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. S201413

Court of Appeal, Second Appellate District, Division One No. B226256
Los Angeles County Superior Court No. BA366071
The Honorable Norman J. Shapiro, Judge

RESPONDENT'S OPENING BRIEF ON THE MERITS

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ISSUES PRESENTED

1. After appellant's successful motion under *Batson v. Kentucky* (1986) 476 U.S. 79 [106 S.Ct. 1712, 90 L.Ed.2d 69] and *People v. Wheeler* (1978) 22 Cal.3d 258, did his failure to object to reseating the juror indicate implied consent to this alternative remedy in lieu of dismissing the entire jury venire?

2. If the trial court in this case erred in reseating the prospective juror because defense counsel did not consent, was the error reversible per se or subject to harmless error analysis?

INTRODUCTION

At jury selection at appellant's trial, his counsel made a motion under *Batson v. Kentucky* (1986) 476 U.S. 79 [106 S.Ct. 1712, 90 L.Ed.2d 69] (*Batson*) and *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*), alleging the prosecutor had exercised a peremptory challenge for a discriminatory purpose against an African-American prospective juror. The court granted the motion and reseated the prospective juror. Counsel did not object or request a new venire. Later, after the prosecutor exercised a peremptory challenge against another African-American prospective juror, defense counsel asked the juror to remain seated while he made a *Batson/Wheeler* motion at sidebar. The trial court characterized appellant's motion as a request to reseat the prospective juror, and it denied the motion. On appeal, the Court of Appeal found the trial court improperly reseated the prospective juror after the successful *Batson/Wheeler* motion without first obtaining defense counsel's waiver of a new venire and consent to the alternative remedy. The Court of Appeal reversed appellant's conviction without further discussion, implicitly finding the error to be reversible per se.

STATEMENT OF THE CASE

Appellant was convicted of possession of cocaine base (Health & Saf. Code, § 11350, subd. (a)) and two misdemeanor counts of resisting an officer (Pen. Code, § 148, subd. (a)(1)). During voir dire at appellant's trial, the prosecutor exercised a peremptory challenge against Prospective Juror 2473, who was sitting in seat 12 at the time. Appellant's trial counsel stated, "I ask for a side bar after she leaves." The court asked the prospective juror to remain seated. (3RT 943.) At sidebar, counsel made a *Batson/Wheeler* motion on the ground that the prospective juror was excused because she was African-American. Counsel argued that because neither party had questioned the prospective juror, the prosecutor had no other reason to excuse her. (3RT 943-944.) Counsel also indicated that Prospective Juror 2473 was the second African-American within the last few challenges against whom the prosecutor had used a peremptory challenge. (3RT 945.) The court asked about appellant's race. After some confusion, counsel indicated that appellant was "Mexican." (3RT 945-946.)

The court asked the prosecutor for his "thoughts" on the prospective juror. The prosecutor indicated that the prospective juror was "extremely quiet," "tuned out," and did not appear to be engaged in the proceedings. The court indicated that it had not been paying attention to the prospective juror during questioning, but it did not find that the prosecutor had a "justification" for excusing the prospective juror. The court ruled, "So I am going to disallow your challenge at this time. And I'd order that the juror remain seated." (3RT 946.) The court instructed the prosecutor that he would be permitted to use his peremptory challenge against another prospective juror. The court concluded, "And we will continue the process." (3RT 947.) Appellant's counsel did not object to the court's ruling. (3RT 946-947.)

Still at sidebar, the prosecutor noted that Prospective Juror 0207, who was in seat 16, was "coming up." (3RT 947.) Prospective Juror 0207 was an African-American woman who had indicated during voir dire that she had had negative experiences with police due to her race. (3RT 905-906, 925-926, 929.) Appellant's trial counsel stated, "We can talk about that, if you challenge her." When the prosecutor attempted to discuss the matter further, appellant's trial counsel cut him off and told the prosecutor, "Think about it." The court and clerk then discussed the order that prospective jurors had been moved from seat to seat, and neither the prosecutor nor appellant's trial counsel further addressed the reseating of Prospective Juror 2473. (3RT 947.)

Thereafter, the court addressed the jury about the order of seating, and noted that it believed Prospective Juror 0207 "in all likelihood, may be made part of the jury." The court instructed Prospective Juror 2473 to remain in seat 12. Appellant's trial counsel did not object, and jury selection resumed. (3RT 948.)

Later in voir dire, after appellant and the prosecutor had exercised other peremptory challenges, the prosecutor used a peremptory challenge to excuse Prospective Juror 0207, who was at that time in seat 8. Appellant's trial counsel stated, "Your Honor, I'd ask that she remain while we have a side bar." The court instructed the prospective juror to remain seated. (3RT 965.) At sidebar, appellant's trial counsel made another *Batson/Wheeler* motion. (3RT 966.) Noting that the prospective juror "did talk about some issues," the court asked the prosecutor to give his reasons for excusing the prospective juror, although the court specified that the defense had not made a prima facie case of purposeful discrimination. (3RT 966-967.) The prosecutor explained that he excused the prospective juror because she had expressed her opinion that the standard of beyond a reasonable doubt required 100 percent certainty, and because she had

nodded her head in agreement with another prospective juror when that juror said street drugs should be legalized. (3RT 967.) Appellant's trial counsel argued that the prosecutor's reasons were pretextual. (3RT 967-969.) The court disagreed and found that the prosecutor had properly exercised a peremptory challenge against the prospective juror. (3RT 968-970.) Counsel complained that the prosecutor had excused another African-American juror. (3RT 968, 970.)[1] The court reminded counsel that it had granted his *Batson/Wheeler* motion as to one African-American juror and that counsel had not made any other *Batson/Wheeler* motions. (3RT 970.) The court reiterated its finding that the prosecutor had a race-neutral justification for exercising a peremptory challenge against Prospective Juror 0207. (3RT 970-972.) Specifically, the court ruled, "Your request to have this juror remain seated is denied. The challenge is accepted." Counsel did not object to the court's characterization of his *Batson/Wheeler* motion as a motion "to have this juror remain seated." (3RT 972.)

