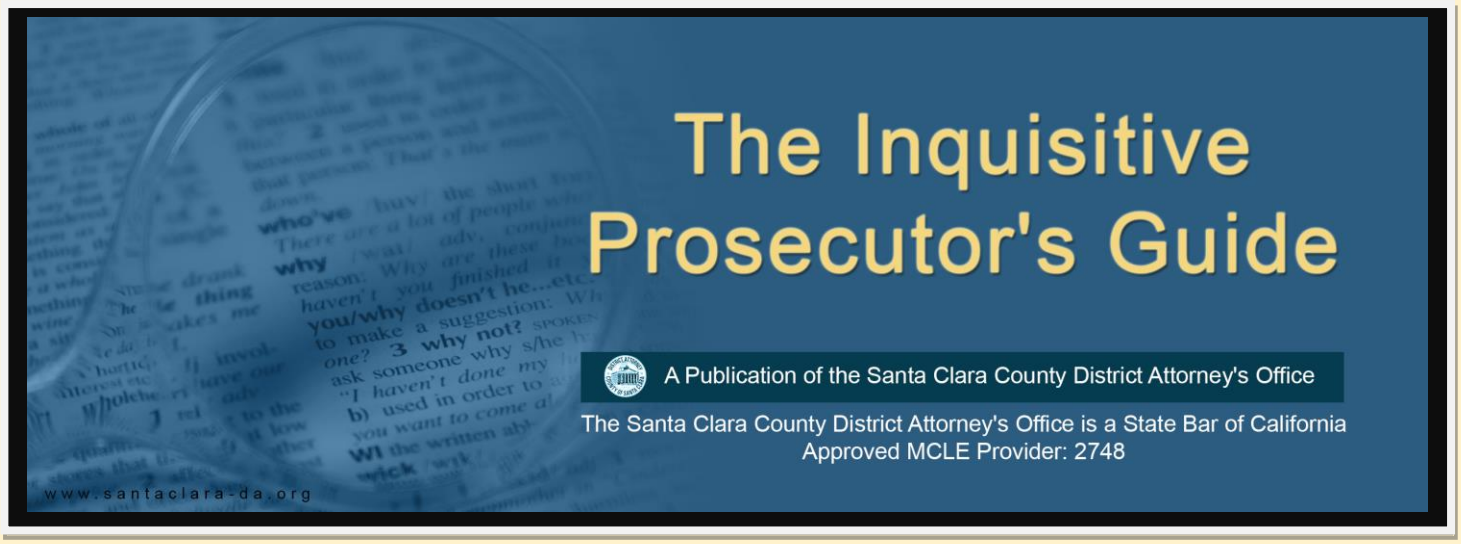

THE 2020 *BATSON-WHEELER* OUTLINE*

*The outline has gone through various versions all of which are the offspring of San Francisco ADA Jerry Coleman's "Mr. *Wheeler* Goes to Washington: The Full Federalization of Jury Challenge Practice in California." (CDAA Prosecutor's Notebook Vol. XXXIII.) However, while this outline is a descendant of that original treatise, and while ADA Coleman has provided past guidance as this outline has evolved, he may not be held culpable for any errors in the outline – that's solely on IPG. This outline has been updated this year to include, among other things, every published ***Batson-Wheeler*** case issued by the United States Supreme Court (including the recent case of ***Flowers* v. *Mississippi*** (2019) 139 S.Ct. 2228) or a California court in 2018 and 2019, a few previously unreported on out of state cases, and a new section on whether and when a prosecutor's notes are discoverable at a ***Batson-Wheeler*** motion. This special edition (unaccompanied by a podcast) should be used as a replacement for the 2016-IPG-19 and the *Batson-Wheeler* outline from 2018.

BTW, if you only have 5 minutes to bone up on the rules governing a *Batson-Wheeler* motion, print out pages 10-13 for a short summary. If you only have 30 minutes to bone up and/or quickly need to get a judge up to speed, skip to the sample judicial bench memo electronically accompanying this IPG that explains the obligations of the trial court both before and after a *Batson-Wheeler* motion is made, as well as the law surrounding some of the more common issues arising when a *Batson-Wheeler* motion is made. With minor revisions it can be filed in almost any case.

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I. *Batson-Wheeler*: A 5-Minute Summary

A. Constitutional Basis

"It is well settled that '[a] prosecutor's use of peremptory challenges to strike prospective jurors on the basis of group bias—that is, bias against members of an identifiable group distinguished on racial, religious, ethnic, or similar grounds—violates the right of a criminal defendant to trial by a jury drawn from a representative cross-section of the community under article I, section 16 of the California Constitution. [Citations.] Such a practice also violates the defendant's right to equal protection under the Fourteenth Amendment to the United States Constitution. [Citations.]'" (***People* v. *Hamilton*** (2009) 45 Cal.4th 863, 898, citing to ***People* v. *Wheeler*** (1978) 22 Cal.3d 258 and ***Batson* v. *Kentucky*** (1986) 476 U.S. 79; **see also** Code Civ. Proc., § 231.5[precluding use of peremptory challenges based on assumption juror "is biased merely because of a characteristic listed or defined in Section 11135 of the Government Code (i.e., race, national origin, ethnic group identification, religion, age, sex, sexual orientation, color, genetic information, or disability) or similar grounds"]; **but see *Holland* v. *Illinois*** (1990) 493 U.S. 474, 487 [*Sixth Amendment* doesn't forbid striking jurors on basis of race].)

A motion claiming a prosecutor exercised his or her peremptory challenges on the basis of group bias is titled a ***Wheeler*** motion or a ***Batson*** motion or a ***Batson/Wheeler*** motion. Whatever the motion is titled, the standards and procedures utilized are the same. (***People* v. *Cowan*** (2010) 50 Cal.4th 401, 446, 447; **accord *Crittenden* v. *Ayers*** (9th Cir. 2010) 624 F.3d 943, 951, fn. 2 ["***Wheeler*** is considered the California procedural equivalent of ***Batson***" and "a ***Wheeler*** motion serves as an implicit ***Batson*** objection.) Until the jury is sworn, a ***Batson-Wheeler*** motion should be raised by motion to quash or dismiss the jury, not by a motion for mistrial. (***People* v. *Williams*** (1997) 16 C.4th 635, 662, fn. 9.)

"The ***Batson/Wheeler*** framework is designed to enforce the constitutional prohibition on exclusion of persons from jury service on account of their membership in a cognizable group. It is also designed to otherwise preserve the historical privilege of peremptory challenges free of judicial control, which 'traditionally have been viewed as one means of assuring the selection of a qualified and unbiased jury.'" (***People* v. *Scott*** (2015) 61 Cal.4th 363, 387.)

B. Basic Procedure When a Claim is Made That an Attorney is Exercising His or Her Challenges in an Unconstitutionally Discriminatory Manner

For both federal and state constitutional claims, there is a three-step inquiry whenever a ***Batson-Wheeler*** challenge is made by either the defense or the prosecution. (***People* v. *Lenix*** (2008) 44 Cal.4th 602, 612-613.) The analysis begins, however, with a "presumption a party exercising a peremptory challenge is doing so on a constitutionally permissible ground." (***People* v. *Wheeler*** (1978) 22 Cal.3d 258, 278; **see also *People* v. *Bonilla*** (2007) 41 Cal.4th 313, 341.)

1. First step

The party objecting to the challenge has the burden of making out a prima facie case "by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose." (***Johnson* v. *California*** (2005) 545 U.S. 162, 168; ***People* v. *Clark*** (2012) 52 Cal.4th 856, 906.)

Although the term "systematic exclusion" is sometimes used "to describe a discriminatory use of peremptory challenges, . . . [t]he term is not apposite in the ***Wheeler*** context, for a single discriminatory exclusion may violate a defendant's

right to a representative jury." (***People* v. *Fuentes*** (1990) 54 Cal.3d 707, 716, fn. 4; **accord *People* v. *Montiel*** (1993) 5 Cal.4th 877, 909; **see also *People* v. *Reynoso*** (2003) 31 Cal.4th 903, 927, fn. 8 ["the unconstitutional exclusion of even a single juror on improper grounds of racial or group bias requires the commencement of jury selection anew"]; **but see *People* v. *Garcia*** (2011) 52 Cal.4th 706, 744-750 [discussing why it is very difficult, if not practically impossible to *draw an inference* of discrimination solely on the basis of a challenge to a single juror]; ***People* v. *Bell*** (2007) 40 Cal.4th 582, 598 [similar]; **this** outline, section VII-B at pp. 36-38.)

When a ***Batson-Wheeler*** motion is made, "the party opposing the motion should be given an opportunity to respond to the motion, i.e., to argue that no prima facie case has been made." (***People* v. *Fuentes*** (1990) 54 Cal.3d 707, 716, fn. 5.)

"The three-step ***Batson*** analysis, however, is not so mechanistic that the trial court must proceed through each discrete step in ritual fashion." (***People* v. *Battle*** (2011) 198 Cal.App.4th 50, 60; ***People* v. *Adanandus*** (2007) 157 Cal.App.4th 496, 500.)

"[T]he party exercising a peremptory challenge has the burden to come forward with nondiscriminatory reasons ***only*** when the moving party has first made out a prima facie case of discrimination." (***People* v. *Scott*** (2015) 61 Cal.4th 363, 387 citing to ***J.E.B.* v. *Alabama ex rel. T.B.*** (1994) 511 U.S. 127, 145.) However, a trial court may invite the prosecutor to state neutral reasons for the challenged strikes after announcing its finding on whether a defendant met the first step of the ***Batson*** test by making out a prima facie case of discrimination. Indeed, the California Supreme Court has repeatedly recommended that the judge allow the prosecutor to place his reasons for excusing jurors belonging to the cognizable class on the record, *notwithstanding* the lack of any prima facie finding, in order to enable creation of an adequate record for an appellate court, should it disagree with the first-stage ruling. (**See *People* v. *Reed*** (2018) 4 Cal.5th 989, 999; ***People* v. *Scott*** (2015) 61 Cal.4th 363, 388; ***People* v. *Cunningham*** (2015) 61 Cal.4th 609, 660, fn. 12; ***People* v. *Lopez*** (2013) 56 Cal.4th 1028, 1049; ***People* v. *Taylor*** (2010) 48 Cal.4th 574, 616; ***People* v. *Howard*** (2008) 42 Cal.4th 1000, 1020; ***People* v. *Bonilla*** (2007) 41 Cal.4th 313, 343, fn. 13.)

Note though, that if a trial court asks for (*and relies upon*) the reasons provided by the prosecution before ruling on whether a prima facie case has been made, a reviewing court will later view what occurred as a "first stage/third stage ***Batson*** hybrid." The reviewing court will then disregard the question of whether a prima facie case was made, skip to ***Batson***'s third stage, and evaluate the prosecutor's reasons for dismissing the prospective jurors. (**See *People* v. *McKinzie*** (2012) 54 Cal.4th 1302, 1320; this outline, section XIII-A-2 at pp. 141-142.)

2. Second step

Once a prima facie case is made, the "'burden shifts to the [party who originally challenged the juror] to explain adequately the racial [or other cognizable class] exclusion' by offering permissible . . . neutral justifications for the strikes." (***Johnson* v. *California*** (2005) 545 U.S. 162, 168 [bracketed portions and other modifications added by author].) At the second step, "[t]he prosecutor does not bear any burden to *disprove* discrimination[.]" (***People v. Harris*** (2013) 57 Cal.4th 804, 883, emphasis added; **see also *Paulino* v. *Harrison*** (9th Cir. 2008) 542 F.3d 692, 699 [burden at second step is merely "the burden of production."].)

The party who originally challenged the juror must then provide a "'clear and reasonably specific' explanation of his 'legitimate reasons' for exercising the challenges." (***People* v. *Lenix*** (2008) 44 Cal.4th 602, 613, citing to ***Batson* v. *Kentucky*** (1986) 476 U.S. 79, 98, fn. 20.) "Certainly a challenge based on racial prejudice would not be supported by a legitimate reason." (***People* v. *Lenix*** (2008) 44 Cal.4th 602, 613.)

On the other hand, a legitimate reason is simply "one that does not deny equal protection" and "a prosecutor may rely on any number of bases to select jurors[.]" (***People* v. *Lenix*** (2008) 44 Cal.4th 602, 613, citing to ***Purkett* v. *Elem***

(1995) 514 U.S. 765, 769.) Thus, "[t]he justification need not support a challenge for cause, and even a 'trivial' reason, if genuine and neutral, will suffice." (***People* v. *Jones*** (2011) 51 Cal.4th 346, 360; ***People* v. *Lenix*** (2008) 44 Cal.4th 602, 613.) "A prospective juror may be excused based upon facial expressions, gestures, hunches, and even for arbitrary or idiosyncratic reasons." (***People* v. *Jones*** (2011) 51 Cal.4th 346, 360; ***People* v. *Lenix*** (2008) 44 Cal.4th 602, 613.) The "'second step of this process does not demand an explanation that is persuasive, or even plausible'; so long as the reason is not inherently discriminatory, it suffices." (***Rice* v. *Collins*** (2006) 546 U.S. 333, 338.)

3. Third step

If a "neutral explanation is tendered, the trial court must then decide . . . whether the opponent of the strike has proved purposeful racial [or other cognizable group] discrimination." (***Johnson* v. *California*** (2005) 545 U.S. 162, 168 [bracketed portion added by author].) The proper focus is on "the subjective genuineness of the race-neutral reasons given for the peremptory challenge, not on the objective reasonableness of those reasons." (***People* v. *O'Malley*** (2016) 62 Cal.4th 944, 975; ***People* v. *Reynoso*** (2003) 31 Cal.4th 903, 924; accord ***People* v. *Gutierrez*** (2017) 2 Cal.5th 1150, 1158.) "[These determinations of credibility and demeanor lie peculiarly within a trial judge's province." (***Flowers* v. *Mississippi*** (2019) 139 S.Ct. 2228, 2244.)

At the third step, "the issue comes down to whether the trial court finds the prosecutor's race-neutral explanations to be credible. Credibility can be measured by, among other factors, the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy." (***People* v. *Jones*** (2011) 51 Cal.4th 346, 360; ***People* v. *Lenix*** (2008) 44 Cal.4th 602, 613, citing to ***Miller-El* v. *Cockrell*** (2003) 537 U.S. 322, 339; **accord *Felkner* v. *Jackson*** (2011) 562 U.S. 594, 598 [issue of whether prosecutor improperly challenged juror "turns largely on an 'evaluation of credibility'"]; ***Snyder* v. *Louisiana*** (2008) 552 U.S. 472, 477 ["the best evidence [of discriminatory intent] often will be the demeanor of the attorney who exercises the challenge"]; ***People* v. *Cox*** (2010) 187 Cal.App.4th 337, 343 ["often, the best evidence of a prosecutor's intent in exercising a peremptory challenge is his or her demeanor when explaining why a prospective juror was excused"].) The trial court has a duty to "assess the plausibility" of the prosecutor's proffered reasons for striking a potential juror, "in light of all evidence with a bearing on it." (***People* v. *Lenix*** (2008) 44 Cal.4th 602, 625.) In assessing credibility, the court may "also rely on the court's own experiences as a lawyer and bench officer in the community, and even the common practices of the advocate and the office who employs him or her." (***People* v. *Lenix*** (2008) 44 Cal.4th 602, 613, citing to ***People* v. *Wheeler*** (1978) 22 Cal.3d 258, 282; ***People* v. *Lomax*** (2010) 49 Cal.4th 530, 571.)

"In addition, race-neutral reasons for peremptory challenges often invoke a juror's demeanor (e.g., nervousness, inattention), making the trial court's first-hand observations of even greater importance. In this situation, the trial court must evaluate not only whether the prosecutor's demeanor belies a discriminatory intent, but also whether the juror's demeanor can credibly be said to have exhibited the basis for the strike attributed to the juror by the prosecutor." (***Snyder* v. *Louisiana*** (2008) 552 U.S. 472, 477; ***People* v. *Jones*** (2011) 51 Cal.4th 346, 360; ***People* v. *Lenix*** (2008) 44 Cal.4th 602, 613.)

A judge may not be able to observe every gesture, expression or interaction relied upon by the prosecutor (i.e., the judge has a different vantage point and/or may not have noticed the described behavior). Moreover, a judge's impression of a juror's demeanor might be different than the prosecutor's impression without that difference reflecting any pretext on the part of the prosecution as "it is not at all unusual for individuals to come to different conclusions in attempting to read another person's attitude or mood." (***Davis* v. *Ayala*** (2015) 135 S.Ct. 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." (***Id***. at pp. 625-626.)

"Both court and counsel bear responsibility for creating a record that allows for meaningful review." (***People* v. *Lenix*** (2008) 44 Cal.4th 602, 621.)

"When the prosecutor's stated reasons are both inherently plausible and supported by the record, the trial court need not question the prosecutor or make detailed findings. But when the prosecutor's stated reasons are either unsupported by the record, inherently implausible, or both, more is required of the trial court than a global finding that the reasons appear sufficient." (***People* v. *Stevens*** (2007) 41 Cal.4th 182, 193; ***People* v. *Silva*** (2001) 25 Cal.4th 345, 386; **see also *People* v. *Long*** (2010) 189 Cal.App.4th 826, 848 [finding unverified and generalized statements about a juror's body language or way of expressing himself are insufficient to support a finding of legitimacy – at least where there exist other reasons to question the judge's acceptance of the prosecutor's reasons].)

A "trial court is not required to make specific or detailed comments for the record to justify every instance in which a prosecutor's race-neutral reason for exercising a peremptory challenge is being accepted by the court as genuine." (***People* v. *DeHoyos*** (2013) 57 Cal.4th 79, 102; ***People* v. *Vines*** (2011) 51 Cal.4th 830, 848.) And a "prosecutor's demeanor observations, *even if not explicitly confirmed by the record,* are a permissible race-neutral ground for peremptory excusal, especially when they were not disputed in the trial court." (***People* v. *Mai*** (2013) 57 Cal.4th 986, 1052, emphasis added.) But if the court is going to deny the challenge, it should be discernible from the record that: "1) the trial court considered the prosecutor's reasons for the peremptory challenges at issue and found them to be race-neutral; 2) those reasons were consistent with the court's observations of what occurred, in terms of the panelist's statements as well as any pertinent nonverbal behavior; and 3) the court made a credibility finding that the prosecutor was truthful in giving race-neutral reasons for the peremptory challenges." (***People* v. *Lenix*** (2008) 44 Cal.4th 602, 621.)

'There is a rebuttable presumption that a peremptory challenge is being exercised properly, and the burden is on the opposing party to demonstrate impermissible discrimination." (***People* v. *Dement*** (2011) 53 Cal.4th 1, 19.) "The ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike." (***People* v. *Lenix*** (2008) 44 Cal.4th 602, citing to ***Rice* v. *Collins*** (2006) 546 U.S. 333, 338; **accord *People* v. *Manibusan*** (2013) 58 Cal.4th 40, 75; ***People* v. *Lomax*** (2010) 49 Cal.4th 530, 569; **see also *Purkett* v. *Elem*** (1995) 514 U.S. 765, 768.) "The burden of proof at step three is a preponderance of the evidence." (***Crittenden* v. *Ayers*** (9th Cir. 2010) 624 F.3d 943, 954-955.)

C. Remedy for a *Batson-Wheeler* Violation

The traditional remedy/sanction for a ***Batson-Wheeler*** violation was laid out in ***People* v. *Wheeler*** (1978) 22 Cal.3d 258: "when either party in a criminal case succeeds in showing that the opposing party has improperly exercised peremptory challenges to exclude members of a cognizable group, the court must dismiss all the jurors thus far selected, and quash the remaining venire." (***Id***. at p. 282; ***People* v. *Willis*** (2002) 27 Cal.4th 811, 813; ***Batson* v. *Kentucky*** (1986) 476 U.S. 79, 99, fn. 23 [recognizing this remedy as one potential remedy].) However, in ***People* v. *Willis*** (2002) 27 Cal.4th 811, the California Supreme Court also approved of the use of other remedies for a ***Batson-Wheeler*** violation: A trial court, acting ***with the consent of the aggrieved party***, "has discretion to consider and impose remedies or sanctions short of outright dismissal of the entire jury venire." (***Willis***, at pp. 814, 821, emphasis added.) Consent may be obtained from defense counsel (rather than directly from defendant) and may be express or implied. (***People* v. *Mata*** (2013) 57 Cal.4th 178, 181.) Among the suggested alternative remedies: reseating of the juror, imposition of monetary sanction, and (in dicta) allowing the aggrieved party additional challenges. (***Willis***, at p. 821 [albeit suggesting, at pp. 823-824, that imposing monetary sanctions may not effectively vindicate the interests impacted by the improper use of jury challenges and if the offended party requests the remedy of reseating, this request should ordinarily be honored unless the challenged juror has already been discharged].)

II. Anticipating the *Batson-Wheeler* Challenge

A. Request *Batson-Wheeler* Claims Be Made Outside the Jury's Presence

It is a commonly held belief among prosecutors that some defense attorneys do not act in good faith when making a claim the prosecutor is exercising his or her peremptory challenges in a discriminatory fashion. Prosecutors often assume, especially when neutral reasons for removing a particular juror are obvious, that the defense attorney is actually making the ***Batson-Wheeler*** claim not because of an honest belief the prosecutor has improperly exercised a peremptory challenge but as a tactic to render the prosecutor "gun shy" in exercising peremptory challenges against members of a cognizable class. The tactic is premised on the idea that the fear of being subjected to a ***Batson-Wheeler*** challenge (and the attendant possibility that it will be erroneously granted) will dissuade the prosecutor from exercising a future challenge against any panelist belonging to the cognizable class at issue even though the panelist might be unfavorably disposed toward the prosecution. (**See *People* v. *Cunningham*** (2015) 61 Cal.4th 609, 659.) An even more nefarious reason that is sometimes given to explain why the defense is making an apparently disingenuous ***Batson-Wheeler*** claim (if done in front of the jury) is that it done in an attempt to prejudice the jury against the prosecutor by implying the prosecutor is a bigot or racist. (**See *People* v. *Aleman*** [depublished] (2016) 202 Cal.Rptr.3d 563, 583.) Finally, it is sometimes speculated that the disingenuous ***Batson-Wheeler*** claim is made in order to discover the prosecutor's strategy in selecting jurors and, indirectly, the prosecutor's trial strategy.

Certainly, the belief that defense attorneys sometimes use ***Batson-Wheeler*** claims for tactical purposes may arise simply from a difference in perspective. A juror who appears to the prosecutor to be a "bad juror" 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. (Although from a purely tactical standpoint, if, in fact the prosecutor is removing jurors who would be predisposed to the prosecution for reasons of irrational prejudice, the defense should want to encourage such challenges). On the other hand, some defense attorneys appear to be much more prone than others to making ***Batson-Wheeler*** challenges. If a prosecutor is aware that a particular defense attorney has a history of making apparently tactical ***Batson-Wheeler*** challenges and/or making the challenges before the jury in a manner calculated to prejudice the jury against the prosecution, is there anything a prosecutor can do?

As a matter of course (not just when there is a belief the defense attorney may attempt to use ***Batson-Wheeler*** challenges in an improper fashion), the prosecutor should ask that any ***Batson-Wheeler*** claim made by either party be done at sidebar or otherwise outside the presence of the jury. (**See e.g.**, ***People* v. *Willis*** (2002) 27 Cal.4th 811, 822 [noting the ABA recommends that "[a]ll challenges, whether for cause or peremptory, should be addressed to the court outside the presence of the jury, in a manner so that the jury panel is not aware of the nature of the challenge, the party making the challenge, or the basis of the court's ruling on the challenge," but recognizing that this procedure may be cumbersome and alternative procedures may be used to help avoid any prejudice to counsel making the challenge].) Requiring that ***Batson-Wheeler*** motions be made at sidebar helps ensure that (i) the jury in general will not be "poisoned" against the attorney accused of improperly exercising a juror challenge; and (ii) helps keep viable the option of reseating a juror by minimizing the possibility the reseated juror will hold his or her initial removal against the attorney who asked that the juror be removed. (**See *People* v. *Willis*** (2002) 27 Cal.4th 811, 822; **cf.**, ***People* v. *Ward*** (2009) 173 Cal.App.4th 1518, 1527–1528 [upholding trial court refusal to allow defense counsel to claim "prosecutorial misconduct" in front of jury].)

If the defense attorney has a particularly egregious habit of using a ***Batson-Wheeler*** motion for improper purposes, a prosecutor may want to be ready with evidence (i.e., transcripts) of such past abuse to bring to the attention of the court in support of a request that ***Batson-Wheeler*** motions be made outside the presence of the jury.

B. Ask to Use Juror Questionnaires

For entirely plausible reasons, prosecutors do not typically ask the exact same questions of every single juror. Because of time constraints, a prosecutor must pick and choose which questions will be most likely to elicit information from a particular juror or best address the prosecutor's concerns raised by the court's questioning of the juror. A prosecutor may choose not to waste time asking questions of jurors the prosecutor obviously knows he or she will keep or bump. A prosecutor may not want to ask questions of a juror if the prosecutor fears questioning might elicit answers that will poison the jury panel. A prosecutor may want to ask additional questions of a juror who is difficult to read or who gives answers that demand follow-up questions.

That being said, trial courts are empowered to consider disparate questioning (i.e., asking different types of questions of the jurors depending on whether they fall into the cognizable class at issue) or perfunctory questioning (i.e., asking fewer or more questions of jurors in the cognizable class) in assessing a prosecutor's motive when a ***Batson-Wheeler*** motion is made. With that in mind, prosecutors should consider requesting the use of juror questionnaires that ask identical questions of each juror. Questionnaires also can provide support to help show that a panelist was removed because the remainder of the pool of panelists looked better or because the next juror in the box was a significantly better juror for the prosecution. Finally, questionnaires can help avoid a claim that questioning was perfunctory. (**See *People* v. *Bell*** (2007) 40 Cal.4th 582, 598, fn. 5 [quoting the trial court for the proposition that when an extensive questionnaire is used with every juror, "it can never be a perfunctory examination"]; this outline, at section VII-C-4 at pp. 43-44.)

California Code of Civil Procedure section 223(e) now also provides support for requesting questionnaires. In relevant part, it provides: "The trial judge shall, in his or her sound discretion, consider reasonable written questionnaires when requested by counsel. If a questionnaire is utilized, the parties shall be given reasonable time to evaluate the responses to the questionnaires before oral questioning commences."

If a trial court is not inclined to use questionnaires, be cognizant that disparate questioning of jurors (especially in the absence of any explanation for disparate questioning) may be seized upon (fairly or unfairly) by the trial court or the reviewing court as evidence of a discriminatory purpose. (**See** this outline, section VII-C-4 at pp. 43; IX-I at pp. 122-126.)

Editor's Note regarding retaining questionnaires: If questionnaires are used, the court will provide copies of the completed questionnaires to counsel. Sometimes the court will ask that those questionnaires be returned at the end of the trial. A prosecutor should make sure that, at least, the court retains those questionnaires since if the questionnaires are later lost by the trial court, a reviewing court may *potentially* find the state's loss of the questionnaires prejudiced the defendant by depriving him of due process, i.e., the ability to meaningfully appeal the denial of his ***Batson*** claim and thus deprive the defendant of due process. (**See *People* v. *McKinzie*** (2012) 54 Cal.4th 1302, 1349-1350 [loss of juror questionnaires did not prejudice defendant *because* transcript of the voir dire as to each prospective juror provided an ample appellate record as to missing questionnaires of prospective jurors from initial trial]; ***People* v. *Alvarez*** (1996) 14 Cal.4th 155, 196, fn. 8 [criminal defendant is entitled to a record on appeal adequate to permit meaningful review but record is only inadequate if the complained-of deficiency is prejudicial to the defendant's ability to prosecute his appeal and loss of jury questionnaires in the circumstances was not].)

C. Ask for Sufficient Time to Conduct Voir Dire (Have *Lenix* at Hand)

The less opportunity the attorneys are given to question a juror, the more difficult it will be for the judge to assess the real reason a juror has been challenged. A prosecutor might want to have a bench memorandum (available upon request) ready with the following information derived from ***People* v. *Lenix*** (2008) 44 Cal.4th 602 when appearing in front of judges who are reluctant to allow a significant amount of time on voir dire:

"Trial 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." (***People* v. *Lenix*** (2008) 44 Cal.4th 602, 625, emphasis added.) And this admonition was given to trial courts notwithstanding the greater leeway given trial courts to restrict voir dire under the then-existing version of Code of Civil Procedure section 223 and the considerable deference given to trial courts in this regard by appellate courts. (***Id***. at p. 625, fn. 16.) Specifically, the ***Lenix*** court stated: "in exercising that discretion, trial courts should seek to balance the need for effective trial management with the duty to create an adequate record and allow legitimate inquiry." (***Id***. at p. 625, fn. 16.)

Section 223 was recently modified to expressly allow for more extensive voir dire and now **requires** trial judges to "permit liberal and probing examination calculated to discover bias or prejudice with regard to the circumstances of the particular case or the parties before the court" (subd. (b)(1)) and "supplemental time for questioning based on individual responses or conduct of jurors that may evince attitudes inconsistent with suitability to serve as a fair and impartial juror in the particular case" (subd. (b)(3)) without imposing "specific unreasonable or arbitrary time limits or establish[ing] an inflexible time limit policy for voir dire" (subd. (b)(2)). (**See also *Pena-Rodriguez* v. *Colorado*** (2017) 137 S.Ct. 855, 868 ["In an effort to ensure that individuals who sit on juries are free of racial bias, the Court has held that the Constitution at times demands that defendants be permitted to ask questions about racial bias during voir dire."]; ***Mu'Min* v. *Virginia*** (1991) 500 U.S. 415, 424 [14th Amendment demands questioning on racial bias of jurors in case involving a black defendant charged with a violent crime against a white person].)

D. Think About and Be Prepared to Explain the Reasons for Challenging a Juror. Take Notes and Save Them for Posterity.

Gut instinct may be the best indicator of whether a panelist will make a good juror and that is a genuinely neutral reason for removing a juror. (**See *Davis* v. *Ayala*** (2015) 135 S.Ct. 2187, 2201 [peremptory challenges "are often the subjects of instinct"].) Be aware, however, that the less concrete the grounds provided for removing a juror, the more likely it is that those grounds will be scrutinized with a skeptical eye by a judge or reviewing court.

Make note of the reasons for keeping or striking each juror, including the juror's demeanor, attitude, and other intangibles - not just those who seem like they might be adverse to the prosecution. This is especially important when the judge allows limited or no voir dire as the notes will help the judge see beneath superficial similarities between jurors who were kept and those whom the prosecutor challenged. As mentioned in ***Gonzalez* v. *Brown*** (9th Cir. 2009) 585 F.3d 1202, "[i]t is obviously a desirable and correct practice for a prosecutor to have notes of reasons for a peremptory strike if a challenge is raised requiring a race-neutral explanation at step two of ***Batson***." (***Brown*** at p. 1209, fn. 5.)

Keep such notes as they may save a prosecution down the road if a prosecutor needs to refresh his or her recollection at a post-conviction proceeding. (**See *Shirley* v. *Yates*** (9th Cir. 2015) 807 F.3d 1090, 1105, fn. 16.)

E. Taking Notes on the Race, Ethnicity, or Gender of the Jurors

In the case of ***Miller-El* v. *Dretke*** (2005) 545 U.S. 231, the fact a prosecutor had taken notes regarding the juror's race was used as evidence of a racially motivated intent. (**Id**. at p. 266.) And in ***Green* v. *LaMarque*** (9th Cir. 2008) 532 F.3d 1028, the Ninth Circuit, citing to ***Miller-El*,** held that the fact the prosecutor had noted the race of each venire member next to the member's name provided additional evidence of racial discrimination. (***Id***. at p. 1033; **see also *Mitcham* v. *Davis*** (N.D. Cal. 2015) 103 F.Supp.3d 1091, 1097, 1105 [suggesting fact prosecutor kept track of the race of the African American jurors but did not keep track of the race of any other jurors was evidence of discriminatory intent]; ***Adkins* v. *Warden, Holman CF*** (11th Cir. 2013) 710 F.3d 1241, 1253 [similar].)

However, the ***Green*** court completely missed the significance of the note-taking regarding the juror's race in ***Miller-El.*** In ***Miller-El*,** the prosecutor's own notes identifying every potential juror by race were used to show the prosecutor was following an office policy of emphasis on race. The notes were significant because, at the time of the trial in ***Miller-El***, there was no reason to note the juror's race; ***Batson*** was only decided after the defendant in ***Miller-El*** was tried. (***Miller-El*** at p. 264, fn. 38.) By the time ***Green*** was decided, the ***Batson-Wheeler*** principles were well-established and there was every reason ***to*** note a juror's membership in a cognizable class.

As pointed out in ***People* v. *Lenix*** (2008) 44 Cal.4th 602, a case where the court *did* understand the significance of the race-identifying notes in ***Miller-El***, the court emphasized 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." (***Lenix*** at p. 617, fn. 12; **see also *United States* v. *Barnette*** (4th Cir. 2011) 644 F.3d 192, 209, 210-212 [rejecting claim race and gender notations on the cover sheets of government's copies of the juror questionnaires constituted evidence of discrimination because they were not done for improper purpose as in *Miller-El* but to provide the prosecutors with quick access to information about each juror and *to deal with any potential* ***Batson*** *challenges*].)

In the case of ***Foster* v. *Chatman*** (2016) 136 S.Ct. 1737, the High Court relied heavily on notes from the prosecution's file that identified jurors as black to undermine the prosecution's claim it exercised its strikes in a "color-blind" manner, noting "[t]he sheer number of references to race in that file is arresting." (***Id***. at p. 1755.) The prosecution claimed the focus on black prospective jurors did not reflect an attempt to exclude them from the jury. Rather, the focus reflected an effort to ensure that the State was "thoughtful and non-discriminatory in [its] consideration of black prospective jurors [and] to develop and maintain detailed information on those prospective jurors in order to properly defend against any suggestion that decisions regarding [its] selections were pretextual" in light of the uncertainty on the type of showing necessary in light of the recent decision in ***Batson***. (***Ibid***.) The ***Foster*** court did not dispute that identifying jurors by race would be proper if done for the asserted purpose. However, it disbelieved the prosecution because this claim was never "made in the nearly 30–year history of this litigation: not in the trial court, not in the state habeas court, and not even in the State's brief in opposition to Foster's petition for certiorari"; and because the notes in the file "plainly demonstrate[d] a concerted effort to keep black prospective jurors off the jury." (***Ibid***.)

ADA Coleman's note: The Los Angeles District Attorney's Office provides a form to prosecutors to write down observations of panelists during jury selection that has a pre-printed notation on it essentially stating that the identification the juror's race, gender, or ethnicity is done solely for the purpose of responding to a ***Batson-Wheeler*** motion. In the absence of such a form, prosecutors can convey the same intent by simply making a notation in the file of the purpose for identifying the cognizable class to which a panelist belongs or putting the reason for such notation on the record.

F. Have Ready Access to Notes from Other Trials and/or Office Training Materials

In ***People* v. *Lenix*** (2008) 44 Cal.4th 602, the court stated that in assessing credibility of the prosecutor, a trial court may "rely on the court's own experiences as a lawyer and bench officer in the community, and ***even the common practices of the advocate and the office who employs him or her***." (***Id***. at p. 613, citing to ***People* v. *Wheeler*** (1978) 22 Cal.3d 258, 282; **accord *People* v. *Jones*** (2011) 51 Cal.4th 346, 360; **cf.**, ***Miller-El* v. *Dretke*** (2005) 545 U.S. 231, 253 [appearance of discriminatory intent supported by "widely known evidence of the general policy of the Dallas County District Attorney's Office to exclude black venire members from juries at the time Miller-El's jury was selected"]; ***Spencer* v. *State*** (Md. 2016) 149 A.3d 610, 627 [actual *evidence* of past practices required if relied on].)

A prosecutor's history of non-discriminatory practices should be compelling evidence of continuing non-discriminatory practices. It may be useful for a prosecutor to keep records of the composition of previous juries so that they are available to show the prosecutor has previously accepted jurors of the same cognizable class as the jurors the prosecutor is presently being accused of having improperly excluded. (**Cf.**, ***Foster* v. *Chatman*** (2016) 136 S.Ct. 1737, 1748 ["Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial ... evidence of intent as may be available"]; ***Crittenden* v. *Chappell*** (9th Cir. 2015) 804 F.3d 998, 1018 [finding probative value of fact prosecutor challenged African–American prospective juror in a *prior* case offered to show discriminatory intent was weak because it was a single instance and the trial court denied the ***Batson*** objection].)

***Editor's Note: It may also be worthwhile to keep notes of any office training class or copies of training publications (e.g., this memo) establishing the office unequivocally condemns the exercise of peremptory challenges for discriminatory purposes.**

III. What is the Rationale Underlying the *Batson-Wheeler* Line of Cases?

"[T]he Equal Protection Clause of the Fourteenth Amendment prohibits prosecutors from exercising peremptory challenges on the basis of race[.]" (***Davis* v. *Ayala*** (2015) 135 S.Ct. 2187, 2199.) "Discrimination in the jury selection process undermines our criminal justice system and poisons public confidence in the evenhanded administration of justice." (***Davis* v. *Ayala*** (2015) 135 S.Ct. 2187, 2208.)

Moreover, "the 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.)

"It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community. For racial discrimination to result in the exclusion from jury service of otherwise qualified groups not only violates our Constitution and the laws enacted under it but is at war with our basic concepts of a democratic society and a representative government." (***People* v. *Wheeler*** (1978) 22 Cal.3d 258, 267 quoting Justice Black in ***Smith* v. *Texas*** (1940) 311 U.S. 128, 130.) The ***Batson-Wheeler*** line of cases helps ensure that peremptory challenges are not used in a manner that effectively prevents the jury from being a representative body of the community. (**See *Flowers* v. *Mississippi*** (2019) 139 S.Ct. 2228, 2238-2241 [explaining how ***Batson*** was necessary to address persistent problems in certain jurisdictions of prosecutors routinely exercising peremptories to ensure all-white juries by striking all the black prospective jurors and of defense counsel routinely using peremptory challenges to strike all the black prospective jurors in cases involving white defendants and black victims."].)

IV. Handling Unjustified *Batson-Wheeler* Claims in the Trial Court

It goes without saying that for legal, ethical, moral, and tactical reasons, no prosecutor should exercise a peremptory challenge against a juror based solely on that juror's gender, sexual orientation, or membership in a racial, ethnic, or religious group. Prosecutors who engage in discriminatory jury selection will receive condemnation, not support, from fellow prosecutors.* On the other hand, a prosecutor should not refrain from challenging a juror for *permissible* reasons out of a concern that the defense will raise a disingenuous or frivolous ***Batson-Wheeler*** claim.

The remainder of this outline will focus on the various steps (and issues arising at each step) in greater detail.

Editor's Note:** While this outline is geared to how a prosecutor should respond to a ***Batson-Wheeler claim, the principles, procedures and obligations imposed by the federal and state constitution when it comes to juror challenges "apply equally to all advocates." (***People* v. *Lenix*** (2008) 44 Cal.4th 602, 612.)

V. Who Can Make a *Batson-Wheeler* Motion?

A ***Batson-Wheeler*** objection may be raised by the defense or the prosecution. (***Georgia* v. *McCollum*** (1992) 505 U.S. 42, 59; ***People* v. *Wheeler*** (1978) 22 Cal.3d 258, 280, 283, fn. 29; ***People* v. *Williams*** (1994) 26 Cal.App.4th Supp. 1, 9.) Even a court may be able to initiate a ***Batson-Wheeler*** motion on its own. (**See e.g., *Unzueta* v. *Akopyan*** (2019) 42 Cal.App.5th 199 [254 Cal.Rptr.3d 850, 854]; ***People* v. *Lopez*** (1991) 3 Cal.App.4th Supp. 11.)

The defendant need not be a member of the cognizable class the defendant is claiming has been discriminated against in order "to complain of a violation of the representative cross-section rule." (***People* v. *Wheeler*** (1978) 22 Cal.3d 258, 281.) "A defendant of any race may raise a ***Batson*** claim, and a defendant may raise a ***Batson*** claim even if the defendant and the excluded juror are of different races." (***Flowers* v. *Mississippi*** (2019) 139 S.Ct. 2228, 2243.)

VI. Timeliness of a *Batson-Wheeler* Motion

"A motion attacking the use of a peremptory challenge on the basis of group bias must be timely raised." (***People* v. *Roldan*** (2005) 35 Cal.4th 646, 701, citing to ***People* v. *Thompson*** (1990) 50 Cal.3d 134, 179 and ***People v. Wheeler*** (1978) 22 Cal.3d 258, 280.) "To be timely, a ***Batson/Wheeler*** objection must be made before the jury is sworn." (***People* v. *Cunningham*** (2015) 61 Cal.4th 609, 662 citing to ***People* v. *Howard*** (1992) 1 Cal.4th 1132, 1154 and ***People* v. *Thompson*** (1990) 50 Cal.3d 134, 179; **accord *People* v. *Roldan*** (2005) 35 Cal.4th 646, 701.)

"A ***Batson/Wheeler*** motion is timely if it is made before jury impanelment is completed, which does not occur "'until the alternates are selected and sworn.'"" (***People* v. *Scott*** (2015) 61 Cal.4th 363, 383 citing to ***People* v. *McDermott*** (2002) 28 Cal.4th 946, 970; **accord *People* v. *Roldan*** (2005) 35 Cal.4th 646, 701.) The rule requiring a timely ***Batson-Wheeler*** does not mean "such motions must be made, on pain of waiver, immediately upon the exercise of the offending peremptory challenge and before any other challenges have been made." (***People* v. *Roldan*** (2005) 35 Cal.4th 646, 701.)

Moreover, because "a discriminatory motive may become sufficiently apparent to establish a prima facie case only during the selection of alternate jurors," a motion made before the alternate jurors are sworn "is timely not only as to the prospective jurors challenged during the selection of the alternate jurors but also as to those dismissed during selection of the 12 jurors already sworn." (***People* v. *Scott*** (2015) 61 Cal.4th 363, 383; ***People* v. *McDermott*** (2002) 28 Cal.4th 946, 969.)

Some trial courts will put off hearing a ***Batson-Wheeler*** challenge until the very end of jury selection. By doing so, the court will have a better idea of how many members of the cognizable class at issue remain on the panel (a factor in determining whether a ***Batson-Wheeler*** motion should be granted) and more information to conduct a comparative analysis. However, there are downsides to waiting until the entire panel is selected before holding a hearing on a ***Batson-Wheeler*** challenge. First, a party is entitled to bring more than one ***Batson-Wheeler*** challenge. (**See e.g., *People* v. *Dunn*** (1995) 40 Cal.App.4th 1039, 1046-1047; ***People* v. *Bernard*** (1994) 27 Cal.App.4th 458, 466-467.) Second, in ***People* v. *Willis*** (2002) 27 Cal.4th 811, the court indicated that reseating jurors who have been discharged is not an appropriate option. (**Id**. at p. 821.) Since postponing a ruling on a ***Batson-Wheeler*** motion until the end of jury selection would necessarily mean jurors have been discharged, the postponement will limit the possible sanctions open to the trial court to remedy the ***Batson-Wheeler*** challenge. Third, it is a waste of resources and time to continue with jury selection if the initial challenge is valid.

Note though: prosecutor cannot be required to justify a ***future*** peremptory challenge of a prospective juror who is within a cognizable group; the request is premature. (***People* v. *Clair*** (1992) 2 Cal.4th 629, 653.)

VII. Step One: The Prima Facie Case

As noted earlier, the party objecting to the challenge has the burden of making out a prima facie case "by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose." (***Johnson* v. *California*** (2005) 545 U.S. 162, 168.) Keeping in mind there is a "rebuttable presumption that a peremptory challenge is being exercised properly" (***People* v. *Parker*** (2017) 2 Cal.5th 1184, 1211), the burden on the attorney seeking to establish a prima facie case of discriminatory purpose, as identified in ***People* v. *Wheeler*** (1978) 22 Cal.3d 258, is the following:

"First, as in the case at bar, he should make as complete a record of the circumstances as is feasible. Second, he 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 [reasonable inference] that such persons are being challenged because of their group association rather than because of any specific bias." (***Wheeler***, at p. 280 [with bracketed modification by author to reflect the holding in ***Johnson* v. *California*** (2005) 545 U.S. 162*]; **see also *United States* v. *Collins*** (9th Cir. 2009) 551 F.3d 914, 919 [laying out functionally identical federal test].)

Editor's Note**: Before the decision in ***Johnson* v. *California **(**2005) 545 U.S. 162, the California courts used *different* language to identify the "prima facie" standard (i.e., "it was 'more likely than not' that purposeful discrimination had occurred"). (**See *People v. Johnson*** (2003) 30 Cal.4th 1302, 1318.) Because of this discrepancy, California cases finding no prima facie case that issued before the holding in ***Johnson* v. *California*** (2005) 545 U.S. 162 are less persuasive insofar as what constitutes a prima facie case than post-***Johnson*** cases in light of ***Johnson***'s holding that a prima facie case only requires a defendant challenging a peremptory excusal to show a reasonable inference the challenge was for an impermissible group bias rather than the more likely than not standard used in California before ***Johnson*****.** (**See** this outline, section XIII-A at p. 139.)

A. What Groups are Cognizable Classes for Purposes of *Batson-Wheeler* Challenges?

1. Definition of "cognizable class"

When a party claims a panelist has been struck based on the panelist's membership in a particular group, the key initial issue is whether the group identified is a cognizable class, i.e., does the group represent "an identifiable group distinguished on racial, religious, ethnic, or similar grounds. . ." (***People* v. *Wheeler*** (1978) 22 Cal.3d 258, 276.) Although we use the term "cognizable class" throughout this outline (**see *People* v. *Fields*** (1983) 35 Cal.3d 329, 347

[noting this is how such a group is usually described]), courts have also referred to such groups as, inter alia, "distinctive" groups (***People* v. *Fields*** (1983) 35 Cal.3d 329, 347), "cognizable racial groups" (***Batson* v. *Kentucky*** (1986) 476 U.S. 79, 96), or "cognizable groups" (***People* v. *Lewis*** (2008) 43 Cal.4th 415, 482).

In ***Castaneda* v. *Partida*** (1977) 430 U.S. 482, the case from which the ***Batson*** court drew the concept of a "cognizable racial group," the High Court stated that in determining whether a grand jury selection procedure resulted in substantial underrepresentation of the defendant's race or of the identifiable group to which he belongs, "[t]he first step is to establish that the group *is one that is a recognizable, distinct class, singled out for different treatment under the laws, as written or as applied*." (***Id***. at p. 494, emphasis added by IPG.)

However, as Justice Brown observed in her concurring opinion in ***People* v. *Young*** (2005) 34 Cal.4th 1149, neither ***Batson*** nor ***Wheeler*** actually defined the term "cognizable group" and while the California Supreme made some effort to define in the term in ***Rubio* v. *Superior Court*** (1979) 24 Cal.3d 93, 97–98 and ***People* v. *Fields*** (1983) 35 Cal.3d 329, 348–349, neither of those cases had a majority opinion. (***Young***, conc. opn, J. Brown, at p. 1235.) Nevertheless, the following definition from ***People* v. *England*** (2000) 83 Cal.App.4th 772 is not a bad one:

"'[T]here must be a common thread' shared by the group, 'a basic similarity of attitude, ideas or experience among its members so that the exclusion prevents juries from reflecting a cross-section of the community.'" (***Id***. at p. 782, citing to ***People* v. *Henderson*** (1990) 225 Cal.App.3d 1129, 1152-1153.) These groups are generally distinguished by race, gender, religion, or ethnicity. (***England*** at p. 782, citing to ***People* v. *Henderson*** (1990) 225 Cal.App.3d 1129, 1153 and ***People* v. *Cervantes*** (1991) 233 Cal.App.3d 323, 332].) "It is clear that the groups recognized as cognizable classes are generally relatively large and well defined groups in the community whose members may, because of common background or experience, share a distinctive viewpoint on matters of current concern. Generally speaking, the courts have not recognized an otherwise heterogeneous group as cognizable merely because its members agree on one particular matter." (***England*** at p. 782, citing to ***People* v. *Fields*** (1983) 35 Cal.3d 329, 349.)

This definition should be read in conjunction with Justice Mosk's plurality opinion in ***Rubio* v. *Superior Court*** (1979) 24 Cal.3d 93, which discusses what constitutes a cognizable class and states that two requirements must be met to qualify an asserted group as "cognizable" for purposes of the representative cross-section rule: "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." (***Id***. at p. 98.) Second, it must be shown "that no other members of the community are capable of adequately representing the perspective of the group assertedly excluded." (**Ibid**.)

The term "cognizable class" generally means the same thing whether the term is used in the context of a ***Batson-Wheeler*** challenge, a challenge to the underrepresentation of groups in the venire (aka ***Duren* v. *Missouri*** (1979) 439 U.S. 357 challenges), a challenge to the way "hardship" is evaluated, or a challenge to underrepresentation of groups on grand jury panels. (**See *People* v. *Burney*** (2009) 47 Cal.4th 203, 227 [relying on cases discussing "cognizable class" in most of these contexts interchangeably]; ***People* v. *Johnson*** (1989) 47 Cal.3d 1194, 1214 [same]; ***People* v. *Fields*** (1983) 35 Cal.3d 329, 346-348 [same]; **but see *People* v. *Young*** (2005) 34 Cal.4th 1149, 1235, conc. opn. J. Brown, [depending on whether the exclusion is challenged as a violation of equal protection rights (***Batson***) or the defendant's right to an impartial jury drawn from a representative cross-section of the community (***Wheeler***), or both, the question of what constitutes a cognizable group may be answered in different ways].)

2. Sub-groups can be cognizable classes

A cognizable class may contain sub-groups that might qualify as a cognizable class. "[I]n addition to groups defined by either race or gender, groups lying at the intersection of race and gender are cognizable under ***Wheeler***." (***People* v.**

Armstrong (2019) 6 Cal.5th 735, 768 [and finding African-American men are a cognizable class]; **see also *People* v. *Gray*** (2001) 87 Cal.App.4th 781, 788–790 [same]; ***People* v. *Bell*** (2007) 40 Cal.4th 582, 597-598 [African-American women constitute a cognizable class]; ***People* v. *Clair*** (1992) 2 Cal.4th 629, 652 [same]; ***People* v. *Cleveland*** (2004) 32 Cal.4th 704, 734 [same]; ***People* v. *Motton*** (1985) 39 Cal.3d 596, 605-606 [same]; ***People* v. *Boyette*** (2002) 29 Cal.4th 381, 422 [same]; ***People* v. *Willis*** (2002) 27 Cal.4th 811, 814 [white males]; ***People* v. *Gonzalez*** (2008) 165 Cal.App.4th 620, 631 [indicating Spanish-speaking/unassimilated Hispanics may constitute a cognizable class];

3. What "racial" or "ethnic" groups have been identified as cognizable classes?

a. <u>African-Americans/Blacks</u>

African-Americans or Blacks (the terms are used interchangeably in the case law) are a cognizable class. (**See *Batson* v. *Kentucky*** (1986) 476 U.S. 79, 84–89; ***People* v. *Wheeler*** (1978) 22 Cal.3d 258, 280, fn. 6.)

b. <u>Asian-Americans</u>

In ***People* v. *Burney*** (2009) 47 Cal.4th 203, a case involving the question of alleged underrepresentation of members of a cognizable class on the grand jury, the California Supreme Court stated: "Whether 'Asians' can or do constitute a cognizable group is an unsettled issue. We previously have observed, however, that 'it is at least questionable whether the generic description Asian ... can constitute a "cognizable group."' (***Id***. at p. 227, citing to ***People* v. *Johnson*** (1989) 47 Cal.3d 1184, 1217, fn. 3; **see also *People* v. *Romero*** (2012) 204 Cal.App.4th 704, 720[leaving question open in context of whether there was underrepresentation of Asian-Americans on the grand jury].) Asian-Americans have been identified as a cognizable class in other jurisdictions. (**See *Frazier* v. *New York*** (S.D.N.Y. 2002) 187 F.Supp.2d 102, 114-116; ***Rieber* v. *State*** (1994) 663 So.2d 985, 991.)

c. <u>Caucasian-Americans/Whites</u>

Caucasian-Americans/Whites (the terms are used interchangeably in the case law) are a cognizable class. In ***People* v. *Willis*** (2002) 27 Cal.4th 811, the court recognized "white males" as a cognizable class. (***Id***. at p. 814; **see also *Roman* v. *Abrams*** (2nd Cir. 1987) 822 F.2d 214, 227-228 [Caucasians are a cognizable group]; ***State* v. *Chambers*** (Mo.App. E.D. 2007) 234 S.W.3d 501, 514 [same]; ***State v. Daniels*** (Haw. 2005) 122 P.3d 796, 802, fn. 11 [Caucasian males are a cognizable class].)

d. <u>Chinese-Americans</u>

In ***People* v. *Lopez*** (1991) 3 Cal.App.4th Supp. 11, the court treated two Chinese-Americans as belonging to a cognizable group. It is not clear whether the court distinguished between Chinese-Americans and Asian-Americans. (***Id***. at pp. 14-18; **see also *People* v. *Brown*** (1999) 75 Cal.App.4th 916, 924 [recognizing Chinese-Americans as cognizable class in context of challenge to underrepresentation on grand jury].)

e. <u>Filipino-Americans</u>

Filipino-Americans may be a separate cognizable class that is distinct from Asian-Americans. (**See *People* v. *Bell*** (2007) 40 Cal.4th 582, 599 [assuming, but not deciding, whether Filipino-Americans are a distinct group from Asian-Americans]; **cf**., ***United States* v. *Canoy*** (7th Cir. 1994) 38 F.3d 893, 897 [characterizing Filipino-American as belonging to group of persons of "Asian descent"].)

f. Hispanic-Americans/Latinos

Hispanics/Latinos (the terms are used interchangeably in the case law) have been identified as a cognizable class. (**See *People* v. *Alvarez*** (1996) 14 Cal.4th 155, 193; ***People* v. *Perez*** (1996) 48 Cal.App.4th 1310, 1315.)

(i) Can a Spanish-surname suffice to identify a juror as a Hispanic for *Batson-Wheeler* purposes?

The California Supreme Court has held that "Spanish surnamed" jurors can essentially be deemed a surrogate stand-in for the cognizable class of Hispanics. (**See *People* v. *Gutierrez*** (2017) 2 Cal.5th 1150, 1156, fn. 2; ***People* v. *Gutierrez*** (2002) 28 Cal.4th 1083, 1123.) However, this principle only applies "where no one knows at the time of the challenge whether the Spanish-surnamed juror is Hispanic." (**Ibid**.) If a juror is not of Hispanic origin, but only acquires her Hispanic surname through marriage, and indicates on her juror questionnaire and in court that she is not Hispanic, the juror is not Hispanic for ***Batson-Wheeler*** purposes. (***Gutierrez*** (2002) 28 Cal.4th 1083 at p. 1123; **see also *People* v. *Sanchez*** (2016) 63 Cal.4th 411, 438 [*because* the juror "provided no response when asked his racial or ethnic background on the questionnaire, and the record does not otherwise indicate his race or ethnicity; he qualifies as Hispanic because he has a Spanish surname."].)

In ***People* v. *Cruz*** (2008) 44 Cal.4th 636, the California Supreme Court declined to address whether the defense had made a prima facie showing of use of discriminatory challenges against Hispanics based on the prosecution's bumping of a juror with a Spanish surname because the juror identified as "white" and only had obtained a Hispanic surname through marriage. (**Id**. at pp. 656-657.) The ***Cruz*** court acknowledged that that "Spanish surnamed" sufficiently describes a cognizable class "Hispanic" under ***Wheeler***. However, the court stated that is only true "where no one knows at the time of the challenge whether the Spanish-surnamed prospective juror is Hispanic." (***Cruz*** at pp. 656-657.) Since, in ***Cruz***, the record reflected the challenged juror was "white" and not of Hispanic origin, it was not proper to even address whether the juror was bumped because she was Hispanic. (**Ibid**.)

In ***People* v. *Ortega*** (1984) 156 Cal.App.3d 63, the court stated that "with respect to the systematic exclusion of Hispanics, it is necessary to establish that any Spanish-surnamed jurors who are challenged are, in fact, Hispanic." (***Id***. at p. 70.)

(ii) Are Spanish-speaking Hispanics a separately-recognized cognizable class sub-group?

In ***People* v. *Gonzales*** (2008) 165 Cal.App.4th 620, the prosecutor used his first four challenges to excuse Hispanic jurors, one of whom was identified as JC. The prosecutor did not ask any question of JC, and no answers on the jury questionnaire stood out. When the prosecutor asked the panel if anyone who spoke Spanish would be able to accept the interpreter's translation, JC did not raise his hand. After a ***Batson-Wheeler*** challenge was brought, the prosecutor stated he excluded JC based on his youth, his lack of significant family ties, and the fact JC was Spanish-speaking, which, the prosecutor said might be a problem when listening to witnesses who were testifying through a Spanish-interpreter. The defense argued that "Spanish-speaking" (as opposed to Hispanic) jurors were a cognizable class and the prosecutor was improperly excluding them. (***Id***. at pp. 624-625.)

The ***Gonzales*** court recognized that ***Hernandez* v. *New York*** (1991) 500 U.S. 352 held that the fact a bilingual juror might have difficulty in accepting the translator's rendition was a neutral reason for excluding a juror. (***Gonzales*** at pp. 628-629 [and noting that this ground was held to be a valid reason for removing two jurors who expressed hesitancy in their ability to follow the interpreter's translation in ***People* v. *Cardenas*** (2007) 155 Cal.App.4th 1468].) However, the ***Gonzales*** court held that the prosecutor was not actually concerned with the ability of the jurors to follow the rule about ignoring their own interpretation of what a Spanish speaker would say. Rather, the court concluded that the prosecutor had simply provided this reason (as well as the other reasons) to conceal an intent to essentially exclude unassimilated Hispanics (i.e., "those persons who may be perceived as more closely identifying with their national origin

and or their Hispanic ethnicity"). (***Id.*** at p. 631.) The court disregarded the fact there remained other Hispanics on the panel whom the court assumed were non-Spanish speakers "given the prosecutor's systematic elimination of all Hispanic Spanish speakers. (**Ibid**.)

The ***Gonzales*** court came to this conclusion because only two panelists raised any question about the requirement of having to adopt the official translation of the testimony. One of them, who the prosecutor never challenged, was a Spanish-speaker but did not have a Hispanic surname (albeit she may have been Hispanic). The other *was* Hispanic and *was* challenged but the prosecutor did not justify his peremptory challenge on the ground the juror would have difficulty adopting the official translation. (***Id.*** at p. 630.) Moreover, the court found the other grounds asserted by the prosecutor for excluding JC (i.e., his youth and lack of mature family ties) were pretextual. (***Id***. at pp .631-632.)

g. Italian-Americans

There is a split over whether Italian-Americans are a cognizable class. (**See *State* v. *Rambersed*** (N.Y.Sup.Ct.1996) 649 N.Y.S.2d 640, 642 [yes]; ***Wamget* v. *State*** (Tex. Crim. App. 2001) 67 S.W.3d 851, 854 [yes]; ***United States* v. *Marino*** (1st Cir. 2002) 277 F.3d 11, 23 [no]; ***United States* v. *Bucci*** (1st Cir.1988) 839 F.2d 825, 833 [no].)

h. Native-Americans (American Indians)

Native-Americans have been identified as a cognizable class. (**See *United States* v. *Mitchell*** (9th Cir. 2007) 502 F.3d 931, 956; ***Kesser* v. *Cambra*** (9th Cir. 2006) 465 F.3d 351, 357-358, 360; ***United States* v. *Roan Eagle*** (8th Cir. 1989) 867 F.2d 436, 441; ***United States* v. *Chalan*** (10th Cir.1987) 812 F.2d 1302, 1314.)

4. What "religious" groups have been identified as cognizable classes?

"***Batson*** has been held to preclude the removal of a potential juror based solely on the venire member's religious affiliation." (***People* v. *Krebs*** (2019) 8 Cal.5th 265 [255 Cal.Rptr.3d 95, 120, fn. 5]; **see also *People* v. *Richardson*** (2008) 43 Cal.4th 959, 984 ["religious membership constitutes an identifiable group under ***Wheeler***"]; ***In re Freeman*** (2006) 38 Cal.4th 630, 643 [same].) "Such a practice [religious-based excusals] also violates the defendant's right to equal protection under the Fourteenth Amendment to the United States Constitution." (***People* v. *Richardson*** (2008) 43 Cal.4th 959, 984; **see also** Code of Civ. Proc., § 231.5 [preventing use of peremptory challenges based on the assumption that the prospective juror is biased merely because of the juror's religion.) The United States Supreme Court has not yet applied ***Batson*** to forbid group exclusion based on religion, although some state and federal courts have done so. (***In re Freeman*** (2006) 38 Cal.4th 630, 643.)

In many cases, it will be difficult to establish a juror was removed on the basis of religion because a "prospective juror's religious affiliation, if it is not stated on a jury questionnaire or revealed during voir dire, is not ascertained as readily as is his or her race or gender" and inquiry into a juror's religious affiliation is usually not made or relevant. (**See *People* v. *Schmeck*** (2005) 37 Cal.4th 240, 273 [citing to the concurring opinion of Justice Ginsburg in ***Davis* v. *Minnesota*** (1994) 511 U.S. 1115, which noted the Minnesota high court's observation that ordinarily "inquiry into a juror's religious affiliation and beliefs is irrelevant and prejudicial"].)

Generally, courts have recognized that while excluding a juror on the basis of belonging to a particular religious group would be impermissible (***People* v. *Gray*** (2005) 37 Cal.4th 168, 190, fn. 4), it is proper to exclude jurors whose religious beliefs would interfere with the duties of a juror. (**See *People* v. *Cowan*** (2010) 50 Cal.4th 401, 446, 450 [prosecutor could properly challenge juror who, inter alia, claimed on her questionnaire "she's Islamic, that she does not sit in judgment" even though the juror later stated she could sit in judgment]; ***People* v. *Richardson*** (2008) 43 Cal.4th 959, 985 [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]; ***People* v. *Watson*** (2008) 43 Cal.4th 652, 679 [same]; ***People* v. *Cash*** (2002) 28 Cal.4th 703, 725 [same]; ***People* v. *Martin*** (1998) 64 Cal.App.4th 378, 384-385 [challenge of juror who was Jehovah's Witness was upheld based on juror's answer indicating religious principles would make it difficult to judge others]; ***People* v. *Jenkins*** (2000) 22 Cal.4th 900, 988-989 [quoting ***United States* v. *Stafford*** (7th Cir.1998) 136 F.3d 1109, 1114 wherein the court stated, [i]t would be improper and perhaps unconstitutional to strike a juror on the basis of his being a Catholic, a Jew, a Muslim, etc. It would be proper to strike him on the basis of a belief that would prevent him from basing his decision on the evidence and instructions, even if the belief had a religious backing...."]; ***State* v. *Hodge*** (Conn. 1999) 726 A.2d 531, 552-553 [statement of juror that "in the event of a conflict between the court's instructions and his religious beliefs, he would seek guidance from his religious leader about how to handle the situation" was, by itself, "a reasonable basis for the state's attorney to doubt whether [the juror] could follow the court's instructions"].)

Indeed, even where the asserted ground given by the prosecutor is that the juror belonged to a *specific* congregation, this does not mean the prosecutor is acting in a discriminatory manner. For example, in ***People* v. *Jones*** (2011) 51 Cal.4th 346, the defendant argued the prosecutor's concern that the juror was a member of the African Methodist Episcopal Church was itself discriminatory. But the argument was rejected as the prosecutor did not excuse the juror just because she belonged to a largely African–American church, but because this particular church was, in his view, "constantly controversial," and he did not "particularly want anybody that's controversial on my jury panel." (***Id***. at p. 367.)

a. Jewish

In ***People* v. *Johnson*** (1989) 47 Cal.3d 1194, the court proceeded to analyze a defense claim the prosecution improperly excluded Jewish jurors as if Jews were a cognizable class, albeit observing in a footnote that it is at least questionable whether a religious group can constitute a "cognizable group." (***Id***. at p. 1217 and fn. 3.) In ***People* v. *Schmeck*** (2005) 37 Cal.4th 240, the court raised the possibility that a Jewish background may constitute a racial or ethnic classification for the purposes of an equal protection analysis under ***Batson***, but declined to explore the question since the defendant's claim rested solely on an assertion of discrimination on the basis of religion. (***Id***. at p. 266, fn. 5.) Out-of-state cases have held that Jews are a cognizable class. (**See *Joseph* v. *State*** (Fla. 1994) 636 So.2d 777, 780.)

b. Catholic

In ***People* v. *Krebs*** (2019) 8 Cal.5th 265 [255 Cal.Rptr.3d 95], the defendant claimed a juror had been improperly challenged on the basis of religious affiliation, Catholicism. The Attorney General did not dispute that Catholic jurors were a cognizable group. (***Id***. at p. 120, fn. 5].)

c. Muslim

No California court has expressly identified Muslim jurors as a cognizable class. However, in ***State* v. *Hodge*** (Conn. 1999) 726 A.2d 531, the court held striking a juror solely on the basis the juror was a member of the Islamic faith would violate equal protection. (***Id***. at pp. 552–553.)

5. Are persons sharing a sexual orientation a cognizable class?

In ***People* v. *Douglas*** (2018) 22 Cal.App.5th 1162, the court held that "excluding prospective jurors solely on the basis of sexual orientation runs afoul of the principles espoused in ***Batson*** and ***Wheeler***. (***Id***. at p. 1169.) In ***People* v. *Garcia*** (2000) 77 Cal.App.4th 1269, the court held that "gays and lesbians" are a cognizable class. (**Id**. at p. 1281.) The ***Garcia*** court lumped both gays and lesbians together into a single cognizable class without specifically stating whether each might be its own cognizable class. (**See also** Code of Civil Procedure section 231.5 [forbidding peremptory challenges based on an assumption a juror is biased based on sexual orientation, i.e., "heterosexuality, homosexuality,

and bisexuality."].) In ***SmithKline Beecham Corp.* v. *Abbott Labs.*** (9th Cir. 2014) 740 F.3d 471, the Ninth Circuit held equal protection prohibits peremptory strikes based on sexual orientation under ***Batson***. (***Id***. at p. 484.)

6. Are males or females a cognizable class?

"The use of peremptory challenges to exclude prospective jurors based on gender violates both the federal and state Constitutions." (***People* v. *Dement*** (2011) 53 Cal.4th 1, 19, citing to ***J.E.B.* v. *Alabama ex rel. T. B.*** (1994) 511 U.S. 127 [which held equal protection prohibited the exclusion of women from juries on the basis of their gender. (***Id***. at p. 129; **see also *Flowers* v. *Mississippi*** (2019) 139 S.Ct. 2228, 2243 [***Batson*** now applies to gender discrimination]; ***People* v. *Bonilla*** (2007) 41 Cal.4th 313, 343 [treating women as a cognizable class]; Code of Civ. Proc., § 231.5 [preventing use of peremptory challenge on assumption a prospective juror is biased merely because of the juror's sex].)

7. Is geographical location a cognizable class?

No case has held that simply because persons live in a particular geographical location, they may be treated as a cognizable class. However, the claim is sometimes made that where a juror lives is serving as a "proxy" for race.

For example, in ***United States* v. *Bishop*** (9th Cir. 1992) 959 F.2d 82, the prosecutor claimed he struck an African-American juror who lived in Compton because Compton was a poor and violent community whose residents were likely to be "anesthetized to such violence," "more likely to think that the police probably used excessive force," and likely to believe the police "pick on black people." (***Id***. at pp. 821, 825.) The defendant argued that, in view of the fact that approximately three quarters of Compton's population was black, the juror's residence served as a mere surrogate for race. (***Id***. at p. 822.) After noting that there was no evidence that the particular juror had witnessed or heard of incidents of violence or police behavior in Compton, and as a result, would have found it difficult to assess the credibility of a particular witness fairly and impartially, the Ninth Circuit found that the prosecutor's reasons for removing the juror was improper. Specifically, the ***Bishop*** court pointed out that the prosecutor's justification "referred to collective experiences and feelings that he just as easily could have ascribed to vast portions of the African-American community. Implicitly equating low-income, black neighborhoods with violence, and the experience of violence with its acceptance, it referred to assumptions that African-Americans face, and from which they suffer, on a daily basis. Ultimately, the invocation of residence both reflected and conveyed deeply ingrained and pernicious stereotypes." (***Id***. at p. 825.) The court stated such "[g]overnment acts based on such prejudice and stereotypical thinking are precisely the type of acts prohibited by the equal protection clause of the Constitution." (***Id***. at p. 826; **see also *People* v. *Turner*** (2001) 90 Cal.App.4th 413, 418 [finding prosecutor improperly excluded juror for improper reason – one based on racial stereotyping - where juror lived in Inglewood (a community that was almost 50% African-American) and prosecutor stated her "experience with Inglewood jurors has not been good" and "[i]t seems to me that people in that location ... may or may not consider drugs the problem that people in other locations do"].)

However, even in ***United States* v. *Bishop*** (9th Cir. 1992) 959 F.2d 820, the court did not state that all jurors living in a particular geographical location constituted a cognizable class; and recognized that residence could constitute a legitimate reason for excluding a juror where residence was "utilized as a link connecting a specific juror to the facts of the case." (***Id***. at p. 826.)

8. What groups have been held ***not*** to be cognizable classes?

The courts have **rejected** arguments that the following "groups" are cognizable classes for purposes of ***Batson-Wheeler*** challenges:

a. Age Cohorts

Age groups are not cognizable classes. (**See *People* v. *Lewis*** (2008) 43 Cal.4th 415, 472 ["young persons are not a cognizable group"]; ***People* v. *McCoy*** (1995) 40 Cal.App.4th 778, 785 [persons 70 years or older not cognizable class]; ***People* v. *Ayala*** (2000) 23 Cal.4th 225, 257 ["California courts have not been receptive to the argument that age alone identifies a distinctive or cognizable group within the meaning of [the representative cross-section] rule"]; **but see** Code of Civ. Proc., § 231.5 [prohibiting use of "a peremptory challenge to remove a prospective juror on the basis of an assumption that the prospective juror is biased because of, inter alia, "age"]; this outline, section VII-A-9 at p. 31.

b. Arrestees

Persons previously arrested do not constitute a cognizable class. In ***People* v. *Fields*** (1983) 35 Cal.3d 329, the court listed "person previously arrested" as an example of a non-identifiable group. (***Id***. at p. 348; **accord *People* v. *Macioce*** (1987) 197 Cal.App.3d 262, 279-280.)

c. Citizenship Status

In ***Rubio* v. *Superior Court*** (1979) 24 Cal.3d 93, a case involving the question of whether it was proper to maintain a blanket exclusion of resident aliens from jury service, the court held that resident aliens are not a cognizable class. (***Id***. at p. 100; **see also *People* v. *Gonzalez*** (1989) 211 Cal.App.3d 1186, 1190 [indicating, in dicta, that naturalized citizens are not a cognizable class].)

d. Composite Minority Groups: "People of Color"

In ***People* v. *Manibusan*** (2013) 58 Cal.4th 40, the California Supreme Court declined to recognize "'minority jurors' in composite as a cognizable group for purposes of a claim that the prosecution has excused a prospective juror for discriminatory reasons." (***Id***. at p. 83 [and citing to, inter alia, ***Gray* v. *Brady*** (1st Cir.2010) 592 F.3d 296, 305–306; ***People* v. *Greene*** (2001) 282 A.D.2d 757, 724 N.Y.S.2d 344.) In ***People* v. *Davis*** (2009) 46 Cal.4th 539, the California Supreme rejected defendant's contention that the trial court erred by ruling that "people of color" is not a cognizable group for ***Wheeler*** analysis. (***Id***. at p. 583.) In ***People* v. *Neuman*** (2009) 176 Cal.App.4th 571, the court specifically rejected the defense claim that "people of color" is a cognizable group under ***Batson*** or ***Wheeler***. (***Id***. at p. 579 [and pointing out, at p. 580 fn. 14 that in portions of California, "combining all members of minority groups may obliterate their status as members of a group that is in the minority"]*; **but see *Fernandez* v. *Roe*** (9th Cir.2002) 286 F.3d 1073, 1079 [holding prior strike of an *Hispanic* prospective juror supported an inference of general discriminatory intent germane to strike of two *African Americans*].)

