WHEELER/BATSON DEVELOPMENTS

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THE POLICY

"The use of peremptory challenges to remove prospective jurors on the sole ground of group bias violates the right to trial by a jury drawn from a representative cross-section of the community under article I, section 16 of the California Constitution (*People v. Wheeler* [(1978) 22 Cal.3d 258, 276-277]; as well as the equal protection clause of the Fourteenth Amendment to the United States Constitution. (*Batson v. Kentucky* [(1986) 4776 U.S. 79, 89].)" (*People v. Burgener* (2003) 29 Cal.4th 833, 869.) In *Wheeler,* the California Supreme Court held that the "use by a prosecutor to strike prospective jurors on the basis of group membership violates the right of a criminal defendant to trial by jury drawn from a representative cross-section of the community under article I, section 16 of the California Constitution. Subsequently, in *Batson v. Kentucky* (1986) 476 U.S. 79, 84-89 . . . the United States Supreme Court held that such a practice violates, inter alia, the defendant's right to equal protection of the laws under the Fourteenth Amendment to the United States Constitution . . . . " (*People v. Catlin* (2001) 26 Cal.4th 81, 116, internal quotation marks omitted.)

"Defendants are harmed, of course, when racial discrimination in jury selection compromises the right of trial by impartial jury," but also it harms minorities and "the very integrity of the courts." (*Miller-El v. Dretke* (2005) 545 U.S. __ [125 S.Ct. 2317, 2323-2324].) "[R]acial discrimination in the selection of jurors 'casts doubt on the integrity of the judicial process,' [citation] and places the fairness of a criminal proceeding in doubt. [¶] The jury acts as a vital check against the wrongful exercise of power by the State and its prosecutors. [Citation.] The intrusion of racial discrimination into the jury selection process damages both the fact and the perception of this guarantee. 'Just selection is the primary means by which a court may enforce a defendant's right to be tried by a jury free from ethnic, racial, or political prejudice . . . ' " (*Powers v. Ohio* (1991) 499 U.S. 400, 411.)

THREE STEP PROCESS

"First, the defendant must make out a prima facie case 'by showing that the totality of relevant facts give rise to an inference of discriminatory purpose.' [Citations]. 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. [Citations.] 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.' [Citation.]" (*Johnson v. California* (2005) 545 U.S. __ [125 S.Ct. 2410, 2416].)

The three step analysis is similar to the test to determine if there were employment discrimination. (*Batson v. Kentucky* (1986) 476 U.S. 79, 94, fn. 18, relying on *Texas Dept. of Community Affairs v. Burdine* (1981) 450 U.S. 248; see also *Miller-El v. Cockrell* (2003) 537 U.S. 322, 339.) In civil rights actions, the plaintiff must first establish a prima facie case. (*McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 802-803.) The proof required to establish a prima facie case is " 'minimal and does not even need to rise to the level of preponderance of the evidence.' " (*Chuang v. Univ. of Cal. Davis Bd. of Trustees* (9th Cir. 2000) 225 F.3d 1115, 1124.) To establish a prima facie case: (1) the plaintiff is a member of a protected class; (2) it attempted to receive goods or services from the defendant; and (3) it was denied them because he or she is a member of the protected class. (*Christian v. WalMart Stores, Inc.* (6th Cir. 2001) 252 F.3d 862, 872.) If the plaintiff satisfies the initial burden of establishing a prima facie case of racial discrimination, the burden shifts to the defendant to prove it had a legitimate nondiscriminatory reason for the adverse action. (*McDonnell Douglas, supra,* at p. 802.) If the defendant meets that burden, the plaintiff must prove that such a reason was merely a pretext for intentional discrimination. (*Tex. Dept. of Community Affairs v. Burdine* (1981) 450 U.S. 248, 253.) "This explanation comports with our interpretation of the burden-shifting framework in cases arising under Title VII of the Civil Rights Act of 1964. [Citations.]" (*Johnson v. California* (2005) 545 U.S. __, fn. 7 [125 S.Ct. 2410, 2418, fn. 7].)

The defendant need not be from the same group of the excused potential juror. (*Powers v. Ohio* (1991) 499 U.S. 400, 415; *People v. Wheeler* (1978) 22 Cal.3d 258, 281.) Discrimination against jurors because of race, gender, etc. applies in civil cases (*Edmonson v. Leesvilee Concrete Co., Inc.* (1991) 500 U.S. 614), and it applies to defendant's peremptory challenges (*Georgia v. McCollum* (1992) 505 U.S. 42; *People v. Catlin* (2001) 26 Cal.4th 81, 116.)