Although he had peremptory challenges remaining when the court reseated Prospective Juror 2473 (see 3RT 948), appellant's trial counsel did not use any such challenges to excuse that juror. Prospective Juror 2473 thus sat as a juror during appellant's trial. (See 3RT 999, 1201.)

On appeal, appellant claimed that the trial court erred by failing to obtain his consent to the alternative *Batson/Wheeler* remedy of reseating Prospective Juror 2473 instead of declaring a mistrial and ordering a new venire. The People argued that appellant implicitly consented to the

[1] Counsel indicated that "Juror Number Seven" was the other African-American the prosecutor had excused. (3RT 968.) It appears counsel was referring to Prospective Juror 2841, against whom the prosecutor used a peremptory challenge before challenging Prospective Juror 2473. (3RT 942.)

alternative remedy when his counsel failed to object to the remedy, and that counsel otherwise demonstrated by his conduct that he consented to the alternative procedure. The Court of Appeal agreed with appellant and reversed his judgment of conviction without a harmless error analysis. (Opn. at p. 8.) Specifically, the Court of Appeal found that there was no reason to use an alternative *Batson/Wheeler* remedy in this case because there was nothing to suggest that using the "standard" remedy of mistrial and dismissal of the venire was likely to reward the offending party. (Opn. at pp. 6-7.) The Court of Appeal further held that appellant's consent to the alternative remedy could not be inferred from his trial counsel's conduct because, inter alia: the court did not ask appellant to suggest or select a remedy, and appellant did not suggest reseating the juror; appellant did not ask the prospective juror to remain seated while he made the *Batson/Wheeler* motion at sidebar; the court did not ask the parties if they wished to comment on the chosen alternative remedy; counsel did not have a second opportunity to express dissatisfaction with the chosen remedy because the prosecutor did not move for reconsideration of the *Batson/Wheeler* motion; counsel's request for Prospective Juror 0207 to remain seated while counsel made another *Batson/Wheeler* motion at sidebar reflected only counsel's "recognition of, and decision to comply with, the earlier procedure"; and counsel did not explicitly "submit" to the court's chosen remedy. (Opn. at pp. 7-8.)

SUMMARY OF ARGUMENT

The Court of Appeal erred by reversing appellant's conviction on the ground that the trial court did not obtain his counsel's consent to the alternative *Batson/Wheeler* remedy of reseating Prospective Juror 2473. First, the Court of Appeal inappropriately limited this Court's prior holding that alternative *Batson/Wheeler* remedies are available by finding that such remedies are only available in circumstances where the offending party will

be rewarded by the "usual" remedy of a mistrial and dismissal of the venire. Not only did this Court fail to limit its holding to such situations, but some of its stated purposes for allowing alternative remedies—to assist in the expeditious processing of cases for trial, and to deter parties in future cases from purposefully engaging in racial discrimination in order to obtain a new venire—would not be served if the holding were so limited. Thus, alternative *Batson/Wheeler* remedies are available in all cases, including this one, regardless of whether mistrial and dismissal of the remaining venire would reward the offending party.

Moreover, the Court of Appeal erred in not finding that consent to an alternative *Batson/Wheeler* remedy can be inferred from the moving party's failure to object. Consent to an alternative remedy is not a fundamental right, but simply a prophylactic rule generated by this Court. Thus, consent in this context is subject to the usual rule that consent may be implied from the failure to object. Inferring consent from the failure to object also serves the important purpose of ensuring fairness and confidence in trial proceedings, so that a defendant may not remain silent in the face of an alternative *Batson/Wheeler* remedy, causing the trial court and prosecutor to believe the remedy is acceptable, and then, if the verdict is unfavorable, obtain a reversal on appeal on the ground that the remedy was not acceptable. Alternatively, if the failure to object alone does not imply consent to an alternative *Batson/Wheeler* remedy, consent may otherwise be inferred from the totality of the circumstances. In this case, appellant's trial counsel's conduct clearly demonstrated his consent to the reseating of Prospective Juror 2473. The Court of Appeal incorrectly found that counsel's conduct did not demonstrate consent simply because that conduct did not amount to the conduct of counsel in another Court of Appeal case where consent was inferred.

Lastly, the Court of Appeal erred by implicitly finding that the failure to obtain consent to an alternative *Batson/Wheeler* remedy is reversible error per se. The requirement that a party must consent to an alternative remedy is not a federal constitutional right or a fundamental right. Thus, the violation of that requirement is not structural error, and the reversible per se standard does not apply. Instead, the error is of state law and therefore is subject to the harmless error standard for state-law violations: whether the error resulted in a miscarriage of justice such that it is reasonably probable the defendant would have achieved a more favorable result had the error not occurred. Applying that standard to this case, any error in reseating Prospective Juror No. 2473 was harmless. It is not reasonably probable counsel would have declined to consent to the reseating of Prospective Juror 2473 had he been asked to place his explicit consent on the record. Moreover, appellant cannot show that he was tried by a biased jury as he did not challenge any of the jurors for cause. Thus, it is not reasonably probable appellant would have achieved a more favorable result had he been tried by a different impartial jury that would have heard the same evidence.

