S201413

LIU, J.

In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA , **Plaintiff and Respondent,** **v.** **FRANCIS MATA,** **Defendant and Appellant.**	Case No. B226256

Appellate District Division One, Case No. BA366071
Los Angeles County Superior Court, Case No.
The Honorable Norman J. Shapiro, Judge

PETITION FOR REVIEW

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TO THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

Respondent, the People of the State of California, respectfully petitions this Court to grant review of the above-entitled matter, pursuant to rule 8.500 of the California Rules of Court, following the issuance of a published opinion on February 23, 2012, by the Court of Appeal, Second Appellate District, Division Four. The Court of Appeal reversed a conviction for a trial court's failure to obtain waiver of the right to a new jury venire or consent to the remedy of reseating the dismissed juror following a successful challenge to the use of a peremptory strike under *People v. Wheeler* (1978) 22 Cal.3d 258. A copy of the Court of Appeal's opinion is attached as Appendix A.

Dated: April 4, 2012

Respectfully submitted,

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ISSUE PRESENTED

In *People v. Willis* (2002) 27 Cal.4th 811, this Court established that upon finding discriminatory use of peremptory strikes under *Wheeler*, a trial court may reseat the most recently challenged juror in lieu of dismissing the entire jury venire. This Court stressed, however, that the remedy of reseating the juror is available only with the consent or waiver of the complaining party.

The issue presented is:

After a trial court grants a *Wheeler* motion, does the complaining party's failure to object to reseating the juror indicate implied consent to that alternative remedy?

STATEMENT OF THE CASE

On December 21, 2009, police officers saw appellant holding cocaine base on the street next to a companion who was loading a pipe with cocaine base. (4RT 1544.) Appellant was arrested and brought to a police station where he attacked two officers while handcuffed. (4RT 1580, 1593, 1850, 1852-1853, 1860, 1884-1885.) As a result, he was convicted of possession of cocaine base (Health & Saf. Code, § 11350, subd. (a)), and two counts of resisting arrest (Pen. Code, § 148, subd. (a)(1)). (6RT 2718-2720.)

During jury selection at his trial, appellant challenged the prosecutor's use of a peremptory strike against a Black female juror under *Wheeler*. Counsel asked for a sidebar conference "after she leaves," but the court

asked the juror to remain seated until after the conference. (3RT 943-944.) Counsel was unsure if appellant was of Native American or Mexican descent, but argued that there was no race-neutral reason to excuse the challenged juror and that she was the second Black person to be struck by the prosecutor. (3RT 943-946.) The prosecutor said that he used the peremptory strike because the juror was not focused on the proceedings and he wanted someone who would be more engaged. The court admitted that it had not been paying attention, but concluded that it had not otherwise noticed the juror's inattentiveness, and would therefore not allow the prosecutor to use the peremptory strike against her. (3RT 946.) The court stated, "I'd order that the juror remain seated," and jury selection continued. Appellant made no comment on the trial court's remedial procedure and continued to participate in jury selection. (3RT 946-948.)

On appeal, appellant argued that the trial court improperly reseated the juror without obtaining his consent or waiver. On February 26, 2012, the Court of Appeal issued a published opinion agreeing with appellant's argument and reversing the conviction. (Appen. A at pp. 2, 8.)

REASONS FOR GRANTING REVIEW

THIS CASE PRESENTS THE IMPORTANT QUESTION OF WHETHER THE FAILURE TO OBJECT TO THE REMEDY OF RESEATING A JUROR AFTER A *WHEELER* VIOLATION CONSTITUTES "CONSENT"

In *Willis*, this Court extolled the virtues in permitting discretionary alternatives to outright dismissal of the venire for *Wheeler* violations as long as the objecting party assents by either "waiver or consent." (See *People v. Willis*, *supra*, 27 Cal.4th at p. 821.) However, the *Willis* opinion did not decide whether failing to object to a trial court's decision to reseat the challenged juror would suffice to imply consent. This case presents the opportunity to resolve that open question and give needed guidance to courts and parties.