STEP ONE: DEFENDANT MAKES A PRIMA FACIE CASE

"If a party believes his opponent is using his peremptory challenges to strike jurors on the ground of group bias alone, he must raise the point in timely fashion and make a prima facie case of such discrimination to the satisfaction of the court. First, . . . 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 ~~strong likelihood~~ that such person are being challenged because of their group association rather than because of any specific bias." (*People v. Wheeler* (1978) 22 Cal.3d 258, 280, fn. omitted, overruled in part in *Johnson v. California* (2005) 545 U.S. __ [125 S.Ct. 2410, 2416].) California's "strong likelihood" standard from *Wheeler* did not meet the requirements of *Batson* which required only a "reasonable inference" of discrimination. (*Johnson v. California* (2005) 545 U.S. __ [125 S.Ct. 2410, 2416].)

(1) Adequate Record

The defendant waives the claim if he or she fails to make a timely objection and a record sufficient for appellant review. (*People v. Wheeler* (1978) 22 Cal.3d 258, 280; *People v. Morris* (2003) 107 Cal.App.4th 402, 408-409.)

(2) Cognizable Group

The dismissed potential juror must be removed because he or she is from a distinctive group. The federal rule is that a cognizable group had to be "a recognizable distinct class, singled out for different treatment under the laws, as written or as applied." (*Castaneda v. Partida* (1977) 430 U.S. 482, 494.) The moving party "must show that . . . the group [is] one the members of which are experiencing unequal, *i.e.*, discriminatory, treatment, and needs protection from community prejudices." (*Murchu v. United States* (1st Cir. 1991) 926 F.2d 50, 54.) California law has described a cognizable group as a group of people who share a common background or share a distinctive viewpoint. (*People v. Fields* (1983) 35 Cal.3d 329, 349.) This might be broader than the federal definition. (See *People v. Young* (2005) 34 Cal.4th 1149, 1236 (conc. opn. of Brown, J.).)

The United States Supreme Court has applied *Batson* only to race and gender. (See *People v. Cash* (2002) 28 Cal.4th 703, 724.) Other courts have considered the following to be a cognizable group:

Racial groups. (*People v. Wheeler* (1978) 22 Cal. 3d 258; *Batson v. Kentucky* (1986) 476 U.S. 79; *People v. Alvarez* (1996) 14 Cal.4th 155 [blacks]; *Ho By Ho v. San Francisco Unified School Dist.* (9th Cir. 1998) 147 F.3d 854 [Chinese].) "In *Wheeler*, we imposed no requirement that the defendant establish that systematic excluded black jurors were of African-American, Caribbean, African or Latin American descent." (*People v. Trevino* (1985) 39 Cal.3d 667, 687, overruled on other grounds in *People v. Johnson* (1989) 47 Cal.3d 1194, 1219; *People v. Gray* (2005) 37 Cal.4th 168, 187, fn. 3.)

Hispanics. (*People v. Ochoa* (2001) 26 Cal.4th 398, 426; *People v. Ramos* (1997) 15 Cal.4th 1133, 1154; *People v. Montiel* (1993) 5 Cal.4th 877, 907-911; *People v. Trevino* (1985) 39 Cal.App.3d 667, 686; but *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1123 [Hispanic surname is not necessarily an Hispanic].)

Gender. (*J.E.B. v. Alabama* (1994) 511 U.S. 127; *Duren v. Maryland* (1979) 439 U.S. 57; *People v. Howard* (1992) 1 Cal.4th 1132; *People v. Williams* (2000) 78 Cal.App.4th 1118 [men]; *People v. Cervantes* (1991) 232 Cal.App.3d 232, 332.)

Gender with racial subgroup. (*People v. Motton* (1985) 39 Cal.3d 596, 605 [black women]; *People v. Garceau* (1993) 6 Cal.4th 140, 171 [Hispanic female]; *People v. Clair*

(1992) 2 Cal.4th 629, 652 [black female], overruled on another point in *People v. Johnson* (1979) 47 Cal.3d 1194, 1219-1221; *People v. Gray* (2001) 87 Cal.App.4th 781, 788 [black male]; but *Cooperwood v. Cambra* (9th Cir. 2001) 245 F.3d 1042, 1046 [black male].)

Religion. (*People v. Wheeler* (1978) 22 Cal. 3d 258; 276; *People v. Johnson* (1989) 47 Cal.3d 1194, 1215 [Jews]; see *Shaare Tilfila Congregation v. Cobb* (1987) 481 U.S. 615, 617 [permitting Jews to state a claim under 42 U.S.C. § 1982]; *St. Francis College v. Al-Khazraji* (1987) 481 U.S. 604 [permitting Arab ancestry as a basis for a claim under 42 U.S.C. § 1981]; but see *People v. Schmeck* (2005) 37 Cal.4th 240, 274 [it is difficult to show bias against religion from the record on appeal]; *United States v. Somerstein* (E.D. N.Y. 1997) 959 F.Supp. 592 [Jews]; *United States v. Stafford* (7th Cir. 1998) 136 F.3d 1109, 1114.) But can exclude Jehovah's Witnesses who will not judge others. (*People v. Cash* (2002) 28 Cal.4th 703, 725; *People v. Martin* (1998) 64 Cal.App.4th 378, 383-384; see also *People v. Allen* (1989) 212 Cal.App.3d 306, 315-316 [pastor's religion would interfere with his ability to deliberate].)