The Court of Appeal's per se reversal of appellant's conviction for failure to obtain his counsel's explicit consent to an alternative *Batson/Wheeler* remedy fails on several levels. The opinion should be reversed, and appellant's conviction should be affirmed.

ARGUMENT

I. THE MOVING PARTY OF A SUCCESSFUL *BATSON/WHEELER* MOTION IMPLICITLY CONSENTS TO A RESEATING PROCEDURE BY FAILING TO OBJECT TO THIS AUTHORIZED REMEDY

In all cases, when a party improperly exercises a peremptory challenge due to racial bias, the trial court may dismiss the venire and order

a new venire, or, with the moving party's assent, fashion an alternative remedy to the violation of the right to trial by a jury drawn from a representative cross-section of the community. Because the moving party's assent does not waive any fundamental right, but only demonstrates consent to an alternative remedy for a violation of a fundamental right, such assent can be implied. To avoid confusion in this context, and to conform with existing law, this Court should announce a rule that the moving party implicitly consents to an alternative *Batson/Wheeler* remedy by failing to object to the remedy. Alternatively, this Court should adopt a totality of the circumstances test to determine whether a party implicitly consented to an alternative remedy. Under either test, consent was present in this case.

A. With the Moving Party's Consent, a Trial Court Has Discretion to Remedy a *Batson/Wheeler* Violation by Methods Other Than Ordering a New Venire, Including Reseating the Challenged Prospective Juror

The Sixth Amendment to the federal Constitution and article I, section 16 of the California Constitution independently guarantee the right to trial by a jury drawn from a representative cross-section of the community. (*Taylor v. Louisiana* (1975) 419 U.S. 522, 528 [95 S.Ct. 692, 42 L.Ed.2d 690]; *Wheeler*, *supra*, 22 Cal.3d at p. 272.) In *Wheeler*, the California Supreme Court held that the use of peremptory challenges to strike prospective jurors on the basis of race violates this California constitutional guarantee. (*Wheeler*, *supra*, 22 Cal.3d at pp. 276-277.) Thereafter, the United States Supreme Court held that such a practice violates the right to equal protection of the laws under the Fourteenth Amendment of the federal Constitution. (*Batson*, *supra*, 476 U.S. at p. 89.)

Originally, the only option recognized for a *Wheeler* violation was to begin jury selection anew with a different venire. (*Wheeler*, *supra*, 22 Cal.3d at p. 282.) As this Court stated in *Wheeler*:

> If the court finds that the burden of justification is not sustained as to any of the questioned peremptory challenges, the presumption of their validity is rebutted. Accordingly, the court must then conclude that the jury as constituted fails to comply with the representative cross-section requirement, and it must dismiss the jurors thus far selected. So too it must quash any remaining venire, since the complaining party is entitled to a random draw from an entire venire – not one that has been partially or totally stripped of members of a cognizable group by the improper use of peremptory challenges. Upon such dismissal a different venire shall be drawn and the jury selection process may begin anew.

(*Ibid*., fn. omitted.) Eight years later, in *Batson*, the United States Supreme Court declined to 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, upon a finding of [*Batson* error] 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." (*Batson, supra*, 476 U.S. at p. 99, fn. 24, citations omitted.)

Following *Batson*, this Court reconsidered the sole California remedy for the use of group bias in peremptory challenges. (*People v. Willis* (2002) 27 Cal.4th 811 (*Willis*).) In *Willis,* defense counsel, who represented an African-American defendant, first moved to dismiss and replace the entire jury venire as underrepresentative of African-Americans. When that motion was denied, counsel attempted to remedy the perceived problem by using his peremptory challenges to exclude Caucasian males from the jury, thereby violating the People's right to a representative and impartial jury. (*Id.* at pp. 813-815.) After soliciting defense counsel's reasons for his peremptory challenges, the trial court found counsel had exercised discriminatory challenges due to group bias. (*Id.* at pp. 814-815.) With the People's assent, the court rejected a defense motion to dismiss the

remaining venire, and continued voir dire with the original venire. (*Id.* at pp. 814-816.)

On appeal, this Court rejected the defendant's argument that dismissal of the venire was the only available remedy for his own exercise of group bias. (*Willis, supra*, 27 Cal.4th at pp. 814, 822-824.) This Court held "that the trial court, acting with the prosecutor's assent, had discretion to consider and impose remedies or sanctions short of outright dismissal of the entire jury venire." (*Id.* at p. 814.) This Court observed that the *Wheeler* remedy of dismissal is not compelled by the federal Constitution (*id.* at p. 818; see *Batson, supra*, 476 U.S. at p. 99, fn. 24), and concluded that

> 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 . . . reseating any improperly discharged jurors if they are available to serve.

(*Willis, supra*, at p. 821.) Finding it "appropriate, and consistent with the ends of justice, to permit the complaining party to waive the usual remedy of outright dismissal of the remaining venire" (*id.* at p. 823), the Court nevertheless

> stress[ed] 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.

