

The California District Attorneys Association

Jury Selection,  
Examination, and  
Impeachment Seminar  
June 14-16, 2017

CDA



CALIFORNIA  
DISTRICT  
ATTORNEYS  
ASSOCIATION

Mark Zahner  
CDAA Chief Executive Officer

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CDAA President

### CDAA's Mission

*To promote justice by enhancing prosecutorial excellence*

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CALIFORNIA  
DISTRICT  
ATTORNEYS  
ASSOCIATION

## **CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION**

### **Welcome to the Jury Selection, Examination, and Impeachment Seminar – at McGeorge School of Law (Mock Courtroom)**

On behalf of the California District Attorneys Association, welcome to the Jury Selection, Examination, and Impeachment Seminar.

CDAA awards Minimum Continuing Legal Education (MCLE) for prosecutors under the auspices of the California District Attorneys Association, which is designated as an authorized provider of continuing education for prosecutors in the State of California. Strict adherence to attendee hours and participation is applied. Should you have any questions regarding this information please contact Ashton Charette, Training Consultant.

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- Turn off (or turn to "vibrate") your pagers and cell phones while the seminar is in session.
- All attorneys: You must provide CDAA with your State Bar number. If your bar number is not printed on the sign-in roster or if your number is incorrect, please add/correct it. If you attend the entire seminar you will receive MCLE credit. Schedule and credits are subject to agenda changes.
- You are required to sign in each day in order to receive credit. Should you choose to leave earlier than the course schedule or miss time please note the time on your designated sign in space. Please be aware that by signing in indicates you attend the full day; the California State Bar does audit our courses.
- CDAA relies heavily on attendee feedback. Please plan to complete the emailed evaluation at the end of the seminar.
- In order to keep the program running on schedule, please make sure to return from breaks and lunches on time.
- You will receive an electronic Certificate of Attendance approximately two weeks after the seminar.
- CDAA purchases only enough food/beverages for registered attendees. Because of grant restrictions, CDAA is unable to purchase food/beverages in addition to those provided each day.
- Because meeting room temperatures are sometimes unpredictable, we strongly suggest you bring a sweater or light jacket with you to the program each day.
- The meeting room will remain unlocked during lunch hours and after hours. You should not leave personal items of value in the meeting room as CDAA is not responsible for them. You may leave your training materials overnight and at lunch.
- **There is no talking during the Mock Trial and Voir Dire process. Please respect this policy, or you will be asked to leave.**
- If you have any questions or concerns, please see me.

Thank you and enjoy the seminar,

**Ashton Charette**

Training Consultant

California District Attorneys Association

Phone: (916) 443-2017

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CALIFORNIA  
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**AGENDA**

**Jury Selection/Examination/Impeachment Seminar**

June 14-16, 2017

Mock Courtroom at McGeorge School of Law – Sacramento, CA

**Wednesday, June 14, 2016**

- |            |  |
|------------|--|
| 8:00-8:45  | <b>Registration</b>  |
| 8:45-9:00  | <b>Welcome</b><br>Patrick McGrath, District Attorney, Yuba County, Technical Advisor<br>Angela C. Backers, Senior Deputy District Attorney, Alameda County, Technical Advisor  |
| 9:00-12:00 | <b>Voir Dire Techniques (includes breaks)</b><br>Angela C. Backers, Senior Deputy District Attorney, Alameda County, Technical Advisor   |
| 12:00-1:00 | Lunch (on own)   |
| 1:00-4:00  | <b>Live Demonstration of Jury Selection</b><br>(Judge) The Honorable Patrick McGrath, District Attorney, Yuba County, Technical Advisor<br>Angela C. Backers, Senior Deputy District Attorney, Alameda County, Technical Advisor<br>Paris Coleman, Deputy District Attorney, Sacramento County |
| 4:00-4:30  | <b>Panel Debrief (Jury Dismissed)</b><br>Patrick McGrath, District Attorney, Yuba County, Technical Advisor<br>Angela C. Backers, Senior Deputy District Attorney, Alameda County, Technical Advisor<br>Paris Coleman, Deputy District Attorney, Sacramento County                             |



**Thursday, June 15, 2016**

- 8:00-9:30      **Wheeler**  
Cindy DeSilva, Deputy District Attorney, San Joaquin County
- 9:30-9:45      **Break**
- 9:45-11:15     **Impeachment**  
Chuck Gillingham, Deputy District Attorney, Santa Clara County
- 11:15-1:00     Lunch (on own)
- 1:00-4:30      **Live Trial Demonstration**  
(Judge) The Honorable Patrick McGrath, District Attorney, Yuba County, Technical Advisor  
Chuck Gillingham, Deputy District Attorney, Santa Clara County  
Paris Coleman, Deputy District Attorney, Sacramento County