Homosexuals. (*People v. Garcia* (2000) 77 Cal.App.4th 1209.)

The following have been found <u>not</u> to be distinctive groups:

Poor people. (*People v. Carpenter* (1997) 15 Cal.4th 312, 352 [jury pool selection]; *People v. McCoy* (1995) 40 Cal.App.4th 778, 783 [and cases cited therein]; *People v. Henderson* (1990) 225 Cal.App.3d 1129, 1153; *United States v. Pichay* (9th Cir. 1993) 986 F.2d 1239; *United States v. Kleifgen* (9th Cir. 1977) 557 F.2d 1293, 1296.)

Young adults. (*United States v. Fletcher* (9th Cir. 1992) 965 F.2d 781, 782 [college students]; *People v. Ayala* (2000) 24 Cal.4th 243, 277-278; *People v. Ayala* (2000) 23 Cal.4th 225, 257; see *People v. Stansbury* (1993) 4 Cal.4th 1017, 1061.)

People who do not speak English. (*Hernandez v. New York* (1991) 500 U.S. 352.)

People who have been arrested, been victims, or believe in law and order. (*People v. Fields* (1983) 35 Cal.3d 329, 348.)

People with long hair and beard. (*Purkett v. Elem* (1995) 514 U.S. 765, 769 (per curiam).)

(3) Prima Facie Showing of Group Bias

"Group bias is the presumption that jurors are biased merely because they are members of an identifiable group, distinguished on grounds such as race, religion, ethnicity,

or gender." (*People v. Crittenden* (1994) 9 Cal.4th 83, 115, internal quotation marks omitted.) By contrast, acceptable suspected individual or "specific bias" is "a bias relating to the particular case on trial or the parties or witnesses thereto." (*People v. Johnson* (1989) 47 Cal.3d 1194, 1215.)

There is a four-prong test to determine whether there is a prima facie case: "[a] A party may show that his opponent struck most or all of the members of the identified group from the venire. . . . [b] 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. [c] 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. [d] 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. . . . " but 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.) "[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.)

' The California Supreme Court has stated that the United States Supreme Court has not required a comparative analysis in determining whether there is a prima facie case. (*People v. Gray* (2005) 37 Cal.4th 168, 189.) But consider the historical context of *Batson*. Originally, the defendant needed to prove discriminatory purpose in the prosecution's peremptory challenges, and the prosecutor did not need to rebut the allegation at all. (*Swain v. Alabama* (1965) 380 U.S. 202, 223-224.) This standard was considered to be too onerous because it relied on the defendant producing evidence from other cases. (See *Miller-El v. Dretke* (2005) 545 U.S. __ [125 S.Ct. 2317, 2324].) The Court in *Batson* never overruled *Swain*, except to state the three-step process in which a defendant could show invidious discrimination without needing to rely on evidence from outside the trial. (*Id.* at p. 2324.) A defendant may rely on " 'all relevant circumstances' " to raise an inference of purposeful discrimination. (*Id.* at p. 2325, quoting *Batson v. Kentucky* (1986) 476 U.S. 79, 96-97; see also *Johnson v. California* (2005) 545 U.S. __ [125 S.Ct. 2410, 2416-2417 & fn. 5.)

' A prima facie case of discrimination is usually not shown simply because the prosecutor excused one or two potential jurors from a particular group. (*People v. Gray* (2005) 37 Cal.4th 168, 186-192 [removal of two potential jurors when others stayed did not show prima facie case]; *People v. Cornwell* (2005) 37 Cal.4th 50, 69-70 [removing only one of two black potential jurors who spoke of a personal experience with an unfair homicide

investigation showed lack of prima facie case]; *People v. Panah* (2005) 35 Cal.4th 395, 442 [several women removed not a prima facie case]; *People v. Yeoman* (2003) 31 Cal.4th 93, 115 [excused 2 black potential jurors]; *People v. Box* (2000) 23 Cal.4th 1153, 1188-1189; *People v. Davenport* (1995) 11 Cal.4th 1171, 1200; *People v. Turner* (1994) 8 Cal.4th 137, 165; see *People v. Schmeck* (2005) 37 Cal.4th 240, 269-270 [no prima facie case for removing Jewish potential juror when not clear prosecutor remembered the person was Jewish]; but see *Johnson v. California* (2005) 545 U.S. __ [125 S.Ct. 2410, 2419] [removing all three black potential jurors in a trial of a black defendant and a white victim created a prima facie case].)

