D. Limitations on Use of Peremptory Challenges Under People v Wheeler and Batson v Kentucky

§29.30 1. Systematic Exclusion of Jurors Because of Membership in "Cognizable Group" Prohibited

Peremptory challenges may not be used to systematically exclude jurors because of membership in a cognizable group distinguished by racial, religious, ethnic, or similar characteristics. *People v Wheeler* (1978) 22 C3d 258, 276 (decision based on California Constitution representative cross-section rule); *Batson v Kentucky* (1986) 476 US 79, 84, 106 S Ct 1712 (decision based on equal protection clause of Fourteenth Amendment). See also *Purkett v Elem* (1995) 514 US 765, 115 S Ct 1769; *Georgia v McCollum* (1992) 505 US 42, 112 S Ct 2348; *Trevino v Texas* (1992) 503 US 562, 112 S Ct 1547. This principle is codified in CCP §231.5 (prohibiting use of race, color, religion, sex, national origin, sexual orientation, or similar grounds).

The following are examples of cognizable or distinctive groups: gays and lesbians (*People v Garcia* (2000) 77 CA4th 1269; ***SmithKline Beecham Corp. v Abbott Labs.*** (9th Cir 2014) 740 F3d 471, 476); African-American men (*People v Gray* (2001) 87 CA4th 781, 788); Hispanics (*People v Harris* (1984) 36 C3d 36, 51; *People v Gonzales* (2008) 165 CA4th 620, 631); and men (*People v Williams* (2000) 78 CA4th 1118, 1125). In contrast, "people of color" (*People v Davis* (2009) 46 C4th 539, 583; *People v Neuman* (2009) 176 CA4th 571, 578); Caucasians with Spanish surnames (*People v Cruz* (2008) 44 C4th 636, 656); persons with "low incomes" (*People v Burgener* (2003) 29 C4th 833, 856); people over 70 (*People v McCoy* (1995) 40 CA4th 778, 783); and "young people" (*People v Marbley* (1986) 181 CA3d 45, 47) are not members of a cognizable group.

NOTE: In the struck-juror system, a waiver of a peremptory strike (like the exercise of a peremptory strike in an alternate-juror system) may also not be used to systematically exclude jurors for their membership in one of the aforementioned cognizable groups. *U.S. v Esparza-Gonzalez* (9th Cir 2005) 422 F3d 897, 902.

The *Batson-Wheeler* rule applies to both the defense and the prosecution. *Georgia v McCollum* (1992) 505 US 42, 59, 112 S Ct 2348; *People v Willis* (2002) 27 C4th 811. A party may challenge systematic exclusion of a juror who is a member of a cognizable group even though the party is not a member of that group. *People v Farnam* (2002) 28 C4th 107, 135; ***People v Wheeler, supra***; *Powers v Ohio* (1991) 499 US 400, 402, 111 S Ct 1364. The judge may initiate *Batson-Wheeler* proceedings on his or her own motion. *People v Lopez* (1991) 3 CA4th Supp 11, 15.

WARNING: The systematic exclusion of members of a cognizable group is error under both state and federal constitutions, and consequently, the prosecutor's unconstitutional use of peremptory challenges presents a claim cognizable on federal habeas corpus. Because of the federal habeas rules on exhaustion of state remedies (see §45.26) and procedural default (see §45.27), when making a motion challenging the prosecutor's improper removal of prospective jurors, defense counsel should state explicitly that it is made under both *Batson* and *Wheeler*. See *Baldwin v Reese* (2004) 541 US 27, 124 S Ct 1347.

§29.31 2. Procedural Aspects of *Batson-Wheeler* Motion

The court will address the procedure for making *Batson-Wheeler* objections as part of the mandatory pre-voir dire conference. Cal Rules of Ct 4.200(a)(8). To be timely, a *Batson-Wheeler* motion must be made during jury selection. *People v Wheeler* (1978) 22 C3d 258, 280. See *People v McDermott* (2002) 28 C4th 946, 970 (motion timely until alternates are selected and sworn); *People v Perez* (1996) 48 CA4th 1310, 1314 (motion untimely if made after jury sworn).