(*Id.* at pp. 823-824.) The Court did not specify what constitutes consent to an alternative remedy or an effective waiver of the right to a mistrial and new venire. (See *People v. Overby* (2004) 124 Cal.App.4th 1237, 1242.)[2]

In finding that the trial court here "improperly utilized" the reseating remedy (Opn. at p. 8), the Court of Appeal found, "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.)" (Opn. at 6-7). The Court of Appeal thereby limited the holding of *Willis* to allow alternative remedies only in cases in which, as in *Willis*, the party who made the improper challenges did so with the clear purpose of obtaining a new venire.

Nothing in *Willis*, however, limited the use of alternative *Batson/Wheeler* remedies to situations factually similar to *Willis*. The *Willis* Court made clear that the circumstances of that case demonstrated why alternative remedies should be available to trial courts; it did not limit the availability of alternative remedies to cases with those same circumstances. (*Willis, supra*, at p. 818.) Indeed, *Willis* emphasized that the availability of alternative remedies served the purposes of assisting courts with their "substantial and legitimate interest in the expeditious processing of cases for trial," and deterring "in future cases" the type of conduct in which the defense engaged in *Willis*. (*Id.* at pp. 817-818, 820, 822.) Both of these purposes can only be served by having alternative

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[2] Counsel may consent to an alternative remedy on the defendant's behalf, as any right to a particular remedy for a *Batson/Wheeler* violation is not a personal, fundamental constitutional right. (*People v. Overby, supra*, 124 Cal.App.4th at pp. 1243-1244, and cases cited therein.)

remedies available in every case, not just those in which the improper challenges have been made in an effort to obtain a new venire.

Additionally, even in situations where the violation was not an intentional attempt to obtain a new venire, alternative remedies might be preferable to the moving party. For example, reseating the challenged juror will often be a more favorable one for the moving party than dismissing the entire venire because it will force the moving party's adversary to accept the very juror that it wished to exclude. Moreover, the "usual" remedy of dismissal affords jurors no greater protection of their 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." (*Willis*, *supra*, 27 Cal.4th at p. 823.)

Accordingly, the *Willis* Court's determination that *Batson/Wheeler* violations may be remedied by alternatives other than ordering an entirely new venire is not limited to cases in which the violation was purposely effected in an effort to obtain a new venire. Regardless of the circumstances leading to the successful *Batson/Wheeler* motion in this case, under *Willis*, the trial court had discretion not to dismiss the venire and instead to utilize an alternative remedy, so long as it had the defense's consent.

B. Consent to an Alternative *Batson/Wheeler* Remedy, and Waiver of the Right to Mistrial and a New Venire, Is Implied When the Moving Party Fails to Object to the Remedy

Absent the implication of a few particular fundamental constitutional rights, consent or waiver is ordinarily implied by the party's failure to object and continuing participation in the potentially objectionable

proceeding. (See *In re Seaton* (2004) 34 Cal.4th 193, 198 [the failure to object to statutory violations or even violations of fundamental constitutional rights forfeits a claim of error on appeal]; *People v. Haskett* (1982) 30 Cal.3d 841, 858 [the waiver of the constitutional right to a magistrate judge is inferred from the defendant's consent to have a commissioner preside over proceedings, because the right to a magistrate is not a fundamental right]; *People v. Holmes* (1960) 54 Cal.2d 442, 443-444 [the fundamental constitutional right to a jury trial will not be deemed personally waived by virtue of a defendant's mere silence].)

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.) This Court determined that the California Constitution allows the parties to consent to a temporary judge, and such consent may be inferred from counsel's conduct. (*Id.* at pp. 86, 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 Horton's consent could be inferred because "counsel never objected to trial by the commissioner, though they were well aware that he was a commissioner and that he proposed to try the case," and "it is uncontroverted that counsel participated fully and vigorously in the trial, at every point treating the commissioner as competent to rule on matters which rest solely in the discretion of a superior court judge. This conduct was a tacit recognition of, and reliance upon, the authority of the commissioner to act as a temporary judge." (*Id.*

at pp. 98-99; see also *id.* at p. 100.) 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 [relying on *Horton* to find implied consent where the defendant requested that a specific judge hear his disqualification motion, but he did not object when another judge heard the motion].)

Similarly, in other analogous contexts, this Court has found implied consent or waiver from the failure to object. (See, e.g., *Barsamyan v. Appellate Division of Superior Court* (2008) 44 Cal.4th 960, 969-970 [waiver of statutory speedy trial rights may be inferred from silence]; *People v. Gutierrez* (2003) 29 Cal.4th 1196, 1206 [through his conduct, a defendant may implicitly waive his right to be present at trial]; *People v. Toro* (1989) 47 Cal.3d 966, 977 [failure to object to instructions on uncharged lesser related offense was an implied consent to the jury's consideration of the offense], dictum on another point disapproved in *People v. Guiuan* (1998) 18 Cal.4th 558, 568, fn. 3; see also *People v. Torrez* (1987) 195 Cal.App.3d 751, 755 [failure to object to the absence of a filed information before pleading guilty constitutes implied consent to treat the complaint as an information].)

Although the right to an impartial jury drawn from a representative cross-section may be a fundamental California constitutional right (see *Wheeler*, *supra*, 22 Cal.3d at p. 285), the proponent of a *Batson/Wheeler* motion does not waive that right by consenting to the reseating of an improperly challenged juror. Instead, the moving party merely consents to an alternative remedy for the already-recognized violation of that right, and waives any "right" to the usual remedy of a mistrial and new venire. (See

Willis, supra, 27 Cal.4th at pp. 819, 823-824 [every mention of "waiver" in *Willis* is in reference to waiving the usual remedy of mistrial and a new venire].) Any "right" to the particular remedy of 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*. (*Batson, supra*, 476 U.S. at p. 99, fn. 24; *Willis, supra*, 27 Cal.4th at pp. 821, 823.)[3] Thus, consent to an alternative remedy, and waiver of the right to mistrial and a new venire, may be inferred from the moving party's failure to object to the remedy.