Examples where there was a prima facie evidence: *Johnson v. California* (2005) 545 U.S. __ [125 S.Ct. 2410, 2419] [removing all three black potential jurors in a trial of a black defendant and a white victim created a prima facie case]; *Miller-El v. Cockrell* (2003) 537 U.S. 322, 342 ["The prosecution used their peremptory strikes to exclude 91% of the eligible African-American venire members"]; *Paulino v. Castro* (9th Cir. 2004) 371 F.3d 1082, 1090-1092 [prima facie case when removed 5 of 6 black potential jurors]; *Fernandez v. Roe* (9th Cir. 2002) 286 F.3d 1073, 1078 [prosecutor used 4 of 19 challenges (21%) to eliminate 4 of 7 (57%) who were 12% of venire]; *Wade v. Terhune* (9th Cir. 2000) 202 F.3d 1190, 1198 [" 'the Constitution forbids striking even a single prospective juror for a discriminatory purpose[,] . . . the fact that the juror was the one [minority] member of the venire does not, in itself, raise an inference of discrimination.' "]; *Turner v. Marshall* (9th Cir. 1995) 63 F.3d 807, 813 [5 of 9 (56%) to eliminate 5 of 9 (56%) blacks who were 30% of venire; need not remove every juror from the class], overruled on other grounds in *Tolbert v. Page* (9th Cir. 1999) 182 F.3d 677 (en banc); *United States v. Vasquez-Lopez* (9th Cir. 1994) 22 F.3d 900, 902 [need not show pattern; one removal could be unconstitutional but must show more than mere removal]; *Monteil v. City of Los Angeles* (9th Cir. 1993) 2 F.3d 335, 348 [need not remove every juror from the class]; *United States v. Chinchilla* (9th Cir. 1989) 874 F.2d 695, 698 [removed all Hispanics who would have been jurors or alternate jurors]; *United States v. Thompson* (9th Cir. 1987) 827 F.2d 1254, 1256-1257 [all four challenges used to remove blacks].

Examples where there was not a prima facie evidence: *People v. Schmeck* (2005) 37 Cal.4th 240, 269-270 [no prima facie case for removing Jewish potential juror when not clear prosecutor remembered the person was Jewish]; *People v. Gray* (2005) 37 Cal.4th 168, 186-192 [removal of two potential jurors when others stayed did not show prima facie case]; *People v. Cornwell* (2005) 37 Cal.4th 50, 69-70 [removing only one of two black potential jurors who spoke of a personal experience with an unfair homicide investigation showed lack of prima facie case]; *People v. Panah* (2005) 35 Cal.4th 395, 442 [several women removed not a prima facie case]; *People v. Yeoman* (2003) 31 Cal.4th 93, 115 [excused 2 black potential jurors]; *People v. Farnam* (2002) 28 Cal.4th 107, 135, 136 [4 of first 5 challenges

against blacks, small minority of panel was black, but defendant was white]; *People v. Box* (2000) 23 Cal.4th 1153, 1188-1189 [3 blacks]; *People v. Davenport* (1995) 11 Cal.4th 1171, 1200 [3 of 6 challenged potential jurors had Hispanic surnames]; *People v. Turner* (1994) 8 Cal.4th 137, 165 [both blacks on the panel]; *People v. Sanders* (1990) 51 Cal.3d 471, 500 [all for with Spanish surnames]; *People v. Gray* (2001) 87 Cal.App.4th 781, 788 [all three blacks on the panel]; *People v. Walker* (1998) 64 Cal.App.4th 1062 [removed only 1 of 2 black potential jurors]; *People v. Buckley* (1997) 53 Cal.App.4th 658 [removed two]; *People v. Wimbley* (1992) 5 Cal.App.4th 773 [removed only Hispanic]; *Boyd v. Newland* (9th Cir. 2004) 393 F.3d 1008, 1013 [removed two blacks]; *Cooperwood v. Cambra* (9th Cir. 2001) 245 F.3d 1042, 1047 [one of two blacks]; *Tolbert v. Gomez* (9th Cir. 1999) 190 F.3d 985, 989 [there must be more than simply removing a minority potential juror].

STEP TWO: THE PROSECUTOR PROVIDES A REASON

"Once the defendant makes a prima facie showing, the burden shifts to the State to come forward with a neutral explanation for challenging black jurors. . . . The prosecutor . . . must articulate a neutral explanation related to the particular case to be tried. (*Batson v. Kentucky* (1986) 476 U.S. 79, 98.) "[T]he prosecutor [may not] rebut the defendant's [prima facie] case merely by denying that he had a discriminatory motive or 'affirm[ing] [his] good faith in making individual selections.' [Citation.] If these general assertions were accepted as rebutting a defendant's prima facie case, the Equal Protection Clause 'would be but a vain an illusory requirement.' [Citations.]" (*Ibid.*)

It does not matter if the court can come up with a reason; the prosecutor is supposed to give his or her actual reason for the removal. "[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." (*Paulino v. Castro* (9th Cir. 2004) 371 F.3d 1082, 1090.)

