Handling a *Batson/Wheeler* Motion

I. Overview
   A. Every prosecutor will have to deal with the dreaded "*Wheeler"* motion. It usually occurs following the prosecutor's use of a peremptory challenge against someone of a particular race, gender or ethnic background.
   B. How it works – The defense makes a motion, usually on state and federal grounds, that the prosecutor has excused a juror based on racial, ethnic or other improper grounds and has therefore violated the defendant's Constitutional right to a fair and impartial jury. The defendant does not have to be a member of the excluded group to complain of a violation. *People v. Wheeler* (1978) 22 Cal. 3d 258, 281. (**Note**: While the defense usually brings the motion, it may be made by *either party.*)
   C. It goes without saying that no prosecutor should exercise a peremptory challenge against a juror based on that juror's gender, sexual orientation, or membership in a racial, ethnic, or religious group. But 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.

II. THREE STEP PROCESS
   A. "First, the defendant must make out a prima facie case 'by showing that the totality of relevant facts gives rise to an inference of discriminatory purpose.'
   B. Second, once the defendant has made out a prima facie case, the 'burden shifts to the State to explain adequately the racial exclusion' by offering permissible race-neutral justifications for the [peremptory] strikes.
   C. Third, '[i]f a race-neutral explanation is tendered, the trial court must decide…whether the opponent of the strike has proved purposeful racial discrimination.' " (*Johnson v. California* (2005) 545 U.S. 162)

III. History
   A. *Batson* ***is*** the federal standard and *Wheeler* ***was*** the California standard used to determine whether the peremptory challenge was improper.
   B. Both cases used procedures involving 3 part tests to determine the propriety of the challenge.
   C. However, the first prong of the tests in each case was different.
   D. Defendants argued the state burden (*Wheeler*) was more difficult for them to meet than the federal burden (*Batson*).

E. The California Supreme Court tried to reconcile the two cases in 2003 in *People v. Johnson* (2003) 30 Cal. 4th 1302.
F. In 2005, the U.S. Supreme Court reversed *Johnson* and "clarified" the *Batson* decision by stating that the first prong of the *Batson* test need only be satisfied by production of evidence sufficient to permit the trial judge to draw an *inference of discrimination*. (*Johnson v. California* (2005) 545 U.S. 162.)
G. Current State of the Law - Still a 3 prong test based on the holdings of *Batson* and *Johnson.* Although *Wheeler* is still good law, the first step has been replaced by the *Batson* first step. (*Johnson v. California* (2005) 545 U.S. 162.)

IV. Analysis

A. *People v. Wheeler* (1978) 22 Cal. 3d 258 – Peremptory challenges based on group bias violates the defendant's right to jury trial in the California Constitution. *Batson v. Kentucky* (1986) 476 U.S. 79 – Race based challenges violate the Equal Protection Clause of the U.S. Constitution. (*See Also, People v. Bonilla* (2007) 41 Cal.4th 313, 341).
B. Timeliness/Waiver – The claim is waived if the defendant fails to make a timely objection and a record sufficient for appellate review. (*People v. Wheeler* (1978) 22 Cal.3d 258, 280; *People v. Morris* (2003) 107 Cal.App.4th 402, 408-409) Motion made after jury was sworn but before alternates were sworn was not untimely. Jury empanelment is completed when all jurors, including alternates, are selected and sworn in. *People v. Scott* (2015) 61 Cal. 4th 363.
C. Cognizable Class – "An identifiable group distinguished on racial, religious, ethnic, or similar grounds…" *People v. Wheeler* (1978) 22 Cal. 3d 258, 276. Two requirements for a cognizable class:
    1. Members share a common perspective arising from life experience in the group; and
    2. No other members of the community are capable of adequately representing the group perspective. (*See, Rubio v. Superior Court* (1979) 24 Cal.3d 93, 98).
D. Courts and Statutes have recognized several categories of cognizable classes or groups.
    1. Race - (*See, Batson v. Kentucky* (1986) 476 U.S. 79 & *People v. Wheeler* (1978) 22 Cal. 3d 258).
    2. Ethnicity – Although there are fewer reported cases regarding ethnicity, be aware that it is a cognizable class. For example, Native Americans were the subject of the violation in *United States v. Bauer* (9th Cir. 1996) 84 F.3d 1549.
    3. Religion – *People v. Johnson* (1989) 47 Cal.3d 1194, 1217 [Jewish Jurors]

4. Gender – Gender appears to be a cognizable class and should be treated as such. However, most cases dealing with gender also carry a racial component as well. (*People v. Crittenden* (1994) 9 Cal.4th 83, 115 [African-American woman]; *People v. Garceau* (1993) 6 Cal.4th 140, 171 [Hispanic woman]
5. Sexual Orientation – *People v. Garcia* (2000) 77 Cal.App.4th 1269, 1272. (*See Also,* Code of Civil Procedure §231.5)
6. Age – Although not a federally protected class, Code of Civil Procedure §231.5 added "Age" as a protected class in 2016 added by operation of Government Code §11135.
7. Disability – Although not a federally protected class, Code of Civil Procedure §231.5 added "Disability", both mental and physical, as a protected class in 2016 by operation of Government Code §11135**.**