**Friday, June 16, 2016**

- 8:30-10:30     **Live Trial Demonstration, cont'd**  
(Judge) The Honorable Patrick McGrath, District Attorney, Yuba County, Technical Advisor  
Chuck Gillingham, Deputy District Attorney, Santa Clara County  
Paris Coleman, Deputy District Attorney, Sacramento County
- 10:30-10:45    **Break**
- 10:45-11:45    **Closing Arguments to Jury**  
Chuck Gillingham, Deputy District Attorney, Santa Clara County  
Paris Coleman, Deputy District Attorney, Sacramento County
- 11:45-2:00     **Watch Jury Deliberate Live**  
You may step out to grab lunch during this time. We encourage you to watch.
- (\*2:00-3:00)   **Verdict Read/Closing Roundtable**  
Patrick McGrath, District Attorney, Yuba County, Technical Advisor  
Angela C. Backers, Senior Deputy District Attorney, Alameda County, Technical Advisor

\*This time is subject to change depending on when the jury comes back with a verdict.

## **JURY SELECTION/EXAMINATION/IMPEACHMENT SEMINAR ROSTER – 2017**

### **ANGELA C. BACKERS**

(Technical Advisor)

Senior Deputy District Attorney

Co-Chair Capital Litigation Committee

Alameda County District Attorney's Office

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Angela C. Backers is a Senior Deputy District Attorney who has been a prosecutor for 30 years. On January 24, 2005, Angela was promoted to the Capital Litigation Coordinator in Alameda County. As the Capital Litigation Coordinator, Angela was responsible for not only trying capital cases, but also overseeing the prosecution of all capital cases in the county. Her duties include mentoring and assisting all prosecutors that are trying capital cases, as well as those prosecutors preparing capital preliminary hearings. Angela was also responsible for all post-conviction capital matters that are handled in the trial courts. Angela served on the Special Circumstance Committee in Alameda County that decided whether to seek the death penalty in a given case. Since 1998, Angela was assigned to the Capital Team and has prosecuted death penalty cases as well as other homicides. Prior to her assignment to the Capital Team, Angela was assigned to numerous felony trial teams, including the Sexual Assault Team and the Homicide Team. Angela has been trying felony jury trials since January, 1987. Angela assists prosecutors throughout the state and the nation in capital trials. In 2008, Angela was a supervisor of a felony team in a branch office until 2011. Angela is currently assigned to the Juvenile division in her county.

Angela is co-chair of the Capital Litigation Committee of the California District Attorneys Association [CDAA] and she teaches regularly for the Association of Government Attorneys in Capital Litigation [AGACL]. Angela is on the Board of Directors of AGACL, as well as being past-president. She has been an instructor for CDAA and AGACL in the areas of Demonstrative Evidence, Privileges, Opening Statements, Sexual Assault Prosecutions, Dealing with Problematic Victims, Jury Selection, Other Crimes Evidence, the Law Of Homicide, How to Avoid a Manslaughter Verdict, the Law of Special Circumstances, Penalty Phase Preparation in a Capital Case, Factors A through K, Victim Impact Testimony, Arguing for Death, Avoiding Prosecutorial Misconduct, The Top Ten Mistakes in Capital Cases.

In June 2014, Angela was awarded the Instructor of the Year Award from the California District Attorneys Association. In August 2014, Angela was awarded a lifetime achievement award, The William Schafer Award for excellence in Capital Litigation by the national organization Association of Attorneys in Capital Litigation.

### **PARIS COLEMAN**

Deputy District Attorney

Sacramento County District Attorney's Office

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Paris Coleman began his career with the Alameda County District Attorney's Office in 1994. He left Alameda DA in 2007 to return home to Sacramento and start his criminal defense practice focusing on the defense of people charged with serious and violent felonies. He returned to prosecution when he joined the Sacramento County District Attorney's office in January 2015. Paris has conducted more than 65 felony trials involving violent offenses and is currently a Lead Attorney on a Felony Trial team.