> ***Editor's Note**: Whether a group is in the majority or minority should not be legally significant since ***Batson-Wheeler*** challenges are not dependent on the cognizable group being in the minority. However, the absurdity of the defense position in ***Neuman*** is highlighted when you consider that ***every*** juror belongs to *at least* two cognizable groups (male or female, plus an ethnic or racial group). Under the defense logic, you could have a cognizable "supergroup" that encompasses 100% of the jurors!

e. Crime Victims

Crime victims do not constitute a cognizable class. In ***People* v. *Fields*** (1983) 35 Cal.3d 329, the court listed "crime victims" as an example of an identifiable group "whose representation is essential to a constitutional venire." (***Id***. at p. 348; **accord *People* v. *Macioce*** (1987) 197 Cal.App.3d 262, 279-280 [and finding "battered women" do not constitute a cognizable class].)

f. Death-Penalty Opponents or Proponents

Persons opposed to the death penalty are not a cognizable group, neither are death penalty proponents. That was the holding in ***People* v. *Fields*** (1983) 35 Cal.3d 329, a case which dealt with permitting exclusion of persons opposed to the death penalty at the guilt phase rendered a jury unrepresentative of a cross-section of the community. (***Id***. at pp. 349, 353.) In ***People* v. *Anderson*** (1987) 43 Cal.3d 1104, the court held that persons with reservations about capital punishment are not a cognizable group. (***Id***. at p. 1115.)

g. Education-Related Groups

Groups sharing similar levels of education (or lack of education) are not cognizable classes. For example, in ***People* v. *Estrada*** (1979) 93 Cal.App.3d 76, a case involving a challenge to alleged underrepresentation on the grand jury, the court rejected the idea that the "less-educated" are a cognizable class. (***Id***. at pp. 90-91.)

h. Employment-Related Groups

Groups sharing similar jobs are not cognizable classes. For example, in ***People* v. *Estrada*** (1979) 93 Cal.App.3d 76, a case involving a challenge to alleged underrepresentation on the grand jury, the court rejected the claim "blue-collar workers" are a cognizable class. (***Id***. at p. 92.) In ***People* v. *England*** (2000) 83 Cal.App.4th 772, the court held "retired [people] with an aversion or inability to return to [their] former place[s] of employment," e.g., retired correctional workers, were not a cognizable class. (***Id***. at p. 780.)

i. Ex-Felons

In ***Rubio* v. *Superior Court*** (1979) 24 Cal.3d 93, a case involving the question of whether it was proper to maintain a blanket exclusion of ex-felons from jury service, the court held that ex-felons are not a cognizable class. (***Id***. at p. 99.)

j. Income or Wealth-Based Groups

Groups sharing similar income or wealth levels are not cognizable classes. For example, in ***People* v. *Estrada*** (1979) 93 Cal.App.3d 76, a case involving a challenge to alleged underrepresentation on the grand jury, the court rejected the idea that individuals with "low incomes" or "households with family incomes of less than $15,000" can constitute a cognizable class. (***Id***. at pp. 91-92.) In ***People* v. *Johnson*** (1989) 47 Cal.3d 1194, the court held that persons of low income or "poor people" are not a cognizable class for purposes of assessing whether the way hardship challenges excluded poor persons in a disproportionate manner. (***Id***. at p. 1214; **accord *People* v. *Tafoya*** (2007) 42 Cal.4th 147, 169 [same]; **see also *People* v. *Cooper*** (1991) 53 Cal.3d 771, 808 [same, except in context of whether juror fees improperly excluded class of jurors from venire].)

k. Issue-Viewpoint Groups

Groups sharing a similar viewpoint on particular issue, including similar viewpoints on the criminal justice system are not cognizable groups. For example, it was suggested in ***People* v. *Wheeler*** (1978) 22 Cal.3d 258, by way of dicta, that persons who favor "law and order" are not a cognizable class. (***Id***. at p. 276; **accord *People* v. *Fields*** (1983) 35 Cal.3d 329, 349; **see also** this outline, section VII-A-8-f at p. 27 [opponents or proponents of the death penalty are not a cognizable class].)

9. What groups are "cognizable classes" under the state statute (Code of Civil Procedure section 231.5) governing impermissible use of peremptory challenges?

California has a statute that codifies some of the principles embodied in the ***Batson-Wheeler*** line of cases.

California Code of Civil Procedure section 231.5 provides:

"A party shall 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 a characteristic listed or defined in Section 11135 of the Government Code, or similar grounds." (Code of Civ. Proc., § 231.5)

California Government Code section 11135, in relevant part, provides:

(a) No person in the State of California shall, on the basis *of* ***race, national origin, ethnic group identification, religion, age, sex, sexual orientation, color, genetic information, or disability***, be unlawfully denied full and equal access to the benefits of, or be unlawfully subjected to discrimination under, any program or activity that is conducted, operated, or administered by the state or by any state agency, is funded directly by the state, or receives any financial assistance from the state.
¶
(c)(1) As used in this section, "***disability***" means any mental or physical disability, as defined in ***Section 12926***.
¶
(e) As used in this section, "***sex***" and "***sexual orientation***" have the same meanings as those terms are defined in subdivisions (q) and (r) of ***Section 12926.***
¶
(f) As used in this section, "race, national origin, ethnic group identification, religion, age, sex, sexual orientation, color, or disability" includes a perception that a person has any of those characteristics or that the person is associated with a person who has, or is perceived to have, any of those characteristics.
¶
(g) As used in this section, "***genetic information***" has the same definition as in ***paragraph (2) of subdivision (e) of Section 51 of the Civil Code***." (Gov. Code, § 13511; emphasis added.)

California Government Code section 12926, in relevant part, provides:

"As used in this part in connection with unlawful practices, unless a different meaning clearly appears from the context:
¶
(b) "***Age***" refers to the chronological age of any individual who has reached his or her 40th birthday.
¶
(j) "***Mental disability***" includes, but is not limited to, all of the following:

(1) Having any mental or psychological disorder or condition, such as intellectual disability, organic brain syndrome, emotional or mental illness, or specific learning disabilities, that limits a major life activity. For purposes of this section:

(A) "Limits" shall be determined without regard to mitigating measures,such as medications, assistive devices, or reasonable accommodations, unless the mitigating measure itself limits a major life activity.

(B) A mental or psychological disorder or condition limits a major life activity if it makes the achievement of the major life activity difficult.

(C) “Major life activities” shall be broadly construed and shall include physical, mental, and social activities and working.

(2) Any other mental or psychological disorder or condition not described in paragraph (1) that requires special education or related services.

(3) Having a record or history of a mental or psychological disorder or condition described in paragraph (1) or (2), which is known to the employer or other entity covered by this part.

(4) Being regarded or treated by the employer or other entity covered by this part as having, or having had, any mental condition that makes achievement of a major life activity difficult.

(5) Being regarded or treated by the employer or other entity covered by this part as having, or having had, a mental or psychological disorder or condition that has no present disabling effect, but that may become a mental disability as described in paragraph (1) or (2).

“***Mental disability***” does not include sexual behavior disorders, compulsive gambling, kleptomania, pyromania, or psychoactive substance use disorders resulting from the current unlawful use of controlled substances or other drugs.
¶
(m) “***Physical disability***” includes, but is not limited to, all of the following:

(1) Having any physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss that does both of the following:

(A) Affects one or more of the following body systems: neurological, immunological, musculoskeletal, special sense organs, respiratory, including speech organs, cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, and endocrine.

(B) Limits a major life activity. For purposes of this section:

(i) “Limits” shall be determined without regard to mitigating measures such as medications, assistive devices, prosthetics, or reasonable accommodations, unless the mitigating measure itself limits a major life activity.

(ii) A physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss limits a major life activity if it makes the achievement of the major life activity difficult.

(iii) “Major life activities” shall be broadly construed and includes physical, mental, and social activities and working.

(2) Any other health impairment not described in paragraph (1) that requires special education or related services.

(3) Having a record or history of a disease, disorder, condition, cosmetic disfigurement, anatomical loss, or health impairment described in paragraph (1) or (2), which is known to the employer or other entity covered by this part.

(4) Being regarded or treated by the employer or other entity covered by this part as having, or having had, any physical condition that makes achievement of a major life activity difficult.

(5) Being regarded or treated by the employer or other entity covered by this part as having, or having had, a disease, disorder, condition, cosmetic disfigurement, anatomical loss, or health impairment that has no present disabling effect but may become a physical disability as described in paragraph (1) or (2).

(6) “Physical disability” does not include sexual behavior disorders, compulsive gambling, kleptomania, pyromania, or psychoactive substance use disorders resulting from the current unlawful use of controlled substances or other drugs.
¶
(n) Notwithstanding subdivisions (j) and (m), if the definition of “disability” used in the federal Americans with Disabilities Act of 1990 (Public Law 101-336)1 would result in broader protection of the civil rights of individuals with a mental disability or physical disability, as defined in subdivision (j) or (m), or would include any medical condition not included within those definitions, then that broader protection or coverage shall be deemed incorporated by reference into, and shall prevail over conflicting provisions of, the definitions in subdivisions (j) and (m).

(o) “Race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, age, sexual orientation, or military and veteran status” includes a perception that the person has any of those characteristics or that the person is associated with a person who has, or is perceived to have, any of those characteristics.
¶
(q) “Religious creed,” “religion,” “religious observance,” “religious belief,” and “creed” include all aspects of religious belief, observance, and practice, including religious dress and grooming practices. “Religious dress practice” shall be construed broadly to include the wearing or carrying of religious clothing, head or face coverings, jewelry, artifacts, and any other item that is part of the observance by an individual of his or her religious creed. “Religious grooming practice” shall be construed broadly to include all forms of head, facial, and body hair that are part of the observance by an individual of his or her religious creed.

(r)(1) “***Sex***” includes, but is not limited to, the following:

(A) Pregnancy or medical conditions related to pregnancy.

(B) Childbirth or medical conditions related to childbirth.

(C) Breastfeeding or medical conditions related to breastfeeding.

(2) “Sex” also includes, but is not limited to, a person's gender. “Gender” means sex, and includes a person's gender identity and gender expression. “Gender expression” means a person's gender-related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth.

(s) “***Sexual orientation***” means heterosexuality, homosexuality, and bisexuality.

California Civil Code section 51(e)(2) provides:

(A) “***Genetic information***” means, with respect to any individual, information about any of the following:

(i) The individual's genetic tests.

(ii) The genetic tests of family members of the individual.

(iii) The manifestation of a disease or disorder in family members of the individual.

(B) “***Genetic information***” includes any request for, or receipt of, genetic services, or participation in clinical research that includes genetic services, by an individual or any family member of the individual.

(C) "***Genetic information***" does not include information about the sex or age of any individual." (Civ. Code, § 51(e)(2); emphasis added by IPG.)

Section 231.5 has been in effect since 2000 and previously prohibited attorneys from using "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." In 2015, the language of the section was expanded by making the general prohibition apply to other types of juror characteristics, namely "ethnic group identification, age, genetic information, or disability."

Editor's Notes Part I of II:
Although ethnic groups have long been recognized as a kind of cognizable class, courts have not held groups of persons in age cohorts, groups of persons with mental or physical disabilities, or groups of persons with similar genetic diseases or disorders are cognizable classes. And courts have affirmatively held that groups of people who are of the same age are not a cognizable class. (**See** this outline, section VII-A-8-a at p. 26.) The new language has, at least arguably, created several "cognizable classes" that are not recognized under the case law. To the extent the new version of section 231.5 creates new "cognizable classes" (age cohorts, groups of person with disabilities, groups of persons with disabilities, or groups of persons with similar genetic diseases or disorders are cognizable classes), it reflects (at worst) a misunderstanding or (at best) a very superficial understanding of the ***Batson-Wheeler*** principles governing cognizable classes and presents a host of new issues in light of the traditional definition of a cognizable class. (**See *People* v. *England*** (2000) 83 Cal.App.4th 772, 782 ["cognizable classes are generally relatively large and well defined groups in the community whose members may, because of common background or experience, share a distinctive viewpoint on matters of current concern"]; this outline section VII-A-1 at pp. 20-21.)

Keeping in mind that Government Code Section 11135 generally prohibits discrimination "in any program or activity that is conducted, operated or administered by the state or any state agency, funded directly by the state, or receives any financial assistance from the state" and was crafted with the goal of preventing discrimination in government hiring and in the distribution of state services, not with the idea the categories would become "cognizable classes" for purposes of jury selection practices, consider some of the following questions:

Does section 231.5 mean that jurors may not be challenged because they are "young?"

It is highly questionable whether the reference to "age" in Government Code section 11135 means that a juror may not be challenged based on their youth. Discrimination laws preventing discrimination based on age were crafted to prevent discrimination against older persons. They do not prevent discrimination against persons who are not considered older. There are no California laws that state that a person cannot be discriminated against on the basis they are too young! If that were the case, state benefits provided solely to persons over the age of 62 would violate section 231.5. Moreover, while the meaning of "age" is not defined in section 11135 and unlike other terms mentioned in the section, there is no reference to a further definition in Government Code section 12926, section 12926 does state "age" "refers to the chronological age of any individual who has reached his or her 40th birthday." (Gov. Code, § 12926(b).) This lends additional support to the idea that the intent was to prevent the exclusion of older persons from sitting on juries. However, even assuming that "young jurors" are a statutorily recognized cognizable class, the statute just prevents exclusion based on the assumption the young jurors will have a particular viewpoint. It does not prevent the exclusion of a juror for lack of life experience. Moreover, if there is evidence in the record to support, for example, the juror would lack life experience or actually have a particular viewpoint that might disadvantage the prosecution, then exclusion would not run afoul of section 231.5.

Does section 231.5 mean that jurors may not be challenged if they lack intelligence due to a mental disability?

"Disability" is one of the characteristics listed in Government Code section 11135 and "disability" for purposes of that section is defined as meaning "any mental or physical disability, as defined in Section 12926." (**See** Gov. Code, §§ 11135(c)(1).) [Cont'd]

***Editor's Note (Part II of II):**

Government Code section 12926(j) states: "Mental disability" includes, but is not limited to, all of the following: (1) Having any mental or psychological disorder or condition, such as intellectual disability, organic brain syndrome, emotional or mental illness, or specific learning disabilities, . . ." However, it is very unlikely that courts will find that challenging a juror because of an inability to comprehend or fully understand what is going on in court or because the juror is simply not intelligent (**see** this IPG memo, sections VIII-D-20 at p. 76, VIII-D-22 at p. 77, and VIII-D-26 at p. 78) violates section 231.5.

Is a challenge to a juror because the juror is pregnant or breastfeeding permissible under section 231.5?

As noted above, section 11135(e) provides that the term "sex" has the same meaning as it is defined in section 12926 and subdivision (r) of section 12926 provides that the term "sex" includes "(A) Pregnancy or medical conditions related to pregnancy." ¶ (C) Breastfeeding or medical conditions related to breastfeeding."

However, even assuming on its face that a prosecutor could not challenge a juror on grounds she is pregnant or breastfeeding (**see *Johnson* v. *State*** (Ga. Ct. App. 1998) 497 S.E.2d 666, 670-671 ["we agree with the defendant's argument to this Court that striking a juror solely because of her pregnancy would violate equal protection principles"]), if the juror indicates that her pregnancy or breastfeeding obligations would hinder her ability to sit as a juror or distract her from focusing on the trial, a challenge should be permissible because it is not based on any *assumptions* of bias on the part of the juror but on a valid gender neutral reason.

If the prosecutor perceives a person has a characteristic referenced in section 11135 does it make a difference whether the person actually has the characteristic at issue?

As noted, section 231.5 prevents the "use a peremptory challenge to remove a prospective juror on the basis of an assumption that the prospective juror is biased merely because of a characteristic listed or defined in Section 11135 of the Government Code. Subdivision (f) of section 11135 provides: "As used in this section, 'race, national origin, ethnic group identification, religion, age, sex, sexual orientation, color, or disability' *includes a perception that a person has any of those characteristics*[.]" (Emphasis added.) Presumably then, even if the juror is being challenged based on the attorney's assumption that the juror belongs to particular group, it would not make a difference whether the attorney is mistaken about the juror's race. The statute would still be violated. (**Cf.**, ***People* v. *Bell*** (2007) 40 Cal.4th 582, 599 ["a ***Wheeler*** motion may sometimes be based on "appearances," without the need to "establish the true racial identity of the challenged jurors"].)

Can a prosecutor violate section 231.5 by challenging a juror based on the juror's "association with" persons who have, or appear to have, one of the characteristics at issue?

As noted, section 231.5 prevents the "use a peremptory challenge to remove a prospective juror on the basis of an assumption that the prospective juror is biased merely because of a characteristic listed or defined in Section 11135 of the Government Code. Subdivision (f) of section 11135 provides: "As used in this section, 'race, national origin, ethnic group identification, religion, age, sex, sexual orientation, color, or disability' includes a perception . . . that the person is associated with a person who has, or is perceived to have, any of those characteristics."

Thus, section 231.5 would be violated based on the fact that the attorney challenged the juror because the attorney believed the juror (who does not have the characteristic at issue) associates with someone who has the characteristic. (**Cf.**, ***Mitcham* v. *Davis*** (N.D. Cal. 2015) 103 F.Supp.3d 1091, 1097 [finding prosecutor used challenges in discriminatory fashion based, in part, on fact prosecutor challenged a juror who stated that he had an interest in African American culture and had written a book on African American folklore and a Caucasian female who the prosecutor believed might be married to an African-American].)

10. What should a prosecutor do if it is *not clear* that the challenged juror is actually a member of the cognizable class to which the defense claims the juror belongs?

Courts have long recognized the dilemma of trying to figure out whether a juror fits into a particular cognizable class. As pointed out in ***Wheeler*** itself, this dilemma arises because "veniremen are not required to announce their race, religion, or ethnic origin when they enter the box, and these matters are not ordinarily explored on voir dire. The reason, of course, is that the courts of California are or should be blind to all such distinctions among our citizens." (***Id***. at p. 263; **accord *People* v. *Trevino*** (1985) 39 Cal.3d 667, 687; ***People* v. *Motton*** (1985) 39 Cal.3d 596, 603.) Asking jurors to identify their race or ethnicity can be awkward or offensive. (**See *People* v. *Trevino*** (1985) 39 Cal.3d 667, 687 [noting the attorney's decision to make the ***Wheeler*** motion on the basis of easily identifiable surnames, rather than risk juror animosity in quizzing selected individuals as to whether or not they are Mexican-American, was proper]; ***People* v. *Motton*** (1985) 39 Cal.3d 596, 603 [noting while "direct questions on racial identity would help to make a clear and undisputable record" such questions are not required because, inter alia," such questions may be offensive to some jurors and thus are not ordinarily asked on voir dire"].)

This dilemma arises not just in assessing whether the challenged juror belongs to a particular class, but in assessing the cognizable class of **all** the other panelists and jurors. The latter assessment is necessary, of course, in order to effectively utilize the mechanisms for determining whether discriminatory challenges are being made, i.e., disparate questioning analysis, comparative analysis, disproportionality analysis, etc.

Moreover, the dilemma of trying to figure out whether a juror fits into a particular cognizable class is only going to become more frequent as the various ethnic and racial groups that populate California intermarry. Indeed, it is questionable whether the current framework for analyzing ***Batson-Wheeler*** challenges can even rationally be applied when it comes to multiracial or multiethnic jurors. (**Cf.**, ***United States* v. *Guerrero*** (9th Cir. 2010) 595 F.3d 1059, 1063, fn. 3 ["in the modern world it can be difficult, if not impossible, to accurately identify the race/ethnicity of everyone we meet"]; ***State* v. *Edwards*** (Conn. 2014) 102 A.3d 52, 58 [juror appeared to be African–American or a person of color but identified as member of the "human" race].)

Nevertheless, if the prosecutor has doubts about whether the challenged juror or other members of the panel belong to the cognizable class identified by the defense, the issue should be raised. The burden is clearly on the party making the ***Batson-Wheeler*** motion to establish the juror is a member of cognizable class at issue. (***Wheeler***, at p. 280; **see also *People* v. *Cunningham*** (2015) 61 Cal.4th 609, 658, 662 [defendant failed to show juror was member of cognizable class].) And if the class membership of the other members of the venire is going to be relied on by the party making the motion to support a claim the other party is using challenges in a discriminatory fashion, the burden would remain on the party making to the motion to establish that class membership. (**See *People* v. *Bell*** (2007) 40 Cal.4th 582, 600; ***People* v. *Riccardi*** (2012) 54 Cal.4th 758, 796, fn. 17 [declining to use juror in comparative analysis who defense claimed on appeal was Caucasian but who did not state her race in the questionnaire].) Conversely, if the party who initially challenged the juror wants to rely on the class membership of the *other* jurors to defeat a ***Batson-Wheeler*** claim, then it would be incumbent on that party to establish the class membership of those jurors.

Sometimes, this burden can be met because, notwithstanding the implication in ***Wheeler*** that such questions might be inappropriate, the juror questionnaires ask individuals to identify their racial, ethnic, or religious background. Moreover, sometimes it is unnecessary, at least in the context of alleged racial discrimination, to "establish the true racial identity of the challenged jurors" since discrimination is more often based on appearances than verified racial descent, and a showing that the party challenging the jurors was systematically excusing persons based on "appearances" could still establish a prima facie case. (***People* v. *Bell*** (2007) 40 Cal.4th 582, 599; ***People* v. *Motton*** (1985) 39 Cal.3d 596, 604; **see also** Code of Civ. Proc, § 231.5; Gov. Code, § 11135(f) ["As used in this section, 'race, national

origin, ethnic group identification, religion, age, sex, sexual orientation, color, or disability' includes a perception . . . that the person is . . . is perceived to have, any of those characteristics."].)

However, membership in some cognizable classes is difficult to ascertain. For example, in ***People* v. *Gutierrez*** (2017) 2 Cal.5th 1150, the trial court stated, "we're not in a position to determine whether" a juror whom the prosecutor noted had white skin, red hair, and did not appear to be Hispanic but who had a Hispanic surname "might be Hispanic." (Id. at p. 1156, fn. 2.) In ***People* v. *Cunningham*** (2015) 61 Cal.4th 609, the defense argued that one of the jurors who was challenged by the prosecution was African-American even though the juror self-identified as a Caucasian-American, "Danish" and "Dane" in his jury questionnaire. (***Id***. at p. 662.) In ***People* v. *Banks*** (2014) 59 Cal.4th 1113, the prosecution identified one juror as "Armenian" and another as of an "uncertain racial background" while the defense counsel claimed those same jurors were, respectively, white and Hispanic. (***Id***. at p. 1144.) In ***People* v. *Neuman*** (2009) 176 Cal.App.4th 571, the defense initially thought a prospective juror was Hispanic based on counsel's belief the juror had a Latino accent even though the juror did not have a Hispanic last name, did not appear to have an identifiable ethnicity, and counsel later appeared to agree with the judge the juror's accent was "Southern" not Latino. In that same case, the trial judge guessed a different juror was Southeast Asian based on her last name but defense counsel thought of the juror as Middle-Eastern). (***Id***. at p. 573.) In ***United States* v. *Guerrero*** (9th Cir. 2010) 595 F.3d 1059, neither of the attorneys nor the judge knew the race/ethnicity of a juror who was subject to a challenge. The juror questionnaires were redacted to remove the race/ethnicity of jurors before they were provided to counsel. The defense thought the juror might have been Native American or Latina but the juror self-identified as a Hawaiian/Pacific Islander. (***Id***. at p. 1063.) In ***People* v. *Bell*** (2007) 40 Cal.4th 582, a case where the defense attempted to claim the prosecution was discriminating against lesbians, the court pointed out that "sexual orientation is usually not so easily discerned from appearance. Without any definite indication that the challenged prospective jurors either were lesbians or that the prosecutor believed them to be such, no prima facie case of discrimination against lesbians as a group can be made." (***Id***. at p. 599.) Similarly, in ***In re Freeman*** (2006) 38 Cal.4th 630, a case where the defense tried to claim the prosecution was discriminating against Jews, the ***Batson-Wheeler*** claim failed because there was an insufficient showing that challenged prospective jurors either were Jewish or were thought to be so by the prosecutor. (***Id***. at pp. 644-645.) Unfortunately, the courts do not provide much guidance in how to ascertain membership in a cognizable class short of directly asking the juror. (**See *People* v. *Wheeler*** (1978) 22 Cal.3d 258, 263.) If such a question needs to be asked, it may be better to have the court make the inquiry.

If the prosecutor who challenged the juror genuinely did not realize the juror was a member of the cognizable class at issue at the time of making the challenge, the prosecutor should state this on the record. This cuts against a finding of impermissible bias. (***Hernandez* v. *New York*** (1991) 500 U.S. 352, 369 [prosecutor's claim that he did not know which jurors were Latinos "could be taken as evidence of the prosecutor's *sincerity*" in exercising challenges, emphasis added]; ***People* v. *Barber*** (1988) 200 Cal.App.3d 378, 394 ["a bona fide showing by the prosecutor, reasonably accepted by the trial court, that he or she did not believe or recognize a prospective juror as being a member of a particular cognizable class . . . effectively resolves the issue in favor of the prosecution"]; ***Sifuentes* v. *Brazelton*** (9th Cir. 2016) 815 F.3d 490, 499 ["a trial court can reasonably credit a prosecutor's reasons when there is some evidence of sincerity, such as that the prosecutor "did not know which jurors were Latinos"]; **but see *People* v. *Arellano*** (2016) 245 Cal.App.4th 1139, 1167 [finding fact prosecutor refused to concede that one of the jurors challenged was African-American despite the trial court's conclusion to the contrary "undermine[d] his subsequent claim that he excused her because of the race-neutral reason of her prior interaction with the police."]; **cf**., ***Murray* v. *Schriro*** (9th Cir. 2014) 745 F.3d 984, 1010 [although prosecutor's statements, made while questioning the background of the challenged juror, that the prosecutor could not recall if the potential juror appeared to talk Hispanic" and that her maiden name, Garcia, could have been Spanish, as opposed to Hispanic, "may appear clumsy and politically incorrect," that did not alone prove that a racial motivation was underlying the prosecutor's exercise of his peremptory challenges].)

11. Is the fact the *venire panel* does not contain any members of the cognizable group at issue relevant to a *Batson-Wheeler* motion?

The fact that a *venire panel* does not contain jurors of a cognizable class is irrelevant to the issues raised in a ***Batson-Wheeler*** motion. When it comes to ***Batson-Wheeler*** motions, courts "do not hold against the government the fact that the panel lacked African–American members." (***Briggs* v. *Grounds*** (9th Cir. 2012) 682 F.3d 1165, 1168, fn. 1; ***United States* v. *Collins*** (9th Cir. 2009) 551 F.3d 914, 920.)

12. Does the fact there has been a prima facie case made out as to one cognizable class bear on whether a prima facie case has been made out as to another cognizable class?

In ***United States* v. *Mitchell*** (9th Cir. 2007) 502 F.3d 931, the court recognized that the relevant circumstances surrounding strikes can include a prima facie case of discrimination as to *another* cognizable group. (***Id***. at p. 957; **see also *Fernandez* v. *Roe*** (9th Cir.2002) 286 F.3d 1073, 1079 [where defense was claiming there was prima facie case made regarding both African-American and Hispanic jurors, court considered fact prosecutor had engaged in acts creating inference of discrimination involving Hispanics and been warned by trial judge not to strike any more Hispanics in finding inference prosecutor also improperly challenged African-Americans].)

B. How Many Jurors in a Cognizable Class Must be Challenged Before the Burden of Making out a Prima Facie Case Will be Met?

1. Can the removal of a single juror establish a prima facie case?

Whether the removal of a single juror can establish a prima facie case of discrimination has been the subject of some confusion.

On the one hand, it has often been stated that simply pointing out that the prosecutor has challenged one or more members of a particular cognizable class is insufficient to show a prima facie case of discrimination. (**See *People* v. *Sanchez*** (2016) 63 Cal.4th 411, 436 ["Exercising two of eight peremptory challenges to excuse two of the five Hispanic prospective jurors then subject to challenge did not itself provide an inference of discriminatory purpose" as "[t]he prosecution had not excused most or all of the group and did not use a significantly disproportionate number of strikes against that group"]; ***People* v. *Cunningham*** (2015) 61 Cal.4th 609, 658-665 [prosecutor's use of three of eight (or 38 percent) of his peremptory challenges to excuse African–American prospective jurors did not support an inference of bias, particularly where the other two African–American prospective jurors were passed and seated on the jury]; ***People* v. *Harris*** (2013) 57 Cal.4th 804, 835 [insufficient showing to raise inference of discriminatory purpose based on exclusion of two of three African-American jurors]; ***People* v. *Edwards*** (2013) 57 Cal.4th 658, 698 [defense counsel's assertion that a challenged juror was black and there appeared to be only one other Black prospective juror is insufficient to establish a prima facie case]; ***People* v. *Clark*** (2011) 52 Cal.4th 856, 905 [no prima facie case where prosecutor challenged four of five African–American prospective jurors]; ***People* v. *Taylor*** (2010) 48 Cal.4th 574, 643 [fact prosecutor exercised three of ten peremptory challenges to excuse two African-American prospective jurors and one Hispanic prospective juror "without more, is insufficient to create an inference of discrimination, especially where, as here, the number of peremptory challenges at issue is so small"]; ***People* v. *Hawthorne*** (2009) 46 Cal.4th 67, 79-80, [no prima facie showing where the defendant's motion was based solely on the assertion that the prosecutor used three of 11 peremptories to excuse African-American prospective jurors]; ***People* v. *Hoyos*** (2007) 41 Cal.4th 872, 901 [no prima facie case where prosecutor challenged three of the only four Hispanics on the panel]; ***People* v. *Bonilla*** (2007) 41 Cal.4th 313, 343-344 [excusal of three

out of four Hispanics, in a case where defendant was also Hispanic, did not create a prima facie case]; ***People v. Lancaster*** (2007) 41 Cal.4th 50, 76 [excusal of three of seven African-American females insufficient to create a prima facie case]; ***People* v. *Bell*** (2007) 40 Cal.4th 582, 598 [excusal of two out of three African-Americans did not create prima facie showing]; ***People* v. *Yeoman*** (2003) 31 Cal.4th 93, 115, [prima facie case not established by cursory reference to prosecutor's strike of three prospective jurors by name, number, occupation and race]; ***People* v. *Farnam*** (2002) 28 Cal.4th 107, 136-137[insufficient showing where defendant's only "stated bases for establishing a prima facie case were that (1) four of the first five peremptory challenges exercised by the prosecution were" [members of the same cognizable class], and (2) a very small minority of jurors on the panel were [members of that class]"]; ***People* v. *Box*** (2000) 23 Cal.4th 1153, 1188-1189 [insufficient showing where the "only basis for establishing a prima facie case cited by defense counsel was that the [three] prospective jurors-like defendant-were" of the same cognizable class]; ***People* v. *Jones*** (2017) 7 Cal.App.5th 787, 803 ["the prima face showing is not made merely by establishing that an excluded juror was a member of a cognizable group"]; ***People* v. *Buckley*** (1997) 53 Cal.App.4th 658, 665 [no prima facie case just because two defendants and two challenged jurors were all African-American even though nothing in jurors' questionnaires or oral responses indicated particular reason that they would be unsuitable].) This is especially true where the prosecutor has passed on a panel containing one or more members of the cognizable class in issue. (**See *People* v. *Streeter*** (2012) 54 Cal.4th 205, 223 [fact three out five African-American jurors bumped by prosecution insufficient to establish prima facie case – even though 28% of the jurors called into the box were African American but the prosecutors used 60% of his challenges against such jurors]; ***People* v. *Dement*** (2011) 53 Cal.4th 1, 19-21 [no prima facie case where prosecutor challenged 10 out of 13 peremptories against females]; ***People* v. *Cornwell*** (2005) 37 Cal.4th 50, 70 [no prima facie case where prosecutor challenged one out of two African–American prospective jurors]; ***People* v. *Adanandus*** (2007) 157 Cal.App.4th 496, 503[no prima facie case established by simply asserting prosecutor challenged three Black prospective jurors].)

On the other hand, it has been said "the unconstitutional exclusion of even a single juror on improper grounds of racial or group bias requires the commencement of jury selection anew[.]" (***People* v. *Reynoso*** (2003) 31 Cal.4th 903, 927, fn. 8; accord ***People* v. *Gutierrez*** (2017) 2 Cal.5th 1150, 1157 ["the exercise of even a single peremptory challenge ***solely*** on the basis of race or ethnicity offends" both the federal and state constitution, emphasis added]; **see also *Snyder* v. *Louisiana*** (2008) 552 U.S. 472, 478 ["[T]he Constitution forbids striking even a single prospective juror for a discriminatory purpose]"; ***Flowers* v. *Mississippi*** (2019) 139 S.Ct. 2228, 2244 [same]; ***Foster* v. *Chatman*** (2016) 136 S.Ct. 1737, 1747 [same].) And, to be sure, the ultimate issue to be addressed on a ***Wheeler-Batson*** motion "is not whether there is a pattern of systematic exclusion; rather, the issue is whether a particular prospective juror has been challenged because of group bias." (***People* v. *Bonilla*** (2007) 41 Cal.4th 313, 343; ***People* v. *Bell*** (2007) 40 Cal.4th 582, 598, fn. 3; ***People* v. *Avila*** (2006) 38 Cal.4th 491, 549; **see also *People* v. *Cunningham*** (2015) 61 Cal.4th 609, 664 [it is incorrect to state standard for prima facie case is a showing of "no systematic pattern of exclusion" rather than no inference of discriminatory purpose].)

Language from the California Supreme Court in ***People* v. *Bell*** (2007) 40 Cal.4th 582, however, provides a basis for explaining these two somewhat inconsistent perspectives. The general rule is that if the defense can show a prosecutor has challenged a single juror for a discriminatory purpose, there has been a ***Batson-Wheeler*** violation. However, if the court is being asked to "draw an inference of discrimination from the fact one party has excused 'most or all' members of the cognizable group," and that is the ***sole basis*** provided for the inference to be drawn, the court is "necessarily relying on an apparent pattern in the party's challenges." (***Bell***, at p. 598, fn. 3; **accord *People* v. *Bonilla*** (2007) 41 Cal.4th 313, 343.) In ***that*** situation, while it is possible to imagine circumstances "in which a prima facie case could be shown on the basis of a single excusal, in the ordinary case . . . to make a prima face case after the excusal of only one or two members of a group is very difficult." (***Bell***, at p. 598, fn. 3; **accord *People* v. *Bonilla*** (2007) 41 Cal.4th 313, 343 ["[s]uch a pattern will be difficult to discern when the number of challenges is extremely small"]; **see also *People* v. *Hamilton*** (2009) 45 Cal.4th 863, 899 [agreeing with trial judge that the challenge of the only African-

American subject to challenge was insufficient *in and of itself* to suggest a pattern]; **accord *Wade* v. *Terhune*** (9th Cir. 2000) 202 F.3d 1190, 1198.) This is because, as a practical matter, "the challenge of one or two jurors can rarely suggest a *pattern* of impermissible exclusion." (***People* v. *Harris*** (2013) 57 Cal.4th 804, 835; ***People* v. *Lopez*** (2013) 56 Cal.4th 1028, 1049; ***People* v. *Bell*** (2007) 40 Cal.4th 582, 598; **accord *People* v. *Garcia*** (2011) 52 Cal.4th 706, 744-750 [noting it is "'impossible,' as a practical matter, to draw the requisite inference where only a few members of a cognizable group have been excused and no indelible pattern of discrimination appears" and declining to do so based simply on fact prosecutor excused three women].)

In sum, where there are a very small number of panelists falling into the cognizable class, it is "impossible" to draw an inference of discrimination from the fact that the prosecutor challenged a large percentage of the panelists falling into the class. (***People* v. *Woodruff*** (2018) 5 Cal.5th 697, 750 [two of three]; ***People* v. *Lopez*** (2013) 56 Cal.4th 1028, 1049 [two of four]; ***People* v. *Bell*** (2007) 40 Cal.4th 582, 598 [two of three]; ***People* v. *Bonilla*** (2007) 41 Cal.4th 313, 343 [two of two]; **but see *Shirley* v. *Yates*** (9th Cir. 2015) 807 F.3d 1090, 1101 [fact prosecutor struck two of three black venire members not removed for cause sufficient to establish prima facie case]; ***Johnson* v. *Finn*** (9th Cir. 2012) 665 F.3d 1063, 1070 [fact that three of the prosecution's peremptory challenges were exercised against the only three African–Americans in the jury pool is enough to establish a prima facie case of racial discrimination].)

2. Should prosecutors concede a prima facie case where multiple jurors belonging to a cognizable class have been challenged by the prosecutor?

San Francisco ADA Jerry Coleman believes, as a practical matter, that prosecutors can expect a trial court to find a prima facie case when two panelists of a cognizable class are challenged - or even when only a single panelist of a cognizable class has been challenged but there has been no voir dire of that panelist or the panelist is the only member of the cognizable class at issue in the jury venire. (**But see *People* v. *Sattiewhite*** (2014) 59 Cal.4th 446, 470 [the fact a prosecutor challenged the only member of a cognizable class, "standing alone, is not dispositive" in making out a prima facie case].) Accepting this possibility does not mean, however, that in those circumstances, the prosecutor should simply concede the issue of whether a prima facie case has been made out.

To the contrary, "[w]hen a ***Wheeler*** motion is made, the party opposing the motion should be given an opportunity to respond to the motion, i.e., to argue that no prima facie case has been made." (***People* v. *Fuentes*** (1990) 54 Cal.3d 707, 716, fn. 5.) And courts routinely find that, in the absence of any evidence ***other than*** sheer numbers, the fact multiple members of a cognizable group have been challenged does not meet the burden of making a prima facie case. (**See *People* v. *Lopez*** (2013) 56 Cal.4th 1028, 1049 [excusal of two out of four African-Americans did not create prima facie case]; ***People* v. *Bonilla*** (2007) 41 Cal.4th 313, 343-344 [excusal of three out of four Hispanics, in a case where the defendant was also Hispanic, did not create a prima facie case]; ***People* v. *Box*** (2000) 23 C.4th 1153, 1185 [no prima facie case where basis for claim was that two prospective jurors were both African-American and so was the defendant]; ***People v. Welch*** (1999) 20 Cal.4th 701, 746 [no prima facie case where challenges made to 4 black jurors where there were three black jurors and two black alternates seated at the time]; ***People* v. *Jones*** (1998) 17 Cal.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 Cal.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. *Buckley*** (1997) 53 Cal.App.4th 658, 665 [although two defendants and two challenged jurors were African-American, and nothing in jurors' questionnaires or oral responses indicated particular reason that they would be unsuitable, trial court finding of no prima facie case nevertheless upheld]; ***People* v. *Christopher*** (1991) 1 Cal.App.4th 666, 672, 673 [challenge of one or two prospective jurors of same racial or ethnic group as defendant, even when panel contains no other members of group, does not establish prima facie case unless there is significant supporting evidence]; ***People* v. *Allen*** (1989) 212 Cal.App.3d 306, 312, 313 [exclusion of disproportionate number of minority jurors does not by itself establish prima facie case; ***Wheeler***

motion properly denied where record showed neutral grounds for each of nine peremptory challenges against Blacks and Hispanics].)

Moreover, in light of the presumption that a prosecutor exercising a peremptory challenge is doing so on a constitutionally permissible ground (***People* v. *Salcido*** (2008) 44 Cal.4th 93, 136; ***People* v. *Cleveland*** (2004) 32 Cal.4th 704, 732), and the fact that a prosecutor's excusal of ***all*** members of a cognizable group is not ***conclusive*** to such a showing (***People* v. *Hoyos*** (2007) 41 Cal.4th 872, 901; ***People* v. *Neuman*** (2009) 176 Cal.App.4th 571, 575), it is appropriate to hold the defense to its burden at this first step.

However, if a prosecutor challenges *all three* members of a cognizable class *and* the challenges are made at a rate far higher than their percentage in the overall jury pool, this will "certainly justify the trial court's finding of a prima facie case." (***People* v. *Melendez*** (2016) 2 Cal.5th 1, 15; **compare *People* v. *Young*** (2005) 34 Cal.4th 1149, 1172, fn. 7 [defendant failed to make a prima facie showing based on prosecution's excusal of three African–American female jurors where that was the only basis for the prima facie showing]; **accord *People* v. *Jones*** (2017) 7 Cal.App.5th 787, 804.)

C. What Kind of Evidence is Relevant to Whether a Prima Facie Showing Has Been Made?

Below is a list of the kinds of evidence or analysis that is relevant to deciding whether a prima facie case at the first stage has been established. Note, however, much of this evidence and analysis is ***also*** relevant in determining whether a prosecutor has properly exercised his challenges at the third stage. (**See *People* v. *Jones*** (2011) 51 Cal.4th 346, 362.) However, the *weight* to be given statistical factors in establishing a prima facie case at the first stage may be of less significance at the third stage. (**See *People* v. *Smith*** (2018) 4 Cal.5th 1134, 1147.) Some types of evidence or analysis, while mentioned in this section, will be discussed in greater depth in the portion of the outline dealing with the third stage of a ***Batson-Wheeler*** motion. (**See** this outline, section IX at pp. 98-132.)

1. Whether the prosecutor has struck most or all members of the identified group from the venire

In deciding whether a prima facie case has been made, it is proper to consider whether the prosecutor "has struck most or all of the members of the identified group from the venire[.]" (***People* v. *Wheeler*** (1978) 22 Cal.3d 258, 280; **accord *People* v. *Clark*** (2012) 52 Cal.4th 856, 905; ***People* v. *Bell*** (2007) 40 Cal.4th 582, 597.) For example, in ***Snyder* v. *Louisiana*** (2008) 552 U.S. 472, the court took into consideration that the prosecutor had challenged all five prospective African–American jurors, resulting in none on the actual jury, in finding the prosecutor had improperly challenged one of those jurors. (***Id***. at p. 476.) In ***Miller–El* v. *Dretke*** (2005) 545 U.S. 231, the court took into consideration the fact the prosecutor challenged nine of 10 prospective African–American jurors, leaving only one on the jury, in finding the prosecutor had engaged in purposeful discrimination. (***Id***. at pp. 240–241.) And in ***Johnson* v. *California*** (2005) 545 U.S. 162, an inference of discrimination, sufficient to satisfy prima facie standard, arose where prosecutor in interracial murder case used three of 12 peremptory challenges to remove all eligible African–American prospective jurors from a pool of 43. (***Id***. at p. 173.)

Conversely, in ***People* v. *Blacksher*** (2011) 52 Cal.4th 769, the court held that the challenge to two African-American jurors did not establish a prima facie case where, inter alia, the prosecutor did not challenge several other African–American jurors, and six ultimately served on the jury. (***Id***. at p. 802.)

Moreover, where there is a small number of members of the group in question, "the bare circumstance" that all members of the group were struck, will be insufficient to support an inference of discriminatory intent. (**See *People* v. *Parker*** (2017) 2 Cal.5th 1184, 1212 [no inference of discrimination based on striking both African-American members of 136-member jury pool];

Editor's Note: Many of the long list of cases cited in support of the proposition that simply challenging multiple members of a cognizable class does not create a prima facie showing simultaneously involved challenges to most or all members of the cognizable class in the venire. (**See** this outline, section VII-B-2 at p. 38.)

The Ninth Circuit is more likely to rely on the exclusion of most or all members of a cognizable class as establishing a prima facie case of discriminatory intent than are California courts. (**See *Shirley* v. *Yates*** (9th Cir. 2015) 807 F.3d 1090, 1101 ["The fact that a prosecutor peremptorily strikes all or most veniremembers of the defendant's race—as was the case here—is often sufficient on its own to make a prima facie case at Step One"; and finding fact prosecutor struck two of three African-American jurors was enough to meet the standard]; ***Ayala* v. *Wong*** (9th Cir. 2012) 693 F.3d 945, 964 [revs'd in ***Davis* v. *Ayala*** (2015) 135 S.Ct. 2187] [the fact "the prosecution struck each of the seven black or Hispanic jurors available for challenge establishes a basis for significant doubt of its motives" as "[h]appenstance is unlikely to produce this disparity"]; ***Johnson* v. *Finn*** (9th Cir. 2012) 665 F.3d 1063, 1070 [the fact that three of the prosecution's peremptory challenges were exercised against the only three African–Americans in the jury pool is enough to establish a prima facie case of racial discrimination]; ***Paulino* v. *Castro*** (9th Cir. 2004) 371 F.3d 1083, 1091 [finding a prima facie showing where "the prosecution had struck five out of six possible black jurors"];***Williams* v. *Runnels*** (9th Cir.2006) 432 F.3d 1102, 1103-1107 [prosecutor's use of three of his first four peremptories against African-American jurors where only four of the first 49 prospective jurors were African-American was a statistical disparity that alone could create a prima facie showing albeit recognizing other facts could dispel the presumption]; **cf.**, ***Jamerson v. Runnels*** (9th Cir. 2013) 713 F.3d 1218, 1236 [fact prosecutor struck 10/12 African-American jurors did not prove discriminatory intent].)

It is important to remember that in calculating whether a prosecutor has struck some or all the members of a particular cognizable class, it is proper for a court to take into consideration whether a prosecutor would have kept a member of the cognizable class at issue had they not been challenged for cause or for hardship. (**See *People* v. *Jones*** (2011) 51 Cal.4th 346, 362 [noting this is a factor at both the first and third stage of analysis].)

Editor's Note: For a lengthier explanation of this factor, see this outline VII-C-8 at p. 47.

Thus, prosecutors should make sure not only to place on the record whether members of the cognizable class at issue end up sitting on the jury, but whether they would have kept members of the class who were removed by a cause challenge or for hardship purposes.

When the challenges are made can also play a role. Thus, in ***People* v. *Parker*** (2017) 2 Cal.5th 1184, the court distinguished a case relied upon by the defense wherein the prosecutor used three of his *first* four challenges against African-Americans (***Williams* v. *Runnels*** (9th Cir. 2006) 432 F.3d 1102) from the case before it – where the prosecutor used two of 22 challenges (the fourth and seventeenth) in finding no impermissible use. (***Id***. at p. 1212.)

2. Whether the prosecutor has used a disproportionate number of peremptory challenges against the identified group

In deciding whether a prima facie case has been made, it is proper to consider whether the prosecutor "has used a disproportionate number of his peremptories against the group[.]" (***People* v. *Wheeler*** (1978) 22 Cal.3d 258, 280; **see also *Miller-El* v. *Dretke*** (2005) 545 U.S. 231, 240-241 [court may consider the total number of members of a protected class who are in the jury panel in comparison to the number of members of the class who actually sit on the jury; a large disparity supports a finding of discriminatory use].) If the prosecutor has used a high percentage of his challenges against members of the cognizable class, this can be viewed as evidence of a discriminatory purpose. (**See *People* v. *Hall*** (1989) 208 Cal.App.3d 34, 45 [citing cases using a disproportionality analysis to assess whether prima

face case was made].) On the other hand, if the prosecutor has ***not*** used a high percentage of his or her challenges against members of the cognizable class, this can be viewed as evidence of ***non***-discriminatory use. (**See e.g.**, ***People* v. *Welch*** (1999) 20 Cal.4th 701, 746 ["the fact that the prosecution exercised only three of its eleven peremptory challenges on Black prospective jurors," while not conclusive, weighed in favor of finding *no* prima facie showing].)

The disparity must be relatively large in order to allow an inference of discrimination to be made. (**See *People* v. *Johnson*** (2019) 8 Cal.5th 475 [255 Cal.Rptr.3d 393, 422] [no inference arose where prosecutor had used 20 percent of his strikes on African-American jurors — 3 of 15 — despite the proportion of African-American jurors on the panel being 12 percent — 5 of 41 and prosecutor's excusal rate for African-American jurors was 60 percent — 3 of 5 — whereas his exclusion rate for the rest of the panel was 34 percent — 12 of 35]; ***People* v. *Reed*** (2018) 4 Cal.5th 989, 1000 [no inference of discrimination arose where African-Americans made up 34% of jury pool and prosecutor used 46% of strikes against African-Americans]; ***People* v. *Thomas*** (2012) 53 Cal.4th 771, 796 [where African–Americans constituted 26 percent of the prospective jurors who had been called into the jury box (15 out of 61) and the prosecutor had exercised 37 percent of his challenges (6 out of 16) against African–Americans, disparity was not significant enough, in itself, to suggest discrimination]; ***People* v. *Dement*** (2011) 53 Cal.4th 1, 19-21 [no prima facie case of gender discrimination where 20 of the 40 prospective jurors subject to peremptory challenge were female, and prosecutor used 10 of 13 challenges against females]; ***People* v. *Carasi*** (2008) 44 Cal.4th 1263, 1291, 1295 [no prima facie case of gender discrimination even though prosecutor used 20 out of 23 peremptory challenges against female prospective jurors]; ***People* v. *Bonilla*** (2007) 41 Cal.4th 313, 345 [no prima facie case of gender discrimination even though women represented 38 percent of the jury pool and the prosecutor used 67 percent of his strikes against women]; **cf.**, ***People* v. *Banks*** (2014) 59 Cal.4th 1113 [no showing at third stage that prosecutor exercised challenges improperly even though prosecutor used 45% of challenges against black jurors but black jurors only made up 33% of the venire where, inter alia, half of final jury panel consisted of black jurors].)

Moreover, where there is a small sample size, disparities carry "relatively little information" and a small absolute sample size can render such an analysis uninformative. (**See *People* v. *Johnson*** (2019) 8 Cal.5th 475 [255 Cal.Rptr.3d 393, 422]; ***People* v. *Harris*** (2013) 57 Cal.4th 804, 835.) Thus, in ***People* v. *Bell*** (2007) 40 Cal.4th 582, the fact that the prosecutor had used two of his 16 peremptory challenges (12.5%) against members of the cognizable class in issue, when only three of the 47 prospective jurors (6.4%) belonged to that class, was of little use in establishing an inference of discrimination, notwithstanding the former figure was almost twice the latter figure. (***Id.*** at pp. 597-598; **see also *People* v. *Parker*** (2017) 2 Cal.5th 1184, 1212 [where prosecution excused both members of group but where only 2 members in panel of 136, court found the "absolute size of this sample ma[d]e drawing an inference of discrimination from this fact alone impossible"]; ***People* v. *Pearson*** (2013) 56 Cal.4th 393, 422 [prosecutor's use of one of two peremptory challenges (50 percent) against a group comprising only 12.5 percent of the 24–member panel did not appear "suspicious"]**;** ***Wade* v. *Terhune*** (9th Cir. 2000) 202 F.3d 1190, 1198 [significance "limited" where corresponding ratios were "four of sixty-four (or 6%)" (proportion of group in pool) and "one of three (or 33%)" (proportion of challenges exercised against group)].) The California Supreme Court in ***People* v. *Bell*** (2007) 40 Cal.4th 582 cautioned that a "more complete analysis of disproportionality compares the proportion of a party's peremptory challenges used against a group to the group's proportion in the pool of jurors subject to peremptory challenge." (***Id.*** at p. 598, fn. 4.)

In addition, courts will not find "disproportionate use" where a relatively small percentage of a prosecutor's overall challenges are used against the cognizable group and/or where the percentage of jurors in the cognizable group who are challenged is roughly comparable to the percentage of jurors in the cognizable group who eventually sit on the jury. For example, in ***People* v. *Jones*** (2011) 51 Cal.4th 346, the court discounted any inference of discriminatory purpose where the prosecutor challenged 60% (3 of 5) of the African–American prospective jurors, but the prosecutor only used three of his total 22 peremptory challenges against African–Americans before accepting a jury, including alternates, that contained two African–Americans out of 18 – i.e., where the prosecutor challenged African–Americans at a rate only

slightly higher than their percentage on the jury. (***Id***. at pp. 362.) In ***People* v. *Clark*** (2012) 52 Cal.4th 856, the defense argued that a prima facie case had been made out because the prosecution had struck four of the five African-American jurors on the panel and because the prosecutor had used 20 percent of his total peremptory challenges (four of 20) to excuse 80 percent of the eligible African–Americans (four of five), even though African–Americans comprised only 5 percent of the jury panelists not excused for cause. However, the court rejected this argument as, "[s]tanding alone, defendant's statistics do not raise an inference of discrimination," and noted that "African–Americans comprised 5 percent of the jury pool but represented nearly 10 percent of the selected jury." (***Id***. at p. 905; **see also *People v. Bonilla*** (2007) 41 Cal.4th 313, 344 [finding no inference of discrimination against Hispanics, where Hispanics comprised 10% of jury pool, prosecution used 10 percent of its challenges on Hispanics (three of 30), and the final jury was roughly 10 percent Hispanic (1 of 12)].)

Finally, where there is no *other* reason to suspect group bias, courts should be "less inclined to find a prima facie case based solely on the prosecutors' disproportionate use of peremptories against one group." (***People* v. *Rhoades*** (2019) 8 Cal.5th 393 [255 Cal.Rptr.3d 453, 491].)

Prosecutors should consider placing on the record the number of members of the identified group in the jury box and panel as needed to show they have **not** used a disproportionate number of their challenges against members of the cognizable class. (**See *People* v. *Manibusan*** (2013) 58 Cal.4th 40, 80 [finding no inference of discrimination because, inter alia, "the record does not show that the prosecution used a disproportionate number of its peremptory challenges against members of" the ethnic group at issue].)

Moreover, if the defense is relying on the fact that the prosecution disproportionately challenged members of the cognizable class at issue as evidence of discriminatory intent, the court can take into account how the defense is using its own challenges because that can distort the statistical picture. As pointed out by the California Supreme Court in ***People* v. *Banks*** (2014) 59 Cal.4th 1113, if the defense counsel is exercising challenges in a way that makes it statistically more probable that the prosecutor would have to strike members of the cognizable class, this fact provides relevant contextual evidence that may be considered by the court. (***Id***. at p. 1147.) In ***Banks***, it was proper to consider the fact that defense counsel had exercised only one of her 10 peremptory challenges against a black juror because that increased the percentage of blacks remaining on the panel, thus increasing the likelihood that the prosecutor would exercise a disproportionate share of his peremptory challenges against black jurors for entirely permissible reasons." (***Id***. at pp. 1147.)

Editor's Note: Disproportionate exclusion of members of a cognizable class may also be considered at the third stage in assessing whether a prosecutor's stated reason constitutes a pretext for racial discrimination. (**See *People* v. *Chism*** (2014) 58 Cal.4th 1266, 1315 [fact prosecutor used 15.4 percent of her challenges (two of 13) to remove 40 percent (two of five) or 50 percent (two of four) of the available African–Americans (who represented approximately 6.7 or 8.5 percent of the venire) and sole African–American on the jury represented 8.3 percent of the jury, approximately the same percentage of African–Americans on the venire did not suggest improper discrimination].) However, "the statistical showing that motivated the finding of a prima facie case is not dispositive at [the] third stage." (***People* v. *Smith*** (2018) 4 Cal.5th 1134, 1147.) "Rather, '[a]t the third stage of *Batson*, the "critical question … is the persuasiveness of the prosecutor's justification for his peremptory strike."'" (***Smith*** at p. 1147 citing to ***Miller-El* v. *Cockrell*** (2003) 537 U.S. 322, 338–339.)

3. Whether the jurors removed share only their membership in the cognizable group, but in all other respects have little in common

In deciding whether a prima facie case has been made, it is proper to consider whether "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[.]" (***People* v. *Wheeler*** (1978) 22 Cal.3d 258, 280; ***People* v. *Bell*** (2007) 40 Cal.4th 582, 597.) That is, a court can consider whether, aside from their group membership, the jurors have little in common. (***People* v. *Clark*** (2012) 52 Cal.4th 856, 905-906; **see also *People* v. *Yeoman*** (2003) 31 Cal.4th 93, 115 [finding no prima facie showing because, inter alia, defense counsel made no effort to discuss prospective juror's individual characteristics].)

However, as pointed out in ***People* v. *Thomas*** (2012) 53 Cal.4th 771, even if challenged jurors have nothing in common besides their race, "this circumstance does not, in itself, create an inference of" discrimination where "obvious bases for the prosecutor's decision to excuse many of the jurors appear in the record[.]" (***Id***. at p. 795.)

If the jurors who were removed shared *more* in common (when it comes to characteristics relevant to the prosecutor's concerns about their "favorability" as jurors) than just membership in the cognizable class, the prosecutor should point this out to the court. (**See *People* v. *Bell*** (2007) 40 Cal.4th 582, 599 [considering fact defense failed to show that in respects other than their ethnic background or national origin the challenged members of the cognizable class were especially heterogeneous in finding no inference of discrimination]; ***People* v. *Clark*** (2012) 52 Cal.4th 856, 906 [noting defendant had pointed to nothing in the record suggesting that the four challenged jurors shared no characteristics other than their race in finding no prima facie case was made]; ***People* v. *Trevino*** (1997) 55 Cal.App.4th 396, 411 [finding the trial court properly denied ***Wheeler*** motion where challenged jurors shared a characteristic besides being Hispanic, i.e., the juror or juror's spouse had a connection with an organization providing health care -mental or physical].)

4. Whether the prosecutor failed to engage the identified jurors in any, desultory, or disparate questioning

In deciding whether a prima facie case has been made, it is proper to consider whether the prosecutor failed "to engage these same jurors in more than desultory voir dire, or indeed to ask them any questions at all" (***People* v. *Wheeler*** (1978) 22 Cal.3d 258, 281; ***People* v. *Bell*** (2007) 40 Cal.4th 582, 597; **accord *People* v. *Clark*** (2012) 52 Cal.4th 856, 906; **see also *People* v. *Yeoman*** (2003) 31 Cal.4th 93, 115 [finding no prima facie showing because, inter alia, defense counsel made no effort to discuss nature of prosecutor's voir dire or juror's answers].) "A failure to engage in meaningful voir dire on a subject of purported concern can, in some circumstances, be circumstantial evidence suggesting the stated concern is pretextual." (***People* v. *Lomax*** (2010) 49 Cal.4th 530, 573; **see also *People* v. *Lewis*** (2008) 43 Cal.4th 415, 476 [noting failure to engage in meaningful voir dire on a topic the party says was important in the decision to challenge the juror is a factor, albeit not a dispositive factor, that can suggest the stated reason is pretextual]; **but see *People* v. *Jones*** (2017) 7 Cal.App.5th 787, 805 ["there is no requirement that a prosecutor ask a prospective juror a minimum number of questions before deciding whether to accept or excuse the juror"].) On the other hand, an inference that the prosecutor's reasons *were* genuine may be drawn where the prosecutor's questioning *did* focus on the topic related to reasons provided for challenging the juror. (**See *People* v. *Riccardi*** (2012) 54 Cal.4th 758, 788 ***People* v. *Booker*** (2011) 51 Cal.4th 141, 166.)

Whether there has been disparate questioning of jurors (i.e., whether panelists belonging to the cognizable group were questioned in a dramatically different manner (more or less excessively) than panelists not belonging to the cognizable group) may also be considered in determining whether an inference of discriminatory purpose may arise. (**See *Flowers* v. *Mississippi*** (2019) 139 S.Ct. 2228, 2248; ***Miller-El* v. *Dretke*** (2005) 545 U.S. 231, 255-257;

It should be kept in mind, however, that the failure to ask many questions of a juror before challenging the juror is a factor of limited significance in cases in which juror questionnaires (especially extensive questionnaires) are used and the prosecutor is able to gather information about the jurors without directly asking them questions, i.e., by observing their responses and demeanor during individual questioning by the court and/or during group voir dire. (**See *People* v. *Reed*** (2018) 4 Cal.5th 989, 1001; ***People* v. *Edwards*** (2013) 57 Cal.4th 658, 698-699; ***People* v. *Dement*** (2011)

53 Cal.4th 1, 20; ***People* v. *Clark*** (2012) 52 Cal.4th 856, 906-907; **see also *People* v. *Taylor*** (2010) 48 Cal.4th 574, 615–616 [that the prospective juror had completed a 98–question questionnaire was notable when the prosecutor failed to ask any questions]; ***People* v. *Bell*** (2007) 40 Cal.4th 582, 598–599, fn. 5 [noting the trial court's comment that "when you have a questionnaire, it can never be a perfunctory examination'"].)

The failure to ask many questions of a juror is also of diminished significance in situations where the "attorneys [are] not permitted to question prospective jurors directly, but instead ha[ve] to ask the trial court to inquire into areas of special concern." (***People* v. *Lomax*** (2010) 49 Cal.4th 530, 573.)

Moreover, where the prosecutor engages in perfunctory questioning of some jurors and not others but there is no racial pattern to which jurors get desultory questioning, then the fact that the prosecutor engaged in limited questioning of a member of the cognizable class at issue does not provide an indication of bias. (**See *People* v. *Edwards*** (2013) 57 Cal.4th 658, 699.)

Finally, even where there has been little or no questioning about a particular subject, a party need not inquire into every possible concern that party may have regarding a prospective juror. (**See *People* v. *Jones*** (2011) 51 Cal.4th 346, 363; ***Carrera* v. *Ayers*** (9th Cir. 2012) 699 F.3d 1104, 1111 [no "desultory" questioning where prosecutor asked Hispanic-surnamed prospective jurors whether the fact that the defendant was "of Spanish descent" would affect their deliberations without asking potential white jurors similar ethnicity-based questions].)

Conversely, where the questioning is not desultory and the prosecutor takes the time to question the juror about areas of purported concern, this is evidence that will support the conclusion that the prosecutor's reasons for striking a juror are genuinely held. (**See *People* v. *Krebs*** (2019) 8 Cal.5th 265 [255 Cal.Rptr.3d 95, 124–125.) Thus, if applicable, prosecutors should make sure the record shows that the prosecutor has not engaged in "desultory questioning" of members of the cognizable class.

Editor's Note: The significance of disproportionate or desultory questioning at the third stage is discussed in this outline, section IX-I at pp. 122-126.

5. Whether the defendant is a member of the excluded group and if the alleged victim is a member of the group to which a majority of the remaining jurors belong

In deciding whether a prima facie case has been made, it is proper to consider whether the defendant is a member of the excluded group and "especially if in addition his alleged victim is a member of the group to which the majority of the remaining jurors belong" - although the court made it clear this is just a relevant factor and not a prerequisite to making the showing. (***People* v. *Wheeler*** (1978) 22 Cal.3d 258, 281; ***People* v. *Bell*** (2007) 40 Cal.4th 582, 597; **accord *People* v. *Clark*** (2012) 52 Cal.4th 856, 906; **see also *People* v. *Hardy*** (2018) 5 Cal.5th 56, 78 ["racial overtones, although again alone not dispositive, 'raise[ ] heightened concerns about whether the prosecutor's challenge was racially motivated.'"]; ***Powers* v. *Ohio*** (1991) 499 U.S. 400, 416 ["Racial identity between the defendant and the excused person might in some cases be the explanation for the prosecution's adoption of the forbidden stereotype, and if the alleged race bias takes this form, it may provide one of the easier cases to establish both a prima facie case and a conclusive showing that wrongful discrimination has occurred."]; ***People* v. *O'Malley*** (2016) 62 Cal.4th 944, 980-981 [same].) "[W]hen the race of the defendant is different from that of the victim, and the victim is a member of the group to which the majority of remaining jurors belong, this circumstance is one of many that is relevant to whether a prima facie case" exists. (***People* v. *Johnson*** (2019) 8 Cal.5th 475 [255 Cal.Rptr.3d 393, 424].) On the other hand, the fact a defendant and the challenged juror are members of the same group "alone does not establish a prima facie case of discrimination." (***People* v. *Parker*** (2017) 2 Cal.5th 1184, 1212; ***People* v. *Kelly*** (2007) 42 Cal.4th 763, 780.)

If the defendant is ***not*** a member of the cognizable class at issue, this fact should be reflected in the record because it can help show no inference of discrimination should be drawn. (**See *People* v. *Rhoades*** (2019) 8 Cal.5th 393 [255 Cal.Rptr.3d 453, 491 [finding no prima facie case established because, inter alia, juror challenged was African-American and neither defendant nor the victim were African-American so there were not "heightened concerns about whether the prosecutor's challenge was racially motivated"]; ***People* v. *Manibusan*** (2013) 58 Cal.4th 40, 80 ["significant that defendant is not a member of the prospective juror's ethnic group" in finding no inference of discrimination should be drawn]; ***People* v. *Dement*** (2011) 53 Cal.4th 1, 20 [fact defendant was not a member of the cognizable class was a factor that, because it was absent, failed to support an inference of discrimination]; ***People* v. *Bell*** (2007) 40 Cal.4th 582, 599 [considering fact defendant was ***not*** a member of any of the cognizable classes at issue in finding the prosecutor's challenges created no inference of discrimination]; ***People* v. *Neuman*** (2009) 176 Cal.App.4th 571, 581 [fact that defendant is ***not*** a member of the cognizable class can support finding of no prima facie case]; ***People* v. *Chambie*** (1987) 189 Cal.App.3d 149, 157 [noting prosecutor's statement that he did not consider the case to be one in which there was any possible motivation for excluding jurors because they were black since the case involved a black investigating officer and black victim as well as a black defendant].)

If the defense is claiming that the prosecutor has excluded members of a sub-group of a cognizable class (i.e., African-American women) but the prosecutor has not excluded members of the parallel sub-group (i.e., African-American men), this fact should be pointed out. (**See *People* v. *Bell*** (2007) 40 Cal.4th 582, 599 [considering fact prosecutor did not exercise challenges against most or all members of "parallel" group (African-American men) of the cognizable class at issue (African-American women) in finding prosecutor's challenges did not create inference of discrimination].)

6. Whether the victim or prosecution witnesses are members of the same cognizable class as the challenged juror or defendant

If the ***victim*** belongs to the same cognizable class as the challenged juror, this tends to rebut an inference of discrimination (**see *Hernandez* v. *New York*** (1991) 500 U.S. 352, 370; ***People* v. *Bell*** (2007) 40 Cal.4th 582, 599) as does the fact the victim belongs to the same group as the defendant (**see *People* v. *Thomas*** (2012) 53 Cal.4th 771, 794 [no inference of discrimination arose where two of three victims were of same race as defendant]; ***People* v. *Ortega*** (1984) 156 Cal.App.3d 63, 70 [fact all victims in case were Hispanic helped rebut allegation that prosecutor systematically excluded Hispanics from the jury].) Also, the fact the defendant is a member of the same cognizable class as the victims and *prosecution witnesses* tends to undercut any motive on the part of the prosecution to exclude members of that cognizable class. (**See *Hernandez* v. *New York*** (1991) 500 U.S. 352, 370; ***People* v. *Sanchez*** (2016) 63 Cal.4th 411, 436 [fact defendant was Hispanic, and victims murdered by defendant were not would not support an inference of discriminatory intent where many other victims of charged offenses *were* Hispanic]; ***People* v. *Jones*** (2017) 7 Cal.App.5th 787, 806 [fact the "victims of the shootings as well as the civilian witnesses who testified at trial were African–American, and thus, in the same protected class as [the defendant] and the challenged prospective jurors" supported a finding that no prima facie case had been made].)

Thus, if the victims or prosecution witnesses are members of the cognizable class as the challenged juror, or are of the same cognizable class as the defendant this fact should be reflected in the record.

7. Whether the prosecution has passed on a panel that includes members of the cognizable class and/or members of the cognizable class remained on the final jury

If a prosecutor has passed on a particular juror whom the defense claims was later improperly challenged or passed on a panel that includes members of the cognizable class, this should be mentioned as it "strongly suggests that race was not a motive behind the challenge." (***People* v. *Sanchez*** (2016) 63 Cal.4th 411, 439; ***People* v. *Gutierrez*** (2017) 2 Cal.5th

1150, 1170 [citing to ***People* v. *Lomax*** (2010) 49 Cal.4th 530, 576 and ***People* v. *Lenix*** (2008) 44 Cal.4th 602, 629]; **accord *People* v. *Reed*** (2018) 4 Cal.5th 989, 1000–1001 [fact prosecutor accepted panel with two black jurors and three ultimately sat on panel lessened inference of discrimination and a "prosecutor's decision to strike one black juror while accepting another who replaced her suggests that non-race related differences between the jurors, rather than race, explain the prosecutor's actions"]; ***People* v. *Jones*** (2017) 7 Cal.App.5th 787, 806 [fact prosecutor twice accepted a panel that included two African–American prospective jurors, *and* that these individuals were ultimately seated on the jury supported conclusion of no prima facie showing]; **see also *Gonzalez* v. *Brown*** (9th Cir. 2009) 585 F.3d 1202, 1210 [fact the prosecutor accepted an African-American juror twice before she exercised a peremptory strike to remove that juror suggests her motives for exercising the strike were not racial, especially considering the prosecutor had plenty of challenges left when she passed the second time (i.e., the prosecutor did not accept that juror twice simply because she was running low on challenges].)

However, while passing on a particular juror generally reflects a lack of discriminatory purpose in challenging that juror, "neither that acknowledgement nor the prosecutor's passes themselves wholly preclude a finding that a panelist is struck on account of bias against an identifiable group, when such a strike occurs eventually instead of immediately." (***People* v. *Gutierrez*** (2017) 2 Cal.5th 1150, 1170–1171 [reversing case for failure to show lack of discriminatory purpose based on challenge to Hispanic juror even though the prosecution passed on the juror 5 times before striking juror].)