E. Non-Cognizable Class
1. Poor – *People v. Carpenter* (1999) 21 Cal.4th 1016, 1035
2. Less Educated – *People v. Estrada* (1979) 93 Cal.App.3d 76, 90-91
3. Battered Women – *People v. Macioce* (1987) 197 Cal.App.3d 262, 280
4. Young – *People v. Ayala* (2000) 24 Cal.4th 243, 277-278; *United States v. Fletcher* (9th Cir. 1992) 965 F.2d 781, 782 – (Caveat: See CCP§231.5 & Gov't Code §11135)
5. People over 70 – *People v. McCoy* (1995) 40 Cal.App.4th 778, 783 – (Caveat: See CCP§231.5 & Gov't Code §11135)
6. "Insufficient" English – *People v. Lesara* (1998) 206 Cal.App.3d 1304, 1307
7. Unconventional Hairstyle – *Purkett v. Elem* (1995) 514 U.S. 765, 769
8. People who have been arrested *or* been victims – *People v. Fields* (1983) 35 Cal.3d 329, 348
9. "People of Color" – Combining all minority groups does not constitute a "cognizable class". *People v. Davis* (2009) 46 Cal. 4th 539

F. Challenge Exercised Against Member of Cognizable Class
1. **Step One** – The party objecting to the peremptory challenge must make out a prima facie case "by showing the totality of the relevant facts gives rise to an inference of a discriminatory purpose." *Johnson v. California* (2005) 545 U.S. 162. There is a presumption that that the party exercising the challenge (usually the prosecution) does so on a constitutionally permissible ground. (*People v. Wheeler*

(1978) 22 Cal. 3d 258). Thus, the objecting party (usually the defense) must demonstrate a "prima facie case".

a. Prima Facie Case – The court in *Wheeler* provided four examples of ways to demonstrate a prima facie case:
    i. "A party may show that his opponent struck most or all of the members of the identified group from the venire."
    ii. "He may also demonstrate that the jurors in question share only this one characteristic—their membership in the group—and that in all other respects they are as heterogenous as the community as a whole."
    iii. "Next, the showing may be supplemented…by such circumstances as the failure of the opponent to engage these same jurors in more than desultory voir dire, or indeed to ask them any questions at all."
    iv. "Lastly, the defendant need not be a member of the excluded group in order to complain of a violation of the representative cross-section rule." However, this can be probative in making the determination. (*People v. Wheeler* (1978) 22 Cal. 3d 258, 280-281; *People v. Reynoso* (2003) 31 Cal.4th 903, 914.)
b. "[A] 'pattern' of strikes against black jurors included in the particular venire might give rise to an inference of discrimination. Similarly, the prosecutor's questions and statements during *voir dire* examination and in exercising his challenges may support or refute an inference of discriminatory purpose." (*Batson v. Kentucky* (1986) 476 U.S. 79, 96-97.)
c. Rebut the prima facie case by arguing applicable factors:
    i. If the defendant is not a member of the cognizable class at issue, this fact should be reflected in the record. (See *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].
    ii. If the victim was a member of cognizable class at issue, this fact should be reflected in the record. (See *People* v. *Bell* (2007) 40 Cal.4th 582, 599

[considering fact victim was a member of the cognizable class at issue in finding the prosecutor's challenges created no inference of discrimination].)

iii. The fact that you have not used a disproportionate number of your challenges against members of the cognizable class is a factor that weighs against finding an inference of discrimination. (*People v. Streeter* (2012) 54 Cal.4th 205, 223 [no prima facie case where prosecutor excused three of five African Americans]; *People v. Clark* (2011) 52 Cal.4th 856, 903 [statistical analysis subject to various interpretations and did not raise an inference of discrimination]; *People* v. *Bell* (2007) 40 Cal.4th 582, 598 [considering fact prosecutor used only two of 16 peremptory challenges against members of the cognizable class at issue in finding the prosecutor's challenges created no inference of discrimination]; *People v. Cornwell* (2005) 37 Cal.4th 50, 70 [no prima facie case where prosecutor challenged one out of two African-American prospective jurors]). However, See *Ayala v. Wong* (9th Cir. 2012) 693 F.3d 945, 964 [Statistical evidence alone established a prima facie case where prosecution struck each of the seven black or Hispanic jurors available for challenge].

iv. If you have passed on a panel that includes members of the cognizable class, this fact should be mentioned as it undercuts an inference of discrimination. (*People v. Streeter* (2012) 54 Cal.4th 205, 225 [prosecutor passed five times with up to four African Americans in jury box]; *People v. Clark* (2011) 52 Cal.4th at 856, 906 [no prima facie case where prosecutor passed two African-American jurors during several rounds before finally excusing them].) The prosecutor's acceptance of a panel including African-American prospective jurors, 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…'" (*People v. Hartsch* (2010)

49 Cal.4th 472, 487). (See also, *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].)

v. Point out any members of the cognizable class who were challenged by the defense. However, be aware that this fact will not carry the day for you. It is simply something you may want to point out on the record. Further rehabilitation of prospective jurors of a cognizable class ought to be challenged can be an important factor in rebutting a prima facie case. (*People v. Streeter* (2012) 54 Cal.4th 205, 225 [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, citing *People v. Hartsch* (2010) 49 Cal.4th 472, 487]).