In fact, the *Willis* decision itself recognized that consent to an alternative *Batson/Wheeler* remedy and waiver of a new venire could be implied. Specifically, the *Willis* Court instructed, "[I]f 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, supra*, 27 Cal.4th at p. 824, italics added.) By using the term "effectively waives," instead of simply "waives," the *Willis* Court indicated that such waiver or consent need not be explicit, but may be implied. (See *Davis v. United States* (1994) 512 U.S. 452, 458 [114 S.Ct.

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[3] The United States Supreme Court has explicitly held that the racially discriminatory use of peremptory challenges does not violate the Sixth Amendment, which guarantees only that venires, not petit juries, be representative of a fair cross-section of the community in order to protect the defendant's right to an impartial jury. (*Holland v. Illinois* (1990) 493 U.S. 474, 478-488 [110 S.Ct. 803, 107 L.Ed.2d 905].) Instead, racial bias in the use of peremptory challenges violates the equal protection clause of the Fourteenth Amendment. (*Id.* at p. 484, fn. 2; *Batson, supra*, 476 U.S. at pp. 88-89.) The "usual" remedy of declaring a mistrial and ordering a new venire never actually vindicates the violation of the equal protection rights of the improperly excused prospective jurors. (*Willis, supra*, 27 Cal.4th at p. 823.)

2350, 129 L.Ed.2d 362], citing *North Carolina v. Butler* (1979) 441 U.S. 369, 372-376 [99 S.Ct. 1755, 60 L.Ed.2d 286] [where the defendant does not explicitly waive the right to counsel after receiving a *Miranda* warning, but the defendant's conduct implies a waiver of that right, the defendant "effectively waives" the right].)

Moreover, this Court has held that the failure to object to a venire on the ground that it does not represent a fair cross-section of the community forfeits any claim on appeal that the venire was not representative. (*In re Seaton, supra*, 34 Cal.4th at p. 198; *People v. Lewis* (2001) 25 Cal.4th 610, 634.) If the claim that a defendant was denied his constitutional right to a representative venire is forfeited solely by the failure to object, certainly the failure to object should also waive the right to a particular remedy for violating that right. By contrast, to hold that a defendant consents to a nonrepresentative venire and abandons his right to a representative one by failing to object to the venire, but that a defendant does not consent to an authorized remedy for a violation of the right to a representative venire by failing to object to the remedy, would be to provide more protection to a court-created state rule than to a fundamental constitutional right.

Additionally, inferring waiver from the moving party's failure to object to an alternative *Batson/Wheeler* remedy is appropriate because "it is *unfair to the trial judge and to the adverse party* to take advantage of an error on appeal when it could easily have been corrected at the trial. [Citation.] The purpose of the general doctrine of waiver is to encourage a defendant to bring errors to the attention of the trial court, so that they may be corrected or avoided and a fair trial had . . . . [Citation.]" (*People v. Saunders* (1993) 5 Cal.4th 580, 590, internal quotation marks omitted, italics in original.) The failure to obtain the moving party's explicit consent to an alternative *Batson/Wheeler* remedy, or explicit waiver of a new

venire, is a procedural error that can easily be corrected if the trial court is made aware of the oversight by a timely objection.

Indeed, a defendant may forfeit various claims of error with regard to jury selection by failing to object because "important policies mandate that criminal convictions not be overturned on the basis of irregularities in jury selection to which the defendant did not object or in which he has acquiesced. [Citations.]" (*People v. Visciotti* (1992) 2 Cal.4th 1, 38 [challenge to a trial judge's voir dire procedure]; see also *People v. Benavides* (2005) 35 Cal.4th 69, 87-88 [challenge to the excusal of prospective jurors based on questionnaires, without follow-up questioning]; *People v. Holt* (1997) 15 Cal.4th 619, 656-658 [challenge to a trial court's excusal of a juror for cause].) On the other hand, a rule allowing a defendant to complain for the first time on appeal without having objected to an alternative *Batson/Wheeler* remedy or moved to dismiss the venire "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.' [Citation.]" (*People v. Rogers* (1978) 21 Cal.3d 542, 548.) Just as "[a]n attorney may not sit back, fully participate in a trial and then claim that the court was without jurisdiction on receiving a result unfavorable to him" (*In re Horton*, *supra*, 54 Cal.3d at p. 91), counsel should not be permitted to sit back, fully participate in jury selection after an alternative *Batson/Wheeler* remedy has been selected and then claim that the remedy was insufficient upon receiving a result unfavorable to him.