WARNING: An objection at trial is also a prerequisite to a *Batson* challenge for purposes of federal habeas review. *Haney v Adams* (9th Cir 2011) 641 F3d 1168, 1171.

There are three recognized steps to the motion. First, the side asserting the improper use of peremptory challenges must state a prima facie case of systematic exclusion. *Batson v Kentucky* (1986) 476 US 79, 93, 106 S Ct 1712; *People v Wheeler, supra*. See §29.32. If a prima facie case is made, the burden shifts to the other party to show that there were reasons for exercising the challenges other than the systematic exclusion of members of a cognizable group. *Wheeler,* 22 C3d at 281; *Batson,* 476 US at 97. See §29.34. In the third step, the trial court decides whether purposeful discrimination has been shown. *Snyder v Louisiana* (2008) 552 US 472, 128 S Ct 1203. See §29.35. The ultimate burden of persuasion remains on the party alleging systematic exclusion. *Batson,* 476 US at 93. See also *Purkett v Elem* (1995) 514 US 765, 768, 115 S Ct 1769. The burden on that party is to establish purposeful discrimination by a preponderance of the evidence. *People v Hutchins* (2007) 147 CA4th 992, 998.

To ensure against undue prejudice to the party unsuccessfully making a peremptory challenge or challenge for cause, the trial court may use a sidebar conference followed by appropriate disclosure in open court as to *successful* challenges. *People v Willis* (2002) 27 C4th 811, 821; see *People v Williams* (1994) 26 CA4th Supp 1, 7. Because requiring all challenges to be made at a sidebar may be unduly burdensome, the trial court has the discretion to develop appropriate procedures such as limiting sidebars to situations in which a *Wheeler* objection has been made to a particular challenge. *People v Willis* (2002) 27 C4th 811, 821.

***Batson-Wheeler* checklist.** The following checklist can assist with the jury selection process in light of a potential *Batson-Wheeler* motion.

__ Have assistants present at counsel table or in the courtroom gallery to perform immediate content analysis of apparent racial-demographic characteristics of the entire venire.

__ Spreadsheet of the venire can be e-mailed to the trial counsel and others using laptop computer with Internet access.

__ Internet research of potential jurors can be done inside the courtroom and key findings e-mailed to trial counsel.

__ Document each peremptory challenge by opposing counsel potentially involving race or other discriminatory characteristics.

__ Note any patterns reasonably susceptible to discriminatory explanation, *e.g.,* prosecutor kept three Caucasian jurors with the same or similar answers as the one African-American juror who was excused.

__ Object on the record outside the presence of the jury only if you have a good faith belief the peremptory challenge was for a discriminatory purpose. Otherwise, you will lose credibility with the trial judge. Moreover, it is highly unlikely a "slim" discriminatory-purpose argument will be successful on appeal anyway.

__ Make a detailed record of "bias" observations outside the jury's presence. The trial judge must conduct "comparative juror analysis" on the record pursuant to the third prong of *Batson-Wheeler*.

__ Emphasize the potential juror's body language (*e.g.*, crying, anxious, hostile) in response to specific questions by the judge or counsel.

__ Present numbers showing racial composition of venire, discriminatory pattern of peremptory challenge(s), race of defendant, whether opposing counsel has kept any other jurors on the venire of the same race as the one at issue presently, and anything else that reasonably supports the proposition that the prospective juror was excused for a discriminatory purpose.

__ After opposing counsel refutes your argument with race-neutral explanation, rebut that explanation, emphasizing comparative juror analysis that leads to the conclusion that discriminatory purpose is manifest.

__ Consider if it is prudent to get the trial judge to explain why opposing counsel has a valid, nondiscriminatory reason for excusing the potential juror. It may be preferable for a defense attorney to have a "bare record" on appeal because appellate courts increasingly focus on the record—or lack thereof—made by the trial judge with respect to "comparative juror analysis."

__ It is useful to have the trial judge comment on body language in relation to the responses of the prospective juror. Such observations are given great deference by the reviewing courts.

__ If the *Batson-Wheeler* motion is successful, consider a "remedy" other than a new venire, such as reseating improperly discharged jurors, additional peremptory challenges, an admonishment in front of the jury that opposing counsel engaged in improper jury selection, and sanctions for counsel's improper exercise of a peremptory challenge.