vi. If you were honestly not aware the juror was a member of a cognizable group. *People v. Barber* (1988) 200 Cal.App.3d 378, 389. [Challenged juror appeared to be a white and non-Hispanic to DA. DA did not recognize the surname to be Hispanic. Court found DA to be sincere]

2. **Step Two** – If a prima facie case is made, the "burden shifts to the [party making the original, objected to juror challenge] to explain adequately the racial [or other cognizable class] exclusion by offering permissible race neutral justifications for the strikes." (*Johnson v. California* (2005) 545 U.S. 162)
    a. "The justification need not support a challenge for cause, and even a 'trivial' reason, if genuine and neutral, will suffice." (*People v. Arias* (1996) 13 Cal. 4th 92, 136 citing *People v. Montiel* (1993) 5 Cal. 4th 877, 910, fn. 9.)
    b. Examples of Permissible Reasons
        i. **Legal contacts**. (*People v. Panah* (2005) 35 Cal.4th 395, 441-442 [**potential juror was arrested and charged with a crime**]; *People v. Young* (2005) 34 Cal.4th 1149, 1174 [**counselor had testified before in sex assault cases**]; *People v. Cleveland* (2004) 32 Cal.4th 704, 733 [**son was in jail**]; *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1124 [**father was arrested and**

charged with a crime and the potential juror had been roughed up by officers]; *People v. Farnam* (2002) 28 Cal.4th 107, 137-138; *People v. Williams* (1997) 16 Cal.4th 635, 664-665 [**by family member**]; *People v. Arias* (1996) 13 Cal.4th 92, 138; *People v. Turner* (1994) 8 Cal.4th 137, 171; *People v. Sims* (1993) 5 Cal.4th 405, 430; *People v. Cummings* (1993) 4 Cal.4th 1233, 1282; *People v. Johnson* (1989) 47 Cal.3d 1194, 1215; *People v. Walker* (1988) 47 Cal.3d 605, 625-626; *People v. Wheeler* (1978) 22 Cal.3d 258, 275 [**been a crime victim**]; *People v. Douglas* (1995) 36 Cal.App.4th 1681, 1690; *People v. Martinez* (2000) 82 Cal.App.4th 339, 344-345 [**family member**]; *People v. Martin* (1998) 64 Cal.App.4th 378, 385, fn. 5 [**crime victim**]; *People v. Buckley* (1997) 53 Cal.App.4th 658, 667; *People v. Barber* (1988) 200 Cal.App.3d 378; *Mitleider v. Hall* (9th Cir. 2004) 391 F.3d 1039, 1041- 045, 1048-1051 [**contacts by family members**].)

ii. **Served on hung jury before**. (*People v. Farnam* (2002) 28 Cal.4th 107, 137-138.)

iii. **Views on the legal system.** (*People v. Ward* (2005) 36 Cal.4th 186, 201 [**unfavorable views toward guilt**]; *People v. Cleveland* (2004) 32 Cal.4th 704, 733 [**hesitant in answering questions on the death penalty**]; *People v. Yeoman* (2003) 31 Cal.4th 93, 116-117 [**not strong enough views on the death penalty**]; *People v. Burgener* (2003) 29 Cal.4th 833, 864 [**skeptical in imposing death penalty**]; *People v. Farnam* (2002) 28 Cal.4th 107, 137; *People v. Caitlin* (2001) 26 Cal.4th 81, 118 [**skeptical about imposing death penalty**]; *People v. Buckley* (1997) 53 Cal.App.4th 658, 666-667 [**legal training**]; *Boyd v. Newland* (9th Cir. 2004) 393 F.3d 1008, 1013 [**ambivalence towards the legal system**]; *Tolbert v. Gomez* (9th Cir. 1999) 189 F.3d 1099; *United States v. Fike* (5th Cir. 1996) 82 F.3d 1315, 1320.)

iv. **The potential juror's lack of disclosure**. (*People v. Diaz* (1984) 152 Cal.App.3d 926, 932; see *In re Hitchings* (1993) 6 Cal.4th 97, 112; *Mitleider v. Hall*

(9th Cir. 2004) 391 F.3d 1039, 1041-1045, 1048-1051 [**potential juror apparently not honest**].)

v. **The potential juror appeared to be a non-conformer**. (*Purkett v. Elem* (1995) 514 U.S. 765, 769 (per curiam) [**long hair**]; *People v. Ayala* (2000) 24 Cal.4th 243, 261; *People v. Howard* (1992) 1 Cal.4th 1132, 1208; *People v. Wheeler* (1978) 22 Cal.3d 258, 275.) (*People v. Ward* (2005) 36 Cal. 4th 186, 202)

vi. **Lack of life experiences**. (*People v. Sims* (1993) 5 Cal.4th 405, 429; *People v. Perez* (1994) 29 Cal.App.4th 1313, 1328; *Mitleider v. Hall* (9th Cir. 2004) 391 F.3d 1039, 1041-1045, 1048-1051 [**young and immature**].)