**CINDY DE SILVA**

Deputy District Attorney  
San Joaquin County District Attorney's Office  
Phone: (209) 468-2404  
Email: [cindy.desilva@sjcda.org](mailto:cindy.desilva@sjcda.org)

Cindy has been a prosecutor since 2001, and spent the first five years of her prosecutorial career in Shasta County before she moved back home to her beloved Stockton, San Joaquin County, in 2006. She has prosecuted matters in the Juvenile Unit, General Felony Unit, Welfare Fraud Unit, Misdemeanor Unit, and Sexual Assault & Child Abuse Unit, and currently handles jury trials in Stockton's "Mainline Felony" unit.

Cindy is a trainer on a number of subjects for CDAA, POST, California Peace Officers Association, various District Attorney's Offices, and within her own county, including AB 109, Proposition 47, SB 178, Wheeler/Batson, Warrantless Searches and Seizures, Miranda and the Right to Counsel, Brady and Due Process Discovery Obligations, Introduction to Misdemeanor Prosecutions, Introduction to Felony Prosecutions, Preliminary Hearings, Report Writing & Testifying, Jury Selection, and Confidential Informants & the Evidence Code Section 1040-1041 Privileges.

Just last year, Cindy received the 2016 CDAA Instructor of the Year Award. Her goal is to get her audience as excited about her subject matters as she is, and to help prosecutors in their quest to be the most informed attorneys in the courtroom on any given case on any given date.

**CHUCK GILLINGHAM**

Deputy District Attorney  
Santa Clara County  
Phone: (408) 792-2521  
Email: [cgillingham@da.sccgov.org](mailto:cgillingham@da.sccgov.org)

Chuck Gillingham has been a Deputy District Attorney for Santa Clara County since 1994. Mr. Gillingham has handled the prosecution of three strike, attempted murder, robbery, sexual assault, child molest, homicide and death penalty cases among others. Mr. Gillingham was the lead prosecutor for the Internet Crimes Against Children grant in Northern California and handled the prosecution of over 150 exploitation cases.

Mr. Gillingham is a graduate of Stanford University and the Santa Clara University School of Law. Mr. Gillingham lectured as an adjunct professor of law at the Santa Clara University School of Law on evidence for five years. Mr. Gillingham is a sought after speaker in the area of child sexual exploitation. Mr. Gillingham instructs for the Internet Crimes Against Children Task Force in both legal issues and prosecution throughout the United States. Mr. Gillingham instructs for the National Center for Missing and Exploited Children in search and seizure and the prosecution of sexual exploitation cases. Mr. Gillingham has lectured in more than ten countries for the International Centre for Missing and Exploited Children. Mr. Gillingham authored two distance-learning courses for the Korean Institute of Criminology and the United Nations effort to combat child exploitation on the Internet. Mr. Gillingham has taught for the North Dakota and Idaho Prosecutor's Associations.

Mr. Gillingham is also an instructor for the California District Attorneys Association in evidence and trial skills. He sat on the board of directors for the CDAA from 2004-2006. Mr. Gillingham was named the CDAA Instructor of the Year for 2004. Mr. Gillingham authors regular legal updates for law enforcement and has taught at police academies and numerous law enforcement agencies on search and seizure.

**PATRICK J. MCGRATH**

(Technical Advisor)

Yuba County District Attorney

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Patrick McGrath has been a prosecutor in Yuba County for over 30 years. Over that time he has prosecuted every type and level of crime in both Juvenile and Adult courts, including extended assignments to sex crimes, child physical abuse, and major narcotics. He was elected District Attorney of Yuba County in June of 1998, and has been re-elected without opposition in 2002, 2006, 2010, and 2014.

Pat has been teaching for CDAA for thirteen years and is a past recipient of the CDAA "Instructor of the Year" award. He teaches on a variety of subjects including search warrants, felony sentencing, trial procedures, organizational management and leadership excellence. Pat is currently the co-chair of the CDAA Training and Publications Committee, and has served as the technical advisor for the Basic Felony Sentencing seminar, Felony Prosecutor Academy, Management Seminar, Search Warrants Seminar, CDAA Leadership Summit, and Small Counties Conference.

**ASHTON CHARETTE**

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## CASE SUMMARY

On 12/1/2014 at 2347 hours (11:47 p.m.) Officer Polhemus arrived at 1234 A Street in response to a 911 call that occurred at 2332 hours (11:32 p.m.). Upon arrival Officer Polhemus made contact with Complaining Witness Victoria Valdez. Valdez was on the front porch of the residence at the time of the officer's arrival. Valdez appeared reluctant to speak with the officer and repeatedly inquired as to her safety, asking, "he can't hurt me now"? and "I can't take it any more." Officer Polhemus noted that Valdez appeared as if she had been crying. Her clothing appeared disheveled and she had a red mark on her right cheek. Valdez complained of pain to her head and her back.

