STATE CONSTITUTIONAL LAW—DUE PROCESS—FAILING TO OBJECT TO RESEATING AN IMPROPERLY STRUCK JUROR NOW CONSTITUTES ASSENT TO THE COURT'S EXERCISE OF ITS DISCRETION. *PEOPLE v. MATA*, 302 P.3D 1039 (CAL. 2013).

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I. INTRODUCTION

In *People v. Mata*,[1] the Supreme Court of California considered what type of remedy was appropriate after the trial court found that the prosecution had discriminated on the basis of race during jury selection.[2] The California Constitution[3] guarantees the right to a trial by a jury that is drawn from a representative cross-section of the community.[4] Applying

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1. 302 P.3d 1039 (Cal. 2013).

2. *Id.* at 1042–43. The United States Supreme Court has previously held that discrimination on the basis of race during jury selection offends the Equal Protection Clause of the United States Constitution. *See* Batson v. Kentucky, 476 U.S. 79, 93 (1986). The *Mata* case addressed only remedies after a *Batson* violation. However, a general understanding of the *Batson* three-step process is necessary to understand the justification for the remedies in place in California for a *Batson* violation. Under *Batson*, the defendant must first make a prima facie showing that the prosecution is discriminating on the basis of race during jury selection. *Id.* at 96–97. After the defendant has made the requisite showing, the burden shifts to the State to put forward a race-neutral explanation for its exercise of the peremptory challenge. *Id.* at 97. After both sides make their cases, the trial court has a duty to determine if purposeful discrimination has occurred. *Id.* at 98. While providing these three steps, the Court left the question of the proper remedy following a *Batson* violation to the states. *Id.* at 99. For a discussion of the different remedies that the states have created following a *Batson* violation, see Jason Mazzone, Batson *Remedies*, 97 IOWA L. REV. 1613, 1618–25 (2012).

3. CAL. CONST. art. I, § 16.

4. *Mata*, 302 P.3d at 1041. This right is guaranteed independently by the California Constitution and by the Sixth Amendment to the United States Constitution. *Id.* The text of the constitutional provision at issue in *Mata* is as follows:

article I, section 16 of the California Constitution, the Supreme Court of California reached the conclusion that racial discrimination during jury selection was impermissible some eight years before the Supreme Court's decision in *Batson v. Kentucky*.[5] The question presented in the *Mata* case was not only what remedy is appropriate when the court finds a *Batson*/*Wheeler* violation, but under what circumstances a defendant can assent to the trial court's discretion in crafting a remedy.[6] In reaching its decision, the court held that a defendant could "assent" to a trial court's discretionary remedy[7] by failing to object to such a remedy.[8] Though the court called quashing any remaining venire the "default" remedy to a *Batson*/*Wheeler* violation,[9] the circumstances of the case called that into question. Under the court's ruling in *Mata*, the new default remedy to a *Batson*/*Wheeler* violation now seems to be for the trial judge to exercise his or her discretion to do what he or she thinks is right.

This Comment will consider the circumstances of the jury selection process in *Mata* in detail. It will explain the majority and concurring opinions' reasoning on the issues of waiver, consent, and remedies. It will follow with a brief history of this particular area of the law. Its final section discusses the soundness of the court's decision and the future implications of the ruling. Ultimately, this Comment will conclude that, under the facts of *Mata*, the Supreme Court of California reached the

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> Trial by jury is an inviolate right and shall be secured to all, but in a civil cause three-fourths of the jury may render a verdict. A jury may be waived in a criminal cause by the consent of both parties expressed in open court by the defendant and the defendant's counsel. In a civil cause a jury may be waived by the consent of the parties expressed as prescribed by statute.
>
> In civil causes the jury shall consist of [twelve] persons or a lesser number agreed on by the parties in open court. In civil causes other than causes within the appellate jurisdiction of the court of appeal the Legislature may provide that the jury shall consist of eight persons or a lesser number agreed on by the parties in open court.
>
> In criminal actions in which a felony is charged, the jury shall consist of [twelve] persons. In criminal actions in which a misdemeanor is charged, the jury shall consist of [twelve] persons or a lesser number agreed on by the parties in open court.

CAL. CONST. art. I, § 16.

5. *See* People v. Wheeler, 583 P.2d 748, 761–62 (Cal. 1978).

6. *Mata*, 302 P.3d at 1043.

7. As used in this Comment, the term "discretionary remedy" refers to any remedy short of quashing any remaining venire.

8. *Mata*, 302 P.3d at 1045.

9. *See id.* at 1043–44.

correct decision, though it failed to provide a workable solution to the problem of racial discrimination during jury selection.