vii. **The potential juror's occupation**. (*People v. Young* (2005) 34 Cal.4th 1149, 1174 [**counselor who has testified before in other sex assault cases and one who was an insurance claims specialist**]; *People v. Howard* (1992) 1 Cal.4th 1132, 1155-1156 [**non-practicing registered nurse**]; *People v. Landry* (1996) 49 Cal.App.4th 785, 790 [**youth services**]; *People v. Barber* (1988) 200 Cal.App.3d 378, 394; *United States v. Thompson* (9th Cir. 1987) 827 F.2d 1254, 1260.)

viii. **Reluctance to be a juror**. (*People v. Walker* (1998) 64 Cal.App.4th 1062, 1070; *Mitleider v. Hall* (9th Cir. 2004) 391 F.3d 1039, 1041-1045, 1048-1051.) (See *Carrera* v. *Ayers* (9th Cir. 2012) 699 F.3d 1104, 1108 [**calling fact 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**].)

ix. **Eagerness to be a juror**. (*People v. Ervin* (2000) 22 Cal.4th 48, 76.)

x. **Hesitance in applying the death penalty**. (*People v. Panah* (2005) 35 Cal.4th 395, 441; *People v. Smith* (2005) 35 Cal.4th 334, 347.)

xi. **Hesitance, Transient Background, and Grandmotherly 'Persona.'** (*Boyde v. Brown* (9th Cir. 2005) 404 F.3d 1159, 1170.)

xii. **Body language can be proper grounds, at least if there is a sufficient record to support the prosecutor's observations.** (*People v. Elliott* (2012) 53 Cal.4th 535, 569-570 [**Juror failed to make eye contact with anyone, dressed informally, and had an unconventional hairstyle**]; (*People v. Ward* (2005) 36 Cal.4th 186, 202 [**hostility toward prosecutor; though record is silent, other than the prosecutor's assertions, there is no evidence to contradict it**]; *People v. Reynoso* (2003) 31 Cal.4th 903, 919; *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1125-1126 [**hostile look at prosecutor**] *People v. Ervin* (2000) 22 Cal.4th 48 [**nervousness during voir dire**]; *People v. Turner* (1994) 8 Cal.4th 137, 170 [**potential juror won't look prosecutor in the eye**]; *People v. Johnson* (1989) 47 Cal.3d 1194, 1220 [**shy**][**sleepy**]; *People v. Dunn* (1995) 40 Cal.App.4th 1039, 1047; *People v. Perez* (1994) 27 Cal.App.4th 1313, 1330 [**inappropriate laughter**]; *Mitleider v. Hall* (9th Cir. 2004) 391 F.3d 1039, 1041-1045, 1048-1051; *Williams v. Rhoades* (9th Cir. 2004) 354 F.3d 1101 [**uncorroborated assertion by prosecutor of the potential juror's body language enough for affirmance because of deferential standard of review**]; but see *McClain v. Prunty* (9th Cir. 2000) 217 F.3d 1209 [**implied body language not enough without the prosecutor stating the reason**]; *Turner v. Marshall* (9th Cir. 1997) 121 F.3d 1248, 1254 [**cannot infer demeanor when prosecutor never said so**]; *United States v. Power* (9th Cir. 1989) 881 F.2d 733, 740 [**fidgety and inattention**]; *United States v. Changco* (9th Cir. 1993) 1 F.3d 837, 840 [**passive and inattentive**].) (*Rice v. Collins* 546 U.S. 333 (2006) [**rolling of eyes, not seen by trial judge**].)

1. Caution: Body language can be a dangerous area if the record does not support the reasons you are giving for the excuse. Be sure that you make a record of not only what body language or demeanor you observed but *why* this was

important to you and how it affected your decision to excuse the juror. Further, try not to rely solely on body language or demeanor when excusing a cognizable class juror. (See, *People v. Long* (2010) 189 Cal.App. 4th 826) [**record did not support prosecutors reasons for excusing juror and judge did not make a "sincere and reasoned" attempt to evaluate the prosecutor's reasons**]). (*People v. Jones* (2011) 51 Cal.4th 346) [**Prosecutor gave specific and detailed reasons for challenges based upon body language and demeanor**]).

2. *Practice Tip*: If you have a cognizable class juror who is nonverbally communicating in a way that concerns you (i.e. facial expressions, arms folded, sighing, etc.) ask them about it. For example, you might say, "Juror #2, I noticed that while Juror #8 was answering the last question, you had a look on your face that I interpreted as disagreement. Am I correct about that? Would you like to be heard?" If you do this in a respectful way, you accomplish the goal of putting the fact that you noticed it on the record. If you decide to kick this person later and get challenged, you can refer the Court back to this as one of the reasons you kicked the juror.