§29.32 a. Making a Prima Facie Case

It is presumed that peremptory challenges are exercised in a constitutional manner. *People v Alvarez* (1996) 14 C4th 155, 193. Therefore, the party claiming that the opponent is improperly using peremptory challenges bears the burden at the outset to make a prima facie case of systematic exclusion. To meet this burden, the objecting party must

- Establish that the persons excluded are members of a cognizable group under the equal protection clause or the representative cross-section rule (on cognizable groups, see §29.30); and
- Point to each relevant factor and to the totality of relevant facts supporting a reasonable inference that such persons are being challenged because of their membership in the group, rather than because of any specific bias. *People v Scott* (2015) 61 C4th 363, 384; *People v Box* (2000) 23 C4th 1153, 1188, overruled on other grounds in *People v Martinez* (2010) 47 C4th 911, 948 n10; *Wade v Terhune* (9th Cir 2000) 202 F3d 1190, 1195.

Counsel should make as complete and detailed a record of the circumstances as feasible. Simply pointing out that the opposing party has struck several prospective jurors who are members of a cognizable group is seldom sufficient. See *People v Walker* (1998) 64 CA4th 1062, 1069, for a list of cases finding no prima facie showing.

EXAMPLE: To strengthen the inference of systematic exclusion, it might be possible to show that the party has excused members of a cognizable group who have traits often viewed favorable to that party (*e.g.*, that the prosecutor has struck black jurors who have favorable attitudes toward the police) or that membership in a cognizable group was the only discernible difference between jurors the party excused and jurors the party passed.

Under *Batson v Kentucky* (1986) 476 US 79, 93, 106 S Ct 1712, a prima facie showing is one that supports a "reasonable inference" of systematic exclusion of a cognizable group. The U.S. Supreme Court has specifically rejected a requirement that the objecting party show either a "strong likelihood" or that it is "more likely than not" that the other party's peremptory challenges, if unexplained, were based on impermissible group bias. *Johnson v California* (2005) 545 US 162, 125 S Ct 2410. See *People v Reed* (2018) 4 C5th 989, 999 (supreme court conducted independent review of record using *Johnson* standard).

Lay groundwork for comparative juror analysis. Counsel who suspects that the opponent is systematically excluding prospective jurors who are members of a cognizable group should pay close attention to the similarities and differences between jurors who have been struck and jurors who have been retained. Suppose, for example, the prosecutor uses a peremptory challenge to excuse an African-American woman who said she would get too upset listening to the evidence, but does not excuse a Caucasian woman who asks to be excused for the same reason. Such comparisons may be used to strengthen the inference that the juror who was the member of the cognizable group was excused in violation of *Batson-Wheeler*. See *Miller-El v Cockrell* (2003) 537 US 322, 332, 123 S Ct 1029. Evidence of comparative juror analysis must be considered by the trial court in making its determination at the third step of the motion. *People v Lenix* (2008) 44 C4th 602, 622.

Preserving the record for federal posttrial proceedings. To preserve both state and federal issues for appellate purposes, defense counsel should make the record as specific as possible concerning impermissible group bias in the exercise of peremptory challenges by the prosecution. Prosecutorial practices designed to exclude groups of people on the basis of race under the pretense of other legally valid reasons are disdained. See *Johnson v California* (2005) 545 US 162, 125 S Ct 2410; *Miller-El v Dretke* (2005) 545 US 231, 125 S Ct 2317. Defense counsel's duty is to make a detailed record, outside the presence of the jury, which shows that the reasons given by the prosecution are not valid.

WARNING: To preserve the record for future federal habeas challenges, trial counsel must provide a detailed and full record including evidence to assist in comparative juror analysis, even when the trial court finds no prima facie ruling was made. In *Crittenden v Chappell* (9th Cir 2015) 804 F3d 998, although the trial court ruled no

prima facie case of discrimination had been made, the Ninth Circuit, in granting the petitioner's habeas petition, upheld the District Court's reverse finding and conclusions determining the prosecutor was substantially motivated by race. The District Court conducted comparative juror analysis for the first time after the trial, making the determination on the basis of the record, a magistrate's evidentiary hearing that took place more than 13 years after the trial wherein the prosecutor remembered nothing significant, and the prosecutor's notes of jury selection the trial court had never seen.