A prosecutor's acceptance of a panel including members of the cognizable class at issue, "while not conclusive," is "'an indication of the prosecutor's good faith in exercising his peremptories, and … an appropriate fact for the trial judge to consider in ruling on a ***Wheeler*** objection….'" (***People* v. *Streeter*** (2012) 54 Cal.4th 205, 224; ***People* v. *Dement*** (2011) 53 Cal.4th 1, 20; ***People* v. *Hartsch*** (2010) 49 Cal.4th 472, 487; ***People* v. *Snow*** (1987) 44 Cal.3d 216, 225.) Numerous cases have found this factor to be significant in finding no prima facie case was met. (**See *People* v. *Streeter*** (2012) 54 Cal.4th 205, 224 [no prima facie case where prosecutor accepted jury five times with up to four African-American jurors seated in jury box]; ***People* v. *Dement*** (2011) 53 Cal.4th 1, 19, fn. 4 [noting prosecutor repeatedly passed on panel containing women in finding lack of prima facie case]; ***People* v. *Clark*** (2012) 52 Cal.4th 856, 903-908 [no prima facie case where prosecutor repeatedly passed on panel containing two African-American jurors before eventually excusing them and one African-American served on the panel]; ***People* v. *Carasi*** (2008) 44 Cal.4th 1263, 1294-1295 [no prima facie case of discrimination against females shown because, inter alia, the prosecutor repeatedly passed on panels containing numerous women]; ***People* v. *Thomas*** (2012) 53 Cal.4th 771, 796 [no prima facie case of discrimination against African-Americans where, inter alia, prosecution first passed on panel with four African-Americans and passed again where two African-Americans and one half-African-American juror was on the panel]; ***People* v. *Cornwell*** (2005) 37 Cal.4th 50, 69–70 [no inference of bias in excusing one of two African–American prospective jurors, given that the other African–American prospective juror was passed repeatedly by the prosecutor and sat on the jury]; **see also *People* v. *Phillips*** (2007) 147 Cal.App.4th 810, 814 [at third stage review, fact prosecutor passed several times on jury with prospective juror tended to support her explanation that it was later conduct by the juror, not his race, that precipitated the challenge].)

Moreover, the weight placed on the fact that one or more members of the cognizable class at issue ultimately ends up sitting on the jury panel sometimes has more to do with which judges are conducting the review than with anything else. For example, in ***Shirley* v. *Yates*** (9th Cir. 2015) 807 F.3d 1090, the court stated that while the fact "that one black juror was eventually seated does weigh against an inference of discrimination," it "only nominally" does so. (***Id***. at pp. 1101-1102, citing to ***Montiel* v. *City of L.A***. (9th Cir.1993)2 F.3d 335, 340; **see also *Castellanos* v. *Small*** (9th Cir. 2014) 766 F.3d 1137, 1149-1150 [finding ***Batson*** violation based on fact record did not support reason prosecutor gave for excusing one Hispanic juror – even though *seven* Hispanic jurors sat on final jury and prosecutor had more than enough challenges to remove them all if he so desired].)

The presence of jurors belonging to the cognizable class takes on added significance favoring a finding of proper use of peremptory challenges if the prosecutor had challenges remaining when the final jury was seated. (**See *United States* v. *Chinchilla*** (9th Cir. 1989)874 F.2d 695, 698, fn. 4 citing to ***United States* v. *Montgomery*** (8th Cir.1987) 819 F.2d 847, 851; ***United States* v. *Mikhel*** (9th Cir. 2018) 889 F.3d 1003, 1031 [noting two black jurors on the final jury and two black jurors as alternates in finding challenge to black juror was proper]; **but see *Castellanos* v. *Small*** (9th Cir. 2014) 766 F.3d 1137, 1150 [giving lip service to this factor but still disturbingly finding the fact the prosecutor left 7 jurors on the final panel belonging to the cognizable class at issue, despite having more than enough challenges to remove all of them, did not undermine a showing of purposeful discrimination].)

Editor's Note: Presumably, if the prosecutor has run out of challenges, this can diminish the significance of the fact that jurors belonging to the cognizable class remain on the panel – at least if the prosecutor exercised all his or her challenges against members of the cognizable class. The significance of the fact jurors of the cognizable class remain on the panel might also be diminished where the prosecutor has run out of challenges - even if not every challenged juror was a member of the cognizable class, where jury selection is done in a manner that the prosecutor could not have anticipated that he or she would potentially have run out of challenges before all members of the cognizable class were eliminated.

Another factor that potentially can *diminish* the significance of the fact the prosecutor left members of the cognizable class at issue on the jury is whether the prosecutor has been told any future challenges to members of the cognizable class would result in the granting of a ***Batson-Wheeler*** motion. As indicated in ***Shirley* v. *Yates*** (9th Cir. 2015) 807 F.3d 1090, if the prosecutor has been warned either expressly or implicitly that a future challenge to a member of the cognizable class at issue might result in the finding of a prima facie case, the fact a juror in the cognizable class was left on the jury has even less value in showing nondiscriminatory use of challenges. (***Id***. at p. 1102.)

Editor's Note: Unless the judge is simply informing the prosecutor that an inference of discriminatory prosecution is likely to arise based solely on the number of jurors in the targeted cognizable class being challenged, it would be clearly improper (and inconsistent with the case law) for a trial court to state in advance that, regardless of the justification for the challenge, any challenge of a member of the cognizable class would result in finding of impermissible use of challenges.

Editor's Note: For additional discussion of the significance of the composition of the final jury panel at the third stage of the ***Batson-Wheeler*** analysis, see this outline, section IX-J at p. 126.)

8. Whether the prosecutor sought to keep members of the cognizable class from being excused for cause or hardship

In ***People* v. *Streeter*** (2012) 54 Cal.4th 205, the court denied a defendant's claim that the prosecutor's challenge of several African American jurors was racially-based because, inter alia, "after extensive questioning, the prosecutor successfully rehabilitated two African–American jurors . . . staving off defense challenges for cause. The prosecutor's desire to keep African–American jurors on the jury tended to show that the prosecutor was motivated by the jurors' individual views instead of their race." (***Id***. at p. 224.)

In ***People* v. *Jones*** (2011) 51 Cal.4th 346, the court held that the prosecutor's "desire to have had as jurors the three [African-American jurors] who were excused for hardship or cause," helped show that the prosecutor's motive in challenging other African-American jurors was not racially-motivated. (***Id***. at p. 363.)

Editor's Note: The role this factor plays at the second/third stage of the ***Batson-Wheeler*** analysis is discussed in greater depth in this outline, section VIII-M at p. 96.

9. Whether the prosecutor used any challenges for cause against members of the cognizable group

In ***People* v. *Sanchez*** (2016) 63 Cal.4th 411, the court rejected the argument that the prosecutor's use of a challenge against a Hispanic juror supported an inference of discriminatory use of peremptory challenges against Hispanic jurors, noting that "[a] prosecutor (and indeed any party) is entitled to challenge prospective jurors for cause." (**Id**. at p. 437. However, the court indicated in dicta that "a ***specious*** challenge for cause might in some circumstances support an inference of bias in a prosecutor's peremptory challenges . . ." (***Ibid***.)

10. Whether there appears to be reasonable neutral grounds for excusing the identified jurors

In deciding whether a prima facie case has been made, the California Supreme Court has made it clear that it is proper to consider whether there are obvious neutral grounds for excusing the jurors. (**See *People* v. *Montes*** (2014) 58 Cal.4th 809, 852-853; ***People* v. *Manibusan*** (2013) 58 Cal.4th 40, 80; ***People* v. *Clark*** (2012) 52 Cal.4th 856, 907; ***People* v. *Bonilla*** (2007) 41 Cal.4th 313, 343.) As stated in ***People* v. *Sattiewhite*** (2014) 59 Cal.4th 446: "When, as here, a prospective juror exhibits ***obvious*** signs of being unsuitable for the jury, the inference that the prosecutor excused the juror on an improper basis becomes less tenable and a correspondingly greater showing is required to support that inference." (***Id***. at p. 470, emphasis added.)

The rule *may* be different in the Ninth Circuit. (***People* v. *Neuman*** (2009) 176 Cal.App.4th 571, 583 [indicating that Ninth Circuit may have different view on whether the existence of reasonable neutral grounds for excusing jurors may be considered at the first step, but California courts are bound by California Supreme Court precedent]; *compare* ***Johnson* v. *Finn*** (9th Cir. 2012) 665 F.3d 1063, 1071 [stating when it comes to determining whether a prima facie case has been made, the fact "there were numerous legitimate race-neutral reasons for the prosecutor to excuse each of the ... prospective jurors" is not a relevant circumstance]; ***Williams* v. *Runnels*** (9th Cir.2006) 432 F.3d 1102, 1107–1108 [holding that when reviewing whether a prima facie showing of statistical disparity has been rebutted in a *Batson* step-one claim, the "other relevant circumstances" must do more than indicate that the record would support race-neutral reasons for the questioned challenges"] *with* ***United States* v. *Stinson*** (9th Cir. 2011) 647 F.3d 1196, 1206-1207 [finding trial court properly declined to find prima facie case based, in part, on existence of obvious reason for challenging juror]; ***Paulino* v. *Castro*** (9th Cir.2004) 371 F.3d 1083, 1091–1092 ["when '"the record contains entirely plausible reasons, independent of race, why" a prosecutor may have exercised peremptories, such reasons have usually helped persuade us that defendant made no prima facie showing ....'"]; ***Johnson* v. *Campbell*** (9th Cir. 1996) 92 F.3d 951, 953–954 [prima facie case not established under ***Batson*** where "there was an obvious neutral reason for the challenge"].)

In the unreported federal decision of ***Johnson* v. *Hedgpeth*** (C.D.Cal. 2012) 2012 WL 2411203, the court took into consideration the existence of neutral reasons in upholding a state court's finding of no prima facie case and noted that while "some Ninth Circuit cases decided on de novo review have held that where an inference of discrimination is initially supported by a strong showing of statistical disparity, the ***Batson*** prima facie case cannot be rebutted simply by reliance on plausible race-neutral reasons for the challenged strikes discerned by the court from the record [citing to ***Johnson* v. *Finn*** (9th Cir. 2012) 665 F.3d 1063, 1071 and ***Williams* v. *Runnels*** (9th Cir.2006) 432 F.3d 1102, 1107–1108], "[f]or purposes of AEDPA review, these circuit court decisions ***do not clearly establish any general rule precluding such an analysis*** of the record as part of the step-one inquiry in all cases, nor do they dictate that the state courts were objectively unreasonable in considering the legitimate reasons for strikes suggested by the record in this case, given the lack of a significant statistical underpinning for Petitioner's ***Batson*** claim." (***Id***. at p. *8, fn. 11, emphasis added.)

Editor's Note: The various types of valid neutral grounds for challenging a juror are discussed in this outline, section VIII-D at pp. 56-89.

11. Whether the answers provided by the challenged jurors were favorable to the prosecution

It appears that it is proper to consider whether the answers provided by the challenged jurors were favorable to the prosecution in deciding whether a prima facie case has been made, but the absence of an obvious reason to strike a juror will not suggest a discriminatory purpose where answers were not *excessively* favorable to the prosecution and other circumstances suggest the challenge was not done for a racial purpose. (**See *People* v. *Thomas*** (2012) 53 Cal.4th 771, 794-795.)

12. Whether the prosecutor or prosecutor's office has a history of discriminatory jury selection

Evidence of the historical practice of the prosecutor or the prosecutor's office of discriminatory jury selection practice is relevant in assessing whether an inference of discriminatory purpose can arise. (**See *Miller-El* v. *Dretke*** (2005) 545 U.S. 231, 253, 264-266.) Conversely, the lack of any such history or evidence of a historical practice of non-discriminatory selection tends to undermine any inference of discriminatory purpose. (**See *People* v. *Lenix*** (2008) 44 Cal.4th 602, 630 [noting that "[t]here is no indication that the prosecutor or his office relied on racial factors" in upholding trial court's finding prosecutor's reasons for removing African-American juror were proper]; ***Spencer* v. *State*** (Md. 2016) 149 A.3d 610, 627 [if a credibility assessment is going to be based on counsel's past conduct and history there should be *evidence* in the record of counsel's peremptory strikes from other trials and not just a judge's "impression of this alleged practice" based on unspoken perceptions].)

13. Whether the prosecutor only conducted investigations into the criminal history of jurors who fell into the cognizable class at issue

In ***People* v. *Johnson*** (2019) 8 Cal.5th 475 [255 Cal.Rptr.3d 393], the California Supreme Court recognized that if the evidence showed a prosecutor targeted only members of the cognizable class at issue for background checks, that "such conduct would plainly constitute a prima facie case of discrimination." (***Id***. at p. 423, fn. 5.) And in ***Flowers* v. *Mississippi*** (2019) 139 S.Ct. 2228, the High Court recognized that evidence of a prosecutor's disparate *investigation* of black and white prospective jurors could be considered in evaluating whether a prosecutor violated ***Batson***. (***Flowers*** at p. 2248.) (**See also** this outline, section IX-S at pp. 131-132.)

D. Should the Trial Court Do a "Comparative Analysis" at the Prima Facie Level?

Comparative analysis refers to a mechanism that courts use to try to "flush out" the actual motivation of the party accused of using his or her peremptory challenges in a discriminatory fashion. In doing a comparative analysis, the court reviews the reasons given for the challenge as to the particular juror and then looks to see if those reasons would apply equally to other jurors (not belonging to the same cognizable class as the challenged juror) who were ***not*** challenged. If there are two jurors who have given very similar responses, one of whom belongs to the cognizable class and one of whom does not, and the party has only challenged the juror in the cognizable class on the purported basis of a response given by *both* jurors, an inference can arise that the purported basis of the challenge is a pretext designed to conceal a discriminatory purpose. (**See *Miller El* v. *Dretke*** (2005) 545 U.S. 231, 241; ***Cook* v. *LaMarque*** (9th Cir. 2010) 593 F.3d 810, 815.)

If the trial court reserves ruling on the ***Batson-Wheeler*** motion until after the parties have completed their jury selection, then a *properly conducted* comparative analysis may be helpful in supporting or dispelling a claim an attorney is exercising a challenge for impermissible reasons.

However, if the trial court decides to rule upon a ***Batson-Wheeler*** motion ***before*** jury selection is completed, then comparative analysis is less helpful as a means of supporting an inference the challenges are being exercised for a permissible purpose. This is because the removed jurors may only be compared to other removed jurors. The removed jurors cannot be compared to jurors who have not been removed because it is unknown which jurors still sitting will not later be removed. Moreover, comparative analysis is generally useless for purposes of determining whether a first stage prima facie case has been established unless the prosecutor proffers reasons for challenging jurors. "Whatever use comparative juror analysis might have in a third-stage case for determining whether a prosecutor's proffered justifications for his [or her] strikes are pretextual, it has little or no use where the analysis does not hinge on the prosecution's actual proffered rationales." (***People* v. *Taylor*** (2010) 48 Cal.4th 574, 617; ***People* v. *Bonilla*** (2007) 41 Cal.4th 313, 350.)

That said, recently the California Supreme Court has been more willing to engage in a comparative analysis *on appeal* when deciding whether a trial court properly held no prima facie case had been established (**see** this outline, section XIII-B at p. 134). But whether a *trial court* judge may consider whether jurors struck were similarly situated to jurors who were not struck in deciding whether a prima facie case has been made is unresolved. It may be that, like a reviewing court, a trial court could use comparative analysis to ***affirmatively*** support an inference that a prosecutor is **not** using his or her challenges in an impermissible manner (aka "reverse comparative analysis"). Thus, if two jurors (one who belongs to the cognizable class and one who does not) gave similar answers providing an *obvious* basis for a challenge and both were challenged, then the trial court may be able to draw an inference that the purported basis of the challenge is **not** a pretext designed to conceal a discriminatory purpose. (**See *People* v. *Jackson*** (1996) 13 Cal.4th 1164, 1254.)

> **Editor's Note:** For a more extensive discussion of the use of comparative analysis at the third stage of a ***Batson-Wheeler*** juror or when reviewing a trial court's determination on appeal, see, respectively, this outline, section IX-H at pp. 111-122 and section XIII-B at p. 134.

E. Should a Prosecutor State His or Her Reasons for Challenging a Juror If the Trial Court Finds the Defense Has Failed to Make a Prima Facie Showing?

Unless the court finds there has been a prima facie case made out at the first step, there is no obligation for the prosecutor to disclose any reasons for challenging the panelists, and a trial court is not required to evaluate them. (***People* v. *Scott*** (2015) 61 Cal.4th 363, 387; ***People* v. *Lopez*** (2013) 56 Cal.4th 1028, 1049; ***People* v.*Garcia*** (2011) 52 Cal.4th 706, 746; ***People* v. *Carasi*** (2008) 44 Cal.4th 1263, 1292; ***People* v. *Zambrano*** (2007) 41 Cal.4th 1082, 1104-1105 & fn. 3; ***People* v. *Bell*** (2007) 40 Cal.4th 582, 596.)

It is, however, not only permissible, but is considered **the better practice** for a prosecutor to put neutral reasons on the record *after* the court finds no prima facie case has been made out. (***People* v. *Reed*** (2018) 4 Cal.5th 989, 999; ***People* v. *Scott*** (2015) 61 Cal.4th 363, 387; ***People* v. *Cunningham*** (2015) 61 Cal.4th 609, 660, fn. 12; ***People* v. *Lopez*** (2013) 56 Cal.4th 1028, 1049; ***People* v. *Taylor*** (2010) 48 Cal.4th 574, 616; ***People* v. *Howard*** (2008) 42 Cal.4th 1000, 1020 ***People* v. *Bonilla*** (2007) 41 Cal.4th 313, 343, fn. 13; ***People* v. *Mayfield*** (1997) 14 Cal.4th 668, 723-724.)

The reason it is still important for the prosecutor to place justifications for challenging the juror on the record is because the judge's decision that no prima facie case has been made will often be challenged on appeal. (**See e.g.**, ***Johnson* v. *Finn*** (9th Cir. 2011) 665 F.3d 1063, 1069; ***Paulino* v. *Castro*** (9th Cir. 2004) 371 F.3d 1083, 1090; ***Turner* v. *Marshall*** (9th Cir.1995) 63 F.3d 807, 813.) And the placement of reasons will "enable creation of an adequate record for an appellate court, should it disagree with the first-stage ruling, to determine whether any constitutional violation has been established." (***People* v. *Reed*** (2018) 4 Cal.5th 989, 999 fn. 6; ***People* v. *Scott*** (2015) 61 Cal.4th 363, 387.)

A reviewing court may affirm the finding by examining the record for <u>obvious</u> nondiscriminatory reasons for a peremptory challenge that necessarily dispel any inference of bias if they are apparent from and clearly established in the record. (**See *People* v. *Woodruff*** (2018) 5 Cal.5th 697, 751; ***People v. Reed*** (2018) 4 Cal.5th 989, 1000; ***People* v. *Zaragoza*** (2016) 1 Cal.5th 21, 43; ***People* v. *Sanchez*** (2016) 63 Cal.4th 411, 434; ***People* v. *Scott*** (2015) 61 Cal.4th 363, 384; ***People* v. *Taylor*** (2010) 48 Cal.4th 574, 644; ***People* v. *Box*** (2000) 23 Cal.4th 1153, 1189; ***People* v. *Howard*** (1992) 1 Cal.4th 1132, 1155; **accord *United States* v. *Stephens*** (7th Cir.2005) 421 F.3d 503, 518, 516 ['the examination of "apparent" reasons in the record ... involves only reasons for the challenges that are objectively evident in the record ...' such that 'there is no longer any suspicion, or inference, of discrimination in those strikes']; **cf. *Williams* v. *Runnels*** (9th Cir.2006) 432 F.3d 1102, 1110 ['refutation of the inference requires more than a determination that the record could have supported race-neutral reasons for the prosecutor's use of his peremptory challenges ...'].)

Now, it is true that "reviewing court may ***not*** rely on a prosecutor's statement of reasons to support a trial court's finding that the defendant failed to make out a prima facie case of discrimination" where the reasons are only put on the record after the trial court makes its determination and it is clear the trial court did not consider them. (**See *People* v. *Sanchez*** (2016) 63 Cal.4th 411, 435; ***People* v. *Scott*** (2015) 61 Cal.4th 363, 390). But a prosecutor can ***highlight*** for the reviewing court "obvious" neutral reasons the prosecutor might have had for challenging a juror by expressing reasons that might be obvious to any trial attorney but which might be less obvious to a reviewing court. (**Cf.**, ***People* v. *Sanchez*** (2016) 63 Cal.4th 411, 435 ["The mere fact the prosecutors stated the reasons is not relevant to support a finding of no prima facie case. But the reasons apparent from the record and the reasons the prosecutor stated will generally, if not always, coincide."].)

Another very good reason for putting the reasons on the records, despite a finding of no prima facie case is that it avoids the problem of having to remember what the reasons were for excusing a juror many years later. (**See *Paulino* v. *Harrison*** (9th Cir. 2008) 542 F.3d 692, 700; ***Yee* v. *Duncan*** (9th Cir. 2006) 463 F.3d 893, 899.) Unless notes were taken (which may get lost or destroyed), a transcript of the reasons put on the record may be the only way the actual reasons for challenging a juror are recalled. And failure to remember those reasons years later (at, for example, a ***Batson*** remand hearing) can make it **<u>very difficult</u>** to later show the challenges were justified by nondiscriminatory reasons. (**See *Shirley* v. *Yates*** (9th Cir. 2015) 807 F.3d 1090, 1106, fn. 16 [noting "Prosecutors who do not retain notes from voir dire run the risk that, as here, they will not be able to produce circumstantial evidence of their actual reasons for exercising a strike."]; this outline, section XV-C at pp. 151-153.)

<u>Caveat</u>: The rules governing how an appellate court will review a "prima facie" finding vary depending on whether, when, and how a prosecutor places his or her reasons on the record. Unless it is clear that the reasons put on the record after a finding of no prima facie case were NOT used by the trial court in coming to that conclusion, a reviewing will assume they were and will treat the trial court's ruling as the equivalent of a ruling at the third stage of a ***Batson-Wheeler*** motion. (**See** this outline, section XIII-A at pp. 141-144.) Thus, if the judge allows a prosecutor to put reasons on the record, it is a good idea to make it clear on the record the trial court is finding no prima facie case and is simply allowing the prosecutor to state his or her reasons in case of appellate review.

F. Should a Prosecutor Provide a Comparative Analysis Explaining Why Jurors Not Belonging to the Cognizable Class Who Were Not Challenged Were Not Similarly Situated to the Juror Belonging to the Cognizable Class Who Was Challenged?

If a court has not found a prima facie case but gives the prosecutor an opportunity to go on the record regarding his or her reasons for challenging the jurors at issue, it is questionable whether the prosecutor should use the opportunity to provide reasons why the prosecutor did or did not challenge jurors **not** belonging to the cognizable class in question.

As pointed out in ***People* v. *Jones*** (2011) 51 Cal.4th 346, "no authority has imposed the additional burden of anticipating all possible unmade claims of comparative juror analysis and explaining why other jurors were not challenged. (***Id***. at p. 365.)

The upside to the prosecutor establishing why jurors belonging to different cognizable classes than the challenged jurors were or were not challenged is that if the defense argues on appeal that the trial court erred in declining to find a prima facie case, the prosecutor's explanation may assist the appellate court in identifying obvious reasons for finding no prima facie case was established. Moreover, if the reviewing court finds a prima facie case *had* been established, it may assist the reviewing court in finding there was, nevertheless, a proper basis for the challenge at the third stage.

There is also a potential downside to proffering reasons for challenging a particular juror when no prima facie case has been made out. First, it is somewhat onerous. Second, if the court hears the ***Batson-Wheeler*** motion before jury selection is completed, it would be premature to discuss jurors currently sitting on the juror since they may later be challenged. Third, it may reveal more of jury-selection strategy than necessary – especially if the court hears the ***Batson-Wheeler*** motion before jury selection is completed. Fourth, if jury selection is ongoing, and an exceptionally favorable juror appears who has the characteristic earlier cited as a reason for a challenge, it may make it more difficult to explain why this juror was not similarly situated to a juror challenged with the same characteristic.

If a ruling on whether a prima facie case of discriminatory use of challenges has been established is deferred until the end of jury selection, then the decision to discuss why other allegedly similarly situated jurors were or were not challenged may depend on whether the defense is relying on a comparative analysis in asking the trial court to find a prima facie case. If so, a prosecutor would have a greater incentive to explain his or her reasons for keeping other allegedly similarly situated jurors after the trial court finds no prima facie case has been established.

Recommendation: If the defense relies on comparative analysis in asking the judge to make a prima facie finding, the prosecutor should respond in kind. Otherwise, it is probably not necessary to do a comparative analysis "for appellate purposes only" after the court declines to find a prima facie case. Prosecutors should keep notes, however, that will allow them to recollect the reasons for *keeping* jurors in the event of a remand hearing. (**See** this outline, section XV at pp. 150-153.)

G. If a Court Initially Finds No Prima Facie Case Based on a Claim that One or More Jurors Were Improperly Challenged and a Subsequent *Batson-Wheeler* Motion is Made, Can the Court Revisit the Earlier Determination and Request Reasons from the Attorney for Challenging the Jurors Previously Challenged?

"Trial courts are no longer *obligated* to revisit their rulings on earlier ***Wheeler/Batson*** motions when they conclude the defendant has made out a prima facie case in connection with a later motion." (***People* v. *Armstrong*** (2019) 6

Cal.5th 735, 767 [citing cases], emphasis added by IPG.) "However, they have the power to do so in cases when a subsequent challenge places an earlier challenge in a new light. (***Ibid***.) And if "a trial court revisits an earlier ruling, determines a prima facie case has been made, solicits reasons from the prosecutor, and rules on those reasons, its ruling is reviewed [on appeal] in the same fashion as any other third-stage ruling." (***Ibid*** [bracketed information added by IPG].) Moreover, "when the sincerity of the reasons given for excusing one juror bears on the sincerity of the reasons given for excusing a later juror, those reasons may be considered in evaluating the peremptory strike against the original juror." (***People* v. *Armstrong*** (2019) 6 Cal.5th 735, 767.)

VIII. Step Two: Stating the Grounds for the Challenges

Once a prima facie case is made, the "'burden shifts to the [party who originally challenged the juror] to explain adequately the racial [or other cognizable class] exclusion' by offering permissible . . . neutral justifications for the strikes." (***Johnson* v. *California*** (2005) 545 U.S. 162, 168 [bracketed portions and other modifications added by author].) This burden of production cannot be satisfied "by merely denying . . . a discriminatory motive or by merely affirming his good faith." (***Purkett* v. *Elem*** (1995) 514 U.S. 765, 768-769.) "A prosecutor asked to explain his conduct must provide a '"clear and reasonably specific" explanation of his "legitimate reasons" for exercising the challenges.'" (***People* v. *Lenix*** (2008) 44 Cal.4th 602, 613.) The attorney accused of discriminatory conduct must justify the challenge as to *each* juror a court has relied on in finding a prima facie case. (***People* v. *Phillips*** (2007) 147 Cal.App.4th 810, 817.)

Moreover, the less obvious the reason for challenging the juror, the greater the need for the prosecutor to provide a more expansive explanation for challenging the juror, especially when the questioning of the juror in an alleged area of concern is cursory. "Some neutral reasons for a challenge are sufficiently self-evident, if honestly held, such that they require little additional explication." (***People* v. *Gutierrez*** (2017) 2 Cal.5th 1150, 1171.) "Yet when it is not self-evident why an advocate would harbor a concern, the question of whether a neutral explanation is genuine and made in good faith becomes more pressing. That is particularly so when . . . an advocate uses a considerable number of challenges to exclude a large proportion of members of a cognizable group." (***Id***. at p. 1171.)

A. If a Court Has Found a Prima Facie Case Based on the Excusal of *Some* Jurors in a Cognizable Class but not on the Excusal of *Other* Jurors in the Same Cognizable Class, Does the Prosecutor Have to Justify the Challenges to the Jurors Upon Whom the Prima Facie Case is Not Based?

A judge may rely on the exclusion of one juror in a cognizable class in finding a prima facie case, but may choose not to rely on the exclusion of another juror *in the same* cognizable class in finding a prima facie case. If that occurs, a court may properly require an explanation as to the juror upon which the prima facie case was based, but not as to the juror upon whom the court did not base the prima facie showing. (**See *People* v. *Avila*** (2006) 38 Cal.4th 491, 549-550 [where court initially found no prima facie case as to juror who was the subject of an initial ***Batson-Wheeler*** challenge, but did find a prima facie case regarding a second juror in the same cognizable class who was later challenged, the court was not required to ask the prosecutor to justify his challenge to the juror who was the subject of the first ***Batson–Wheeler*** motion].)

Editor's Note: If a later challenge casts the prosecutor's earlier challenges in a new light, causing the trial court to find a prima facie case of group bias as to the earlier jurors ***as well***, then the trial court should require an explanation for the earlier challenge. (**See *People* v. *Avila*** (2006) 38 Cal.4th 491, 552; ***People* v. *Phillips*** (2007) 147 Cal.App.4th 810, 817, fn. 4.)

The rule that a trial judge can find a prima facie case based on a challenge to one juror in a cognizable class, but not another, applies even if the defense does not make seriatim challenges but makes a single challenge based on the removal of several members of a cognizable class. For example, in ***People* v. *Phillips*** (2007) 147 Cal.App.4th 810, the defense made a ***Batson-Wheeler*** challenge based on the exclusion of three African-American jurors. However, the trial court only found a prima facie case based on two of the three prospective jurors who were the subject of defendant's motion and only required the prosecutor to provide an explanation for those two. The trial court explained that an explanation was not necessary as to the third juror because, based on her answers, it was clear the prosecutor had non-racial reasons for challenging the juror. (***Id***. at p. 813-814.) The ***Phillips*** court found this was proper and rejected the defense argument the rule of ***Avila*** did not apply when the defense makes a single ***Batson-Wheeler*** motion based on the exclusion of multiple jurors. (***Phillips***, at p. 817.)

Editor's Note: If the defense raises a ***Batson-Wheeler*** motion based on the exclusion of several jurors in a cognizable class and a court simply finds, ***without further elaboration***, that a defendant has established a prima facie case, the court should require (and the prosecutor should provide) explanations for challenging each juror. (**See *People* v. *Phillips*** (2007) 147 Cal.App.4th 810, 818 [but noting that, in the case before it, the court *did* elaborate and explain why one of the challenged jurors did not factor into the court's finding of a prima facie case].)

B. Should the Prosecutor Ask to Proffer His or Her Reasons for Excluding a Juror Outside the Presence of the Defense?

Prosecutors often are concerned that in responding to a ***Batson-Wheeler*** challenge, they will be forced to reveal jury-picking and/or trial strategies. Thus, there is an instinctual desire to want to privately explain the choices in an ex parte in camera proceeding. In general, however, it is error for a trial court to allow a prosecutor to explain his or her reasons for excluding a particular juror outside the presence of defense counsel and defendant. (**See *People* v. *Ayala*** (2000) 24 Cal.4th 243, 259-269 [prosecutor's multiple ex parte hearings for justifications were error, albeit harmless]; ***Davis* v. *Ayala*** (2015) 135 S.Ct. 2187, 2197 [assuming absence of counsel violated the federal Constitution]; ***United States* v. *Thompson*** (9th Cir. 1987) 827 F.2d 1254, 1260 [reversible error to hold ex parte hearing on prosecutor's explanations].)

The Ninth Circuit does recognize a limited exception to this rule in "those instances in which disclosing the reasons for excluding jurors would reveal the prosecutor's case strategy[.]" (***United States* v. *Alcantar*** (9th Cir. 1990) 897 F.2d 436, 438, fn. 2; ***United States* v. *Thompson*** (9th Cir. 1987) 827 F.2d 1254, 1259.) And the California Supreme Court appears to recognize this very limited exception as well. In ***People* v. *Ayala*** (2000) 24 Cal.4th 243, for example, the court cited to ***Georgia* v. *McCollum*** (1992) 505 U.S. 42, 58 for the proposition that "[i]n 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." (***Ayala*** at p. 262.) The ***Ayala*** court held, however, that the exception did not apply when all that is revealed are *jury* selection strategies. (**Ibid; but see** this outline, section IX-U at pp. 133 [explaining why, in general, jury selection strategies are part of overall trial strategy].)

C. Should the Prosecutor State <u>All</u> Grounds for the Challenge?

While peremptory challenges are often based on instinct and it can sometimes be hard to articulate the reason for removing a juror, "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." (***People* v. *Chism*** (2014) 58 Cal.4th 1266, 1319; ***People* v. *Lenix*** (2008) 44 Cal.4th 602, 624.) The fact a trial or reviewing court can think up reasons for why the prosecutor may have wanted to challenge a juror, "will not satisfy the prosecutors' burden of stating a racially neutral explanation." (***People* v. *Chism*** (2014) 58 Cal.4th 1266, 1319; ***People* v. *Lenix*** (2008) 44 Cal.4th 602, 625.)

Prosecutors should "provide as complete an explanation for their peremptory challenges as possible." (***People* v. *Lenix*** (2008) 44 Cal.4th 602, 624.) If the challenge is based on a very general reason, the prosecutor may need to be more specific in explaining the nature of the reason even if the trial court is willing to accept the generalized reason. For example, if a prosecutor simply states that the juror was challenged because of the juror's body language, without specifying what movements or gestures the juror made and what they conveyed to the prosecutor, an appellate court may find it error for the trial court to accept the explanation. (**See *People* v. *Long*** (2010) 189 Cal.App.4th 826, 848 [discussed in this outline, section VIII-D-17 at pp. 74]; **but see *People* v. *Jones*** (2011) 51 Cal.4th 346, 365 [prosecutor's explanation that he was "'troubled' " by potential juror's "'body language and his response'" to questioning about being falsely accused held to be "clear and reasonably specific" even though prosecutor did not describe exactly what the body language was]; ***People* v. *Gutierrez*** (2017) 2 Cal.5th 1150, 1167 [citing language in ***Jones***].)

Also, if the stated reason is not an obvious reason for finding a juror to be an unfavorable prosecution juror, the prosecutor and/or the judge needs to flush out the rationale – either by additional questioning of the juror or in providing the explanation for challenging the juror.

A good case illustrating this principle is ***People* v. *Gutierrez*** (2017) 2 Cal.5th 1150. In ***Gutierrez***, a prosecutor challenged a juror on the ground the juror lived in Wasco (a city with high gang activity) but was unaware of any gang activity in that city. When later asked to justify the challenge on this basis, the prosecutor explained, "[s]he's from Wasco and she said that she's not aware of any gang activity going on in Wasco, and I was unsatisfied by some of her other answers as to how she would respond when she hears that [an important prosecution witness] is from a criminal street gang, a subset of the Surenos out of Wasco." (***Id***. at p. 1160.) The prosecutor did not specify which of her "other answers" caused him dissatisfaction. (**Ibid**.) Nor did the prosecutor ask any follow-up questions about how the juror would react if she heard that a member of a Wasco gang would testify in this case. (***Id***. at pp. 1169-1170.) In finding this juror was improperly challenged, the court observed: "It is not evident why a panelist's unawareness of gang activity in Wasco would indicate a bias against a member of a gang based in Wasco. Although it is possible that a juror unaware of gang activity in Wasco would be discomfited by, and skeptical of, a witness who claimed to be member of a gang based in her neighborhood, such a conclusion does not strike us as an obvious or natural inference drawn from this panelist's responses." (***Id***. at p. 1169.) The court considered this lack of follow-up questioning and limited voir dire in general as "at least rais[ing] a question as to how interested [the prosecutor] was in meaningfully examining whether her unawareness of gang activity in Wasco might cause her to be biased against the witness for the People's case." (***Id***. at p. 1170.) The court also considered the fact that the prosecutor's reference to juror's "other answers" as they related to an expectation of the juror's reaction to the prosecution was not borne out by the record; as well as the failure of the trial court to either reject this reason or ask the prosecutor to explain further. (***Id***. at pp. 1171-1172.)

Editor's note: **(Part I of II.)** The ***Gutierrez*** court did recognize that it "is conceivable—even though the People do not present this argument—that the prosecutor genuinely believed gang activity to be so rampant in Wasco that this panelist must have been either untruthful or uninformed in denying her awareness of Wasco gang activity." (**Id**. at p. 1169.) However, the court went on to say: "If this had been the case, *such reasoning should have been articulated by the prosecutor*." (**Ibid**, emphasis added.) The court then observed: "Even if a prosecutor had justified this strike with the belief that a panelist's professed unawareness of gang activity indicated her dishonesty or ignorance, the basis for such a belief would compel further scrutiny. Insofar as a prosecutor's challenges might be guided by an ungrounded assumption that Hispanic or Latino residents of Wasco (a community that is predominantly Hispanic or Latino) should be aware of gang activity in their neighborhood, a court might query whether this reasoning is inherently neutral as to race or ethnicity." (**Id**. at p. 1169, fn. 7.) The ***Gutierrez*** court also considered the fact that the juror's ex-husband was in law enforcement as were several of her family members (a characteristic that weighed in favor of keeping the juror). What the ***Gutierrez*** court did *not* recognize is that *uncertainty* over how a juror might react is itself a neutral reason for challenging a juror. And, considering that the prosecutor passed on the juror 5 times, the presumption that challenges are properly exercised, and the trial judge's finding the prosecutor did not act in a discriminatory manner, the conclusions drawn by the court are themselves a little shaky. (Cont'd)

Editor's note: (Part II of II.)
In any event, ***Gutierrez*** is a warning to prosecutors that no assumptions should be made that reviewing courts will have any understanding of trial strategy or that conclusions that are obvious to the prosecutor will be obvious to anyone else. Ergo, the reasons for challenging a juror must be articulated in a manner a lay person can easily understand.

Failure to provide a reason when initially asked to justify a challenge may cast doubt on whether subsequently provided reasons are genuine. For example, additional reasons for excusing a juror provided by a prosecutor after the prosecutor's initial reason or reasons have been challenged or disregarded may be treated as disingenuous "afterthoughts" and be discounted by reviewing courts. (**See *Miller El* v. *Dretke*** (2005) 545 U.S. 231, 246 [characterizing as an afterthought the prosecutor's explanation for challenging a prospective juror on grounds the juror's brother had a prior conviction—because he provided it only after defense counsel had discredited an earlier-stated reason as patently false]; ***People* v. *Arellano*** (2016) 245 Cal.App.4th 1139, 1169 [discounting prosecutor's claim he challenged juror out of concern about juror's negative feelings toward police because reason was only raised after the trial court and defense counsel questioned prosecutor's erroneous characterization of juror's employment and unsupported speculation about her political views].)

WARNING!!

As pointed out in the California Supreme Court case of ***People* v. *Smith*** (2018) 4 Cal.5th 1134, providing a "laundry list" of reasons no matter how plausible "carries a significant danger: that the trial court will take a short-cut in its determination of the prosecutor's credibility, picking one plausible item from the list and summarily accepting it without considering whether the prosecutor's explanation as a whole, including offered reasons that are implausible or unsupported by the prospective juror's questionnaire and voir dire, indicates a pretextual justification. A prosecutor's positing of multiple reasons, some of which, upon examination, prove implausible or unsupported by the facts, can in some circumstances fatally impair the prosecutor's credibility." (***Id***. at pp. 1157-1158.)

And, in fact, the Ninth Circuit has held that "[t]he proffer of various faulty reasons and only one or two otherwise adequate reasons, may undermine the prosecutor's credibility to such an extent that the court should sustain a ***Batson*** challenge." (***Lewis* v. *Lewis*** (9th Cir.2003) 321 F.3d 824, 831; ***Cook* v. *LaMarque*** (9th Cir. 2010) 593 F.3d 810, 815.) For example, in ***Ali* v. *Hickman*** (9th Cir. 2009) 584 F.3d 1174, the court held that "the weakness" of at least two of the four justifications provided for challenging one African-American juror lent support to the idea that the challenge to a ***different*** African-American juror was racially motivated. (**Id**. at p. 1193; **see also *United States* v. *Chinchilla*** (9th Cir. 1989) 874 F.2d 695, 699 [holding ***Batson*** motion should have been granted even though two bases for the challenges were acceptable because two were not and "the fact that two of the four proffered reasons do not hold up under judicial scrutiny militates against [the supported reasons'] sufficiency"].)

That said, the Ninth Circuit has ***also*** held that "[t]he *quantity* of the prosecutor's justifications alone, without examination of the quality of those justifications, cannot prove purposeful discrimination." (***Briggs* v. *Grounds*** (9th Cir. 2011) 682 F.3d 1165, 1174, fn. 9, emphasis added by IPG.)

D. What are Valid Neutral Justifications for Challenging a Juror?

Any reason for challenging a juror can be a neutral reason. "[A] party may exercise a peremptory challenge for any permissible reason or no reason at all[.]" (***People* v. *Smith*** (2018) 4 Cal.5th 1134, 1146.) "The basis for a challenge may range from 'the virtually certain to the highly speculative' . . . and "even a 'trivial' reason, if genuine and neutral, will suffice." (***People* v. *O'Malley*** (2016) 62 Cal.4th 944, 982; ***People* v. *Chism*** (2014) 58 Cal.4th 1266, 1316.) All that matters is that the prosecutor's reason for exercising the peremptory challenge is sincere and legitimate, legitimate in the

sense of being nondiscriminatory." (***People* v. *DeHoyos*** (2013) 57 Cal.4th 79, 102; ***People* v. *Cruz*** (2008) 44 Cal.4th 636, 655.) "[H]unches[,]' and even 'arbitrary' exclusion is permissible, so long as the reasons are not based on impermissible group bias[.]" (***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.)

Nevertheless, reasons that *do* make sense are less likely to be viewed skeptically (**cf.**, ***Purkett* v. *Elem*** (1995) 514 U.S. 765, 768 [at the third "stage, implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination"]; ***People* v. *Johnson*** (2015) 61 Cal.4th 734, 755 [same]; ***Foster* v. *Chatman*** (2016) 136 S.Ct. 1737, 1752 [finding fact prosecutor's explanation was "nonsense" supported court's conclusion explanation was pretextual]), and we have compiled a list of neutral reasons that courts have upheld as providing a valid basis for challenging a juror.

The Ninth Circuit has held that the prosecutor's stated reasons for striking a juror must be "relevant to the case." (***Jamerson* v. *Runnels*** (9th Cir. 2013) 713 F.3d 1218, 1228; ***Green* v. *LaMarque*** (9th Cir. 2008) 532 F.3d 1028, 1030.) However, the reason given does not have to relate to the particular facts of the case: "[r]elevance, in the context of exercising peremptory strikes, requires only that the prosecutor express a believable and articulable connection between the race-neutral characteristic identified and the desirability of a prospective juror." (***Jamerson* v. *Runnels*** (9th Cir. 2013) 713 F.3d 1218, 1229 [and noting, for example, a concern that a juror might identify with the defendant is valid "regardless of whether the identifying feature relates to the merits of the case, is 'relevant' under ***Batson***"].)

1. Negative experiences jurors, or persons close to jurors, have had with law enforcement or hostile attitudes towards law enforcement

There are many cases holding that negative views of law enforcement or prior negative contacts or experiences between a juror or someone close to the juror and law enforcement or the criminal justice system is a neutral reason for a prosecutor to challenge a juror. (**See *Felkner* v. *Jackson*** (2011) 131 S.Ct. 1305, 1306-1307 [juror felt he was frequently stopped by police due to his race and age]; ***People* v. *Hardy*** (2018) 5 Cal.5th 56, 83, 85 [noting "those currently on probation are often excused peremptorily" and finding fact one juror said he was falsely arrested and another juror said he was "roughed up by the police, for no reason at all" were all permissible grounds for a challenge]; ***People* v. *Winbush*** (2017) 2 Cal.5th 402, 436, 441 [proper to challenge jurors where one juror was detained for obstructing officer in trying to make an arrest and the other was arrested and had low opinion of department investigating the case]; ***People* v. *Melendez*** (2016) 2 Cal.5th 1, 18 ["A 'negative experience with law enforcement' is a valid basis for a peremptory challenge."]; ***People* v. *Scott*** (2015) 61 Cal.4th 363, 385 [juror's son prosecuted by same prosecutor and juror stated prior prosecution was racially-motivated]; ***People* v. *Jones*** (2013) 57 Cal.4th 899, 918 [a peremptory challenge can be based on a prospective juror's "negative views of the police"]; ***People* v. *Lomax*** (2010) 49 Cal.4th 530, 573 ["The arrest of a juror or a close relative is an accepted race-neutral reason for exclusion"]; ***People* v. *Booker*** (2011) 51 Cal.4th 141, 167, fn. 13 ["A negative experience with the criminal justice system is a valid neutral reason for a peremptory challenge"]; ***People* v. *Bryant*** (2019) 40 Cal.App.5th 525, 532 [fact juror "was pulled over by the police, [and the] police lied ... to him about being pulled over" was a race-neutral reason for excusal].)

This can include the juror or the juror's close relative being detained, arrested, prosecuted, court-martialed, and/or convicted of a crime. (**See *People* v. *McKinzie*** (2012) 54 Cal.4th 1302, 1321 [juror]; ***People* v. *Johnson*** (2019) 8 Cal.5th 475 [255 Cal.Rptr.3d 393, 424 [juror's son]; ***People* v. *Riccardi*** (2012) 54 Cal.4th 758, 794-795 [juror; juror's son]; ***People* v. *Thomas*** (2012) 53 Cal.4th 771, 794-795 [juror's son]; ***People* v. *Cruz*** (2008) 44 Cal.4th 636, 656, fn. 3 [juror's son]; ***People* v. *Watson*** (2008) 43 Cal.4th 652, 677 [same]; ***People* v. *Davis*** (2008) 164 Cal.App.4th 305, 313 [same]; ***People* v. *Arellano*** (2016) 245 Cal.App.4th 1139, 1161 [juror's sons in prison – one

unfairly];***People* v. *Thomas*** (2011) 51 Cal.4th 449, 471, 475 [juror, juror's father]; ***People* v. *Booker*** (2011) 51 Cal.4th 141, 167 [juror's son; juror's brother; juror's aunt]; ***Sifuentes* v. *Brazelton*** (9th Cir. 2016) 815 F.3d 490, 507-511 [juror's son, brother, her son, brothers-in-law, and cousins served time in prison]; ***People v. Zaragoza*** (2016) 1 Cal.5th 21, 43 [juror; juror's sister]; ***People* v. *Reed*** (2018) 4 Cal.5th 989, 1001 [juror's brother; other jurors' spouses]; ***People* v. *Duff*** (2014) 58 Cal.4th 527, 546 [juror's brother]; ***People* v. *Blacksher*** (2011) 52 Cal.4th 769, 802 [same]; ***People* v. *Cowan*** (2010) 50 Cal.4th 401, 446, 450 [juror; juror's brother]; ***People* v. *Garcia*** (2011) 52 Cal.4th 706, 748 [juror's brother, friends, ex-boyfriend]; ***People* v. *Avila*** (2006) 38 Cal.4th 491, 554-555 [juror's brother]; ***People* v. *Adanandus*** (2007) 157 Cal.App.4th 496, 504, 509 [juror's brother; juror's son]; ***People* v. *Cox*** (2010) 187 Cal.App.4th 337, 349 [juror's father; juror's husband]; ***People* v. *Farnam*** (2002) 28 Cal.4th 107, 138 [juror's nephew]; ***People* v. *Cox*** (2010) 187 Cal.App.4th 337, 351 [juror's nephew and boyfriend; father of juror's child]; ***People* v. *Morris*** (2003) 107 Cal.App.4th 402, 409 [juror's nephew]; ***United States* v. *Stinson*** (9th Cir. 2011) 647 F.3d 1196, 1207 [juror's nephew]; ***People v. Williams*** (2013) 58 Cal.4th 197, 284 [juror's uncle]; ***People* v. *Watson*** (2008) 43 Cal.4th 652, 678 [juror's ex-husband]; ***People* v. *Salcido*** (2008) 44 Cal.4th 93, 140 [juror's boyfriend]; ***People* v. *Melendez*** (2016) 2 Cal.5th 1, 19 [juror's brother-in-law; juror court-martialed; juror arrested or charged but charges dismissed; juror's brother and nephew convicted].) "Prosecutors are understandably concerned about retaining such persons on criminal juries." (***People* v. *Calvin*** (2008) 159 Cal.App.4th 1377, 1386.) This reason remains a neutral ground notwithstanding the 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.) This reason is particularly compelling when a juror feels the relative was *wrongly* convicted or arrested. (**See *People* v. *Rhoades*** (2019) 8 Cal.5th 393 [255 Cal.Rptr.3d 453, 493] [juror's belief that her brother had been wrongly convicted of a sexual offense" was a "readily apparent bas[is] for objection from a prosecutorial view that tend[ed] strongly to dispel any inference of bias"]; ***People* v. *Bryant*** (2019) 40 Cal.App.5th 525, 537 [juror believed her nephew was "treated unfairly" in DUI case].)

Moreover, the negative experience with the criminal justice system does not require the juror or a relative be the target of a criminal investigation. It can stem from unhappiness with how law enforcement handled a case where the juror or a relative was the *victim* of a crime. (**See *People* v. *Woodruff*** (2018) 5 Cal.5th 697, 751 [fact juror felt upset about an incident where she was a victim and believed the police department had made an inadequate investigation was race-neutral reason for challenging juror]; ***People* v. *Montes*** (2014) 58 Cal.4th 809, 855 [prosecutor properly concerned that juror believed a police detective had closed an investigation of a molestation report juror made concerning her son because he had been unwilling to do the work to pursue the investigation, and that his unwillingness had prevented the justice system from doing its job"]; ***People* v. *Jones*** (2013) 57 Cal.4th 899, 919 [juror dissatisfied about a police response to a burglary]; ***People* v. *Watson*** (2008) 43 Cal.4th 652, 675 [juror was witness to fatal shooting but was never contacted by police who she felt did not take crime seriously].)

2. Juror holds belief that the justice system is unfair, expresses hostility toward the criminal justice system, or mistrusts the system

a. Belief criminal justice system in general is not fair or flawed

"[S]kepticism about the fairness of the criminal justice system is a valid ground for excusing jurors." (***People* v. *Calvin*** (2008) 159 Cal.App.4th 1377, 1386.) A "belief that the criminal justice system is flawed" is a valid, race-neutral reasons for exercising a peremptory challenge. (***People* v. *Smith*** (2019) 32 Cal.App.5th 860, 873.) "A prospective juror's distrust of the criminal justice system is a race-neutral basis for excusal." (***People* v. *Hardy*** (2018) 5 Cal.5th 56, 81; ***People* v. *Winbush*** (2017) 2 Cal.5th 402, 439.)

In ***People* v. *Hardy*** (2018) 5 Cal.5th 56, the court held it a juror's mistrust of prosecutors or police provided a "strong" permissible reason to remove a juror. (***Id***. at p. 83 [and rejecting, at p. 81, the idea that mistrust of prosecutors is not significant if the juror also expresses mistrust of defense attorneys].) In ***People* v. *Melendez*** (2016) 2 Cal.5th 1, the court held that a juror's "critical comments about prosecutors, defense attorneys, and judges" and his "exhibited distrust of police" provided a proper basis for challenging the juror. (***Id***. at p. 18.) As did another juror's claim that officer's put words in her mouth when she was a witness – even though the juror denied a distrust of police or legal system. (***Id***. at p. 20.) In ***People* v. *Williams*** (2013) 58 Cal.4th 197, the court held it was proper for prosecutor to challenge juror who had expressed a "distrust of the legal system," that he believed that "prosecutors want to convict regardless of the evidence," and that he had "sat as a juror in a case and hated it". (***Id*** at p. 287.) In ***People* v. *Elliott*** (2012) 53 Cal.4th 535, the court held that a juror's statements regarding his views of the most important problems with the criminal justice system, (i.e., that "Sometimes people are tried with lack of evidence. Innocent people convicted. Guilty (known fact) people getting away easy," along with the juror's statement that "If justice is not served correctly I tend to be biased against the judicial system") were permissible and race neutral reasons to excuse the juror. (***Id***. at p. 569.) In ***People* v. *Clark*** (2012) 52 Cal.4th 856, the court held a juror could be properly challenged based on the juror's belief "that facts could be manipulated and anyone could be 'hoodwinked' by corrupt attorneys." (***Id***. at p. 907.) In ***People* v. *Cowan*** (2010) 50 Cal.4th 401, the court held a prosecutor could properly challenge a juror because, inter alia, the juror knew three people "that were falsely accused of crimes"]. (***Id***. at p. 446, 450.) And in ***People* v. *Cruz*** (2008) 44 Cal.4th 636, the California Supreme Court described the following as "ample nondiscriminatory bases on which to peremptorily excuse" a juror: a juror's feeling that sometimes that system is not fair and a juror's sense that the police were from time to time opinionated about situations and were not willing to consider other possibilities and listen to explanations. (***Id***. at p. 656, fn. 3.)

b. <u>Belief criminal justice system is not fair to certain groups</u>

Sometimes a juror will express a belief that the justice system treats a particular cognizable class unfairly. "Skepticism about the fairness of the criminal justice system to indigents and racial minorities has also been recognized as a valid race-neutral ground for excusing a juror." (***People* v. *Smith*** (2018) 4 Cal.5th 1134, 1153; ***People* v. *Winbush*** (2017) 2 Cal.5th 402, 439; **see also *People* v. *Bryant*** (2019) 40 Cal.App.5th 525, 539, 540 [juror's belief that minorities were not treated fairly in any county in California, including, presumably, the county where defendants were on trial was a race-neutral reason for excusal for excusing one juror as was belief of another juror that many officers "abus[e] their authority, especially involving black suspects"].)

This is especially true when the defendant is a member of that same class and the juror indicates this belief might bias him or her. (**See *People* v. *Williams*** (2013) 58 Cal.4th 197, 284 [proper to challenge juror because, inter alia, juror said African Americans were "rarely" treated "fairly" in the court system]; ***People* v. *Vines*** (2011) 51 Cal.4th 830, 849-851 [proper to remove juror based on, inter alia, juror's questionnaire responses that "he originally felt the death penalty was imposed unfairly against African–Americans, and now was unsure" and that "the criminal justice system treats some individuals unfairly based on race"]; ***People* v. *Cornwell*** (2005) 37 Cal.4th 50, 70 "voir dire disclosed a large number of reasons other than racial bias for any prosecutor to challenge" the juror, including but not limited to . . . her express distrust of the criminal justice system and its treatment of African–American defendants."]; ***People* v. *Calvin*** (2008) 159 Cal.App.4th 1377, 1381 [fact juror indicated that the criminal justice system was not fair for Black people, that if you can't pay for a good attorney, the criminal justice system is not fair, and that Blacks are accused wrongfully, get convicted because they don't know their rights or the system or have the means to hire an attorney" and he had concerns about being fair and impartial" provided neutral grounds for challenging the juror]; ***People* v. *Adanandus*** (2007) 157 Cal.App.4th 496, 504, 507 [juror's opinion there was "inherent bias in the criminal justice system against young African-American men" and that it would be difficult for her to "impartial" in the pending trial was a neutral reason for challenging juror].)

Editor's Note: Interestingly, an asserted belief in the fairness of the criminal justice can potentially be viewed as a neutral reason for removing a juror. In ***People* v. *Vines*** (2011) 51 Cal.4th 830, the court held a prosecutor could properly challenge a juror based on, among other answers, the juror's statement that the O.J. Simpson trial restored his "faith" in the justice system. (***Id***. at pp. 848-850.) Though, of course, the statement is two-edged in that it also reflects a potential lack of faith in the system (at least pre-OJ) as well, and a potential pro-defense bias.

In ***People* v. *Calvin*** (2008) 159 Cal.App.4th 1377, the court rejected the argument that skepticism toward the criminal justice system is so prevalent among African-Americans that it should be considered a proxy for race and that, as a result, peremptory challenges based on such an attitude should be deemed discriminatory. (***Id***. at p. 1379.) Ironically, if the prosecutor had challenged the juror based solely on the assumption that the defense adopted in ***Calvin***, it would probably **not** be considered a neutral reason. In other words, "[i]f the prosecutor . . . had dismissed the African-American jurors based on his ***assumptions*** about their attitudes, he would have demonstrated the type of group-based discrimination outlawed by both the equal protection clause and the California Constitution's guarantee of a trial by a jury drawn from a representative cross-section of the community." (***People* v. *Calvin*** (2008) 159 Cal.App.4th 1377, 1387.) However, as long as the challenge is not made based on assumptions that members of the class would hold skeptical views towards the criminal justice system, but rather on actual views expressed by the challenged jurors, it is permissible to challenge the jurors on that basis. (***People* v. *Calvin*** (2008) 159 Cal.App.4th 1377, 1388.) The fact that similar attitudes are held by many other members of the class to which the juror belonged "does not convert the prosecutor's challenge into intentional race-based discrimination." (**Ibid**; **see also *People* v. *Avila*** (2006) 38 Cal.4th 491, 545 [prosecutor's challenge to juror proper where it was based on juror's *personal* experience that police officers lied, "not on a theoretical perception that she, a member of a minority group, might view the police with distrust"].)

c. Belief criminal justice system has failed the juror or someone close to the juror

In ***People* v. *Johnson*** (2019) 8 Cal.5th 475 [255 Cal.Rptr.3d 393], the court held [juror's belief "the court process was unfair and that her son may have been coerced into accepting a plea bargain for a crime he did not commit" was obvious nondiscriminatory basis for challenge. (***Id***. at p. 424, fn. 7; **see also *People* v. *Rhoades*** (2019) 8 Cal.5th 393 [255 Cal.Rptr.3d 453, 493] [juror's belief that her brother had been wrongly convicted of a sexual offense" was a "readily apparent" nondiscriminatory reason for challenging the juror]; ***People* v. *Melendez*** (2016) 2 Cal.5th 1, 18 [juror's belief the criminal justice system had treated his brother-in-law unfairly proper basis for challenge].)

In ***People* v. *Cox*** (2010) 187 Cal.App.4th 337, a juror informed the court that her father had been killed by a drunk hit and run driver 15 years earlier but that no one had ever been prosecuted for the crime. This fact was held to be a race neutral basis for challenging the juror. (***Id***. at pp. 351-352.) In ***People* v. *Winbush*** (2017) 2 Cal.5th 402, the court held it was proper to challenge a juror who, inter alia, had a daughter who was raped by someone who was not prosecuted. (***Id***. at p. 439.)

d. Juror holds favorable view of verdict in O.J. Simpson case

In ***People* v. *Smith*** (2018) 4 Cal.5th 1134, the court held that a prosecutor's concern with the juror's response regarding the evidence presented in the O.J. Simpson case was a permissible basis to challenge a juror where the juror stated on her questionnaire: "[i]f they couldn't prove he murdered Nicole, then the verdict was fair." (***Id***. at p. 1153.) In ***People* v. *Mills*** (2010) 48 Cal.4th 158, the court held a prospective juror's belief that the prosecution in the O.J. Simpson murder trial had not proved Simpson's guilt was a permissible race-neutral basis for a challenge. (***Id***. at p. 184.)

3. Juror or someone close to juror was victim of a crime

In ***People* v. *Cox*** (2010) 187 Cal.App.4th 337, the court found the fact, inter alia, the juror had been held up at gunpoint while employed as a teller, had a friend who was nearly decapitated and stabbed 15 times; and had a good friend whose two sons were murdered as a result of gang violence in the same area as where the crime at issue in the trial occurred provide a neutral basis for the prosecutor to believe the juror should be challenged. (***Id***. at pp. 352-353; **see also *People* v. *Garcia*** (2011) 52 Cal.4th 706, 748 [fact that juror had numerous friends who had been killed in violent gang activities was a gender-neutral reason supporting challenge of juror]; ***People* v. *Lenix*** (2008) 44 Cal.4th 602, 628 [prosecutor could be concerned that juror who had relative who was victim of gang violence because in prosecutor's experience "victims of gangs, not always by any means, but quite often are themselves gang members"]; ***Jamerson* v. *Runnels*** (9th Cir. 2013) 713 F.3d 1218., 1230-1234 [proper to strike jurors where one juror was victim of unsolved hit and run and another juror's brother was murdered and murder was never solved]; **cf**., ***People* v. *Vines*** (2011) 51 Cal.4th 830, 852-853 [prosecutor could properly view retained juror more favorably than challenged juror because retained juror had relative who had been victim of a crime].)

4. Juror is young, immature, and/or lacks life experience

Relative youth and immaturity are well-established neutral grounds for excusing a juror. (**See *Rice* v. *Collins*** (2006) 546 U.S. 333, 341 ["It is not unreasonable to believe the prosecutor remained worried that a young person with few ties to the community might be less willing than an older, more permanent resident to impose a lengthy sentence for possessing a small amount of a controlled substance"]; ***People* v. *Mai*** (2013) 57 Cal.4th 986, 1051 [finding fact juror was 40 years old, single and childless could, in combination with her "testiness," persuade the prosecutor the juror was immature and provide a neutral basis for challenging the juror]; ***People* v. *Lomax*** (2010) 49 Cal.4th 530, 575 ["A potential juror's youth and apparent immaturity are race-neutral reasons that can support a peremptory challenge"]; ***People* v. *Taylor*** (2010) 48 Cal.4th 574, 616 [record disclosed race-neutral reasons for striking prospective juror where "she was single and very young, and had not registered to vote"]; ***People* v. *Cruz*** (2008) 44 Cal.4th 636, 657-659 [prosecutor could properly challenge a juror based on, inter alia, the fact the juror was only 20 years old and "one of youngest, or the youngest" prospective juror," "may not be in the mainstream and that experienced in life," and juror's stated goal in life was to open up a small "comic book store" arguably showed a lack of life experiences]; ***People* v. *Salcido*** (2008) 44 Cal.4th 93, 140 [proper for a prosecutor to challenge a 19-year old juror who was "immature" as reflected by her "focus on the attention she had received at work because of the possibility she would be selected as a juror in this case, and on the useful experience she might acquire as a result" and answers she gave indicating she did not appreciate the gravity of the responsibility in a death case]; ***People* v. *Watson*** (2008) 43 Cal.4th 652, 679 [proper for a prosecutor to challenge a juror who, inter alia, was young, inexperienced, and who believed the reason for why the crime rates were increasing was because "Republicans [were] in the presidency" - a reason the prosecutor characterized as "immature"]; ***People* v. *Sims*** (1993) 5 Cal.4th 405, 429-430 [upholding peremptory challenge based upon juror's immaturity]; ***People* v. *Jones*** (2017) 7 Cal.App.5th 787, 805 [proper to excuse because they were young, single, and did not have children, which reflected a lack a life experience]; ***People* v. *Neuman*** (2009) 176 Cal.App.4th 571, 586-587 [finding jurors could be properly removed because jurors were young students, living at home with limited life experience]; **cf**., ***People* v. *Vines*** (2011) 51 Cal.4th 830, 851-852 [finding juror kept by the prosecutor was not similarly situated to a juror challenged by the prosecutor because, inter alia, the kept juror, unlike the challenged juror was older (51 versus 34 years old), had supervisory experience and hiring and firing responsibility, had raised a child to adulthood, and had a spouse who was employed]; **but see *Foster* v. *Chatman*** (2016) 136 S.Ct. 1737, 1750 [noting that on its face, striking a juror because she was "too young" seemed reasonable enough but this reason was belied by the fact the juror was 34 years old and the prosecutor kept other jurors of a similar age]; ***People* v. *Gonzales*** (2008) 165 Cal.App.4th 620, 631-632 [finding prosecutor's claim a juror was excused for immaturity to be bogus where the exact age of the juror was not disclosed by the record, the prosecutor claimed the occupation of the juror (clearing utility lines) indicated the juror was lacking maturity, but the job could have been a "responsible, permanent, possibly career

position", and the prosecutor asserted the juror was single and childless but this was not supported by the record as a fact]; **cf**., Code of Civ. Proc., § 231.5; Govt. Code, § 11135 [read together, prohibiting use of peremptory challenges on basis of assumption about person's age]; this outline, section VII-A-9 at pp. 29-34].)

5. Juror holds out of the mainstream views regarding criminal laws

In ***People* v. *Adanandus*** (2007) 157 Cal.App.4th 496, the court held it was a legitimate ground to excuse a juror who said drugs, including crack cocaine, should be legalized, who was ambivalent about whether he would be able to hold defendant accountable if the offense stemmed from drug dealing, and who was equivocal about the effect his views on the drug laws might have if he had to decide the case. (***Id***. at pp. 505, 510.)

6. Juror is soft on crime or likely harbors pro-defense bias

If the juror harbors a "generally prodefense partiality or bias," this, by itself, provides a legitimate ground to challenge a juror. (***People* v. *Adanandus*** (2007) 157 Cal.App.4th 496, 507, citing to ***People* v. *Farnam*** (2002) 28 Cal.4th 107, 138; **see also *People* v. *Semien*** (2008) 162 Cal.App.4th 701, 708 [noting prosecutor could rightly be concerned with juror who worked with the "underprivileged" where the term could encompass persons who are "on the defense side of a government prosecution"].)

In ***People* v. *Zaragoza*** (2016) 1 Cal.5th 21, the court held the fact the juror "strongly disagreed with the proposition that the rights of persons charged with crimes are better protected than the rights of crime victims and that harsh punishment is the best solution to the crime problem" was a part of a "compelling nondiscriminatory justification for excusing the juror. (***Id***. at p. 43.) In ***People* v. *Vines*** (2011) 51 Cal.4th 830, the court found a trial court properly allowed the prosecutor's challenge of an African-American juror based on, inter alia, the juror's statement that the O.J. Simpson trial restored his "faith" in the justice system, the fact the juror "disagreed strongly" with the proposition that if the prosecution brings someone to trial, that person is probably guilty (the prosecutor reasoned he could "live with" a juror who "disagreed somewhat" with that proposition, but a response so extreme was problematic), and the juror's belief that it was better to let some guilty people go free rather than risk convicting an innocent person (whereas the prosecutor preferred a jury "oriented the other way"). (***Id***. at p 848-850.) In ***People* v. *Cox*** (2010) 187 Cal.App.4th 337, the court found a prosecutor had a race neutral reason for excusing a juror who was the brother of a judge who had previously been a prosecutor where, inter alia, the juror stated he did not talk to his brother about cases because they had different opinions about things. (***Id***. at p. 347.) And in ***People* v. *Jones*** (2011) 51 Cal.4th 346, the court upheld a prosecutor's challenge to a juror where, inter alia, the prosecutor had reason to believe the juror was, based on her defensive and overbearing manner, "buying into some of this 'falsely accused' business." (***Id***. at p. 368.)

7. Juror is, or appears to be, lying or evasive, and/or gives less than forthright or unbelievable answers

If a juror lies on a questionnaire about criminal convictions, that is an obvious nondiscriminatory basis for excusing the juror. (***People* v. *Johnson*** (2019) 8 Cal.5th 475 [255 Cal.Rptr.3d 393, 424.) If a juror gives answers that *appear* to be inconsistent, less than forthcoming, or provides some other reason for the prosecutor to distrust the juror or believe the juror's responses are not credible, this provides a legitimate ground to challenge a juror. (**See *People* v. *Reed*** (2018) 4 Cal.5th 989, 1002 [conflicting responses on "critical aspects of the questionnaire provide a strong reason for the prosecutor to excuse" juror]; ***People* v. *Winbush*** (2017) 2 Cal.5th 402, 441 ["the juror's failure to disclose his arrest in the questionnaire could reflect a lack of candor, a legitimate concern for the prosecutor"]; ***People* v. *DeHoyos*** (2013) 57 Cal.4th 79, 105, 114] [proper to remove one juror who gave inconsistent answers concerning whether she ever formed an opinion about the death penalty and another juror who initially "forgot" to mention close relative was victim of murder and brother committed numerous crimes];

People* v. *Thomas (2011) 51 Cal.4th 449, 472, 475 [the court held a prosecutor could properly challenge a juror based on, inter alia, the fact the juror had not "been entirely forthright or at least accurate in his description" of an incident the juror had described and had "understate[d] his criminal record" by failing to mention he had misdemeanor convictions for resisting a police officer and petty theft as well as a probation violation]; ***People* v. *Booker*** (2011) 51 Cal.4th 141, 166-167 [juror's answer that no family member had ever been accused of a crime when, in fact, juror's son had been prosecuted as a juvenile, provided proper basis to challenge juror, notwithstanding juror's claim he was confused regarding whether juvenile proceedings counted]; ***People* v. *Lenix*** (2008) 44 Cal.4th 602, 628 [prosecutor could be suspicious of jurors' equivocal answers indicating juror was not forthcoming about true opinion]; ***People* v. *Roldan*** (2005) 35 Cal.4th 646, 703 [proper to challenge juror who "was not entirely candid, initially reporting he was a 'peace officer' when he was not"]; ***People* v. *Welch*** (1999) 20 Cal.4th 701, 746 [proper to remove juror where juror said she had no children during voir dire but who, according to a bailiff, had a child seated on her lap in the jury room]; ***People* v. *Adanandus*** (2007) 157 Cal.App.4th 496, 500; ***People* v. *Cardenas*** (2007) 155 Cal.App.4th 1468, 1475; **see also *People* v. *Salcido*** (2008) 44 Cal.4th 93, 140 [fact juror less than direct in answering questions relating to his views on the death penalty provided neutral grounds for excusing juror]; ***People* v. *Cox*** (2010) 187 Cal.App.4th 337, 360 [noting challenged juror had "evasively responded, 'Not necessarily,'" when asked if he was a member of a gang]; ***People* v. *Neuman*** (2009) 176 Cal.App.4th 571, 586-587 [fact juror gave somewhat conflicting answers regarding her ability to put aside the fact she had been a victim of molestation (i.e., by initially claiming she gave the issue much thought but then later becoming much more unequivocal and boasting of an "incredible ability of being impartial with everything that happened to me") were neutral grounds for removing juror]; ***Gonzalez* v. *Brown*** (9th Cir. 2009) 585 F.3d 1202, 1205, 1209-1210 [finding prosecutor properly challenged juror who had been "very evasive" when asked about her license suspension]; ***Hayes* v. *Woodford*** (9th Cir. 2002) 301 F.3d 1054, 1082-1083 [the fact a juror claimed he had been accepted for employment with a police department (when that would have been impossible because of the department's age requirement) and appeared prone to exaggeration (i.e., juror made a comment he had a "photostatic" mind) provided legitimate grounds for booting the juror]; **see also *Foster* v. *Chatman*** (2016) 136 S.Ct. 1737, 1748, 1749 [on its face, striking a juror because she "misrepresented her familiarity with the location of the crime" and "failed to disclose that her cousin had been arrested on a drug charge" was "reasonable enough" albeit ultimately neither was viewed as a sincere reason].)

Such lack of forthrightness is often revealed by a juror mischaracterizing a relative or friend as being the "victim" of a crime when, in fact, later questioning reveals the relative or friend was the *suspect* in the crime. (**See *People* v. *Davis*** (2008) 164 Cal.App.4th 305, 313 [fact juror initially *mistakenly or intentionally* characterized her son as a victim of a DUI driver but later revealed her son had actually been arrested for DUI was, inter alia, a proper basis for challenging the juror]; ***Cook* v. *LaMarque*** (9th Cir. 2010) 593 F.3d 810, 816 [juror properly challenged on ground she initially claimed her brother shot someone in self-defense although, in reality, her brother had been convicted of the crime and self-defense was an unsuccessful defense to prosecution].) In other circumstances, the juror's demeanor may suggest concealment. (**See *People* v. *Hensley*** (2014) 59 Cal.4th 788, 803 [where juror's responses seemed "very mechanical" and "very guarded" - a "prosecutor could reasonably conclude that [the juror's] nonrevealing responses might conceal views that would be unsympathetic to the prosecution's case."].)