xiii. **Bilingual Juror Who Won't Defer to Court Translator.** (*Hernandez v. New York* (1991) 500 U.S. 352, 356-357) CAUTION – Be careful when kicking bilingual jurors as it could be seen as a cover for discrimination. (*See, People v. Gonzales* (2008) 165 Cal.App.4th 620)

xiv. **Intelligence.** (*People v. Arias* (1996) 13 Cal. 4th 92, 137-139)

xv. **Sympathetic to defendant.** (*People v. McKinzie* (2012) 54 Cal.4th 1302, 1321-1322) [**fact juror had been arrested for domestic violence was proper basis to challenge because 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. Mayfield* (1997) 14 Cal. 4th 668, 724-726)

xvi. **Desire for next juror.** (*People v. Jones* (2011) 51 Cal.4th 346, 367) [**challenge upheld where prosecutor believed he had even better potential jurors who had not been called**]; (See also, *People v. Alvarez* (1996) 14 Cal. 4th 155, 194-195). But see, (*People v. Cisneros* (2015) 234 Cal.App.4th 111) [**Holding that preference for next juror *alone* is not enough. You must also articulate reasons for excusing the challenged juror.**]

xvii. **Because prosecutor wished to ask the potential juror more questions**. (*People v. Cleveland* (2004) 32 Cal.4th 704, 733.)

xviii. **Mistake**. (*Aleman* v. *Uribe* (9th Cir. 2013) 2013) [**prosecutor mistakenly transposed two jurors' information. Prosecutor helped by making a good record that he was "under the weather"**] (See *People v. Williams* (2013) 56 Cal.4th 630, 660-661 [**holding that, regardless of whether prosecutor challenged one juror under the mistaken belief she was a different juror, there was no *Batson-Wheeler* violation since the reason given for challenging the juror (hesitancy to impose the death penalty) would have provided valid basis for challenging different juror**].) (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1124 [**prosecutor misunderstood the juror's answer**]; *People v. Williams* (1997) 16 Cal.4th 153, 188-189; *United States v. Lorenzo* (9th

Cir. 1993) 995 F.2d 1448, 1454-1455 [**time crunch**].) But see, (*Castellanos v. Small* (2014) 766 F.3d 1137) [**Prosecutor's stated reason was in error. It survived through the appellate courts as a mistake but the 9th Circuit ultimately found the prosecutor's error to be pre-textual.**]

xix. **Financial Hardship/Work Related Issues.** (See *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**]

3. **STEP 3** – "If a race neutral explanation is tendered, the trial court must then decide…whether the opponent of the strike has proved purposeful racial discrimination." (*Johnson v. California* (2005) 54 U.S. 162)
    a. "It is not until the third step that the persuasiveness of the justification becomes relevant – the step in which the trial court determines whether the opponent of the strike has carried his burden of proving purposeful discrimination." (*Purkett v. Elem* (1995) 514 U.S. 765, 768.) [**Burden of proof of is preponderance of the evidence**]
    b. "[W]e rely on the good judgment of trial courts to distinguish bona fide reasons for such peremptories from sham excuses belatedly contrived to avoid admitting acts of group discrimination." (*People v. Wheeler* (1978) 22 Cal.3d 258, 282; *People v. Johnson* (1989) 47 Cal.3d 1194, 1216; see *Purkett v. Elem* (1995) 514 U.S. 765, 768.)
    c. "This demands of the trial judge a sincere and reasoned attempt to evaluate the prosecutor's explanation in light of the circumstances of the case as then known, his knowledge of trial techniques, and his observations of the manner in which the prosecutor has

examined members of the venire and has exercised challenges for cause or peremptorily…" (*People v. Hall* (1983) 35 Cal.3d 161, 167-168; See also, *People v. Silva* (2001) 25 Cal. 4th 345, 386)

d. "In assessing credibility, the court draws upon its contemporaneous observations of the voir dire. It 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 that employs him or her. [Citation.]" (*People v. Lenix, supra*, 44 Cal.4th at p. 613, fn. omitted, *quoting Miller–El v. Cockrell* (2003) 537 U.S. 322, 339.)

e. It is proper for a trial court, in evaluating the prosecutor's justifications, to consider the prosecutor's actions in excusing jurors in a *previous trial* and whether a prosecutor has kept members of the cognizable class at issue on the jury in a *prior trial.* (*People v. DeHoyos* (2013) 57 Cal.4th 79)

f. ***People v. Gutierrez* (2017) 2 Cal. 5th 1150**

   i. First time in 16 years that the California Supreme Court has found a *Batson Wheeler violation.*

   ii. "This case offers us an opportunity to clarify the constitutionally required duties of California lawyers, trial judges, and appellate judges when a party has raised a claim of discriminatory bias in jury selection." (*People v. Gutierrez* (2017) 2 Cal. 5th 1150, 1154.

   iii. Facts: Gutierrez and other defendants were all Sureño gang members in the Bakersfield area. V got into a fight with one of the defendants and then left. Other D's, including Gutierrez, got in a car and searched for V. When they found V, Gutierrez got out of the car and shot V multiple times. One of the co-D's from a gang subset in Wasco testified and provided this information. (*Id.* at 1155.)

   iv. Step One – Three Overview: Prosecutor struck ten Hispanic jurors out of sixteen peremptory challenges, four of those challenges to Hispanic jurors coming in a row. The defense made a *Batson/Wheeler* motion. The trial court found the existence of a prima facie case in that there was an inference of discrimination. (*Id.* at 1156.) The

prosecutor gave reasons and the trial court found them to be race neutral. Defense motion was denied. The Court of Appeal upheld the denial of the defense motion. (*Id.* at 1157.)