§29.33 b. Trial Court's Response

When a defense attorney has made a prima facie case that one particular juror was challenged because of impermissible group bias, the trial court is not required to ask a prosecutor to justify all other challenges to other potential jurors in the same group. *People v Avila* (2006) 38 C4th 491, 549. If the trial court concludes that the objecting party has made out a prima facie case of systematic exclusion of members of a cognizable class, the opponent is given the opportunity to rebut the inference. If the trial court concludes that the circumstances do not support a prima facie case, there is no need for the opposing party to respond, but in practice, trial courts often request a response before ruling on the prima facie case. This is the recommended practice. *People v Scott* (2015) 61 C4th 363, 391. For example, in *People v Gray* (2001) 87 CA4th 781, 788, the court explained:

Even when it appears to the trial court that the defense has failed to present a prima facie case of prosecutor bias in selection of the jury, the court should hear the prosecutor's explanation for excusing the jurors in question. By permitting the prosecutor to make a record, the trial court enables the Court of Appeal to determine whether the prosecutor possessed any legitimate, nonsuspect reasons for excusing the jurors in question.

When the trial court solicits an explanation of the questioned peremptory challenges without first indicating its views on the prima facie issue, the appellate court may infer that the trial court made an implied prima facie finding. *People v Arias* (1996) 13 C4th 92, 135. When, however, the court finds that the movant has not made out a prima facie case but nevertheless asks counsel to justify peremptory challenges, the appellate court begins its analysis with a review of the prima facie ruling. *Scott,* 61 C4th at 391. If the appellate court agrees with the first-stage ruling, the analysis will stop there. If the appellate court disagrees, then, with the full record of reasons and the trial court's evaluation, the court will conduct a third-stage review. *People v Scott, supra.*

WARNING: For purposes of federal habeas challenges, it is imperative for trial counsel to provide a detailed and full record, even when the trial court finds no prima facie ruling was made. In *Crittenden v Chappell* (9th Cir 2015) 804 F3d 998, although the trial court ruled no prima facie case had been made, the Ninth Circuit upheld a District Court finding that a prima facie case had been made and the prosecutor was substantially motivated by race. The District Court conducted a comparative juror analysis for the first time, and its determination was based on the record, on a magistrate's evidentiary hearing that took place more than 13 years after the trial, and on the prosecutor's notes of jury selection the trial court had never seen. A trial court's finding of a prima facie showing for one *Batson-Wheeler* motion does not mean that all subsequent challenges to members of that juror group are to be presumed improper. *People v Irvin* (1996) 46 CA4th 1340, 1351.

§29.34 c. Responding Party

Once a prima facie case has been shown, the burden shifts to the other party to rebut the claim by neutral reasons for the peremptory challenge or challenges. *Purkett v Elem* (1995) 514 US 765, 768, 115 S Ct 1769; *People v Clair* (1992) 2 C4th 629, 652. Absent "compelling reasons," these proceedings should not be conducted ex parte. *People v Ayala* (2000) 24 C4th 243, 262.

These reasons may be subjective. Hunches (see *People v Hall* (1983) 35 C3d 161, 170), the prospective juror's "body language," mode of answering questions, or lack of life experience, as long as they are not pretexts for systematic exclusion for members of a cognizable group, may be acceptable reasons for excusing jurors and can be used to rebut the inference of systematic exclusion. *People v Gray* (2001) 87 CA4th 781, 788; *People v Perez* (1994) 29 CA4th 1313, 1328. The opposing party's burden at this stage is met by an explanation that is facially valid; it need not be persuasive or even plausible. *People v Gutierrez* (2017) 2 C5th 1150, 1168. But see *People v Cisneros* (2015) 234 CA4th 111, 120 (prosecutor's stated reason of merely preferring next juror insufficient without articulated neutral explanation); *People v Long* (2010) 189 CA4th 826, 848 (prosecutor's peremptory challenge, based on unrecorded aspect of prospective juror's appearance or behavior, must have some support in the record).