Existing law and policy considerations thus weigh in favor of a rule that the failure to object to an alternative *Batson/Wheeler* remedy constitutes implicit consent to that remedy. Any concern that such a rule might unfairly place the burden of objecting on the moving party even in situations where the trial court did not give the party an opportunity to

object is easily obviated by the already-existing rule requiring a meaningful opportunity to object. (*See People v. Scott* (1994) 9 Cal.4th 331, 356.) In the context of selecting a *Batson/Wheeler* remedy, a meaningful opportunity to object is provided when the party is allowed to participate in discussions on the issue, and the trial court fully apprises the party of its intended remedy. For example, in this case, appellant was given a meaningful opportunity to object to the alternative remedy of reseating Prospective Juror 2473 when the court proposed the alternative remedy at sidebar after having asked the juror to remain seated during the sidebar discussion, during the continued sidebar discussion about Prospective Juror 0207 and the seating arrangements of the prospective jurors, when the court actually ordered Prospective Juror 2473 to remain on the panel, and during the subsequent sidebar *Batson/Wheeler* discussion regarding Prospective Juror 0207. Because counsel was provided several opportunities to voice his disapproval of the alternative remedy, he was not overly burdened by the responsibility to voice such disapproval. Thus, inferring consent and waiver from the failure to object to an alternative *Batson/Wheeler* remedy is appropriate in cases like this one where the moving party was given a meaningful opportunity to make such an objection.

Accordingly, a ruling from this Court that the failure to object implies consent to an alternative *Batson/Wheeler* remedy is best in keeping with this Court's precedent.

C. Even If Consent Or Waiver Cannot Be Implied Solely from the Failure to Object to an Alternative *Batson/Wheeler* Remedy, a Totality of the Circumstances Test Should Be Employed to Determine Whether Consent and Waiver Were Implied

Even if this Court chooses not to adopt a bright line rule that the failure to object constitutes implied consent to an alternative *Batson/Wheeler* remedy and waiver of a new venire, the above arguments

make clear that consent to an alternative remedy can be implied. Thus, at the very least, this Court should find that consent and waiver are implied where the totality of the circumstances demonstrate such consent and waiver. (See *People v. Overby, supra*, 124 Cal.App.4th at pp. 1244-1245 [finding counsel's conduct demonstrated implied consent to an alternative *Batson/Wheeler* remedy]; see also *Stanley v. Superior Court* (May 22, 2012, B238486) __ Cal.App.4th __ [2012 WL 1850932 at pp. *1, 8, 13-14, 16-17] [applying totality of circumstances test to find counsel implicitly consented to the discharge of the jury, and that therefore the defendant was precluded from claiming double jeopardy].) Like the failure-to-object rule advocated above, a totality of the circumstances rule is in keeping with existing law, policy, and basic fairness.

Here, the conduct of appellant's trial counsel further demonstrated his implied consent to reseating Prospective Juror 2473 instead of empanelling a new venire. Significantly, once the trial court indicated it would reseat Prospective Juror 2473, appellant's trial counsel and the prosecutor discussed whether the prosecutor would exercise a peremptory challenge against Prospective Juror 0207, another African-American prospective juror on the venire. By discussing Prospective Juror 0207, defense counsel implicitly demonstrated his consent to the reseating procedure, as the prospective juror would have been irrelevant if a new venire were to be called. Moreover, by not using a peremptory challenge on Prospective Juror 2473, even though he had such challenges remaining when he accepted the jury, counsel made clear he wanted Prospective Juror 2473 on the jury. In fact, by accepting the jury when he had peremptory challenges remaining, counsel demonstrated that he was content with this venire. Further, when the prosecutor eventually did attempt to exercise a peremptory challenge against Prospective Juror 0207, defense counsel asked the juror to remain seated while he made a *Batson/Wheeler* motion at

sidebar, thus demonstrating his continued consent to the reseating procedure.

And, contrary to the Court of Appeal's finding, counsel's request for Prospective Juror 0207 to remain seated while he made the motion did not simply demonstrate his "recognition of, and decision to comply with," the trial court's chosen alternative remedy, but rather showed his agreement with it. (See Opn. at 7.) This could be seen at the time of the second *Batson/Wheeler* motion, when the court characterized the motion as a request to have the prospective juror reseated. (3RT 972.) Tellingly, counsel did not contest the court's characterization of his motion, implying that he found it accurate. (See *People v. Overby*, *supra*, 124 Cal.App.4th at p. 1243 [consent was implied where counsel did not "indicate any dissatisfaction with the remedy chosen by the court," even during the prosecutor's motion for the court to reconsider its finding of *Batson/Wheeler* error]; *id.* at p. 1245 [consent was implied where counsel "did not alter her position or indicate dissatisfaction with the reseating remedy even after having time and opportunity to consider it further"].)

In sum, counsel not only failed to object to the alternative remedy of reseating or explicitly request a new venire despite several opportunities to do so, he also: discussed another prospective juror on the current venire during the first *Batson/Wheeler* motion; chose not to use any remaining peremptory challenge to excuse the juror against whom the improper challenge was made; asked another prospective juror to remain seated while he made another *Batson/Wheeler* motion at sidebar with regard to that juror; and did not correct or otherwise contest the trial court's characterization of his second *Batson/Wheeler* motion as a motion to reseat the prospective juror. Thus, this is not a case where the only evidence of counsel's consent to the alternative *Batson/Wheeler* remedy was his failure to object to that remedy; instead, his conduct demonstrated that he wished

to reseat the prospective jurors that the prosecution attempted to use peremptory challenges against. Under these circumstances, appellant's consent to the alternative *Batson/Wheeler* remedy should be implied. Accordingly, the Court of Appeal's contrary decision should be reversed.