In 1976, this Court determined that a right to a jury drawn from a representative cross-section of the community under the California Constitution is violated by the use of peremptory challenges based on group bias. (*People v. Wheeler*, *supra*, 22 Cal.3d at pp. 276-277.) As a remedy for such a violation, *Wheeler* held that a trial court "must dismiss the jurors thus far selected. So too it must quash any remaining venire . . . . Upon such a dismissal a different venire shall be drawn and the jury selection process may begin anew." (*Id.* at pp. 280-282.) Eight years later, the United States Supreme Court found a similar right under the United States Constitution in *Batson v. Kentucky* (1986) 476 U.S. 79 [106 S.Ct. 1712, 90

L.Ed.2d 69]. However, *Batson* did not propose a remedy and instead left to the state courts "how best to implement our holding," including "whether it is more appropriate in a particular case . . . for the trial court to discharge the venire and select a new jury from a panel not previously associated with the case, or to disallow the discriminatory challenges and resume selection with the improperly challenged jurors reinstated on the venire." (*Id.* at p. 99, fn. 24, citations omitted.)

Following *Batson*, this Court rethought our state remedy for the use of group bias in peremptory challenges. This Court in *Willis* found that "the benefits of discretionary alternatives to mistrial and dismissal of the remaining jury venire outweigh any possible drawbacks." (*People v. Willis, supra,* 27 Cal.4th at p. 821.) This Court specifically authorized the alternative procedure of reseating the improperly challenged juror with the "waiver or consent" of the objecting party. (*Id.* at pp. 821, 823.) Given this direction, it became incumbent upon the appellate courts to decide, when this alternative occured, what constituted waiver or consent.

Requiring an explicit waiver is generally limited to fundamental constitutional rights. (See *People v. Haskett* (1982) 30 Cal.3d 841, 858.) Although the right to an impartial jury drawn from a representative cross-section may be a fundamental constitutional right (see *People v. Wheeler*, *supra*, 22 Cal.3d at p. 285), an objecting party does not waive that right by consenting to the reseating of a challenged juror. Instead, the objecting

party merely consents to a remedy for the already-recognized violation of the right. At bottom, the right to dismissal of the venire is not fundamental under the federal Constitution, and, if it ever was under the California Constitution, it no longer is after *Willis*. (See *Batson v. Kentucky*, *supra*, 476 U.S. at p. 99, fn. 24; *People v. Willis*, *supra*, 27 Cal.4th at pp. 821, 823.)

The usual rule is that, absent the implication of a fundamental constitutional right, consent is implied from the party's failure to object and continuing to participate in the potentially objectionable proceeding. This rule is illustrated by *In re Horton* (1991) 54 Cal.3d 82, which dealt with the California constitutional right to be criminally tried by a superior court judge. There, a temporary commissioner tried a capital case and the defendant appealed, claiming that he had never consented to the commissioner because he had never expressly stipulated to the proceedings or waived his constitutional right to be tried by a superior court judge. (*Id.* at pp. 86, 90.) But this Court determined that because the California Constitution allows the parties to consent to a temporary judge, that consent may be implied. (*Id.* at p. 90, citing Cal. Const. art. VI, § 21.) This Court noted that it had "ratified a line of cases recognizing that a valid stipulation for purposes of the constitutional provision may arise as a result of the *conduct* of the parties." (*Horton*, at p. 91, italics in original.) The Court reasoned that the defendant consented in *Horton* because he "was

represented by an attorney who noted his appearance on the record; he voiced no objection to the matter being heard by the commissioner, and he participated fully in the hearing which ensued." (*Id.* at pp. 91-92.) The *Horton* Court also differentiated waiver of a fundamental right from waiver of a "palpably less fundamental right." (*Id.* at p. 93.) "Our refusal to equate the right at stake with the personal rights [implicated in a guilty plea] suggests that no personal waiver is constitutionally required." (*Id.* at p. 94; see *People v. Mayfield* (1997) 14 Cal.4th 668, 811 [extending *Horton* to a case where the defendant objected to a first commissioner on the basis that he was a commissioner, but failed to do so a second time when the case was later transferred, and found implied consent]; *In re Brittany K.* (2002) 96 Cal.App.4th 805, 813 [failure to object when commissioner was announced at juvenile hearing setting waived right to later refuse to consent to his jurisdiction at start of actual hearing].)

Similarly, in other analogous contexts, this Court has found implied consent from failing to object. (See, e.g., *Barsamyan v. Superior Court* (2008) 44 Cal.4th 960, 969-970 [waiver of statutory speedy trial rights may be inferred from silence]; *People v. Toro* (1989) 47 Cal.3d 966, 976-977 [failure to object to instructions and verdict form recognizing uncharged lesser related offense implied consent to consideration of the offense]; see also *People v. Torrez* (1987) 195 Cal.App.3d 751, 755 [failure to object to

absence of a filed information before pleading guilty implied consent to treat complaint as information].)