NOTE: Counsel must consider that any pretextual reason offered for striking a juror may raise an inference that other proffered rationales are also "make-weight." See, *e.g., Ali v Hickman* (9th Cir 2009) 584 F3d 1174, 1184.

For example, California appellate courts have found the exercise of a peremptory challenge to be valid when based on the prospective juror's

- Prior criminal arrest (*People v Winbush* (2017) 2 C5th 402, 436);
- Son having been convicted by same prosecutor with the same lead detective (*People v Scott* (2015) 61 C4th 363, 385);
- Lack of supervisory work experience (*People v Chism* (2014) 58 C4th 1266, 1316);
- Limited life experience combined with a concern about the prospective juror's intellectual capacity (*People v DeHoyos* (2013) 57 C4th 79, 108);
- Prior criminal conviction (*People v McKinzie* (2012) 54 C4th 1302, 1321, overruled on other grounds in *People v Scott* (2015) 61 C4th 363, 391 n3);
- Experience in counseling or social services (*People v Clark* (2011) 52 C4th 856, 907; *People v Trevino* (1997) 55 CA4th 396, 411);
- Views about the death penalty in a capital case (*People v Booker* (2011) 51 C4th 141, 167);
- Unwillingness to interact with other jurors (*People v Mills* (2010) 48 C4th 158, 184; *People v Cox* (2010) 187 CA4th 337, 346);
- Indication that the prospective juror would place undue reliance on expert witness opinion (*People v Gutierrez* (2002) 28 C4th 1083, 1124);
- Bias against a victim or witness (*Gutierrez,* 28 C4th at 1125 (prospective juror stated he felt transsexuals were "sick human beings"));
- Apparent inability to focus on the evidence (*People v Gutierrez, supra*);
- Being overwhelmed by outside stress (*People v Gutierrez, supra* (prospective juror cried twice during voir dire and referred to her "nerves"));
- Previous service that resulted in a hung jury (*People v Farnam* (2002) 28 C4th 107, 138; *People v Jones* (2017) 7 CA5th 787, 804);
- Having visited a relative in prison within the past year (*People v Farnam, supra*);
- Intransigence in refusing to be influenced by anyone else's opinion (*People v Davenport* (1995) 11 C4th 1171, 1203);
- Relative with a criminal conviction (*People v Cummings* (1993) 4 C4th 1233, 1282; *People v Adanandus* (2007) 157 CA4th 496, 509);
- Bad feelings against the police (*People v Johnson* (1989) 47 C3d 1194, 1215);

- Apparent agreement with defense counsel's questions, leading prosecutor to conclude he might be skeptical of the People's evidence (*People v Johnson, supra*);
- Hostile looks (*People v Wheeler* (1978) 22 C3d 258, 275);
- Skepticism about the fairness of the criminal justice system (*People v Calvin* (2008) 159 CA4th 1377, 1386);
- Views that illicit drugs should be legalized combined with ambivalent or noncommittal responses to questions on whether those views might affect the juror's view of the case (*People v Adanandus* (2007) 157 CA4th 496, 510);
- Manner of dress (*People v Barber* (1988) 200 CA3d 378, 396); or
- Poor grasp of the English language (*Barber,* 200 CA3d at 397).

§29.35 d. Trial Court's Determination of Motive

Once a neutral basis for the exercise of a peremptory challenge is offered, the trial court must then determine if purposeful discrimination has been established. *Hernandez v New York* (1991) 500 US 352, 363, 111 S Ct 1859. The proper analysis is whether the prosecutor was "motivated in substantial part" by race. *Cook v LaMarque* (9th Cir 2010) 593 F3d 810, 815.

Before ruling, the trial court will give the moving party an opportunity to respond to the offered justifications.

PRACTICE TIP: This is counsel's last and best opportunity to persuade the trial court that opposing counsel is using peremptory challenges to improperly strip the jury of members of a cognizable group. Counsel should carefully evaluate neutral-sounding justifications for indications that they are actually pretextual. Counsel should also keep in mind that the proffered justifications present another opportunity for comparative analysis and should point out to the trial court any instances of jurors who are not members of the cognizable class being retained on the jury even though they shared the allegedly neutral trait used to justify a peremptory challenge.