8. Juror gives answers indicating juror would have sympathy for persons in defendant's situation or defendant himself

If a juror expresses attitudes reflecting a belief that a defendant's social environment or history might excuse or mitigate his or her criminal behavior, this can provide neutral grounds for challenging a juror. (**See *People v. Johnson*** (2019) 8 Cal.5th 475 [255 Cal.Rptr.3d 393, 424 fn. 7 [obvious nondiscriminatory ground for challenging juror was that she "Had worked extensively with abused and troubled adolescents, including youths from juvenile courts, and she stated that she had a 'heart' for 'what we call throw-away kids.'"]; ***People* v. *Watson*** (2008) 43

Cal.4th 652, 673-675 [proper to excuse juror who said her childhood friend had committed murders but did not deserve the death penalty because of the neighborhood he grew up in and fact friend came from single parent home]; ***People* v. *Cruz*** (2008) 44 Cal.4th 636, 657-659 [prosecutor properly challenged juror who, inter alia, had "some sympathy toward those individuals who became intoxicated"]; ***Ngo* v. *Giurbino*** (9th Cir. 2011) 651 F.3d 1112, 1116-1117 [prosecutor had permissible basis for challenging juror where juror's responses regarding a gun purchase indicated that the prospective juror shared the defendants' attitude about guns].)

In gang cases, contacts with or sympathy for gang members can be a neutral basis for excluding a juror. In ***People* v. *Watson*** (2008) 43 Cal.4th 652, the court held that that contacts with members of street gangs where the prospective juror lived provided support for the prosecutor's bias concerns. (***Id***. at pp. 679–680; **see also *People* v. *Williams*** (1997) 16 Cal.4th 153, 191 [that prospective juror might be sympathetic to defendant because of his high school familiarity with Blood gang members warranted peremptory challenge]; ***People* v. *Rushing*** (2011) 197 Cal.App.4th 801, 811 [proper to excuse juror in gang case because, inter alia, juror expressed some degree of sympathy for gang members when she said she believed people joined gangs because they had nowhere else to turn]; ***People* v. *Cox*** (2010) 187 Cal.App.4th 337, 347-348, 356 [proper to excuse juror who not only knew about the local gang, but grew up with members of that gang and "ran with them" when he was 12 or 13 and to excuse another juror who had friends in gangs in her area and reported she had held a friend's gun]; ***United States* v. *Stinson*** (9th Cir. 2011) 647 F.3d 1196, 1207 [juror's personal familiarity with gangs was a neutral explanation for excusing juror].)

In ***People* v. *Winbush*** (2017) 2 Cal.5th 402, the court found a prosecutor could challenge a juror out of a justifiable concern the juror "would feel sympathy for the defendants because she would believe they were not receiving adequate representation." (***Id***. at p. 1439.) In ***People* v. *Arellano*** (2016) 245 Cal.App.4th 1139, the fact the juror described the defendant as "a young man, well-groomed, in a nice suit" was a valid reason for challenging the juror as it "raised the prosecutor's concerns that she would be overly sympathetic to him." (***Id***. at pp. 1163-1164.)

9. Juror has life experiences or characteristics that might make the juror overly sympathetic to, or biased towards, a person in the defendant's position

If a juror has had experiences that might cause her to sympathize or empathize with the criminal defendant on trial, this can provide neutral grounds for excusing the juror. (**See *People* v. *Jones*** (2013) 57 Cal.4th 899, 918 [fact juror had worked at the Job Corps and prosecutor thought some mitigating evidence relating to defendant's attendance there might be introduced at the penalty phase was permissible basis to challenge juror out of fear she might have a "link" to defendant on this basis]; ***People* v. *McKinzie*** (2012) 54 Cal.4th 1302, 1321-1322 [fact juror had been arrested for domestic violence was proper basis to challenge juror because, inter alia, defendant's prior acts of domestic violence would be introduced in penalty phase and juror might be sympathetic to defendant]; ***People* v. *Watson*** (2008) 43 Cal.4th 652, 676, 680 [proper to challenge juror who, inter alia, had brother who worked in CYA and sometimes would tell her "a sad story from an inmate's point of view"; fact juror has had substantial exposure to gang members such that it might make it more difficult for her to impose the death penalty in a gang-related drive-by shooting case was neutral reason to exercise a challenge against the juror]; ***People* v. *Salcido*** (2008) 44 Cal.4th 93, 140 [juror's own history of alcoholism resulting in a court martial and abusive behavior toward his family was proper ground for excusing juror because it could predispose him to bias in favor of a defendant who might use alcoholism as mitigation in a death penalty case]; ***People* v. *Stanley*** (2006) 39 Cal.4th 913, 940 [finding sympathy for defendant a valid race-neutral reason for peremptory challenge].)

Similarly, if the juror and defendant have characteristics in common, this can be a valid basis for excusing the juror. (**See *People* v. *Pearson*** (2013) 56 Cal.4th 393, 422 [fact both juror and defendant were governmental employees responsible to a supervisor was an adequate non-racial reason for challenging the juror]; ***Jamerson* v. *Runnels*** (9th Cir. 2013) 713 F.3d 1218, 1228 [prosecutor could properly use challenge based on fear that juror who suffered a long term bout of hepatitis might sympathize with defendant who also had physical ailment – leg impairment]; ***People* v. *Bryant*** (2019) 40 Cal.App.5th 525, 542 [prosecutor had legitimate reason for excusing juror who had a 27-year old son who, like defendant, had been arrested by the same police department]; ***Williams* v. *Rhoades*** (9th Cir. 2004) 354 F.3d 1101, 1109–1010 [fear that a juror might identify with the defendant because both had young sons was a valid, race-neutral reason to exercise a peremptory strike]; **see also *United States* v. *Brown*** (8th Cir. 2009) 560 F.3d 754, 763 [strike of a prospective juror valid because both the juror and the defendant received public assistance (**ed. note**: ***Brown*** was cited favorably in ***Jamerson* v. *Runnels*** (9th Cir. 2013) 713 F.3d 1218 to illustrate the principle it is proper to challenge juror who might identify with the defendant on that basis].)

10. Juror has life experiences or a viewpoint that might cause the juror to question some aspect of the prosecution's case or more readily accept the defense case

If a juror expresses sentiments, has prior experiences, or has attributes that might bear on how the prosecution's case is viewed (e.g., doubts about the validity of certain types of evidence or certain types of witnesses), this can provide neutral grounds for challenging the juror. (**See *People* v. *Rhoades*** (2019) 8 Cal.5th 393 [255 Cal.Rptr.3d 453, 494] [proper to excuse juror because, inter alia, juror's belief her brother's alcoholism led to his wrongful conviction by rendering him incapable of supplying an alibi created a clear risk the juror would be "receptive to the alibi defense put forward by defendant, who claimed to be taking drugs during the period when the victim was abducted and killed"]; ***People* v. *Krebs*** (2019) 8 Cal.5th 265 [255 Cal.Rptr.3d 95, 121, 124] [proper to excuse juror who "puts faith in psychiatric testing, thinks psychology and psychiatry is very useful, and believes it can explain a lot about a person" where defense was going to rely on, inter alia, "the use of psychiatric testimony — that he did not deserve the death penalty because he suffered childhood abuse, alcoholism, and mental illnesses" – even though the a psychiatrist also going to testify for the prosecution since "the prosecution could have judged that a juror not so inclined to believe in psychiatric testimony altogether might be better for its case"]; ***People* v. *Hardy*** (2018) 5 Cal.5th 56, 84 [proper to excuse juror in death penalty case because, inter alia, juror felt "that mental defects may alter intent, thus making death unwarranted and LWOP would suffice"]; ***People* v. *Duff*** (2014) 58 Cal.4th 527, 547-548 [holding juror was properly excused because, inter alia, the juror stated she had seen police brutality which might have made her susceptible to an argument that defendant's confession was in part due to police brutality and because the juror believed a person was simply a product of his environment, which might have made her susceptible to culpability mitigation arguments in the penalty phase]; ***People* v. *O'Malley*** (2016) 62 Cal.4th 944, 976-977 [proper to excused juror because juror indicated someone who bragged about doing something wrong could be joking around and might not be telling the truth in case where defense would be claiming confession was just a false brag]; ***People* v. *Cunningham*** (2015) 61 Cal.4th 609, 660-661, 665 [proper to excuse juror who linked her job as a prison guard with the possibility of becoming a psychologist who counseled inmates, which was problematic from the prosecutor's perspective because defendant's penalty phase specifically involved psychological and psychiatric testimony" and because of indications, the juror "would tend to always believe such testimony"]; ***People* v. *Pearson*** (2013) 56 Cal.4th 393, 422 [proper to excuse juror based on fact she thought psychologists and psychiatrists were "good" and "would have a good opinion" in court]; ***People* v. *Jones*** (2011) 51 Cal.4th 346, 368 [proper for prosecutor to challenge African-American juror based on the prosecutor's "feeling that she would look down upon those kids," whom he described as "kind of rough" "black kids," due possibly to her "overbearing manner"]; ***People* v. *Watson*** (2008) 43 Cal.4th 652, 676 [fact juror had trouble describing her own assailant when she was a victim of purse snatching, inter alia, provided neutral grounds for challenging a juror in a case dependent on identification testimony]; ***People* v. *Gutierrez*** (2002) 28 Cal.4th 1083, 1124-1125 [proper, in a case

involving defense mental expert witnesses, to remove one juror who gave answers indicating he might rely too heavily on the expert opinion testimony of psychologists, another juror who said he never disagreed with a psychologist's evaluation of a student and expressed hesitancy in disagreeing with an expert; and to challenge another juror who stated he felt "transsexuals were sick" where the victim was a transsexual]; ***Briggs* v. *Grounds*** (9th Cir. 2011) 682 F.3d 1165, 1172, 1179-1180 [prosecutor could properly challenge one juror based on juror's own involvement in the workplace-sexual-harassment investigation and the concern that his involvement would affect how he viewed the prosecution witnesses (two teenage victims of sexual assault); and challenge another juror who indicated he never discussed the possibility of being sexually assaulted with his daughters, thought teenagers were more susceptible to coaching, thought sexual assault victims are sometimes less believable because of age or personal background, and failed to explain during voir dire why he answered he had a bias on a questionnaire].)

10.5 Juror was victim of the same crime with which defendant is charged

In ***People* v. *Gutierrez*** (2017) 2 Cal.5th 1150, the court stated it was self-evident that "excusing a panelist because she has previously been victim to the same crime at issue in the case to be tried" was a neutral reason for excusing a juror. (***Id***. at p. 1171.) **Editor's note**: Though why a *prosecutor*'s challenge on this basis is self-evident is not so self-evident.

11. Juror has connection to parties or persons (e.g., witnesses) involved in the case

In ***People* v. *Pearson*** (2013) 56 Cal.4th 393, the court held it was proper to excuse juror based on either the fact the juror was acquainted with the prosecutor from having previously cleaned his office or on the fact the juror knew one of the defense witnesses. (***Id***. at p. 422.) In ***People* v. *Cox*** (2010) 187 Cal.App.4th 337, the court held the prosecutor could properly challenge a juror based on the fact that the juror had a conversation with one of defendant's family members in the elevator and apparently had some familiarity with family members of the defendant who might appear in court. (***Id***. at p. 350.) Another juror in ***Cox*** was also held to have been challenged for neutral reasons based on, inter alia, the fact that the juror had a possible affiliation with the defendants – one defendant had nudged the other defendant and pointed toward the juror when she was seated. (***Id***. at p. 356.) In ***Hayes* v. *Woodford*** (9th Cir. 2002) 301 F.3d 1054, a prosecutor's challenge to a juror was upheld where a person's wallet had been found at a crime scene pertinent to the case, and the juror's daughter employed the wallet's owner. (***Id***. at pp. 1082-1083.) And in ***Carrera* v. *Ayers*** (9th Cir. 2012) 699 F.3d 1104, the court held the fact the juror worked at the juvenile detention facility where the defendant's co-defendant was held was an "obvious" non-discriminatory reason for challenging the juror. (***Id***. at p. 1108.)

In ***People* v. *Harris*** (2013) 57 Cal.4th 804, the court held the fact the juror knew eight of the potential witnesses in the case was a race-neutral basis for challenging the juror. (***Id***. at p. 835.)

12. Juror has religious beliefs or biases that might affect his or her decision

If a person's religious beliefs would make it difficult for the juror to sit in judgment, convict, or impose a penalty, this can provide neutral grounds for challenging a juror. (**See *People* v. *Hardy*** (2018) 5 Cal.5th 56, 85 [prosecutor can legitimately be concerned about a person whose religion is very important to her, and who finds it difficult to judge another due to religious, philosophical, or moral reasons."]; ***People* v. *Cowan*** (2010) 50 Cal.4th 401, 446, 450 [prosecutor could properly challenge juror who, inter alia, claimed on her questionnaire "she's Islamic, that she does not sit in judgment" even though the juror later stated she could sit in judgment]; ***People* v. *Mills*** (2010) 48 Cal.4th 158, 184 [prospective juror who "believed Satan controls this world and the people in it" was properly challenged for "strident ... religious views"]; ***People* v. *Martin*** (1998) 64 Cal.App.4th 378, 384 [prosecutor properly challenged Jehovah's Witness whose voir dire answers indicated her "religious views might render her uncomfortable with sitting in judgment

of a fellow human being"]; ***People* v. *Allen*** (1989) 212 Cal.App.3d 306, 315-316 [proper to remove juror who was pastor where, inter alia, juror conceded her religious views might interfere with her ability to deliberate]; ***Sifuentes* v. *Brazelton*** (9th Cir. 2016) 815 F.3d 490, 509-511 [prosecutor could validly challenge juror where jurors held views that the Bible required two or three witnesses before imposing the death penalty and other Christian beliefs that might have affected her decision on the death penalty].)

If a juror has a religious *bias* that can also be a race-neutral reason for removing the juror, even if it cannot be shown the parties to the trial or witnesses would be target of that bias. For example, in ***People* v. *Rushing*** (2011) 197 Cal.App.4th 801, the juror allegedly challenged by the prosecutor for discriminatory reasons was the only juror who responded affirmatively to the question of "A party, witness, or attorney may come from a particular national, racial, or religious group or may have a lifestyle different from your own. Would that fact in any way affect your ability to be a fair and impartial juror?" When asked to elaborate, the juror explained that she answered affirmatively as to the "religious part" because "depending on the person's view" of "religion or God, it affects their whole outlook on everything." The juror stated, "[I]f somebody doesn't believe in God then I think just their whole outlook on everything [sic]." The juror indicated that she didn't know how that might affect how she viewed the witness, that she disagreed with some religions, and that it may be an issue for her as a juror. However, the juror also said she did not believe her views would prevent her from being a fair juror, and that she understood this was not a religious court. (***Id***. at p. 809.) The court found that the juror's statements reflected an acknowledged religious prejudice against atheists which might have prevented her from being a fair juror. The court rejected the defendant's argument that because "religious beliefs were not an issue in the case nor would the religious beliefs of any of the witnesses or defendants ever become part of the trial the juror's bias would not matter." (***Id***. at p. 812.) The court found the prosecutor could have been legitimately concerned the juror "might discover or assume that any one of the trial participants (e.g., witnesses, attorneys, etc.) was a non-believer and, accordingly, view that person in a negative light." (**Ibid**.)

If a particular congregation has a reputation for being "controversial," this can also be a legitimate reason for challenging the juror – and does not constitute impermissible discrimination based on religious affiliation. (**See e.g., *People* v. *Jones*** (2011) 51 Cal.4th 346, 367 [proper to challenge juror who was member of the African Methodist Episcopal Church in Los Angeles because the particular congregation was, in his view, "constantly controversial," and he did not "particularly want anybody that's controversial on my jury panel"].)

Editor's Note: As to whether a religious group can constitute a cognizable class, **see** this outline, section VII-A-4, at pp. 24-25.

13. Juror expresses an unwillingness or reluctance to follow the law or directions

a. Reluctance to follow law in general or regarding a specific aspect of the law

In ***People* v. *Howard*** (2008) 42 Cal.4th 1000, the court held that it was proper to challenge a juror who indicated that he would "negotiate" with the judge if there was a law or instruction that differed from the juror's own opinion or belief. (***Id***. at p. 1017.)

In ***People* v. *Riccardi*** (2012) 54 Cal.4th 758, the court held it was proper to challenge a juror who initially expressed a strong reluctance to considering evidence of flight as consciousness of guilt, and, who only half-heartedly accepted the principle after being told such evidence could be considered – even though the juror was later "rehabilitated" and said he could "certainly" follow the flight instruction. (***Id***. at pp. 793-794.)

In ***People* v. *Bryant*** (2019) 40 Cal.App.5th 525, the court held a clear nondiscriminatory reason for challenging a juror was apparent from the juror's hesitation in applying the single-witness rule. (***Id***. at p. 240; **accord *People* v. *Smith*** (2019) 32 Cal.App.5th 860, 873.)

b. Holding the People to a higher burden of proof

In ***People* v. *Watson*** (2008) 43 Cal.4th 652, the court held the fact the juror indicated he might hold the prosecution to a higher burden of proof than beyond a reasonable doubt was a neutral reason for challenging a juror. (***Id***. at pp. 679-680; **accord *People* v. *Melendez*** (2016) 2 Cal.5th 1, 18 [juror's statement "he would hold the prosecution to a higher standard than reasonable doubt" in capital case proper grounds for challenge]; **see also *People* v. *O'Malley*** (2016) 62 Cal.4th 944, 977-978 [juror not improperly challenged because, inter alia, juror stated she "somewhat agreed" when asked whether the prosecutor should be held to a higher standard of proof than beyond a reasonable doubt]; ***People v. Duff*** (2014) 58 Cal.4th 527, 546 [proper to boot juror who might hold the prosecution to proof "without a reasonable shadow of a doubt"]; ***People* v. *Jones*** (2013) 57 Cal.4th 899, 919[juror properly challenged, inter alia, because she indicated she would use "shadow of a doubt" standard and had doubts about the persuasiveness of circumstantial evidence]; ***People* v. *Mills*** (2010) 48 Cal.4th 158, 176–177 [legitimate for prosecutor to want to excuse juror who may wish to impose higher standard of proof]; ***Briggs* v. *Grounds*** (9th Cir. 2011) 682 F.3d 1165, 1172-1174 [proper to challenge jurors who indicated they would hold the prosecution to a higher standard of proof than required by law]; ***Gonzalez* v. *Brown*** (9th Cir. 2009) 585 F.3d 1202, 1205, 1209-1210 [upholding determination prosecutor exercised a challenge against juror for a neutral reason where the juror kept answering he expected the People to prove it beyond *all* doubt].)

c. Accepting interpreter's translation despite coming to a different translation

The failure of a bilingual juror to accept a translator's rendition of what a witness has testified to, regardless of the juror's own interpretation is a neutral reason for challenging a juror. (**See *Hernandez* v. *New York*** (1991) 500 U.S. 353, 361; ***People* v. *Cardenas*** (2007) 155 Cal.App.4th 1468, 1476-1477.)

d. Failure to follow court's instructions

The failure of the juror to abide by the court's instructions during voir dire provides a race-neutral basis for challenging the juror. (**See *People* v. *Perez*** (1994) 29 Cal.App.4th 1313, 1330 [permissible to strike juror on ground that, despite the court's instruction that venirepersons with prior jury experience should not reveal the nature of the verdict they had reached, the juror volunteered his jury had acquitted the defendant in a drunk driving case].)

14. Juror's demeanor, attitude, and behavior during court proceedings

A juror's overall demeanor can be a neutral reason for challenging a juror. (**See *Thaler* v. *Haynes*** (2010) 130 S.Ct. 1171, 1172-1175; ***People* v. *Parker*** (2017) 2 Cal.5th 1184, 1213; ***People* v. *Mai*** (2013) 57 Cal.4th 986, 1052; ***People* v. *DeHoyos*** (2013) 57 Cal.4th 79, 109; ***People* v. *Stanley*** (2006) 39 Cal.4th 913, 939.) Indeed, "race-neutral reasons for peremptory challenges ***often*** invoke a juror's demeanor[.]" (***Davis* v. *Ayala*** (2015) 135 S.Ct. 2187, 2201, emphasis added.) Among things that a prosecutor may legitimately take into account in deciding whether to strike or retain juror are the "juror's attitude, attention, interest, body language, facial expression and eye contact[.]" (***People* v. *Elliott*** (2012) 53 Cal.4th 535, 569; ***People* v. *Lenix*** (2008) 44 Cal.4th 602, 622-623.)* "Even an inflection in the voice can make a difference in the meaning. The sentence, 'She never said she missed him,' is susceptible of six different meanings, depending on which word is emphasized." (***Lenix*** at p. 622.) "Indeed, even less tangible evidence of potential bias may bring forth a peremptory challenge: either party may feel a mistrust of a juror's objectivity on no more than the 'sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another' (citation omitted) upon entering the box the juror may

have smiled at the defendant, for instance, or glared at him." (***People* v. *Reynoso*** (2003) 31 Cal.4th 903, 917.) The court can hear the juror's tone and inflection and see whether a juror hesitates or struggles with particular answers in a way the record may never reveal.

> ***Editor's Note:** The significance of a juror's body language is discussed in this outline, section VIII-D-17 at pp. 73-74.

a. Late to court

In ***People* v. *Duff*** (2014) 58 Cal.4th 527, the court upheld a peremptory challenge because, inter alia, the juror failed to show up for the final day of jury selection and a prosecutor can "reasonably be concerned that future tardiness or absences might delay trial proceedings." (***Id***. at p. 548.) In ***People* v. *Watson*** (2008) 43 Cal.4th 652, the court held the fact a juror was twice late to court provided grounds for the prosecutor to believe the juror was irresponsible and that this was, inter alia, a legitimate ground for challenging the juror. (***Id***. at pp. 679-680.) Similarly, in ***People* v. *Davis*** (2008) 164 Cal.App.4th 305, the court found, inter alia, the fact the juror was not punctual provided neutral grounds for challenging the juror. (***Id.*** at pp. 312-313; **see also *Sifuentes* v. *Brazelton*** (9th Cir. 2016) 815 F.3d 490, 512 [fact juror was absent from court on two occasions was one of several reasons a state court could find to be nondiscriminatory].)

b. Inattention or Boredom

"A genuine concern that a prospective juror is . . . not paying sufficient attention to the proceedings is a race-neutral basis for a peremptory challenge." (***People* v. *DeHoyos*** (2013) 57 Cal.4th 79, 114; **accord *People* v. *Lopez*** (2013) 56 Cal.4th 1028, 1049.) In ***People* v. *Mai*** (2013) 57 Cal.4th 986, the prosecutor's assertions about the juror having a "bored" and disinterested manner, inter alia, were considered race-neutral reasons for challenging the juror. (***Id***. at p. 1052.) In ***People* v. *Davis*** (2008) 164 Cal.App.4th 305, the court found, inter alia, the fact the juror was inattentive provided neutral grounds for challenging the juror. (***Id.*** at pp. 315; **accord *Stubbs* v. *Gomez*** (9th Cir. 1999) 189 F.3d 1099, 1105 [("inattentiveness" is a valid, race-neutral explanations for excluding jurors]; ***United States* v. *Changco*** (9th Cir. 1993) 1 F.3d 837, 840 [same].)

c. Insufficiently serious or flippant attitude

In ***Thaler* v. *Haynes*** (2010) 130 S.Ct. 1171, the court recognized that the fact a juror exhibits a light-hearted or humorous attitude, especially in a serious case, can be a neutral reason for challenging the juror. (***Id***. at p. 1172.)

In ***People* v. *Montes*** (2014) 58 Cal.4th 809, the court found a prosecutor could properly challenge a juror because of her "ditzy" attitude and demeanor in court; and because the way she interacted with other jurors caused the prosecutor to believe she was interested in "having a good time" which in turn left the prosecutor with a concern her "state of mind would not mix well with the predominantly female composition of the jury." (***Id***. at pp. 854-855.)

In ***People* v. *DeHoyos*** (2013) 57 Cal.4th 79, the court held a prosecutor could validly be concerned about a juror's lack of understanding of the "gravity of a juror's personal responsibility in a capital case" based on the juror saying she was not apprehensive about making a life-and-death decision in a capital case and looked forward to sitting. (**Id**. at p. 105.)

In ***People* v. *Howard*** (2008) 42 Cal.4th 1000, the court cited to a trial judge's observation that the juror was "arrogant, flippant" in finding the prosecutor was justified in challenging one juror and observed that another juror was properly challenged because, inter alia, the juror's responses revealed a flippant attitude toward the proceeding and suggested he was trying to avoid jury service. (***Id***. at pp. 1017, 1019 [and noting the latter juror had written prosecutors "are trickly (sic) people," and that defense attorneys "will say anything"].)

In ***People* v. *Reynoso*** (2003) 31 Cal.4th 903, the court observed that the fact a juror was "laughing at an inappropriate point during voir dire" has been upheld as a valid ground for bumping a juror even though the appellate court could not verify the conduct occurred based on the record. (***Id***. at p. 917; **see also *People v. Perez*** (1994) 29 Cal.App.4th 1313, 1330.)

In ***People* v. *Ayala*** (2000) 24 Cal.4th 243, the court held ***Wheeler*** was not violated by challenging a juror who, inter alia, "exhibited a somewhat flippant attitude in responding to various questions during general voir dire." (***Id***. at p. 264.)

In ***Briggs* v. *Grounds*** (9th Cir. 2011) 682 F.3d 1165, the Ninth Circuit held there was nothing pretextual in challenging a juror were the juror's demeanor and manner of responding to the prosecutor's questions on voir dire suggested the juror was not taking the selection process seriously and was flippant and evasive in his answers. (***Id***. at p. 1178 [and noting that least four exchanges between the prosecutor and the juror where the juror answered questions with questions or avoided giving any direct answer].)

d. Attempt to avoid jury service

In ***People* v. *Howard*** (2008) 42 Cal.4th 1000, the court cited to a trial judge's observation that the juror was "trying to get off the panel" in upholding the trial court's finding the prosecutor had properly challenged the juror. (***Id***. at p. 1019.)

e. Reluctance or failure to answer questions

In ***People* v. *Howard*** (2008) 42 Cal.4th 1000, the court stated "[a]n advocate may legitimately be concerned about a prospective juror who will not answer questions." (***Id***. at p. 1019 [and noting one of the challenged jurors declined to fill out substantial portions of the jury questionnaire, marking "confidential" on "almost all of his answers"].) In ***People* v. *Reed*** (2018) 4 Cal.5th 989, the fact a juror's questionnaire answers were frequently incomplete and her failure to answer critical questions related to her husband's criminal history was cited as an independent reason for challenging the juror aside from her race. (***Id***. at p. 1003.) In ***People* v. *Armstrong*** (2019) 6 Cal.5th 735, the court held a prosecutor had a genuine basis for a challenge because, inter alia, the jurors' questionnaire revealed little or nothing about his views on the death penalty and the prosecutor had an equally difficult time discovering the juror's feelings on the subject during questioning. (***Id***. at p. 774.)

f. Insufficiently forthcoming or expressive during questioning

The fact a juror appears "quiet during voir dire" is a valid basis for challenging a juror because this could lead a prosecutor to believe the juror will be "hesitant to discuss issues or any number of other factors that might influence the verdict." (***People* v. *Cox*** (2010) 187 Cal.App.4th 337, 358.)

In ***People* v. *Hensley*** (2014) 59 Cal.4th 788, the court agreed that the "nonrevealing responses" of a juror who seemed "very mechanical" and "very guarded" could be a proper basis for challenging the juror as it might reflect concealed views that would be unsympathetic to the prosecution's case. (***Id***. a p. 802.)

In ***People* v. *Cisneros*** (2015) 234 Cal.App.4th 111, the court held a "trial court *properly* accepted as gender neutral the prosecutor's explanation she had excused prospective male [jurors] because they were "robotic" and responded only with yes or no." (***Id***. at p. 121, fn. 10, emphasis added.)

In ***People* v. *Cox*** (2010) 187 Cal.App.4th 337, the court held that, inter alia, the fact the juror did not provide any affirmative responses to any of the court's questions so that the prosecutor felt as if she "got very little information from" the juror was deemed a race neutral justification for removing the juror. (***Id***. at p. 349; **cf**., ***People* v. *Long*** (2010) 189 Cal.App.4th 826, 839-848 [rejecting claim by prosecutor that juror did not participate in jury voir dire where record showed juror did answer some questions].)

g. Curt or terse answers

In ***Foster* v. *Chatman*** (2016) 136 S.Ct. 1737, the court noted that, on its face, striking a juror because, inter alia, she "gave short and curt answers during voir dire" seemed reasonable enough. (***Id***. at p. 1749; **see also *People* v. *Douglas*** (2018) 22 Cal.App.5th 1162, 1170 [juror's terse answers provided reasonable cause for concern].)

h. Lack of memory or interest in prior proceeding

In ***People* v. *Battle*** (2011) 197 Cal.App.4th 50, a juror was asked whether she had previously served on a jury. The juror had previously served on a jury but stated she could not remember what type of case it was or even whether it was a criminal case. The court agreed with the trial court that the juror's response "exhibited a lack of interest and lack of memory—acceptable reasons for a peremptory challenge." (***Id***. at p. 60-61.)

i. Unwillingness or inability to interact with other jurors or personality trait that might alienate other jurors

An "advocate is entitled to consider a panelist's willingness to consider competing views [and] openness to different opinions and experiences[.]" (***People* v. *Lenix*** (2008) 44 Cal.4th 602, 623.) Thus, the California Supreme Court has held a prosecutor may "legitimately challenge a prospective juror whose behavior may indicate an inability to get along with other members of the panel." (***People* v. *Hensley*** (2014) 59 Cal.4th 788, 805 [and noting a prosecutor could properly challenge juror who had a very harsh response when the court clerk mispronounced her name twice, even though the clerk apologized in advance for any mispronunciations]; ***id***. at p. 802 ["Rigid jurors who appear emotionally detached and terse may be divisive during deliberations. They may not perform well as open-minded jurors willing and able to articulate their views and persuade others."]; ***People* v. *Garcia*** (2011) 52 Cal.4th 706, 749 [prosecutor could properly challenge juror out of concern juror would be close-minded based on juror stating she learned from previous experience on hung jury to avoid being swayed by the views of others]; ***People* v. *Watson*** (2008) 43 Cal.4th 652, 681 [peremptory challenge supported by relevant race-neutral concerns where a juror appears too stubborn or opinionated to appropriately participate in jury deliberations]; ***People* v. *Gutierrez*** (2002) 28 Cal.4th 1083, 1124-1125 [proper to challenge juror who said he would not be influenced by anyone's opinion but his own because prosecutor could be concerned juror would not listen to the opinions of other jurors]; ***People* v. *Ayala*** (2000) 24 Cal.4th 243, 264 [***Wheeler*** not violated by where prosecutor removed juror who, inter alia, referred to the average juror as Joe Six-Pack and stated "most people bother me" on ground juror had attitude that would "create alienation and hostility on the part of the other jurors"]; ***People* v. *Cox*** (2010) 187 Cal.App.4th 337, 345-346 [a juror's expressed disinclination to talk to or deal with other people and statements indicating he would not be open to having his mind changed by the other jurors or in changing the other jurors' minds was a proper neutral basis for challenging the juror]; ***Stubbs* v. *Gomez*** (9th Cir. 1999) 189 F.3d 1099, 1105 ["inability to relate to other jurors" is a valid, race-neutral explanation for excluding a juror]; ***United States* v. *Changco*** (9th Cir. 1993) 1 F.3d 837, 840 [same].)

In ***People* v. *Montes*** (2014) 58 Cal.4th 809, the court found a prosecutor could properly challenge a juror because of, inter alia, the way she interacted with other jurors caused the prosecutor to believe she was interested in "having a good time" which in turn left the prosecutor with a concern her "state of mind would not mix well with the predominantly female composition of the jury." (***Id***. at pp. 854-855.)

j. Lack of opinion

The fact a juror repeatedly expressed "no opinion" to many questions on the juror questionnaire, whether stemming from a true lack of opinion or a refusal to express them, was a valid, race-neutral reason for striking the juror. (***People* v. *Melendez*** (2016) 2 Cal.5th 1, 21.)

k. Hesitation in answering

If a juror hesitates in answering or equivocates when asked whether she could be fair or impartial, this can potentially provide a race neutral basis for removing the juror. (**See *People* v. *Cox*** (2010) 187 Cal.App.4th 337, 352-353; **accord *People* v. *Jones*** (2011) 51 Cal.4th 346, 367 ["the circumstance that a prospective juror hesitates over whether he would favor (or try to protect) one side provides a valid reason for the opposing side to use a peremptory challenge out of caution"]; ***People* v. *Armstrong*** (2019) 6 Cal.5th 735, 770 [crediting prosecutor's claim the juror hesitated for a very long time before finally indicating that he could impose the death penalty as basis for strike]; ***United States* v. *Mikhel*** (9th Cir. 2018) 889 F.3d 1003, 1030 [juror's "hesitant responses during voir dire—particularly her interruption of the prosecutor and unwillingness to give an unequivocal answer to whether she could consider imposing the death penalty—would understandably give pause to any prosecutor trying a death penalty case"].)

l. Too deferential or timid

"[P]rosecutors may legitimately choose to shy away from followers or unduly timid jurors." (***People* v. *Duff*** (2014) 58 Cal.4th 527, 546.) In ***People* v. *DeHoyos*** (2013) 57 Cal.4th 79, the court held a prosecutor could properly challenge a juror because, inter alia, the juror's deferential demeanor "suggested he would be unable to independently reach a judgment on the issues[.]" (***Id***. at p. 109.)

m. Unfriendly

In ***Sifuentes* v. *Brazelton*** (9th Cir. 2016) 815 F.3d 490, the court held a state trial court did not err in crediting the prosecutor's reasons for challenging a juror, one of which was that the juror was unfriendly, even though trial court made not findings the juror had a unfriendly demeanor. (***Id***. at p. 513.)

n. Passivity

Passivity of a juror is a "valid, race-neutral" explanation for excluding a juror. (**See *Stubbs* v. *Gomez*** (9th Cir. 1999) 189 F.3d 1099, 1105; ***United States* v. *Changco*** (9th Cir. 1993) 1 F.3d 837, 840.)

o. Rigidity or Lack of Emotion

In ***People* v. *Hensley*** (2014) 59 Cal.4th 788, the prosecutor challenged a juror who the prosecutor believed "lacked sensitivity, was factually oriented, and displayed little emotion." (***Id***. at p. 802.) The defendant claimed that the prosecutor's reasons for challenging a juror in a death penalty case were pretextual because "objectivity and reluctance to be easily swayed by appeals to emotion are generally considered characteristics of desirable jurors for the prosecution." (**Ibid**.) However, the California Supreme Court not only found these reasons to be honestly given but to be a reasonable rationale for challenging a juror since "[r]igid jurors who appear emotionally detached and terse may be divisive during deliberations. They may not perform well as open-minded jurors willing and able to articulate their views and persuade others." (**Ibid**.) Moreover, the "trial court expressly agreed with the prosecutor that [the juror's] responses seemed 'very mechanical' and 'very guarded" - a "prosecutor could reasonably conclude that [the juror's] nonrevealing responses might conceal views that would be unsympathetic to the prosecution's case." (**Ibid**.)

15. Reluctance to serve

A reluctance to serve on the jury is a neutral reason for challenging a juror. (**See *People* v. *Hardy*** (2018) 5 Cal.5th 56, 88 ["that the juror did not want to sit in the case was a legitimate race-neutral reason"]; ***People* v. *Parker*** (2017) 2 Cal.5th 1184, 1213 [fact juror's "answers and demeanor indicated he was reluctant to serve on the jury" was a race-neutral reason for excusing juror]; ***People* v. *Woodruff*** (2018) 5 Cal.5th 697, 749, 751 [proper to

boot jurors who did not want to serve]; ***Carrera* v. *Ayers*** (9th Cir. 2012) 699 F.3d 1104, 1108 [calling the fact a juror appeared bitter about being called to jury service an "obvious nondiscriminatory reason" for challenging the juror]; ***United States* v. *Stinson*** (9th Cir. 2011) 647 F.3d 1196, 1206-1207 [proper to challenge juror because of juror's insistence she did not want to serve].)

16. Eagerness to serve

An eagerness to serve can be valid neutral grounds for challenging a juror. (**See *People* v. *Duff*** (2014) 58 Cal.4th 527, 546-547 [proper to excuse juror who was "overly eager to be on the jury"]; ***People* v. *DeHoyos*** (2013) 57 Cal.4th 79, 104-105 [proper to excuse juror who said "she was looking forward to sitting on a capital case" because it indicates person might have a hidden reason or agenda for wanting to be seated]; ***People* v. *Thompson*** (2010) 49 Cal.4th 79, 108–109 [upholding excusal of prospective juror for, inter alia, being too eager to be on a jury]; ***People* v. *Ervin*** (2000) 22 Cal.4th 48, 76–77 [same]; **see also *Foster* v. *Chatman*** (2016) 136 S.Ct. 1737, 1749 [holding, on its face, striking a juror because she was divorced, "had two children and two jobs" and yet "did not ask to be excused from jury service" was "reasonable enough" grounds for challenging the juror].)

17. Body Language

"A prospective juror may be excused based upon facial expressions, gestures, [or] hunches[.]" (***People* v. *O'Malley*** (2016) 62 Cal.4th 944, 975; ***People* v. *Lenix*** (2008) 44 Cal.4th 602, 613.) "Experienced trial lawyers recognize what has been borne out by common experience over the centuries. There is more to human communication than mere linguistic content." (***People* v. *Jones*** (2011) 51 Cal.4th 346, 363; ***People* v. *Lenix*** (2008) 44 Cal.4th 602, 622.) "Myriad subtle nuances may shape it, including attitude, attention, interest, ***body language***, ***facial expression and eye contact***. 'Even an inflection in the voice can make a difference in the meaning." (**Ibid**, emphasis added; **accord *People* v. *O'Malley*** (2016) 62 Cal.4th 944. 980.) "Depending on intonation and facial expression, the same or similar answers coming from different prospective jurors may have very different meanings, and 'those differences may legitimately impact the prosecutor's decision to strike or retain the prospective juror.'" (***People* v. *Long*** (2010) 189 Cal.App.4th 826, 845, citing to ***People* v. *Lenix*** (2008) 44 Cal.4th at p. 623.) Peremptory challenges based on alienating "bare looks and gestures" are race neutral and not improper. (***People* v. *Phillips*** (2007) 147 Cal.App.4th 810, 819, citing to ***People* v. *Wheeler*** (1978) 22 Cal.3d 258, 276.) "[T]erse answers and negative body language" could give a prosecutor reasonable cause for concern. (***People* v. *Douglas*** (2018) 22 Cal.App.5th 1162, 1170.)

In ***People* v. *Hardy*** (2018) 5 Cal.5th 56, the court held the fact "the juror did not smile at the prosecutor although he smiled at the defense" was a permissible neutral ground for challenging the juror. (***Id***. at p. 82.) In ***People* v. *Elliott*** (2012) 53 Cal.4th 535, the court held that the failure of a juror to make eye contact with anybody provided a neutral reason for challenging the juror. (***Id***. at pp. 569-570.) In ***People* v. *Gutierrez*** (2002) 28 Cal.4th 1083, the court held that hostile looks from a prospective juror can themselves support a peremptory challenge. (***Id***. at p. 1125.) In ***People* v. *Parker*** (2017) 2 Cal.5th 1184, the way the juror walked from the venire to the jury box reflected his reluctance to serve and, inter alia, provided a valid reason for the challenge]; **see also *Foster* v. *Chatman*** (2016) 136 S.Ct. 1737, 1748-1749 [on its face, striking a juror because, inter alia, "she kept looking at the ground during voir dire" and "appeared nervous" seemed reasonable enough].)

CAVEAT: "[T]here is no clearly established Supreme Court rule that 'a demeanor—based explanation must be rejected if the judge did not observe or cannot recall the juror's demeanor.'" (***Sifuentes* v. *Brazelton*** (9th Cir. 2016) 815 F.3d 490, 513 citing to ***Thaler* v. *Haynes*** (2010) 559 U.S. 43, 48.) Indeed, the California Supreme Court has repeatedly stated that a "prosecutor's demeanor observations, *even if not explicitly confirmed by the record*, are a permissible race-neutral ground for peremptory excusal, especially when they were not disputed in the trial court." (***People* v. *Hardy*** (2018) 5 Cal.5th 56, 82; ***People* v. *Mai*** (2013) 57 Cal.4th 986, 1052, emphasis

added.) However, if a prosecutor is going to rely on nonverbal cues (body language), it is important to: (i) be as specific as possible in describing the behavior involved; (ii) explain what the prosecutor believes is the significance of the behavior; and (iii) attempt to obtain confirmation of the observations from the trial judge, or failing that, attempt to obtain a finding on the record that the court credits the observations as true, despite not having observed them.

Example: "Your honor, I am asking for this court, once the third stage is reached, to state for the record that you observed what I observed or, if that cannot be done, to make a specific determination as to whether you believe I am telling the truth as to my observations – such that they may be considered in finding justification for my challenge."

A case that illustrates the rationale behind this advice is ***People* v. *Long*** (2010) 189 Cal.App.4th 826. In ***Long***, the prosecutor challenged three Vietnamese jurors, and stated she had challenged one of them because, during questioning of the entire panel, he did not participate in the discussion or make eye contact with the prosecutor during the entire voir dire. The prosecutor also said she "did not feel comfortable with his body language and the way that he was expressing himself, or able to express himself in the context of a juror." (***Id***. at pp. 839–840, 843.) The prosecutor *did not further describe* what it was about the juror's body language or manner of expressing himself that made her uncomfortable and neither defense counsel nor the court challenged the prosecutor's assertions. In denying the defendant's ***Batson*** motion, the trial court made only a general finding that the prosecutor's reasons were legitimate. (***Long*** at p. 843.) On appeal, the appellate court reviewed the transcript and found the first reason (lack of participation) was "demonstrably false." (***Id***. at p. 843.) In conjunction with the lack of any description in the record (by the trial court or the prosecutor) of what was disturbing about the juror's body language or his way of expressing himself, the fact that the trial court accepted as legitimate a reason unsupported by the record also cast doubt on the legitimacy of these other reasons. The ***Long*** court held the trial court "erred in accepting the prosecutor's virtually unverifiable and unverified explanation for challenging" the juror. (***Id***. at p. 848.)

> ***Editor's Note:** The ***Long*** court seemed to ignore the fact the prosecutor has stated the juror did not make any eye contact with the prosecutor – a more specific reason than simply that the prosecutor had qualms about the juror's body language.

As pointed out in ***People* v. *Allen*** (2004) 115 Cal.App.4th 542, simply saying that a peremptory challenge is based on a juror's demeanor, without a fuller description of what the prospective juror was or was not doing, provides no indication of what the prosecutor observed, and no basis for the court to evaluate the genuineness of the purported non-discriminatory reason. (***Id***. at p. 551.) Rather, the trial court should probe into what it is about a juror's body language, dress and demeanor the prosecutor dislikes. (***Id***. at p. 553; **see also *People* v. *Granillo*** (1987) 197 Cal.App.3d 110, 117, 121 [finding prosecutor impermissibly challenged juror based on failure of record to support one asserted reason for challenging juror while utterly ignoring prosecutor's other reason; namely that the juror's "eyes moved between the two attorneys' tables and the bench during voir dire, indicating she was not being completely candid"]; **but see *People* v. *Jones*** (2011) 51 Cal.4th 346, 358, 367 [rejecting argument prosecutor's asserted reliance on body language was insufficient reason where the prosecutor did not go on to describe exactly what the body language was; and noting "an explanation need not be that specific" albeit also noting "the prosecutor's overall explanation regarding the juror was clear and reasonably specific"].)

18. Juror's appearance, including clothing, hairstyle, or other accoutrements

In the case of ***People* v. *Wheeler*** (1978) 22 Cal.3d 258 itself, the court indicated it is not impermissible for a prosecutor to "fear bias ... because [a juror's] clothes or hair length suggest an unconventional life-style." (***Id***. at p. 275; ***People* v. *Rushing*** (2011) 197 Cal.App.4th 801, 808; **see also *People* v. *Ward*** (2005) 36 Cal.4th 186, 202

citing to ***Wheeler*** for the proposition that "that a party may legitimately challenge a prospective juror based on the juror's appearance"].)

In ***People*** **v.** ***Smith*** (2018) 4 Cal.5th 1134, the court stated that "[c]asual dress is a facially race-neutral reason for exercising a strike, and courts have noted that prosecutors may regard a juror's dress as some indication of how seriously he or she takes the responsibility of serving as a juror." (***Id***. at p. 1153.)

In ***People*** **v.** ***Mai*** (2013) 57 Cal.4th 986, the court held the fact the juror wore very casual clothing was, in conjunction with other reasons, a proper basis for challenging the juror. (***Id***. at pp. 1047, 1052.)

In ***People*** **v.** ***Elliott*** (2012) 53 Cal.4th 535, the court held the fact that the juror came to court every day dressed in jeans and a t-shirt (i.e., in a manner that stood out in its informality) and had a bizarre/unusual hairstyle were both held to be valid reasons for challenging the juror. (***Id***. at pp. 568-570.)

In ***People*** **v.** ***Cruz*** (2008) 44 Cal.4th 636, the court held a prosecutor properly challenged a juror based on, inter alia, the fact the juror had "long hair," "Fu Manchu type" facial hair, had come to court in a long, unbuttoned flannel shirt, and thereafter arrived in a plain white T-shirt. (***Id***. at p. 657-658, 661.)

In ***People*** **v.** ***Ward*** (2005) 36 Cal.4th 186, the court did not take issue with the fact the prosecutor challenged a juror because, inter alia, she was 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. (***Id***. at p. 202.)

In ***People*** **v.** ***Reynoso*** (2003) 31 Cal.4th 903, the court held a prosecutor could challenge a juror because he does not like potential juror's hairstyle. (***Id***. at p. 917.)

In ***Sifuentes*** **v.** ***Brazelton*** (9th Cir. 2016) 815 F.3d 490, the Ninth Circuit held that one of the prosecutor's reasons for challenging a juror (i.e., that she came to court wearing leather pants) was not a persuasive reason but was "race-neutral" on its face. (***Id***. at p. 513.)

19. Hostility or lack of "rapport" between the prosecutor and the juror

Obvious hostility towards a prosecutor by the juror is a neutral basis for challenging a juror. (**See** ***People*** **v.** ***Armstrong*** (2019) 6 Cal.5th 735, 774-775.) However, it is debatable whether a prosecutor's statement of "lack of rapport" with a juror, without further explanation, will be deemed a valid reason for challenging a juror. In ***Briggs*** **v.** ***Grounds*** (9th Cir. 2011) 682 F.3d 1165, one of several reasons a prosecutor gave for challenging a juror was that the prosecutor did not have a good "rapport" with the juror, i.e., the prosecutor did not "get a warm feeling from" the juror," the prosecutor "actually got a cold stare with little eye contact," and felt the juror "had no connection with" the juror while there "was actually good rapport" between the defense attorney and the juror. (***Id***. at p. 1174.) Because the state trial court did not make a specific finding about this justification, the Ninth Circuit could not presume that the trial court credited or discredited this reason, and thus did not take the reason into consideration. However, in a footnote, the Ninth Circuit distinguished the prosecutor's detailed justification for excusing the juror, in which rapport played a minor role, in the case before it as being "far different than the reason found insufficient in ***United States*** **v.** ***Horsley*** (11th Cir. 1989) 864 F.2d 1543, a case where the court held a prosecutor's explanation for exercising peremptory challenge to strike black venireman that "I just got a feeling about him," was legally insufficient to refute a prima facie case of purposeful racial discrimination. (***Briggs*** at p. 1177, fn. 12.) Significantly, the ***Briggs*** court noted it "could not find, and the dissent does not cite, any Ninth Circuit precedent to support the distinction between a 'rapport and a demeanor-based justification." (**Ibid**.) Equally significantly, while recognizing the inherent problem of citing rapport, the ***Briggs*** court *disagreed* with the dissenting opinion that it had to reject "the rapport justification" simply because it would be too easy for prosecutors to mask racial animus by

claiming a lack of rapport with a juror. (***Id***. at p. 1177, fn. 13; **see also *Johnson* v. *Haviland*** (unreported N.D. Cal. 2013) 2013 WL 3354435, *4 [prosecutor's inability to "establish personal rapport," not pretextual].)

CAVEAT: Claims of lack of rapport should be flushed out as much as possible.

20. Juror lacks mental ability to understand the issues or proceedings

"A concern with a juror's ability to understand the proceedings and anticipated testimony is [a] proper basis for a challenge." (***People* v. *DeHoyos*** (2013) 57 Cal.4th 79, 108; **see also *People* v. *Muhammed*** (2003) 108 Cal.App.4th 313, 322 ["As a general proposition, an honestly held belief that a prospective juror will be unable to understand the case is a legitimate basis for a peremptory challenge" - albeit deferring to the trial court's determination that this rationale was a pretext in the case before it].)

In ***People* v. *Sattiewhite*** (2014) 59 Cal.4th 446, the court held a prosecutor properly challenged a juror on grounds the juror exhibited confused, rambling, and incoherent thinking. (***Id***. at p. 470.) In ***People* v. *Montes*** (2014) 58 Cal.4th 809, the court held a prosecutor properly challenged three jurors: one juror on grounds he was not sufficiently educated to comprehend the complicated jury instructions in a special circumstances case, notwithstanding the fact the juror graduated from high school and took some college classes, where juror had misspelled many words in his questionnaire, including "honest," "offense," and "misdemeanor" (***id***. at p. 850); another juror on the ground the juror had no "opinion on important issues and appeared to be uninformed about them" and because of concerns about the juror's "apparent lack of education, which was reflected in his misspelling of the words 'juror' and 'trial'" (**id**. at p. 856); and another juror whose "questionnaire had illegible writing and misspelled words, including a misspelling of the word 'manager,' a word that described his current job" (***id***. at p. 857). In ***People* v. *Manibusan*** (2013) 58 Cal.4th 40, the court held the fact a juror did not understand two of the questions on the questionnaire was a legitimate, nondiscriminatory ground for exercising a peremptory challenge. (***Id***. at p. 82.) In ***People* v. *DeHoyos*** (2013) 57 Cal.4th 79, the court held a prosecutor could properly challenge a juror on grounds that the juror would "very easily be overwhelmed" by the massive amounts of psychological and psychiatric testimony expected where the juror had limited life experience and education, had "light" reading interests, made several spelling errors on the jury questionnaire (including misspelling his own ethnicity), was initially confused when read some penalty phase jury instructions, and was deferential. (***Id***. at pp. 108-109.) In ***People* v. *Watson*** (2008) 43 Cal.4th 652, the court held the fact a juror, inter alia, exhibited significant confusion about the death penalty determination provided a neutral ground for removing the juror. (***Id.*** at p. 682.) In ***People* v. *Ledesma*** (2006) 39 Cal.4th 641, the court held a prosecutor properly challenged a juror on grounds she "was not very bright," gave inconsistent answers, and was a "follower." (***Id***. at pp. 678–679.) In ***People* v. *Welch*** (1999) 20 Cal.4th 701, the court found the fact a juror appeared to the prosecutor as "mentally slow" was a proper basis for exclusion. (***Id***. at p. 746.) In ***People* v. *Reynoso*** (2003) 31 Cal.4th 903, the court upheld a prosecutor's challenge of a juror due to, inter alia, her "insufficient 'educational experience,'" and her inattentiveness and lack of involvement the jury selection process. (***Id***. at pp. 924-925.) In ***People* v. *Battle*** (2011) 197 Cal.App.4th 50, the court held a juror's inability to remember anything about her previous jury service was an acceptable reason for challenging the juror. (***Id***. at pp. 60-61.) In ***People* v. *Davis*** (2008) 164 Cal.App.4th 305, the court found that, inter alia, the fact a juror seemed very confused, sat in the wrong chair, did not seem to be able to follow the court's instructions, and appeared dazed and somewhat unresponsive provided neutral grounds for challenging the juror. (***Id.*** at pp. 312-313.) A juror's memory difficulties, inter alia, is a neutral basis for challenging a juror. (**See *People* v. *Armstrong*** (2019) 6 Cal.5th 735, 774.) And in ***United States* v. *Murillo*** (9th Cir. 2002) 288 F.3d 1126, the court found a juror's apparent trouble communicating was a proper ground for a peremptory challenge. (**Id**. at pp. 1135-1137; **but see** Code of Civ. Proc., § 231.5; Govt. Code, §§ 11135 and 12926 [collectively preventing challenge to a juror on the basis of an assumption that the juror is biased because of a mental disability]; this outline, section VII-A-9 at pp. 29-34.)

21. Juror has health issues or there are other reasons that will distract the juror from paying attention

In ***People* v. *Arellano*** (2016) 245 Cal.App.4th 1139, the court held it was proper to challenge a juror who said her family situation and health concerns would prevent her from giving her undivided attention to the case. (***Id***. at pp. 1145, 1161.)

22. Juror has psychological issues or lacks emotional ability to focus on the trial

If a juror has psychological issues, this can "legitimately raise red flags for the prosecutor." (***People* v. *Jones*** (2013) 57 Cal.4th 899, 918-919 [finding proper for prosecutor to challenge one juror because, inter alia, she was seeing a psychiatrist and another juror who "admitted she had been very depressed and had been seeing a therapist periodically"].) "Concern that a prospective juror is extremely emotional and overwhelmed by outside stresses is a proper race-neutral ground for a peremptory challenge." (***People* v. *DeHoyos*** (2013) 57 Cal.4th 79, 113.)

In ***People* v. *DeHoyos*** (2013) 57 Cal.4th 79, the court held it was proper to remove a juror who apparently had unresolved feelings about being a victim, appeared very anxious, exhibited concerned and pained facial expressions, seemed emotionally upset, described himself as an emotional person, and vacillated in his responses to questioning about his ability to handle the issues in this case. (***Id***. at pp. 112-113.) The ***DeHoyos*** court also upheld the prosecutor's excusal of a juror who "forgot" that she had a close cousin who had been murdered and that her older brother had been arrested a number of times for minor offenses as this could properly cause the prosecutor to be concerned whether the was paying enough attention to the process and to her responsibilities. (***Id***. at p. 114.)

In ***People* v. *Gutierrez*** (2002) 28 Cal.4th 1083, the court held the prosecutor was justified in challenging a juror on grounds her ability to concentrate or fairly deliberate on the evidence would be compromised where the juror appeared extremely emotional and overwhelmed by outside stresses, repeatedly referred to her "nerves" and to being under considerable stress, and cried twice during voir dire. (***Id***. at p. 1124; **see also *Mitchell* v. *Superior Court*** (1984) 155 Cal.App.3d 624, 628.)

23. Juror provides strange, unusual, nonsensical, or inconsistent responses

In ***Davis* v. *Ayala*** (2015) 135 S.Ct. 2187, the court held a juror's incoherent explanation for changing his views death penalty which "did not make a lot of sense," "were not thought out," and "demonstrate[d] a lack of ability to express himself well" provided a legitimate reason to challenge the juror. (***Id***. at p. 2202.)

In ***People* v. *Duff*** (2014) 58 Cal.4th 527, the court upheld the challenge to a juror challenged because, inter alia, the prosecutor thought the juror's questionnaire answers were "unusual," including (i) "he had been arrested for driving with a suspended license and was not happy about being fined and losing his car"; (ii) "[p]rosecutors and defense attorneys were necessary 'but make way too much money'"; and (iii) that "[v]ictim impact evidence was in his mind irrelevant because the 'crime wasn't necessarily against the family.'" (***Id***. at p. 547.)

In ***People* v. *Elliott*** (2012) 53 Cal.4th 535, the court noted that a juror's "inconsistency and ambiguity of" responses suggested she might have difficulty performing her duties as a juror." (***Id***. at p. 567.)

In ***People* v. *Thomas*** (2011) 51 Cal.4th 449, the court held a prosecutor could properly challenge a juror based on, inter alia, the fact that the juror told a "bizarre" story about witnessing a home invasion robbery by men wearing beekeeper hats and said being a juror would not pose a financial hardship because he was "not living in a money based world." (***Id***. at pp. 472, 475.)

In ***People* v. *Neuman*** (2009) 176 Cal.App.4th 571, a juror, in response to a question about whether, when reading about someone being arrested or charged with a crime in the paper, she thought "where there's smoke, there's fire" or thought that people are presumed innocent and the paper may omit certain crucial facts," stated the latter - because she was recently a victim of media manipulation, where she was quoted out of context, but then offered no explanation as to how she came to be in that situation. The court found this "strange" response to be neutral grounds to challenge the juror. (***Id***. at pp. 586-587.)

24. Juror has difficulty making a decision

An "advocate is entitled to consider a panelist's . . . acceptance of responsibility for making weighty decisions." (***People* v. *Lenix*** (2008) 44 Cal.4th 602, 623.) In ***People* v. *Fiu*** (2008) 165 Cal.App.4th 360, the juror repeatedly expressed a concern that it might be difficult for her to make a decision regarding guilt if the defendant was present in the courtroom. This was found to be a neutral reason for removing the juror. (***Id***. at p. 395; **see also *Briggs* v. *Grounds*** (9th Cir. 2011) 682 F.3d 1165, 1177 [fact juror said "she was not good at assessing who is telling the truth—plausibly could compound the prosecutor's concern" that juror would not be a good juror]; ***People* v. *Chism*** (2014) 58 Cal.4th 1266, 1317 [prosecutor's subjective estimation that a juror does not have "high stress" decision-making skills constitutes "an entirely valid and nondiscriminatory reason" for exercise of a challenge]; ***Murray* v. *Schriro*** (9th Cir. 2014) 745 F.3d 984, 1007, 1009 ["indecisiveness is a legitimate reason to exercise a peremptory challenge" and thus proper to challenge juror where prosecutor knew juror and thought he "was excessively nice, to the point that he was indecisive"].)

25. Juror's political outlook or membership in organizations associated with anti-law enforcement outlook

In ***People* v. *Bryant*** (2019) 40 Cal.App.5th 525, the court held the fact that a juror and her daughter had worked for organizations the prosecutor felt were "typically" liberal or not "pro-law enforcement" were accepted race-neutral reasons to exclude jurors. (***Id***. at p. 537.)

In ***People* v. *Woodruff*** (2018) 5 Cal.5th 697, the court upheld challenge as valid where, inter alia, juror's master's thesis was about "the brainwashing of Africa through colonial education." (***Id***. at p. 754.)

In ***People* v. *Jones*** (2013) 57 Cal.4th 899, the court held a prosecutor could properly challenge a juror because she exhibited "liberal tendencies" as reflected by her "involvement with the restoration of wetlands in the Famosa Slough, along with her involvement with the "San Diego Environmental Project, [and the] Equal Employment Opportunity [Commission]." (***Id***. at p. 918.) The California Supreme Court stated it "need not debate whether the policies of certain organizations are liberal or not; the prosecutor's subjective distrust of jurors affiliated with such organizations—if genuine—is sufficient to support the juror challenge." (**Ibid**; **see also *People* v. *Bryant*** (2019) 40 Cal.App.5th 525, 542 [legitimate nondiscriminatory reason to challenge juror was based on fact "she worked in environmental protection—a job with a strong liberal slant"].)

In ***People* v. *Arellano*** (2016) 245 Cal.App.4th 1139, the court noted a juror's particular philosophical leanings can provide a basis for challenging a juror and cited to ***People* v. *Barber*** (1988) 200 Cal.App.3d 378, 394 a case that noted "peremptory challenges are often exercised against teachers by prosecutors on the belief they are deemed to be rather *liberal*" to illustrate the principle. (***Arellano*** at p. 1165, emphasis added by IPG.)

26. Juror has "too much" or "too little" education

In ***People* v. *Reynoso*** (2003) 31 Cal.4th 903, the court stated it would be lawful and valid for an attorney to "peremptorily excuse a potential juror because he or she feels the potential juror's occupation reflects too much education, and that a juror with that particularly high a level of education would likely be specifically biased against their

witnesses, or their client's position in the case. (***Id***. at p. 926, fn. 6; **see also *Ngo* v. *Giurbino*** (9th Cir. 2011) 651 F.3d 1112, 1116-1117 ["striking a juror who is 'overly educated' is sufficiently race-neutral to shift the burden back on the defendant to prove purposeful discrimination"].)

On the other hand, a lack of education can also be a basis for challenging a juror – especially if the lack of education is being used as a proxy for a lack of sufficient ability to understand the evidence. (**See *People* v. *DeHoyos*** (2013) 57 Cal.4th 79, 108-109.)

The fact that a prosecutor is concerned both about jurors with too much and too little education – even in the same case – does not mean the prosecutor does not have a genuine neutral concern. (**See e.g., *People* v. *DeHoyos*** (2013) 57 Cal.4th 79, 111 [noting it "is reasonable to desire jurors with sufficient education and intellectual capacity to thoughtfully consider anticipated expert testimony, but to reject jurors who have so much interest, education, and experience in the same field as the anticipated testimony that they are likely to have established views and predispositions regarding the testimony, which they might share with the other jurors"].)

27. Juror has "too much" specialized knowledge in a particular area

A concern that the juror has too much knowledge of a particular area such that the juror might rely on his or her own specialized knowledge or come into a case with a predisposition based on that knowledge, and/or that other jurors might use the juror as source of that knowledge is a valid neutral concern that will support a challenge. (**See *People* v. *DeHoyos*** (2013) 57 Cal.4th 79, 111.)

28. Juror's reading and television preferences

In ***People* v. *Jones*** (2013) 57 Cal.4th 899, the court held the fact the juror said she did not read the newspaper was a "genuine" permissible reason to challenge the juror. (***Id***. at p. 919; **accord *People* v. *Melendez*** (2016) 2 Cal.5th 1, 19 [fact juror did not "read the paper or watch the news" permissible reason to challenge].) The fact that juror stated only "Hot V.W." when asked about the books he read for pleasure provided a valid reason, inter alia, to remove a juror where the trial would involve sophisticated psychological and psychiatric testimony. (**See *People* v. *DeHoyos*** (2013) 57 Cal.4th 79, 107.) And the fact a juror claimed that she *never read a book* and her statement that "Judge Judy" was her favorite TV show were legitimate grounds for bumping a juror. (**See *United States* v. *Murillo*** (9th Cir. 2002) 288 F.3d 1126, 1135-1137.) In ***People* v. *Hardy*** (2018) 5 Cal.5th 56, the court held it proper to challenge a juror based on, inter alia, the fact the juror "watched CSI, Crime Scene Investigation, all the time" and it was a DNA case. (***Id***. at p. 85.)

29. Juror has previously served on a hung jury

"Prior service on a deadlocked jury is an accepted neutral reason for excusing a prospective juror." (***People* v. *Johnson*** (2015) 61 Cal.4th 734, 758 citing to ***People* v. *Taylor*** (2010) 48 Cal.4th 574, 644; **accord *People* v. *Reed*** (2018) 4 Cal.5th 989, 1001; ***People* v. *Manibusan*** (2013) 58 Cal.4th 40, 48.) The fact a panelist has previously served on a jury that was unable to reach a verdict "constitutes a legitimate concern for the prosecution, which seeks a jury that can reach a unanimous verdict[.]" (***People* v. *Farnam*** (2002) 28 Cal.4th 107, 138; ***People* v. *Turner*** (1994) 8 Cal.4th 137, 170; **see also *People* v. *Garcia*** (2011) 52 Cal.4th 706, 749 [proper to excuse juror who had previously served on jury that deadlocked on intent]; ***People* v. *Bonilla*** (2007) 41 Cal.4th 313, 349 [upholding dismissal of juror who, inter alia, had previously served on deadlocked jury and said she "would adhere to her views" if faced with the same situation again]; ***Ngo* v. *Giurbino*** (9th Cir. 2011) 651 F.3d 1112, 1116-1117 [fact juror served on five previous juries, three of which hung, was neutral basis for challenging juror].) Even if the juror served on a jury that only hung on one count, this has been viewed as a neutral reason for challenging the juror. (**See *People* v. *Winbush*** (2017) 2 Cal.5th 402, 438.) Or on multiple juries, only one of which deadlocked. (**See *People* v. *Bryant*** (2019) 40 Cal.App.5th 525, 533, 540.)

Moreover, an attitude of complacency about a jury deadlock is a related reason for challenging a juror. (**See e.g., *People* v. *Winbush*** (2017) 2 Cal.5th 402, 438 [challenge upheld where one of prosecutor's reasons was that the juror found service was "satisfying and nonstressful" even though the jury hung on one count]; ***People* v. *Jones*** (2017) 7 Cal.App.5th 787, 804 [proper to excuse juror who served on several juries where one of the juries hung and juror said the result of the hung jury did not cause her any frustration - even though prosecutor did not ask follow-up questions to ascertain whether the hung jury was civil or criminal, or precisely why the juror was not frustrated by the result].)

30. Juror has previously served on a jury that acquitted

"That a juror acquitted in a prior case is a valid, race-neutral reason to strike." (***United States* v. *Mitchell*** (9th Cir. 2007) 502 F.3d 931, 958; ***United States* v. *Thompson*** (9th Cir.1987) 827 F.2d 1254, 1260.)

31. Juror has no prior jury experience

In ***People* v. *Manibusan*** (2013) 58 Cal.4th 40, the court held the fact the prospective juror had no prior jury experience was a legitimate, nondiscriminatory ground for exercising a peremptory challenge. (***Id***. at p. 82 and citing to ***People* v. *Reynoso*** (2003) 31 Cal.4th 903, 925.)

32. Juror has language difficulties

The fact a juror might have difficulty understanding spoken English is a valid, neutral reason for challenging a juror. (**See *Davis* v. *Ayala*** (2015) 135 S.Ct. 2187, 2203; ***People* v. *Jurado*** (2006) 38 Cal.4th 72, 107.) Insufficient command of the English language to allow full understanding of the words employed in instructions and full participation in deliberations clearly renders a juror "unable to perform his duty" within the meaning of the California Penal Code. (***Davis* v. *Ayala*** (2015) 135 S.Ct. 2187, 2203, fn. 3, citing to ***People* v. *Lomax*** (2010) 49 Cal.4th 530, 566 and Civ. Proc. § 203(a)(6).) Indeed, the seating of jurors whose lack of English proficiency can be error. (**See *Davis* v. *Ayala*** (2015) 135 S.Ct. 2187, 2203, fn. 3, citing to ***People* v. *Szymanski*** (2003) 109 Cal.App.4th 1126.)

33. Failure to answer questions on questionnaire

Failure to answer questions on the jury questionnaire can be a neutral basis for challenging a juror. (**See *People* v. *Williams*** (2013) 58 Cal.4th 197, 284 [proper to challenge juror because, inter alia, he answered "not applicable" to various questions about the death penalty].)

34. Juror directly or indirectly expresses reluctance to impose the death penalty in a death penalty case

"Opposition to the death penalty is a permissible, race-neutral reason for a peremptory challenge." (***People* v. *Montes*** (2014) 58 Cal.4th 809, 851.) Statements or attitudes of a juror that reflect a reluctance to impose the death penalty provide neutral reasons for excusing the juror. (**See *People* v. *Riccardi*** (2012) 54 Cal.4th 758, 788; ***People* v. *Streeter*** (2012) 54 Cal.4th 205, 226; ***People* v. *Thomas*** (2012) 53 Cal.4th 771, 795; ***People* v. *Elliott*** (2012) 53 Cal.4th 535, 561; ***People* v. *Vines*** (2011) 51 Cal.4th 830, 849-851; ***People* v. *Booker*** (2011) 51 Cal.4th 141, 167; ***People* v. *Cowan*** (2010) 50 Cal.4th 401, 448-449; ***People* v. *Watson*** (2008) 43 Cal.4th 652, 673-675, 679-681 ***People* v. *Lewis*** (2008) 43 Cal.4th 415, 472; ***People* v. *Welch*** (1999) 20 Cal.4th 701, 746.) "The view that life without possibility of parole is a more severe punishment than death is also an 'obvious race-neutral ground[ ]' for challenging a prospective juror." (***People* v. *Armstrong*** (2019) 6 Cal.5th 735, 771 citing to ***People* v. *Davis*** (2009) 46 Cal.4th 539, 584.)

"In a capital case, it is not surprising for prospective jurors to express varying degrees of hesitancy about voting for a death verdict." (***Davis* v. *Ayala*** (2015) 135 S.Ct. 2187, 2201.) "[B]oth the prosecution and the defense may be required to make fine judgment calls about which jurors are more or less willing to vote for the ultimate punishment. These judgment calls may involve a comparison of responses that differ in only nuanced respects, as well as a sensitive assessment of jurors' demeanor." (**Ibid**.) "A prosecutor may exercise peremptory challenges against prospective jurors who are not so intractably opposed to the death penalty that they are subject to challenge for cause under the ***Witt-Wainwright*** standard, but who nonetheless are substantially opposed to the death penalty." (***People* v. *Salcido*** (2008) 44 Cal.4th 93, 139-140; **see also *People* v. *Zambrano*** (2007) 41 Cal.4th 1082, 1104-1107; ***People* v. *Jurado*** (2006) 38 Cal.4th 72, 106.) A "declaration of opposition to the death penalty, even when combined with some subsequent equivocation, reasonably dispels any inference of discrimination." (***People* v. *Reed*** (2018) 4 Cal.5th 989, 1002.) "Ambiguity as to whether a juror would be able to give appropriate consideration to imposing the death penalty is a legitimate and reasonable basis for striking a juror." (***Sifuentes* v. *Brazelton*** (9th Cir. 2016) 815 F.3d 490, 507.)

Even excusing jurors with "a neutral stance" on the death penalty is valid reason for excusing a juror where a prosecutor is seeking the jurors with the "strongest" position on capital punishment. (**See *People* v. *Lomax*** (2010) 49 Cal.4th 530, 572; **see also *People* v. *Streeter*** (2012) 54 Cal.4th 205, 225 [prosecutor could properly challenge juror who indicated a willingness to impose the death penalty only under very limited circumstances and if the defendant confessed, facts not present in the case]; ***People* v. *Blacksher*** (2011) 52 Cal.4th 769, 802 [proper to excuse juror who was only "moderately" in favor of the death penalty and believed a life sentence was a more severe penalty].) Indeed, even "[a] prospective juror's unresponsiveness concerning opinions about the death penalty is a valid nondiscriminatory basis for striking a juror." (***People* v. *Trinh*** (2014) 59 Cal.4th 216, 243 citing to ***People* v. *Mills*** (2010) 48 Cal.4th 158, 176–180.)