Unless necessary, prosecutor shall not give the reason ex parte. (*People v. Ayala* (2000) 24 Cal.4th 243, 262-263.)

"If the court finds that a prima facie case has been made, the burden shifts to the other party to show if he can that the peremptory challenges in question were not predicated on group bias alone. The showing need not rise to the level of a challenge for cause. But to sustain his burden of justification, the allegedly offending party must satisfy the court that he exercised such peremptories on grounds that were reasonably relevant to the particular case on trial or its parties or witnesses—i.e., for reasons of specific bias as defined herein. He, too, may support his showing by references to the totality of the circumstances: for example, it will be relevant if he can demonstrate that in the course of the same voir dire he also challenged similarly situated members of the majority group on identical or comparable grounds." (*People v. Wheeler* (1978) 22 Cal.3d 258, 281-282, fn. omitted.)

' Is discrimination based on a cognizable group acceptable if there is also a non-invidious reason for removing the potential juror? (See *Kesser v. Cambra* (9th Cir. 2004, No. 02-15475) formerly at 392 F.3d 327, 337, rehearing en banc granted Oct. 14, 2005.) The United States Supreme Court has permitted the removal of an Hispanic potential juror would listen to a Spanish interpreter. (*Hernandez v. New York* (1991) 500 U.S. 352, 359, 371.) The religious views of the prospective juror, making it difficult for him or her to judge, is acceptable. (*People v. Martin* (1998) 64 Cal.App.4th 378, 381, 384 [Jehovah's Witness who said could fulfill the duty of a juror].) In civil cases, a mixed reason which includes prohibited discrimination is not permissible. (See, e.g., *Arlington Heights v. Metropolitan Housing Development, Corp.* (1977) 429 U.S. 252, 265-266 [Plaintiff is not required "to prove that the challenged action rested solely on racially discriminatory purposes. . . . When there is a proof that a discriminatory purpose has been a motivating factor in the decision, this judicial deference [to the defendant's reasons] is no longer justified."]; *PriceWaterhouse v. Hopkins* (1989) 490 U.S. 228, 241, 258 [unless the defendant would have made the same decision without considering race or gender]; *Desert Palace, Inc. v. Costa* (2003) 539 U.S. 90, 101-102 [same].)

"The second step of this process does not demand an explanation that is persuasive, or even plausible. 'At this [second] step of the inquiry, the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." (*Purkett v. Elem* (1995) 514 U.S. 765, 767-768 (per curiam); *People v. Reynoso* (2003) 31 Cal.4th 903, 916.) "The reasons advanced by the challenging party at step two need not be tactically sound or even plausible; absent a discriminatory intent inherent in the proffered reasons, those reasons will be deemed race neutral." (*People v. Cash* (2002) 28 Cal.4th 703, 724, citing *Purkett v. Elem* (1995) 514 U.S. 765, 768 (per curiam).)

Any non-racial reason for removing a potential juror is sufficient:

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

Mistake. (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1124 [misunderstood the 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].)

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, 1041-1045, 1048-1051 [contacts by family members].)

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

Views on the legal system. (*People v. Ward* (2005) 35 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.)

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].)

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.)

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 [and young and immature].)

Daughter was raped by psychologist in a case concerning psychological testimony. (*People v. Panah* (2005) 35 Cal.4th 395, 442.)

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 [nonpracticing 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.)

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.)

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

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

Hesitance, transient background, and grandmotherly 'persona.' (*Boyde v. Brown* (9th Cir. 2005) 404 U.S. 1159, 1170.)

' Body language can be proper grounds, at least if there is a sufficient record to support the prosecutor's observations. (*People v. Ward* (2005) 35 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]; *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].) The deference federal courts owe to a state court determination on whether the state court properly found the prosecutor's reliance on body language is currently being considered by the United States Supreme Court. (*Collins v. Rice* (9th Cir. 2003) 348 F.3d 1082, 1097, cert. granted sub nom. *Rice v. Collins,* June 28, 2005, No. 04-52.)

Once the prosecutor gives a reason, go to step three. "[E]ven if the State produces

only a frivolous or utterly nonsensical justification for its strike, the case does not end – it merely proceeds to step three. [Citation.] The first two *Batson* steps govern the production of evidence. . . . " In the third step, the defendant has the "burden of proving purposeful discrimination." (*Johnson v. California* (2005) 545 U.S. __ [125 S.Ct. 2410, 2417-2418].) If the prosecution fails to give a reason, this simply supplies additional support for the inference of purposeful discrimination. (See *id.* at p. __, fn. 6 [125 S.Ct. 2410, 2417, fn. 6].)