II. STATEMENT OF THE CASE

Defendant Mata was arrested on suspicion of drug possession[10] and he was subsequently convicted of one count of possession of cocaine[11] and two misdemeanor counts of resisting a peace officer.[12] Mata appealed on the ground that the trial court impermissibly allowed racial discrimination during voir dire. The court of appeal reversed his conviction,[13] pursuant to *People v. Wheeler*[14] and the California state constitution.[15] On appeal by the People, the Supreme Court of California reversed.[16]

During jury selection, the prosecutor exercised his eleventh peremptory challenge against an African-American woman.[17] Defense counsel requested a sidebar and the trial court directed the juror to remain in her seat for a moment.[18] The prosecutor gave a few race-neutral reasons for excluding the juror but the court concluded that the prosecutor had no race-neutral reason for excluding her.[19] The court ordered the prospective juror to remain seated, defense counsel said nothing, and the attorneys continued the jury selection process.[20] After the court conducted its own voir dire on several prospective jurors and after both defense attorneys present chose to exercise no challenges, the prosecutor exercised two more challenges—one of the challenged

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10. *Id.* at 1041 (citing CAL. HEALTH & SAFETY CODE § 11350 (West 2011)). The police observed Mata with a man named Earl Early stopped next to another man named Anthony Coleman. *Id.* at 1040–41. After Mata and Early approached him, Coleman gave Early a small white object in exchange for some cash. *Id.* at 1041.

11. *Id.*

12. *Id.* (citing CAL. PENAL CODE § 148 (West 2011)). These charges and subsequent convictions stem from an incident where Mata attacked two officers who were escorting him to a holding tank. *Id.*

13. People v. Mata, 137 Cal. Rptr. 3d 851, 852 (Ct. App. 2012).

14. *Id.* (citing People v. Wheeler, 583 P.2d 748 (Cal. 1978)).

15. *See* CAL. CONST. art. I, § 16. The Supreme Court of California has previously held that this clause guarantees the right to trial by a jury drawn from a representative cross-section of the community in equal force and effect as the Sixth Amendment of the United States Constitution. *Wheeler*, 583 P.2d at 754.

16. *Mata*, 302 P.3d at 1045.

17. *Id.* at 1044.

18. *Id.*

19. *Id.* Specifically, the prosecutor stated that she was "kind of quiet," "tuned out," and the prosecutor "wanted somebody who is a little bit more . . . engaging." *Id.*

20. *Id.*

prospective jurors was African-American.[21] Defense counsel said, "Your honor, *I'd ask that she remain* while we have a sidebar."[22] In response to defense counsel's motion, the court ruled, "*Your request to have this juror remain seated* is denied."[23]

III. HISTORY OF THE AREA

Thou shalt not discriminate on the basis of race during jury selection. To many, this pronouncement stems from the Supreme Court's direction in *Batson v. Kentucky*.[24] In California, however, the story starts with *Wheeler*.[25] In *Wheeler*, the court stressed that the peremptory challenge was a statutory privilege and that the prosecution's exercise of peremptory challenges must comport with the California Constitution.[26] In order to ensure that prosecutors would exercise their peremptory challenges in constitutionally permissible ways, the *Wheeler* court crafted a remedy for defense attorneys. Under *Wheeler*, if the jury had been partially or totally stripped of members of a cognizable group through the improper use of peremptory challenges, then the court was to dismiss the selected jurors and *quash any remaining venire*.[27]

The system that *Wheeler* produced was ripe for abuse. For instance, a defense lawyer, unsatisfied with the initial panel of prospective jurors, could systematically reject members of a cognizable group. When the prosecutor brought a *Wheeler* motion, the remaining venire would be quashed and defense counsel would have a whole new panel to play with.

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21. *Id.* at 1045.

22. *Mata*, 302 P.3d at 1045. At the bench, the defense attorney brought a second *Wheeler* motion. *Id.* However, this time, the court ruled that the prosecutor had several legitimate race-neutral justifications for excluding the prospective juror. *Id.*

23. *Id.*

24. 476 U.S. 79 (1986).

25. People v. Wheeler, 583 P.2d 748 (Cal. 1978). The *Wheeler* decision involved two African-Americans who were convicted of robbery and murder by an all-white jury—caused by the prosecution exercising its peremptory strikes against all African-American prospective jurors—on the basis of evidence which, on its face, appeared to be propensity evidence admitted to prove that the defendants acted in accordance with that trait. *Id.* at 751–54. Ultimately, the Supreme Court of California did not reach the evidentiary issue and instead reversed the *Wheeler* defendants' convictions on constitutional grounds. *Id.* at 752, 768. Among other state court decisions, the Supreme Court cited to *Wheeler* with approval in its decision in *Batson* some eight years later. *Batson*, 476 U.S. at 83–84.

26. *Wheeler*, 583 P.2d at 765 n.28.