II. Even If the Trial Court Erred by Reseating the Prospective Juror, Reversal Was Not Warranted

State-law procedural error in utilizing an alternative remedy to a *Batson/Wheeler* violation without obtaining the moving party's consent should be subject to harmless error analysis. By reversing appellant's conviction without addressing the issue of prejudice, the Court of Appeal improperly utilized a reversal per se standard for a nonstructural error. Instead, when error of this sort occurs, an appellate court should determine whether the error resulted in a miscarriage of justice such that it is reasonably probable the defendant would have achieved a more favorable result had the error not occurred. Applying that standard to this case, any error in reseating Prospective Juror 2473 was harmless.

A. Utilizing an Alternative Remedy after a Successful *Batson/Wheeler* Motion without the Moving Party's Explicit Consent Is Subject to Harmless Error Analysis

By reversing appellant's judgment of conviction without any discussion of whether appellant was prejudiced by the reseating of Prospective Juror 2473, the Court of Appeal implicitly and incorrectly found that such error was reversible per se. Only a structural error, which affects the framework within which the trial proceeds, is reversible per se. (*Arizona v. Fulminante* (1991) 499 U.S. 279, 309-310 [111 S.Ct. 1246, 113 L.Ed.2d 302]; *People v. Stewart* (2004) 33 Cal.4th 425, 462.) Structural error occurs """only in a very limited class of cases,""" such as where the defendant has been completely deprived of the right to counsel at trial, the trial was heard by a biased factfinder, racial discrimination in jury selection

was improperly allowed, the defendant was denied the right to self-representation at trial, or the defendant was denied the right to a public trial. (*People v. Mil* (2012) 53 Cal.4th 400, 410, quoting *Neder v. United States* (1999) 527 U.S. 1, 8 [119 S.Ct. 1827, 144 L.Ed.2d 35]; *People v. Stewart*, *supra*, 33 Cal.4th at p. 462.) "If, on the other hand, '"the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other [constitutional] errors that may have occurred are subject to harmless-error analysis."'" (*People v. Mil*, *supra*, 53 Cal.4th at p. 410, quoting *Neder v. United States*, *supra*, 527 U.S. at p. 8, bracketed text in *Neder*; accord, *People v. Marshall* (1996) 13 Cal.4th 799, 851.)

The failure to obtain the moving party's consent to an alternative remedy to a *Batson/Wheeler* violation is, at most, a procedural error that is subject to harmless error analysis. The trial court's duty to obtain the moving party's consent to an alternative remedy is a rule promulgated by this Court in *Willis*. That rule is not required by the federal Constitution. (*Batson*, *supra*, 476 U.S. at p. 99, fn. 24 [leaving to trial courts the task of fashioning appropriate remedies to equal protection violations due to discriminatory use of peremptory challenges].) Instead, the rule was created to protect the California constitutional right to a random draw from a representative venire. In *Willis*, this Court explained that it was imposing the consent rule because "*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." (*Willis*, *supra*, 27 Cal.4th at p. 823, quoting *Wheeler*, *supra*, 22 Cal.3d at p. 282.) Because the consent rule is merely a prophylactic procedure and not a fundamental right itself, violation of the rule is not structural error.

In fact, in some contexts, the *Willis* consent rule is entirely unnecessary to protect the California constitutional right to a random draw from an entire representative venire. For example, if a court reseats each

prospective juror that a peremptory challenge was improperly exercised against, the right to a random draw from an entire representative venire has been completely vindicated. This is because in a case where any improperly excused jurors have been reseated, the venire has not been "partially or totally stripped of members of a cognizable group by the use of peremptory challenges." (*Wheeler*, *supra*, 22 Cal.3d at p. 282.) Because these prospective jurors remain as part of the venire, the moving party's ability to obtain a random draw from an entire venire has in no way been affected. (See *People v. Overby*, *supra*, 124 Cal.App.4th at p. 1245 [reseating remedy "effectively undid the peremptory challenge" and """"vindicated all the rights"""" at issue]; *People v. Williams* (1994) 26 Cal.App.4th Supp. 1, 10 [where the trial court found a *Batson/Wheeler* violation as to a single juror, and that juror was reseated, the defendant had "failed to establish prejudice" because he had not shown that "the jury was 'partially or totally stripped of members of a cognizable group by the improper use of peremptory challenges'"].) Accordingly, in the context of reseating each improperly excused prospective juror, *Willis*'s consent rule does not serve to protect any California constitutional right.

Because the consent rule is not mandated by the federal Constitution, and because there are circumstances under which the rule does not even serve to protect a California constitutional right, violation of the rule is not structural error. Thus, a harmless error analysis applies. (See *People v. Wright* (2012) 204 Cal.App.4th 1084, 1094-1095 [any error in failing to hold peremptory challenges at sidebar and reseating juror against whom defense had improperly exercised peremptory challenge was "procedural error" and subject to harmless error analysis]; *People v. Rodriguez* (1996) 50 Cal.App.4th 1013, 1034 [where trial court properly performed its *Batson/Wheeler* duties and granted the defense *Batson/Wheeler* motion as

to an alternate juror, any error in refusing to order a new venire was a "'trial defect'" subject to harmless error analysis].)

Cases involving the defense's use of peremptory challenges to dismiss jurors erroneously deemed not subject to dismissal for cause are instructive. For example, in *People v. Yeoman* (2003) 31 Cal.4th 93, this Court held:

> An erroneous [for cause] ruling that forces a defendant to use a peremptory challenge, and thus leaves him unable to exclude a juror who actually sits on his case, provides grounds for reversal only if the defendant "*can actually show that his right to an impartial jury was affected* . . . ." [Citation.]