35. The juror may be distracted or unable to serve throughout the entire trial due to financial hardship or other difficulties stemming from the juror's family, work, or school obligations

The fact a juror may experience hardship or difficulties in serving that may distract the juror from focusing on the case or create the possibility the juror may drop out mid-trial can be neutral grounds for challenging the juror. (**See *People* v. *Rhoades*** (2019) 8 Cal.5th 393 [255 Cal.Rptr.3d 453, 493] [a juror's "uncertainty whether she would be able to serve as a juror while caring for her six-month-old infant (often on her own while her husband was away)" , provided a "readily apparent" basis for a prosecutor to challenge the juror]; ***People* v. *Harris*** (2013) 57 Cal.4th 804, 836 [fact juror would be forced to drop some of her summer school classes, which she feared would interfere with her ability to transfer to a four-year college provided a reasonable basis for prosecutor to believe juror's concerns about completing her education might impair her ability to focus on the case and serve as an impartial juror]; ***People* v. *Clark*** (2012) 52 Cal.4th 856, 907 [proper to excuse juror who indicated jury service might be problematic because he recently had been promoted to a management position in the company and was scheduled in the following month to begin 15 weeks of training, and when asked if this would cause him distraction stated that while he "could be conscious of what's happening around here," he emphasized how much the promotion meant to him and that it was "a great step" for him in his career]; ***People* v. *Jenkins*** (2000) 22 Cal.4th 900, 994, 1044 [the risk of detriment to the prospective juror's employment if he was required to serve on a lengthy trial was a proper race-neutral ground for his excusal]; ***People* v. *Neuman*** (2009) 176 Cal.App.4th 571, 585-586 [fact jurors asked to be excused due to hardship from having to work and go to school, along with lengthy commutes provided neutral grounds for challenging jurors].)

36. Juror (or close relative of juror) is employed in a job or engages in activities that reflect an orientation toward rehabilitation and sympathy for defendants

"A peremptory challenge may be based on employment[.]" (***People* v. *Chism*** (2014) 58 Cal.4th 1266, 1316; **see also *People* v. *Arellano*** (2016) 245 Cal.App.4th 1139, 1165 ["A prospective juror's occupation may be a permissible, nondiscriminatory reason for exercising a peremptory challenge"].) And even "[t]he occupation of a prospective juror's spouse may be a legitimate nondiscriminatory reason for a peremptory challenge." (***People* v. *Arellano*** (2016) 245 Cal.App.4th 1139, 1163; ***People* v. *Rushing*** (2011) 197 Cal.App.4th 801, 811.)

"[A] prosecutor is entitled to believe that people involved in particularly professions or with particular philosophical leanings are ill-suited to serve as jurors because they are not sympathetic to the prosecutor." (***People* v. *Arellano*** (2016) 245 Cal.App.4th 1139, 1165.)

a. Counselors

In ***People* v. *Jones*** (2013) 57 Cal.4th 899, the court held it was proper to challenge a juror because, inter alia, she expressed interest in being a counselor, "a helping person, someone to get everyone better." (***Id***. at p. 918.)

In ***People* v. *Clark*** (2012) 52 Cal.4th 856, the court held the fact a juror was a licensed pastoral counselor with a master's degree in theological studies, was working toward a Ph.D, and, along with his wife, led religious services for the homeless and helped them obtain social service benefits was a valid neutral basis for excusing that juror. (***Id***. at p. 907.)

In ***People* v. *Lewis*** (2008) 43 Cal.4th 415, the court found prosecutor's asserted reasons for striking a juror who worked as a correctional counselor and had a background in psychology and sociology to be valid. (***Id***. at p. 476.)

In ***People* v. *Ervin*** (2000) 22 Cal.4th 48, the court held it was proper to excuse a juvenile counselor who believed in rehabilitation on grounds this might cause her to reject the death penalty. (***Id***. at p. 75.)

In ***People* v. *Arellano*** (2016) 245 Cal.App.4th 1139, the court stated "a peremptory challenge based on a prospective juror's experience in counseling . . . , and the prosecutor's concern that such a person might be too sympathetic to the defense, have been held as proper race-neutral reasons for excusal." (***Id***. at p. 1163.)

In ***People* v. *Neuman*** (2009) 176 Cal.App.4th 571 the fact the mother of the one of the challenged jurors "had been involved for more than all her life as a counselor and probation officer" provide a neutral ground for removing a juror. (***Id***. at p. 586)

In ***People* v. *Adanandus*** (2007) 157 Cal.App.4th 496, the court found a prosecutor could properly excuse a juror because, inter alia, the juror worked as a school counselor in the Americorps program (a program that focused primarily on rehabilitation) and this "might make her more partial to the defense[.]" (***Id***. at p. 507.)

b. Drug treatment affiliation

In ***People* v. *Landry*** (1996) 49 Cal.App.4th 785, the court held it was proper to excuse a juror who, inter alia, was on the board of a drug treatment program. (***Id***. at pp. 789-790; **see also *People* v. *Adanandus*** (2007) 157 Cal.App.4th 496, 508.)

c. Healthcare workers

In ***People* v. *Trevino*** (1997) 55 Cal.App.4th 396, the court indicated that challenging jurors on grounds they (or their spouse) worked in health care would constitute a race-neutral reason. (***Id***. at p. 411; **accord *People* v. *Arellano*** (2016) 245 Cal.App.4th 1139, 1165; ***People* v. *Rushing*** (2011) 197 Cal.App.4th 801, 812.) In ***People* v. *Howard*** (1992) 1 Cal.4th 1132, the court held a prospective juror's professional training as a nurse suggested a possible ground for the prosecutor's challenge. (***Id***. at pp. 1156.) In ***People* v. *Davis*** (2008) 164 Cal.App.4th 305, the court held it was proper for a prosecutor to excuse a juror who was a certified nursing assistant based on the prosecutor's ***own personal bad experiences, outside of court***, with nursing assistants. (***Id***. at p. 313.)

d. Legal professions (judges, attorneys, employees of court or attorneys)

It is proper to excuse a juror who works in the legal field (or who has family members in the legal field) out of a concern that such a juror might exercise undue influence on the jury.

In ***People* v. *Hardy*** (2018) 5 Cal.5th 56, the court stated that "[l]awyers . . . are often excused peremptorily." (***Id***. at p. 84.) And a "juror's close and daily professional relationship with lawyers and the court system" provides a "strong" and permissible reason for challenging a juror. (***Id***. at p. 83.)

In ***People* v. *Clark*** (2012) 52 Cal.4th 856, the court held the prosecutor could properly remove an administrative law judge since it was reasonable to believe the judge "might consciously or unconsciously exert undue influence during the deliberative process, or that fellow jurors would ascribe to her a special legal expertise." (***Id***. at p. 907.)

In ***People* v. *Buckley*** (1997) 53 Cal.App.4th 658, the court found the prosecutor has stated race-neutral grounds for excusing a prospective juror based on the juror's history of working in various legal departments. (***Id***. at pp. 667–668.)

In ***People* v. *Barber*** (1988) 200 Cal.App.3d 378, the court held it was proper to excuse a juror whose *spouse* worked for a "liberal attorney." (***Id***. at pp. 389-394.)

In ***People* v. *Chambie*** (1987) 189 Cal.App.3d 149, the court held the prosecutor had non-racial grounds for removing a juror who the prosecutor felt other jurors might tend to defer to since she was in law school. (***Id***. at p. 156; **see also *Ngo* v. *Giurbino*** (9th Cir. 2011) 651 F.3d 1112, 1116-1117 [fact juror had a law degree was, inter alia, neutral reason for challenging juror].)

In ***Sifuentes* v. *Brazelton*** (9th Cir. 2016) 815 F.3d 490, the Ninth Circuit held a state court could reasonably determine that the prosecutor's explanation that a juror's legal training would cause problems, based on the prosecutor's experience with lawyers on juries, was not pretextual where the juror had a law degree although she did not practice law and the prosecutor stated, "I don't want a lawyer on my jury. I've never liked having lawyers on juries. They're know-it-alls, they inject themselves into the case, they think they can do a better job." (***Id***. at pp. 509, 511.)

e. Probation or parole officers

In ***People* v. *Neuman*** (2009) 176 Cal.App.4th 571 the fact the mother of the one of the challenged jurors "had been involved for more than all her life as a counselor and ***probation officer***" provide a neutral ground for removing a juror. (***Id***. at p. 586.) In ***People* v. *Lewis*** (2008) 43 Cal.4th 415, the court held it was proper to excuse parole agent with a psychology degree. (***Id***. at pp. 476–477.)

f. Psychologists/psychiatrists

In ***People* v. *Landry*** (1996) 49 Cal.App.4th 785, the court held it was proper to excuse a juror who, inter alia, had a background in psychiatry or psychology. (***Id***. at pp. 789-790; **see also *People* v. *Adanandus*** (2007) 157 Cal.App.4th 496, 508.) In ***People* v. *Cox*** (2010) 187 Cal.App.4th 337, the court held it was proper to excuse a juror because the juror was employed as a "psychiatric social worker." (***Id***. at p. 347.) In ***People* v. *Clark*** (2012) 52 Cal.4th 856, the court held a valid neutral reason for excusing a juror could be based on the fact the juror had taken college courses in psychology, and had expressed the view that someone who commits murder must have "something wrong with them in their mind." (***Id***. at p. 907.) In ***People* v. *Blacksher*** (2011) 52 Cal.4th 769, 802 [fact juror was a psychology major and characterized that discipline as a "science" was a valid neutral reason for excusing juror where "[h]er background thus posed the danger of having her own specialized knowledge influence her decisionmaking regarding the significance of the claims of defendant's mental illness"]; **see also *People* v. *DeHoyos*** (2013) 57 Cal.4th 79, 110-111 [proper to challenge juror who had taken numerous undergraduate and postgraduate psychology courses and was considering seeking a master's degree in the area out of concern juror would "have a predisposition toward accepting defense psychological evidence"]; ***People* v. *Gutierrez*** (2002) 28 Cal.4th 1083, 1124–1125 [prosecutor's belief that the prospective juror would place too much weight on the opinion testimony of mental health experts justified the peremptory challenge]; ***Ngo* v. *Giurbino*** (9th Cir. 2011) 651 F.3d 1112, 1116-1117 [fact juror had psychology background was, inter alia, neutral reason for challenging juror where prosecutor said she was concerned the defense might call psychologists or psychiatrists as witnesses].)

g. Religious leaders

In ***People* v. *Clark*** (2012) 52 Cal.4th 856 the court held the fact a juror was a licensed pastoral counselor with a master's degree in theological studies, was working toward a PhD, and led religious services for the homeless and also helped them obtain social service benefits was a valid neutral basis for excusing that juror. (***Id***. at p. 907.) In ***People* v. *Semien*** (2008) 162 Cal.App.4th 701, the court held a prosecutor had legitimate grounds for challenging a pastor who dealt with homeless people since the pastor was "in the business of forgiveness," and the prosecutor was not required to accept the pastors' assurance that he could find someone guilty." (***Id***. at p. 708.) In ***People* v. *Arellano*** (2016) 245 Cal.App.4th 1139, the fact the juror's husband was a pastor was one of several valid justifications for challenging the juror. (***Id***. at p. 1163.) And in ***People* v. *Montes*** (2014) 58 Cal.4th 809, the court upheld the excusal of an elder in a church because "[e]xcusing prospective jurors who hold religious views that make it difficult for them to impose the death penalty is a proper, nondiscriminatory ground for a peremptory challenge." (***Id***. at p. 856.)

h. Social workers or social service type workers

If a juror has a background in, or is employed in, social service type work, this can provide neutral grounds for challenging the juror. (**See *Felkner* v. *Jackson*** (2011) 131 S.Ct. 1305, 1306 [proper to excuse a juror who had a masters in social work and interned in jail, probably in the psych unit]; ***People* v. *Woodruff*** (2018) 5 Cal.5th 697, 752 -753 [proper to challenge juror who had master's degree in sociology and had been working at the Los Angeles County Department of Public Social Services for eight years as an administrator managing assistance programs and conducting research in the jobs training program and noting trial judge's comments that "prosecutors generally will excuse people with social welfare type of backgrounds"]; ***People* v. *Mai*** (2013) 57 Cal.4th 986, 1053 [prosecutors "expressed reservation about having social workers on the jury was race neutral" and had "some basis in accepted trial strategy" "insofar as it stemmed from a concern about the general attitudes and philosophies persons in that profession might harbor."]; ***People* v. *Streeter*** (2012) 54 Cal.4th 205, 225 [proper to challenge social services caseworker and juror who graduated with a BA in sociology and was a social worker for 30 years]; ***People* v. *Clark*** (2011) 52 Cal.4th 856, 907 [peremptory challenge properly based on juror's experience in counseling or social services] ***People* v. *Watson*** (2008) 43 Cal.4th 652, 677 [proper to excuse a juror who, inter alia, was a social worker]; ***People* v. *Turner*** (1994) 8 Cal.4th

137, 170 [proper to excuse a juror who had trained with the Department of Social Services] ***People v. Arellano*** (2016) 245 Cal.App.4th 1139, 1163 ["a prospective juror's experience in . . . social services , and the prosecutor's concern that such a person might be too sympathetic to the defense, have been held as proper race-neutral reasons for excusal; ***People* v. *Cox*** (2010) 187 Cal.App.4th 337, 347 [proper to excuse a juror employed as a "psychiatric social worker"]; ***People* v. *Landry*** (1996) 49 Cal.App.4th 785, 789-790 [proper to excuse a juror who, inter alia, had worked in a youth services agency]; ***People* v. *Perez*** (1996) 48 Cal.App.4th 1310, 1315 [no prima facie case where challenged members shared characteristic of being single and working in "social services or caregiving fields"]; **accord *People* v. *Jones*** (2013) 57 Cal.4th 899, 918; ***People* v. *Adanandus*** (2007) 157 Cal.App.4th 496, 508.) Indeed, even if someone close to the juror has a background or job in social work, this can provide neutral grounds for challenging the juror. (**See *People* v. *Semien*** (2008) 162 Cal.App.4th 701, 707-708 [proper to excuse a juror who, inter alia, had a wife working in the county welfare department].)

i. Teachers

In ***People* v. *Landry*** (1996) 49 Cal.App.4th 785, the court held it was proper to excuse a juror who, inter alia, was a teacher. (***Id***. at pp. 789-790; **see also *People* v. *Adanandus*** (2007) 157 Cal.App.4th 496, 507.) In ***People* v. *Barber*** (1988) 200 Cal.App.3d 378, the court held it was proper to excuse a juror because the juror was a teacher and prosecutor believed teachers tended to be liberal and "less prosecution oriented." (***Id***. at pp. 389-394; **accord *People* v. *Arellano*** (2016) 245 Cal.App.4th 1139, 1165; **see also *Sifuentes* v. *Brazelton*** (9th Cir. 2016) 815 F.3d 490, 511 [fact juror had been a teacher was not a discriminatory reason for challenging a juror].) In ***Foster* v. *Chatman*** (2016) 136 S.Ct. 1737, the High Court held that on its face, striking a juror because she "worked with disadvantaged youth in her job as a teacher's aide" seemed reasonable enough. (***Id***. at pp. 1748-1749.)

37. Juror (or close relative of juror) is employed in a profession whose members make "bad prosecution jurors"

"Occupation can be a permissible, non-discriminatory reason for exercising a peremptory challenge." (***People* v. *Rushing*** (2011) 197 Cal.App.4th 801, 811.) Even jurors who work in professions that do not necessarily reflect an orientation toward rehabilitation and sympathy for defendants may be challenged if persons working in the profession are honestly viewed as poor prosecution jurors. "Whether a prosecutor's generalizations about a given occupation have any basis in reality or not, a prosecutor 'surely … can challenge a potential juror whose occupation, in the prosecutor's subjective estimation, would not render him or her the best type of juror to sit on the case for which the jury is being selected.'" (***People* v. *Trinh*** (2014) 59 Cal.4th 216, 242 citing to ***People* v. *Reynoso*** (2003) 31 Cal.4th 903, 925; **accord *People* v. *Chism*** (2014) 58 Cal.4th 1266, 1317; **but see *United States* v. *Murillo*** (9th Cir. 2002) 288 F.3d 1126, 1135-1137 [claim juror was bumped because juror worked for a casino was not given much credence where a large part of the county's citizens also worked in casinos].)

And a prosecutor may legitimately take into account whether *too many* persons in the same profession are on the jury even if the profession itself is not an automatic basis for exclusion in the prosecutor's eyes. (**See *Carpenter* v. *Soto*** (C.D. Cal.) 2016 WL 1696903, *16, fn. 13.)

a. Customer Service Workers

In in ***People* v. *Reynoso*** (2003) 31 Cal.4th 903, the court upheld a prosecutor's challenge to a juror on grounds she was a "customer service representative" with a lack of educational experience was a legitimate basis to believe that such a juror would not be the best person to decide a multi-defendant murder case, especially when coupled with the juror's inattentiveness and lack of prior experience with the criminal justice system. (***Id***. at p. 925.)

b. Magicians

In ***People* v. *O'Malley*** (2016) 62 Cal.4th 944, the court held the prosecutor's aversion to having an amateur magician (i.e., someone who practiced illusion and deception as a *pastime*) as a juror was "idiosyncratic" and even "arbitrary" but did not establish the prosecutor acted with discriminatory intent. (***Id***. at pp. 981-982.)

c. Postal Workers

In ***People* v. *Trinh*** (2014) 59 Cal.4th 216, the court found that one of the prosecutor's stated reasons for removing a juror (i.e., that he was a postal worker) was a permissible basis for challenging a juror. (***Id***. at p. 242.) In ***Sifuentes* v. *Brazelton*** (9th Cir. 2016) 815 F.3d 490, the Ninth Circuit found one of the prosecutor's reasons for challenging the juror (i.e., that the juror was a postal worker and postal workers as "lazy") while is not persuasive, was race neutral on its face. (***Id***. at p. 517.) In ***Jamerson* v. *Runnels*** (9th Cir. 2013) 713 F.3d 1218, the court found the prosecutor's explanation for removing a postal worker based on a past "terrible experiences with postal workers," coupled with the jurors' facial expressions, could be a valid neutral basis for seeking to excuse the juror. (***Id***. at pp. 1234-1235 [albeit also noting the explanation was not "overwhelmingly persuasive"].)

Even the fact that the *spouse* of a juror is a postal worker is a nondiscriminatory basis for challenging a juror. (***People* v. *Bryant*** (2019) 40 Cal.App.5th 525, 542; ***People* v. *Rushing*** (2011) 197 Cal.App.4th 801, 812 [and citing three out-of-state cases finding challenges against postal workers by prosecutors was proper: ***Williams* v. *Groose*** (8th Cir. 1996) 77 F.3d 259, 261; ***Johnson* v. *State*** (Ga. 1996) 470 S.E.2d 637, 639; and ***State* v. *Hinkle*** (Mo. App. E.D.1999) 987 S.W.2d 11, 13]; **see also *Johnson* v. *Haviland*** (unreported N.D. Cal. 2013) 2013 WL 3354435, *4 [upholding challenge to juror where prosecutor noted, "I have yet to find a postal worker employee who impresses me as someone who would be sympathetic to law enforcement."].)

d. Professionals

In ***People* v. *Arellano*** (2016) 245 Cal.App.4th 1139, the court stated that a prospective juror's occupation may be a permissible, nondiscriminatory reason for exercising a peremptory challenge, and a prosecutor is entitled to believe that people involved in particularly professions . . . are ill-suited to serve as jurors because they are not sympathetic to the prosecutor." (***Id***. at p. 1165.) In support of this principle, the ***Arellano*** court cited to, among other cases, the case of ***People* v. *Granillo*** (1987) 197 Cal.App.3d 110 at pp. 120–121, fn. 2, wherein the ***Granillo*** court observed "many prosecutors believe various professional people are too demanding or require certainty". (***Arellano*** at p. 1165.)

38. Lack of Supervisory Experience

In ***People* v. *Chism*** (2014) 58 Cal.4th 1266, the court upheld a prosecutor's challenge of a juror based on the juror's lack of supervisory experience in a death penalty case where the prosecutor explained "she desired jurors who could make difficult decisions such as those in the penalty phase of a death penalty case" and that "[i]t was her belief that this quality is demonstrated by a person who has had practical work experience as a supervisor and that those who did not have this experience were less likely to be able to decide hard questions." (***Id***. at p. 1317.)

39. Lack of Employment or Underemployment of Juror or Juror's Family Member

Lack of employment or under-employment of a juror or family member of juror can be a neutral basis for challenging a juror. For example, in ***People* v. *Thomas*** (2011) 51 Cal.4th 449, the court held a prosecutor could properly challenge a juror based on the fact that the juror was "irresponsible" in that he was thirty-one, but had not had significant employment in his life and lived out of a van on his father's property. (***Id***. at pp. 472-473, 475; **see also *People* v.**

Jones (2011) 51 Cal.4th 346, 363 [concern over the fact the juror has unemployed *children* was held to be a race neutral reason for challenging juror]; ***Stubbs* v. *Gomez*** (9th Cir.1999) 189 F.3d 1099, 1106 [upholding a prosecutor's challenge of a juror on ground she lacked employment experience and experience outside of the home and citing to ***United States* v. *Hunter*** (7th Cir.1996) 86 F.3d 679, 683 for the proposition that employment status and personal history are race-neutral reasons for striking a juror]; ***People* v. *Vines*** (2011) 51 Cal.4th 830, 852-853 [prosecutor could properly view kept juror more favorably than challenged juror because spouse of former was employed and spouse of latter was not]; **cf**., ***United States* v. *Brown*** (8th Cir. 2009) 560 F.3d 754, 763 (cited favorably in ***Jamerson* v. *Runnels*** (9th Cir. 2013) 713 F.3d 1218, 1229) [strike of a prospective juror valid because both the juror and the defendant received public assistance and juror might identify with the defendant on that basis].)

40. Hobbies

In ***People* v. *O'Malley*** (2016) 62 Cal.4th 944, the court held the prosecutor's aversion to having an amateur magician (i.e., someone who practiced illusion and deception as a *pastime*) as a juror was "idiosyncratic" and even "arbitrary" but did not establish the prosecutor acted with discriminatory intent. (***Id***. at pp. 981-982.)

41. Marital status

In ***People* v. *Hamilton*** (2009) 45 Cal.4th 863, the court upheld challenges to one juror who the prosecutor challenged because, inter alia, she was single; and to another juror on grounds, she was an unmarried mother. (***Id***. at p 899, 903-905; **see also *People* v. *Jones*** (2017) 7 Cal.App.5th 787, 805 [proper to excuse jurors, inter alia, because they were young, *single*, and did not have children, which reflected a lack a life experience]; ***People* v. *Perez*** (1996) 48 Cal.App.4th 1310, 1315 [no prima facie case where challenged members shared characteristic of *being single* and working in "social services or caregiving fields"]; ***Foster* v. *Chatman*** (2016) 136 S.Ct. 1737, 1749 [holding, on its face, striking a juror because she was divorced was, inter alia, a "reasonable enough" ground for challenging the juror]; ***Sifuentes* v. *Brazelton*** (9th Cir. 2016) 815 F.3d 490, 511, 513 [fact one juror had been a single mother was not a discriminatory reason for challenging a juror; and fact another juror was a single mother with a six-year old child was not a persuasive reason but was "race-neutral" on its face].)

42. Lack of children or family ties

The fact a juror does not have family ties can be a neutral basis for challenging a juror. (**See *People* v. *O'Malley*** (2016) 62 Cal.4th 944, 981 [defense conceded that juror's "lack of knowledge about his children" was a race-neutral reason for challenging the juror]; ***People* v. *Hung Thanh Mai*** (2013) 57 Cal.4th 986, 1051 [fact juror was 40 years old, single and childless were, inter alia, valid reasons to challenge juror]; ***People* v. *Jones*** (2017) 7 Cal.App.5th 787, 805 [proper to excuse jurors, inter alia, because they were young, single, and did not have children, which reflected a lack a life experience].)

43. Too *many* family ties

In ***People* v. *Hensley*** (2014) 59 Cal.4th 788, the fact a prospective juror had many children and grandchildren, and had "strong feelings regarding ... child molestation" was a proper basis for challenging the juror because it caused the prosecutor to believe the juror would be "sensitive to the nature of children in this case" and because the victim in the case may have had child abuse allegations made against him. (***Id***. at pp. 801, 805.)

44. Other jurors who would be more favorable to the prosecutor are due up

It is a valid neutral reason for challenging a juror that other jurors who are more favorably disposed to the prosecution will be seated if the jurors in the cognizable group are removed. Thus, in ***People* v. *Jones*** (2011) 51

Cal.4th 346, the court found the prosecutor had both a plausible and race neutral reason for excusing a juror who the prosecutor characterized as having some "good qualities"" where the prosecutor "believed he had even better potential jurors who had not yet been called, and defendant had already exhausted his peremptory challenges." (***Id***. at p. 367; **see also *People* v. *Reynoso*** (2003) 31 Cal.4th 903, 918-919 [noting that "as the number of challenges decreases, a lawyer necessarily evaluates whether the prospective jurors remaining in the courtroom appear to be better or worse than those who are seated. If they appear better, he may elect to excuse a previously passed juror hoping to draw an even better juror from the remaining panel."]; ***People* v. *Johnson*** (1989) 47 Cal.3d 1194, 1220-1221 [same].)

However, once a prima facie case is made, a prosecutor cannot rebut the showing by simply stating a preference for the next prospective juror while saying nothing else about the juror against whom the challenge was exercised. For example, in ***People* v. *Cisneros*** (2015) 234 Cal.App.4th 111, the trial court found a prima facie case had been made that the prosecutor was exercising her challenges in a gender-biased fashion as to two separate male jurors excused by the prosecution. When asked to provide a reason for striking the jurors, the prosecutor in each instance, said she preferred the next prospective juror. Although the prosecutor provided some information about why the next jurors were desirable, "she failed to identify any characteristics whatsoever about the two struck jurors or articulate personal observations about their demeanor or even a hunch about them that animated the decision to excuse them." (***Id***. at p. 121.) The appellate court recognized that the trial court had believed the prosecutor's reasons were "genuine." (**Ibid**.) However, the court found the explanation given was a "truism" and noted that whenever counsel exercises a peremptory challenge, it necessarily means that he or she prefers the next prospective juror to the one being challenged, and thus a preference for the next juror is, in effect, "no reason at all." (***Ibid***.) Thus, the court reversed the conviction because the prosecutor's explanations did nothing to dispel the "reasonable inference the prosecutor preferred women to men and was exercising her peremptory challenges to effect that preference." (***Id***. at p. 122.)

45. Juror was friendly with juror who was challenged by the prosecution

If an attorney senses that a juror might resent the attorney as a result of the attorney challenging *another* juror, this can be a neutral reason for challenging the juror. (**See *Johnson* v. *Haviland*** (unreported N.D. Cal. 2013) 2013 WL 3354435, *4.)

46. Juror lives or works in a city known for anti-law enforcement attitudes

Certain cities (e.g., Berkeley, CA) are known to attract and be populated by persons not very sympathetic to the prosecution. Living/working in such a city can be a valid basis for challenging a juror. (**See *People* v. *Huggins*** (2006) 38 Cal.4th 175, 229 [proper to challenge juror on grounds "he was born in Berkeley and might share anti-death-penalty views the prosecutor believed to be prevalent there" and noting at p. 231, fn. 15, that it does "not matter whether it was reasonable for the prosecutor to doubt the desirability of prospective jurors who were born in Berkeley," it is a permissible reason "[a]bsent evidence that being born in Berkeley . . . is so closely associated with a protected group that they are surrogates for membership in the group and thus arguably impermissible"]; ***Johnson* v. *Haviland*** (unreported N.D. Cal. 2013) 2013 WL 3354435, *4 [upholding challenge where, inter alia, the prosecutor indicated his concern that the juror worked for the Berkeley Unified School District, which was generally a very liberal area, and is "not particularly one that you can expect to have a lot of people who are sympathetic to law enforcement, at least in these types of cases"]; ***State* v. *Lewis*** 2017-Ohio-7480 [2017 WL 3912696, *7] [proper to excuse juror based on, inter alia, juror living in Cleveland Heights, which based on prosecutor's past unfavorable jury verdicts, led him to conclude that the juror would "tend to side more with the defense."].) That said, prosecutors should be alert that if the area where a juror works or lives is serving as a proxy for race or ethnicity, the challenge will be invalid. (**See** this outline, section VIII-E-1 at p. 90.)

47. Defense appears to like the juror (as reflected in the lack of questions for the juror)

A defense counsel's failure to question a juror has been viewed as a valid race-neutral reason justifying the prosecutor's peremptory challenge. (**See *People* v. *Ervin*** (2000) 22 Cal.4th 48, 75-76.) In ***People* v. *Winbush*** (2017) 2 Cal.5th 402, the court stated that "[w]hile this reason might not be sufficient in isolation to support a challenge, the absence of any significant questioning by defense counsel is relevant and may legitimately support a prosecutor's feeling that the panelist would favor the defense. (**Id**. at p. 437.)

48. Any basis that would provide (or come close to providing) a challenge for cause

If the reason for exercising a peremptory would provide (or come close to providing) a challenge for cause, the reason will ordinarily provide a proper basis for a peremptory challenge. However, the fact a prosecutor did not seek to exercise a challenge for cause on a particular basis does not mean that the basis does not provide an obvious ground for excusal. "Unlike a for-cause challenge ..., the issue here is not whether a juror held views that would impair his or her ability to follow the law. Unimpaired jurors may still be the subject of valid peremptory strikes." (***People* v. *Rhoades*** (2019) 8 Cal.5th 393 [255 Cal.Rptr.3d 453, 495]; ***People* v. *Armstrong*** (2019) 6 Cal.5th 735, 773.) It is entirely plausible that a prosecutor would not make a challenge for cause on a particular basis because the prosecutor believed they were unlikely to succeed with for-cause challenge, but nonetheless rely on the basis in exercising a peremptory challenge. (**See *People* v. *Rhoades*** (2019) 8 Cal.5th 393 [255 Cal.Rptr.3d 453, 495.)

49. A combination of traits

A prosecutor may be concerned about the presence of several traits in particular combination that the prosecutor would not otherwise be concerned about if only one of the traits was present. For example, in ***People* v. *Trinh*** (2014) 59 Cal.4th 216, the court held the prosecutor could properly challenge a juror based on the combination of age, marital status and parental status, i.e., the fact the juror was 45, single, and had never been married or had children could properly render the juror an unacceptable juror for the prosecution. (***Id***. at p. 242.)

E. What are Impermissible Reasons for Challenging a Juror?

"[T]he exercise of a peremptory challenge must not be based on either the race of the juror or the racial stereotypes held by the party." (***Georgia* v. *McCollum*** (1992) 505 U.S. 42, 59.) Although the language of ***McCollum*** speaks only to race and racial stereotypes, the ***Batson/Wheeler*** principles apply to defense peremptory challenges excusing jurors improperly on the basis of race, gender, or ethnic grounds. (**See *United States* v. *Martinez–Salazar*** (2000) 528 U.S. 304, 315; ***People* v. *Willis*** (2002) 27 Cal.4th 811, 813–814.)

California Code of Civil Procedure section 231.5 provides: "A party shall 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 a characteristic listed or defined in Section 11135 of the Government Code, or similar grounds." (Code of Civ. Proc., § 231.5)

Government Code section 11135 lists or defines the following characteristics: race, national origin, ethnic group identification, religion, age, sex, sexual orientation, color, genetic information, or disability[.]" (Gov. Code, § 11135(a).)

Editor's Note: Section 231.5 is discussed in greater depth in this outline, section VII-A-9 at pp. 29-34.)

1. Proxy reasons: criteria so closely tied to race/ethnicity that they act as stand-ins for cognizable classes

No case has held that simply because people share a similar belief system (other than a shared religion) or geographical location, they may be treated as a cognizable class. To the contrary, the fact that people share a similar belief system will *not* create a cognizable class. (**See *People* v. *Howard*** (1992) 1 Cal.4th 1132, 1157 ["persons opposed to the death penalty do not make up a cognizable class for ***Wheeler*** purposes"]; ***People* v. *Wheeler*** (1978) 22 Cal.3d 258, 276 [indicating, by way of dicta, that persons who favor "law and order" are not a cognizable class].)

However, courts may sometimes find that a proffered justification is so closely tied to race that it ceases to be race-neutral and becomes a surrogate for impermissible racial biases. (**See *Stubbs* v. *Gomez*** (9th Cir. 1992) 189 F.3d 1099, 1106.) In other words, a generic reason or group-based presupposition that would be applicable in all criminal trials to members of a minority is not race-neutral. (**See *United States* v. *Bishop*** (9th Cir. 1992) 959 F.2d 820, 823-826; **see also *Hernandez* v. *New York*** (1991) 500 U.S. 352, 371–372 [recognizing in dicta that "a policy of striking all who speak a given language, without regard to the particular circumstances of the trial or the individual responses of the jurors, may be found by the trial judge to be a pretext for racial discrimination" but not finding criterion that juror spoke another language in the case before it to be a proxy].)

For example, ***United States* v. *Bishop*** (9th Cir. 1992) 959 F.2d 82, the court found that the prosecutor's justification for striking an African-American juror who lived in Compton because Compton was a poor and violent community whose residents were likely to be "anesthetized to such violence," "more likely to think that the police probably used excessive force," and likely to believe the police "pick on black people" was improper because the prosecutor's justification "referred to collective experiences and feelings that he just as easily could have ascribed to vast portions of the African-American community. (***Id***. at pp. 821, 825.) The justification implicitly equated "low-income, black neighborhoods with violence, and the experience of violence with its acceptance," and "referred to assumptions that African-Americans face, and from which they suffer, on a daily basis. Ultimately, the invocation of residence both reflected and conveyed deeply ingrained and pernicious stereotypes." (***Id***. at p. 825.) The court stated such "[g]overnment acts based on such prejudice and stereotypical thinking are precisely the type of acts prohibited by the equal protection clause of the Constitution." (***Id***. at p. 826; **see also *People* v. *Turner*** (2001) 90 Cal.App.4th 413, 418 [finding prosecutor improperly excluded juror for improper reason – one based on racial stereotyping - where juror lived in Inglewood (a community that was almost 50% African-American) and prosecutor stated her "experience with Inglewood jurors has not been good" and "[i]t seems to me that people in that location … may or may not consider drugs the problem that people in other locations do"]; **cf**., this outline, section VIII-D-46 at pp. 88-89 [discussing when location of residence will be viewed as proper basis for challenge].)

> **Editor's Note:** ***United States* v. *Bishop*** (9th Cir. 1992) 959 F.2d 82 is also discussed in this outline, section VII-A-7 at p. 26.

However, the fact a prosecution's criterion might well result in the disproportionate removal of members of a cognizable class "does not turn the prosecutor's actions into a per se violation of the Equal Protection Clause." (***People* v. *Melendez*** (2016) 2 Cal.5th 1, 16-17 citing to ***Hernandez* v. *New York*** (1991) 500 U.S. 352, 361 [albeit also noting that whether a criterion will have a disproportionate impact on members of the cognizable class might have relevance in assessing whether the challenge was pretextual].)

And it usually is not easy to establish a reason is effectively a proxy for race. (**See *People* v. *Gutierrez*** (2017) 2 Cal.5th 1150, 1167 [prosecutor's removal of juror who lived in Wasco (a city whose population is mostly Hispanic or Latino) on grounds she was unaware of gang activity in that city was not a "proxy" for Hispanic ethnicity]; ***People* v. *Melendez*** (2016) 2 Cal.5th 1, 16-17 [rejecting defense argument that because more African-Americans have

relatives in prison than members of other groups, the fact that the juror has a relative in state prison is not race-neutral]; ***People* v. *Booker*** (2011) 51 Cal.4th 141, 167 [although defense claimed prosecutor was removing jurors with religious reservations about imposing the death penalty "as a proxy for *racial* discrimination" under the theory that since African-Americans allegedly were more prone to hold such religious reservations (a sentiment actually expressed by the trial judge), removing African-American jurors on this basis was just a proxy for racial discrimination, the claim was ultimately rejected because "as the trial court noted and defendant concedes, the prosecutor also challenged jurors of other races based on these same reservations"]; ***People* v. *Calvin*** (2008) 159 Cal.App.4th 1377, 1379 [rejecting the argument that skepticism toward the criminal justice system is so prevalent among African-Americans that it should be considered a proxy for race and that, as a result, peremptory challenges based on such an attitude should be deemed discriminatory].) And this is especially true when there is a specific link between the stated reason and the basis for the challenge. (**See *People* v. *Williams*** (1997) 16 Cal.4th 153, 190–191.) For example, in ***People* v. *Jones*** (2011) 51 Cal.4th 346, the defendant argued the prosecutor's concern that the juror was a member of the African Methodist Episcopal Church was itself discriminatory. But the argument was rejected as the prosecutor did not excuse the juror just because she belonged to a largely African–American church, but because this particular church was, in his view, "constantly controversial," and he did not "particularly want anybody that's controversial on my jury panel." (***Id***. at p. 367; **see also *People* v. *Williams*** (1997) 16 Cal.4th 153, 191 [although defendant claimed prosecutor was using residence as a proxy for race, the court held the prosecutor had properly excluded an African-American prospective juror because the juror had attended high school in a "Blood gang area" and the prosecutor could link the juror's actual experiences with a concern the juror would be sympathetic to a defendant who was Blood gang member]; **but see *Shirley* v. *Yates*** (9th Cir. 2015) 807 F.3d 1090 p. 1111, fn. 26 [suggesting vague preference for jurors with college attendance *could be* a proxy for race]; ***People* v. *Watson*** (N.Y. App. Div. 2019) 169 A.D.3d 81, 84–85 [expressing belief that "refusing to seat any and all jurors who have been unfairly stopped and frisked or otherwise been the victim of police harassment is effectively a pretext for excluding a particular protected group as prospective jurors" because "a disproportionately high number of black males in this City have had occasion to be stopped and frisked by the police in a manner that does not comport with the Constitution"].)

2. "Unexplained challenges" ("I don't remember" doesn't cut it)

A reason that has been forgotten (so that it is never articulated) is not a valid basis for excluding a juror. (**See *People* v. *Cervantes*** (1991) 233 Cal.App.3d 323, 329, 335.)

Even a prosecutor's explanation that she prefers the next prospective jurors, *when offered without identifying any characteristics of the jurors being excused* is not a nondiscriminatory justification. (***People* v. *Cisneros*** (2015) 234 Cal.App.4th 111, 114 [discussed in greater depth in this outline section VIII-D-44 at p. 87].)

3. Unsupported assumptions based on how members of a group think

An unsupported assumption based on stereotypical beliefs about how members of a group think is not considered a valid basis for excusing a juror. "The Equal Protection Clause 'forbids the States to strike black veniremen on the assumption that they will be biased in a particular case simply because the defendant is black. The core guarantee of equal protection, ensuring citizens that their State will not discriminate on account of race, would be meaningless were we to approve the exclusion of jurors on the basis of such assumptions, which arise solely from the jurors' race.'" (***Flowers* v. *Mississippi*** (2019) 139 S.Ct. 2228, 2241 quoting ***Batson*** at pp. 97-98.)

For example, in ***People* v. *Douglas*** (2018) 22 Cal.App.5th 1162, the court held that a prosecutor who excused two jurors who were *openly* gay out of a belief that they might "be biased against the *closeted* victim, the main witness" was "baldly discriminatory." (***Id***. at pp. 1170, emphasis added.) The court recognized that a valid challenge could be made to "an openly gay venireperson who *expressed* contempt for or distrust of closeted homosexuals . . . because

the reason would not be their sexuality, but their inability to fairly judge testimony of closeted homosexuals, simply because they have chosen to remain closeted." (***Id***. at pp. 1171-1172.) But went on to observe the jurors in the case before it did not express any such contempt or distrust; they were challenged based on prosecutor's impermissible group-based *assumption* they would be biased. (***Id***. at p. 1172; **see also *People* v. *Calvin*** (2008) 159 Cal.App.4th 1377, 1387 [noting that "[i]f the prosecutor . . . had dismissed the African-American jurors based on *his assumptions about their attitudes*, he would have demonstrated the type of group-based discrimination outlawed by both the equal protection clause and the California Constitution's guarantee of a trial by a jury drawn from a representative cross-section of the community.", emphasis added.].)

F. Can a Prosecutor Challenge a Juror Based on the Prosecutor's *Own* Idiosyncratic Personal Biases?

In general, "[a]n advocate is permitted to rely on his or her own experiences and to draw conclusions from them." (***People* v. *Lenix*** (2008) 44 Cal.4th 602, 629.) "[E]ven hunches and idiosyncratic reasons may support a peremptory challenge." (**Ibid**; **accord *People* v. *O'Malley*** (2016) 62 Cal.4th 944, 982.) For example, in ***People* v. *Melendez*** (2016) 2 Cal.5th 1, a prosecutor's prior experience with a juror who had difficulties imposing the death penalty because of his military service was held to be a credible and nonpretextual reason for exercising a peremptory challenge on a potential juror with a similar military background -even though the explanation was "unusual." (***Id***. at p. 20.) In ***People* v. *O'Malley*** (2016) 62 Cal.4th 944, the court held the prosecutor's aversion to having an amateur magician (i.e., someone who practiced illusion and deception as a pastime) as a juror was "idiosyncratic" and even "arbitrary" but did not establish the prosecutor acted with discriminatory intent. (***Id***. at pp. 981-982.) In ***State* v. *Lewis*** (Ohio 2017) 96 N.E.3d 1203, 1212-1214 [proper to excuse juror because, inter alia, juror lived in Cleveland Heights, which based on *prosecutor's past unfavorable jury verdicts*, led him to conclude the juror would "tend to side more with the defense."].)

It is fairly well-established that a prosecutor can rely on stereotypical assumptions about persons involved in certain occupations tilting toward the defense (**see** this outline, sections VIII-D-36-37 at pp. 82-86), but a prosecutor's idiosyncratic hostility towards members of a particular profession can also provide neutral grounds for challenging a juror. For example, in ***People* v. *Rushing*** (2011) 197 Cal.App.4th 801, the court cited with approval ***Johnson* v. *State*** (Ga. 1996) 470 S.E.2d 637, 639, a case from Georgia that upheld the challenge to a juror who was a postal worker on the ground that "postal workers, ***in the prosecutor's experience***, do not make good jurors." (***Rushing***, at p. 812, emphasis added.) In ***People* v. *Davis*** (2008) 164 Cal.App.4th 305, the prosecutor challenged a juror who was a certified nursing assistant (CNA) because of the prosecutor's own personal bias against CNAs stemming from the bad experiences the prosecutor had outside of court with CNAs who were working in her father's nursing home. This was found to be a neutral reason for challenging the juror, notwithstanding a lack of any assertion that CNAs lean toward the defense from an objective standpoint. (***Id***. at p. 313.)

NOTE: The following sub-sections G through P (at pp. 93-98) might be more properly characterized as relating to information only relevant in the *third* stage of the *Batson* process. However, we have included them in the discussion of the second stage because the kind of information discussed in these sections may need to be placed on the record at the second stage. This would be done out of an abundance of caution, i.e., since a judge might not take any argument at the third stage, it is possible this information may be omitted from the record. Moreover, at the second stage, the prosecutor has the "floor" and will likely be able to address the concerns raised in these sub-sections unless the judge indicates the information is being supplied prematurely. Accordingly, we have included these sections in section VIII.

G. Should a Prosecutor Ask the Trial Court to Confirm the Prosecutor's Observations Regarding a Juror's Demeanor or Non-verbal Body Language?

It is especially important to seek verification of observations made by the prosecutor regarding a juror that will not be reflected in the transcript – such as the juror's demeanor, attitude, body language, facial expressions, and/or intonation. Where the explanation for a peremptory challenge is based on a prospective juror's demeanor, the judges are **supposed to** "take into account, among other things, any observations of the juror that the judge was able to make during the voir dire." (***Thaler* v. *Haynes*** (2010) 130 S.Ct. 1171, 1174.)

Moreover, when the explanation for a peremptory challenge "invoke[s] a juror's demeanor," the trial judge's "first hand observations" are of great importance. (***Thaler* v. *Haynes*** (2010) 130 S.Ct. 1171, 1174; ***Snyder* v. *Louisiana***, (2008) 552 U.S. 472, 477.)

Granted, it is not required that the trial court "make explicit and detailed findings for the record in every instance in which the court determines to credit a prosecutor's demeanor-based reasons for exercising a peremptory challenge." (***People* v. *Montes*** (2014) 58 Cal.4th 809, 855; ***People* v. *Williams*** (2013) 56 Cal.4th 630, 653; ***People* v. *Reynoso*** (2003) 31 Cal.4th 903, 939 [and noting, at p. 929 that "[t]he impracticality of requiring a trial judge to take note for the record of each prospective juror's demeanor with respect to his or her ongoing contacts with the prosecutor during voir dire is self-evident"]; **see also *People* v. *Long*** (2010) 189 Cal.App.4th 826, 848 [judges are not expected to "provide a continuous recorded narrative during jury voir dire of the appearance, behavior, and intonation of each prospective juror"].) Moreover, even if a judge cannot confirm the observation, this does not mean the judge is precluded from finding the demeanor explanation credible. It is not necessary that the judge personally observe and recall the relevant aspect of the prospective juror's demeanor. The judge can consider the attorney's own demeanor in assessing whether to believe the attorney who is claiming a challenge is based on juror demeanor evidence that was not observed by the judge. (**See *Thaler* v. *Haynes*** (2010) 130 S.Ct. 1171, 1175; ***People* v. *Long*** (2010) 189 Cal.App.4th 826, 842; **see also *People* v. *Lenix*** (2008) 44 Cal.4th 602, 619 [noting that while is not necessary the court observe the specific behavior alleged as the basis for the challenge, "the 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" and "the record must reflect the trial court's determination on this point"].)

However, while it may prove awkward, if a prosecutor is basing a challenge to a juror on the basis of the juror's demeanor, it is important to ask whether the judge made the same observations as the prosecutor. As pointed out in Justice Moreno's concurring opinion in ***People* v. *Lenix*** (2008) 44 Cal.4th 602, "[w]hen a trial judge validates a prosecutor's challenge based on the prospective juror's demeanor, and makes clear that such demeanor is the primary reason for validating the challenge, then it is difficult to imagine any circumstance under which an appellate court would second-guess that judgment." (***Lenix***, at p. 634, conc. opn., J. Moreno; **see also *People* v. *Parker*** (2017) 2 Cal.5th 1184, 1210, 1213 [noting judge made express factual findings about juror's "audible groan and facial expression" as juror was called into the box as well as his "demeanor, his facial expressions when he was inquired about his availability" in finding challenge permissible].)

In addition, if the trial judge is not asked to validate the observation, an appellate court may not ***necessarily*** presume that the trial judge credited the prosecutor's explanation. (*Compare* ***Snyder* v. *Louisiana*** (2008) 128 S.Ct. 1203, 1209-1210 [recognizing that deference to the trial judge "is especially appropriate where a trial judge has made a finding that an attorney credibly relied on demeanor in exercising a strike[,]" but declining to defer to the trial judge's acceptance of the prosecutor's allegedly neutral explanation he removed a juror based on the juror's demeanor where the prosecutor's other explanation for removing the juror was unsupported by the record and the trial judge "responded to the prosecutor's two proffered reasons by simply allowing the challenge without

explanation"] and ***People* v. *Long*** (2010) 189 Cal.App.4th 826, 848 [observing that the normal deference to a trial court's implied finding will not apply where there is only a prosecutor's statement that he removed a juror because of the juror's body language and the juror's way of expressing himself without further description, and where another reason the trial court ruled legitimate was demonstrably inaccurate] *with* ***Thaler* v. *Haynes*** (2010) 130 S.Ct. 1171, 1175 [where the explanation for a peremptory challenge is based on a prospective juror's demeanor, the judge should take into account, among other things, any observations of the juror that the judge was able to make during the voir dire but neither ***Batson*** nor ***Snyder*** require "that a demeanor-based explanation must be rejected if the judge did not observe or cannot recall the juror's demeanor"]; ***People* v. *Elliott*** (2012) 53 Cal.4th 535, 569 [reviewing court may infer that trial court agreed with prosecutor's statement that prospective juror "'wouldn't make eye contact with anybody'" where "[d]efense counsel did not deny that [prospective juror] had failed to make eye contact"]; and ***People* v. *Adanandus*** (2007) 157 Cal.App.4th 496, 510 [where neither trial court nor defense counsel contradicted prosecutor's account of challenged jurors' demeanor or manner of responding to his questions, this suggests the prosecutor's description is accurate].)

Editor's Note: One way of ensuring that hostile body language appears in the record is to ask the juror to explain the body language. For example, the prosecutor could ask: "Juror #4, I noticed that you rolled your eyes in response to juror #5's answer regarding law enforcement. Is that because you disagree with what juror #5 said?"

H. Should a Prosecutor Place on the Record Why He or She Kept Jurors Who Were, At Least, Superficially Similarly Situated to the Challenged Juror, for Comparative Analysis Purposes?

If the defense has relied on a comparative analysis, it will be necessary to explain why a juror who the defense is claiming is similarly situated is not similarly situated. If the defense has not relied on a comparative analysis in their arguments, it is not required that the prosecutor engage in any comparative analysis. As pointed out in ***People* v. *Jones*** (2011) 51 Cal.4th 346, "no authority has imposed the additional burden of anticipating all possible unmade claims of comparative juror analysis and explaining why other jurors were not challenged." (***Id***. at p. 365.) Nevertheless, if there is a concern that the judge may do so, it may be wise to anticipate this analysis and short circuit it by explaining the reasons why jurors who might appear to be similarly situated are not, in fact, similarly situated. Conversely, a prosecutor may wish to point out the fact that other challenged panelists, *regardless of* whether or not they were members of the cognizable class at issue, were challenged on the same ground or grounds as the panelist whom the defense is claiming was improperly excused. (**See *People* v. *Watson*** (2008) 43 Cal.4th 652, 680 [noting prosecutor challenged both jurors who were similarly situated regarding their exposure to gangs in finding prosecutor acted for non-discriminatory reasons].)

Editor's Note: For a full description of the nature of comparative analysis, **see** this outline, section IX-H at pp. 111-122.

I. Should the Prosecutor Point Out that the Victims or Prosecution Witnesses are Members of the Same Cognizable Class the Defense is Claiming is Being Discriminated Against?

In ***Hernandez* v. *New York*** (1991) 500 U.S. 352, the plurality opinion held the fact that the victims and prosecution witnesses were of the same ethnicity as the cognizable class at issue "tended to undercut any motive to exclude [that cognizable class] from the jury." (***Id***. at p. 370.) In ***People* v. *Bell*** (2007) 40 Cal.4th 582, the court held the fact the victims in a criminal case are members of the same cognizable class as the challenged juror can help show that defendant did not meet his burden of raising an inference of discrimination. However, the court also said it discussed this

circumstance not because it affirmatively showed the absence of discrimination but only as an indication of why defendant did not make a prima facie showing at step one. (***Id***. at p. 600.) In ***People* v. *DeHoyos*** (2013) 57 Cal.4th 79, the court said it was appropriate for the trial court to take into consideration the fact the victim, as well as the defendant, belonged to the same cognizable class (Hispanic) as the challenged juror (i.e., because it made it unlikely the prosecutor would be concerned about minorities unduly identifying with the defendant) in denying a ***Batson-Wheeler*** motion. (***Id***. at p. 115) Thus, when the victims or witnesses are of the same cognizable class as the challenged juror, prosecutors should point out this fact as it provides some evidence that would tend to substantiate a lack of motive on the part of the prosecutor to exclude members of the cognizable class at issue.

J. Should the Prosecutor Point Out the Defendant is Not a Member of the Cognizable Class the Defense is Claiming is Being Discriminated Against?

Although a defendant may properly bring a ***Batson-Wheeler*** motion based on a prosecutor's removal of members of a cognizable class to which the defendant does not belong, the fact the defendant is not a member of the cognizable class at issue "remains a subject of proper consideration by the court." (***People* v. *Farnam*** (2002) 28 Cal.4th 107, 135.) This factor weighs against a finding the challenge was improper. (**See *People* v. *Neuman*** (2009) 176 Cal.App.4th 571, 579.)

K. Should the Prosecutor Point Out He or She is a Member of the Cognizable Class the Defense is Claiming is Being Discriminated Against?

The fact a prosecutor is a member of the same cognizable class as the challenged juror does not insulate a prosecutor from being found to have exercised his or her challenges in a discriminatory fashion. Although as a practical matter, a defense attorney is less likely to use a ***Batson-Wheeler*** challenge in an attempt to surreptitiously prejudice the jury against the prosecutor when the juror being challenged and the prosecutor are of the same cognizable class, there does not appear to be any cases indicating that the fact the prosecutor is of the same or different cognizable class as the challenged juror is relevant. All prosecutors (regardless of the cognizable class to which they belong) are entitled to the presumption that they are exercising their challenges in a constitutional manner. (**See *People* v. *Salcido*** (2008) 44 Cal.4th 93, 136.)

L. Should the Prosecutor Point Out that He or She Passed on the Panel While It Contained Members of the Cognizable Class at Issue and/or that the Final Panel Contained Members of the Cognizable Class at Issue?

The fact a prosecutor has passed on a juror who is a member of the cognizable class in issue, while not conclusive on the issue of good faith, 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." (***People* v. *Jones*** (2011) 51 Cal.4th 346, 363; ***People* v. *Turner*** (1994) 8 Cal.4th 13, 168; ***People* v. *Adanandus*** (2007) 157 Cal.App.4th 496, 511; ***People* v. *Irvin*** (1996) 46 Cal.App.4th 1340, 1355; **accord *People* v. *Woodruff*** (2018) 5 Cal.5th 697, 750; ***People* v. *Clark*** (2011) 52 Cal.4th 856, 906; ***People* v. *Johnson*** (2015) 61 Cal.4th 734, 760; **see also *Aleman* v. *Uribe*** (9th Cir. 2013) 723 F.3d 976, 983 [prosecutor's acceptance of minorities on the jury a valid, but not necessarily dispositive, factor]; ***Gonzalez v. Brown*** (9th Cir. 2009) 585 F.3d 1202, 1210 [the fact the prosecutor twice passed on panel with African-American juror suggests her motives for exercising the strike were not racial, especially considering the prosecutor had plenty of

challenges left when she passed the second time]; **but see *Castellanos* v. *Small*** (9th Cir. 2014) 766 F.3d 1137, 1150 [fact 7 jurors of the cognizable class at issue left on panel did not undermine a showing of discrimination].) Thus, if a prosecutor has passed on a panel that includes members of the cognizable class at issue, this should be pointed out. (**See *People* v. *Carasi*** (2008) 44 Cal.4th 1263, 1294-1295.) Moreover, if the prosecutor has passed *on a particular* juror, that circumstance, while not dispositive, "strongly suggests" a later challenge of the juror was not based on race. (***People* v. *Hardy*** (2018) 5 Cal.5th 56, 85.)

Editor's Note: For a fuller discussion of the significance of leaving members of the cognizable class at issue on the final panel, **see** this outline, section VII-C-7 at pp. 45-47.

M. Should Prosecutors Point Out They Would Have Kept (and/or Tried to Rehabilitate) a Juror in the Cognizable Class Who was Excused for Cause or for Hardship?

If the prosecutor would have accepted a juror belonging to the cognizable class at issue who was challenged for cause by the *defense*, attempted to "rehabilitate" such a juror, or argued against excusing such a juror, this is a factor that weighs against a finding the prosecutor acted in a discriminatory manner in challenging another juror of the same cognizable class. (**See *People* v. *Streeter*** (2012) 54 Cal.4th 205, 224; ***People* v. *Jones*** (2011) 51 Cal.4th 346, 362.)

In ***People* v. *Streeter*** (2012) 54 Cal.4th 205, the California Supreme Court denied a claim the prosecutor's challenge of several African American jurors was racially-based because, inter alia, "after extensive questioning, the prosecutor successfully rehabilitated two African–American jurors . . . staving off defense challenges for cause. The prosecutor's desire to keep African–American jurors on the jury tended to show that the prosecutor was motivated by the jurors' individual views instead of their race." (***Id***. at p. 224.)

In ***People* v. *Jones*** (2011) 51 Cal.4th 346, when asked to justify his reasons for challenging three African-American jurors, the prosecutor explained that one African–American juror whom he had rated highly as a possible juror had been excused for cause, and that he had been reluctant to stipulate to the hardship excusals of two other African–American prospective jurors because he would have liked to see them on the jury. The California Supreme Court upheld the trial court's finding that the prosecutor was credible regarding the jurors excused for hardship and took this factor into account in finding the prosecutor used his challenges properly. As to the juror who was excused for cause, the California Supreme Court reviewed the record, which allowed them to independently determine that the prosecutor questioned the juror in a manner "obviously designed to do what is called 'rehabilitate' the juror—that is, to elicit answers that would make her not subject to a challenge for cause," and also took this fact into account in finding the prosecutor acted properly. (***Id***. at p. 362 [and noting that, taking into account these facts, the prosecutor wanted five of the eight African-American jurors who were excused for hardship or cause or were called into the box].)

Thus, it is important for a prosecutor to put on the record whether he or she would have found a juror in the cognizable class who was removed for cause or due to hardship to have been acceptable, had opposed the defense challenge for cause, and/or had fought to rehabilitate the juror challenged for cause.

N. If a Prosecutor Was Unaware that the Juror Belonged to the Cognizable Class at Issue, Should the Prosecutor Place this Fact on the Record?

The fact the prosecutor was **honestly** unaware that a particular juror belonged to the cognizable class that the defense is claiming the prosecutor was being discriminated against should be placed on the record. This constitutes evidence the prosecutor was not seeking to remove the juror for an impermissible purpose. (**See *Hernandez v.***

New York (1991) 500 U.S. 352, 369–370 [fact that prosecutor "did not know which jurors were Latinos . . . tended to undercut any motive to exclude Latinos from the jury . . . could be taken as evidence of the prosecutor's sincerity."]; ***United States* v. *Guerrero*** (9th Cir. 2010) 595 F.3d 1059, 1063, fn 3 ["***Batson*** is predicated not on the potential juror's actual race/ethnicity, but on the prosecutor's perception of that race/ethnicity as the reason for striking an otherwise qualified venire person. This is true because ***Batson*** is seeking to cure government misconduct based on racial prejudice, not to simply guarantee an ethnically diverse jury."]; **see also** this outline, section VII-A-10 at p. 34 [discussing issue in context of what prosecutor should do when race or ethnicity of juror is unclear].)

O. Should a Prosecutor Put on Evidence of His Own (or His Office's Past History of Non-Discriminatory Use of Peremptory Challenges?

In assessing credibility, the court may "rely on the court's own experiences as a lawyer and bench officer in the community, and even the common practices of the advocate and the office that employs him or her." (***People* v. *DeHoyos*** (2013) 53 Cal.4th 79 [[158 Cal.Rptr.3d 797, 821]; ***People* v. *Lenix*** (2008) 44 Cal.4th 602, 613.) A history or evidence of a historical practice of discriminatory selection tends to support a claim of discriminatory use of challenges. (**See *Flowers* v. *Mississippi*** (2019) 139 S.Ct. 2228, 2243 [defendants may present a "relevant history of the State's peremptory strikes in past cases" to support a claim "a prosecutor's peremptory strikes were made on the basis of race"]; ***Miller-El* v. *Dretke*** (2005) 545 U.S. 231, 253, 263-264 [finding racially discriminatory use of challenges based, in part on the fact "that for decades leading up to the time this case was tried prosecutors in the Dallas County office had followed a specific policy of systematically excluding blacks from juries"]; ***Currie* v. *McDowell*** (9th Cir. 2016) 825 F.3d 603, 610-611 [prosecutor's personal history of prior ***Batson*** violation in earlier trial of same case and in another case treated as evidence of pretext].)

Conversely, a lack of any such history on the part of the prosecutor or office tends to undermine any inference of discriminatory purpose. (**See *People* v. *Lenix*** (2008) 44 Cal.4th 602, 630 [noting that "[t]here is no indication that the prosecutor or his office relied on racial factors" in upholding trial court's finding prosecutor's reasons for removing African-American juror were proper].) In ***People* v. *DeHoyos*** (2013) 57 Cal.4th 79, the California Supreme Court held it was appropriate for the trial court, at the third stage, to take into consideration the fact that the prosecutor had been forthright with the trial court in a ***previous*** trial (albeit in the same case) and the fact that the prosecutor had previously left a member of the cognizable group at issue on the jury in a previous trial (albeit in the same case) in denying a ***Batson/Wheeler*** motion. (***Id***. at p. 115.)

Thus, if the prosecutor has a prior history of accepting jurors belonging to the cognizable class at issue and/or the prosecutor's office has a history condemning use of discriminatory challenges, this should be brought to the attention of the court.

P. Should a Prosecutor Ask for a Transcript of the Voir Dire Before Providing Reasons for Challenging Jurors?

If the record fails to support or contradicts a prosecutor's reasons for challenging a juror, this can be viewed by a reviewing court as evidence that the prosecutor was acting in a pretextual manner. (**See *Foster* v. *Chatman*** (2016) 136 S.Ct. 1737, 1744-1755; ***People* v. *Silva*** (2001) 25 Cal.4th 345, 386.) Although California courts are relatively forgiving of a prosecutor who proffers a reason for removing a juror based on an erroneous recollection of what a juror stated (**see *People* v. *Elliott*** (2012) 53 Cal.4th 535, 561; ***People* v. *Jones*** (2011) 51 Cal.4th 346, 366; ***People* v. *Taylor*** (2009) 47 Cal.4th 850, 896), the Ninth Circuit is considerably more likely than a California court to interpret a misrecollection by a prosecutor giving allegedly neutral reasons for removing a juror as evidence supporting a claim the

prosecutor had an improper motive. (**See e.g.**, ***Castellanos* v. *Small*** (9th Cir. 2014) 766 F.3d 1137, 1143, 1149; ***Ali* v. *Hickman*** (9th Cir. 2009) 584 F.3d 1174, 1190; ***Cook* v. *LaMarque*** (9th Cir. 2010) 593 F.3d 810, 818). Finally, if one of the reasons a prosecutor provides for challenging a juror turns out to be unsupported by the record, a reviewing court may be less likely on appeal to give deference to a trial court's findings of nondiscriminatory purpose. (**See *Foster* v. *Chatman*** (2016) 136 S.Ct. 1737, 1750-1755; ***Snyder* v. *Louisiana*** (2008) 552 U.S. 472; ***People* v. *Long*** (2010) 189 Cal.App.4th 826, 843; ***Castellanos* v. *Small*** (9th Cir. 2014) 766 F.3d 1137, 1150.)

Thus, it is strongly **recommended** that if a prosecutor does not have a very accurate recollection of juror responses, the prosecutor should ask for readback or for a transcript to be provided of, at least, the answers given by the challenged juror and/or other jurors whose responses would be useful for a comparative analysis. (**See *Lewis* v. *Lewis*** (9th Cir. 2003) 321 F.3d 824 [suggesting counsel can be of particular assistance at the third stage "when afforded the opportunity to review a transcript of the jury selection proceedings"].)

IX. Step Three: Deciding Whether the Prosecutor Engaged in Discriminatory Use of Peremptory Challenges

At the third stage of a ***Batson-Wheeler*** motion, "[t]he trial judge must determine whether the prosecutor's proffered reasons are the actual reasons, or whether the proffered reasons are pretextual and the prosecutor instead exercised peremptory strikes on the basis of [membership in a cognizable group]." (***Flowers v. Mississippi*** (2019) 139 S.Ct. 2228, 2243 [bracketed information added].) If a "neutral explanation is tendered, the trial court must then decide . . . whether the opponent of the strike has proved purposeful racial [or other cognizable group] discrimination." (***Johnson* v. *California*** (2005) 545 U.S. 162, 168 [bracketed portion added].) "The trial court must consider the prosecutor's race-neutral explanations in light of all of the relevant facts and circumstances, and in light of the arguments of the parties. The trial judge's assessment of the prosecutor's credibility is often important." (***Flowers* v. *Mississippi*** (2019) 139 S.Ct. 2228, 2243.) The proper focus is on "the subjective genuineness of the race-neutral reasons given for the peremptory challenge, not on the objective reasonableness of those reasons." (***People* v. *O'Malley*** (2016) 62 Cal.4th 944, 975; ***People* v. *Reynoso*** (2003) 31 Cal.4th 903, 924.) "The ultimate inquiry is whether the State was 'motivated in substantial part by discriminatory intent.'" (***Flowers* v. *Mississippi*** (2019) 139 S.Ct. 2228, 2243.)

If the defense has brought the challenge, then "[t]he ***prosecutor*** need not establish with evidence on the record that her voir dire instincts are objectively correct; instead, the ***defendant*** must show that the prosecutor's reasons are not subjectively genuine." (***Jamerson* v. *Runnels*** (9th Cir. 2013) 713 F.3d 1218, 1229, emphasis added.)

The party claiming a ***Batson-Wheeler*** violation must establish this claim at step three by a preponderance of the evidence. (***Crittenden* v. *Ayers*** (9th Cir. 2010) 624 F.3d 943, 954-955.) That is, "[t]he defendant's ultimate burden is to demonstrate that "it was more likely than not that the challenge was improperly motivated." (***People* v. *Trinh*** (2014) 59 Cal.4th 216, 241, citing to ***Johnson* v. *California*** (2005) 545 U.S. 162, 170.) It is an open question whether the defense must be given an opportunity to rebut the prosecutor's reasons. (**See *Sifuentes* v. *Brazelton*** (9th Cir. 2016) 815 F.3d 490, 517-519 [noting the United States Supreme Court has not yet held there is such a right but assuming the right exists, defendant could not show prejudice from such failure as required to obtain relief in collateral proceeding].)

A. In General, Should a *Batson-Wheeler* Motion be Denied When an Attorney Has a Genuine Non-discriminatory Reason for Challenging a Juror - Even if the Reason "Makes No Sense?"

"[T]he law recognizes that a peremptory challenge may be predicated on a broad spectrum of evidence suggestive of juror partiality. The evidence may range from the obviously serious to the apparently trivial, from the virtually certain to the highly speculative." (***People* v. *Wheeler*** (1978) 22 Cal.3d 258, 275.)

In ***People* v. *Cruz*** (2008) 44 Cal.4th 636, the California Supreme Court reiterated some principles it had espoused in ***People* v. *Guerra*** (2006) 37 Cal.4th 1067, 1100 and ***People* v. *Reynoso*** (2003) 31 Cal.4th 903, 919 regarding what constitutes legitimate grounds for a prosecutor to peremptorily challenge a juror: "'All that matters is that the prosecutor's reason for exercising the peremptory challenge is sincere and legitimate, legitimate in the sense of being nondiscriminatory.' [Citation omitted by author.) A reason that makes no sense is nonetheless 'sincere and legitimate' as long as it does not deny equal protection." (***Cruz*** at p. 655, quoting ***Reynoso*** at p. 924; **see also *Aleman* v. *Uribe*** (9th Cir. 2013) 723 F.3d 976, 982 quoting ***Jamerson* v. *Runnels*** (9th Cir.2013) 713 F.3d 1218, 1224 ["Although the prosecutor's reasons for the strike must relate to the case to be tried, the court need not believe that 'the stated reason represents a sound strategic judgment' to find the prosecutor's rationale persuasive; rather, it need be convinced only that the justification 'should be believed'"].) Moreover, "[t]he fact that the *objector* thinks his opponent should feel comfortable with the candidate is not the relevant question. The question is whether the advocate exercising the challenge had an honest and racially neutral reason for doing so." (***People* v. *Hensley*** (2014) 59 Cal.4th 788, 803.)

That being said, "[c]redibility can be measured by, among other factors, the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy." (***Miller-El* v. *Cockrell*** (2003) 537 U.S. 322, 339; **accord *Foster* v. *Chatman*** (2016) 136 S.Ct. 1737, 1752; ***People* v. *Gutierrez*** (2017) 2 Cal.5th 1150, 1168; ***People* v. *Duff*** (2014) 58 Cal.4th 527, 545 ["The key question at this juncture is how persuasive the prosecutor's proffered justifications are, considering, inter alia, their inherent plausibility and their relation to accepted trial strategy considerations."].) "[I]mplausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination." (***People* v. *Johnson*** (2015) 61 Cal.4th 734, 755; ***People* v. *Arellano*** (2016) 245 Cal.App.4th 1139, 1159; **see also *Foster* v. *Chatman*** (2016) 136 S.Ct. 1737, 1752 [finding fact prosecutor's explanation was "nonsense" supported court's conclusion explanation was pretextual].) Thus, prosecutors who have been improperly accused of a ***Batson-Wheeler*** violation should explain why an otherwise seemingly irrelevant reason for a challenge actually makes sense.

B. What Types of Evidence Can a Court Take Into Account in Assessing Whether the Prosecutor's Purported Neutral Grounds for Challenging a Juror are Genuine?

The types of evidence that may be considered in deciding whether a *prima facie* case of discriminatory use of peremptory challenges has been made out may also be taken into consideration at the third stage of the ***Batson-Wheeler*** analysis in assessing the genuineness of a prosecutor's allegedly neutral reasons for challenging a juror (**see *People* v. *Jones*** (2011) 51 Cal.4th 346, 362) – albeit the weight to be given these factors may change and additional factors may also be taken into consideration. For example, "the statistical showing that motivated the finding of a prima facie case is not dispositive at [the] third stage." (***People* v. *Smith*** (2018) 4 Cal.5th 1134, 1147.) "Rather, '[a]t the third stage of ***Batson***, the "critical question ... is the persuasiveness of the prosecutor's justification for his peremptory strike."'" (***Smith*** at p. 1147 citing to ***Miller-El v. Cockrell*** (2003) 537 U.S. 322, 338–339.)

Thus, the trial court may consider the following first stage factors at the third stage:

1. Whether the prosecutor has struck most or all members of the cognizable group from the venire (**see** this outline, sections VII-B and C-1, at pp. 36-40)

2. Whether the prosecutor has used disproportionate number of peremptory challenges against the cognizable group (**see** this outline, section VII-C-2, at pp. 40-42)

3. Whether the jurors removed share only their membership in the cognizable group, but in other respects have little in common (**see** this outline, sections VII-C-3, at p. 42) and the discussion of comparative analysis in section IX-H at pp. 108-119)

4. Whether the prosecutor failed to engage jurors in the cognizable class in desultory voir dire or failed to ask them any questions at all (**see** this outline, sections V-C-4, at p. 43 and IX-I at pp. 122-126.)

5. Whether the defendant is a member of the excluded group, especially if his alleged victim is a member of the group to which the majority of the remaining jurors belong (**see** this outline, sections VII-C-5, at p. 44)

6. Whether the prosecutor passed on a panel that (or the final panel) included members of the cognizable class (**see** this outline, sections VII-C-7, at pp. 45-47)

7. Whether the prosecutor sought to keep members of the cognizable class excused for cause or hardship (**see** this outline, sections VII-C-8, at p. 47)

8. Whether there appear to be reasonable neutral grounds for excusing the jurors (**see** this outline, section VII-C-10 at p. 48; VIII-D at pp. 56-89)

9. Whether the answers provided by the challenged jurors were favorable to the prosecution (**see** this outline, sections VII-C-11, at p. 49)

10. Whether there is evidence of the historical practice of the prosecutor or the prosecutor's office of discriminatory jury selection practice (**see** this outline, sections VII-C-12, at pp. 49)

11. Whether the prosecutor only conducted investigations into the criminal history of jurors who fell into the cognizable class at issue (**see** this outline, sections VII-C-13, at p. 49)

In addition, the court may consider:

12. "[T]he court's own experiences as a lawyer and bench officer in the community" (***People* v. *Lenix*** (2008) 44 Cal.4th 602, 613)

13. Evidence deduced from a comparative analysis (**see** this outline, sections IX-H at pp. 111-122.)

14. Evidence stemming from the prosecutor's demeanor in explaining the reasons (**see *Flowers* v. *Mississippi*** (2019) 139 S.Ct. 2228, 2244 ["the best evidence of discriminatory intent often will be the demeanor of the attorney who exercises the challenge"]; accord ***People* v. *Cox*** (2010) 187 Cal.App.4th 337, 343)

15. Whether the prosecutor's asserted reasons are supported by the record (**see** this outline, section IX-F at pp. 104-110)

16. Whether the prosecutor's asserted reasons will (statistically) result in a disproportionate number of jurors belonging to the cognizable class being challenged (**see** this outline, section IX-Q at p. 131).