27. *Id.* at 765. The justification for such a remedy was that the damage had already been done by the time that defense counsel realized that the prosecution was abusing his or her peremptory challenge privilege. *See id.* at 765–66. Only by bringing in a completely new panel of prospective jurors could courts be sure to wash away the taint of racial discrimination from the jury pool. *See id.*

Under these circumstances, the *Wheeler* procedures did nothing more than reward counsel for improperly exercising peremptory challenges. This regime could not stand. The Supreme Court of California addressed this issue in *People v. Willis*.[28]

In *Willis*, defense counsel was disappointed in the original jury pool.[29] After unsuccessfully moving to dismiss the entire panel, defense counsel started using his peremptory challenges, almost exclusively, on white males.[30] The prosecutor brought a *Wheeler* motion and the court found that defense counsel was improperly excluding white males from the jury.[31] However, instead of quashing the remaining venire, which would have been the default remedy under *Wheeler*, the court admonished defense counsel and ordered jury selection to continue without re-seating any improperly discharged jurors.[32] On appeal, the defendant argued that he was entitled to a mistrial because there had been impermissible discrimination on the basis of race during jury selection without application of the mandatory *Wheeler* remedy of quashing the remaining venire.[33] The Supreme Court of California did not buy this argument; instead, they crafted a discretionary remedy that a court could impose instead of quashing the remaining venire.[34]

Under *Willis*, the new procedure was as follows: One lawyer improperly uses peremptory challenges and his adversary brings a *Wheeler* motion. The challenging lawyer does not want a mistrial and instead wants to continue with voir dire. Under these 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

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28. 43 P.3d 130 (Cal. 2002). The defendant in *Willis* had been convicted of possessing cocaine with seven prior strike conditions. *Id.* at 132–33. The trial court sentenced him to twenty-five years to life in prison. *Id.* at 133.

29. *Id.* Upon seeing the original panel, defense counsel objected on the ground that the panel of prospective jurors did not constitute a fair cross-section of the community. *Id.* Specifically, defense counsel was worried that there were too many white people and only one African-American. *Id.*

30. *Id.*

31. *Id.*

32. *Id.* The trial judge suspected that defense counsel was committing *Wheeler* violations in the hopes that the court would quash any remaining venire and bring in a new panel of prospective jurors. *Id.* With the assent of the prosecutor, the court declined to do this and instead continued jury selection. *Id.* Undeterred, defense counsel continued his discriminatory practices. *Id.* Instead of rewarding defense counsel with a new panel, the court imposed sanctions on him which were later stayed and then removed. *Id.*

33. *Id.* at 134.

34. *Willis*, 43 P.3d at 137.

jurors if they are available to serve."[35] The *Mata* decision resolved two issues raised by this solution. First, could mere silence on part of counsel constitute "assent" within the meaning of *Willis*? Second, is the right to trial by an impartial jury waivable by counsel instead of only being waivable by the accused? The Supreme Court of California answered both questions in the affirmative.[36]

IV. THE COURT'S REASONING

A. The Majority

The first issue that the court addressed was whether the assent to a discretionary remedy, short of quashing the remaining venire, can be given by counsel rather than by the defendant himself.[37] The court cited the *People v. Overby*[38] decision of the court of appeal, which expressly held that assent to the court's discretionary remedy could be given by counsel.[39] In so doing, the court noted that counsel has the right to control not only the procedural aspects of the case, but also to bind his client accordingly.[40] Furthermore, the court reasoned, without much discussion, that the "right to request a mistrial or to elect to continue with a particular jury is not one of the constitutional rights deemed to be so personal and fundamental that it may only be personally waived by the defendant."[41]

After establishing that counsel's waiver, if any, bound his client,[42] the court moved to the issue of whether failing to object to the trial court's remedy was "assent" within the meaning of *Willis*.[43] The court explained: "'[a]ssent,' the term we used in *Willis*, encompasses positive agreement *as*

35. *Id.*
36. People v. Mata, 302 P.3d 1039, 1043–44 (Cal. 2013).
37. *Id.* at 1043.
38. 22 Cal. Rptr. 3d 233 (Ct. App. 2004).
39. *Mata*, 302 P.3d at 1043 (citing *Overby*, 22 Cal. Rptr. 3d at 237).
40. *Id.*
41. *Id.* (citation omitted). Courts have found some aspects of litigation to be fundamental rights, which can only be waived by the defendant personally. For example, a criminal defendant always has the right to testify on his own behalf even against counsel's advice. *See* U.S. CONST. amend. V; Rock v. Arkansas, 483 U.S. 44 (1987). The court in *Mata* dismissed the argument that only a defendant could elect to waive his right to a representative jury almost out of hand. *Mata*, 302 P.3d at 1043. The implication is that the right to a trial by a fair and impartial jury is weakening in California in favor of jurors' Fourteenth Amendment right not to be discriminated against and the judiciary's interest in judicial economy.
42. *Mata*, 302 P.3d at 1043.
43. *Id.* at 1043–44.

well as passive concession."[44] The court pointed out that defense counsel had failed to object to the court's proposed remedy[45] and had therefore waived any right to the "default" remedy of quashing any remaining venire.[46] In light of these holdings, it is clear that the trial judge's discretion is now the "default" remedy to a *Wheeler* violation rather than the old "default" remedy of quashing any remaining venire.[47]