Here, appellant failed to object to a procedure implemented by the trial court to remedy the recognized violation of his constitutional right to a jury drawn from a representative cross-section of the community. Because his right to a have the venire dismissed as a remedy is not in itself a fundamental right under either *Batson* (federal Constitution) or *Willis* (California Constitution), and because *Willis* explicitly stated that consent to the remedy could be obtained either through "waiver *or* consent," a rule that consent can be implied by failing to object and continuing to participate in jury selection is reasonable and in keeping with California case law. (See *Batson v. Kentucky*, *supra*, 476 U.S. at p. 99, fn. 24; *People v. Willis*, *supra*, 27 Cal.4th at pp. 821, 823, italics added; see *In re Horton*, *supra*, 54 Cal.3d at p. 91.) On the other hand, a rule allowing a defendant to complain for the first time on appeal without having objected to this alternative remedy "would deprive the People [and the trial court] of the opportunity to cure the defect at trial and would permit the defendant to gamble on an acquittal at his trial secure in the knowledge that a conviction would be reversed on appeal." (*People v. Rogers* (1978) 21 Cal.3d 542, 548, internal quotation marks omitted.)

Additionally, the alternative remedy of reseating the challenged juror is often a more favorable one for the complaining party than dismissing the

entire jury venire because it forces its adversary to accept the very juror that it wished to exclude. Indeed, in this case, appellant apparently preferred this remedy to dismissal when, during a later *Wheeler* motion regarding a different juror (which was denied), defense counsel asked the juror to remain seated. (3RT 965.) And the "usual" remedy of dismissal affords jurors no greater protection of their *Wheeler/Batson* rights than the remedy of reseating; as this Court has found, "to the extent the court has retained control over improperly discharged jurors and can reseat them, their rights are indeed vindicated. And if some improperly dismissed jurors are no longer available to serve, dismissing the remaining jurors and calling a mistrial does little to vindicate the rights of those excluded." (*People v. Willis, supra,* 27 Cal.4th at p. 823.)

If the Court of Appeal's opinion stands, it will create a morass in the law of implied consent. The only other published case on this issue involved a fairly explicit statement by defense counsel that the defendant agreed to the trial court's juror reseating remedy. (*People v. Overby* (2004) 124 Cal.App.4th 1237, 1244-1245 [finding implied consent where defense counsel responded "submit" after the trial court announced that it would reseat the dismissed juror and then inquired whether defense counsel wished to be heard].) The Court of Appeal in this case, however, listed at least seven possible factors that might influence whether consent could be

implied. (Appen. A at pp. 6-7.)[1] Under these circumstances, courts should not be bound by the Court of Appeal's murky interpretation of *Willis*'s requirements.

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[1] The Court of Appeal listed the following possible factors:

> In contrast with *Willis*, here neither [1] the court nor [2] defendant suggested that dismissing the venire would reward the prosecutor for an improper peremptory challenge . . . . Unlike *Overby*, [3] defendant had not asked [the challenged juror] to remain while he made the *Wheeler* motion. Indeed, [4] defendant expressly asked to address the court at sidebar after the prospective juror left. Also in contrast to *Overby*, [5] [the challenged juror] was not the first African-American juror the prosecutor had challenged [and] [6] the trial court did not ask counsel if they wished to comment on the court's chosen remedy . . . . [7] Defendant also did not have a second opportunity to express dissatisfaction with the court's alternate remedy, as *Overby* did in the context of the prosecutor's motion for reconsideration . . . .

(Appen. A at p. 7, list numbers added.)

CONCLUSION

This Court should grant the petition for review.

Dated: April 4, 2012

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached PETITION FOR REVIEW uses a 13 point Times New Roman font and contains 2,114 words.

Dated: April 4, 2012

KAMALA D. HARRIS
Attorney General of California

DAVID ZARMI
Deputy Attorney General
Attorneys for Respondent

APPENDIX A

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. FRANCIS MATA, Defendant and Appellant.	B226256 (Los Angeles County Super. Ct. No. BA366071)

APPEAL from a judgment of the Superior Court of Los Angeles County. Norman J. Shapiro, Judge. Reversed.