C. Is a Prosecutor or Court Required to Assume a Juror's Responses are True?

The fact that a juror provides an answer that "contradicts" the basis for the prosecutor's challenge does not mean the prosecutor's reason will be held pretextual. "[T]he prosecution is not required to accept at face value a prospective juror's assurance that, despite an answer indicating the contrary, she would have no problem being neutral." (***People* v. *Rushing*** (2011) 197 Cal.App.4th 801, 812; **see also *Foster* v. *Chatman*** (2016) 136 S.Ct. 1737, 1753 ["A prosecutor is entitled to disbelieve a juror's voir dire answers, of course."]; ***Rice* v. *Collins*** (2006) 546 U.S. 333, 341 [prosecutor could still have concerns about juror's being too tolerant of crime, despite juror's averments to the contrary]; ***People* v. *Scott*** (2015) 61 Cal.4th 363, 385 ["we doubt that any prosecutor would have kept [the juror] on the jury, despite her assertion that she could be fair and impartial in this case" where juror was mother of person previously prosecuted by same prosecutor, juror had criticized her son's prosecution as racially motivated, and juror admitted having been very upset about it]; ***People* v. *Jones*** (2011) 51 Cal.4th 346, 367 [prosecutor could rightly be concerned about juror who initially hesitated before answering, "Yeah, in a way" when asked if he would have a "tendency of trying to protect [defendant] on a case like this because you're black?" even though, on further questioning, the juror said this answer related to earlier questioning regarding defendant's hairstyle, and he later stated he would not protect defendant just because he was African–American.]; ***People* v. *Cowan*** (2010) 50 Cal.4th 401, 446, 450 [prosecutor could disbelieve juror (and properly challenge juror) who initially stated in questionnaire she could not sit in judgment because she was Islamic but then later said she could]; ***Briggs* v. *Grounds*** (9th Cir. 2011) 682 F.3d 1165, 1175 [prosecutor not required to ignore jurors' answers to question reflecting she would hold prosecutor to higher burden of proof even though she eventually acquiesced to the agreeing she would not upon the judge's explanations].)

Numerous cases have held that a prosecutor is entitled to dismiss a juror who has had negative contacts with law enforcement or the criminal justice system, or have close relatives who had such negative contacts, notwithstanding the juror's assurances that the prior experiences would not impact the juror. (***People* v. *McKinzie*** (2012) 54 Cal.4th 1302, 1321-1322; ***People* v. *Avila*** (2006) 38 Cal.4th 491, 554-555; ***People* v. *Farnam*** (2002) 28 Cal.4th 107, 138; ***People v. Bryant*** (2019) 40 Cal.App.5th 525, 532; ***People* v. *Adanandus*** (2007) 157 Cal.App.4th 496, 505.) Many other cases have found the prosecutor is not bound by the jurors' answers in regard to other issues as well. (**See e.g., *Rice* v. *Collins*** (2006) 546 U.S. 333, 341 [notwithstanding young juror's oral response she could be impartial, prosecutor entitled to believe juror's youth and lack of ties to the community would make her a bad juror for the prosecution]; ***People* v. *Melendez*** (2016) 2 Cal.5th 1, 21 [prosecutor was entitled to discount juror who said his experience in having killed before would not be a problem in a death penalty case especially since the prosecutor's concern was based on his experience with a previous juror with a similar background who had not realized it would be a problem until deliberations]; ***People* v. *Riccardi*** (2012) 54 Cal.4th 758, 793-794 [prosecutor entitled to reject juror on ground juror could not follow the flight instruction where the juror initially expressed a strong reluctance to considering evidence of flight as consciousness of guilt even though the juror was later "rehabilitated" and said he could "certainly" follow the flight instruction]; ***People* v. *Taylor*** (2010) 48 Cal.4th 574, 643, fn. 19 [prosecutor legitimately could have believed prospective juror who worked as nurse would be inclined to credit defense mental health experts, despite her questionnaire statement to the contrary]; ***People* v. *Young*** (2005) 34 Cal.4th 1149, 1174 [even though prospective juror who worked as therapist "gave assurances she harbored no biases or opinions that would affect her ability to be open-minded and fair, the prosecutor might have reasonably exercised a challenge to excuse [her] on this basis" because there might be evidence of "extreme mental disturbance" at penalty phase]; ***People* v. *Gutierrez*** (2002) 28 Cal.4th 1083, 1124 [prosecutor justified in removing a juror on grounds the juror might harbor bad feelings toward the police despite the juror's claim otherwise; prosecutor was entitled to disregard a juror's claim that her emotional state and stressful circumstances would not interfere with her ability to consider the evidence where the juror repeatedly referred to her "nerves" and to being under considerable stress, cried twice during voir dire, and the unduly "emotional" state of

the juror was confirmed by the judge]; ***People* v. *Rushing*** (2011) 197 Cal.App.4th 801, 812 [prosecutor could be legitimately concerned that juror would allow her religious beliefs to affect her service, despite the juror's claim to the contrary]; ***People* v. *Cardenas*** (2007) 155 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 translation].)

D. Is a Prosecutor Entitled to Exercise a Challenge Based on the Overall and Changing Composition of the Jury?

As repeatedly noted by the California Supreme Court, jury selection is a fluid process with the composition of the jury continually changing. Whether a juror is acceptable or not will change over the course of jury selection because a lawyer is not only seeking a particular kind of juror but a particular mix of jurors. "It may be acceptable, for example, to have one juror with a particular point of view but unacceptable to have more than one with that view. If the panel as seated appears to contain a sufficient number of jurors who appear strong-willed and favorable to a lawyer's position, the lawyer might be satisfied with a jury that includes one or more passive or timid appearing jurors. However, if one or more of the supposed favorable or strong jurors is excused either for cause or [by] peremptory challenge and the replacement jurors appear to be passive or timid types, it would not be unusual or unreasonable for the lawyer to peremptorily challenge one of these apparently less favorable jurors even though other similar types remain. These same considerations apply when considering the age, education, training, employment, prior jury service, and experience of the prospective jurors." (***People* v. *Armstrong*** (2019) 6 Cal.5th 735, 780 in ***People* v. *Lenix*** (2008) 44 Cal.4th 602, 623.)

"It is also common knowledge among trial lawyers that the same factors used in evaluating a juror may be given different weight depending on the number of peremptory challenges the lawyer has at the time of the exercise of the particular challenge and the number of challenges remaining with the other side. Near the end of the voir dire process a lawyer will naturally be more cautious about 'spending' his increasingly precious peremptory challenges. Thus, at the beginning of voir dire the lawyer may exercise his challenges freely against a person who has had a minor adverse police contact and later be more hesitant with his challenges on that ground for fear that if he exhausts them too soon, he may be forced to go to trial with a juror who exhibits an even stronger bias. Moreover, as the number of challenges decreases, a lawyer necessarily evaluates whether the prospective jurors remaining in the courtroom appear to be better or worse than those who are seated. If they appear better, he may elect to excuse a previously passed juror hoping to draw an even better juror from the remaining panel." (***People* v. *Reynoso*** (2003) 31 Cal.4th 903, 918-919; ***People* v. *Johnson*** (1989) 47 Cal.3d 1194, 1220-1221; **see also *Burks* v. *Borg*** (9th Cir. 1994) 27 F.3d 1424, 1429 ["counsel is entitled to take account of the characteristics of the other prospective jurors against whom peremptories might be exercised; to reevaluate the mix of jurors and the weight he gives to various characteristics as he begins to exhaust his peremptories"].) Or *not* to exercise a challenge against a juror purportedly comparably situated to the dismissed juror. (**See *Miller El* v. *Dretke*** (2005) 545 U.S. 231,249–50 [noting the prosecutors' need "to exercise prudent restraint in using strikes" late in the jury-selection process].)

In ***People* v. *Smith*** (2018) 4 Cal.5th 1134, the court upheld a trial court's conclusion that a prosecutor's determination to challenge a juror who remained on the panel even though the prosecutor previously passed on the panel three times was not motivated by the juror's race, but instead "by the prosecutor's evaluation of the dynamics of the jury following a series of defense strikes." (***Id***. at p. 1161.)

In ***People* v. *Riccardi*** (2012) 54 Cal.4th 758, the court found the prosecutor had exercised a challenge of an African-American juror for a valid reason where the prosecutor had initially passed on the juror four times, but then decided to challenge the juror when the opportunity arose to replace the juror with a juror more favorably disposed toward the prosecution and imposition of the death penalty. (***Id***. at p. 789.)

In ***Gonzalez* v. *Brown*** (9th Cir. 2009) 585 F.3d 1202, the Ninth Circuit upheld the finding of a trial court that a prosecutor had exercised a challenge of an African-American juror for a neutral reason where the prosecutor had initially passed twice on the juror but then decided to challenge the juror in light of the changing jury composition. (***Id***. at p. 1205, 1209-1210.)

E. Is the Challenge of a Juror Valid if the Prosecutor Has a Mixed-Motivation (both Proper and Improper) for Challenging a Juror?

The United States Supreme Court has not addressed the question of whether a ***Batson-Wheeler*** motion should be granted if the court finds a prosecutor challenged a juror based on mixed motives (i.e., if the prosecutor has both improper and proper motives for challenging the juror). (**See *Foster* v. *Chatman*** (2016) 136 S.Ct. 1737, 1754, fn. 6; ***Snyder* v. *Louisiana*** (2008) 128 S.Ct. 1203, 1212.) The California Supreme Court has also declined to address the issue. (**See *People* v. *Smith*** (2018) 4 Cal.5th 1134, 1162, fn. 7.)

In California, only one published case has addressed the issue: ***People* v. *Douglas*** (2018) 22 Cal.App.5th 1162. Although in its initial opinion, the appellate court adopted a mixed-motive approach (**see *People* v. *Douglas*** (2017) 10 Cal.App.5th 834), it reversed course after rehearing and rejected that approach. (***Id***. at pp. 1165-1166.) Instead, the court adopted a "per-se" reversal standard. (***Id***. at p. 1175.) The court explained that "the fact that the party may also have had one or more legitimate reasons for challenging that juror does not eliminate the taint to the process" and held "it is not appropriate to use the [mixed-motive] test when considering the remedy for invidious discrimination in jury selection, which should be free of any bias." (***Id***. at p. 1164.)

Editor's Note: Several state courts have also adopted a "per se" approach which invalidates a challenge if any of the multiple rationales provided are impermissible. (**See e.g.**, ***McCormick* v. *State*** (Ind. 2004) 803 N.E.2d 1108, 1112-1113 [collecting cases adopting the tainted approach].) The Second, Third, Fourth, Eighth, and Eleventh federal Circuits adopt a "mixed-motive or dual motivation" analysis that holds that "where both race-based and race-neutral reasons have motivated a challenged decision, . . . the Court allows those accused of unlawful discrimination to prevail, despite clear evidence of racially discriminatory motivation, if they can show that the challenged decision would have been made even absent the impermissible motivation, or, put another way, that the discriminatory motivation was not a "but for" cause of the challenged decision." (***Cook* v. *LaMarque*** (9th Cir. 2010) 593 F.3d 810, 814; ***Howard* v. *Senkowski*** (2d Cir. 1993) 986 F.2d 24, 27; ***Gattis* v. *Snyder*** (3d Cir. Del. 2002) 278 F.3d 222, 233; ***Jones* v. *Plaster*** (4th Cir. 1995) 57 F.3d 417, 420-422; ***United States* v. *Darden*** (8th Cir. 1995) 70 F.3d 1507, 1530-1532; ***Wallace* v. *Morrison*** (11th Cir. 1996) 87 F.3d 1271, 1274-1275.) However, in ***Cook* v. *LaMarque*** (9th Cir. 2010) 593 F.3d 810, the Ninth Circuit adopted a third approach known as the substantial motivating factor approach. (***Id***. at pp. 814-815.) Under that approach, "once it is shown that a discriminatory intent was ***a substantial or motivating factor*** in an action taken by a state actor, the burden shifts to the party defending the action to show that this actor was not determinative. (***Id***. at p. 814-815.) A reviewing court should limit its inquiry to whether the prosecutor was "motivated in substantial part by discriminatory intent." (***Id***. at p. 815.) The most recent High Court opinion on ***Batson*** challenges suggests that when the issue is eventually directly presented, the Court will agree with the Ninth Circuit's approach. (**See *Flowers* v. *Mississippi*** (2019) 139 S.Ct. 2228, 2244 [stating the "ultimate inquiry" in deciding whether to grant a ***Batson*** motion "is whether the State was 'motivated in substantial part by discriminatory intent'", citing to ***Foster* v. *Chatman*** (2016) 136 S.Ct. 1737, 1754.)

F. In Assessing Discriminatory Intent, How Significant is the Fact a Prosecutor Has Mischaracterized What a Juror Said or Cited a Reason for Excusing a Juror that is Contradicted by or Lacks Support in the Record?

Sometimes a prosecutor will proffer an allegedly neutral reason for challenging a juror that is based on a misrecollection of what the juror wrote in a questionnaire or stated in court. How significant is the fact the prosecutor's reason is based on a mischaracterization of what a juror said, lacks support in the record, or is contradicted by the record when it comes to assessing whether the prosecutor's reason was a pretext to cover a discriminatory intent?

The fact that a reason cited by the prosecutor as a basis for challenging a juror is not borne out, or is contradicted, by the record **can be viewed as evidence of pretext**. (**See e.g**., ***Flowers* v. *Mississippi*** (2019) 139 S.Ct. 2228, 2243; ***Foster* v. *Chatman*** (2016) 136 S.Ct. 1737, 1748-1755; ***Snyder* v. *Louisiana*** (2008) 552 U.S. 472; ***People* v. *Silva*** (2001) 25 Cal.4th 345, 386; ***People* v. *Long*** (2010) 189 Cal.App.4th 826, 843; **see also *People* v. *Jones*** (2011) 51 Cal.4th 346, 366 [recognizing the failure of the record to support the prosecutor's reason is relevant, though not dispositive].) This happens when the characterization of the juror's response is viewed as an intentional misrepresentation by the prosecutor. "Where the facts in the record are objectively contrary to the prosecutor's statements, serious questions about the legitimacy of a prosecutor's reasons for exercising peremptory challenges are raised." (***People* v. *Arellano*** (2016) 245 Cal.App.4th 1139, 1169 citing to ***McClain* v. *Prunty*** (9th Cir.2000) 217 F.3d 1209, 1221; ***People* v. *Boyette*** (2002) 29 Cal.4th 381, 471–472; ***Castellanos* v. *Small*** (9th Cir.2014) 766 F.3d 1137, 1148; and ***Caldwell* v. *Maloney*** (1st. Cir. 1998) 159 F.3d 639, 651; **see also *People* v. *Smith*** (2019) 32 Cal.App.5th 860, 878 ["a prosecutor's credibility may be questioned if the prosecutor 'mischaracterizes a juror's testimony in a manner completely contrary to the juror's stated beliefs'" citing to ***Sifuentes* v. *Brazelton*** (9th Cir. 2016) 815 F.3d 490, 499]; ***People* v. *Smith*** (2018) 4 Cal.5th 1134, 1153–1154 ["questioning" sincerity of prosecutor who first acknowledged he failed to notice challenged juror had a bachelor's degree and then claimed the juror had "limited education" even after this realization - but ultimately upholding challenge as non-pretextual].)

On the other hand, just because a mistake has been made in recollecting what a juror said does not mean the attorney is being pretextual or acting with a discriminatory purpose. (**See *People* v. *O'Malley*** (2016) 62 Cal.4th 944, 979; ***People* v. *Elliott*** (2012) 53 Cal.4th 535, 561; ***People* v. *Jones*** (2011) 51 Cal.4th 346, 366; ***People* v. *Taylor*** (2009) 47 Cal.4th 850, 896.) "While an attorney who offers unsupported explanations for excusing a prospective juror may be trying to cover for the fact his or her real motivation is discriminatory, alternatively this may reflect nothing more than a misguided sense that more reasons must be better than fewer ***or simply a failure of accurate recollection***." (***People* v.*Taylor*** (2009) 47 Cal.4th 850, 896, emphasis added.) "To be sure, the back and forth of a ***Batson*** hearing can be hurried, and prosecutors can make mistakes when providing explanations. That is entirely understandable, and mistaken explanations should not be confused with racial discrimination." (***Flowers* v. *Mississippi*** (2019) 139 S.Ct. 2228, 2250.) Accordingly, "an isolated mistake or misstatement that the trial court recognizes as such is generally insufficient to demonstrate discriminatory intent …." (***People* v. *Manibusan*** (2013) 58 Cal.4th 40, 48 citing to ***People* v. *Silva*** (2001) 25 Cal.4th 345, 385.) "[A] 'mistake' is, at the very least, a 'reason,' that is, a coherent explanation for the peremptory challenge. It is self-evidently possible for counsel to err when exercising peremptory challenges…. [A] genuine 'mistake' is a race-neutral reason. Faulty memory, clerical errors, and similar conditions that might engender a 'mistake' … are not necessarily associated with impermissible reliance on presumed group bias. [Citation.]" (***People* v. *Manibusan*** (2013) 58 Cal.4th 40, 48 citing to ***People* v. *Williams*** (1997) 16 Cal.4th 153, 188–189.) "There is 'no ***Batson*** violation when [a] prosecutor excuse[s] a prospective juror for a factually erroneous but race-neutral reason." (***People* v. *Hardy*** (2018) 5 Cal.5th 56, 79–80; ***People* v. *O'Malley*** (2016) 62 Cal.4th 944, 990; **see also**

People* v. *Phillips (2007) 147 Cal.App.4th 810, 814.) "[T]he purpose of a hearing on an objection to a peremptory challenge 'is not to test the prosecutor's memory but to determine whether the reasons given are genuine and race [or gender] neutral.'" (***People* v. *Manibusan*** (2013) 58 Cal.4th 40, 48.)

Similarly, an honest misrecollection of ***which*** juror made a statement will not establish pretext. (**See *Rice* v. *Collins*** (2006) 546 U.S. 333, 340 [noting it was quite plausible that the prosecutor simply misspoke with respect to a juror's numerical designation and that it was a "tenuous inference to say that an accidental reference with respect to one juror," undermines the prosecutor's credibility with respect to another juror]; ***People* v. *Williams*** (2013) 56 Cal.4th 630, 661 [finding on review that where it was likely the prosecutor had mistakenly but honestly confused two jurors and challenged one of them based on the responses given by the other, there was no ***Batson-Wheeler*** violation where the responses given –no matter who gave them – reflected a valid non-racial basis (i.e., hesitancy in imposing the death penalty) for excusal]; ***People* v. *Smith*** (2019) 32 Cal.App.5th 860, 878 ["a prosecutor's 'mistake in good faith, such as an innocent transposition of juror information,' does not support a finding that the prosecutor is not credible."]; ***People* v. *Phillips*** (2007) 147 Cal.App.4th 810, 814, 819 [no ***Batson-Wheeler*** violation where prosecutor gave a reason for excusing the juror the prosecutor later discovered (and disclosed) was based on information in the questionnaire of *another* juror].)

The Ninth Circuit is more prone than most courts in putting the most negative spin possible on the prosecutor's motives when a prosecutor misquotes a juror, and/or the record does not factually support the prosecutor's proffered reason. (**See e.g.**, ***Castellanos* v. *Small*** (9th Cir. 2014) 766 F.3d 1137, 1149-1150; ***Ali* v. *Hickman*** (9th Cir. 2009) 584 F.3d 1174, 1190; ***Cook* v. *LaMarque*** (9th Cir. 2010) 593 F.3d 810, 818; ***McClain* v. *Prunty*** (9th Cir. 2000) 217 F.3d 1209, 1220-1224; ***Johnson* v. *Vasquez*** (9th Cir. 1993) 3 F.3d 1327, 1331.) However, even the Ninth Circuit does not view every misstatement as evidence of pretext. "[I]f a prosecutor makes a mistake in good faith, such as an innocent transposition of juror information, then that mistake does not support the conclusion that the prosecutor's explanation is clearly not credible." (***Aleman* v. *Uribe*** (9th Cir. 2013) 723 F.3d 976, 982 [and noting that "***Batson*** prohibits purposeful discrimination, not honest, unintentional mistakes"].) This holds true especially when the inaccuracy "does nothing to change the basis for the strike." (***Aleman* v. *Uribe*** (9th Cir. 2013) 723 F.3d 976, 982; **accord *Sifuentes* v. *Brazelton*** (9th Cir. 2016) 815 F.3d 490, 511-512 [prosecutor's mistaken attribution of statements and biographical information about one black juror to a different black juror did not show bias where both jurors expressed similar reservations about death penalty and that was reason for challenge; other confusion between jurors also made in good faith]; ***Jamerson* v. *Runnels*** (9th Cir. 2013) 713 F.3d 1218, 1232, fn. 7 [finding prosecutor's mistaken belief that a juror had multiple "brothers serving time," rather than just a single brother, did not offer any proof of discriminatory intent because "[w]hether or not the juror had one brother or two brothers incarcerated, the same justification for the strike remained—the juror might have an unfavorable view of the system based upon a family member's involvement in it"].)

Indeed, even cases finding prosecutorial statements unsupported by the record were pretextual have acknowledged that "an isolated mistake or misstatement that the trial court recognizes as such is generally insufficient to demonstrate discriminatory intent[.]" (**See *People* v. *Silva*** (2001) 25 Cal.4th 345, 385; ***People* v. *Arellano*** (2016) 245 Cal.App.4th 1139, 1166-1167; **see also *Flowers* v. *Mississippi*** (2019) 139 S.Ct. 2228, 2250.)

It must be kept in mind that "the defendant's burden at the third stage of a ***Wheeler/Batson*** hearing is to show the prosecutor excused prospective jurors for discriminatory reasons [citation], not merely that some of the nondiscriminatory reasons offered by the prosecutor are not supported by the record." (***People* v. *Mai*** (2013) 57 Cal.4th 986, 1049; ***People* v. *Taylor*** (2009) 47 Cal.4th 850, 891.)

Of course, the more reasons that lack support or are contradicted by the record, the greater the chance the court will find the prosecutor acted with discriminatory intent and the greater the chance that other types of evidence

allegedly showing discriminatory intent will be given greater credence. (**See *Foster* v. *Chatman*** (2016) 136 S.Ct. 1737, 1748-1755; ***People* v. *Long*** (2010) 189 Cal.App.4th 826, 843-848.) As noted by the High Court in ***Flowers* v. *Mississippi*** (2019) 139 S.Ct. 2228, "a ***pattern*** of factually inaccurate statements about black prospective jurors suggests that the State intended to keep black prospective jurors off the jury" and "when considered with other evidence of discrimination, a ***series*** of factually inaccurate explanations for striking black prospective jurors can be telling." (***Id***. at pp. 2250 [emphasis added].)

1. Cases finding prosecutor's reasons were pretextual based on inconsistencies between the record and the prosecutor's reasons

In ***Flowers* v. *Mississippi*** (2019) 139 S.Ct. 2228, the prosecutor mischaracterized what several jurors had stated on voir dire. As to the one black juror who the Court found was improperly excused, the prosecutor incorrectly stated she had worked with one of the defendant's sisters. As to another stricken black prospective juror (Cunningham), the prosecution "contradicted Cunningham's earlier statement that she had only a working relationship with [the defendant's] sister by inaccurately asserting that Cunningham and [defendant's] sister were close friends. (***Id***. at p. 2250.) The prosecution also incorrectly asserted that another black juror had tried to cover up a suit that had been filed against the victim's family business. (**Ibid**.) And the prosecution untruthfully explained that it struck yet another black juror in part because she was defendant's aunt." (**Ibid**.) The High Court viewed this "pattern of factually inaccurate statements about black prospective jurors" as "suggest[ing] that the State intended to keep black prospective jurors off the jury." (**Ibid**; **but see *Flowers*** (dis. opn., J. Thomas [describing errors as "trivial" and "inconsequential"].)

In ***Foster* v. *Chatman*** (2016) 136 S.Ct. 1737, the High Court found that prosecutors who removed four black prospective jurors (two of whom were the focus of the ***Batson*** challenge) used their challenges in a racially motivated manner. In ***Chatman***, a case tried shortly after the ***Batson*** decision issued, the defense obtained various prosecutorial notes that reflected the prosecutors were intent on removing all black jurors and which contradicted much of what the prosecutors claimed were the reasons they challenged the jurors. (***Id***. at pp. 1743-1744.)

For example, the prosecutor in ***Foster*** told the trial court that one of the black jurors challenged was only struck when a peremptory challenge opened up due to an unexpected event resulting in the excusal of another juror for cause. The prosecutor explained that the juror was listed in his notes as "questionable" along with another white juror and then provided reasons why the "questionable" white juror was just a better fit in comparison. (***Id***. at p. 1749.) However, the High Court found, based on the prosecution notes, that "the predicate for the State's account—that [the juror] was "listed" by the prosecution as "questionable," making that strike a last-minute race-neutral decision—was false." (**Ibid**.) Rather, the juror in question was one of ten listed jurors (the first five of whom listed were black) that the prosecutor intended to strike in advance who were definite "NO's." (***Id***. at p. 1750.) "Only in the number six position did a white prospective juror appear, and she had informed the court during voir dire that she could not "say positively" that she could impose the death penalty even if the evidence warranted it." (**Ibid**.) The court rejected the prosecution argument that this contradiction was explainable as the prosecutor misspeaking, noting that the statement regarding the questionability of the jurors were "not some off-the-cuff remark; it was an intricate story expounded by the prosecution in writing, laid out over three single-spaced pages in a brief filed with the trial court." (**Ibid**.) The court observed that several of prosecutor's reasons for why he chose to strike the black juror over the other questionable white juror were also contradicted by the record: although the prosecutor said he struck the black juror because "the defense did not ask her questions about" three different trial issues, the transcripts revealed that the defense asked her several questions on all three topics. (**Ibid**.) Moreover, the court stated other explanations given (such as the fact that the black juror was divorced, young, and arguably lied about not being familiar with the neighborhood because she went to high school near the neighborhood of the crime)

while not explicitly contradicted by the record, were difficult to credit because the State accepted 3 of 4 white jurors who were divorced, accepted eight white jurors who were under 36 (the black juror was 34 years old), and a white juror who lived and worked near the neighborhood of the crime. (***Id***. at pp. 1750-1751.) The High Court highlighted that it was "not faced with a single isolated misrepresentation." (***Id***. at p. 1751.)

Another reason the Supreme Court disbelieved the prosecutor's reasons were genuine was the fact the prosecutor's statement of the primary reasons for challenging the second black juror shifted over time. At the pre-trial ***Batson*** motion, the prosecutor initially provided eight reasons for challenging the juror but strongly indicated he was only concerned about was the fact the juror had an 18 years old son, which is about the same age as the defendant. But at the subsequent motion for a new trial, the prosecutor told that trial court his paramount concern was the second black juror's membership in the Church of Christ. The prosecutor claimed the "bottom line" was the juror's affiliation with the Church of Christ, a church which does not take a formal stand against the death penalty but whose members "are very, very reluctant to vote for the death penalty." (***Id***. at p. 1752.)

Editor's Note: The High Court, to this day, has not ruled that it is unconstitutional to remove jurors based on religious affiliation. (**See** this outline, section VII-4 at pp. 24-25.)

The High Court recognized that the prosecutor may have simply misspoke in one of these two proceedings. However, the Court then noted that if that were the case, at least one of the two purportedly principal justifications for the strike would withstand closer scrutiny - and neither did. The Court did not put much stock in the prosecutor's claim he was concerned about the age of the juror's son since the prosecutor did not accept the second black juror who stated the defendant's age would not be a factor in sentencing "whatsoever," but accepted white jurors with sons close in age to the defendant, including a juror who stated the defendant's age would "probably" be a factor in sentencing. (***Id***. at p. 1752.) The prosecution sought to explain this away by noting that, unlike the white jurors, the son of the second black juror had been convicted of "basically the same thing that this defendant is charged with." (**Ibid**.) The High Court said equating the crime committed by the son of the second black juror (stealing hubcaps from a car in a mall parking lot five years earlier for which the son received a 12 month suspended sentence) with defendant's crime (a capital murder of a 79–year–old widow after a brutal sexual assault) was "nonsense" and so implausible that it actually supported the conclusion that the focus on the second juror's son was pretextual. (***Id***. at p. 1752.) As to the claim the second black juror was struck because of his affiliation with the Church of Christ, the Court juror asserted no fewer than four times during voir dire that he could impose the death penalty and while the prosecution argued it challenged several white jurors on the same basis (i.e., for belonging to that same denomination), the record showed these other jurors were actually challenged for cause for different reasons. In addition, the handwritten notes from the prosecution's file stated that the Church of Christ did not take a stand on the death penalty, leaving it to individual members but the notes then stated: "NO. NO Black Church." (***Id***. at p. 1753.)

The Court held many of the other justifications provided for challenging this second black juror "similarly [came] undone when subjected to scrutiny." The prosecution stated this juror "appeared to be confused and slow in responding to questions concerning his views on the death penalty" but the juror unequivocally voiced his willingness to impose the death penalty, the way the question was asked was confusing in general (according to the trial court) and a white juror who showed similar confusion served on the jury. (***Id***. at pp. 1753-1754.) The prosecution stated it struck the second black juror because his wife worked at a hospital that dealt a lot with mentally disturbed and mentally ill people but expressed no such concerns about white juror who had worked at the same hospital. (***Id***. at p. 1754.) And the prosecution stated the second black juror was struck because the defense didn't ask the juror questions about the age of the defendant, his feelings about criminal responsibility involved in "insanity" or "publicity"; but such questions were asked by the defense. (**Ibid**.)

In sum, the difference in treatment of the black jurors and white jurors with similar characteristics, coupled with "the shifting explanations, the misrepresentations of the record, and the persistent focus on race in the prosecution's file" left the ***Foster*** Court "with the firm conviction that the strikes . . . were 'motivated in substantial part by discriminatory intent.'" (**Ibid**.)

In ***People* v. *Arellano*** (2016) 245 Cal.App.4th 1139, the appellate court found the prosecutor's challenges to two of three female African-American jurors were justified; but not a challenge to a third African-American female – even though two African-American males sat on the jury and some of the reasons provided were clearly race-neutral. This was largely because of the prosecutor's mischaracterization of what the juror had stated on voir dire and the prosecutor's insistence the third juror was not African-American. (***Id***. at pp. 1164-1169.) Specifically, the juror said she had been a field representative for the Department of *Commerce* and collected information "for Congress and President and different organizations that distribute information back down to the cities and counties about work, the state of the nation, how people are doing health-wise…." (***Id***. at p. 1164.) The prosecutor claimed he challenged the juror because "she works for a liberal political organization where she provides information to the Democratic Party or Congress[.]" (***Id***. at pp. 1164-1165.) The court and defense counsel then asked some questions indicating the juror worked for the Department of Commerce not for Congress. But the prosecutor responded by saying, "she deals with these liberal organizations for what I heard was Congress and collects—she did say she collects information for the government and I don't know—I mean, she could have political motives or anything like that. I just don't know. And I don't have all day to go into that." (***Id***. at p. 1165.) The appellate court found no evidentiary basis for the prosecutor's declaration and noted the juror had the same job for 22 years, which meant she worked throughout presidential administrations and congressional majorities from both political parties and "never said she was affiliated with a particular political party." (***Id***. at pp. 1165-1166.) It did not make a difference to the appellate court that the prosecution mentioned another reason for removing the juror (namely a concern that the juror had a problem with law enforcement*) because the prosecutor "only stated these reasons after he refused to concede [the juror] was African–American, expounded on her alleged employment by a "liberal political organization," and the court and defense counsel attempted to tell him that his version of [the juror's] voir dire response was erroneous. (***Id***. at pp. 1168-1169.)

> ***Editor's Note:** The prosecutor's concern that the juror had a problem with law enforcement was based on two factors. First, the juror had recounted an incident where she expressed discontent with the fact the police declined to offer her a ride home or get her any medical care after she had been attacked by another woman (who erroneously believed the juror was messing with the woman's husband). Second, when the juror was asked about her prior jury service, the first thing she mentioned was that she sat on a civil suit involving police brutality even though that was just one of four cases where she had been called to jury duty. (***Arellano*** at pp. 1148-1149, 1166.) The ***Arellano*** court was "not persuaded by the prosecutor's suggestion that [the juror's] referencing a police brutality case first in order among several cases on which she previously served as a juror necessarily suggests bias." (***Id***. at p. 1168, fn. 11.)

The appellate court was troubled by the "belated" provision of reasons, the refusal of the prosecutor to acknowledge the juror was African-American,* and the trial court's lack of "a sincere and reasoned attempt to evaluate" each of the reasons provided by the prosecution (i.e., the trial court never questioned the prosecutor regarding the obvious inaccuracy about juror's employment and the inference which the prosecutor drew from it). Accordingly, it reversed the conviction for ***Batson-Wheeler*** error. (***Id***. at pp. 1168-1169.)

> ***Editor's Note:** The ***Arellano*** appellate court never explained why the prosecutor's refusal to concede the juror was African-American showed bias. And it is not obvious why it does- given that the prosecutor did not insist that the juror was *not* African-American and even the trial court said it initially believed the juror was Hispanic. (***Id***. at p. 1153; **cf**., ***Hernandez* v. *New York*** (1991) 500 U.S. 352, 369 [prosecutor's claim that he did not know which jurors were Latinos "could be taken as evidence of the prosecutor's *sincerity*" in exercising challenges, emphasis added]; **see also** this outline, section VII-A-10 at pp. 34-35])

In ***People* v. *Long*** (2010) 189 Cal.App.4th 826, the court found that if a prosecutor's factual mistake or claim is unsupported by the record, this casts doubt on the genuineness of *other* reasons provided by the prosecutor. In ***Long***, the prosecutor provided two basic reasons for challenging a juror: the juror did not participate in group questioning and the juror exhibited negative body language, including failing to make eye contact. (***Id***. at p. 843.) When the appellate court reviewed the transcript, it found the first reason was "demonstrably false." Because the first reason was proven to be false, the appellate court was unwilling to give the normal deference to the trial court's determination that the second reason was legitimate in the absence of any specific or verified description of the juror's body language or manner of expressing himself or why it was "disturbing or unseemly." (***Id***. at p. 848.)
In ***People* v. *Granillo*** (1987) 197 Cal.App.3d 110, the court held the prosecutor impermissibly challenged a juror where the prosecutor stated the juror would have difficulty dealing with murder or death and there was "absolutely nothing" in the record indicating the juror expressed or implied would have any difficulty dealing with murder or death. (***Id***. at p. 121.)

In ***Castellanos* v. *Small*** (9th Cir. 2014) 766 F.3d 1137, a prosecutor exercised his challenges against four Hispanic prospective jurors. When asked to justify his challenge against one of the female Hispanic jurors (who had been identified only by number), the prosecutor stated he believed the juror was white (a fact disputed by defense counsel) but then said that even if she was not, he challenged her because the juror didn't have any children and the victim was a child and he wanted jurors who understood children. (***Id***. at p. 1143.) In reality, the juror assigned the number identified had stated she had two adult children (and possibly more – the record was ambiguous). Although by all appearances, the prosecutor had likely confused two different jurors or answers, the Ninth Circuit believed this discrepancy showed the challenge was pretextual because other jurors who had no adult children were not challenged and because the Ninth Circuit believed that if the prosecutor was truly concerned about "whether the venireperson had experience with young children like the child witness who planned to testify", the prosecutor would not have asked the question asked about whether a juror had any "adult children" but would have asked "Do you have any children?" (***Id***. at pp. 1143, 1149.) The Ninth Circuit held their comparative juror analysis revealed "such significant evidence of pretext," that reversal was required notwithstanding the fact (i) *seven* Hispanic jurors were left on the jury; (ii) the prosecutor had more than enough remaining challenges to have removed all of the seven Hispanic jurors but did not use them; (iii) the reason the prosecutor asked about whether the juror had *adult* children was because that specific question was one of five standard questions *required by the trial court* to be asked of each juror; (iv) there was no discussion of whether the jurors left on the jury who did not have children were favorable jurors *based on any other* characteristics; (v) the trial court found no evidence of discriminatory purpose and (vii) this determination of lack of pretext was supposed to be subject to a *doubly deferential* standard of review. (***Id***. at pp. 1148-1150.)

Editor's note: We leave it to the reader to decide who actually was engaged in pretextual conduct: the prosecutor or the Ninth Circuit. The latter may not have liked the fact the defendant was facing a lengthy sentence but was only 17 at the time of the crime. (The fact the murder victim was a 12-year old boy who was fatally shot in the head by the defendant because the boy refused to join defendant's street gang was of less concern.)

2. Cases finding prosecutor's reasons were *not* pretextual *despite* inconsistencies between the record and the prosecutor's reasons

In ***Rice* v. *Collins*** (2006) 546 U.S. 333, the High Court took the Ninth Circuit to task for inferring that a prosecutor's reason for removing a juror (#16) was pretextual simply because the prosecutor referred to a different juror (#19) as "young" even though she was a grandmother. The court pointed out that it was quite plausible that the prosecutor simply misspoke with respect to a juror's numerical designation and that it was a "tenuous inference to say that an accidental reference with respect to one juror, Juror 19, undermines the prosecutor's credibility with respect to Juror 16. Seizing on what can plausibly be viewed as an innocent transposition makes little headway toward the conclusion that the prosecutor's explanation was clearly not credible." (***Id***. at p. 340.)

In ***People* v. *O'Malley*** (2016) 62 Cal.4th 944, the prosecutor said one of the reasons for striking a juror was that the juror "recalled and spoke of prejudice. He mentioned the license tag and so on." (***Id***. at p. 979.) The prosecutor was wrong about the juror speaking of prejudice. But the court nonetheless rejected defendant's claim the answer was pretextual. The court observed the prosecutor "was attempting to reconstruct the voir dire of a juror that had taken place more than two weeks earlier, in the midst of a voir dire process that had lasted almost a month, over the course of which 163 prospective jurors were questioned. His brief, passing reference to prejudice was linked to [the juror's] written response to the question on the jury questionnaire asking about unfavorable experiences with law enforcement, in which [the juror] noted he had been cited for an expired registration only one day after the license plate tag had expired. The prosecutor questioned [the juror] about the incident and, while [the juror] said he held no grudge against the officer who had cited him, evidently the prosecutor disbelieved that assurance. The prosecutor, unlike this court, not only heard [the juror's] words, but heard his tone of voice and observed his body language as he denied bearing a grudge against the officer who had cited him." (***Id***. at pp. 979-980 [and noting that "[e]ven if the prosecutor's concern about the citation, considered in isolation, might not provide a compelling reason for a peremptory challenge, the prosecutor's mistaken reference to prejudice alone does not establish that the prosecutor's stated reasons were pretexts for discrimination."].) The ***O'Malley*** court also implicitly did not find significant the fact that the prosecutor recalled the juror strongly agreeing, rather than merely "somewhat agreeing," the prosecutor should be held to a burden of proof higher than beyond a reasonable doubt. (***Id***. at p. 980.)

In ***People* v. *Jones*** (2011) 51 Cal.4th 346, the prosecutor misstated what a juror had written when providing reasons for challenging a juror. The prosecutor said that the juror's son had been accused of attempt murder or murder when, in fact, the juror had stated on the questionnaire only that his son had been accused of a crime and that it went to trial without describing what the crime was and what happened. (**Id**. at pp. 358, 366.) The ***Jones*** court found this misstatement did not mean the prosecutor was acting in a pretextual manner:

> No reason appears to assume the prosecutor intentionally misstated the matter. He might have based what he thought on information he obtained outside the record. Or he may simply have misremembered the record. The prosecutor had to keep track of dozens of prospective jurors, thousands of pages of jury questionnaires, and several days of jury voir dire, and then he had to make his challenges in the heat of trial. He did not have the luxury of being able to double-check all the facts that appellate attorneys and reviewing courts have. Under the circumstances, it is quite plausible that he simply made an honest mistake of fact. Such a mistake would not show racial bias, especially given that an accurate statement (that [the juror] wrote that his son had been accused of, and tried for, a crime but left the rest of the answer blank) would also have provided a race-neutral reason for the challenge. ¶ The purpose of a hearing on a ***Wheeler/Batson*** motion is not to test the prosecutor's memory but to determine whether the reasons given are genuine and race neutral. 'Faulty memory, clerical errors, and similar conditions that might engender a "mistake" of the type the prosecutor proffered to explain his peremptory challenge are not necessarily associated with impermissible reliance on presumed group bias.' (***People* v. *Williams*** (1997) 16 Cal.4th 153, 187 [alternate citations omitted].) This 'isolated mistake or misstatement' (***People* v. *Silva*** [(2001)] 25 Cal.4th [345,] 385, [alternate citations omitted) does not alone compel the conclusion that this reason was not sincere." (***Jones,*** at p. 366; **see also *People* v. *Elliott*** (2012) 53 Cal.4th 535, 561 [factual mistakes about where a juror was sitting and when voir dire occurred are the type of mistakes that are the result of a faulty memory and are not "necessarily associated with impermissible reliance on presumed group bias"].)

In ***People* v. *Smith*** (2019) 32 Cal.App.5th 860, the prosecutor stated a juror doubted "whether the criminal justice system works for the most part" when, in fact, the juror said: "The Criminal Justice System works for the most part but there are cases where I feel the system has not worked." (***Id***. at p. 879.) The prosecutor also was mistaken when he said the juror's mother was incarcerated and that the juror lived with his mother at the time of the prosecution and visited her in prison. Rather, it was the juror's aunt (who the juror stated he was close to) who was incarcerated, and it was ambiguous if the juror was actually living in the same house or was simply in the same geographic area as the aunt. (***Ibid***.) The court of appeal did not find these mistakes to be significant or to have any bearing on the credibility of the prosecutor. (***Ibid***.)

In ***People* v. *Jones*** (2017) 7 Cal.App.5th 787, the prosecutor stated she excused a juror because the juror was young, single and did not have children. The record did not show the juror ever expressly said she did not have children. However, the court rejected this discrepancy as evidence of pretext since the "prosecutor reasonably may have inferred that the juror did not have children given that she was young and single, and did not mention any children in responding to the trial court's standard voir dire questions." (***Id***. at p. 806.) The ***Jones*** court then held that, under the totality of the record, the prosecutor's statement that the juror lacked life experience as a "younger female who is single with no children" did not give rise to an inference of discriminatory purpose. (***Id***. at p. 806.)

In ***Aleman* v. *Uribe*** (9th Cir. 2013) 723 F.3d 976 the court noted that there is a "fine distinction between a prosecutor's false statement that creates a new basis for a strike that otherwise would not exist and a prosecutor's inaccurate statement that does nothing to change the basis for the strike . . ." (***Id***. at p. 982.) And held a prosecutor's honest mistake in attributing the statement of one juror (i.e., that she was too prissy for police work) to another juror in attempting to show the latter juror was properly challenged was not evidence of pretext where the record supported the prosecutor's claim his mistake was due to feeling ill, the challenged juror was sitting near the juror who made the "prissy" comment, and the challenged juror made a similar comment to the prissy comment. (***Id***. at pp. 982-983.)

In ***Briggs* v. *Grounds*** (9th Cir. 2011) 682 F.3d 1165, the court held that while the prosecutor in one instance, mischaracterized an exchange between defense counsel and challenged juror in support of the challenge, and in another instance, seemed to merge the juror's answers to two separate questions, the prosecutor's reasons were nonetheless valid since it appeared the prosecutor's mix-up stemmed from innocent confusion of different answers that did not undermine thrust of prosecutor's claim. (***Id***. at pp. 1173, fn .7, 1179-1180.)

G. Does Each Specific Reason Have to Provide a Neutral Justification by Itself or Can the Reasons Be Considered Cumulatively?

In ***Briggs* v. *Grounds*** (9th Cir. 2011) 682 F.3d 1165, the prosecutor gave numerous reasons for challenging a particular juror, including: (i) the juror said if there was a slight doubt in her mind, that would be reasonable doubt; (ii) the juror she might need a little bit more evidence in a rape case than in an auto case; (iii) the juror said she had no opinion on whether sex victims were more or less believable; (iv) the juror gave an ambiguous answer as to whether, in the absence of DNA evidence, she could convict a defendant of a sexual crime; (v) the juror said she would hesitate to convict on the word of a single witness; (vii) the juror said she was not a good judge of telling the truth; and (vii) the prosecutor did not have a good rapport with the juror but the defense did. (***Id***. at pp. 1173-1178.)

The court held that even though "each detail" cited by the prosecutor did not "necessarily constitute a stand-alone justification," and some were "weak" reasons if taken in isolation, in total they "provided support for her overall concern" that the juror would hold the prosecution to a higher burden of proof than the law required. (***Id***. at p. 1174.)

H. The Use of Comparative Analysis to Assess the Existence of a Discriminatory Motive

1. What is comparative analysis?

Comparative analysis refers to a mechanism that courts use to try to "flush out" the actual motivation of the party accused of using his or her peremptory challenges in a discriminatory fashion. In doing a comparative analysis, the court reviews the reasons given for the challenge as to the particular juror and then looks to see if those reasons would apply equally to other jurors (not belonging to the same cognizable class as the challenged juror) who were *not*

challenged. If there are two jurors who have given very similar responses, one of whom belongs to the cognizable class and one of whom does not, and the party has only challenged the juror in the cognizable class on the purported basis of a response given by *both* jurors, then an inference can arise that the purported basis of the challenge is a pretext designed to conceal a discriminatory purpose. (**See *Flowers* v. *Mississippi*** (2019) 139 S.Ct. 2228. 2248-2249; ***Foster* v. *Chatman*** (2017) 136 S.Ct. 1737, 1754; ***Miller El* v. *Dretke*** (2005) 545 U.S. 231, 241; ***People* v. *DeHoyos*** (2013) 57 Cal.4th 79, 109; ***People* v. *Lenix*** (2008) 44 Cal.4th 602, 621; ***Cook* v. *LaMarque*** (9th Cir. 2010) 593 F.3d 810, 815.)

"***Batson*** and the cases that follow it do not require ***trial*** courts to conduct a comparative juror analysis." (***Murray* v. *Schriro*** (9th Cir. 2014) 745 F.3d 984, 1005, emphasis added.) However, the California Supreme Court has stated, "evidence of comparative juror analysis ***must*** be considered in the trial court and even for the first time on appeal ***if*** relied upon by defendant and the record is adequate to permit the urged comparisons." (***People* v. *Lenix*** (2008) 44 Cal.4th 602, 622, emphasis added; **see also *People* v. *Gutierrez*** (2017) 2 Cal.5th 1150, 1174 [expressly overruling language in its earlier decision in ***People* v. *Johnson*** (1989) 47 Cal.3d 1194, 1220, which suggested that comparative analysis performed by a reviewing court is disfavored as impractical and insufficiently deferential to the trial court].) However, "comparative juror analysis is but one form of circumstantial evidence that is relevant, but not necessarily dispositive, on the issue of intentional discrimination." (***People* v. *Chism*** (2014) 58 Cal.4th 1266, 1318; ***People* v. *McKinzie*** (2012) 54 Cal.4th 1302, 1320; ***People* v. *Lenix*** (2008) 44 Cal.4th 602, 622.)

Federal courts conducting a review of a state court ruling (to determine whether the state court's denial of the ***Batson*** objection was contrary to, or involved an unreasonable application of, clearly established federal law, or was based upon an unreasonable determination of the facts) are required to conduct a comparative juror analysis. (***Murray* v. *Schriro*** (9th Cir. 2014) 745 F.3d 984, 1005.)

2. What is "reverse" comparative analysis?

Comparative analysis may also be used to affirmatively support an inference that a prosecutor is **not** using his or her challenges in an impermissible manner. This type of comparative analysis is sometimes referred to as "reverse," "affirmative" or "positive" comparative analysis. If there are two jurors who have given very similar responses, one who belongs to the cognizable class and one who does not, and the party has challenged **both** jurors for the same reason, then an inference can arise that the purported basis of the challenge is **not** a pretext designed to conceal a discriminatory purpose. (**See *People* v. *Jackson*** (1996) 13 Cal.4th 1164, 1254; ***People* v. *Trevino*** (1997) 55 Cal.App.4th 396, 411-412 [finding trial court properly denied defendant's ***Wheeler*** motion because, inter alia, alleged basis for challenge (i.e., the juror's or juror's spouse connection with an organization that provided health care) was shared by each of the Hispanic jurors challenged and non-Hispanic jurors who were challenged]; ***People* v. *Bryant*** (2019) 40 Cal.App.5th 525, 542 [prosecutor's use of peremptory challenges based on failure to follow one-witness rule regardless of whether jurors in same cognizable class "strengthens the inference that the exercise of those challenges was based on a race-neutral reason"].)

This form of comparative analysis may potentially be conducted even at the prima facie level if some of the jurors who have been challenged are not from the same cognizable class as the juror who was purportedly improperly struck.

3. A valid comparative analysis must take into account much more than a single shared factor

One of the most common mistakes made by counsel attempting to use comparative analysis to establish an impermissible motive is to compare a removed juror belonging to one cognizable class with a retained juror not belonging to the same cognizable class on the basis of an isolated characteristic. For example, let's say a prosecutor challenges a Hispanic-American juror for the asserted reason that the juror had a relative with a criminal history but allows a non-Hispanic-American juror who also had a relative with a criminal history to remain on the jury. The defense

attorney may claim that this shows the prosecutor is not truly concerned about the fact that challenged juror has a relative with a criminal history and this creates an inference the challenged juror was actually removed because the prosecutor has a bias against Hispanic-Americans. However, the conclusion the defense attorney is asking the court to draw is ***only valid*** insofar as the two jurors being compared are, *in fact*, similarly situated ***in other respects***. Whether the jurors are truly similarly situated (even on the isolated characteristic alone) would depend, inter alia, on how close the relative is to each juror, how similar are the criminal history records of the respective jurors, and what type of attitudes the juror has regarding their relatives' criminal history.

Even more important, a comparative analysis using the isolated characteristic is relatively useless if there exists other characteristics present or absent that allow a distinction to be drawn between the challenged juror and the unchallenged juror. "Two panelists might give a similar answer on a given point. Yet the risk posed by one panelist might be offset by other answers, behavior, attitudes or experiences that make one juror, on balance, more or less desirable." (***People v. Krebs*** (2019) 8 Cal.5th 265 [255 Cal.Rptr.3d 95, 126]; ***People* v. *Jones*** (2011) 51 Cal.4th 346, 365; ***People* v. *Booker*** (2011) 51 Cal.4th 141, 166; ***People* v. *Taylor*** (2009) 47 Cal.4th 850, 887.) "[P]arties with limited peremptory challenges generally cannot excuse every potential juror who has any trait that is at all problematic. They must instead excuse those they believe will be most problematic under all the circumstances. *There will always be some similarities between excused jurors and nonexcused jurors*." (***People* v. *Hardy*** (2018) 5 Cal.5th 56, 83, emphasis added.)

Although courts applying comparative analysis sometimes engage in very simplistic or superficial comparisons, "overlapping responses alone are not enough to demonstrate purposeful discrimination." (***People* v. *Calvin*** (2008) 159 Cal.App.4th 1377, 1389, citing to ***People* v. *Lewis and Oliver*** (2006) 39 Cal.4th 970, 1020.) "To prove such a claim, a defendant must engage in a careful side-by-side comparative analysis to demonstrate that the dismissed and retained jurors were "similarly situated." (***People* v. *Calvin*** (2008) 159 Cal.App.4th 1377, 1389, citing to ***People* v. *Lewis and Oliver*** (2006) 39 Cal.4th 970, 1016-1024.) Comparative analysis on a "high level of generality" should be eschewed. (**See *People* v. *Montes*** (2014) 58 Cal.4th 809, 851.) Jurors who give similar responses to one question are not similarly situated where the jurors do not have otherwise have a "substantially similar ***combination*** of [relevant] responses[.]" (***People* v. *DeHoyos*** (2013) 57 Cal.4th 79, 107, emphasis added; **see also *People* v. *Harris*** (2013) 57 Cal.4th 804, 837 [juror challenged not similar to juror kept "because the combination of [juror's] potential biases made him sufficiently different from other jurors who had been evaluated at the time the prosecutor excused him"]; ***People* v. *Mai*** (2013) 57 Cal.4th 986, 1050–1051 ["Nothing indicates the prosecutor was wrong in suggesting that when [the challenged juror's] age, familial status, and *death penalty* views were considered ***together***, she was unique among the jurors who had been evaluated at the time the prosecutor excused her"]; ***People* v. *Watson*** (2008) 43 Cal.4th 652, 675–676 [noting none of the comparative jurors shared the combined characteristics relied upon by the prosecutor in excusing the juror in rejecting defense argument comparative analysis showed prosecutors' reasons were pretextual].)

"An attorney must consider many factors in deciding how to use the limited number of peremptory challenges available and often must accept jurors despite some concerns about them. A party concerned about one factor need not challenge every prospective juror to whom that concern applies in order to legitimately challenge any of them." (***People* v. *Jones*** (2011) 51 Cal.4th 346, 365.)

Moreover, in doing a comparative analysis, courts must take into account that "[w]hile an advocate 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." (***People* v. *Lenix*** (2008) 44 Cal.4th 602, 631; **see also *People* v. *Vines*** (2011) 51 Cal.4th 830, 851-852 [finding jurors not similarly situated for comparative analysis purposes despite giving similar answers and sharing some personal characteristics including academic background, occupation, place of residence, and a preference for science fiction movies, where the jurors differed in age and life experience (i.e., unlike the challenged juror, the kept juror was a supervisor with the power to hire

and fire, had been in the military, had a spouse who was employed, had raised a child to adulthood, had a daughter who worked in a fast food restaurant like the victims who were killed, and had a relative who had been a victim of a crime)]; ***People* v. *Watson*** (2008) 43 Cal.4th 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]; ***People* v. *Gray*** (2005) 37 Cal.4th 168, 190–191 [noting the prosecutor may have preferred not to strike the other jurors for other positive reasons that suggested they would be a favorable juror for the prosecution].)

Even when two jurors give ostensibly similar answers, the ***way*** in which the answer is given may reveal that one juror is giving a genuine response and the other is not. The differences in the manner in how a juror answers a question "may legitimately impact the prosecutor's decision to strike or retain the prospective juror." (***People* v. *Lenix*** (2008) 44 Cal.4th 602, 623.)

It is extremely important that the comparative analysis conducted understand **nuanced distinctions**. (**See *Davis* v. *Ayala*** (2015) 135 S.Ct. 2187 [judgment calls as to which juror to keep "may involve a comparison of responses that differ in only nuanced respects, as well as a sensitive assessment of jurors' demeanor"]; ***People* v. *DeHoyos*** (2013) 57 Cal.4th 79, 104-105, fn. 5 [juror who was challenged, inter alia, because she made a statement reflecting an eagerness to serve in a *particular* brutal death penalty case was not comparably situated to unchallenged juror who made statements reflecting that the juror thought everybody should do jury service in *general* and who, unlike the challenged juror, seemed to understand the gravity of responsibility being undertaken by service].)

All that being said, this does not mean the jurors used for comparison must "be identical in all respects[.]" (***People* v. *DeHoyos*** (2013) 57 Cal.4th 79, 107; **see also *Flowers* v. *Mississippi*** (2019) 139 S.Ct. 2228, 2249 ["a defendant is not required to identify an identical white juror for the side-by-side comparison to be suggestive of discriminatory intent"].) "[C]omparative juror analysis is not simply an exercise in identifying any conceivable distinctions among prospective jurors." (***People* v. *O'Malley*** (2016) 62 Cal.4th 944, 977; **see also *Miller El* v. *Dretke*** (2005) 545 U.S. 231, 246, fn. 6 ["A per se rule that a defendant cannot win a ***Batson*** claim unless there is an exactly identical white juror would leave ***Batson*** inoperable"].) Rather, the relevant question is "whether there were any ***material*** differences among the jurors—that is, differences, other than race, that we can reasonably infer motivated the prosecutor's pattern of challenges." (***People* v. *O'Malley*** (2016) 62 Cal.4th 944, 977, emphasis in original; **see also *People* v. *Winbush*** (2017) 2 Cal.5th 402, 442 [the jurors being compared "must be materially similar in the respects significant to the prosecutor's stated basis for the challenge."]; ***People* v. *DeHoyos*** (2013) 57 Cal.4th 79, 107 [same].)

a. Variances in the nature of the criminal records of jurors or persons close to jurors can show jurors are not similarly situated for comparative analysis purposes

In ***People* v. *Riccardi*** (2012) 54 Cal.4th 758, the defense argued a comparative analysis of the arrest records of prospective jurors or their relatives revealed that the prosecution's dismissal of two African-American jurors (one whose son was recently arrested on six counts of assault and the other who was arrested 25 years earlier during a student protest against the lack of a black studies program) was pretextual. However, the California Supreme Court rejected the argument, noting the jurors who were retained had relatively minor arrest records: one had been court-martialed for going 2-days AWOL in the late 1960's, had been arrested for DUI many years earlier and had a son arrested for vandalism; one had a husband accidentally arrested for a warrant on outstanding tickets; and one had a son arrested for "unpaid tickets." (***Id***. at pp. 795-796.) In addition, the court declined to compare the challenged jurors to Caucasian jurors who were initially passed on by the prosecution but later removed; but held that even if a comparison was done, their records were relatively minor: one had a husband arrested for drunkenness; one's deceased mother had prior arrest records for drunkenness and petty theft; and one had a friend arrested for a DUI. (***Id***. at p.796.) The court stated "none of the compared jurors or prospective jurors revealed a record comparable to the arrest of [one challenged juror's] son for six counts of assault or the nature of [the other challenged juror's] arrest, which suggested" she might have "firm anti-authoritarian opinions and might also harbor a mistrust of the criminal justice system." (***Id***. at p. 796; **see also**

People* v. *Montes (2014) 58 Cal.4th 809, 848-849 [juror with conviction for theft whose spouse had ongoing drug addiction not similarly situated to jurors who, respectively, had a husband, father, or brother who had been convicted of driving under the influence; nor to a juror who had used drugs in her youth, had a sister with a drug problem, and a husband with a prior drinking; nor to a juror who had a stepson with drug problems that had resulted in juvenile court intervention and a drug program; nor to a juror had been arrested and charged with domestic violence, although the charges later were dropped]; ***People* v. *Jones*** (2011) 51 Cal.4th 346, 366 [juror with son accused of crime in California not similarly situated to juror with brother accused of a crime in *another country*]; ***People* v. *Ledesma*** (2006) 39 Cal.4th 641, 679 [challenged juror's prior convictions for brandishing a weapon and driving under the influence distinguished him from other jurors with just traffic citations]; ***Murray* v. *Schriro*** (9th Cir. 2014) 745 F.3d 984, 1008 [challenged juror not similarly situated to two other jurors, even though all three had family members who were involved with the criminal justice system and all claimed it would not affect their ability to sit on the jury, where the relative of the challenged juror was her mother, the mother was charged with involvement in a major drug investigation and subject to criminal forfeiture proceedings that could directly impact the juror, and there was evidence the juror was actively involved in her mother's case; whereas the relationship of the other jurors to persons involved in criminal activity was respectively sister-in-law and son-in-law, the criminal activity was of a more minor nature, and these other jurors expressed ambivalence or disapproval of their relative's conduct].)

The fact that a juror has been *arrested* (or whose relatives were arrested) may not be viewed as similarly situated to a juror who has been *convicted* (or whose relatives were convicted.). A prosecutor may properly conclude "that a criminal conviction, or time spent in prison, was more significant than simply having a family member arrested." (***People* v. *Reed*** (2018) 4 Cal.5th 989, 1003.)

b. <u>Other examples of comparative analysis finding similarities between challenged and unchallenged jurors did not show jurors were similarly situated</u>

In ***Felkner* v. *Jackson*** (2011) 131 S.Ct. 1305, the prosecutor challenged two African-American jurors. The first juror believed he had been stopped frequently by police in California while he was between the ages of 16-30 due to his race and age. The defense argued the challenge was pretextual because the prosecutor did not challenge a white juror who believed he had been stopped while driving in Illinois several years earlier as part of what he believed to be a "scam" by Illinois police targeting drivers with California license plates, and who also complained that he had been disappointed by the failure of law enforcement officers to investigate the burglary of his car. The United States Supreme Court found that it was not unreasonable for the lower California court of appeal to have concluded that the unchallenged juror's "negative experience out of state and the car burglary is not comparable to [the challenged juror's] 14 years of perceived harassment by law enforcement based in part on race." (***Id***. at pp. 1306-1307.) The second African-American juror was challenged by the prosecutor on the ground she had a master's degree in social work and had interned in the county jail, probably in the psych unit as a sociologist of some sort. The defense claimed the prosecutor did not ask questions of (and retained) other jurors of comparable educational background. The High Court also found it was not unreasonable for the court of appeal to have concluded that the fact the prosecutors kept unchallenged jurors with "backgrounds in law, bio-chemistry or environmental engineering" and who had not worked in the jail did not show the prosecutor's asserted reason was pretextual. (**Ibid**.)

In ***People* v. *Reed*** (2018) 4 Cal.5th 989, the court rejected the idea that jurors with family members arrested for crimes were similarly situated to challenged jurors who also had family members arrested for crimes - where one of the challenged jurors had served on a hung jury and the other frequently failed to complete answers on the questionnaire or answer important questions about her husband's criminal history. (***Id***. at pp. 1002-1003.)

In ***People* v. *Winbush*** (2017) 2 Cal.5th 402, the court held a juror, who was not questioned by the defense and who checked "no" on the questionnaire when asked if the criminal justice system treats minorities fairly was not similarly situated to challenged jurors who expressed similar views and whom the defense also did not question

where the unchallenged expressed strong support for the death penalty and the "juror's demeanor and questionnaire responses convinced the prosecutor he was "a conservative person" with "strong beliefs in the need for people to take personal responsibility for their actions." (***Id***. at p. 443.)

In ***People* v. *O'Malley*** (2016) 62 Cal.4th 944, the court held two jurors were not similarly situated even though both had parents involved in law enforcement, where, inter alia, the juror kept had close ties to a number of people employed in law enforcement and criminal justice administration and was longtime friends with persons who were prosecutors and judges, and the juror challenged simply had a father who was a police officer. (***Id***. at p. 979.)
In ***People* v. *Chism*** (2014) 58 Cal.4th 1266, the defense claimed the prosecutor improperly challenged two African-American jurors. One of the grounds asserted by the prosecutor was that the jurors lacked supervisory experience. One was a life-long UPS driver who never supervised anyone and had no significant life experiences that indicated strong decisionmaking skills. The other was a filing clerk that did not supervise anyone but trained others in the use of computers and circuit designs. (***Id***. at p. 1311-1312.) The ***Chism*** court held that several other jurors who were kept were not comparable to the challenged jurors based on the fact they had supervisory skills, and/*or* directed others at work, and/*or* had been involved in making decisions in high stress circumstances, and/*or* had some special experience that would make the juror a favorable juror regarding some other aspect of the case, and/*or* had sat on a capital jury in the past, *and/or* had ties to law enforcement, *and/or* had been a witness in a murder case. (***Id***. at pp. 1319-1322.)

Editor's note: ***Chism*** should be juxtaposed with the Ninth Circuit decision in ***Shirley* v. *Yates*** (9th Cir. 2015) 807 F.3d 1090- a case highlighting the difference in how comparative analysis is used in the Ninth Circuit in contrast to California state courts. ***Shirley*** is discussed below in this outline, section IX-H-3-c at p. 119.

In ***People* v. *Montes*** (2014) 58 Cal.4th 809, the court held a juror, who had graduated from high school and took some college classes but misspelled many words in his questionnaire and had a misdemeanor conviction, was not similarly situated to jurors with comparable educational levels or even a juror who had no college experience and also made numerous spelling errors in his questionnaire because the other jurors did not exhibit difficulty (as the challenged juror did) comprehending voir dire questions and had not been convicted of crimes. (***Id***. at p. 850.)

In ***People* v. *Lenix*** (2008) 44 Cal.4th 602, the defense claimed that the prosecution improperly exercised a challenge against a black female panelist (i.e., a member of the venire). During questioning, the panelist stated that "murder aspect" of the case concerned her. When the prosecutor followed up by asking if there was something beyond what might trouble anybody about murder charges, the juror said, "The fact someone lost a life." (***Id***. at p. 609.) The prosecutor asked if anyone close to the juror had been involved in something like that. She answered that her sister's husband, to whom she was close, had been murdered 10 or 11 years ago. When asked if the murder was gang related, the juror said it was. The prosecutor asked which gang committed the offense, and the juror replied no one had ever been arrested. In response to further questions from the prosecutor, the juror said she did not have any trouble with law enforcement for failing to make an arrest and would not hold the experience against the defendant. The juror said there was nothing else the parties needed to know about the murder or any "similar situations." (***Id***. at p. 609.) Later, the prosecutor asked the entire venire: "Has anybody here had any contacts with law enforcement that were hostile, confrontational, adverse, however you want to describe it, that might carry over into what we're going to do here in this courtroom? Anybody at all? Traffic ticket you didn't feel you deserved?" The black female juror was the sole juror to reply; she stated that she had gotten a traffic ticket. When asked whether the officer was impolite "or anything like that," she answered, "No. Well, no one ever feels they deserve a ticket. That was all." The prosecutor asked, "You feel that maybe he was a little shading the truth a little bit in it?" The juror answered, "Yeah." The prosecutor then asked, "Did you feel you deserved it?" The juror replied, "I didn't know if I deserved it or not, so I just went along with it." (***Id***. at p. 609.) Initially, the prosecutor accepted (i.e., passed on) the jury panel that included the black female juror as well as a black male juror. After the defense challenged the black male juror, the prosecutor against accepted the panel. Following another defense peremptory challenge, the prosecutor challenged a Hispanic juror. The defense then made a

Batson-Wheeler motion, which the trial judge reserved until the completion of voir dire. Only after the defense exercised another peremptory challenge, did the prosecutor challenge the black female juror. (***Id***. at p. 610.) When the prosecutor was asked to explain his reasons for removing the black female juror, the prosecutor stated he was concerned about her statement regarding the traffic ticket, noting she was the only juror who raised her hand when the prosecutor asked about uncomfortable run-ins with the police and while the panelist (somewhat inconsistently) indicated the encounter wasn't adversarial, that she didn't know whether the officer was lying, and didn't fight the ticket, the prosecutor believed there was "probably a lot more to it than that[.]" The prosecutor also expressed concerned that the juror's brother (sic) was involved in a gang-related homicide because, in the prosecutor's experience, people who are victims of gangs quite often are themselves gang members and that could have negative repercussions on the prosecutor's case - a case involving a gang-related murder. (***Id***. at pp. 610-611.)

The ***Lenix*** court accepted the premise that comparative analysis could be done for the first time on appeal in reviewing a ***Batson-Wheeler*** motion that progressed to the third stage. Nevertheless, the court held that applying comparative analysis did not undermine the trial court's finding that prosecutor exercised his challenges for proper motives. (***Id***. at p. 630.) The court **rejected** the notion that the removed juror was similarly situated to another juror who had a fairly hostile interaction with the police when the police responded to a call from the juror's mother after the juror had taken away some keys from his mother to prevent her from driving while intoxicated. During that incident, the police threatened to mace the juror's brother unless the keys were returned. (***Id***. at p. 630.) The court observed that the prosecutor's hesitation regarding the removed panelist was based on his sense of her possible lingering resentment, whereas the juror who was kept had later realized the police were acting out of a concern for their safety, (i.e., the kept juror had stated he thought about sending a letter to the editor but chose not to because he "figured they're trying ... to handle that situation without getting hurt." (***Ibid***.) The court also **rejected** the defense argument that the removed juror was similar to another juror who was kept. That other juror had a cousin who shot and killed someone when he was 16 years old. The cousin was convicted and sent to jail but was eventually released and was "doing great." The juror stated that his cousin was treated fairly by the police and courts, and "it was a bad situation, but it turned out to be a good situation for him." (***Id***. at p. 630.) That juror was also a high school acquaintance of one of the police officers identified as a potential witness in defendant's case and the juror described the officer as "a really good guy." (**Ibid**.) Although the defendant argued the prosecutor's concern about the gang affiliation of the brother of the removed panelist was pretextual because the prosecutor did not display similar concerns that the other juror's cousin might be a gang member (e.g., because he never asked about the gang status of the other juror's cousin), the court held, in light of the juror's comments about his cousin's past experience and present circumstances, the prosecutor could have found such questioning unnecessary. (***Id***. at pp. 630-631.) Moreover, the court stated the fact the juror held a high opinion of a prosecution witness "would likely have been significant in the prosecutor's decision to retain the juror and further distinguishes this juror from" the removed panelist. (***Id***. at p. 631.)

In ***People*** **v.** ***Cruz*** (2008) 44 Cal.4th 636, the defendant claimed the prosecutor improperly exercised a peremptory challenge against a Hispanic juror on the sole basis of group bias. (***Id***. at p. 654.) The prosecutor gave many reasons for excusing the juror, including the fact he was young, immature, dressed in an informal manner, and had long hair and a Fu Manchu moustache. The prosecutor also relied on several facts that the defense argued were pretextual because other jurors who were retained had provided similar answers. The California Supreme Court took a nuanced approach to comparing answers that recognized that subtle differences could be very significant. (***Id***. at p. 661.) For instance, one of the reasons cited by the prosecutor was that the juror failed to answer questions on the written jury questionnaire pertaining to his feelings about criminal defense attorneys, prosecutors, and police. The defense argued other retained jurors were similarly situated to the challenged jurors who had indicated "no opinion," "Don't know" (sic) and "N/A." The court rejected this comparison because "the failure to respond to a question altogether is arguably of greater concern than a forthright response of "no opinion" or "Don't know." (***Id***. at p. 660.) Another reason asserted by the prosecutor was that the juror had responded "police officers are human, and they can lie too" when asked if he felt a police officer's testimony was more

truthful/accurate that of a civilian. The defendant pointed out that eight of the seated jurors answered the same question with either "no" or "not necessarily." However, the court rejected the idea these jurors were similarly situated to the challenged juror because "expressing the opinion that a police officer's testimony is not 'more truthful/accurate than that of a civilian is qualitatively different than the affirmative response, 'they can lie too.'" (***Id***. at pp. 660-661.)