The court addressed this tension by pointing to defense counsel's conduct.[48] The court stressed that defense counsel failed to object when the trial judge re-sat the first improperly excused juror.[49] Also, the court noted that defense counsel kept his silence when the court ordered the prosecutor to continue.[50] Defense counsel even requested, the second time that he brought a *Wheeler* motion, for the struck juror to remain seated.[51] The trial judge then responded that his request to have her remain seated was denied.[52] Considering defense counsel's conduct, the court

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44. *Id.* at 1044 (emphasis added). The Supreme Court of California created the "with the assent of the complaining party" language in *Willis*. *See* People v. Willis, 43 P.3d 130, 137 (Cal. 2002). The test in *Willis* was a judicial creation and the Supreme Court of California certainly has plenary authority to interpret it as it will. *See* CAL. CONST. art. VI, § 1; *see also* Marbury v. Madison, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."). However, in the interest of fairness to defense counsel in *Mata*, it bears mention that Webster's Dictionary defines "assent" as "to agree with something *especially after thoughtful consideration*." *Assent Definition*, MERRIAM-WEBSTER DICTIONARY, http://www.merriam-webster.com/dictionary/assent (last visited May 31, 2015).

45. *Mata*, 302 P.3d at 1044.

46. *Id.* The court noted that failing to object is usually deemed to be a waiver unless the court's actions preclude a meaningful opportunity to object. *Id.* The court did not specify exactly what would or would not have been a meaningful opportunity to object. However, from the opinion itself, it is plainly clear that a judge ordering the prosecutor to continue jury selection at a brief sidebar clearly presents defense counsel with a meaningful opportunity to object. *See id.*

47. *See id.* at 1044–45.

48. *Id.*

49. *Id.* at 1044.

50. *Id.*

51. *Mata*, 302 P.3d at 1045.

52. *Id.* The defendant argued before the court that his counsel's silence might have stemmed from his ignorance of the availability of a different remedy other than re-seating—such as quashing the remaining venire. *Id.* However, the court summarily dismissed this argument stating: "We assume that counsel knew the law as it stood at the time of trial." *Id.* (quoting People v. Odom, 456 P.2d 145, 150 (Cal. 1969)). While it is possible that defense counsel might have been ignorant of the "default" remedy of quashing the entire venire, the more likely scenario is that he chose not to object in hopes that the court of appeal would overturn his client's conviction. Ultimately, the court of appeal did overturn the defendant's conviction. *Id.* at 1041. The state supreme court, however, reinstated it. *Id.* at 1045.

held that counsel had consented to the trial court's discretionary remedy by failing to object.[53]

B. Justice Baxter's Concurring Opinion

Justice Baxter agreed entirely with the majority,[54] but wrote separately to express his view that a party should not have the right to quash any remaining venire after any type of *Wheeler* violation.[55] Though he would not have done away with *Wheeler*'s default remedy of quashing any remaining venire in some circumstances, Justice Baxter reasoned that the defendant should have had no right at all in the *Mata* case to demand such a remedy.[56] Justice Baxter argued that the default *Wheeler* remedy "[a]pplied rigidly to the single-excusal situation . . . risks wasting judicial resources, squandering the jury pool, and contributing to the potential for delay and game-playing that, in *Willis*, prompted [the Supreme Court of California] to modify *Wheeler*'s absolute insistence on this extreme remedy."[57]

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53. *Id.*

54. *Id.* (Baxter, J., concurring).

55. *Id.* at 1046. The *Mata* decision came before the court after only one prospective juror had been improperly struck. *Id.* Justice Baxter pointed out that quashing any remaining venire after only one quickly remedied improper strike serves only to delay the proceedings. *Id.* at 1046–47.

56. *Id.* at 1047. As previously explained, the *Mata* decision only involved one improperly struck juror. *Id.* at 1046. Justice Baxter did admit that there might still be some circumstances where quashing any remaining venire is the only appropriate remedy. *Id.* For example, if a party makes a *Wheeler* motion after a pattern of discriminatory conduct and there is no way to re-seat the improperly struck jurors, then the court could only remedy the discrimination by quashing the venire and bringing in a new panel of prospective jurors. *Id.* Short of these circumstances though, Justice Baxter would trust the discretion of the trial court to remedy any racial discrimination. *Id.* This pronouncement arguably goes too far because defense counsel brought his first *Wheeler* motion and stated: "[T]his is the second African-American within the last few challenges [the prosecution] has tried to take off." *See id.* at 1044 (majority opinion) (alteration in original). Ultimately, the court re-sat the second African-American juror, but no mention of the first African-American juror appears in the opinion. *Id.*

57. *Mata*, 302 P.3d at 1047 (Baxter, J., concurring). Justice Baxter raised a valid point that strict application of *Wheeler*'s default remedy would lead to more game-playing and would serve to delay the proceedings. However, the approach advocated by Justice Baxter—removing the defendant's right to quash any remaining venire after one improperly struck juror—goes too far. In *Mata*, defense counsel objected after the prosecution struck the second African-American juror. The court found that the second juror had been improperly struck which, at the very least, raises the possibility that the first African-American juror was improperly struck. *See id.* at 1044 (majority opinion). If that was the case, then racial discrimination had already set into the proceedings and *Wheeler*'s default remedy of quashing any remaining venire should be applied.