Distinguishing bona fide reasons for using peremptory challenges from sham excuses is, in essence, a credibility determination; thus, the trial court's decision is given great deference on appeal (*People v Reynoso* (2003) 31 C4th 903, 928; *People v Ervin* (2000) 22 C4th 48, 74), and must be sustained unless it is clearly erroneous. *Snyder v Louisiana* (2008) 552 US 472, 128 S Ct 1203. Failure to conduct a third-step analysis may result in remand to the trial court for a factual hearing or new trial, or the appellate court may conduct the third-step analysis de novo. See *U.S. v Alvarez-Ulloa* (2015) 784 F3d 558, 565.

The proper focus of this third-step analysis is the subjective genuineness of the responding party's neutral explanation, not the objective reasonableness of that explanation. *People v Reynoso* (2003) 31 C4th 903, 924. See also *Purkett v Elem* (1995) 514 US 765, 768, 115 S Ct 1769 (trier of fact must evaluate "persuasiveness of the justifications"). The trial court must engage on the record in a "sincere and reasoned inquiry" into counsel's proffered explanations and make findings as to the genuineness of those explanations. *People v McDermott* (2002) 28 C4th 946, 971. The court's focus must be on the *real* reason the juror was stricken, not on nondiscriminatory reasons the party exercising the peremptory challenge *might* have had. See *Paulino v Castro* (9th Cir 2004) 371 F3d 1083, 1089 (trial court erred in speculating sua sponte as to why prosecutor may have struck potential jurors in question rather than requiring actual explanation from prosecutor). The trial court must consider evidence of comparative juror analysis. *People v Lenix* (2008) 44 C4th 602, 622.

The record should contain sufficient detail so that the issue can be intelligently considered on appeal. *People v McDermott* (2002) 28 C4th 946, 981. See *Green v LaMarque* (9th Cir 2008) 532 F3d 1028, 1030 (habeas relief granted when record failed to demonstrate that trial court's inquiry included required comparative juror analysis). Moreover, a state court trial judge's determination that the prosecutor properly exercised a peremptory challenge could be viewed differently by a federal judge. See, *e.g.*, *Castellanos v Small* (9th Cir 2014) 766 F3d 1137, 1148 (Ninth Circuit reversed California court of appeal affirmation of murder conviction because prosecutor improperly excluded Hispanic prospective juror).

PRACTICE TIP: Trial counsel opposing a *Batson-Wheeler* motion should point out any jurors who are members of the group allegedly discriminated against. This is an indication of good faith in exercising peremptories, and an objective factor for the trial judge to consider in ruling on the motion. See *People v Gutierrez* (2002) 28 C4th 1083, 1122. Counsel need only identify facially valid neutral reasons why prospective jurors were excused; the explanation need not justify a challenge for cause. *People v Silva* (2001) 25 C4th 345. If a juror is excused on the basis of demeanor, the record should contain the court's observation of that juror's demeanor. See *Snyder v Louisiana* (2008) 552 US 472, 128 S Ct 1203; *People v Long* (2010) 189 CA4th 826, 848. But see *Thaler v Haynes* (2010) 559 US 43, 130 S Ct 1171 (judge need not have personally observed and recalled prospective juror's demeanor to accept demeanor-based explanation for peremptory challenge).

§29.36 3. Successful Motion Requires New Panel Absent Waiver or Consent

If the objecting party makes a prima facie case of illegal discrimination and if the responding party is unsuccessful in establishing to the court's satisfaction that the prospective juror or jurors were excused for nondiscriminatory reasons, the court must dismiss the jurors selected, excuse any remaining members of the jury panel, and start over with a new panel. *People v Wheeler* (1978) 22 C3d 258, 283; *People v Smith* (1993) 21 CA4th 342, 345. Dismissal of the panel is not, however, required when it would reward the party who exercises biased peremptory exclusions, but waiver or consent of the objecting party is required. *People v Willis* (2002) 27 C4th 811, 818 (defense counsel persisted in improperly "kicking" Caucasian males); *People v Morris* (2003) 107 CA4th 402. The consent required by *Willis* need not be personally given by the defendant and may be granted by counsel. *People v Overby* (2004) 124 CA4th 1237, 1243.