In ***People* v. *Cox*** (2010) 187 Cal.App.4th 337, the defendant claimed that several jurors who were challenged as a result of family contacts with law enforcement were similarly situated to other retained jurors who had similar life experiences. (***Id***. at p. 357.) However, the court pointed out that there were several other reasons why the retained jurors would be kept while the removed jurors would be booted. For example, one juror has hesitated when asked if she could be fair, while the retained jurors all "expressed confidence without hesitation in their abilities to impartially decide the case." (***Id***. at p. 359.) Another juror who was retained not only had a relative with negative contacts with the criminal justice but had a father who was killed without the killer ever being brought to justice. Moreover, the jurors who were retained had family members who were less closely connected with the juror, had eventually responded positively to the contacts, or who had been in trouble in the more remote past that the family members of the jurors who were challenged. (***Id***. at p. 358.) The defendants in ***Cox*** also argued that the prosecutor retained jurors with gang associations even though jurors who were challenged were removed on this basis. The ***Cox*** court rejected this argument and pointed out distinctions between the retained and removed jurors. For example, unlike the retained jurors, one of the challenged jurors had "evasively responded, 'Not necessarily,'" when asked if he was a member of a gang and had an ex-wife who was taking a bar exam. And unlike the retained jurors, another challenged juror had *current* familiarity with gang members and possibly even the defendants. (***Id***. at pp. 359-360.) The defendants claimed that two jurors were booted for being soft-spoken and very quiet but that a juror who the court repeatedly prompted to "speak up" was retained. However, the ***Cox*** court found that, after being admonished to speak up, the kept juror answered questions without difficulty and readily volunteered correct answers, and indicated she would voice her opinions during deliberations, showing she had paid attention to the judge's preliminary instructions and would serve as a thoughtful juror. In contrast, one of the challenged jurors indicated he would not interact with the other jurors during deliberations. Moreover, the other challenged juror, unlike the retained juror, had an incarcerated relative. (***Id***. at p. 360.) The ***Cox*** court also rejected comparisons between a challenged juror who was removed because he was the brother of judge and two retained jurors (one of whom was a legal assistant and another who had cousins who were lawyers). The court noted that, unlike the retained jurors (neither of whom had connections to the field of *criminal* law), the challenged juror was employed as a psychiatric social worker and indicated that he would not speak with his brother (who was a prosecutor before becoming a judge) because they had such strong differences of opinion. For these same reasons, the challenged juror was also held not similarly situated to two other jurors who the defendant argued might be sympathetic to young people (a musician and a principal assistant to the County Board of Education). (***Id***. at pp. 360-361.) Finally, the court rejected the argument that one of the reasons for removing a challenged juror (i.e., that she had handled a friend's gun) was spurious because the prosecutor had kept several other jurors who had possessed or used firearms. The court observed that unlike the retained jurors, the challenged juror knew a lot of gang members and may have known the defendants. (***Id***. at p. 361.)

c. <u>Example of comparative analysis finding similarities between challenged and unchallenged jurors showed they *were* similarly situated</u>

In ***Flowers* v. *Mississippi*** (2019) 139 S.Ct. 2228, the High Court reversed a sentence of a defendant for discriminatory use of a peremptory challenge against a black juror based on several different reasons. One reason (albeit one that was not given much discussion and which was intertwined with a discussion of disparate questioning)* was because the prosecutor claimed to have struck the juror "part because she knew several defense witnesses and had worked at Wal-Mart where [the defendant's] father also worked" but did not strike "three white

prospective jurors[who] also knew many individuals involved in the case." (***Id***. at p. 2249.) Moreover, two of those white jurors "also had relationships with members of [the defendant's] family. (**Ibid**.)

Editor's note: There was some hesitancy in including ***Flowers*** as a true example of comparative analysis because the comparison of "characteristics" of the jurors was of much less significance than how this black juror and other black jurors were *treated* by the prosecution in comparison to how the prosecution treated white jurors in general. (***Id***. at pp. 2249-2251.) Indeed, the dissenting justices in ***Flowers*** took the majority to task (in a convincing manner) for finding the juror stricken was similarly situated to the jurors kept. (**See** dis. opn. of Thomas, J. at p. 2253, 2255-2256.) And even the majority acknowledged that "[t]he side-by-side comparison of [the juror stricken] to white prospective jurors whom the State accepted for the jury cannot be considered in isolation in this case. In a different context, the . . . strike might be deemed permissible." (***Flowers***, at p. 2250.)

In ***Shirley* v. *Yates*** (9th Cir. 2015) 807 F.3d 1090, the Ninth Circuit reviewed findings made after a ***Batson***-remand hearing where the prosecutor had to give post-hoc reasons for challenging two African-American jurors he was not originally asked to justify excusing because no prima facie case had been found by the trial court. As to one of the jurors, the prosecutor explained he challenged the juror because she lacked life experience: she was only three years out of high school, lived at home, and worked at a Walgreens pharmacy developing photographs in the same community she grew up in. The prosecutor explained "people who lack that kind of life experience don't make particularly good jurors. They don't have a perspective upon which to make sound decisions." (***Id***. at p. 1099.) When asked, for purposes of a comparative juror analysis, about an unchallenged white male juror of approximately the same age who also lived at home, the prosecutor explained that juror was going to college – which showed some initiative and a certain degree of intelligence. Moreover, the juror was also working as a manager at a gymnastics facility, which indicated the juror had significant responsibilities and would be involved in decision-making. The prosecutor also stated the juror had a "favorable view of law enforcement," reflected by the fact that he twice called the police to report vandalism or burglaries at the elementary school across the street from his house, and that his sister and brother-in-law were employed by police departments. (**Ibid**.) The Ninth Circuit held the comparison between the jurors *undermined* the prosecutor's claim of permissible use of challenges. The Ninth Circuit found the two jurors had very similar levels of "life experience" and the differences were slight. (***Id***. at p. 1112.) The Ninth Circuit also indicated that the juror challenged gave answers that would make her better juror for the prosecution than the juror struck (i.e., the challenged jurors said she was enthusiastic about serving and would readily follow the evidence, while the unchallenged juror said he preferred not to serve and did not have the ability to follow the trial with his full attention. (**Ibid**.)*

Editor's note**: Aside from failing to recognize that "eagerness to serve" is often a reason given for *challenging* a juror (**see** this outline, section VIII-D-16 at p. 73), the Ninth Circuit discounted the affirmative reasons given by the prosecutor for keeping the unchallenged juror instead of the challenged juror because the prosecutor did not *explicitly* say the unchallenged lacked those qualities – even though that was obviously implicit in the prosecutor's testimony. (**See *Shirley at p. 1112, fn. 28.) The unconvincing analysis in ***Shirley*** may potentially be explained by the opinion's author penchant for overturning sentences he personally felt were too harsh by any means necessary – including turning the presumption that an attorney is exercising challenges in a constitutional manner on its head. One clue to this type of outcome-driven analysis is when, as in ***Shirley***, the opinion begins with a description of the lengthy sentence received by the defendant, a focus on mitigating circumstances, and a lack of focus on the offender's past criminal history - even though the sentence received has NOTHING to do with the issue before the court. (**See *Shirley***, at p. 1095.) The fact that a ***Batson*** claim is simply being used as a pretextual vehicle to overturn a sentence a reviewing court does not like can be inferred by how much the opinion has to stretch to justify its conclusions. (**Cf**., ***Purkett* v. *Elem*** (1995) 514 U.S. 765, 768 [at the third "stage, implausible or fantastic justifications may (and probably will) be found to be pretexts].) In fairness though, a *contrary* inference can be drawn of a result-oriented approach when justices seeking to *uphold* a sentence against a ***Batson-Wheeler*** challenge spend a lot of time discussing the otherwise irrelevant aggravating circumstances of a crime.

4. Does the fact that one juror not belonging to a cognizable class was retained even though the juror *is* similarly situated to a juror belonging to a cognizable class who was removed *necessarily* mean the prosecutor acted for a discriminatory purpose?

Although the fact that a juror who does not belong to a cognizable class was retained while a juror belonging to the cognizable class who appears similarly situated to a retained juror was removed provides some evidence of a discriminatory purpose, it is not dispositive especially when it is inconsistent with the overall behavior of the prosecutor. For example, in ***People* v. *Riccardi*** (2012) 54 Cal.4th 758, the prosecutor retained a Caucasian juror who expressed reservations about the death penalty even though this was an asserted reason for removing several African-American jurors. However, when it came to all the other jurors, the prosecutor was consistent in removing jurors of all classes who expressed reservations about capital punishment. The ***Riccardi*** court held "[t]he fact that defendant has identified a single aberration in the prosecutor's strategy fails to establish a pretextual removal of African–American [p]rospective [j]urors." (***Id***. at p. 792.) The court noted that "a comparative analysis here reveals the obvious — the prosecutor of a death penalty case would be reluctant to keep any prospective juror who expresses some hesitation about being able to return a death verdict in an appropriate case. Accordingly, the prosecutor's explanations for challenging [the African-American prospective jurors] and the trial court's explicit and implicit credibility determinations surrounding those explanations, is supported by substantial evidence and thus entitled to deference." (**Ibid**.) And in ***United States* v. *Mensah*** (1st Cir. 2013) 737 F.3d 789, the court observed that the prosecutor's explanation for not striking a juror similarly situated to the juror he struck (i.e., that he was being cautious about exercising his final peremptory challenge, which would have meant seating a replacement juror whom the prosecutor would have no opportunity to strike) was held to be "on its face plausible." (***Id***. at p. 802.)

5. Can a court compare jurors who were later struck by *the defense* in a comparative analysis?

It seems obvious that the only relevant comparisons in a comparative juror analysis are between the jurors struck by the prosecution (*not* the defense) and the jurors who are ultimately seated - since it is unknown whether the prosecutor would have challenged the juror if the defense had not. Thus, the California Supreme Court in ***People* v. *Riccardi*** (2012) 54 Cal.4th 758, declined to consider prospective jurors who were removed by defense peremptory challenges in conducting a comparative analysis because it was "impossible to conclude that the prosecutor had no concerns about [these jurors]" considering that the prosecutor, for tactical reasons, sometimes passed on jurors the prosecution would thereafter challenge. (***Id***. at p. 796; **accord *People* v. *DeHoyos*** (2013) 57 Cal.4th 79 [158 Cal.Rptr.3d 797, 827].) Moreover, a prosecutor may pass on a juror who shares comparable characteristics to the juror the prosecutor dismissed because it is assumed that the defense will strike the juror. That is, it is unfair to consider a juror stricken by the defense because a prosecutor may have had little opportunity—or incentive—to strike the juror before the defendant eliminates the juror. (**See *United States* v. *Mensah*** (1st Cir. 2013) 737 F.3d 789, 802.)

However, in ***Ayala* v. *Wong*** (9th Cir. 2012) 693 F.3d 945, the Ninth Circuit held "the otherwise-similar jurors to whom the struck jurors can be compared include those "permitted to serve" by the prosecution but ultimately struck by the defense." (***Id***. at p. 964, fn. 17.) The Ninth Circuit cited to ***Miller–El* v. *Dretke*** (2005) 545 U.S. 231, 244–245, which compared a struck juror to a juror not challenged by the prosecution who was later challenged by the defense, in support of this principle and then went on to say such comparisons make "perfect sense" as "some of these jurors were not struck by the defense until after the prosecution had passed them for several rounds, and the 'underlying question is not what the defense thought about these jurors,' but what the prosecution did." (***Ayala***, at 964, fn. 17.) This decision was later withdrawn and superseded by an en banc opinion in ***Ayala* v. *Wong*** (9th Cir. 2013) 730 F.3d 831. The en banc decision *indicated* that a reviewing court could consider, for comparison purposes

the challenged jurors to other prospective jurors struck *not by the prosecution but by the defense*. (***Id***. at p. 857.) Fortunately, the en banc decision was later overturned by the United States Supreme Court in ***Davis* v. *Ayala*** (2015) 135 S.Ct. 2187. Unfortunately, that High Court decision did not discuss the question of whether it was fair to compare jurors who the defense struck to the challenged jurors in deciding whether the prosecutor acted pretextually.

In ***Mayes* v. *Premo*** (9th Cir. 2014) 766 F.3d 949, the court recognized that jurors struck by the defense *before* the prosecution passed on the panel could **not** be considered in a comparative analysis. (***Id***. at pp. 961-962.) However, the court also stated that jurors struck by the defense were fair game for consideration in a comparative analysis if they were struck by the defense *after* the prosecutor passed on the jury (i.e., it was fair to consider "the prosecutor's thoughts about those veniremen because he had actually decided that they should be 'permitted to serve' on the jury." (***Id***. at p. 961 citing to ***Miller–El* v. *Dretke*** (2005) 545 U.S. 231, 241, 245, fn. 4.) This latter conclusion is likely unwarranted. (**See** editor's note below.)

Editor's note: In the event, trial counsel asks the court to consider jurors who were challenged by the defense in arguing that the prosecutor did not bump these jurors of a different cognizable class even though they had similar characteristics to the juror who was challenged, be prepared to make these two points. First, if the jurors used for comparison purposes had **not been passed on** by the prosecution before they were bumped by the defense, then it is impossible to draw any conclusions as to whether the prosecutor would or would not have retained the juror. Second, even if a prosecutor passed on a jury containing a juror that the defense later bumped, this does not necessarily indicate the prosecutor would have ultimately kept the juror. The prosecutor cannot bump everyone simultaneously, so even though the prosecutor passed on the juror initially, it does not mean the prosecutor would have ultimately passed on the juror. (**See *People* v. *Lenix*** (2008) 44 Cal. 4th 602, 623 ["[t]he selection of a jury is a fluid process, with challenges for cause and peremptory strikes continually changing the composition of the jury before it is finally empanelled"].) Prosecutors often take calculated risks in passing on a jury (in hopes of "going up in jury challenges") knowing that the defense is very unlikely to pass as well even though the prosecutor may fully intend to later bump one or more of the jurors they initially passed on. (**See *People* v. *Riccardi*** (2012) 54 Cal.4th 758, 790-791 [and finding that trying to use jurors for comparison purposes who were originally passed on by the prosecutor but later removed was not a fruitful endeavor].) Thus, while using jurors outside the cognizable class who the defense bumped after the prosecutor passed is not 100% ludicrous, it is still a very dubious proposition and reflects either a lack of understanding, or purposeful ignorance, of prosecutorial trial tactics. Of course, under a similar rationale, an argument could be made that it is unfair to take into account the fact the *prosecutor* passed on jurors falling into the cognizable class regardless of whether the defense later bumped the juror - something courts routinely do in finding the prosecutor did not exercise his or her challenge for a discriminatory purpose. (**See *People* v. *Carasi*** (2008) 44 Cal.4th 1263, 1294-1295 [no prima facie case of discrimination against females shown because, inter alia, the prosecutor repeatedly passed on panels containing numerous women].) But the two circumstances are not truly similar. It is one thing for a prosecutor to take a risk in keeping a juror who the prosecutor can live with but may decide to bump after the jury composition changes. It is another thing for a prosecutor who cannot stand the thought of having a member of a particular cognizable class on his or her jury to risk having to do so if the defense decides to pass on the jury.

6. Can a court compare jurors who were initially passed upon by the prosecution but then later dismissed by the prosecutor in a comparative analysis?

In ***People* v. *Riccardi*** (2012) 54 Cal.4th 758, the defense attempted to argue that the prosecutor's reasons in a death penalty case for removing some African-American jurors were not genuine because the same reasons applied to non-African American jurors who were *initially passed on by the prosecutor but then later challenged by the prosecution*. (***Id***. at pp. 790-791.) However, the court rejected the use of these jurors as a valid basis for

comparison because the initial retention of the jurors appears to have a tactical choice in order to allow the prosecutor to create a situation where the prosecution had more remaining challenges than the defense and not because they were Caucasian. That is, since "there appears to be a legitimate explanation for why the prosecutor did not immediately challenge [the Caucasian jurors], the prosecutor's mere delay in dismissing them does not provide reliable '"circumstantial evidence"' in determining 'the legitimacy of a party's explanation for exercising a peremptory challenge.'" (***Id***. at p. 791.)

7. Can "alternate jurors" who were challenged be compared to seated jurors?

Depending on the basis for the challenge, it may not be fair to compare jurors considered during selection of the alternates with jurors considered during selection of the actual jury because the milieu in which alternate jurors are selected is different.

For example, in ***People* v. *Trinh*** (2014) 59 Cal.4th 216, the prosecutor challenged a juror based on, among other things, the fact the juror was a postal worker. The defendant later claimed this was a pretextual reason because an *alternate* juror from a different cognizable class was not challenged. The California Supreme Court rejected this argument for several reasons, one of which was that the prosecutor "took a markedly different approach" in examining the four alternate jurors than the prosecutor took when selecting the first 12 jurors, "engaging them in a much more cursory voir dire and failing to exercise any strikes, in contrast to using 17 peremptories in the selection of the main jury." (***Id***. at p. 242.)

Similarly, in ***People* v. *Jones*** (2011) 51 Cal.4th 346, the defendant asked the reviewing court to compare the prosecutor's challenge to an African –American juror who was challenged during selection of the alternate jurors with the prosecutor's failure to challenge two White jurors about whom, the defendant claimed, the prosecutor should have had similar concerns. (***Id***. at p. 368.) However, the California Supreme Court observed that this would be a "false comparison" because the two White jurors were part of the originally chosen jury and thus when the prosecutor had to decide whether to challenge the juror in question, "it was too late to challenge either of the other two jurors." (**Ibid**.) The court then noted that, unlike in selecting the seated jury, in deciding about the challenged African-American juror (and others among the alternates), the prosecutor felt he had the luxury of challenging good jurors in the hope of obtaining even better ones. That is, even if the prosecutor at trial were to view the African-American juror "as more favorable to the prosecution than either of the other two, the prosecutor never had a choice between [that juror] and them." (**Ibid**.)

I. The Use of Disparate Questioning Analysis to Assess the Existence of a Discriminatory Motive

1. Perfunctory Questioning Solely of Members of a Cognizable Class

In determining whether a prosecutor has exercised her challenge in a discriminatory fashion, courts sometimes consider whether the prosecutor engaged in "disparate questioning" of jurors. If the prosecutor only engages in limited questioning of members of the cognizable class at issue, this can be indicative of hidden bias. (***Miller–El* v. *Dretke*** (2004) 545 U.S. 231, 246, 250, fn. 8 [a party's failure to engage in meaningful voir dire on a topic the party says is important can suggest the stated reason is pretextual]; ***People* v. *Hensley*** (2014) 59 Cal.4th 788, 804 ["Superficial or desultory questioning may indicate disinterest in an individual for any number of reasons."]; ***People* v. *Edwards*** (2013) 57 Cal.4th 658, 698 ["Under certain circumstances perfunctory voir dire can be indicative of hidden bias."]; ***People* v. *Lomax*** (2010) 49 Cal.4th 530, 573 ["failure to engage in meaningful voir dire on a subject of purported concern can, in some circumstances, be circumstantial evidence suggesting the stated concern is pretextual"]; **cf**.,

People* v. *DeHoyos (2013) 57 Cal.4th 79 [158 Cal.Rptr.3d 797, 832 [fact that prosecutor *did* in-depth questioning of all the challenged jurors properly considered in ***denying Batson-Wheeler*** motion].)

On the other hand, a lack of follow-up questioning in an area of alleged concern can reflect a desire to *keep* the jurors because they are not members of the cognizable class at issue, i.e., where jurors of the cognizable class at issue are the subject of excessive follow-up questions but jurors who are not members of the class are not subjected to follow-up questions. (**See *Flowers* v. *Mississippi*** (2019) 139 S.Ct. 2228, 2249.)

However, disparate questioning of a juror before challenging the juror is a factor of limited significance in cases in which juror questionnaires (especially extensive questionnaires) are used and the prosecutor is able to gather information about the jurors without directly asking them questions, i.e., by observing their responses and demeanor during individual questioning by the court and/or during group voir dire. (**See *People* v. *Hardy*** (2018) 5 Cal.5th 56, 83; ***People* v. *Melendez*** (2016) 2 Cal.5th 1, 19; ***People* v. *Dement*** (2011) 53 Cal.4th 1, 20; ***People* v. *Clark*** (2012) 52 Cal.4th 856, 906-907; ***People* v. *Jones*** (2011) 51 Cal.4th 346, 363; **see also *People* v. *Taylor*** (2010) 48 Cal.4th 574, 615–616 [that the prospective juror had completed a 98–question questionnaire was notable when the prosecutor failed to ask any questions]; ***People* v. *Bell*** (2007) 40 Cal.4th 582, 598–599, fn. 5 [noting the trial court's comment that "'when you have a questionnaire, it can never be a perfunctory examination'"].)

Similarly, a prosecutor's failure to specially question a juror about professed concerns justifying a challenge, by itself, "is of little or no consequence" where the juror responds to numerous questions from the court and defense counsel. (**See *People* v. *Arellano*** (2016) 245 Cal.App.4th 1139, 1163 [citing to ***People* v. *Lewis*** (2008) 43 Cal.4th 415, 476]; **see also *Jamerson* v. *Runnels*** (9th Cir. 2013) 713 F.3d 1218, 1229 [noting the failure to ask many questions of a juror is of no significance when the court conducts voir dire].) The lack of questioning is also of diminished significance in situations where the "attorneys [are] not permitted to question prospective jurors directly, but instead ha[ve] to ask the trial court to inquire into areas of special concern." (***People* v. *Lomax*** (2010) 49 Cal.4th 530, 573.)

Finally, "[a] party is not required to examine a prospective juror about every aspect that might cause concern before it may exercise a peremptory challenge." (***People* v. *Hardy*** (2018) 5 Cal.5th 56, 83; ***People* v. *Jones*** (2011) 51 Cal.4th 346, 363; **accord *People* v. *Melendez*** (2016) 2 Cal.5th 1, 21.) If there are non-discriminatory reasons for why a prosecutor might question jurors differently, then the existence of "disparate questioning" has little meaning. For example, in ***People* v. *Hardy*** (2018) 5 Cal.5th 56, the California Supreme Court rejected the idea that disparate questioning had any significance where "the prosecutor questioned an African-American juror extensively, while she questioned a White juror only briefly" because the former "happened to be a particularly interesting juror for reasons entirely unrelated to her race. Among other things, she stated on the questionnaire that her husband was a 'ret. Judge atty,' and that she had worked in her husband's law office. She also disclosed that her 'husband's cousin's wife shot & killed him.' Obviously, and reasonably, interested in these answers, the prosecutor asked her a series of questions about them." (***Id***. at p. 85.) In ***People* v. *Riccardi*** (2012) 54 Cal.4th 758, a prosecutor challenged some African-American jurors on the basis of their experience with the criminal justice system. The defendant contended that the prosecutor's failure, during the selection of the alternate jurors, to question two Caucasian prospective jurors regarding their relevant arrests, and to remove them, demonstrated that the prosecutor was not genuinely concerned about the criminal justice experience of the prospective jurors. The court rejected the defense argument, noting that the disclosures by these jurors were of a relatively banal nature which neither party found important to explore in depth and that, as to least one of the jurors, both parties were primarily focused exclusively on the juror's distrust of lawyers and the justice system. (***Id***. at pp. 796-797.) In ***People* v. *Jones*** (2011) 51 Cal.4th 346, the defendant claimed the prosecutor's stated concern that the juror's children were unemployed was not sincere or legitimate because he did not question him about this concern. The court rejected this claim, pointing out that not only were there lengthy juror questionnaires supplemented by substantial voir dire questioning of the prospective jurors by the court and the parties, but also that there was a reason that the prosecutor would not spend his time questioning the juror about this concern; namely, the prosecutor

used his time questioning the juror about a more pressing concern (i.e., that the juror appeared to be buying into a particular defense theory). (***Id***. at p. 363.) And in ***People* v. *Cowan*** (2010) 50 Cal.4th 401, the court found the fact the prosecutor did not question prospective jurors about their negative experiences with the justice system (even though these were some of the stated bases for challenging the juror) did not show the race-neutral reasons for excusing these prospective jurors were pretextual where the prosecutor *did* engage the jurors extensively on the topic that apparently concerned her most: their ability, because of their religious views, to sit in judgment of others and to impose the death penalty. (***Id***. at p. 451.)

The fact that a prosecutor does not ask questions about every aspect of concern about a juror will not have much significance where a court gives the parties limited time to question the jurors and the prosecutor chooses to focus on the area of greatest concern. (**See *People* v. *Bryant*** (2019) 40 Cal.App.5th 525, 538 [rejecting defense argument that prosecutor's decision not to question a juror about topics that were allegedly critical to the decision to discharge where the "court gave the parties limited time to question the jurors and it was reasonable for the prosecutor to focus on questions about [the area], which would likely give greater insight into her opinions most pertinent to the case at hand."].)

Note that where the questioning is ***not*** desultory this is evidence that will support the conclusion that the prosecutor's reasons for striking that juror are genuinely held. (**See *People* v. *Krebs*** (2019) 8 Cal.5th 265 [255 Cal.Rptr.3d 95, 124–125.)

2. Excessive Questioning Solely of Members of a Cognizable Class

In ***Flowers* v. *Mississippi*** (2019) 139 S.Ct. 2228, the High Court observed that "[t]he lopsidedness of the prosecutor's questioning and inquiry can itself be evidence of the prosecutor's objective as much as it is of the actual qualifications of the black and white prospective jurors who are struck or seated. The prosecutor's dramatically disparate questioning of black and white prospective jurors—at least if it rises to a certain level of disparity—can supply a clue that the prosecutor may have been seeking to paper the record and disguise a discriminatory intent." (***Id***. at p. 2248.) The ***Flowers*** court noted that "by asking a lot of questions of the black prospective jurors or conducting additional inquiry into their backgrounds, a prosecutor can try to find some pretextual reason—any reason—that the prosecutor can later articulate to justify what is in reality a racially motivated strike. And by not doing the same for white prospective jurors, by not asking white prospective jurors those same questions, the prosecutor can try to distort the record so as to thereby avoid being accused of treating black and white jurors differently." (***Id***. at p. 2248.)

The ***Flowers*** court recognized that "disparate questioning or investigation alone does not constitute a ***Batson*** violation. The disparate questioning or investigation of black and white prospective jurors may reflect ordinary race-neutral considerations." (**Ibid**.) But held that "disparate questioning or investigation can also, along with other evidence, inform the trial court's evaluation of whether discrimination occurred." (**Ibid**.)

Ultimately, the High Court found the prosecutor in ***Flowers*** had a discriminatory intent based, in part, on the fact the prosecutor asked many more questions of black jurors who were struck than white jurors who were seated. "The State asked the five black prospective jurors who were struck a total of 145 questions. By contrast, the State asked the 11 seated white jurors a total of 12 questions. On average, therefore, the State asked 29 questions to each struck black prospective juror. The State asked an average of one question to each seated white juror." (***Id***. at pp. 2246-2247.) The Court rejected the argument that prosecutor questioned black and white prospective jurors differently only because of differences in the jurors' characteristics. For example, while the prosecution asked extensive follow-up questions about a black juror's relationships with the defendant's family and with witnesses in the case, and did a follow-up investigation of a black juror, the prosecution neither investigated nor asked follow-up questions of a white juror about her relationships with the defendant's family even though the prosecutor was aware the white juror knew several members

of defendant's family. Nor were other white prospective jurors who had known relationships with defense witnesses questioned or investigated. (***Id***. at p. 2247, 2249.) The ***Flowers*** court believed this was "a telling statistic. If the State were concerned about prospective jurors' connections to witnesses in the case, the State presumably would have used individual questioning to ask those potential white jurors whether they could remain impartial despite their relationships." (***Id***. at p. 2249.)

In contrast to ***Flowers***, the California Supreme Court in ***People* v. *Hensley*** (2014) 59 Cal.4th 788 held the defendant had failed to show that *excessive* questioning of a juror about a topic of alleged concern revealed pretext. Specifically, in ***Hensley***, one of the prosecutor's proffered reasons for challenging a juror was that the juror did not have an opinion regarding psychology. The defendant claimed the prosecutor had explored the topic of psychology with the juror "more extensively than [with] most jurors" and that the "prosecutor's prolonged questioning of [the juror] on psychiatry … represented an effort to uncover some pretext on which to dismiss" him. (***Id***. at p. 804.) The California Supreme Court rejected this argument because it was "aware of no case suggesting that genuine inquiry designed to understand a candidate's point of view provides grounds for suspicion." (**Ibid**.) The court pointed out that, unlike the other seated jurors, the juror at issue did not answer the questionnaire's request for his "general opinions about psychology and psychiatry" and the "prosecutor reasonably asked follow-up questions to ascertain whether [the juror] had any preconceived views on this topic. (**Ibid**.)

3. Failure to Ask Follow-Up Questions

The failure of a prosecutor to ask "follow-up" (as opposed to no questions) in an area of expressed concern can also be used as a means of showing pretext. For example, in ***People* v. *Gutierrez*** (2017) 2 Cal.5th 1150, the California Supreme Court found that failure to ask follow-up questions that would clarify the reasons for prosecutor's challenge when the reasons are not obvious can help show bias. (***Id***. at p. 1170.) And in ***Flowers* v. *Mississippi*** (2019) 139 S.Ct. 2228, the High Court stated the "[s]tate's failure to engage in any meaningful voir dire examination on a subject the State alleges it is concerned about is evidence suggesting that the explanation is a sham and a pretext for discrimination." (***Id***. at p. 2249.)

However, failure to ask follow-up questions becomes insignificant if follow-up questioning in the area of expressed concern is conducted by defense counsel or there are questionnaires that cover the topic. (**See *People* v. *Jones*** (2017) 7 Cal.App.5th 787, 805 [in case where prosecutor said the reason juror was rejected was because she served on a hung jury without being frustrated, the fact the prosecutor failed to ask follow-up questions to ascertain whether the case resulting in a hung jury was civil or criminal, or precisely why the prospective juror was not frustrated by the result did not establish prima facie case as "there is no requirement that a prosecutor ask a prospective juror a minimum number of questions before deciding whether to accept or excuse the juror"]; ***People* v. *Melendez*** (2016) 2 Cal.5th 1, 21 [failure of prosecutor to ask follow-up questions about area of concern did not show improper intent where defense counsel asked about it].)

Note that where the prosecutor *does* engage in follow-up questions in the area of purported concern, this is evidence that will support the conclusion that the prosecutor's reasons for striking that juror are genuinely held. (**See *People* v. *Krebs*** (2019) 8 Cal.5th 265 [255 Cal.Rptr.3d 95, 124–125.)

4. Targeted ("Differential") Questioning

If the prosecutor only asks jurors of one cognizable class questions about a topic, but not other jurors, and the questioned jurors' answers are later used by the prosecutor as allegedly neutral justifications for removing them, this can be evidence of discriminatory intent. (**See *People* v. *Hall*** (1983) 35 Cal.3d 161, 168 [fact the prosecutor only asked black jurors where they lived before moving to California but not white jurors was one of several factors the California Supreme Court pointed to in support of their conclusion the prosecution was engaging in disparate treatment of jurors];

Rice* v. *State (Ala. Crim. App. 2010) 84 So.3d 144, 148 [pretext can be shown by [d]isparate examination of members of the venire; e.g., a question designed to provoke a certain response that is likely to disqualify the juror was asked to black jurors, but not to white jurors...."]; ***Harper* v. *State*** (Tex. App. 1996) 930 S.W.2d 625, 635 [pretext can be shown by "disparate examination of the venirepersons—questions designed to provoke certain responses that are likely to disqualify black venirepersons were put to blacks, but not to whites"].)

a. Necessarily Disparate Questioning

In ***Carrera* v. *Ayers*** (9th Cir. 2012) 699 F.3d 1104, the Ninth Circuit **rejected** an argument that the prosecutor engaged in discriminatory jury selection even though prosecutor asked Hispanic-surnamed venirepersons whether the fact that the defendant was "of Spanish descent" would affect their deliberations but did not ask potential white jurors similar ethnicity-based questions. The ***Carrera*** court did not find this significant because "asking questions about potential bias is the *purpose* of voir dire." (***Id***. at p. 1111.) To illustrate that this was the purpose of voir dire, the Ninth Circuit noted defense *also* asked ethnicity-based questions of the Hispanic-surnamed venirepersons. (**Ibid**.)

In ***Mitcham* v. *Davis*** (N.D. Cal. 2015) 103 F.Supp.3d 1091, one of the factors the court relied on in support of its finding that the defense counsel provided ineffective assistance of counsel by failing to bring what was likely to have been a successful ***Wheeler*** motion was the fact the prosecutor asked only African-American jurors whether they could impartially sit in judgment of defendants of their same race but not Caucasian jurors. (***Id***. at pp. 1116-1120.) The ***Mitcham*** court attempted to distinguish ***Carrera*** on both valid and disingenuous grounds. The ***Mitcham*** court correctly pointed out that, unlike in ***Carrera***, the differential questioning in the case before it was not limited "to whether non-Caucasian jurors could impartially sit in judgment of defendants of their same race. Rather, African Americans were asked broader questions about their views of the criminal justice system and whether the death penalty was enforced disproportionately against minorities." (***Id***. at p. 1117.) On the other hand, the ***Mitcham*** court misconstrued what the ***Carrera*** court said to suggest that one of the *reasons* the ***Carrera*** court found differential treatment in the prosecutor asking questions tied to the race of the juror to be permissible was because defense counsel also asked such questions of the jurors. (***Id***. at p. 1117.) But defense counsel's questioning was not mentioned in ***Carrera*** to give authorization to the prosecution's disparate race-based questions, it was mentioned to help illustrate asking such questions had a *permissible* purpose. That is, such questions are permitted under Carrera *regardless* of whether defense counsel asks similar questions.

J. How Significant is the Fact that the Final Jury Panel Contained Members of the Cognizable Class at Issue?

There is a difference on how much weight is given to a prosecutor's passing on or final acceptance of a panel containing jurors of the cognizable class at issue depending on whether the reviewing court is a California court or a Ninth Circuit court – although some Ninth Circuit panels are more reasonable in this regard than others.

In ***People* v. *Garcia*** (2011) 52 Cal.4th 706, the California Supreme Court stated the "ultimate inclusion on the jury of members of the group allegedly targeted by discrimination indicates 'good faith' in the use of peremptory challenges, and may show under all the circumstances no ***Wheeler/Batson*** violation occurred." (***Id***. at p. 747.) In ***People v. Johnson*** (2019) 8 Cal.5th 475 [255 Cal.Rptr.3d 393, the court observed a prosecutor's acceptance of a jury panel including multiple members of the group allegedly discriminated against, "while not conclusive, was 'an indication of the prosecutor's good faith in exercising his peremptories, and ... an appropriate factor for the trial judge to consider in ruling on a ***Wheeler*** objection." (***Id***. at pp. 422-423; ***People* v. *Turner*** (1994) 8 Cal.4th 137, 168 [same].) In ***People* v. *Manibusan*** (2013) 58 Cal.4th 40, the court stated "[t]he prosecution's acceptance of panels containing other women strongly suggests that gender was not a motive in its challenge to" a female juror. (***Id***. at p. 84.) And in ***People* v. *Lenix*** (2008) 44 Cal.4th 602, the California Supreme Court held, in a case involving a claim the prosecutor improperly

removed black jurors, that "[t]he prosecutor's acceptance of the panel containing a Black juror ***strongly*** suggests that race was not a motive" in the challenge[.]" (***Id***. at p. 629 citing to ***People* v. *Kelly*** (2007) 42 Cal.4th 763, 780 and ***People* v. *Cornwell*** (2005) 37 Cal.4th 50, 69–70, emphasis added; **accord *People* v. *Krebs*** (2019) 8 Cal.5th 265 [255 Cal.Rptr.3d 95, 125] [fact prosecutor accepted jury with three Catholics on the panel and final jury included two Catholics "strongly suggested" bias against Catholics was not a motive in selection]; **see also *People* v. *Huggins*** (2006) 38 Cal.4th 175, 236 [fact prosecutor accepted three jurors of the cognizable class at issue was "an indication of the prosecution's good faith in exercising his peremptories"].) At a minimum "[w]hile acceptance of one or more [jurors in the cognizable class] by the prosecution does not necessarily settle all questions about how the prosecution used its peremptory challenges, these facts nonetheless help lessen the strength of any inference of discrimination that the pattern of the prosecutor's strikes might otherwise imply." (***People* v. *Johnson*** (2019) 8 Cal.5th 475 [255 Cal.Rptr.3d 393, 422]; ***People* v. *Reed*** (2018) 4 Cal.5th 989, 1000 [bracketed information added].)

In ***Gonzalez* v. *Brown*** (9th Cir. 2009) 585 F.3d 1202, the court stated "[t]he fact that African–American jurors remained on the panel may be considered indicative of a nondiscriminatory motive." (***Id***. at p. 1210.) And in ***United States* v. *Chinchilla*** (9th Cir. 1989) 874 F.2d 695, the court stated, at step one, "the willingness of a prosecutor to accept minority jurors weighs against the findings of a prima facie case." (***Id***. at p. 698 fn.4.) However, in ***Shirley* v. *Yates*** (9th Cir. 2015) 807 F.3d 1090, the court stated that while the fact "that one black juror was eventually seated does weigh against an inference of discrimination," it "only nominally" does so. (***Id***. at pp. 1101-1102, citing to ***Montiel* v. *City of L.A***. (9th Cir. 1993) 2 F.3d 335, 340; **see also *Castellanos* v. *Small*** (9th Cir. 2014) 766 F.3d 1137, 1149-1150 [finding ***Batson*** violation based on fact record did not support reason prosecutor gave for excusing one Hispanic juror – even though *seven* Hispanic jurors sat on final jury and prosecutor had more than enough challenges to remove them all if he so desired].)

> **Editor's note**: The significance of whether the prosecution has passed on panel containing members of the cognizable class at issue at the first stage of the ***Batson-Wheeler*** analysis, is discussed in this outline, section VII-C-7 at pp. 45-46; **see also *People* v. *Jones*** (2017) 7 Cal.App.5th 787, 806 [fact jurors belonging to cognizable class at issue were ultimately seated on the jury support conclusion of no prima facie showing].)

If a prosecutor has passed on a panel that includes members of a different sub-group of the same cognizable class, this should be pointed out as well. For example, in ***People* v. *Bell*** (2007) 40 Cal.4th 582, the court noted that the fact the prosecutor did not exercise peremptory challenges against African-American males tended to undermine a prima facie showing that the prosecutor was exercising challenges against African-American females with a discriminatory purpose. (***Id***. at p. 599; **but see *People* v. *Arellano*** (2016) 245 Cal.App.4th 1139, 1168 [fact that two African-American male jurors sat on a jury was insufficient evidence the prosecutor did not permissibly excuse an African-American female juror where the prosecutor's primary explanation for excusing the juror was contradicted by the record].)

K. Should Any Significance be Given to the Fact that the Final Jury Panel Generally Matched the Composition of the Jury Venire?

In ***People* v. *Banks*** (2014) 59 Cal.4th 1113, the California Supreme Court cited to its earlier decision in ***People* v. *Cleveland*** (2004) 32 Cal.4th 704 for the proposition that "where the jury's minority composition is ultimately 'either slightly higher or slightly lower' than the venire's, such statistics are 'probative' although not necessarily 'dispositive' of a lack of discriminatory intent[.]" (***Banks*** at p. 1147 citing to ***Cleveland*** at p. 732.) The fact that at the time the ***Batson*** motion is made the jury's racial composition matches the venire and/or the fact that the number of jurors belonging to the cognizable class at issues who sit on the final jury represents a higher percentage of the total jury than the percentage of members of the cognizable in the venire is a "significant indication" of the prosecution's good faith in exercising his peremptories. (***People* v. *Banks*** (2014) 59 Cal.4th 1113, 1149.)

The ***Banks*** court also compared the percentage of black jurors in the entire jury pool to the percentage of peremptory challenges the prosecutor exercised against black prospective jurors and found the disparity not to be very significant. "The prosecutor used about 45 percent of his peremptory challenges to remove black jurors. Had he removed one fewer black juror, that percentage would have fallen to about 36 percent, almost equal to the percentage of blacks in the entire jury pool. And at the time defendant made his ***Wheeler*** motion, four of the 12 prospective jurors on the panel—exactly one-third—were black. Given the small sample size at issue, the trial court reasonably refused to infer a discriminatory intent on the basis of these statistics." (***Id***. at p. 1147; **see also *People* v. *Johnson*** (2019) 8 Cal.5th 475 [255 Cal.Rptr.3d 393, 422] [finding no prima facie case where prosecutor struck 4 of 7 African-American jurors — an excusal rate of 57 percent — while striking 15 of 47 non-African-American jurors — an excusal rate of 32 percent, and the "numbers could also indicate that African-American jurors were overrepresented in the box compared to their representation in the candidate pool: constituting 25 percent of the seated panel (3 of 12) as compared to 13 percent of the available pool (7 of 54)"].)

L. Can a Disparity in a Prosecutor's Personal Rating System that Does Not Appear Justified by the Facts be Considered Evidence of Discriminatory Use of Peremptory Challenges?

In ***Crittenden* v. *Chappell*** (9th Cir. 2015) 804 F.3d 998, the prosecution challenged the only African-American prospective juror in a death penalty case. The juror had answered on a questionnaire that "I don't like to see anyone put to death" but also wrote that she could set aside her personal feelings regarding what the law should be and follow the law as the court explained it. (***Id***. at p. 1003.) During her voir dire, the juror reiterated her opposition to the death penalty. She also said, however, that her opposition would not prohibit her from voting for a first-degree murder conviction or the death penalty. The trial denied the prosecutor's challenge to the juror for cause, "based upon her answer that she doesn't believe in the death penalty." (***Ibid***.) Based on the juror's response, the prosecutor gave the juror a rating ("XXXX") which was the worse rating a juror could get under the prosecutor's personal system for rating jurors: "X's" being negative, and the more "X"s, the more unfavorable the juror. In contrast, jurors who were favorable or tolerable as jurors got "✓s," with four "✓s," being the most favorable. In giving the jurors ratings, the prosecutor considered whether the person was opposed to the death penalty and how strongly opposition was stated and also considered "people's backgrounds, whether they're employed, homeowners, what they had to lose. [He] wanted people who had something to lose in society, who might be victims of crime, solid citizens, preferably well educated." (***Ibid***.) The prosecutor challenged all jurors who received one or more Xs. The juror in question was seated after the prosecution's 13th challenge. The prosecutor used his 14th challenge against a juror who had received one ✓. He then used his 15th challenge against the juror in question. (***Id***. at p. 1004.) The case eventually reached the federal district court after the defendant's ***Batson-Wheeler*** claim was denied by the California Supreme Court. (***Id***. at p. 1005.)

The federal district court held that the prosecutor's challenged was substantially motivated by race for four reasons. First, the prosecutor rated [the juror] far more negatively than comparable white jurors. Second, [the juror] was the only prospective juror the prosecutor challenged for cause based on a general objection to the death penalty, and it was well established that such objections did not warrant a for-cause challenge. Third, the prosecutor asked [the juror] a provocative question regarding the death penalty, and twice used the charged term 'gas chamber,' whereas 'no other juror was questioned in this manner with use of the same charged term.' Fourth, 'even if it is not given great weight, [the prosecutor's] strike of another black juror in a prior trial [the juror in the prior trial was struck because he was the President [of] the Student Law Union of Minorities, which indicated to the prosecutor that the individual was 'active in law problems involving minorities' and had 'sympathy for minorities'] suggests that he took account of race in assessing how a juror would vote." (***Id***. at p. 1004.)

The Ninth Circuit upheld the federal district court's finding of purposeful discrimination based primarily on the claim that "a comparative juror analysis shows the XXXX rating on which the prosecutor based his challenge cannot be explained by [the juror]'s death penalty views or other race-neutral factors." (***Id***. at p. 1012.) The Ninth Circuit also found "[t]he prosecutor's meritless for-cause challenge provide[d] additional support for the district court's finding that he was substantially motivated by race." (***Ibid***.) In other words, even though the all other jurors with X's were struck, the fact that the juror was rated more unfavorably than her answers would merit (i.e., she should not have been given so many X's according to the Ninth Circuit), this showed the prosecutor was actually biased against African-Americans. (***Id***. at pp. 1012-1017.) The Ninth Circuit observed that the only other juror to get 4 "X's" was a lot worse juror for the prosecution than the African-American juror, especially considered the various criteria used by the prosecution. (***Id***. at pp. 1012-1013.) Other white jurors who were similarly situated to the African-American juror and who "expressed death penalty views generally unfavorable to the prosecution" were both rated at least ✓✓, and selected to serve on the jury. (***Id***. at p. 1014.) Moreover, other jurors who were not selected for the jury but were white and similarly situated to the African-American juror got positive ✓✓s. (***Id***. at pp. 1015-1016.)

The Ninth Circuit was not persuaded by the state's argument that the record revealed a number of non-discriminatory factors that were more plausible reasons for the [XXXX] rating than racial bias (such as the juror's concern about transportation to and from the court, her general indecision, and her reluctance to serve on a jury - which she found "scary") because other jurors who were rated more highly also expressed indecision about their ability to vote for the death penalty, the juror's transportation issues appeared resolved before she was challenged, and the juror's reluctance to serve could not account for the significant difference in juror ratings. (***Id***. at p. 1017, fn. 10.)

M. Should a Court Take into Account the Defendant's Challenges in Assessing Whether a Prosecutor Properly Challenged a Juror?

It is settled that "the propriety of the prosecutor's peremptory challenges must be determined without regard to the ***validity*** of defendant's own challenges." (***People* v. *Reynoso*** (2003) 31 Cal.4th 903, 927, emphasis added.)

However, if the defense is relying on the fact that the prosecution disproportionately challenged members of the cognizable class at issue as evidence of discriminatory intent, the court ***can*** take into account how the defense is using its own challenges because that can distort the statistical picture. As pointed out by the California Supreme Court in ***People* v. *Banks*** (2014) 59 Cal.4th 1113, if the defense counsel is exercising his challenges in a way that makes it statistically more probable that the prosecutor would have to strike members of the cognizable class, this fact provides relevant contextual evidence that may be considered by the court. (***Id***. at p. 1147.) Specifically, the ***Banks*** court found "the fact that defense counsel had exercised only one of her 10 peremptory challenges against a black juror increased the percentage of blacks remaining on the panel, thus increasing the likelihood that the prosecutor would exercise a disproportionate share of his peremptory challenges against black jurors for entirely permissible reasons." (***Id***. at pp. 1147.) This undermined the significance of the disparity between the percentage of black jurors in the venire and the percentage of black jurors struck by the prosecution. (**Ibid**.)

> **Editor's note**: The trial court in ***Banks*** illustrated the principle in the following way: "If you take out the green socks out of the drawer and leave the blue ones in," . . . "any challenge will be made to a blue sock." (***Id***. at p. 1144.)

N. May a Court Take into Account Facts Justifying a Challenge That are Apparent to a Court But Which Were Not Stated as Reasons by the Prosecutor?

At the third stage, "[w]hat courts should not do is substitute their own reasoning for the rationale given by the prosecutor, even if they can imagine a valid reason that would not be shown to be pretextual." (***People v. Gutierrez*** (2017) 2 Cal.5th 1150, 1159; **see also *People* v. *Ervin*** (2000) 22 Cal.4th 48, 77 ["ordinarily the court should not attempt to bolster a prosecutor's legally insufficient reasons with new or additional factors drawn from the record"].) A trial court "is not permitted to substitute its conjecture or surmise for the actual reasons declared by the prosecutor. '[I]t does not matter that the prosecutor might have had good reasons to strike the prospective jurors. What matters is the real reason they were stricken.'" (***People* v. *Phillips*** (2007) 147 Cal.App.4th 810, 818, citing to ***Paulino* v. *Castro*** (9th Cir.2004) 371 F.3d 1083, 1090.) This is because a prosecutor's explanations must be found to have "actually prompted" exercise of a peremptory challenge. (**See *People* v. *Ervin*** (2000) 22 Cal.4th 48, 77; ***People* v. *Fuentes*** (1991) 54 Cal.3d 707, 720.)

Editor's note: This rule does *not* mean a judge may not consider obvious facts in the record that would help dispel an inference of discriminatory intent on the part of the prosecution in deciding *whether a prima facie case* has been made (i.e., where the prosecutor provides no reasons before the ruling on the issue of whether a prima facie case has been made). (**See *People* v. *Montes*** (2014) 58 Cal.4th 809, 852-854 [finding trial court properly considered fact juror dismissed by prosecution had expressed reluctance to impose death penalty in support of its finding no prima facie case established]; this outline, section VII-C-10 at p. 48.)

O. Should a Court Consider the Responses of Jurors Who Filled Out Questionnaires If the Jurors Were Not Actually Called Into the Jury Box?

In assessing whether a prosecutor used his challenges in a discriminatory fashion, "the answers of the prospective jurors who never made it into the jury box are irrelevant because they do not prove that the prosecutor would have accepted such jurors." (***People* v. *Banks*** (2014) 59 Cal.4th 1113, 1149.)

P. Should a Court Consider Whether the Juror Challenged by the Prosecution Gave Favorable Responses?

The fact a prosecutor struck a juror with a characteristic while expressing a "tendency to favor this characteristic with regard to other panelists—is a relevant circumstance in assessing the credibility of the prosecutor's reasoning. (***People* v. *Gutierrez*** (2017) 2 Cal.5th 1150, 1170; **see also *Miller El* v. *Dretke*** (2005) 545 U.S. 231, 247 [considering fact that challenged black panelist "should have been an ideal juror in the eyes of a prosecutor" when assessing credibility of prosecutor's reasons].)

Editor's note: It is questionable whether a judge could treat a *less than obvious* characteristic as "favorable" to the prosecution absent an express description by the prosecutor of the characteristic as such. Just as a trial court should avoid identifying unstated bases for finding a non-discriminatory intent (**see *People* v. *Gutierrez*** (2017) 2 Cal.5th 1150, 1170), the court should be prohibited from making an unexpressed assumption that a characteristic is favorable in finding a discriminatory intent because the characteristic may not, in fact, be viewed as favorable by the prosecutor.

Q. Should a Court Consider Whether the Prosecutor's Asserted Reasons will (Statistically) Result in a Disproportionate Number of Jurors Belonging to the Cognizable Class Being Challenged?

"If a prosecutor articulates a basis for a peremptory challenge that results in the disproportionate exclusion of members of a certain race, the trial judge may consider that fact as evidence that the prosecutor's stated reason constitutes a pretext for racial discrimination." (***Hernandez* v. *New York*** (1991) 500 U.S. 352, 363 (plur. opn. of Kennedy, J.); ***People* v. *Melendez*** (2016) 2 Cal.5th 1, 17–18.) However, the claim should be supported by actual statistical evidence that the stated reason would have a disproportionate impact on the cognizable class at issue to avoid the irony of a court relying on a stereotype to uncover alleged stereotyping.

R. Should a Court Consider the Statistical Underrepresentation of a Group in the Jury Pool?

There is no case "holding that statistical evidence about the underrepresentation of particular groups on a venire, or jury panel, can be sufficient to undermine a trial court's considered findings at the third step of a ***Batson/Wheeler*** analysis. By the third step, the court has already found that exclusion of jurors from a particular group requires explanation. [Citation omitted.] The question at the third step is not whether the defendant can plausibly urge systematic exclusion, but whether any particular panelist was, in fact, excused due to group bias." (***People v. Winbush*** (2017) 2 Cal.5th 402, 446.) "While statistical facts may retain some relevance at ***Batson***'s third step as part of the universe of evidence bearing on the plausibility of asserted justifications for a strike . . . no case has suggested such facts alone could be sufficient to establish pretext." (***Id***. at p 447.)

S. May a Court Consider Whether a Prosecutor Only Did a Background Investigation of Members of the Cognizable Class at Issue?

In ***Flowers* v. *Mississippi*** (2019) 139 S.Ct. 2228, the High Court recognized that evidence of a prosecutor's disparate *investigation* of black and white prospective jurors could be considered in evaluating whether a prosecutor violated ***Batson***: "To be clear, disparate. . . investigation alone does not constitute a ***Batson*** violation. The disparate . . . investigation of black and white prospective jurors may reflect ordinary race-neutral considerations. But the disparate . . . investigation can also, along with other evidence, inform the trial court's evaluation of whether discrimination occurred." (***Flowers*** at p. 2248.) Thus, where prosecution actively investigated (and summoned a witness) to disprove a black juror's statement about the lack of connection to the defendant's family but did not conduct similar investigations of white prospective jurors who were acquainted with the defendant's family or defense witnesses, it was proper to consider this fact in finding the prosecution acted with discriminatory intent. (***Ibid***.)

In ***People* v. *Johnson*** (2019) 8 Cal.5th 475 [255 Cal.Rptr.3d 393], the California Supreme Court also recognized targeted investigations could be evidence bearing on an attorney's intent, albeit finding a lack of evidence in the case before it: "If there were evidence that the prosecutor in fact targeted only African-Americans for background checks, we would agree that such conduct would plainly constitute a prima facie case of discrimination. But there is no such evidence here." (***Id***. at p. 423, fn. 5.)

Editor's note: In ***Johnson***, the defendant (and dissenting justice) claimed that the prosecutor's unwillingness to answer defense counsel's questions about whether he checked only African-American jurors by itself constituted an "implicit[] admission of discriminatory conduct" and gave rise to a prima facie case. The ***Johnson*** court rejected this claim for two reasons: "First, it is not incumbent on a prosecutor to respond to questions from defense counsel; questions to opposing counsel are properly funneled through the court. A prosecutor may have numerous innocuous reasons for not engaging with defense counsel, including not wanting to encourage further probing into a topic relating to jury selection or trial strategy." (***Id***. at p. 423.) "Second, even assuming that a response was required, the transcript of proceedings shows that the prosecutor did, in fact, give a nondiscriminatory reason concerning why he had not initially answered defense counsel's query. Specifically, the prosecutor told the court that he was objecting to defense counsel's questions relating to the investigation of prospective jurors because defense counsel had not yet "ma[d]e a prima facie case" under ***Batson/Wheeler***." (***Id***. at pp. 423-424.) "[T]he prosecutor was under no obligation to respond to defense counsel's question, and his stated reason for not answering it is innocuous and credible." (***Ibid***.)

T. Must a Court Give a Detailed Explanation of Why the Prosecutor's Reasons Were Not Found to Be Discriminatory?

"In determining whether the defendant ultimately has carried his burden of proving purposeful racial discrimination, 'the trial court "must make 'a sincere and reasoned attempt to evaluate the prosecutor's explanation[.]" (***People* v. *Mai*** (2013) 57 Cal.4th 986, 1048 citing to ***People* v. *Stanley*** (2006) 39 Cal.4th 913, 936.) However, "the trial court is not required to make specific or detailed comments for the record to justify every instance in which a prosecutor's race-neutral reason for exercising a peremptory challenge is being accepted by the court as genuine." (***Ibid***.)

U. Are an Attorney's Notes Discoverable When a *Batson-Wheeler* Motion is Made?

In ***People* v. *Superior Court (Jones)*** (2019) 34 Cal.App.5th 75 [taken up for review], the defense made two ***Batson-Wheeler*** motions, the first based on the prosecutor excusing first two African-American jurors, and the second based on the prosecutor excusing a third African-American juror. Both motions were denied. While proffering race-neutral explanations for excusing the jurors, the prosecutor referenced a numerical score for each prospective juror that the prosecution team had devised. (***Id***. at p. 78.) On appeal, the Supreme Court upheld the trial court's denial of the motions. Later, in a petition for writ of habeas corpus, defendant claimed his trial attorney provided ineffective assistance of counsel because his trial counsel failed to raise a *third* ***Batson/Wheeler*** motion in the trial court based on the prosecutor's exercise of 13 peremptory challenges against female prospective jurors, four of whom were African-American. (***Ibid***.) To support this petition, the defendant sought postconviction discovery of jury selection notes pursuant to Penal Code section 1054.9. (***Id***. at p. 79.)

Editor's note: Although not described in the ***Jones*** opinion, the record in the case reflects that a post-conviction hearing was held wherein a prosecutor was asked to (and did) provide reasons for challenging the various prospective female jurors based, in part, on referencing trial notes from the original jury selection.

The judge hearing the post-conviction discovery request ordered disclosure of all the prosecutor's jury selection notes to the defense over a work-product privilege objection and without conducting any in camera review. (***Id***. at pp. 77, 79.) The prosecution then challenged this order in the court of appeal. The court of appeal upheld the trial court's order based on the following analysis:

First, the appellate court held section 1054.9 provides that a defendant is entitled to materials to which he would have been entitled at trial and defendant would have been *entitled* to the prosecutor's jury notes at the time of trial.

Second, relying on ***Foster* v. *Chatman*** (2016) 136 S.Ct. 1737 (**see** this outline at II-E at p. 17), the court held a prosecutor's notes are relevant at a ***Batson-Wheeler*** hearing because a court has an obligation to evaluate the intent of the prosecution, and the written mental impressions themselves may reveal an effort to unlawfully exclude prospective jurors based on race or gender. (***Jones*** at p. 81.) Third, the court indicated the notes are not likely protected by the work-product privilege because an attorney's "thoughts and opinions about the adequacy of prospective jurors" are not "germane to trial strategy." (***Id***. at p. 82.) Fourth, the court held that, in the context of a ***Batson-Wheeler*** motion, the constitutional concerns in ensuring a juror is not excluded for discriminatory reasons outweigh any protection for work product. (***Id***. at p. 83.) Fifth, the court stated that "[e]ven assuming the jury selection notes are undiscoverable core work product, the prosecution's reference to their contents waived the protection." (**Ibid**.) Sixth, even though the prosecutor was not sworn nor subject to examination, the court also believed that the defense was entitled to the notes pursuant to Evidence Code section 771(a), which "requires the production of a writing used to refresh a *witness's* memory while testifying if requested by the adverse party." (***Id***. at p. 84, emphasis added.) Not surprisingly, the California Supreme Court granted the People's petition for review. (S255826.)

Upon request, IPG will make available to prosecutors (or defense attorneys) copies of a letter in support of the petition for review in Jones containing respectful criticism of the reasoning of the appellate court in ***Jones*.** In the meantime, a short synopsis of the flaws in the opinion follows:

First, reliance on the ***Foster*** case as standing for the proposition that notes of an attorney regarding jury selection are discoverable notwithstanding a claim of the work-product privilege is misplaced since the ***Foster*** court never addressed whether the notes in that case were discoverable nor whether the notes were protected by the work-product privilege.

Second, appellate court found Evidence Code section 771 applicable to an attorney giving reasons for challenging a juror (***id***. at pp. 83-85), even though, on its face, section 771 only applies to *witnesses* who refresh their recollection. While an attorney may have a duty of candor to the court (see Rules of Prof. Conduct, Rule 5-200), this does not magically convert the attorney into a testifying witness – subject to all the rules and restrictions applicable to true witnesses. The California Code of Civil Procedures defines a witness as "a person whose *declaration under oath* is received as evidence for any purpose, whether such declaration be made on oral examination, or by deposition or affidavit." (Code Civ. Proc., § 1878, emphasis added; **see also** Pen. Code, § 1102 ["The rules of evidence in civil actions are applicable also to criminal actions, except as otherwise provided in this Code."]; Evid. Code, § 710 ["Every *witness before testifying shall take an oath* or make an affirmation or declaration in the form provided by law . . ." (emphasis added.)].) The prosecutor in the instant case, just like any attorney providing reasons for challenging a juror at a ***Batson-Wheeler*** motion, was not a witness. He did not take an oath, he did not testify or make a declaration under oath, and he was not subject to direct or cross-examination. (**See *People* v. *Young*** (Ill. 1989) 538 N.E.2d 453, 459-460 [noting all the complications that would arise if the prosecutor were deemed a witness at ***Batson-Wheeler*** hearing, including the need for a second prosecutor to act as an advocate]; **cf**., ***People v. Watson*** (N.Y. App. Div. 2019) 169 A.D.3d 81, 83–84 [At a "***Batson*** reconstruction hearing" it is "typical to rely on the contemporaneous notes of the prosecutor and to elicit testimony from him or her. The prosecutor testifies as a sworn witness, and is subject to cross-examination concerning the strike or strikes."].) Section 771 not relevant on the question of whether the prosecutor waived the work-product privilege.

Third, to the extent the ***Jones*** court indicated a prosecutor's choice of who is best suited to sit on the jury is not protected by the work product privilege because that choice is not a part of "trial strategy," the ***Jones*** court is wrong. (**See *People* v. *Armstrong*** (2019) 6 Cal.5th 735, 767 [in assessing whether a prosecutor's race-neutral explanations are credible, court can consider, inter alia, "whether the proffered rationale has some basis in accepted *trial strategy*." (emphasis added)]; ***People* v. *Smith*** (2018) 4 Cal.5th 1134, 1147 [same]; ***People* v. *Gutierrez***

(2017) 2 Cal.5th 1150, 1159 [same]; ***People* v. *Lenix*** (2008) 44 Cal.4th 602, 613 [same]; **see also *Miller-El* v. *Cockrell*** (2003) 537 U.S. 322, 339 [same].)

Fourth, assuming the work-product privilege can be waived, simply relying on some of the notes to refresh the recollection as to certain jurors does not waive the privilege as to *any and all* jury selection notes. A prosecutor's notes may reflect thoughts and impressions about jurors *who were not the subject of the challenge* and whose selection has no bearing on the reasons provided by the prosecutor for challenging the jurors who are the subject of the ***Batson-Wheeler*** motion. The notes may relate to jurors who neither attorney mentioned, who were not the subject of the challenge, and who were not even tangentially relevant as examples of jurors who are "similarly situated" to one or more of the challenged jurors. The bottom line is that an attorney's jury selection notes can provide a wealth of information about an attorney's mental impressions, opinions, conclusions, or theories of the case - some of which may be discoverable and some of which are *not* discoverable. *At a minimum, the trial court hearing the post-conviction section 1054.9 motion should have reviewed the prosecutor's notes in camera before ordering disclosure*. The appellate court approved a blanket order requiring the prosecution to disclose all jury selection notes without even scrutinizing the notes. As explained in ***Coito* v. *Superior Court*** (2012) 54 Cal.4th 480: "If the party resisting discovery alleges that a witness statement, or portion thereof, is absolutely protected because it "reflects an attorney's impressions, conclusions, opinions, or legal research or theories" (§ 2018.030, subd. (a)), that party must make a preliminary or foundational showing in support of its claim. The trial court should *then make an in camera inspection to determine whether absolute work product protection applies to* ***some or all*** *of the material*." (***Id***. at pp. 499–500, emphasis added.)

Finally (and perhaps most importantly), it is difficult to claim that the defense attorney would have been *entitled* to the notes at trial since an in camera hearing was never held and thus the court never had the opportunity to decide what, if any, aspects of the notes were sufficiently relevant to the ***Batson-Wheeler*** motion such that the work-product privilege should have been overridden. And even if an in camera hearing was held, nothing in ***Batson*** or ***Wheeler*** suggests a court *must* order disclosure after in camera review if the interest in disclosure is not particularly compelling. While a trial court may initially decide that an attorney's jury selection notes would be sufficiently helpful to the defense such that disclosure should be required, *upon in camera review*, the trial court may determine that the notes are not sufficiently probative on the issues at the ***Batson-Wheeler*** hearing, that disclosure is not warranted. (**See *People* v. *Freeman*** (Ill. App. Ct. 1991) 581 N.E.2d 293, 297 [determining no discovery of prosecutor's jury selection notes required after reviewing notes in camera pursuant to ***Batson*** motion in jurisdiction where a prosecutor's jury selection notes are protected from disclosure under the work-product doctrine unless they contain material favorable to the defense under ***Brady* v. *Maryland*** (1963), 373 U.S. 83]; ***People* v. *Mack*** (Ill. 1989) 538 N.E.2d 1107, 1116 [even if judge looked at notes of prosecutor in camera, this "would not have automatically necessitated disclosure of them to the defense" where judge found notes did not contain material that could benefit the defendant]; **cf., *United States* v. *Barnette*** (4th Cir. 2011) 644 F.3d 192, 209-213 [finding no reversible error for reviewing jury selection notes ex parte and in camera and citing to cases allowing in camera review, but indicating in camera review of notes should only be done in compelling circumstances].)

Editor's note: ***Jones*** is currently pending before the California Supreme Court. (**See** S255826 445 P.3d 1.)

X. Practice Tips for Prosecutors at the Third Stage

Respond to any issues raised by the judge

If the *defense* has not supported a ***Batson-Wheeler*** claim with one or more of the relevant factors, but the *judge* asks about the factors, the prosecutor should address those concerns.

Make sure the record reflects the necessary findings by the trial judge

The prosecutor should make sure the following is discernible from the record: "1) the trial court considered the prosecutor's reasons for the peremptory challenges at issue and found them to be race-neutral; 2) those reasons were consistent with the court's observations of what occurred, in terms of the panelist's statements as well as any pertinent nonverbal behavior; and 3) the court made a credibility finding that the prosecutor was truthful in giving race-neutral reasons for the peremptory challenges." (***People* v. *Lenix*** (2008) 44 Cal.4th 602, 621.)

Ask the trial judge to take note of the final composition of the jury

As pointed out in ***People* v. *Lenix*** (2008) 44 Cal.4th 602, "[w]hen a ***Wheeler/Batson*** motion has been made, it is helpful for the record to reflect the ultimate composition of the jury." (***Id***. at p. 610, fn. 6.) If the prosecutor passed on a jury panel that includes a member of the cognizable class at issue, this strongly suggests that the prosecutor was not motivated in exercising challenges by the panelist's membership in the class. (**See *People* v. *Krebs*** (2019) 8 Cal.5th 265 [255 Cal.Rptr.3d 95, 125]; ***People* v. *Cunningham*** (2015) 61 Cal.4th 609, 664; ***People* v. *Dement*** (2011) 53 Cal.4th 1, 20; ***People* v. *Clark*** (2012) 52 Cal.4th 856, 906.)

XI. Remedies for *Batson-Wheeler* Violations

A. Traditional Remedy: Dismissal of Panel

The traditional remedy/sanction for a ***Batson-Wheeler*** violation was laid out in ***People* v. *Wheeler*** (1978) 22 Cal.3d 258: "when either party in a criminal case succeeds in showing that the opposing party has improperly exercised peremptory challenges to exclude members of a cognizable group, the court must dismiss all the jurors thus far selected, and quash the remaining venire." (***Id***. at p. 282; ***People* v. *Willis*** (2002) 27 Cal.4th 811, 813.)

This remedy was recognized as *one* means of responding to an attorney's discriminatory use of a peremptory challenge in ***Batson* v. *Kentucky*** (1986) 476 U.S. 79 although the High Court expressed "no view on whether it is more appropriate in a particular case, upon a finding of discrimination against black jurors, for the trial court to discharge the venire and select a new jury from a panel not previously associated with the case . . . ***or*** to disallow the discriminatory challenges and resume selection with the improperly challenged jurors reinstated on the venire[.]" (***Id***. at p. 99, fn. 24, emphasis added by author.)

Although the California Supreme Court in ***Wheeler*** indicated the remedy upon a finding of discrimination had to be dismissal of the venire, they later recognized that other remedies could be imposed with the consent of the offended party. (**See *People* v. *Willis*** (2002) 27 Cal.4th 811, 814, 821; ***People* v. *Mata*** (2013) 57 Cal.4th 178, 183.)

B. *Alternative* Remedy: Reseating Jurors, Monetary Sanctions, Additional Challenges

In ***People* v. *Willis*** (2002) 27 Cal.4th 811, the California Supreme Court noted that the sanction of dismissal for a ***Batson-Wheeler*** violation was not mandated by the federal Constitution and expressly approved of the use of remedies for a ***Batson-Wheeler*** violation other than simply dismissing the panel and restarting jury selection: A trial court, ***acting with the consent of the aggrieved party***, "has discretion to consider and impose remedies or sanctions short of outright dismissal of the entire jury venire." (***Willis*** at pp. 814, 821.)

The ***Willis*** court held "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." (***Id***. at pp. 823-824; ***People* v. *Mata*** (2013) 57 Cal.4th 178, 183.)

Among the alternative remedies suggested by the ***Willis*** court: reseating of the juror, imposition of monetary sanction, and (in dicta) allowing the aggrieved party additional challenges. (***Id***. at p. 821.) The ***Willis*** court seemed to suggest that alternative sanctions are most appropriately imposed in situations "in which the remedy of mistrial and dismissal of the venire accomplish nothing more than to reward improper voir dire challenges and postpone trial." (***Id***. at pp. 821, 824; **see also *People* v. *Mata*** (2013) 57 Cal.4th 178, 183.)

In ***People* v. *Mata*** (2013) 57 Cal.4th 178, the California Supreme Court held that consent to use of the alternative remedy of reseating a juror may be express or implied and may come from the defense attorney. It is not necessary that the defendant expressly or implicitly consent on the record. (***Id***. at pp. 181, 184-185.) Moreover, the court held that "by failing to object to the trial court's proposed alternative remedy when the opportunity to do so arises, the complaining party impliedly waives the right to the default remedy of quashing the entire venire and impliedly consents to the court's proposed alternative remedy." (***Id***. at p. 186; **but see *People* v. *Overby*** (2004) 124 Cal.App.4th 1237, 1245 [correctly anticipating the holding in ***Mata,*** but emphasizing that "it would be preferable and advisable for the trial court to ensure that the record reflects the express consent of the prevailing party whenever an alternate remedy authorized by ***Willis*** . . . is employed"].)

1. Reseating the improperly challenged juror

A trial judge may "disallow the improper challenge(s) and seat the wrongfully excluded juror(s)." (***People* v. *Willis*** (2002) 27 Cal.4th 811, 820; **accord *People* v. *Mata*** (2013) 57 Cal.4th 178, 181; ***People* v. *Douglas*** (2018) 22 Cal.App.5th 1162, 1172, fn. 5.) However, this remedy should not be imposed if the challenged juror has already been discharged. (**See *People* v. *Willis*** (2002) 27 Cal.4th 811, 823; ***People* v. *Muhammed*** (2003) 108 Cal.App.4th 313, 323 [noting trial court could not use the sanction of reseating bumped jurors because the prospective jurors had already been excused].)

Minimizing the Prejudice:

There is a concern that if a challenged juror is kept on the jury after the juror has become aware he or she has been challenged, the juror might hold it against the attorney who exercised the challenge. This concern would only be magnified if the juror figures out that the challenge was disallowed because the attorney purportedly wanted challenged the juror for a discriminatory purpose.

In light of this concern, the ***Willis*** court approved the use of having peremptory challenges made at sidebar outside the jury's presence, followed by appropriate disclosure in open court as to successful challenges, so that any successful ***Wheeler*** objection could be ruled on, and any improperly challenged jurors retained, without revealing to them which party had attempted their removal. (***Id***. at pp. 819, 821.)

The ***Willis*** court pointed out that the American Bar Association has included as one of its Criminal Justice Trial by Jury Standards that "[a]ll challenges, whether for cause or peremptory, should be addressed to the court outside the presence of the jury, in a manner so that the jury panel is not aware of the nature of the challenge, the party making the challenge, or the basis of the court's ruling on the challenge." (***Id***. at p. 822; **see also *People* v. *Williams*** (2013) 58 Cal.4th 197, 279 ["the trial court and the parties agreed to litigate any peremptory challenges to African American prospective jurors outside the presence of the jury"].)

However, the ***Willis*** court went on to recognize that requiring all challenges to be made at sidebar may be unduly burdensome. Thus, it stated that trial courts should have discretion to develop appropriate procedures to avoid such burdens, such as limiting such conferences to situations in which the opposing party has voiced a ***Wheeler*** objection to a particular challenge. (***Id***. at p. 822.)