(*Id.* at p. 114, italics added by *Yeoman*; see *Ross v. Oklahoma* (1988) 487 U.S. 81, 86-88 [108 S.Ct. 2273, 101 L.Ed.2d 80] [same under federal constitutional law].) If a prejudice analysis is appropriate in cases where a defendant is forced to accept a juror due to the trial court's erroneous failure to excuse another juror for cause, certainly a prejudice analysis should be applied to the failure to follow the appropriate procedure in imposing the *Batson/Wheeler* remedy of reseating the improperly challenged juror.

B. The Error Is Harmless Because It Did Not Result in a Miscarriage of Justice

Because *Willis*'s consent rule is not mandated by the federal Constitution, a violation of the rule must be analyzed under California's standard for error. (See *People v. Hernandez* (2011) 51 Cal.4th 733, 745 [where there is no federal constitutional violation, error is reviewed under the state-law standard]; *People v. Rodriguez, supra*, 50 Cal.App.4th at p. 1035 [applying state-law standard to an error in failing to quash a panel and order a new venire upon the defendant's successful *Batson/Wheeler* motion during the selection of alternates].) Under this standard, an error is reversible only where it resulted in a miscarriage of justice, i.e., where it is reasonably probable the defendant would have achieved a more favorable

result had the error not occurred. (Cal. Const., art. VI, § 13; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

First, any error in failing to obtain the moving party's consent should be harmless where it is not reasonably probable the party would have declined to explicitly consent to the alternative remedy had the party been asked. For example, in this case, counsel did not object to the court's decision to reseat Prospective Juror 2473, although he had several opportunities to do. Moreover, counsel's discussion of Prospective Juror 0207 during the sidebar about Prospective Juror 2473 demonstrated that counsel did not wish to have a mistrial and obtain a new venire. Also indicative of counsel's desire to proceed with the same venire was his request that Prospective Juror 0207 remain seated while he made a sidebar *Batson/Wheeler* motion regarding the prosecutor's use of a peremptory challenge against her. Additionally, counsel did not object or otherwise correct the trial court when it characterized his second *Batson/Wheeler* motion as a motion to reseat the prospective juror. Further, counsel accepted the jury when he had remaining peremptory challenges, thus demonstrating his satisfaction with the jurors. From this record, it is not reasonably probable that counsel would have declined to consent to reseating Prospective Juror 2473 had he been explicitly asked. As a tactical matter, it appears that counsel would have explicitly consented to reseating Prospective Juror 2473, as leaving Prospective Juror 2473 on the jury left the People "with the unpleasant chore of trying a case to a jury containing at least one member who had been wronged by the prosecutor." (*People v. Smith* (1993) 21 Cal.App.4th 342, 346; see *Willis, supra*, 27 Cal.4th at p. 821.)

Even if appellant could show that it is reasonably probable he would have declined to consent to reseating Prospective Juror 2473, however, he cannot show a reasonable probability of a different result. To be sure,

absent counsel's consent to the reseating procedure, a new venire would have been ordered. But it is not reasonably probable any other jury would have acquitted appellant had it been presented with the same evidence presented to this jury. In particular, appellant cannot show that his jury was biased. (See *Holland v. Illinois, supra*, 480 U.S. at p. 480 ["The Sixth Amendment requirement of a fair cross section on the venire is a means of assuring, not a representative jury (which the Constitution does not demand), but an impartial one (which it does)"].) Appellant's trial counsel demonstrated his belief that Prospective Juror 2473 and the other jurors who tried the case were impartial by accepting the jury when he had remaining peremptory challenges and by failing to challenge for cause any sitting juror. (See *Rivera v. Illinois* (2009) 556 U.S. 148, 158 [129 S.Ct. 1446, 173 L.Ed.2d 320] [jury is impartial if no member was removable for cause]; *People v. Yeoman, supra*, 31 Cal.4th at p. 114 ["defendant cannot show his right to an impartial jury was affected because he did not challenge for cause any sitting juror"].) Moreover, each of the jurors who tried appellant's cause took an oath to render an impartial verdict based on the evidence presented (3RT 1201), and nothing in the record demonstrates any juror violated this oath (see *People v. Aranda* (1965) 63 Cal.2d 518, 524-525 [it is presumed jurors "performed their duties with fidelity to their oaths"]). In fact, if any bias can be discerned from the record, it was in appellant's favor, as Prospective Juror 2473 tried the case knowing that the People had tried to excuse her. (See *People v. Smith, supra*, 21 Cal.App.4th at p. 346; see also *Willis, supra*, 27 Cal.4th at p. 821 [suggesting courts may conduct peremptory challenges at sidebar "to ensure against undue prejudice to the party unsuccessfully making the peremptory challenge"].) Because appellant received an impartial jury, he cannot show it is reasonable probable he would have achieved a different

result from a different impartial jury selected from a different venire. Accordingly, any error was harmless.

CONCLUSION

Respondent respectfully requests that this Court reverse the decision of the Court of Appeal and affirm appellant's conviction.

Dated: July 5, 2012

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached Respondent's Opening Brief On The Merits uses a 13-point Times New Roman font, and contains 8,138 words.

Dated: July 5, 2012

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No.: **S201413**

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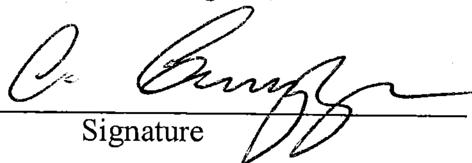
C. Esparza	
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