded manner' in this trial."].)

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Whalen, *Don't Be a Lying Racist: Dealing With* Batson/Wheeler *Motions* (Vol. XXX, No. 1 2007) Prosecutor's Brief, (California District Attorneys Association) [An excellent quick overview, but remember to Shephardize cases, as some have been overruled since monograph was written]

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