Elizabeth Garfinkle, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Susan Sullivan Pithey, Supervising Deputy Attorney General, Mary Sanchez and David Zarmi, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Francis Mata appeals from the judgment entered following a jury trial in which he was convicted of possession of cocaine base and two misdemeanor counts of resisting an officer. Defendant contends the trial court erred by reseating a prospective juror improperly challenged by the prosecution instead of discharging the venire after it granted his motion under *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*). We agree because defendant neither waived nor consented to the juror's reseating. Accordingly, we reverse.

BACKGROUND

On the afternoon of December 21, 2009, Los Angeles Police Department narcotics officers conducted surveillance on San Julian Street between 6th and 7th Streets in downtown Los Angeles. Detective James Miller saw defendant walking on the sidewalk with Earl Early, who held cash in his hand. Early and defendant stopped next to Anthony Coleman. Miller testified he saw Coleman spit a plastic-wrapped item into his hand, remove a small white object from it, hand the object to Early, and take Early's cash. Coleman walked away, and Early and defendant crouched near a fence. At Miller's direction, other officers detained the three men. Coleman, who was tried with defendant, had $5 and six small rocks that together weighed 0.52 grams and contained cocaine base. Defendant had one rock that weighed 0.02 grams and contained cocaine base. Early threw down a glass smoking pipe and one rock that weighed 0.02 grams and contained cocaine base.

At the police station, defendant expressed anger and refused to walk when two officers attempted to escort him to another area. He leaped up and backward, and his body struck one of the officers in the face. He continued to move after the officers tackled him and told them to release his handcuffs so he could fight them with his good hand.

Coleman testified that he purchased the rocks of cocaine base on the afternoon of his arrest for personal use. He was a long-time, heavy user of cocaine base and intended to smoke all of the rocks he had in rapid succession. He did not provide Early or

defendant with any cocaine base or take money from Early, but merely lent Early his smoking pipe. Coleman saw police officers knee defendant in the back and drag him at least 20 feet to the middle of the street. An officer threatened to do the same to Coleman if he did not turn and face the other way.

The jury convicted defendant of possession of cocaine base and two misdemeanor counts of resisting an officer (Pen. Code, § 148, subd. (a)(1)). The court sentenced him to two years in prison.

DISCUSSION

On the fourth day of jury selection, the prosecutor exercised his 11th peremptory challenge against Prospective Juror No. 2473. Counsel for defendant stated, "I ask for a side bar after she leaves." The court directed the prospective juror to remain in her seat, then conducted a conference with counsel outside the presence of the jury. Counsel for defendant explained that he was making a *Wheeler* motion, stating that Prospective Juror No. 2473 was "the second African-American within the last few challenges" by the prosecutor. The court noted that the prospective juror's responses were "very neutral," and asked the prosecutor for his "thoughts." The prosecutor said he had been watching the prospective juror and "didn't find her to be as engaging [*sic*]. I found her to be extremely quiet. . . . I just felt that at times she was just kind of quiet and tuned out. And I wanted somebody who is a little bit more, to me, appear [*sic*] to be a little bit engaging." The court found there was no "justification" for challenging the prospective juror and stated, "I am going to disallow your challenge at this time. And I'd order that the juror remain seated." The court told the prosecutor he could exercise a peremptory challenge against a different prospective juror, "[a]nd we will continue the process." Counsel for defendant said nothing about the court's remedy, and voir dire continued, with Prospective Juror No. 2473 seated.

A little later, the prosecutor exercised a peremptory challenge against another African-American, Prospective Juror No. 207, who had stated she disliked police because she had been a victim of racial profiling and police mistreatment. Counsel for defendant

stated, "Your honor, I'd ask that she remain while we have a side bar." The court asked Prospective Juror No. 207 to remain seated and conducted a conference with counsel outside the presence of the jury. Counsel for defendant made a *Wheeler* motion that the court denied.

Defendant contends that the trial court erred by reseating Prospective Juror No. 2473 instead of dismissing the venire because defendant did not waive or consent to the juror's reseating.

In *Wheeler*, *supra*, 22 Cal.3d at page 282, the California Supreme Court held that if a trial court concludes that one party has impermissibly exercised peremptory challenges on the basis of group bias, the court "must dismiss the jurors thus far selected" and "quash any remaining venire."