STEP THREE: THE COURT'S INQUIRY

"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 (per curiam).) "Only at step three is the persuasiveness of the reason relevant. 'At that stage implausible or fantastic justifications may . . . be found to be pretexts for purposeful discrimination.' " (*People v. Cash* (2002) 28 Cal.4th 703, 724.) The defendant must offer a reason why the prosecutor's reasons were pretextual; otherwise, he or she does not rebut the presumption that the prosecutor's facially race-neutral reasons were proper. (*Puckett v. Elem* (1995) 514 U.S. 765, 768 (per curiam); *Boyde v. Brown* (9th Cir. 2005) 404 U.S. 1159, 1172.)

"[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 (per curiam).) "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.) "[A] truly 'reasoned attempt' to evaluate the prosecutor's explanations [citations] requires the court to address the challenged jurors individually to determine whether any one of them has been improperly excluded. In that process, the trial court must determine not only that a valid reason existed but also that the reason actually prompted the prosecutor's exercises of the particular peremptory challenge." (*People v. Fuentes* (1991) 54 Cal.3d 707, 720; *People v. Reynoso* (2003) 31 Cal.4th 903, 929.)

' The scope of the trial court's required inquiry is currently on review: Where the trial court found a prima facie case of *Wheeler/Batson* error with regard to the third African-American potential juror removed by the prosecutor by peremptory challenge (*People v. Wheeler* (1978) 22 Cal.3d 258; *Batson v. Kentucky* (1986) 476 U.S. 79), was the court required to obtain the prosecutor's reasons for removing each of the three African-American

potential jurors or could the court limit its inquiry to the prosecutor's reasons for the third challenge? (*People v. Robinson,* formerly published at (2004)116 Cal.App.4th 1302, review granted June 9, 2004, S123938.)

' What happens if the court is allegedly in collusion with the prosecutor in exercising invidious discrimination: Is petitioner entitled to relief on the claims that (1) the trial judge actively colluded with the prosecutor to secure a conviction and death sentence, and (2) the prosecutor improperly exercised peremptory challenges on the basis of religion at the advice of the trial judge? (*In re Freeman*, OSC issued July 28, 2004, S122590; see *People v. Freeman* (1994) 8 Cal.4th 450.)

The state cannot on appeal justify removal for reasons not given by the prosecutor at the time. (*People v. McGee* (2002) 104 Cal.App.4th 559, 571; *McClain v. Prunty* (9th Cir. 2000) 217 F.3d 1209, 1220.) "[A] prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gave. A *Batson* challenge does not call for a mere exercise in thinking up any rational basis. If the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appellate court, can imagine a reason that might not have been shown up as false." (*Miller-El v. Dretke* (2005) 545 U.S. __ [125 S.Ct. 2317, 2332].)

Federal courts have determined that in order to determine if the prosecutor's reasons were pretextual, a comparative analysis is appropriate. "Some stated reasons are false, and although some false reasons are shown up within the four corners of a given case, sometimes a court may not be sure unless it looks beyond the case at hand. Hence *Batson's* explanation that a defendant may rely on 'all relevant circumstances' to raise an inference of purposeful discrimination." (*Miller-El v. Dretke* (2005) 545 U.S. __ [125 S.Ct. 2317, 2325]; *id.* at pp. 2325-2330 & fn. 2 [though no comparative analysis done in state court, removing black potential jurors because of expression of reservation on the death penalty was pretextual when white jurors saying the same thing remained]; see *Miller-El v. Cockrell* (2003) 537 U.S. 331, 343 [expressly relying on comparative analysis]; *id.* at p. 339 [the credibility of reasons given can be measured by "how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy"]; see *Purkett v. Elem* (1995) 514 U.S. 765, 768 (per curiam) ["if a review of the record undermines the prosecutor's stated reasons, or many of the proffered reasons, the reasons may be deemed a pretext for racial discrimination]; see also *Hernandez v. United States* (1991) 500 U.S. 352, 363 [a prosecutor's motive "may often be inferred from the totality of relevant facts"]; *McClain v. Prunty* (9th Cir. 2000) 217 F.3d 1209, 1221; *Turner v. Marshall* (9th Cir. 1997) 121 F.3d 1248, 1251-1252 ["A comparative analysis of jurors struck and those remaining is a well- established tool for exploring the possibility that facially race-neutral reasons are a pretext for discrimination."]; *United States v. Chinchilla* (9th Cir.

1989) 874 F.2d 695, 699.)

The United States Supreme Court stated the issue is exhausted for federal habeas corpus purposes if the claim is made in the state supreme court, but the federal courts can consider additional evidence and theories. (*Miller-El v. Dretke* (2005) 545 U.S. __ [125 S.Ct. 2317, 2326, fn. 2].) This appears to have impliedly overrule *Boyd v. Newland* (9th Cir. 2004) 393 F.3d 1008 at pages 1013 to 1014 where the Ninth Circuit held that the federal court on habeas review cannot do comparative analysis for the first time.