C. Justice Werdegar's Concurring Opinion

Justice Werdegar concurred in the disposition of the case,[58] but wrote separately to express her disagreement with the majority's reasoning.[59] Specifically, she disagreed with the waiver and consent reasoning of the majority.[60] She stated that what the majority called "waiver" more closely resembled "forfeiture"[61] of the default *Wheeler* remedy during voir dire.[62] Justice Werdegar continued to question the majority's reasoning by attacking the grounds for its holding with respect to waiver.[63]

The first case that Justice Werdegar's concurrence addressed was *Barsamyan v. Appellate Division of the Superior Court*.[64] In that case, counsel, who represented two unrelated defendants, impliedly waived one defendant's right to a speedy trial because he could not represent them both in the same trial.[65] The opinion next addressed *People v. Gutierrez*, where the defendant waived his right to be present at his trial by refusing to exit his jail cell.[66] Finally, it addressed *People v. Toro*, where the defendant urged that the court erred by instructing the jury with

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58. *Id.* at 1050 (Werdegar, J., concurring). Justice Werdegar assumed that, because the defendant did have some remedy after the *Batson*/*Wheeler* violation, the jury eventually selected was fair and impartial. *Id.* Justice Werdegar's hands were arguably tied given that the Supreme Court of California had already approved such a remedy, and given that article VI, section 13 of the California Constitution provides that "[n]o judgment shall be set aside . . . unless, after an examination of the entire cause . . . the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." *Id.* (quoting CAL. CONST. art. VI, § 13).

59. *Id.* at 1047.

60. *Id.* at 1049.

61. Justice Werdegar cited to *United States v. Olano* for the competing definitions of waiver and forfeiture. *Id.* (citing United States v. Olano, 507 U.S. 725, 733 (1993)). "Waiver," she wrote, is an "express relinquishment . . . of a known right or privilege." *Id.* Forfeiture, on the other hand, occurs when someone "fail[s] to make [a] timely assertion of a right." *Id.* (quoting *Olano*, 507 U.S. at 733). She correctly observed that the circumstances surrounding the "implied consent" that the majority identified seem more like forfeiture than waiver. *Id.* However, she failed to account for the majority's response that counsel is presumed to know the law as it stands and, where counsel fails to object, counsel is presumed to know what he or she is relinquishing.

62. *Id.* She did not address the argument, advanced by the defendant, that the right to an impartial jury is so fundamental that it can only be waived by the accused. Instead, she stated that the choice to proceed with the jury as constituted or elect to quash any remaining venire is a strategic decision, which is properly in the hands of counsel. *See id.*

63. *Mata*, 302 P.3d at 1049 (Werdegar, J., concurring).

64. 189 P.3d 271 (Cal. 2008).

65. *See Mata*, 302 P.3d at 1049 (Werdegar, J., concurring). Though counsel in that case did not expressly waive the right to a speedy trial, his actions—consenting to sending one defendant out of the courtroom while the other was tried—clearly waived the right. *Id.*

66. 63 P.3d 1000, 1001 (Cal. 2003).

respect to lesser crimes than what he was accused of committing.[67] The trial transcript of the *Toro* case showed that the trial court advised defense counsel on how it was going to instruct the jury and invited defense counsel to object to any instruction.[68]

To Justice Werdegar, the above cases, while not constituting express waiver in its strictest sense, at least presented clear affirmative choices made by either the defendant or his counsel.[69] Counsel knowingly sent a defendant out of the courtroom in one case; in another, the defendant, knowing that his trial was about to happen, refused to leave his cell; and, in the final case, counsel did not object when prompted by the court.[70] The circumstances of counsel's waiver in *Mata* did not suggest that he was relinquishing a known right. Instead, the circumstances suggested that he was merely complying with the court's order to continue with jury selection while being unaware of the potential consequences.[71] Justice Werdegar explained that she joined the court's opinion in *Willis*[72] because of the need for a discretionary alternative remedy other than the one that *Wheeler* provides by default.[73] However, she saw nothing in the facts of *Mata* to warrant limiting *Wheeler* further than it already has been.[74]

D. Justice Liu's Concurring Opinion

In a one-paragraph opinion, Justice Liu correctly navigates the proper application of *Wheeler* to the facts of *Mata*.[75] He agreed with the concerns regarding weakening the *Wheeler* remedy that were raised by Justice Werdegar.[76] And, he concurred fully with the majority in ruling that counsel had waived his right to the default *Wheeler* remedy by not

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67. 766 P.2d 577, 578 (Cal. 1989).

68. *See Mata*, 302 P.3d at 1049 (Werdegar, J., concurring).

69. *Id.*

70. *Id.*

71. *See id.* The potential consequences of his actions were probably unknown to counsel at the time. However, as the case makes clear, the consequence for such silence is now waiver of the defendant's rights under *Wheeler*. *Id.* at 1044 (majority opinion).