1. Step One: The trial court found that 10 out of 16 challenges to Hispanic jurors established a prima facia case.
2. Step Two: The prosecutor gave reasons for the 10 strikes. 7 of the 10 were found to be race neutral. The Supreme Court identified error in three of the challenges but based the reversal only upon one and did not determine the other two.
    a. Wasco Juror – Teacher from Wasco. Divorced. No Kids. Ex is a correctional officer. Other relatives in law enforcement. No connection to gangs.
    b. Voir Dire of Wasco Juror by the prosecutor consisted of asking the juror whether she was aware of gangs in Wasco. She said "No". Prosecutor then asked if she lived in the Wasco area and Wasco itself to which she answered "Yes."
    c. Prosecutor's reason for kicking the Wasco juror was that she was unaware of gangs in Wasco and by some of her other answers. He wasn't sure how she'd respond when she hears that the testifying co-D was from a Wasco gang.
    d. The AG gave some reason that would explain the prosecutor's reasons for the kicks. While the Supreme Court agreed that those may have been valid reasons, they made it clear that those reason were NOT given by the prosecutor.
    e. The Court stated, "[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." (*Id.* at 1159. *See also*, *Miller-El v. Dretke* (2005) 545 U.S. 231, 252(*Miller-El II*).)

3. Step Three: The Supreme Court found the prosecutor's reason for kicking all jurors to be neutral on their face. (*Id.* at 1168.) However, the Court found that although the trial court made a *sincere* attempt to evaluate the prosecutor's reason, it failed to make a *reasoned* attempt. (*Id.* at 1172.)

v. The Supreme Court also found that the Court of Appeal erred by refusing to do comparative analysis for the first time on appeal. (*Id.* at 1174.)

vi. The Court opinion illustrates what information they want the record to contain in a *Batson/Wheeler* challenge:

1. The court may only rule on reasons specifically and actually expressed by the attorney, and may not consider other, even obvious, reasons that the challenge is appropriate. So make sure you list all your reasons.
2. If a prima facie finding is made and the court proceeds to the second step of the analysis: the "neutral justification" stage, the issue is facial validity. The court states that the rationale need only be clear and reasonably specific as to legitimate reasons for challenging the juror, but need not detail "why" the prosecutor kicked the juror. However, a deficient record was clearly part of the reason that Gutierrez was reversed.
3. The Court wants a significant record created at Step 3: evaluating the credibility of the reasons actually stated.

vii. Justice Liu's concurrence attempts to lay out the purpose of the rule established:

1. The ultimate issue is "whether it was *more likely than not* that the challenge was improperly motivated." (*Johnson v. California* (2005) 545 U.S. 162, 170, italics added.) This probabilistic standard is not

> designed to elicit a definitive finding of deceit or racism. Instead, it defines a level of risk that courts cannot tolerate in light of the serious harms that racial discrimination in jury selection causes to the defendant, to the excluded juror, and to public confidence in the fairness of our system of justice. (*Batson*, *supra*, 476 U.S. at p. 87; see *Miller-El*, *supra*, 545 U.S. at p. 238; *Powers v. Ohio* (1991) 499 U.S. 400, 412–414.)

G. Comparative Analysis

1. This term refers to the process by which courts will evaluate the reasons given for the challenge of a member of a cognizable class. The courts will look for non-cognizable class jurors who were *not* challenged to see whether the reasons would apply equally.
2. For example, if a prosecutor challenged an African American juror who was employed as a teacher and gave the reason, "Judge, I always excuse teachers." The court would then look to see whether the prosecutor failed to challenge any teachers who were not members of a cognizable class.
3. History - Federal Courts approved of comparative analysis in *Turner v. Marshall* (9th Cir. 1997) 121 F. 3d 1248. California rejected comparative analysis in *People v. Landry* (1996) 49 Cal.App.4th 785. *People v. Jones* (1997) 15 Cal. 4th 119. However, things began to change in 2003 with *Johnson*. Then in 2005, the U.S. Supreme Court decided *Miller-El v. Dretke* (2005) 545 U.S. 231 using comparative analysis in the decision.
4. ***Snyder v. Louisiana* (2008) 552 U.S. 472** – In *Snyder,* the U.S. Supreme Court found that the prosecutors race neutral reasons for excusing a black juror were implausible and were reinforced by the prosecutor's acceptance of white jurors who disclosed conflicting obligations similar to the excused juror. (*Id.* at 483-484). The Court held that a comparative analysis was appropriate since "the shared characteristic, i.e., 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 p. 483)
5. ***People v. Lenix* (2008) 44 Cal. 4th 602** – Comparative Analysis is alive in California.

a. “If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson’s* third step.” (*Id.* at p. 621)
b. In reviewing the plausibility of a prosecutor’s reasons for striking a juror, an appellate court can consider various kinds of evidence, including a comparison of panelists' responses. (*Id.* at p. 622)
c. Failing to engage in comparative juror analysis for the first time on appeal unduly restricts review based on the entire record.” (*Id.* at p. 622) “Thus, 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.” (*Id.* at p. 622)
d. 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.” (*Id.* at p. 625) Trial courts “must evaluate the demeanor of the prosecutor in determining the credibility of proffered explanations, and the demeanor of the panelist when that factor is a basis for the challenge.” (*Id.* at p. 625)
e. 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. (*Id.* at pp. 625-626)
f. “As to the second point, the court may not have observed every gesture, expression or interaction relied upon by the prosecutor. The judge has a different vantage point, and may have, for example, been looking at another panelist or making a note when the described behavior occurred. But 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.