' California courts had resisted doing a comparative analysis. (See *People v. Johnson* (2003) 30 Cal.4th 1302, 1321, reversed sub nom. *Johnson v. California* (2005) 545 U.S. __ [125 S.Ct. 2410] [although the trial court may do a comparative analysis, the appellate court may not do so for the first time]; cf. *People v. Box* (2000) 23 Cal.4th 1153, 1190 [holding that the Court did not expect the trial judge to do a comparative analysis].) Now California courts recognize that the United States Supreme Court has relied on comparative analysis in review of state convictions, even when the state court had refused to engage in comparative analysis. The state courts now appear to be more willing to do it: "The United States Supreme Court recently held that an appeals court should scrutinize a prosecutor's reason for exercising his or peremptory challenge and determine whether those reasons were applied equally to other jurors, in order to assess the credibility of the prosecution's expressed motivations." (*People v. Gray* (2005) 37 Cal.4th 168, 188-189, relying on *Miller-El v. Dretke* (2005) 545 U.S. __ [125 S.Ct. 2317].)

It may be possible to show pretext when the prosecutor questioned minority potential jurors more closely (*Miller-El v. Dretke* (2005) 545 U.S. __ [125 S.Ct. 2317, 2334, 2336]; see also *Miller-El v. Cockrell* (2003) 537 U.S. 322, 344), there was discriminatory impact (*Id.*, at p. 345), or an historical pattern of discrimination (*Id.*, at p. 346).

A place of residence that is predominantly populated by minorities can be a pretext for removing potential jurors for racial reasons. (*United States v. Bishop* (9th Cir. 1992) 959 F.2d 820, 825-826.)

APPELLATE REVIEW

1. Preparation of the Record

" ' "When a trial court denies a *Wheeler* motion because it finds no prima facie case of group bias was established, the reviewing court considers the entire record of voir dire.' " (*People v. Davenport* (1995) 11 Cal.4th 1171, 1200.)

' What is the court's responsibility in presenting a complete record of the voir dire?

(See *Kesser v. Cambra* (9th Cir. 2004, No. 02-15475) formerly at 392 F.3d 327, 342-343, rehearing en banc granted Oct. 14, 2005; *Leahy v. Farmon* (9th Cir. 2004, No. 01-17467) 115 Fed.Appx. 403, rehearing en banc granted Oct. 14, 2005.) Boyde v. Newland (9th Cir. 2004) 393 F.3d 1008.)

2. Preservation of the Issue

The defendant waives the claim if he or she fails to make a timely objection and a record sufficient for appellant review. (*People v. Wheeler* (1978) 22 Cal.3d 258, 280; *People v. Morris* (2003) 107 Cal.App.4th 402, 408-409.) However, an objection on state ground ("*Wheeler*") preserves the federal *Batson* claim. (*People v. Yeoman* (2003) 31 Cal.4th 93, 117.) A slight delay in making the motion with justification might be sufficient to preserve the issue. (See *People v. Roldan* (2005) 35 Cal.4th 64635, 701-702 [motion was timely when made immediately after defendant exercised a peremptory challenge after the prosecutor made the disputed peremptory challenge and defendant gave a reason for delay].) Nonetheless, the motion must be made before swearing in the alternate jurors. (*People v. McDermott* (2002) 28 Cal.4th 946, 969; *People v. Rodriguez* (1996) 50 Cal.App.4th 1013; *People v. Perez* (1996) 48 Cal.App.4th 1310, 1314.)

There must be a motion to encompass each challenged peremptory challenge. (See *People v. McDermott* (2002) 28 Cal.4th 946, 969-970; *People v. Irvin* (1996) 46 Cal.App.4th 1340, 1351.)

The motion must be on same grounds raised on appeal. (*People v. Cornwell* (2005) 37 Cal.4th 50, 70, fn. 4 [argument on black females waived when objection concerned only blacks]; *People v. Cleveland* (2004) 32 Cal.4th 704, 734 [argument on black females waived when the objection concerned only blacks].)

3. Standard of Review

Review of step one: When the superior court finds a prima facie case was not made, the appellate court considers the entire record of voir dire and affirm if there was substantial evidence. "When the trial court under these circumstances rules that no prima facie case has been made, 'the reviewing court considers the entire record of voir dire. [Citation.] "If the record 'suggests grounds upon which the prosecutor might reasonably have challenged" the jurors in question,' we reject the challenge." (*People v. Welch* (1999) 20 Cal.4th 701, 746, quoting *People v. Davenport* (1995) 11 Cal. 4th 1171, 1200 [even if the court heard the prosecutor's reasons]; accord, *People v. Gray* (2005) 37 Cal.4th 168, 186; *People v. Griffin* (2004) 33 Cal.4th 536, 555 & fn. 5 [overruling prior cases applying the abuse of discretion standard].)