When Officer Polhemus asked Valdez what happened she immediately stated "he raped me". When Officer Polhemus asked who she was referring to she stated, "David". When asked where David was now Valdez stated he was in the house passed out in the bedroom. Officer immediately went into the house and found a sole male occupant in the back bedroom. The male was either passed out or sleeping in the bed. The male was wearing a pair of jeans which were unbuttoned, unzipped, and pulled down slightly showing his underwear, which were twisted. The male was taken into custody and placed in the rear of Officer Polhemus' vehicle.

After securing the suspect Officer Polhemus obtained a statement from Valdez. In summary Valdez stated the following (for details complainant's complete statement): She and the suspect David Delaney have been living together for the last 3 months, since approximately Sept. 1<sup>st</sup>, and have been dating since approximately June. A week ago she found out she was pregnant. When she told Delaney he initially acted pleased and within a couple of days became moody. Today she arrived home from working late around 1900 hours (7:00 p.m.), as she had to work an hour overtime at the restaurant - she normally arrives home at 1730 hours (5:30 p.m.). When she got home it was evident that Delaney had been drinking. He immediately accused her of seeing someone else and then questioned Valdez as to whether or not the child was his. This made Valdez mad and she responded that he was a "prick" and of course the child was his. Delaney slapped Valdez across the face. When Valdez fell to the floor Delaney kicked her in the back. He then pulled Valdez by the hair into the bedroom and pushed her onto the bed. Delaney then pulled his pants half way down and then pulled her panties down. Delaney tried to put his penis in the complainant's vagina but he couldn't maintain an erection. He then put his finger in her vagina. Valdez repeatedly told him "no" and pushed his hand away. She doesn't recall how many times he put his finger in her vagina. Valdez stayed on the bed until Delaney passed out and then she got up, grabbed her phone and called her best friend Monica Sela and told her what happened. Monica convinced her to call the police. Valdez then called 911 and waited outside for the officer to arrive.

Officer Polhemus noticed the injury on her right cheek.

After obtaining Valdez's statement, Officer Polhemus questioned David Delaney and told him that Valdez said she was raped by Delaney, he spontaneously uttered "how can you rape a bitch that's giving it away."

Valdez was transported by Officer Polhemus to the medical center for an examination of her facial injury and sexual assault examination by Nurse Nancy Newhall.

The case was submitted to the District Attorney's Office. The intake deputy filed the following charges: 289(c) (forcible penetration with a foreign object), 220 (assault with intent to commit rape) and 273.5 (spouse/cohabitant abuse).

Defendant Delaney is in custody unable to make bail.

**Booked evidence:**

- Tape of 911 call
- police report
- Complainant's damaged clothing (blouse with missing button)
- photos showing injuries to complainant
- photos of scene
- booking photo
- tape of jail call between defendant and complainant (call initiated by defendant) made on December 15<sup>th</sup>
- Cal OES 2-923 form from the SAFE examination
- Hospital discharge paperwork
- X-Ray Victoria Valdez