In *People v. Willis* (2002) 27 Cal.4th 811 (*Willis*), the Supreme Court noted "the need for the availability of some discretionary remedy short of dismissal of the remaining jury venire" and that the remedy prescribed by *Wheeler* is not compelled by the federal Constitution. (*Willis*, at p. 818.) The court concluded, "We think the benefits of discretionary alternatives to mistrial and dismissal of the remaining jury venire outweigh any possible drawbacks. As the present case demonstrates, situations can arise in which the remedy of mistrial and dismissal of the venire accomplish nothing more than to reward improper voir dire challenges and postpone trial. Under such circumstances, and with the assent of the complaining party, the trial court should have the discretion to issue appropriate orders short of outright dismissal of the remaining jury, including assessment of sanctions against counsel whose challenges exhibit group bias and reseating any improperly discharged jurors if they are available to serve. In the event improperly challenged jurors have been discharged, some cases have suggested that the court might allow the innocent party additional peremptory challenges." (*Id.* at p. 821.) "We stress that such waiver or consent is a prerequisite to the use of such alternative remedies or sanctions, for *Wheeler* made clear that 'the complaining party is entitled to a random draw from an entire venire' and that dismissal of the remaining venire is the appropriate

remedy for a violation of that right. [Citation.] Thus, trial courts lack discretion to impose alternative procedures in the absence of consent or waiver by the complaining party. On the other hand, if the complaining party does effectively waive its right to mistrial, preferring to take its chances with the remaining venire, ordinarily the court should honor that waiver rather than dismiss the venire and subject the parties to additional delay." (*Willis*, at pp. 823–824.)

In *Willis*, defense counsel unsuccessfully moved to dismiss the venire as underrepresentative of African-Americans, then used seven of eleven peremptory challenges to remove White men from the jury. (*Willis*, *supra*, 27 Cal.4th at pp. 814–815.) The prosecutor made a *Wheeler* motion, and the trial court found systematic exclusion of a protected class. The court asked the prosecutor, "'So now what do you want me to do about it?'" The prosecutor replied, "'[A]t this point obviously the remedy of excusing a panel would only . . . serve to his benefit because that is what he is seeking to do. At this point I would ask for the court to admonish him to not continue that kind of behavior. And if he does, sanction him if he does so.'" (*Id.* at p. 815.) "Defendant moved for a mistrial, asserting he should not be left with the remaining members of the original venire, and claiming that the process was depriving him of a fair trial. The court denied the motion, stating for the record its 'suspicion' that counsel was committing *Wheeler* error in the hope the court would dismiss the venire, and admonishing counsel that such a tactic would be illegal, immoral and improper. Jury selection resumed. The court did not excuse the venire or reseat any of the improperly excused jurors. [¶] Later, the prosecutor made a second *Wheeler* motion based on defendant's using eight of his next nine peremptories to strike White males. After demanding explanations, the court again found defendant had violated *Wheeler*. The court sanctioned defense counsel with $1,500 in monetary sanctions . . . . Defendant's renewed motion for mistrial was denied. Again, the court did not reseat any improperly challenged jurors or quash the venire and begin jury selection again with a new venire." (*Willis*, at p. 816.) The Supreme Court

rejected Willis's claim on appeal that the trial court erred by not dismissing the venire. (*Id.* at p. 814.)

In *People v. Overby* (2004) 124 Cal.App.4th 1237 (*Overby*), the first time the prosecutor exercised a peremptory challenge against an African-American juror, counsel for Overby asked the court to order the juror to remain in the courtroom, then made her *Wheeler* motion. The trial court granted the motion and said, "'I'm going to elect the remedy to reseat Number 9 rather than the remedy to kick the entire panel.' The court then asked counsel if they wished to be heard 'as to the court's decision.' Both defense counsel said, 'Submit,' and the prosecutor objected. The challenged juror was reseated and voir dire resumed." (*Overby*, at pp. 1242–1243.) The prosecutor made an unsuccessful *Wheeler* motion and later sought reconsideration of the rulings on both the defense and prosecution motions and asked the court to dismiss the venire. "At no time during the reconsideration arguments did Overby's counsel state that she agreed that the venire should be dismissed, nor did she indicate any dissatisfaction with the remedy chosen by the court." (*Overby*, at p. 1243.)