Further, California courts have held that "[w]hen a trial court expressly rules that a prima facie case was not made, but allows the prosecutor to state his or her justifications for the record, the issue of whether a prima facie case was made is not moot. [Citations.] Rather, "when an appellate court is presented with such a record, and concludes that the trial court properly determined that no prima facie case was made, it need not review the adequacy of counsel's justifications for the peremptory challenges.' [Citation.]" (*People v. Box* (2000) 23 Cal.4th 1153, 1188; accord, *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1122-1123.) But most courts hold that "[o]nce a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a prima facie showing becomes moot." (*Hernandez v. New York* (1991) 500 U.S. 352, 359 (plur opn.); see *People v. Boyette* (2002) 29 Cal.4th 381, 468 (dis. opn. of Kennard, J.); see also *People v. Sims* (1993) 5 Cal.4th 405, 453; *People v. Hayes* (1990) 52 Cal.3d 577, 605.) Recently, however, the California Supreme Court has disagreed with the majority view, stating that simply asking the prosecutor for a justification for the challenge does not imply the defendant made a prima facie case. (*Boyette, supra,* at p. 422; *People v. Farnam* (2002) 28 Cal.4th 107, 136; but see *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1122-1123 [the trial court immediately asking the prosecutor for an explanation is conduct implying a finding of a prima facie case].)

Review of step two: "The second *Batson* step answers a legal, not a factual question. The appellate court is required to independently review those comments to determine whether they evinced discriminatory intent." (*Williams v. Rhodes* (9th Cir. 2004) 354 F.3d 1101, 1108, citing *Tolbert v. Page* (9th Cir. 1999) 182 F.3d 677, 680, fn. 5; see also *United States v. Alanis* (9th Cir. 2003) 335 F.3d 965, 967, fn. 1 [whether the court erred in not doing a step three analysis is reviewed independently].)

Review of step three: If the superior court finds a prima facie case, the appellate court need not look at whether there was a prima facie case, and it reviews the record for substantial evidence. (*People v. Ervin* (2000) 22 Cal.4th 48, 74; *People v. Arias* (1996) 13 Cal.4th 92, 135; see *People v. Silva* (2001) 25 Cal.4th 345, 385-386; *People v. Johnson* (1989) 47 Cal.3d 1194, 1216-1217; *People v. Perez* (1994) 29 Cal.App.4th 13113, 1327; *United States v. Bishop* (9th Cir. 1992) 959 F.2d 820, 824.) Whether the trial court made a sincere and reasoned effort to scrutinize the prosecution's reasons is a factual question. (*Miller-El v. Cockrell* (2003) 537 U.S. 332, 339 [clear error]; *Hernandez v. New York* (1991) 500 U.S. 352, 365 [whether prosecutor's reasons were sincere is an issue of fact because "[t]he decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed"]; *Batson v. Kentucky* (1986) 476 U.S. 79, 98, fn. 21 ["Since the trial court's findings in the context under consideration here largely will turn on evaluation of credibility, a reviewing court ordinarily should give those findings great

deference."]; *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1126; *People v. Wheeler* (1978) 22 Cal.3d 258, 282; *People v. Allen* (2004) 115 Cal.App.4th 542, 549.)

The appellate court exercises "great restraint" (*People v. Ervin* (2000) 22 Cal.4th 48, 74.) The appellate court accords "great restraint," however, "only when the trial court has made a sincere and reasoned attempt to evaluate each stated reasons as applied to each challenged juror. [Citations.] When the prosecutor's stated reasons are both inherently plausible and supported by the record, the trial court need not question the prosecution 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 an global finding that the reasons appear sufficient." (*People v. Silva* (2001) 25 Cal.4th 345, 385-386.) "Notwithstanding the deference we give to a trial court's determinations of credibility and sincerity, we can only do so when the court has clearly expressed its findings and rulings and the bases therefore." (*People v. Reynoso* (2003) 31 Cal.4th 903, 923, internal quotation marks omitted [simply saying juror demeanor without a description was insufficient].)

4. Standard of Prejudice

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. __ [125 S.Ct. 2317, 2332].)

5. Remedy

' Error in step one: 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].) 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.) 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. __ [125 S.Ct. 2317, 2328 [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. __ [125 S.Ct. 2410, 2418], 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"].) This issue is currently on review. (See *Johnson v. California* (2005) 545 U.S. __ [125 S.Ct. 2410, 2416], on remand Nov. 16, 2005, S127602; *People v. Ibarra* [nonpub. opn.], review granted June 9, 2004, S124067.)

Error in step three: When the trial court fails to sustain motion after the prosecutor gives reason, error normally requires new trial. (*People v. Wheeler* (1978) 22 Cal.3d 258, 283; see *Miller-El v. Dretke* (2005) 545 U.S. __ [125 S.Ct. 2317, 2332].) However, the defendant in 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, re-instating 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].)