**Witnesses:**

**For the prosecution:**

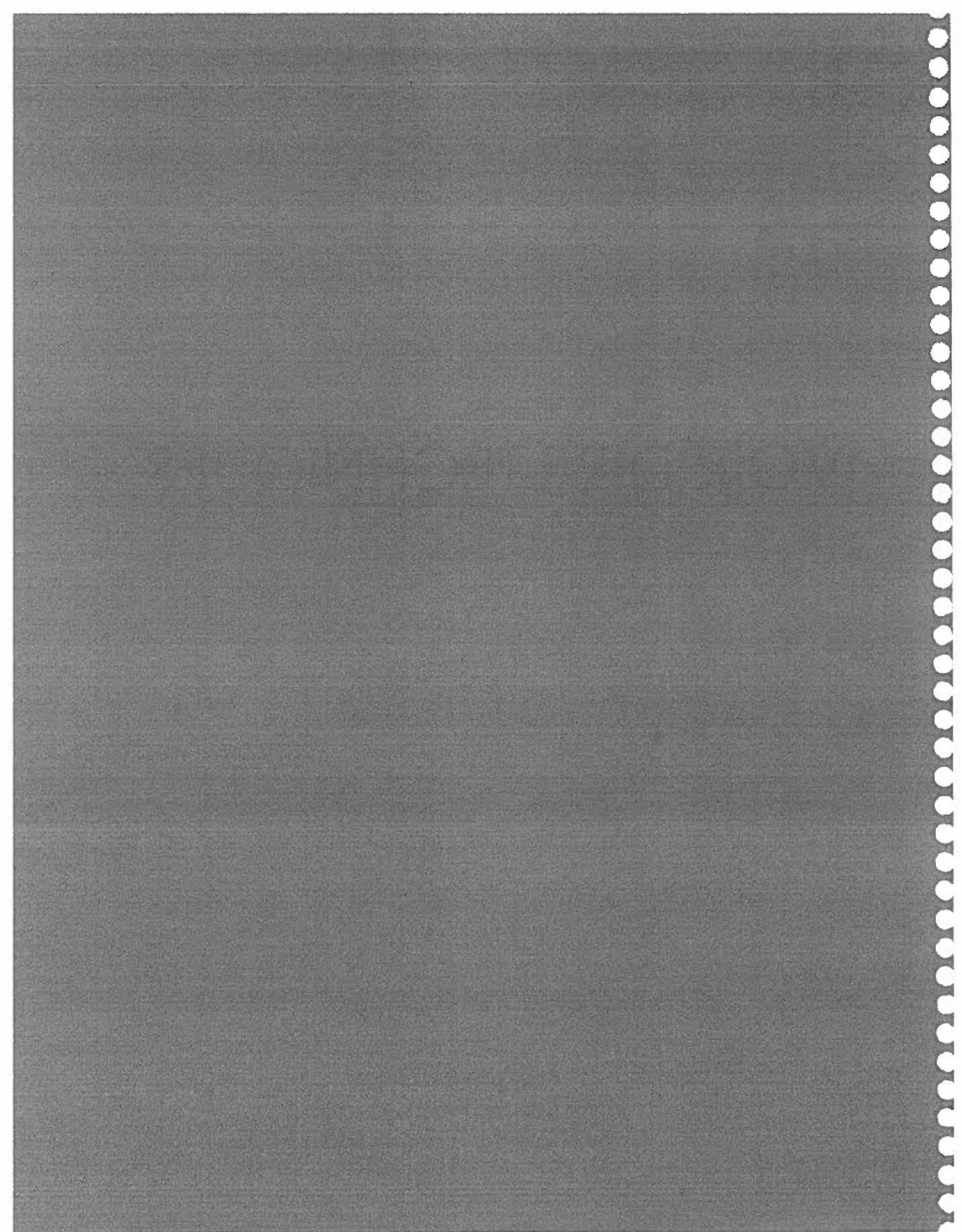
- Victoria Valdez (now recanting statement she gave to Officer Polhemus – she claims that she and the defendant argued, he was gesturing with his hands and she was accidentally struck by him and she bruises easily – she accused him of rape to retaliate for accusing her of infidelity and questioning the parentage of the child she's carrying)
- Monica Sela (process servers have been unable to locate)
- Officer Ed Polhemus
- Nancy Newhall (nurse practitioner who conducted 923 examination)

**For the defense:**

- David Delaney
- Dr. Vickers (expert contacted by the defense to testify re the 923 exam)

# VOIR DIRE TECHNIQUES

Angela C. Backers  
Senior Deputy District Attorney  
Alameda County, Technical Advisor





***The Lost Art of  
Jury Selection:  
Picking A Jury That Will Do Justice©***

**Angela C. Backers**

Senior Deputy District Attorney  
Co-Chair of Capital Litigation Committee  
Alameda County District Attorney's Office

June 14, 2017

CDAA – Sacramento, CA

*difficult to like + picky them*

***The Lost Art of  
Jury Selection:  
Picking A Jury That Will Do Justice©***

**Angela C. Backers**

Senior Deputy District Attorney  
Co-Chair of Capital Litigation Committee

Alameda County

Oakland, California

[angela.backers@acgov.org](mailto:angela.backers@acgov.org)

***Objective of this Presentation***

- To enhance your skills in jury selection
- To provide you with new tools for making informed decisions about who you select to be on your jury
- To discuss the use of a juror questionnaire
- To enlighten you and your jurors about internal/unknown biases
- To demonstrate valuable techniques in questioning and educating your jurors

### ***Rating Potential Jurors***

- Flash Card System
- Number Rating
- Color Rating

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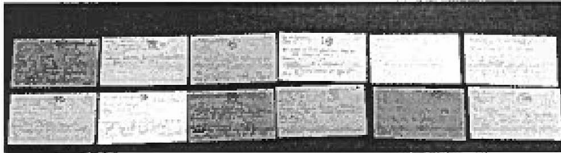
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### **MOCK JURY SELECTION**

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### ***A Science or An Art?***

- Jury selection is an art form
- Jury selection is an intuitive process
- Jury selection is a study in human behavior
- Jury selection varies with your evidence/witnesses
- Jury selection is not a task that can be delegated to another person
- ONE mistake in jury selection can deprive you, your victim and the community of a just verdict

sworn before empanelled?