The Court of Appeal in *Overby* held that the consent required by *Willis* could be given by counsel, rather than defendant himself (*Overby*, *supra*, 124 Cal.App.4th at p. 1243), and concluded that defense counsel implicitly consented to the court's remedy by asking the court to prevent the challenged juror from leaving and responding "'Submit'" when the court asked counsel if counsel wished to comment on the court's chosen remedy (*Overby*, at p. 1244). The court further commented that its conclusion was "reinforced by the fact that [counsel for Overby] did not alter her position or indicate dissatisfaction with the reseating remedy even after having time and opportunity to consider it further," such as when the prosecutor sought reconsideration of the court's rulings on the *Wheeler* motions and asked the court to dismiss the venire. (*Overby*, at p. 1245.)

Nothing in the record in the present case indicates that the standard *Wheeler* remedy of mistrial and dismissal of the venire was likely to "accomplish nothing more

than to reward improper voir dire challenges and postpone trial." (*Willis*, *supra*, 27 Cal.4th at p. 821.) In contrast with *Willis*, here neither the court nor defendant suggested that dismissing the venire would reward the prosecutor for an improper peremptory challenge. Unlike *Willis*, the court did not ask the aggrieved party (defendant) to suggest or select a remedy, and the aggrieved party (defendant) did not suggest reseating the juror. Unlike *Overby*, defendant had not asked Prospective Juror No. 2473 to remain while he made the *Wheeler* motion. Indeed, defendant expressly asked to address the court at sidebar after the prospective juror left. Also in contrast to *Overby*, Prospective Juror No. 2473 was not the first African-American juror the prosecutor had challenged, the trial court did not ask counsel if they wished to comment on the court's chosen remedy, and defendant neither said that he submitted to the court's chosen remedy nor otherwise expressly or implicitly consented to the remedy. Defendant also did not have a second opportunity to express dissatisfaction with the court's alternate remedy, as Overby did in the context of the prosecutor's motion for reconsideration and request that the court dismiss the venire.

The Attorney General argues that defendant's consent to the alternate remedy is shown by his request that Prospective Juror No. 207 remain seated while the court addressed his second *Wheeler* motion. This request may have reflected nothing more than a recognition of, and decision to comply with, the earlier procedure that the trial court followed pending its ruling upon a *Wheeler* motion. Asking that the prospective juror remain pending resolution of the motion in no way indicates consent to reseating the juror as a remedy if the court grants the motion, which it did not. We might find consent if, as in *Overby*, Prospective Juror No. 2473 had been the first African-American prospective juror challenged by the prosecutor, defendant had asked that the prospective juror remain, the trial court had granted defendant's motion and said it would reseat the prospective juror and asked counsel if they wished to be heard, defendant had then submitted to the court's proposed remedy, and later when the prosecutor asked that the venire be dismissed, defendant did not join. But the trial court denied the second *Wheeler* motion.

Thus, as no remedy was provided, defendant did not consent or submit to a remedy, and there is an insufficient basis to infer any consent by defendant.

Thus, the trial court here did not obtain defendant's waiver or consent, as required by *Willis* and obtained by the trial courts in *Willis* and *Overby*. Because such waiver or consent "is a prerequisite to the use of such alternative remedies or sanctions" (*Willis*, *supra*, 27 Cal.4th at p. 823), the trial court improperly utilized the remedy of reseating Prospective Juror No. 2473. Defendant was entitled to commence jury selection with a new venire untainted by the prosecutor's impermissible use of peremptory challenges on the basis of race.

Given our disposition, we need not address the Attorney General's request to modify the judgment to include a variety of mandatory fees and penalty assessments that the trial court might have failed to impose.

DISPOSITION

The judgment is reversed.

CERTIFIED FOR PUBLICATION.

MALLANO, P. J.

We concur:

CHANEY, J.

JOHNSON, J.

AMENDED DECLARATION OF SERVICE

Case Name: ***The People of the State of California v. Francis Mata***

Case No.: **B226256**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On April 4, 2012, I served the attached **PETITION FOR REVIEW WITH APPENDIX A ATTACHED** by placing a true copy thereof enclosed in a sealed envelope in the internal mail system of the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

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For Hon. Norm Shapiro, Judge

Court of Appeal of the State of California
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On April 4, 2012 I caused the original and thirteen (13) copies of the **PETITION FOR REVIEW WITH APPENDIX A ATTACHED** in this case to be delivered to the California Supreme Court at 350 McAllister Street, First Floor, San Francisco, California 94102-4797 via overnight mail.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on April 4, 2012, at Los Angeles, California.

J.R. Familo
Declarant

Signature

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