g. The record must reflect the trial court's determination on this point (see *Snyder*, supra, at p. 460), 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)
h. The court observed that comparative juror analysis is a form of circumstantial evidence (*Id.* at p. 622) and that 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 *Batson/Wheeler* 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." (*Id.* at pp. 625-626)
    i. Comparative Analysis will only be considered for the first time on appeal at the *Third* Step. (*See, People v. Clark* (2016) 63 Cal.4th 522, 568 [Declining the defense invitation to engage in comparative analysis for the first time on appeal at the first step of *Batson*.])
i. "Positive" Comparative Analysis
    i. This term refers to the idea of using comparative analysis to support a challenge of a member of a cognizable class by comparing other similarly situated non-cognizable class jurors who were also challenged.
    ii. (*Rice v. Collins* (2006) 546 U.S. 333, 341 [**prosecutor struck a white juror with the same characteristics of a cognizable class juror she struck**]; (*Briggs v. Grounds* (2012) 682 F.3d 1165 [**prosecutor struck at least on non-African American who indicated they would hold the prosecution to a higher standard of proof**]).

V. Practical Issues in Dealing with *Batson/Wheeler* Motions
A. Realize that a challenge will likely come at some point during jury selection and be ready to deal with it. It should go without saying, but ***NEVER*** excuse a juror on the basis of race, ethnicity, religion, gender etc…Question all jurors you plan to challenge. Desultory (non-substantive) questioning does not count.

B. Be prepared to rebut the prima facie case. (*See,* pp. 4-6)
C. Assume that a prima facie case will be made and be prepared to give race neutral reasons for excusing the juror. 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. *Lenix* (2008) 44 Cal.4th 602, 624.) Prosecutors should "provide as complete an explanation for their peremptory challenges as possible." (*People* v. *Lenix* (2008) 44 Cal.4th 602, 624.)
D. If you can't recall specifically why you excused a juror, it is better to ask for a "time out" so that you may review the transcript/recording of the juror's answers. (See *Lewis v. Lewis* (9th Cir. 2003) 321 F.3d 824 [suggesting that counsel can be particularly helpful in assisting the court at the third step of *Batson* "when afforded the opportunity to review a transcript of the jury selection proceedings"].)
E. If judge finds no prima facie case, insist that the finding is placed on the record. Then state your reasons anyway. But, DO NOT give reasons unless and until the court specifically finds no prima facie case. Giving reasons without a specific finding on the first prong will constitute an implied finding of a prima facie case. *People v. Arias* (1996) 13 Cal. 4th 92; *People v. Gutierrez* (2002) 28 Cal. 4th 1083. *People v. Scott* (2015) 61 Cal.4th 363.
F. Trial Tips
    1. Create a Good Record
        a. The prosecutor should make sure the following is discernible from the record:
            i. "1) The trial court considered the prosecutor's reasons for the peremptory challenges at issue and found them to be race-neutral. And the trial court made a sincere and reasoned attempt to evaluate the reasons given;
            ii. 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.)
    2. Obtain a Transcript of Voir Dire Before Making Challenges

a. In certain situations, a prosecutor may not recall or have accurate notes regarding the responses of a juror he or she wishes to challenge.
b. In those cases, it is appropriate and recommended that the prosecutor ask for read back of the juror's responses. (*See Lewis v. Lewis* (9th Cir. 2003) 321 F.3d 824)

3. Ask Court to Note the Final Jury Composition
    a. 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); See also *People v. Neuman* (2009) 176 Cal.App.4th 571, 588, fn. 21["the ultimate composition of the jury is a factor to be considered in an appellate court a *Wheeler/Batson* challenge"].)
    b. If the prosecutor passed on a final jury panel that includes a member of the cognizable class allegedly being improperly excluded, this strongly suggests that the prosecutor was not motivated in exercising challenges by the panelist's membership in the class. (See *People v. Dement* (2011) 53 Cal.4th 1, 20; *People* v. *Clark*, (2012) 52 Cal.4th 856, 906; *People* v. *Garcia* (2011) 52 Cal.4th 706, 747-748; *People* v. *Lenix* (2008) 44 Cal.4th 602, 629; *People* v. *Kelly* (2007) 42 Cal.4th 763, 780; *People* v. *Cornwell* (2005) 37 Cal.4th 50, 69-70; *People* v. *Reynoso* (2003) 31 Cal.4th 903, 926; *People v. Adanandus* (2007) 157 Cal.App.4th 496, 503–504; but see *People* v. *Snow* (1987) 44 Cal.3d 216, 226 ["although the passing of certain jurors may be an indication of the prosecutor's good faith in exercising his peremptories, and may be an appropriate factor for the trial judge to consider in ruling on a *Wheeler* objection, it is not a conclusive factor"]; *Brinson* v. *Vaughn* (3d Cir. 2005) 398 F.3d 225, 233 ["a prosecutor may violate *Batson* even if the prosecutor passes up the opportunity to strike some African American jurors" and "a prosecutor's decision to refrain from discriminating against some African American jurors does not cure discrimination against others"].)
4. Save your notes. If case is reviewed later, voir dire may be an issue. Always save your notes so that if asked, you are

better able to recollect why you may have challenged a specific juror.