72. People v. Willis, 43 P.3d 130 (Cal. 2002). In *Willis*, the court created a discretionary alternative to the default *Wheeler* remedy. *Id.*

73. *Mata*, 302 P.3d at 1050 (Werdegar, J., concurring).

74. *Id.*

75. *See id.* at 1050–51 (Liu, J., concurring).

76. *Id.* at 1051. He stressed the importance of the lurking default *Wheeler* remedy, which gives incentive to lawyers to "affirmatively examine and avoid the possible influence of conscious or unconscious bias." *Id.* Though he referred to quashing any remaining venire as the "default" remedy, this seems, under the majority's holding, not to be the case anymore in California. Under the standard articulated in *Mata*, it is only the *possibility* of a *Wheeler*-type remedy that lawyers need to consider during jury selection.

objecting to the trial court's exercise of its discretion.[77] Under different facts, Justice Liu stated that he might reach a different result but he saw no persuasive reason not to concur with the majority.[78]

V. AUTHOR'S ANALYSIS

This section will discuss both the soundness of the court's reasoning and the probable implications of its *Mata* ruling. The soundness of the court's reasoning can be attacked on two bases. The first is the new nature of the default remedy for racial discrimination during jury selection in California. The second is the court's definition of "assent" as the term was used in *Willis*. The standard applied in *Mata* is not the same as applied in *Willis* despite the court's effort to couch its new standard in the language of the old one. The next subsection will discuss the probable implications of this ruling. Ultimately, this Comment will argue that the ruling will erode a criminal defendant's right to a jury made up of a representative cross-section of the community by removing the remedies available to the defendant.

A. California's New "Default" Remedy

Under *Wheeler*, when a jury had been partially or totally stripped of members of a cognizable group, the court had to dismiss the jurors already selected and quash any remaining venire.[79] Though a harsh remedy,[80] it was nonetheless an effective one. As suggested by Justice Liu

77. *Id.* He stressed that the circumstances might be very different had the trial court failed to give defense counsel a meaningful opportunity to object or re-sat the improperly struck juror over counsel's objection. *Id.* This argument assumes that defense counsel did, in fact, have a meaningful opportunity to object during jury selection.

78. *Id.*

79. *See* People v. Wheeler, 583 P.2d 748, 765 (Cal. 1978). The express language of *Wheeler* implied that the court had no discretion in the matter. On the contrary, under *Wheeler*, where the court finds that one party has been exercising peremptory challenges against one group, on the basis of group bias alone, the court "*must* quash any remaining venire." *Id.* (emphasis added).

80. Many judges and commentators have advocated a stronger approach. For instance, in his concurrence, Justice Marshall argued that the only surefire way to get rid of discrimination on the basis of race during jury selection was to get rid of the peremptory strike altogether. Batson v. Kentucky, 476 U.S. 79, 103 (1986) (Marshall, J., concurring). Justice Marshall has not been alone. *See, e.g.*, State v. Saintcalle, 309 P.3d 326, 350 (Wash. 2013) (en banc) (Gonzalez, J., concurring); *see also* Raymond J. Broderick, *Why the Peremptory Challenge Should Be Abolished*, 65 TEMP. L. REV. 369 (1992); Morris B. Hoffman, *Peremptory Challenges Should Be Abolished: A Trial Judge's Perspective*, 64 U. CHI. L. REV. 809 (1997); Nancy S. Marder, *Beyond Gender: Peremptory Challenges and the Roles of the Jury*, 73 TEX. L. REV. 1041 (1995).

in his concurrence, the lurking possibility of the default *Wheeler* remedy appropriately charged litigants to consider both their conscious and unconscious bias when exercising peremptory challenges.[81]

Due to the potential for abuse[82] by the strict application of the *Wheeler* remedy, the court added a discretionary alternative that, after *Mata*, is now California's new default remedy.[83] The discretionary alternative was first adopted by the Supreme Court of California in *People v. Willis*, and its application in *Mata* calls into question whether a criminal defendant still has a right to demand *Wheeler*'s default remedy of quashing any remaining venire after a *Batson*/*Wheeler* violation.

After *Mata*, the new norm in California is reseating an improperly struck juror rather than quashing any remaining venire[84] after a *Wheeler* violation.[85] This presents two problems. First, as was the case in *Mata*,

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81. Though curbing racial discrimination during jury selection is an important goal, some commentators contend that limiting a litigant's peremptory strike options forecasts the end of the peremptory strike altogether. *See* William C. Waller, *The Beginning of the End of Peremptory Challenges:* Georgia v. McCollum*, 112 S. Ct. 2348 (1992)*, 16 HARV. J.L. & PUB. POL'Y 287, 292–93 (1993).

82. *See supra* notes 28–34 and accompanying text.