PRACTICE TIP: Under *People v Willis, supra,* if the aggrieved party consents to maintaining the existing panel, the trial court has broad discretion to fashion remedies short of the "traditional" remedy of excusing the entire venire. Among the orders a trial court may issue to remedy a *Batson-Wheeler* violation (as long as the aggrieved party consents) include assessing sanctions against counsel whose challenges exhibit group bias; reseating any improperly discharged jurors if they are available to serve (see, *e.g., People v Mata* (2013) 57 C4th 178 (complaining party impliedly consented to reseating of improperly discharged juror)); and, possibly, allowing the aggrieved party additional peremptory challenges. Some cases tactically require counsel to request a new panel, which is the traditional remedy. However, if keeping the existing panel will benefit the client, counsel should ask for sanctions and for any improperly discharged jurors to be reseated if they are available to serve. See *People v Singh* (2015) 234 CA4th 1319. The court is likely to prefer this approach in that it promotes judicial economy because another venire does not have to be ordered from the jury commissioner. If the improperly challenged jurors have been excused, counsel should ask for additional peremptory challenges. More "kicks" are better for the client than having opposing counsel pay monetary sanctions. Finally, counsel should consider asking the trial judge to admonish the jury that opposing counsel engaged in illegal selection methods, that he or she was told to stop, that he or she persisted, and that this unprofessional behavior caused the jury selection process to be more time-consuming.

§29.37 4. Review

On appeal, *Wheeler* error is prejudicial per se; the conviction must be reversed. *People v Snow* (1987) 44 C3d 216, 226; *People v Wheeler* (1978) 22 C3d 258, 283. When the error was in failing to recognize that a prima facie case was made and in not requiring an explanation of challenges, however, the U.S. Supreme Court in *Batson v Kentucky* (1986) 476 US 79, 106 S Ct 1712, ordered the case to be remanded to allow the prosecutor to explain his reasons for excluding the prospective jurors in question. The California Supreme Court has not absolutely rejected or endorsed that remedy for an error in failing to require a statement of reasons, but it has declined to adopt it in two cases in which the lapse of time made it unrealistic to expect the prosecution to recall the details of the case, or for the court to assess the manner in which the challenges had been exercised. *People v Snow, supra* (6-year lapse); *People v Hall* (1983) 35 C3d 161, 170 (3-year lapse). Other courts have applied the *Batson* remand procedure. *People v Williams* (2000) 78 CA4th 1118, 1125; *People v Rodriguez* (1999) 76 CA4th 1093, 1101.

When a trial court denies a *Batson-Wheeler* motion on the ground that no prima facie case of group bias has been established, the reviewing court must consider the entire voir dire record. If the record suggests grounds on which the prosecutor might reasonably have challenged the jurors in question, the court will affirm. *People v Box* (2000) 23 C4th 1153, 1188, overruled on other grounds in *People v Martinez* (2010) 47 C4th 911; *People v Davenport* (1995) 11 C4th 1171, 1200.

Federal courts in habeas corpus proceedings may review de novo a trial court's holding that a purported reason for excusing the juror is neutral and may conclude, despite the trial court's holding, that the proffered reason was merely a pretext for illegal discrimination, inferring motive from the totality of the relevant facts. *McClain v Prunty* (9th Cir 2000) 217 F3d 1209, 1220. A reviewing federal court may consider the entire state court record, including evidence presented only to the trial court. See *McDaniels v Kirkland* (9th Cir 2015) 813 F3d 770, 780. See also *Foster v Chatman* (2016) ___ US ___, 136 S Ct 1737, 1746 (lists and notes from prosecution files reviewed; excusal of two black prospective jurors deemed discriminatory when juxtaposed against answers given by nonblack jurors, whom prosecution did not excuse); *Snyder v Louisiana* (2008) 552 US 472, 478, 128 S Ct 1203 (reviewing court must consult all evidence "that bear[s] upon the issue of racial animosity").