a. At remand hearing, the prosecutor does NOT have to state reasons under oath. (*People v. Kelly* (2008) 162 Cal.App.4th 797)
b. At remand hearing, the prosecutor does NOT have to turn over original voir dire notes. (*People v. Kelly* (2008) 162 Cal.App.4th 797)
c. At remand hearing, prosecutor cannot be cross-examined by the defense. (*People v. Kelly* (2008) 162 Cal.App.4th 797)
d. I don't recall" May or May Not Fly – (*Paulino v. Harrison* (9th Cir. 2008) 542 F.3d 692); (But see, *Yee* v. *Duncan* (9th Cir. 2006) 463 F.3d 893.) [notwithstanding the inability to recall reason for excusing one cognizable class juror, totality of prosecutor's responses regarding other excused jurors did not evidence a discriminatory motive].)
e. If you use shorthand, make sure you define your terms. Don't make a reviewing court guess at what you meant. (*See, Foster v. Chatman* (2016) 136 Sup.Ct. 1737 [Murder conviction reversed for third step *Batson* violation. Very bad facts that we hope to never see. However, it's instructive on the issue of the clarity, or lack thereof, of the prosecutor's notes.])

G. Remedies

1. *Wheeler-Batson* error is reversible per se. (*People v. Wheeler* (1978) 22 Cal.3d 258, 283; see *Miller-El v. Dretke* (2005) 545 U.S. 231)
2. Step One Error: When the trial court erroneously finds there was not a prima facie case, the matter is often remanded for prosecutor to state reasons for peremptory challenge. (*Batson v. Kentucky* (1986) 476 U.S. 79, 100; *People v. McGee* (2002) 104 Cal.App.4th 559, 571, 573 [remand to permit prosecutor give reasons].)
    a. This remedy has been criticized for two reasons. First, the long passage of time makes it nearly impossible for the prosecutor to genuinely remember the real reason. (*People v. Hall* (1983) 35 Cal.3d 161, 171 [pointless to remand for the prosecutor to give a reason 11 years later]; *People v. Allen* (2004) 115 Cal.App.4th 542, 553-554, fn. 10 [remand for new trial, not for the prosecutor to give reasons, because occurred three years ago];

see also *People v. Ayala* (2000) 24 Cal.4th 243, 297, fn. 8 (conc. opn. of George, C.J.); *People v. Robinson* (2003) 110 Cal.App.4th 1196, 1208 [remand for the prosecutor to give the reason but retrial if it could not recall]; *People v. Williams* (2000) 78 Cal.App.4th 1118, 1130 [on remand, the court must first determine if it can adequately address the issue after the delay]; *United States v. Alcantar* (9th Cir. 1990) 897 F.2d 436, 438-439.)

b. Second, this procedure is subject to a prosecutor trying to invent more legitimate reasons after the fact. (See, e.g., *Miller-El v. Dretke* (2005) 545 U.S. 231 [prosecution's reasons after the fact "reeks of afterthought"]; *Miller-El v. Cockrell* (2003) 537 U.S. 331, 343 [reasons given after trial "was subject to the usual risks of imprecision and distortions from the passage of time"]; see also *Johnson v. California* (2005) 545 U.S. 162, quoting *Paulino v. Castro* (9th Cir. 2004) 371 F.3d 1083, 1090 ["it does not matter that the prosecution might have had good reasons . . . [w]hat matters is the real reason they were stricken"].)

3. Step Three Error: When the trial court fails to sustain motion after the prosecutor gives reason, error normally requires new venire. (*People v. Wheeler* (1978) 22 Cal.3d 258, 283; see *Miller-El v. Dretke* (2005) 545 U.S. 162). However, the defendant and the trial court can stipulate to a different remedy. (*People v. Willis* (2002) 27 Cal.4th 811, 821-824 [with consent of movant, can use other remedies such as sanctions, reinstating removed jurors or doing challenges at sidebar]; *People v. Overby* (2004) 124 Cal.App.4th 1237, 1244-1245 [defendant not objecting to judge re-seating the excused juror indicates consent to this remedy]. (See *People v. Mata* (2013) 57 Cal.4th 178) [holding that the trial court may reseat an improperly challenged juror if affected counsel either expressly or implicitly consents]
4. Consequences
    a. If the court grants a *Batson/Wheeler* motion at trial and employs one or more of the remedies discussed, that is arguably a "sanction".
        i. Court must notify the bar of any judicial sanctions against an attorney (Business & Professions Code §6068(a) (3)).

ii. Attorney must self-report any judicial sanction (Business & Professions Code §6068(o) (3)).
iii. However, reporting will likely not be required unless the conduct is egregious.

b. If the trial court erroneously denies a *Batson/Wheeler* motion at trial and the case is reversed.
i. Court must notify bar whenever there is a reversal. (Business & Professions Code §6086.7(b) (2)).
ii. Attorney must notify bar whenever reversal is based in whole or in part upon misconduct of the attorney. (Business & Professions Code §6068(o) (7)).