83. Due to the Supreme Court's abstention in *Batson v. Kentucky*, the states have applied different remedies in the case of a *Batson* violation. *Batson* specifically identified two remedies: reseating the improperly struck juror and quashing any remaining venire. Batson v. Kentucky, 476 U.S. 79, 99 n.24 (1986). Some state appellate and supreme courts give trial courts discretion in choosing one of the specifically enumerated *Batson* remedies. *See, e.g.*, Ezell v. State, 909 P.2d 68, 72 (Okla. Crim. App. 1995) (holding that the choice of reseating an improperly struck juror or quashing any remaining venire is left to the discretion of the trial court). Some courts have held that reseating is the proper remedy. *See, e.g.*, State v. Grim, 854 S.W.2d 403, 416 (Mo. 1993) (en banc). States that have constitutions with a fair cross-section requirement for juries generally require quashing the venire. *See, e.g.*, State v. Gilmore, 511 A.2d 1150, 1157 (N.J. 1986) (adopting the strict *Wheeler* rule as a matter of New Jersey constitutional law). Other courts have adopted other alternatives such as forfeiture of peremptory strikes in the case of a *Batson* violation. *See, e.g.*, People v. Luciano, 890 N.E.2d 214, 216–19 (N.Y. 2008).

84. Reseating an improperly struck juror does cause some problems with respect to juror bias. If the juror knows that he or she was struck merely because of their membership in some identifiable group, then the improperly struck juror is highly likely to be biased against the offending party. This bias, though wrongfully caused by the offending party, should render the improperly struck juror unfit to serve on the jury for the trial from which he or she was excused.

85. It should be noted that the *Batson* procedures as applied by courts involve determinations about counsel's subjective intent. The lawyer exercising a peremptory challenge may do so on the basis of nothing more than a gut feeling. Where the struck juror is a member of a cognizable group, however, the lawyer's discretion is impeded. In California, after a party brings a *Wheeler* motion, the court must rule as to whether there is a race-neutral explanation for the challenge or not. In so doing, the court runs the risk of substituting its own unconscious bias for counsel's conscious or unconscious bias. *See generally* Antony Page, Batson*'s Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. REV. 155 (2005). This problem also occurred in *Mata*. The court simply

defense counsel may object after seeing multiple—in *Mata* it was two African-American jurors in the last few challenges exercised by the prosecution—prospective jurors of the same race struck. Where the circumstances are such, the court can reseat the most recently challenged juror, but would be unable to reseat the first challenged juror—assuming that both the first and second jurors were not struck for race-neutral reasons. The second problem is that of deterrence.[86] As Justice Liu explained, the default *Wheeler* remedy compels counsel to examine the justification for his or her strike to ensure that they are not violating the California Constitution. Changing the default remedy from quashing the remaining venire to reseating makes an improper peremptory challenge a less risky endeavor. The prosecution would be free to exercise peremptory strikes for hidden and forbidden reasons and then would only be punished by replacing some of the improperly struck jurors.

B. The New Definition of Assent

The court in *Mata* held that waiver could constitute "assent" as the term was used in *Willis*.[87] The court explained, "'[a]ssent,' the term [the Supreme Court of California] used in *Willis*, encompasses positive agreement as well as passive concession."[88] While this explanation will provide guidance going forward, neither defense counsel, nor the California Court of Appeal defined assent in such a way. Under *Mata*, assent is merely failing to object when given apparent opportunity[89] to

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substituted its own views about the prospective jurors' demeanor when the defense brought each *Wheeler* motion. The trial court ultimately granted one and denied another. *See supra* notes 19–23 and accompanying text.

86. *See, e.g.*, Lonnie T. Brown, Jr., *Racial Discrimination in Jury Selection: Professional Misconduct, Not Legitimate Advocacy*, 22 REV. LITIG. 209, 315–17 (2003) (stating that the peremptory challenge is the last vestige of legal discrimination and arguing that the punishments currently imposed, including quashing any remaining venire, do not sufficiently deter lawyers from this practice); *see also* Robin Charlow, *Tolerating Deception and Discrimination After* Batson, 50 STAN. L. REV. 9, 49–62 (1997) (arguing that, though there are serious ethical problems with a court finding a *Batson* violation after a lawyer provides a race-neutral explanation to the court, courts should err on the side of granting *Batson* motions in order to be more certain of rooting out discriminatory practices during jury selection).

87. In statutory construction, words are given their common parlance. However, as the new definition of "assent" from *Mata* makes clear, in judicial opinions, words are given the meaning most convenient to the court. *See supra* note 44 and accompanying text.