The ***Willis*** court suggested that the court could require counsel first privately to advise opposing counsel of an anticipated peremptory challenge. If no objection is raised, then the challenge could be openly approved. In that way, only objectionable challenges would be heard at sidebar. (***Id***. at p. 822.)

> **Practice Note**: There is always the possibility that the proper exercise of a peremptory challenge(s) will not be viewed as such by an undiscerning judge. Attorneys who finds themselves in this position and who are facing the sanction of reseating a juror, especially in cases where the juror is aware that you have challenged the juror, should consider dismissing the case before the jury is sworn (i.e., before jeopardy has attached) and refiling the case. It makes little sense to try a case to a foregone conclusion of no better than a hung jury.

2. Monetary sanctions

In ***People* v. *Willis*** (2002) 27 Cal.4th 811, the court noted that one appropriate remedy for a ***Wheeler/Batson*** violation is for the offending party to be hit with monetary sanctions. However, the court pointed out that unless this sanction is combined with another remedy, such as reseating the challenged juror, a monetary sanction "fails to vindicate the juror's fundamental right not to be wrongly excluded from participation, and permits the case to be tried by an intentionally unrepresentative and biased jury." (***Id***. at pp. 821, 824 quoting the lower appellate court.)

Moreover, while the sanction imposed in by the trial court in ***Willis*** was a $1,500 fine, the California Supreme Court stated that "in future cases courts should consider framing a more effective form of relief for ***Wheeler*** errors . . . and imposing sanctions severe enough to guard against a repetition of the improper conduct." (***Id***. at p. 824.) And, at the very least, an order imposing monetary sanctions should not later be vacated (as the trial judge did in ***Willis***) since doing so makes the sanction meaningless and effectively provides no remedy at all for the violation. (***Id***. at p. 821, quoting the lower appellate court.)

In ***People* v. *Muhammed*** (2003) 108 Cal.App.4th 313, the judge imposed monetary sanctions in the amount of $1,500 pursuant to Code of Civil Procedure section 177.5 against the prosecutor for exercising peremptory challenges in a discriminatory fashion. (The judge also threatened to prevent the prosecutor from using any more peremptory challenges but never made good on this threat.) Ultimately, the defendant pled guilty, but the People appealed the imposition of the sanctions. (***Id***. at p. 318.) The ***Muhammed*** court recognized that under section 177.5, a monetary sanction can be imposed "for any violation of a lawful court order by a person, done without good cause or substantial justification." (***Id***. at p. 324.) Nevertheless, the court vacated the trial court' order because no order was made before the judge imposed the monetary sanction. (***Id***. at pp. 325-326 and noting, at p. 324, the court's order imposing a monetary sanction was also deficient because it did not comply with section 177.5(b)'s requirement that it "be in writing and shall recite in detail the conduct or circumstances justifying the order"].)

The ***Muhammed*** court stated that if a trial judge wants to impose a monetary sanction for a ***Wheeler/Batson*** violation, it **must** first order counsel not to violate the Equal Protection Clause in selecting jurors, albeit observing that it seems "degrading to the judicial process and to the attorneys who practice before our courts for a court to have to warn counsel that, on penalty of a monetary sanction, they must not violate the Constitution." (***Id***. at pp. 325-326.) Thus, the ***Muhammed*** court anticipated that monetary sanctions would only be imposed after a second ***Wheeler*** motion - the first ***Wheeler*** motion providing the opportunity for an admonition/order from the court. (***Muhammed***, at p. 326; **but see *People* v. *Bouldon*** (2005) 126 Cal.App.4th 1305 [discussed below on this page].) At that juncture, if a court "admonishes counsel that a repetition of specific conduct will result in a monetary sanction, that statement is tantamount to an order not to repeat the conduct, and should suffice under section 177.5. (***Muhammed*** at p. 325.)

The ***Muhammed*** court observed that where the alternative sanction of reseating a challenged juror is not available, there is a stronger reason to impose a monetary sanction. (***Id***. at p. 325.) Finally, the ***Muhammed*** court stated a monetary sanction may be imposed **in addition to** the granting of the mistrial. (***Id***. at pp. 324-325.)

In ***People* v. *Bouldon*** (2005) 126 Cal.App.4th 1305, the court recognized that the decisions in ***Willis*** and ***Muhammed*** anticipated that the order containing the threat of sanctions would issue ***after*** problematic conduct on the part of counsel became evident during voir dire. Nevertheless, the court said such an order before any challenge is made (i.e. a pre-emptive prophylactic order) ***is*** authorized by a trial judge's "statutory and the inherent power to exercise reasonable control over all proceedings connected with the litigation before him," and to "take whatever steps [are] necessary to see that no conduct on the part of any person obstructs the administration of justice." (***Bouldon***, at p. 1314 [and noting that the possibility that counsel will incur a financial sanction for violating ***Wheeler*** does not represent a serious impediment to a defendant's right to zealous representation by counsel].)

3. Additional peremptory challenges

In *People* v. *Willis* (2002) 27 Cal.4th 811, the court observed that where the alternative of reseating improperly challenged jurors is not available because the jurors have been discharged, some cases have suggested that the court might allow the innocent party additional peremptory challenges. (***Id***. at p. 821.)

4. Tactical advice from ADA Jerry Coleman

If a prosecutor is found in violation of ***Wheeler*** and the court reseats a challenged juror, the prosecutor should make sure that he or she gets to re-exercise that challenge (albeit not on the juror reseated). That is, if a prosecutor used challenge number 8 incorrectly, and the juror is reseated, the prosecutor should make sure to get the eighth challenge back.

Conversely, if a defense counsel has been found in violation of ***Wheeler***, a prosecutor should only ask the court to reseat the last juror challenged but ask for additional challenges for each juror the court has found was improperly bumped and who have already been discharged.

C. Does an Attorney Have Any Duty to Report to the State Bar a *Trial Court's* Finding of a *Batson-Wheeler* Violation?

If a trial court finds an attorney was exercising peremptory challenges in a discriminatory fashion (i.e., finds a ***Batson-Wheeler*** violation), does the attorney or the trial court still have a duty to report it to the State Bar?

Business and Professions Code § 6086.7 states a court shall notify the State Bar of any of the following: . . . (c) The imposition of any judicial sanctions against the attorney, except for sanctions for failure to make discovery or monetary sanctions of less than one thousand dollars ($1,000)."

Business and Professions Code § 6068(o) states that is the duty of an attorney to report to the "agency charged with attorney discipline" (i.e. the State Bar), in writing, within 30 days of the time the attorney has knowledge of any of the following: . . . (3) The imposition of any judicial sanctions against the attorney, except for sanctions for failure to make discovery or monetary sanctions of less than one thousand dollars ($1,000)."

Since the California Supreme Court in ***Wheeler*** appears to have considered dismissing the venire a "sanction" (***id***., at p. 282, fn. 29; **see also *People* v. *Willis*** (2002) 27 Cal.4th 811, 815 [appearing to accept without comment the trial court's reference to the remedies imposed for improper use of peremptory challenges as "sanctions"]), an argument can be made that if an attorney is found to have violated the ***Batson-Wheeler***, and the court has imposed the "sanction" of dismissing the venire or re-seating the juror or imposing a fine of over a thousand dollars, the attorney would have a duty to report. (**See** Coleman, "Meeting the Wheeler Challenge" Prosecutor's Notebook Volume XIX, p. 35; Michaels (ed), "Professionalism" Prosecutor's Notebook Volume XX, p. III-33-34.)

Moreover, attorneys have the responsibility to uphold the law. Business and Professions Code section 6068(a) specifically mandates that lawyers "support the Constitution and the laws of the United States and of this state." A lawyer's use of peremptory challenges for an invidious reason fails to support the law and is arguably a violation of these rules as well.

Nevertheless, based on discussions with State Bar administrators, unless the trial court finds the prosecutor in contempt or imposes a fine of over $1,000 or unless the trial court specifically states the court is "sanctioning" the offending attorney, it is not necessary to report that a trial court has found a ***Batson-Wheeler*** violation.

XII. Do the *Batson-Wheeler* Rules Apply in Civil Cases?

Batson applies to civil cases. (***Flowers* v. *Mississippi*** (2019) 139 S.Ct. 2228, 2243. So does ***Wheeler***. (**See *Unzueta* v. *Akopyan*** (2019) 42 Cal.App.5th 199 [254 Cal.Rptr.3d 850, 862]; ***Holley* v. *J & S Sweeping Co.*** (1983) 143 Cal.App.3d 588, 592.)

XIII. Appellate Review Rules

"The right to a fair and impartial jury is one of the most sacred and important of the guaranties of the constitution. Where it has been infringed, no inquiry as to the sufficiency of the evidence to show guilt is indulged and a conviction by a jury so selected must be set aside." (***People* v. *Allen*** (2004) 115 Cal.App.4th 542, 553, citing to ***People* v. *Wheeler*** (1978) 22 Cal.3d 258, 283.) Thus, "[o]n review, ***Batson/Wheeler*** error is reversible per se, and the remedy is a new trial without any inquiry into harmless error." (***People* v. *Arellano*** (2016) 245 Cal.App.4th 1139, 1144 citing to ***People* v. *Wheeler*** (1978) 22 Cal.3d 258, 283 and ***People* v. *Cisneros*** (2015) 234 Cal.App.4th 111, 120; **see also *People* v. *Silva*** (2001) 25 Cal.4th 345, 386 ["The exclusion by peremptory challenge of a single juror on the basis of race or ethnicity is an error of constitutional magnitude requiring reversal."].)

An "objection on the basis of ***Wheeler*** also preserves claims that may be made under ***Batson***." (***People* v. *Parker*** (2017) 2 Cal.5th 1184, 1211.) However, a claim of either a ***Batson*** or ***Wheeler*** violation may not be raised for the first time on appeal. (**See *People* v. *Howard*** (1992) 1 Cal.4th 1132, 1157; ***People* v. *Hayes*** (1990) 52 Cal.3d 577, 605.)

The ***erroneous*** granting of a ***Batson-Wheeler*** challenge ***made by the prosecution*** against the defense is not reversible per se. It is not "structural error" because an error in overruling a peremptory (and reseating a juror properly challenged by the defense) "does not result in any fundamental unfairness, or interference with the reliability of the jury's factfinding function . . .". (***People* v. *Singh*** (2015) 234 Cal.App.4th 1319, 1331.) The ***Singh*** court rejected that idea that "the difficulty in establishing prejudice from the inclusion of a merely objectionable juror in deliberations" was a sufficient reason to apply a standard of automatic reversal. (***Ibid***.)

A. Review Where Finding of No Prima Facie Case Made

A trial court's finding that no prima facie case has been made is entitled to "considerable deference on appeal" and if the record "suggests grounds upon which the prosecutor might reasonably have challenged" the panelists in question, the conviction will be affirmed. (***People* v. *Crittenden*** (1994) 9 Cal.4th 83, 116-117; ***People* v. *Adanandus*** (2007) 157 Cal.App.4th 496, 501.)

The only time deference will *not* be given is where the trial occurred before the decision in ***Johnson* v. *California*** (2005) 545 U.S. 162 and thus the trial court may have applied the incorrect unnecessarily high standard of "more likely than not" instead of the mere "reasonable inference of discrimination" standard in assessing whether a prima facie case

has been made out. In that situation, the record is reviewed independently to "'apply the high court's standard and resolve the legal question whether the record supports an inference that the prosecutor excused a juror' on a prohibited discriminatory basis." (***People* v. *Clark*** (2012) 52 Cal.4th 856, 903; ***People* v. *Bonilla*** (2007) 41 Cal.4th 313, 342; **accord *People* v. *Sattiewhite*** (2014) 59 Cal.4th 446, 470.)

In doing so, the reviewing court "must consider 'all relevant circumstances.'" (***People* v. *Thomas*** (2012) 53 Cal.4th 771, 794 citing to ***Batson* v. *Kentucky*** (1986) 476 U.S. 79, 96.) "A court may also consider nondiscriminatory reasons for a peremptory challenge that are apparent from and 'clearly established' in the record (citations omitted) and that necessarily dispel any inference of bias." (***People* v. *Scott*** (2015) 61 Cal.4th 363, 384; **accord *People* v. *Reed*** (2018) 4 Cal.5th 989, 999-1000; ***People* v. *Johnson*** (2019) 8 Cal.5th 475 [255 Cal.Rptr.3d 393, 421].)

1. No prima facie finding – no reasons provided by prosecutor

If a trial court denies a ***Batson-Wheeler*** motion without finding a prima facie case of group bias and the prosecutor does not place any reasons on the record for challenging the juror(s) in question, the reviewing court may consider the entire record of voir dire. (***People* v. *Adanandus*** (2007) 157 Cal.App.4th 496, 501.)

The foregoing rule encompasses "two different ways in which [a reviewing court] may uphold the trial court's denial of a ***Wheeler/Batson*** challenge." (***People* v. *Neuman*** (2009) 176 Cal.App.4th 571, 580.)

First, the finding is affirmed "if an examination of the relevant statistics and pattern of the excusals, or other facts, such as whether defendant is also a member of the group excused, the prosecutor engaged in desultory or no questioning of the prospective jurors in question and whether their only commonality is their membership in a cognizable group (citation omitted), provide substantial evidence to support the trial court's finding that a prima facie case has not been made[.]" (***People* v. *Neuman*** (2009) 176 Cal.App.4th 571, 580 citing to ***People* v. *Carasi*** (2008) 44 Cal.4th 1263, 1294 and 1295 and ***People* v. *Kelly*** (2007) 42 Cal.4th 763, 780].)

Second, the finding is affirmed if the record provides "for race-neutral grounds upon which the prosecutor might have challenged the prospective jurors in question." (***People* v. *Neuman*** (2009) 176 Cal.App.4th 571, 580 citing to ***People* v. *Davis*** (2009) 46 Cal.4th 539; ***People* v. *Carasi*** (2008) 44 Cal.4th 1263, 1295, fn. 17 (conc. & dis.opn. of Kennard, J.); ***People* v. *Hoyos*** (2007) 41 Cal.4th 872, 900-901, fn. 15; ***People* v. *Lancaster*** (2007) 41 Cal.4th 50, 76; ***People* v. *Bonilla*** (2007) 41 Cal.4th 313, 341.) This does not mean the reviewing court can affirm if the court can merely "imagine race-neutral reasons the prosecutors might have given if required to do so at the second step of the ***Batson*** inquiry." (***People* v. *Rhoades*** (2019) 8 Cal.5th 393 [255 Cal.Rptr.3d 453, 491].) "[S]peculation about reasons the prosecutors might have had for striking the jurors would go beyond our proper role in assessing the prima facie case." (***Ibid***.) However, "where the record reveals 'obvious race-neutral grounds for the prosecutor's challenges to the prospective jurors in question,' those reasons can definitively undermine any inference of discrimination that an appellate court might otherwise draw from viewing the statistical pattern of strikes in isolation." (***Id***. at pp. 491-492.) Obvious nondiscriminatory reasons for a peremptory challenge that are apparent from and clearly established in the record can dispel any inference of bias. (**See *People* v. *Zaragoza*** (2016) 1 Cal.5th 21, 43; ***People* v. *Sanchez*** (2016) 63 Cal.4th 411, 434; ***People* v. *Scott*** (2015) 61 Cal.4th 363, 384; ***People* v. *Taylor*** (2010) 48 Cal.4th 574, 644; ***People* v. *Box*** (2000) 23 Cal.4th 1153, 1189; ***People* v. *Howard*** (1992) 1 Cal.4th 1132, 1155; **cf. *Williams* v. *Runnels*** (9th Cir.2006) 432 F.3d 1102, 1110 ['refutation of the inference requires more than a determination that the record could have supported race-neutral reasons for the prosecutor's use of his peremptory challenges ...'].)

Editor's note: As noted in the case of ***People* v. *Sanchez*** (2016) 63 Cal.4th 411, even though the reasons given by a prosecutor are not relevant to support a finding of no prima facie case, the reasons given by the prosecutor and the reasons apparent from the record (that can be considered) "will generally, if not always, coincide." (***Id***. at p. 435.)

2. No prima facie finding - but prosecutor is asked for reasons *before* the ruling is made and the court may have considered them

Sometimes a trial court skips over the first stage altogether (**see e.g.**, ***Hernandez* v. *New York*** (1991) 500 U.S. 352, 359 (plur. opn. of Kennedy, J.); ***People* v. *Elliott*** (2012) 53 Cal.4th 535, 560) or purports to rule on the first stage only after the prosecutor had already offered a statement of reasons (**see e.g., *People* v. *Chism*** (2014) 58 Cal.4th 1266, 1311–1312; ***People* v. *Mills*** (2010) 48 Cal.4th 158, 173–174). In that circumstance, a reviewing court will not bother to review whether a prima facie case was established at the first stage and will proceed to analyze whether the trial court properly found the prosecutor's reasons were genuine, i.e., a third stage review. "When a trial court solicits an explanation of the strike without first declaring its views on the first stage, we infer an 'implied prima facie finding' of discrimination and proceed directly to review of the ultimate question of purposeful discrimination." (***People* v. *Scott*** (2015) 61 Cal.4th 363, 387, fn. 1; ***People* v. *O'Malley*** (2016) 62 Cal.4th 944, 975; **accord *People* v. *Krebs*** (2019) 8 Cal.5th 265 [255 Cal.Rptr.3d 95, 123]; **see also *People* v. *Arias*** (1996) 13 Cal.4th 92, 135 ["The court cannot undo an implied ruling once made by stating after explanations have been received that it never intended to find a prima facie case"].) This type of analysis is often referred to as a "first stage/third stage ***Batson*** hybrid." (**See *People* v. *Chism*** (2014) 58 Cal.4th 1266, 1314; ***People* v. *Williams*** (2013) 58 Cal.4th 197, 280–281; ***People* v. *Riccardi*** (2012) 54 Cal.4th 758, 786-787; ***People* v. *Booker*** (2011) 51 Cal.4th 141, 161-166; ***People* v. *Thomas*** (2011) 51 Cal.4th 449, 471-475; ***People* v. *Cowan*** (2010) 50 Cal.4th 401, 448; ***People* v. *Mills*** (2010) 48 Cal.4th 158, 174; ***People* v. *Lewis*** (2008) 43 Cal.4th 415, 471.)

The rule allowing a reviewing court to bypass the question of whether a prima facie case was made "applies *only* when the trial court *explicitly or implicitly evaluates the prosecutor's stated reasons*." (***People* v. *Sattiewhite*** (2014) 59 Cal.4th 446, 469 citing to ***People* v. *Riccardi*** (2012) 54 Cal.4th 758, 786–787; ***People* v. *Elliott*** (2012) 53 Cal.4th 535, 560–561; ***People* v. *Mills*** (2010) 48 Cal.4th 158, 174–175; and ***People* v. *Lenix*** (2008) 44 Cal.4th 602, 613, fn. 8, emphasis added.)

In such circumstances, the reviewing court will **not** be able to speculate on whether there existed "additional reasons" for challenging the juror that were not stated by the prosecution or relied upon by the court. (**See *People* v. *Thomas*** (2011) 51 Cal.4th 449, 474 ["the pertinent question is not whether, in the abstract, there were valid reasons the prosecutor might have relied upon in exercising the peremptory challenge, but whether the prosecutor actually relied upon a nondiscriminatory reason"]; ***People* v. *Jones*** (2011) 51 Cal.4th 346, 365 ["We agree with defendant that in judging why a prosecutor exercised a particular challenge, the trial court and reviewing court must examine only the reasons actually given"]; **see also *Miller El* v. *Dretke*** (2005) 545 U.S. 231, 252 ["If the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false"]; ***Gonzalez* v. *Brown*** (9th Cir. 2009) 585 F.3d 1202, 1207 [reviewing court will not speculate on reasons challenge may be justified]; ***Williams* v. *Runnels*** (9th Cir. 2006) 432 F.3d 1102, 1106-1110 [same, but in context of reviewing a trial judge's finding of no prima facie showing].)

However, if a prosecutor does not provide reasons explaining why other jurors were kept or not kept (for purposes of doing a *later comparative analysis*), the appellate court may properly speculate regarding why a prosecutor may have kept one juror and not another. As pointed out in ***People* v. *Jones*** (2011) 51 Cal.4th 346, "no authority has imposed the additional burden of anticipating all possible unmade claims of comparative juror analysis and explaining why other jurors were not challenged. One of the problems of comparative juror analysis not raised at trial is that the prosecutor generally has not provided, and was not asked to provide, an explanation for nonchallenges. When asked to engage in comparative juror analysis for the first time on appeal, a reviewing court need not, indeed, must not turn a blind eye to reasons the record discloses for not challenging other jurors even if those other jurors are similar in some respects to excused jurors." (***Id***. at pp. 365-366; **accord *People* v. *Chism*** (2014) 58 Cal.4th 1266, 1319; **see also *People v. Melendez*** (2016) 2 Cal.5th 1, 15 [noting that when doing a comparative analysis the first on appeal, the reviewing court

must keep in mind that exploring the question at trial might have shown that the jurors were not really comparable" and thus such evidence should be considered "in light of the deference due to the trial court's ultimate finding of no discriminatory purpose."].)

Sometimes it is *not clear* whether a trial court made a prima facie finding but nonetheless asks the prosecutor to explain the reasons for the challenge and then rules on their validity. In such a case, a reviewing court will "simply proceed as though this is a step three case, analyzing whether the trial court properly accepted the race-neutral reasons given by the prosecutor." (***People* v. *Mai*** (2013) 57 Cal.4th 986, 1050 citing to ***People* v. *Zambrano*** (2007) 41 Cal.4th 1082, 1105–1106; ***People* v. *Lewis and Oliver*** (2006) 39 Cal.4th 970, 1010; ***People* v. *Ward*** (2005) 36 Cal.4th 186, 199–201; **accord *People* v. *Hensley*** (2014) 59 Cal.4th 788, 802.)

3. No prima facie case – prosecutor asked to place reasons on record "for review," but the trial court does not rely on those reasons

Sometimes a court will ask the prosecutor to put his or her reasons on the record simply for appellate purposes and **not** because the court is seeking to rely on those reasons in finding no prima facie case was made. (**See e.g.**, ***People* v. *Sattiewhite*** (2014) 59 Cal.4th 446, 467-468; ***People* v. *Clark*** (2012) 52 Cal.4th 856, 908, fn. 13; ***People* v. *Taylor*** (2010) 48 Cal.4th 574, 614; ***People* v. *Welch*** (1999) 20 Cal.4th 701, 746.) Where a "trial court states that it does not believe a prima facie case has been made, and then invites the prosecution to justify its challenges ***for purposes of completing the record on appeal***, the question whether a prima facie case has been made is ***not*** mooted, ***nor*** is a finding of a prima facie showing implied." (***People* v. *Welch*** (1999) 20 Cal.4th 701, 746, citing to ***People* v. *Turner*** (1994) 8 Cal.4th 137, 167, emphasis added; **accord *People* v. *Sattiewhite*** (2014) 59 Cal.4th 446, 469-470.) In that circumstance, "an appellate court properly reviews the first-stage ruling[.]" (***People* v. *Scott*** (2015) 61 Cal.4th 363, 386 citing to ***People* v. *Taylor*** (2010) 48 Cal.4th 574, 612-614; ***People* v. *Hawthorne*** (2009) 46 Cal.4th 67, 78–79 & fn. 2, 9; ***United States* v. *Johnson*** (7th Cir.2014) 756 F.3d 532, 536–537; and ***United States* v. *Valencia–Trujillo*** (11th Cir. 2009) 573 F.3d 1171, 1184, fn. 8.)

"When the trial court under these circumstances rules that no prima facie case has been made, the reviewing court will consider the entire record of voir dire and uphold the trial court's ruling if the record "suggests grounds upon which the prosecutor might reasonably have challenged" the jurors in question. (***People* v. *Welch*** (1999) 20 Cal.4th 701, 746, citing to ***People* v. *Davenport*** (1995) 11 Cal.4th 1171, 1200.) In that circumstance, there is no need to consider whether the prosecutor's explanations for his peremptory challenges are genuine. (**See *People* v. *Clark*** (2012) 52 Cal.4th 856, 908, fn. 13.)

Note: "Although a court reviewing a first-stage ruling that no inference of discrimination exists 'may consider ***apparent*** reasons for the challenges discernible on the record' as part of its 'consideration of "all relevant circumstances"'" (***People* v. *Scott*** (2015) 61 Cal.4th 363, 390), a "reviewing court may ***not*** rely on a prosecutor's statement of reasons to support a trial court's finding that the defendant failed to make out a prima facie case of discrimination." (**Ibid**, emphasis added.) In ***People* v. *Scott*** (2015) 61 Cal.4th 363, the California Supreme Court expressly overruled its earlier decision in ***People* v. *Mayfield*** (1997) 14 Cal.4th 668, 723-724, which had indicated that a reviewing court *could* consider a prosecutor's reasons given after the trial court's determination that no prima facie case had been established. (***Scott*** at p. 390 at fn. 2.)

4. No prima facie finding - but trial court allows prosecutor to provide reasons after finding no prima facie case and then finds *alternatively* that the prosecutor had valid justification for removing the juror(s)

In ***People* v. *Scott*** (2015) 61 Cal.4th 363, the court had to address the nature of appellate review "where (1) the trial court has determined that no prima facie case of discrimination exists, (2) the trial court allows or invites the prosecutor

to state his or her reasons for excusing the juror for the record, (3) the prosecutor provides nondiscriminatory reasons, and (4) the trial court determines that the prosecutor's nondiscriminatory reasons are genuine[.]" (***Id***. at p. 390.)

The ***Scott*** court began its analysis by noting that "[t]he United States Supreme Court has not established whether an appellate court in such circumstances should review the trial court's first-stage ruling that there was no prima facie case of discrimination or, instead, its third-stage ruling that there was no purposeful discrimination." (***Id***. at p. 386.)

The ***Scott*** court observed that there is a benefit to having prosecutors place their reasons for challenging jurors on the record even though no prima facie finding was made. Namely, doing so engenders confidence in the process and allays some of the difficulties caused by lost or misplaced documentation and faded memories when an appellate court disagrees with the trial court's determination that no prima facie case was met, and sends the case back down to the trial court to do full-blown ***Batson-Wheeler*** hearing. (***Id***. at pp. 387-388.) Accordingly, the court sought to craft a rule that ensured that discriminatory use of peremptory challenges was discovered and remedied, but preserved the right to unexplained peremptory challenges and also encouraged the parties to create a record that would be sufficient for resolution of the ***Batson-Wheeler*** claim on appeal. (***Id***. at pp. 388-389.)

The ***Scott*** court came up with two rules or review: one that generally applies and one that applies in the rare case when the prosecutor gives a *discriminatory* reason after the trial court finds no prima facie case was made out.

The general rule is: "where (1) the trial court has determined that no prima facie case of discrimination exists, (2) the trial court allows or invites the prosecutor to state his or her reasons for excusing the juror for the record, (3) the prosecutor provides nondiscriminatory reasons, and (4) the trial court determines that the prosecutor's nondiscriminatory reasons are genuine, an appellate court should begin its analysis of the trial court's denial of the ***Batson/Wheeler*** motion with a review of the first-stage ruling." (***People* v. *Scott*** (2015) 61 Cal.4th 363, 391 [and overruling ***People* v. *Banks*** (2014) 59 Cal.4th 1113, 1146, and ***People* v. *McKinzie*** (2012) 54 Cal.4th 1302, 1320 at p. 391, fn. 3 to the extent they suggest that in these circumstances, the reviewing court should skip a review of the first-stage ruling and skip to the third-stage ruling]; ***People* v. *Krebs*** (2019) 8 Cal.5th 265 [255 Cal.Rptr.3d 95, 123].) At this stage, the reviewing court "may not rely on a prosecutor's statement of reasons to ***support*** a trial court's finding that the defendant failed to make out a prima facie case of discrimination. (***Scott*** at p. 390, emphasis in original.)

The rule that applies in the rare case is: "where (1) the trial court has determined that no prima facie case of discrimination exists, (2) the trial court allows or invites the prosecutor to state his or her reasons for excusing the juror on the record, (3) ***the prosecutor provides a reason that is discriminatory on its face,*** and (4) the trial court nonetheless finds no purposeful discrimination, the appellate court should likewise begin its analysis of the trial court's denial of the ***Batson/Wheeler*** motion with a review of the first-stage ruling. In that (likely rare) situation though, the relevant circumstances, *including the facially discriminatory justification advanced by the prosecutor*, would almost certainly raise an inference of discrimination and therefore trigger review of the next step of the ***Batson/Wheeler*** analysis." (***People* v. *Scott*** (2015) 61 Cal.4th 363, 391-392, emphasis added.) In other words, in this circumstance, a prosecutor's reasons *can* be used to *undermine* a finding of no prima facie case. "A proffered justification that is facially discriminatory must be weighed with the totality of the relevant facts to determine whether they give rise to an inference of discriminatory purpose and thus compel analysis of the subsequent steps in the ***Batson/Wheeler*** framework." (***Scott*** at p. 391.)

The only other time when an appellate court may consider a prosecutor's reasons for challenging a juror when those reasons are given after the trial court has declined to find a prima facie case is when (i) the prosecutor proffered a reason as to one juror after a prima facie finding was made; (ii) the reviewing court is considering whether other different jurors were removed for a discriminatory purpose; and (iii) the reviewing court is "already evaluating the sincerity of the proffered reason for excusing [the] one juror as part of its review of all the evidence as it bears on the question whether the excusal of *another* juror constituted unlawful discrimination" and it would be "wholly artificial" to consider the

reason proffered as to one but not the other juror(s). (***People* v. *Scott*** (2015) 61 Cal.4th 363, 3 [and indicating this was what motivated the court to consider the prosecutor's proffered reason in ***People* v. *Riccardi*** (2012) 54 Cal.4th 758, 786-787; ***People* v. *Chism*** (2014) 58 Cal.4th 1266, 1313-1314; and ***People* v. *Montes*** (2014) 58 Cal.4th 809, 852–857.)

5. No prima facie finding on first motion, but trial court asks for reasons for initial challenges on a subsequent motion

"Trial courts are no longer obligated to revisit their rulings on earlier ***Wheeler/Batson*** motions when they conclude the defendant has made out a prima facie case in connection with a later motion." (***People* v. *Armstrong*** (2019) 6 Cal.5th 735, 767.) "However, they have the power to do so in cases when a subsequent challenge places an earlier challenge in a new light. (***Ibid***.) And if "a trial court revisits an earlier ruling, determines a prima facie case has been made, solicits reasons from the prosecutor, and rules on those reasons, its ruling is reviewed [on appeal] in the same fashion as any other third-stage ruling." (***Ibid*** [bracketed information added by IPG].)

B. Can Comparative Analysis Be Done for the First Time on Appeal?

Use of Comparative Analysis When Evaluating *Batson-Wheeler* Claims that Expressly or Impliedly Went Through the *Three-Step* Process

Appellate courts are now required to conduct a comparative analysis in evaluating ***Batson-Wheeler*** claims that expressly or impliedly ***went through the three-step process*** even though the attorney challenging the removal of a juror did not rely on a comparative analysis to argue the removal was improper in the trial court. (**See *People* v. *Krebs*** (2019) 8 Cal.5th 265 [255 Cal.Rptr.3d 95, 125]; ***People* v. *O'Malley*** (2016) 62 Cal.4th 944, 976; ***People* v. *Lenix*** (2008) 44 Cal.4th 602, 622; **see also *Sifuentes* v. *Brazelton*** (9th Cir. 2016) 815 F.3d 490, 501 [federal court deciding whether a state court's decision was "based on an unreasonable determination of the facts in light of the evidence" must "conduct a comparative juror analysis in the first instance if the state reviewing court has not done so].)

However, when a comparative analysis is not made at trial, "the prosecutor generally has not provided, and was not asked to, provide, an explanation for nonchallenges." (***People* v. *O'Malley*** (2016) 62 Cal.4th 944, 976; ***People* v. *Jones*** (2011) 51 Cal.4th 346, 365.) Thus, "an appellate court must be mindful that an exploration of the alleged similarities at the time of trial might have shown that the jurors in question were not really comparable." (***Snyder v. Louisiana*** (2008) 552 U.S. 472, 483; ***People* v. *O'Malley*** (2016) 62 Cal.4th 944, 976.) The reviewing court must also remain "mindful that comparative juror analysis on a cold appellate record has inherent limitations." (***People* v. *Booker*** (2011) 51 Cal.4th 141, 165-166; ***People* v. *Taylor*** (2009) 47 Cal.4th 850, 886.)

Moreover, unlike a reviewing court, "the trial judge's unique perspective of voir dire enables the judge to have first-hand knowledge and observation of critical events. [Citation.] The trial judge personally witnesses the totality of circumstances that comprises the 'factual inquiry,' including the jurors' demeanor and tone of voice as they answer questions and counsel's demeanor and tone of voice in posing the questions. [Citation.] The trial judge is able to observe a juror's attention span, alertness, and interest in the proceedings and thus will have a sense of whether the prosecutor's challenge can be readily explained by a legitimate reason...." (***People* v. *Lenix*** (2008) 44 Cal.4th 602, 626-627.) In addition to recognizing the "difficulty of assessing tone, expression and gesture from the written transcript of voir dire," a reviewing court must "attempt to keep in mind the fluid character of the jury selection process and the complexity of the balance involved. 'Two panelists might give a similar answer on a given point. Yet the risk posed by one panelist might be offset by other answers, behavior, attitudes or experiences that make one juror, on balance, more or less desirable. These realities, and the complexity of human nature, make a formulaic comparison of isolated responses an

exceptionally poor medium to overturn a trial court's factual finding.'" (***People* v. *Winbush*** (2017) 2 Cal.5th 402, 442; ***People* v. *Booker*** (2011) 51 Cal.4th 141, 165-166; ***People* v. *Taylor*** (2009) 47 Cal.4th 850, 886; ***People* v. *Lenix*** (2008) 44 Cal.4th 602, 624.) Accordingly, when a defendant asks for comparative juror analysis for the first time on appeal "such evidence will be considered in view of the deference accorded the trial court's ultimate finding of no discriminatory intent." (***People* v. *O'Malley*** (2016) 62 Cal.4th 944, 976.)

Finally, even though a comparative analysis can be done for the first time on appeal, when a defendant "wait[s] until appeal to argue comparative juror analysis," then "review is necessarily circumscribed," and reviewing courts "need not consider responses by stricken panelists or seated jurors other than those identified by the defendant." (***People* v. *Smith*** (2018) 4 Cal.5th 1134, 1148; ***People* v. *Lenix*** (2008) 44 Cal.4th 602, 624; **accord *People* v. *Lomax*** (2010) 49 Cal.4th 530, 572.)

That said, a reviewing court "'must not turn a blind eye to reasons the record discloses for not challenging other jurors even if those other jurors are similar in some respects to excused jurors.'" (***People* v. *Krebs*** (2019) 8 Cal.5th 265 [255 Cal.Rptr.3d 95, 126]; ***People* v. *O'Malley*** (2016) 62 Cal.4th 944, 977.) And even if the prosecutor only provided limited reasons for challenging a particular juror, "to determine whether the seated jurors were truly comparable to the challenged juror, [a court] may look at more than just the specific questions from the questionnaire that the prosecutor cited in explaining his decision . . . [and] [d]efendant is wrong to suggest otherwise . . .". (***People* v. *Krebs*** (2019) 8 Cal.5th 265 [255 Cal.Rptr.3d 95, 126].)

The trial court's finding of no discriminatory intent is reviewed "on the record as it stands at the time the ***Wheeler/Batson*** ruling is made. If the defendant believes that subsequent events should be considered by the trial court, a renewed objection is required to permit appellate consideration of these subsequent developments." (***People* v. *Lenix*** (2008) 44 Cal.4th 602, 624; **accord *People* v. *Trinh*** (2014) 59 Cal.4th 216, 241; ***People* v. *Chism*** (2014) 58 Cal.4th 1266, 1319.) In other words, an appellate court cannot consider the responses of jurors who were challenged ***after*** the ***Batson-Wheeler*** motion was ruled upon unless the defendant *renews* the challenge to incorporate these new developments.

Comparative juror analysis is a form of circumstantial evidence. (***Id***. at p. 622.) A reviewing court must be careful not to accept one reasonable interpretation to the exclusion of other reasonable ones when reviewing the circumstantial evidence supporting the trial court's factual findings in a ***Wheeler/Batson*** holding. "If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also be reasonably reconciled with a contrary finding does not warrant a reversal of the judgment." (***People* v. *Lenix*** (2008) 44 Cal.4th 602, 627-628.)

It should be kept in mind that while the High Court relied on comparative juror analysis as part of its reasons for not deferring to the lower courts in both ***Snyder* v. *Louisiana*** (2008) 552 U.S. 472 and ***Miller El* v. *Dretke*** (2005) 545 U.S. 231, "in neither case was that analysis the sole reason for its conclusion that the challenges in question were racially motivated. The comparative juror analysis in both cases merely supplemented other strong evidence that the challenges were improper." (***People* v. *Jones*** (2011) 51 Cal.4th 346, 364, fn. 2.)

Use of Comparative Analysis When Evaluating *Batson-Wheeler* Claims that only Reached the First Step (i.e., Where the Trial Court Declined to Find a Prima Facie Case)

The United States Supreme Court has not approved use of comparative analysis upon review when the trial court denied the ***Batson-Wheeler*** motion at the first stage. Up until recently, the California Supreme Court had repeatedly rejected the use of comparative analysis for the *first time* on appeal when deciding whether a trial judge properly declined to find a prima facie case. (**See *People* v. *Sanchez*** (2016) 63 Cal.4th 411, 439; ***People* v. *Clark*** (2012) 52 Cal.4th 856, 908, fn. 13; ***People* v. *Taylor*** (2010) 48 Cal.4th 574, 644, fn. 20 citing to ***People* v.**

Howard (2008) 42 Cal.4th 1000, 1019–1020 and ***People* v. *Bonilla*** (2007) 41 Cal.4th 313, 350.) In ***People* v. *Streeter*** (2012) 54 Cal.4th 205, the California Supreme Court did not address whether appellate comparative juror analysis was required "when the objector has failed to make a prima facie showing of discrimination" but noted that the High Court precedents definitely do **not** mandate the use of comparative juror analysis in a first-stage ***Wheeler-Batson*** case, where neither the trial court nor the reviewing court has been presented with the prosecutor's reasons or have hypothesized any possible reasons. (***Id***. at p. 622, fn. 15 citing to ***People* v. *Bell*** (2007) 40 Cal.4th 582, 600-601 [which noted that where no reasons are provided at the first stage, comparative analysis would make little sense since there is nothing to compare].) In ***People* v. *Reed*** (2018) 4 Cal.5th 989, the court recognized that it had "often declined to undertake comparative juror analysis at step one of the ***Batson/Wheeler*** framework." (***Id***. at p. 1002 [citing to ***People* v. *Sanchez*** (2016) 63 Cal.4th 411, 439; ***People* v. *Taylor*** (2010) 48 Cal.4th 574, 616-617; and ***People* v. *Bonilla*** (2007) 41 Cal.4th 313, 350]; accord ***People* v. *Woodruff*** (2018) 5 Cal.5th 697, 751-752.) But went on to say that "such analysis can be helpful in certain circumstances to assess whether a defendant established a prima facie case of bias." (***Reed*** at p. 1002 [citing to ***People* v. *Scott*** (2015) 61 Cal.4th 363, 390; ***People* v. *Harris*** (2013) 57 Cal.4th 804, 836 (conc. opn. of Liu, J.)]; accord ***People* v. *Woodruff*** (2018) 5 Cal.5th 697, 752.)

More recently, the California Supreme Court has clarified "that juror comparisons can play a role at the first stage of the ***Batson-Wheeler*** analysis" as "an aid in determining whether the reasons we are able to identify on the record are ones that help to dispel any inference that the prosecution exercised its strikes in a biased manner." (***People* v. *Rhoades*** (2019) 8 Cal.5th 393 [255 Cal.Rptr.3d 453, 493, fn. 17].) In other words, the court may look to other seated jurors the prosecution accepted to determine whether the retention of those jurors support or negate the force of the "readily apparent reasons" that may be considered in deciding whether a prima facie case was established. (***Id***. at p. 493.) "By comparing the excused jurors to those the prosecutor retained on the identified characteristics, . . . the hypothesis that these characteristics were distinct enough to account for the challenge and dispel any inference of bias" can be tested. (**Ibid**.)

Nevertheless notwithstanding the "evolution of jurisprudence" regarding the use of comparative analysis in first-step cases, the California Supreme Court did not explicitly "repudiate" its earlier decisions finding it inappropriate to use comparative analysis when the issue is simply whether a prima facie case was established - as insisted upon by the dissenting justice in ***Rhoades***. (**Ibid**.)

The rule appears to be different in the Ninth Circuit. (**See *United States* v. *Collins*** (9th Cir.2009) 551 F.3d 914 [comparative juror analysis employed for first-stage ***Batson*** case]; ***Shirley* v. *Yates*** (9th Cir. 2015) 807 F.3d 1090, 1102, fn. 9 [comparative juror analysis is "called for on appeal even when the trial court ruled that the defendant failed to make a prima facie showing at the first step of the ***Batson*** analysis" citing to ***Boyd* v. *Newland*** (9th Cir.2006) 467 F.3d 1139, 1149 and ***Crittenden* v. *Ayers*** (9th Cir.2010) 624 F.3d 943, 956, which concluded that the defendant made a prima facie showing based in part on a comparative juror analysis].)

C. Great Deference to, But Not Abdication of, Responsibility to Review, Trial Court's Findings

When it comes to whether a prosecutor exercised his or her peremptory challenge in a discriminatory manner, determinations of credibility and demeanor lie "peculiarly within a trial judge's province", and "in the absence of exceptional circumstances," the trial court's determination is entitled to deference on appeal. (***Snyder* v. *Louisiana*** (2008) 552 U.S. 472, 477.) "[T]he appellate standard of review of the trial court's factual determinations in a ***Batson*** hearing . . . is highly deferential." (***Flowers* v. *Mississippi*** (2019) 139 S.Ct. 2228, 2244.) "On appeal, a trial court's ruling on the issue of discriminatory intent must be sustained unless it is clearly erroneous." (**Ibid**; **see also *Felkner* v. *Jackson*** (2011) 131 S.Ct. 1305, 1307; ***People* v. *Gutierrez*** (2017) 2

Cal.5th 1150, 1159 [trial court's determination regarding the sufficiency of tendered justifications is viewed with "'great restraint'"].

This deference stems from the fact that ''the trial court enjoys a relative advantage vis-à -vis reviewing courts, for it draws on its contemporaneous observations when assessing a prosecutor's credibility." (***People* v. *Gutierrez*** (2017) 2 Cal.5th 1150, 1159.) Because the "trial court is best situated to evaluate both the words and the demeanor of jurors who are peremptorily challenged, as well as the credibility of the prosecutor who exercised those strikes[,] ... 'these determinations of credibility and demeanor lie peculiarly within a trial judge's province,' and 'in the absence of exceptional circumstances, we [will] defer to the trial court.' " (***Davis* v. *Ayala*** (2015) 135 S.Ct. 2187, 2201; **see also *People* v. *Armstrong*** (2019) 6 Cal.5th 735, [noting only the trial court is in a position to observe and hear a "juror's tone and inflection and see whether a juror hesitates or struggles with particular answers in a way the record may never reveal."]; ***Jamerson* v. *Runnels*** (9th Cir. 2013) 713 F.3d 1218, 1224 ["the trial judge is in the best position to evaluate the credibility of the prosecutor's proffered justifications"].) A reviewing court only looks at whether substantial evidence supports the trial court's denial of a ***Batson/Wheeler*** motion. (***People* v. *Mills*** (2010) 48 Cal.4th 158, 176; ***People* v. *Lenix*** (2008) 44 Cal.4th 602, 613.)

It is presumed that a prosecutor used the peremptory challenges in a constitutional manner and "great deference" is given to the trial court's ability "to distinguish bona fide reasons from sham excuses." (***People* v. *Booker*** (2011) 51 Cal.4th 141, 165; ***People* v. *Taylor*** (2009) 47 Cal.4th 850, 886; ***People* v. *Lenix*** (2008) 44 Cal.4th 602, 613.) This holds true both when it comes to the reasons given for excusing a juror and when it comes to reasons given for excusing an allegedly comparably situated juror. (***People* v. *Johnson*** (2015) 61 Cal.4th 734, 755.) The trial court's determination regarding the sufficiency of a prosecutor's justifications for exercising peremptory challenges is reviewed "with great restraint." (***Ibid***.) This is because "'[o]n appellate review, a voir dire answer sits on a page of transcript. In the trial court, however, advocates and trial judges watch and listen as the answer is delivered. Myriad subtle nuances may shape it, including attitude, attention, interest, body language, facial expression and eye contact.'" (***People* v. *O'Malley*** (2016) 62 Cal.4th 944, 980; ***People* v. *Jones*** (2011) 51 Cal.4th 346, 363.)

So long as the trial court makes "a sincere and reasoned effort to evaluate the nondiscriminatory justifications offered, its conclusions are entitled to deference on appeal." (***People* v. *Zambrano*** (2007) 41 Cal.4th 1082, 1104; ***People* v. *Lewis*** (2006) 39 Cal.4th 970, 1009.) But deference is *only* given in that circumstance. (**See *People* v. *Gutierrez*** (2017) 2 Cal.5th 1150, 1159.)

Moreover, "deference is not abdication." (***People* v. *Gonzales*** (2008) 165 Cal.App.4th 620, 628.) "When the prosecutor's stated reasons are both inherently plausible and supported by the record, the trial court need not question the prosecutor or make detailed findings. But when the prosecutor's stated reasons are either unsupported by the record, inherently implausible, or both, more is required of the trial court than a global finding that the reasons appear sufficient." (***People* v. *Stevens*** (2007) 41 Cal.4th 182, 193; ***People* v. *Silva*** (2001) 25 Cal.4th 345, 386.)

And when a prosecutor provides two reasons, one demeanor and one nondemeanor, but the reviewing court determines the nondemeanor reason (i.e., the only reason a reviewing court can evaluate) is pretextual, a reviewing court should not uphold the challenge solely because the prosecutor also gave a demeanor reason, at least not when the trial court does not specifically cite that demeanor in its ruling. (**See *People* v. *Jones*** (2011) 51 Cal.4th 346, 363 [discussing ***Snyder* v. *Louisiana*** (2008) 552 U.S. 472].)

For example, in ***Snyder* v. *Louisiana*** (2008) 552 U.S. 472, a case in which the prosecutor challenged five out of five African-American jurors, the trial court denied a challenge that the prosecutor was acting in a discriminatory manner where the prosecutor gave two purportedly neutral reasons for challenging one of the jurors: (i) that the juror appeared nervous during voir dire questioning and (ii) out of a concern that the panelist might have been motivated to find the defendant guilty of a lesser included offense, thus obviating the need for a penalty phase proceeding, based on the juror

stating that he was a student teacher and would miss class if he served on the jury. Without explanation, the trial court said it was going to allow the challenge of the juror. The trial and penalty phases concluded two days after the panelist was struck. (***Id***. at pp. 478-479.) The United States Supreme Court, while recognizing that "deference is especially appropriate where a trial judge has made a finding that an attorney credibly relied on demeanor in exercising a strike," found no such deference was due. As to the first reason (i.e., the prosecutor's explanation of nervousness), the court refused to give deference to the determination because the trial court simply allowed the challenge without explanation. As to the second reason (the fact the juror had a student-teaching obligation), the court rejected any deference because (i) the juror told the court that he got clearance to miss a week of work and the trial and penalty phase only lasted a few days, and (ii) the prosecutor accepted white jurors who disclosed conflicting obligations that appear to have been at least as serious and each juror's concern about serving on the jury due to conflicting obligations, was *thoroughly explored* by the trial court when the relevant jurors asked to be excused for cause. (***Id***. at pp. 480-485 [albeit recognizing that, in general, "a retrospective comparison of jurors based on a cold appellate record may be very misleading when alleged similarities were not raised at trial].)

D. Alleged *Batson-Wheeler* Violations Involving Prospective Alternate Jurors Who Do Not Sit on the Final Jury

A defendant cannot complain on appeal of a ***Batson/Wheeler*** violation as to alternate jurors who never serve on the final jury. (***People* v. *Roldan*** (2005) 35 Cal.4th 646, 703 [and noting any violation could not possibly have prejudiced the defendant].)

E. How Significant is the Fact the *Trial Court* Relied on a Fact in Denying the *Batson-Wheeler* Motion that Was Not Supported by the Record?

Sometimes it is not the prosecutor who is mistaken about what a juror said on voir dire, it is the judge. When an appellate court is reviewing the trial court's determination that the prosecutor exercised his or her challenges in a neutral fashion, how significant is the fact that trial court was mistaken about a fact bearing on the question? It likely will depend on how material the fact is to the nature of the challenge.

In ***People* v. *Gutierrez*** (2017) 2 Cal.5th 1150, the court erroneously noted on the record that one of the reasons a juror was excused by the prosecution was because she lacked life experience. The court was mistaken. (***Id***. at p. 1161.) The ***Gutierrez*** court criticized the trial court for this lapse and used the fact the court improperly cited a justification not offered by the prosecutor as one of several reasons for finding the trial court failed to make "a sincere and reasoned attempt to evaluate the prosecutor's explanation . . ." (***Id***. at p. 1172.)

In contrast, in ***People* v. *Smith*** (2019) 32 Cal.App.5th 860, both the prosecutor and the court were mistaken about a few things stated by a juror, including: (i) that it was the juror's aunt (not her mother) who had been incarcerated; (ii) that the juror doubted "whether the criminal justice system works for the most part" when, in fact, the juror stated he believed the criminal justice system worked for the most part but there are cases where I feel the system has not worked"; and (iii) that the juror lived with his "mother" at the time she was prosecuted an incarcerated when it was ambiguous whether he lived in the same house or just lived in the same area. (***Id***. at p. 879.) The appellate court did not find these mistakes to be significant. (***Ibid***.)

XIV. Federal Habeas Review

As pointed out by the United States Supreme Court in ***Felkner* v. *Jackson*** (2011) 131 S.Ct. 1305: "On federal habeas review, AEDPA 'imposes a highly deferential standard for evaluating state-court rulings' and 'demands that state-court decisions be given the benefit of the doubt.'" (***Id***. at p. 1307, citing to ***Renico* v. *Lett*** (2010) 130 S.Ct. 1855, 1862.) Trial court findings "regarding the credibility of an attorney's explanation of the ground for a peremptory challenge" are "entitled to 'great deference'[.]'" (***Davis* v. *Ayala*** (2015) 135 S.Ct. 2187, 2199.) "On direct appeal, those findings may be reversed only if the trial judge is shown to have committed clear error." (**Ibid**.) "Under AEDPA, even more must be shown. A federal habeas court must accept a state-court finding unless it was based on 'an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.'" (**Ibid**.)

A federal habeas court can only grant a habeas petition based on a third-stage ***Batson*** claim, "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.'" (***Rice* v. *Collins*** (2006) 546 U.S. 333, 338-339 quoting ***Miller-El* v. *Dretke*** (2005) 545 U.S. 231, 240.) "When it comes to a federal habeas petition based on a claim that the prosecutor exercised his peremptory challenges in a discriminatory manner, even greater deference is due." (***Briggs* v. *Grounds*** (9th Cir. 2011) 682 F.3d 1165, 1171; **see also *Aleman* v. *Uribe*** (9th Cir. 2013) (9th Cir. 2013) 723 F.3d 976, 983["double deferential" standard of review is applied to the question of whether a state court "violates a defendant's constitutional rights by denying a ***Batson*** motion" because a "level of deference arises from the broad power of a trial court to assess credibility of the prosecutor's statements that were made in open court"; and because when a federal court reviews a state court decision by way of a habeas writ under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) it must defer to state court decisions that are not objectively unreasonable].)

If the state court has found constitutional error harmless beyond a reasonable doubt, and there is a collateral attack on the verdict (i.e., by way of a habeas petition), the federal court does not apply the same test as the state court. "For reasons of finality, comity, and federalism, habeas petitioners 'are not entitled to habeas relief based on trial error unless they can establish that it resulted in "actual prejudice."'" (***Davis* v. *Ayala*** (2015) 135 S.Ct. 2187, 2197.) "Under this test, relief is proper only if the federal court has 'grave doubt about whether a trial error of federal law had "substantial and injurious effect or influence in determining the jury's verdict."'" (***Ibid***.) The federal court "must find that the defendant was actually prejudiced by the error." (***Id***. at p. 2198.)

Application of this standard was well-illustrated in ***Felkner* v. *Jackson*** (2011) 131 S.Ct. 1305. In ***Felkner***, the prosecutor excused two African-American jurors: one was excused based on the juror's belief that he was frequently stopped by police from the ages of 16 to 30 years old based on his race and age; the other was excused because she had master's degree in social work, and had interned at the county jail, probably in the psych unit as a sociologist of some sort. (***Id***. at p. 1306.) The trial court found these reasons were race-neutral, rejecting the defense argument that other non-African-American jurors who were not challenged were similarly situated (**see** this outline, section IX-H-3-b, at p. 115). The state appellate court upheld the conviction. The Ninth Circuit Court of Appeals offered the following one sentence explanation for granting the defendant's habeas petition: "The prosecutor's proffered race-neutral bases for peremptorily striking the two African–American jurors were not sufficient to counter the evidence of purposeful discrimination in light of the fact that two out of three prospective African–American jurors were stricken, and the record reflected different treatment of comparably situated jurors." (***Id***. at p. 1307.) In reversing, the High Court characterized the Ninth Circuit decision "as inexplicable as it is unexplained" and stated: "The state appellate court's decision was plainly not unreasonable. There was simply no basis for the Ninth Circuit to reach the opposite conclusion, particularly in such a dismissive manner." (***Id***. at p. 1307.)

A timely objection to the prosecutor's use of peremptory challenges is a prerequisite to a ***Batson*** challenge on a habeas petition under the AEDPA. (***Haney* v. *Adams*** (9th Cir. 2011) 641 F.3d 1168, 1173.)

No De Novo Comparative Analysis if State Court Conducted Comparative Analysis: Where the state court conducted comparative analysis and determined that the prosecutor did not exercise her peremptory challenges in a discriminatory manner, AEDPA deference applies and a federal court need not undertake a comparative analysis de novo. (***Briggs* v. *Grounds*** (9th Cir. 2011) 682 F.3d 1165, 1171, fn. 6 [and applying this rule where the state court did not give detailed reasons but did give some specific reasons why the comparative analysis failed to show purposeful discrimination at step three].)

Outside Evidence of Race or Ethnicity of Jurors Can Be Considered on Collateral Review if Appellate Record Does Not Disclose It and Comparative Analysis is Done for First Time by Federal Court: If, on review, the state appellate record does not disclose the race or ethnicity of the jurors and the federal court is doing a comparative analysis for the first time, the federal court may consider "enlarged driver's license photographs" of the jurors that the defendant submitted to show the race of each venire member. (***Jamerson* v. *Runnels*** (9th Cir. 2013) 713 F.3d 1218, 1227.)

XV. *Batson-Wheeler* Remand Hearings

Sometimes an appellate court will find that the trial judge erred in determining that no prima facie case had been established, often where the state court used the improper standard for finding a prima facie case. In such circumstances, appellate courts will often remand the case to the trial court with orders to conduct a ***Batson-Wheeler*** hearing *as if* the prima facie case had been made, i.e., the trial court is ordered to go through steps two and three. (**See e.g.**, ***Johnson v. Finn*** (9th Cir. 2012) 665 F.3d 1063, 1068.) This allows the prosecutor to provide neutral reasons for excusing the jurors who the defense claimed were removed for discriminatory reasons and allows the trial court to decide whether those neutral reasons are credible. (**See e.g.**, ***People* v. *Kelly*** (2008) 162 Cal.App.4th 797; ***Paulino* v. *Harrison*** (9th Cir. 2008) 542 F.3d 692; ***Yee* v. *Duncan*** (9th Cir. 2006) 463 F.3d 893.)

A. Some General Principles

In ***People* v. *Kelly*** (2008) 162 Cal.App.4th 797, the court laid out several principles as to how those hearings may be conducted: (i) it is not necessary that the defendant have his original voir dire attorney at the remand hearing; (ii) the prosecutor does not have to be under oath when stating the reasons he or she challenged the juror; (iii) the prosecutor does not have turn over his or her original voir dire notes; and (iv) the defense does not get to cross-examine the prosecutor regarding his or her stated reasons. (***Id***. at pp. 802-805.)

B. Inability to Recall Reason for Exclusion Not Dispositive

In ***Yee* v. *Duncan*** (9th Cir. 2006) 463 F.3d 893, the defendant was a male dental assistant who had been convicted of sexual battery and lewd acts upon female juvenile patients under anesthesia. The prosecutor excused eight men from the jury, albeit leaving four men on the jury. When the time came for the prosecutor to explain the challenges, she offered gender-neutral reasons for seven of the eight men. However, the prosecutor "could not recall" the reason she excluded the eighth male juror. (***Id.*** at pp. 895-896.) The trial judge nonetheless found held there had been "no systematic exclusion of the male gender" and said that it believed the prosecutor's representations to the court and found them unobjectionable. (***Id***. at p. 896.)

The Ninth Circuit upheld the conviction, noting that while failure to provide a reason for bumping a juror at the second step "becomes evidence that is added to the inference of discrimination raised by the prima facie showing," it is not an automatic violation of equal protection. (***Id***. at pp. 899, 900.) To the contrary, the ***Yee*** court held a trial court must still

proceed to step three before it can determine that purposeful discrimination has occurred. At that point, the trial court "considers all the evidence to determine whether the ***actual*** reason for the strike violated the defendant's equal protection rights." (**Ibid**, emphasis added by author.) The court pointed out that if the rule were otherwise, the "prosecution would then bear the ultimate burden even though only an inference of discrimination had been made" and this would be contrary to the purpose of ***Batson***; namely, getting at "the real reason" why the jurors were stricken. (***Yee***, at p. 899.) "[I]nferences are simply not enough." (**Ibid**.)

Applying the proper standard, the Ninth Circuit in ***Yee*** found the California appellate court that affirmed the conviction did not act unreasonably since (i) the voir dire testimony suggested a gender-neutral reason why the prosecutor might have wanted to challenge the juror - the juror had served as a juror on a medical malpractice case and such service could well have brought the juror too close to the malpractice issues presented in the defendant's case which arose from acts committed in defendant's dental office; (ii) "the prosecutor twice accepted the jury; and (iii) the prosecutor had non-discriminatory, objectively verifiable reasons for excluding all of the other removed venire members. (***Id.*** at p. 901.)

C. Speculation as to Reasons for Bumping a Juror May Be Insufficient to Show Permissible Reason

The holding in ***Yee*** should be contrasted with the Ninth Circuit cases of ***Shirley* v. *Yates*** (9th Cir. 2015) 807 F.3d 1090 and ***Paulino* v. *Harrison*** (9th Cir. 2008) 542 F.3d 692.

In ***Shirley* v. *Yates*** (9th Cir. 2015) 807 F.3d 1090, Judge Reinhardt created a near-impossible standard for the prosecution ever prevailing at a remand hearing unless the prosecutor has a specific memory of the questions asked of the jurors. The Ninth Circuit characterized the question at the center of this case as "whether a list of standard considerations, absent affirmative evidence that they were used in the particular case in question, is competent evidence of a prosecutor's actual reasons for striking certain jurors." (***Id***. at p. 1100.) The ***Shirley*** court gave obeisance to the notion that where time has passed since the jury selection, and the prosecutor "no longer has a present recollection of his or her reasons for striking the juror, the state may offer an explanation based on circumstantial evidence." (***Id***. at p. 1103, citing to ***Crittenden* v. *Ayers*** (9th Cir. 2010) 624 F.3d 943, 957–958.) Thus, "an assertion by a prosecutor that he *remembers* striking a veniremember for a particular reason is sufficient to meet the burden of production at Step Two, because the prosecutor's memory-based testimony is direct evidence which, if believed, supports a finding that he actually exercised the strike for the reason articulated." (***Shirley*** at p. 1104, fn. 12.) Moreover, even where the prosecutor cannot actually remember the reason why he struck the veniremembers, "if a prosecutor testifies both to his general jury selection approach and that he is confident one of these race-neutral preferences was the actual reason for the strike, this is sufficient circumstantial evidence to satisfy ***Batson*** Step Two." (***Id***. at p. 1113.) However, the ***Shirley*** court found that "in a case in which the prosecutor does not recall his actual reason for striking the juror in question, it provides little or no probative support for a conclusion at Step Three" that the prosecutor he struck the juror for the reason proffered. (***Id***. at p. 1113.) Such "evidence alone will seldom be enough at Step Three to overcome a prima facie case unless the prosecutor has a regular practice of striking veniremembers who possess an objective characteristic that may be clearly defined. That a veniremember (allegedly) lacks a certain je ne sais quoi that the prosecutor prefers is simply not enough." (***Ibid***.)

Applying that rule to the case before it, and using a cramped form of comparative analysis, the ***Shirley*** court held the prosecutor's statement in support of why he challenged a young African-American female juror who lived at home and worked as a retail clerk that (i.e., that he liked "jurors who have life experience ... well, a person basically who has been around, done some things, who's been in different situations, met different people,") was just a "vague, general preference—as opposed to a regular practice of striking veniremembers for a specific reason" that could not "in itself support the conclusion that he struck [the juror] for that reason." (***Id***. at pp. 1111-1113.) Since the prosecutor did not testify it was his general practice to always strike jurors with this amount of life experience and it was "far from evident

from the transcript that [this juror] had so little life experience that this preference was a significant, much less determinative, factor in [the prosecutor's] decision to strike her" the prosecutor's testimony provided little support for his assertion (which was based only on an inference) that this was his actual reason for striking the juror. (***Id***. at pp. 1111-1112.)

The ***Shirley*** court did strongly indicate (but did not decide) that it would have found the prosecutor's challenge to the other African-American juror to have been permissible since the prosecutor testified an adult criminal conviction was a "deal breaker" for him and the transcript showed the juror was convicted of a crime as an adult. The ***Shirley*** court stated that since an adult criminal conviction was a "clear and specific factor on the basis of which [the prosecutor] consistently exercised strikes" . . . the circumstantial evidence of his regular practice provided significant support for the conclusion that [the prosecutor] struck [the juror] because of her conviction." (***Id***. at p. 1111.)

Editor's note: The ***Shirley*** court observed that "[v]ague preferences are particularly likely to conceal implicit bias[.]" (***Id***. at p. 1111, fn. 26.) For example, in discussing the purportedly "vague" preferences in the case before it, the Ninth Circuit stated: "Prosecutors might well conceive of 'life experience' in ways that have a profoundly disparate impact on members of different racial groups. Young black people may be less likely to enroll in college than young white people, but this can hardly be taken to signify that the average young black person has less "life experience" than the average young white person. Moreover, a vague preference may be more likely to play a part in a prosecutor's decision to strike a veniremember who is black than it would if that juror were white, if the prosecutor is motivated to a substantial degree by racial bias." (**Ibid**.)

In ***Paulino* v. *Harrison*** (9th Cir. 2008) 542 F.3d 692, the prosecutor used challenges against five of six African-Americans; one African-American remained on the jury. After the prosecutor challenged the fifth African-American venire-member, defense counsel made a ***Wheeler*** objection. The parties conferred with the judge who, after speculating as to why the prosecutor removed the juror, declined to find any prima facie case had been made. The judge pontificated that while "the statistical improbability of five out of six is such [as] to give rise to an inference that these peremptory challenges were in part based upon race[,]" the judge could "see why [the prosecutor] would be uncomfortable with each one of them[.]" (***Id***. at p. 695.)

Defendant challenged this ruling in state courts to no avail and then filed a habeas petition in federal court. After the federal district court also denied the claim, the Ninth Circuit ordered the district court to conduct an evidentiary hearing to give the state an "opportunity to present evidence as to the prosecutor's race-neutral reasons for the apparently-biased pattern of peremptories[.]" (***Id***. at pp. 695-696.)

*__Editor's note__: When the case was first remanded to the district court, it did not require the prosecutor to state any reasons but simply relied on its own speculation as to the reasons for bumping the jurors. (***Id***. at p. 696.)

At the hearing, the prosecutor testified that she had absolutely no memory of jury selection, nor of her actual reasons for striking any of the venire-members in question; she could not find the notes she had taken during jury selection and reading the voir dire transcript did not refresh her recollection. Moreover, there was nothing in the state court record that reflected her contemporaneous thoughts on why she struck the African-American jurors because the trial court never required her to explain the reasons for the five strikes. Thus, "instead of explaining her actual non-discriminatory reasons for exercising her peremptory challenges, the prosecutor offered hypothetical race-neutral reasons for striking each potential African-American juror in question." (***Id***. at p. 696 [and noting the prosecutor acknowledged that the reasons she articulated were mere speculation drawn from her reading of the voir dire transcript].) The district court found the prosecution failed to meet its "burden of production" at the second step. (***Id***. at p. 699.)

When the case got back to the Ninth Circuit, the State argued that the prosecutor's testimony, taken as a whole, constituted persuasive circumstantial evidence of her actual non-discriminatory reasons for striking the five African-

American venire-members. (***Id***. at p. 699.) However, the Ninth Circuit disagreed. The Ninth Circuit recognized that "[e]vidence of a prosecutor's actual reasons may be direct or circumstantial," (***id***. at p. 700) but held that pure speculation does not qualify "as circumstantial evidence of the prosecutor's actual reasons, simply because it was the prosecutor herself who offered the speculation during the course of an evidentiary hearing." (***Id***. at pp. 701 [and rejecting the idea that it should put any stock in testimony from the prosecutor regarding her "general principles" of jury selection since prosecutor was not sure which principles she considered in selecting jury].)

The ***Paulino*** court agreed with ***Yee*** that even where the prosecutor does not produce neutral reasons for challenging a juror at the second step, the trial court must proceed to the third step. (***Paulino*** at p. 702.) However, the court held that, at step three, "the prima facie showing plus the evidence of discrimination drawn from the state's failure to produce a reason-- will establish purposeful discrimination by a preponderance of the evidence in ***most*** cases." (***Id***. at p. 703, emphasis added by author.)

Ultimately, the ***Paulino*** court concluded that the defense had met its burden of showing impermissible use of peremptory strikes based on (i) the "stark" statistical disparities, i.e., the removal of 83% of the potential African-American jurors; (ii) the pattern in which the prosecutor exercised her peremptory challenges, i.e., the prosecutor never accepted the jury with a black juror other than one seated juror # 2 and " after using two of her first three peremptory challenges against the other two blacks in the jury box at the time, the prosecutor immediately excused each of the three subsequent black jurors called into the jury box;" and (iii) the lack of any evidence of race-neutral reasons to explain the prosecutor's pattern of strikes or the resulting statistical disparities. (***Id***. at p. 703.)

D. Federal Magistrate's Finding on Credibility of Prosecutor May Not Be Reversed by Federal District Court Without Holding Evidentiary Hearing in District Court Where Prosecutor Testifies

In ***Johnson* v. *Finn*** (9th Cir. 2012) 665 F.3d 1063, the Ninth Circuit held that where a magistrate judge is evaluating the prosecutor's credibility as to reasons for challenging a juror at a remand hearing, the district judge is required to hold a new evidentiary hearing before rejecting a credibility determination of the magistrate judge. (***Id***. at p. 1075.)

E. Prosecutor's Notes Might be Reviewable In Camera if Necessary to Protect Work-Product Privilege

In ***United States* v. *Barnette*** (4th Cir. 2011) 644 F.3d 192, the Fourth Circuit remanded a case to the district court for reconsideration of its earlier ruling (finding no ***Batson*** violation) in light of the holding in ***Miller El* v. *Dretke*** (2005) 545 U.S. 231. (***Id***. at p. 196.) The district court ordered the government to submit unredacted copies of all juror questionnaires in its possession (which included handwritten notations on the questionnaires) for in camera review. (***Id***. at 209.) "In complying with the district court's order, the government also provided copies of handwritten notes taken by the prosecutors during voir dire. [The defendant] vigorously objected to the court's refusal to permit him to examine the government's unredacted jury questionnaires as well as the copies of the handwritten notes made during the jury selection process." (**Ibid**.) On review of the district court finding, the court indicated that district courts "should rarely if ever resort to in camera, ex parte examination of evidence or conduct" ***Batson*** proceedings. (Id. at p. 209.) However, the Fourth Circuit then *approved of* the ex parte review of the records provided by the government in part because of the unique procedural posture of the case but also because the defendant "was no more entitled to examine the work product of his trial prosecutors during the hearing on remand than he would have been (had he asked to do so) at the initial *Batson* hearing in 2002." (***Id***. at p. 210, 211.) For a fuller discussion of the question of the work-product privilege and prosecutor's notes at a Batson-Wheeler hearing, see this outline, section

XVI. Any Duty to Report to the State Bar a Reversal Based on a *Batson-Wheeler* Violation?

Business and Professions Code § 6086.7 states a court shall notify the State Bar of any of the following: . . . ¶ "(b) Whenever a modification or ***reversal of a judgment*** in a judicial proceeding is based in whole or in part on the ***misconduct***, incompetent representation, or willful misrepresentation of an attorney." (Emphasis added by IPG.)

Business and Professions Code § 6068(o) states that is the duty of an attorney to report to the "agency charged with attorney discipline" (i.e. the State Bar), in writing, within 30 days of the time the attorney has knowledge of any of the following: ¶¶ "(7) ***Reversal of judgement in a proceeding based in whole or in part upon misconduct***, grossly incompetent representation, or willful misrepresentation by an attorney." (Emphasis added by IPG.)

In all likelihood, this means that if a case is reversed on appeal because of a determination that the prosecutor used peremptory challenges in a discriminatory manner (i.e., violated equal protection as described in the ***Batson-Wheeler*** line of cases), the reversing court and the attorney who is sanctioned must both report the reversal to the State Bar.

"[A] reversal based on ***Wheeler*** error would seem to be attorney conduct rendering the trial fundamentally unfair. At the very least, if the reversal is predicated upon an appellate court finding the attorney's reasons to be sham or pretextual, that means counsel was deceptive in stating justification, and therefore has committed misconduct. Since either way the reversal was caused by attorney misconduct, it must be reported to the Bar by both court and counsel." (Coleman, "Meeting the Wheeler Challenge" Prosecutor's Notebook Volume XIX, p. 35; Michaels (ed), "Professionalism" Prosecutor's Notebook Volume XX, p. III-33-34.)

Per discussions with the State Bar, it would be a different story if the reversal was based on ***Batson-Wheeler***-related grounds that did not specifically implicate the prosecutor's state of mind. Moreover, per discussions with the State Bar, just because a reversal based on ***Batson-Wheeler*** error is reported, this does not mean that an investigation or any disciplinary proceedings will necessarily follow.

Failure to report the reversal is potentially a basis for discipline itself. Business and Professions Code § 6068(o)(10) states: "This subdivision is only intended to provide that the ***failure to report*** as required herein may serve as a basis of discipline." (Emphasis added.) However, per discussions with the State Bar, while failure to report may be the subject of disciplinary proceedings, failure to report is rarely, by itself, grounds for the imposition of discipline.

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