Counsel appealing an adverse trial court ruling on the issue of bias in the exercise of peremptory challenges has a high hurdle to overcome. The trial court's ruling will be upheld even when the record does not contain detailed findings on the reasons for the exercise of each challenge as long as (1) the trial court was fully apprised of the nature of the defense challenge, (2) the proffered reasons for excusing the juror are neither contradicted by the record nor inherently implausible, and (3) nothing in the record conflicts with either the presumption that all peremptory challenges have been exercised in a constitutional manner or the presumption that the trial court properly made a sincere and reasoned evaluation of the prosecutor's proffered reasons. See, *e.g.*, *People v Reynoso* (2003) 31 C4th 903, 925 (prosecutor did not demonstrate purposeful racial discrimination by challenging two Hispanic women, thereby leaving jury of 12 Caucasians). But see *U.S. v Alanis* (9th Cir 2003) 335 F3d 965, 969 (when prosecutor used all six peremptory challenges to strike men from jury in abusive sexual conduct trial, and did not strike four women who possessed objective characteristics that prosecutor claimed she found objectionable in the men, judge had sua sponte duty to decide whether the prosecutor in fact had gender-neutral explanations); *People v Gutierrez* (2017) 2 C5th 1150, 1175 (trial court failed to make "sincere and reasoned attempt to evaluate prosecutor's explanation" and "clearly express its findings"). See also *Miller-El v Dretke* (2005) 545 US 231, 125 S Ct 2317 (more striking than prosecutors' use of peremptory strikes to exclude 91 percent of eligible African-American venire members was side-by-side comparison of some black venire panelists who were struck and white panelists allowed to serve).

NOTE: Counsel challenging an adverse state trial court ruling on the issue of bias in the exercise of peremptory challenge with a federal habeas petition has a very high hurdle to overcome. After the prosecution has presented a race-neutral explanation for exercising the challenge, the trial court's determination of credibility will stand as long as it is not unreasonable. See, *e.g.*, *Felkner v Jackson* (2011) 562 US 594, 131 S Ct 1305; *Rice v Collins*

(2006) 546 US 333, 126 S Ct 969. See also *White v Wheeler* (2015) ___ US ___, 136 S Ct 456, 461. See Appeals and Writs in Criminal Cases §13.66 (3d ed Cal CEB).

Comparative analysis on review. It is important for the party making a *Batson-Wheeler* motion to bring such comparisons to the trial court's attention. If the trial court denies the defendant's motion at the "first stage," *i.e.*, after concluding the defense has not made a prima facie case, *Miller-El v Dretke* (2005) 545 US 231, 125 S Ct 2317, does not mandate that the reviewing court conduct comparative juror analysis for the first time on appeal. *People v Bell* (2007) 40 C4th 582, 601; *People v Bonilla* (2007) 41 C4th 313, 350. See *People v Lenix* (2008) 44 C4th 602, 622 n15. On the other hand, an appellate court is obligated to conduct a comparative juror analysis for the first time in a "third stage" *Batson-Wheeler* case, *i.e.*, one in which a trial court concluded a prima facie case had been made, solicited an explanation of the peremptory challenges from the prosecutor, and then determined that the defense did not carry its burden of demonstrating group bias. *People v Gutierrez* (2017) 2 C5th 1150, 1171; *People v Lenix* (2008) 44 C4th 602, 622. In such a case, the record must be adequate to permit the argued comparisons. *People v Lenix, supra*. Therefore, prudent trial counsel will make the comparative analysis record, if applicable, for each and every challenge under *Batson-Wheeler* to avoid a potential waiver of the issue in subsequent appellate litigation. See *People v Scott* (2015) 61 C4th 363, 391. While the trial judge may get impatient, this record must be made to protect the client. See *Currie v McDowell* (9th Cir 2016) 825 F3d 603, 613 (using comparative juror analysis for first time in habeas litigation, Ninth Circuit determined that race was substantial motiving factor in prosecutor's striking juror and that prosecutor's stated reasons were pretext); *Crittenden v Chappell* (9th Cir 2015) 804 F3d 998, 1012 (comparative juror analysis used in habeas challenge found purposeful discrimination by prosecutor despite trial court's initial finding of no prima facie case). With the Ninth Circuit utilizing comparative juror analysis for the first time during habeas litigation, trial counsel's efforts to make a comparative record will assist any reviewing court.