88. People v. Mata, 302 P.3d 1039, 1044 (Cal. 2013).

89. After the prosecutor exercised a peremptory strike on an African-American juror, defense counsel asked for a sidebar. *Id.* The court ordered the juror to remain in her seat while the lawyers and the court conducted a sidebar. *Id.* During the sidebar, defense counsel brought his first, successful, *Wheeler* motion. *Id.* The court, after ruling on the

object.[90] Despite this strained definition, the underlying goal of the court appears to, under these facts,[91] preserve the individual juror's right to serve over the defendant's right to a jury of his choosing.[92]

C. Implications of the Ruling

The implications of this ruling are twofold. First, it signals to trial judges around the state that the defendant's state constitutional rights[93] are weakening. A fair reading of the case instructs judges to accommodate, where possible, improperly stricken jurors through reseating rather than ensure that the defendant gets a fair trial through quashing any remaining venire.[94] The second signal is to the bar. The

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motion, ordered the juror to remain seated and informed the prosecutor that if he wanted to exercise another peremptory strike he could do so. *Id.* It bears mentioning that defense counsel did not speak after initially bringing the *Wheeler* motion. After that, only the court and the prosecutor spoke. *See id.* The court called this interaction "a meaningful opportunity to object." *Id.* at 1045. This logic seems somewhat strained, as the court did not ask defense counsel anything about what remedy he would like. The court's holding on the issue of "assent" therefore instructs lawyers around the state to object to any exercise of the court's discretion in crafting a *Wheeler* remedy at the earliest possible moment, unless counsel wants to consent, or risk losing it altogether.

90. As earlier explained, though the court called failing to object waiving the default remedy of quashing any remaining venire, the circumstances presented by the *Mata* case seem much closer to a forfeiture than waiver. *See supra* notes 58–73 and accompanying text.

91. Justice Liu noted that the court would be dealing with a much different case if the court had ordered that the juror be reseated over counsel's objection or without giving counsel a meaningful opportunity to object. *See supra* notes 78–79 and accompanying text.

92. The court, though not mentioning it explicitly, appeared to be balancing the defendant's right to a jury representing a fair cross-section of the community with the improperly struck juror's Fourteenth Amendment right under the United States Constitution not to be discriminated against during jury selection. *See* Mazzone, *supra* note 2, at 1620.

93. Specifically, a defendant's right to a jury representing a fair cross-section of the community. *See* CAL. CONST. art. I § 16.

94. This policy reflects the tension between the juror's rights and the rights of the criminal defendant. The defendant is entitled to a jury composed of a representative cross-section of the community. *See id.* The juror, on the other hand, is entitled to the opportunity to serve on a jury, race notwithstanding. *See* Mazzone, *supra* note 2, at 1620. Where, as in *Mata*, courts can choose between vindicating the juror (through reseating) and purging the jury of any discriminatory action (through quashing the remaining venire), courts should err on the side of protecting the criminal defendant. As explained, defense counsel in *Mata* did not bring his first *Wheeler* motion until after the prosecution had struck two African-American jurors within the last few strikes. This, at the very least, raises a plausible inference that both were struck for non-race-neutral reasons, which would make quashing the venire the appropriate remedy. Though this fails to vindicate the jurors' rights, it would adequately protect the criminal defendant who has more to lose—his very liberty—than does the improperly struck juror—losing out on jury service.

decision is abundantly clear that failing to object to the court's discretionary remedy is assent to it. Though defense counsel in *Mata* may not have known this,[95] defense lawyers now should. Therefore, before bringing a *Wheeler* motion, counsel should make a strategic decision whether he or she would rather reseat the challenged juror or whether he or she would rather take his or her chances with a new panel of prospective jurors.[96]

VI. CONCLUSION

Under the facts that *Mata* presented, the Supreme Court of California reached the correct decision. Where the prosecutor improperly struck one juror and the court quickly reseated her, the defendant could hardly argue that the remedy was insufficient. Also, the court was correct in inferring the defendant's consent to the panel through counsel's failure to object to the exercise of the court's discretion.[97] Under these circumstances, and in the absence of an objection, courts should not interpret the fair cross-section requirement of the community requirement in jury selection in a way that would waste time and resources.

However, as noted by Justice Werdegar in her concurrence, there are concerns to this approach. Under the court's new ruling, the individual juror's rights are becoming more important while the defendant's rights are becoming less. The next case regarding a *Wheeler* violation may well involve the court doing away with *Wheeler*'s default remedy of quashing the remaining venire altogether, or allowing the court to impose a discretionary remedy over counsel's objection. Following the decision in *Mata*, *Wheeler*'s default remedy is still available to litigants who properly ask for it but its continued availability is in doubt.

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95. *See supra* note 52 and accompanying text.

96. Whether this chance actually remains in the hands of counsel is, after the ruling in *Mata*, arguably an open question. Justice Baxter expressed his view that the defendant in *Mata* should not have had any right at all to quash the remaining venire after only one juror had been improperly struck. *See supra* notes 54–57 and accompanying text. Justices Liu and Werdegar appear to insist that the defendant in *Mata* had a right to demand *Wheeler*'s default remedy of quashing the remaining venire. *See supra* notes 58–80 and accompanying text. It remains to be seen, however, if a trial court abuses its discretion by reseating an improperly struck juror over counsel's objection.

97. Though the opinion does not mention it, it is possible that counsel made a strategic choice not to object to the court's ruling because he would have rather proceeded with the current jury than a new random draw.