### ***Jury Selection Does NOT begin in the Courtroom***

- Gather as much information as possible
- Be hyper-vigilant
- The Parking Garage and the Crosswalk (last night)
- Metal detectors and Restrooms
- Coffee Stand and Newspaper Stand (handoff)
- Elevators and Cell-Phone conversations (spouse)
- Outside the courtroom - (when panel first called)
- BE A TRAINED OBSERVER**
- Remember, you are ALWAYS making a "First Impression"

### ***Swear the Potential Jurors***

"Do you, and each of you, understand and agree that you will accurately and truthfully answer, under penalty of perjury, all questions propounded to you concerning your qualifications and competency to serve as a trial juror in the matter pending before this court; and that failure to do so may subject you to criminal prosecution?"

Potential Juror: "I do."

- Jurors should be sworn **BEFORE** filling out the questionnaire - BE OBSERVANT DURING OATH! (2nd oath takes place after jury is selected\* never swear until opening)
- The questionnaire should be signed under penalty of perjury

## *Attorney Voir Dire*

"Upon completion of the court's initial examination, counsel for each party **SHALL** have the right to examine, by oral and direct questioning, any or all of the prospective jurors."

- The court may limit the questioning by counsel
- The court may limit time with each juror/party
- Voir Dire is **ONLY** to aid the exercise of challenges for CAUSE

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## *List of Witnesses, Parties, Staff*

- In the questionnaire, list names of the Judge, all court staff, attorneys and parties.
- In the questionnaire, list all potential witnesses (including penalty phase witnesses)
- In the questionnaire, ask whether the juror <sup>+</sup> recognizes or knows any other potential juror
- If no questionnaire is used, make a **written list** of all these individuals and have each potential juror <sup>\*</sup> review it and circle names that sound familiar

Do you know anyone on this  
court room

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## *Preventing Juror Misconduct*

- During jury selection it is your duty both in oral voir dire and/or in the questionnaire to admonish the jury about what they are **NOT** allowed to do....
  - Do not investigate anything on the internet or a dictionary
  - Do not visit the crime scene
  - Do not talk about the case or the bible
  - Do not consult your pastor
  - Do not read articles about the case or defendant
  - The defendant doesn't have to prove anything... he doesn't have to call witnesses, he doesn't have to testify, he doesn't have to produce any evidence... will you follow that law?
  - Do you promise not to hold it against him if he doesn't prove his innocence? I am the only one who has a burden of proof, I am the only one who has to produce witnesses and evidence, will you follow that law? (\*\*\*)

I am the only one who has to prove  
anything - are you cool with that?  
I am

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## ***Removal for Cause***

- **CCP 225 Challenge for Cause:** one of the following
- (A): **General Disqualification** (CCP 228)
- (B): **Implied Bias:** the existence of facts disqualify the juror (CCP 229 - READ IT!)
- (C): **Actual Bias:** the existence of a state of mind on the part of the juror in reference to the case or to any of the parties, **which will prevent the juror from acting with entire impartiality and without prejudice** to the substantial rights of any party.
- DA is a party and has a right to a fair trial! →

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## ***A Juror who is Too Close to the Case - Implied Bias- Cause challenge***

- Be sure to ask **EACH** juror whether they **know** **ANYONE in the courtroom**, including staff and other potential jurors
- Be sure to ask **EACH** juror whether they know any of the potential witnesses, including the victim or victim's family, defendant or defendant's family (\*\*avert disaster – Juror #1 and surprise alibi W)
- These questions go to challenge for **CAUSE** and must be asked **regardless** of whether you use a questionnaire or have attorney voir dire

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## ***When Do You Exercise Your Challenges?***

- **Code of Civil Procedure 226:**
- 226(d): All challenges to an individual juror, **except a peremptory challenge**, shall be taken **first** by the defendants, then by the People.  
Defense goes first on challenges for CAUSE.
- **Code of Civil Procedure 231(d):**
- 231(d) Peremptory challenges are exercised or passed **alternately**, **People go first**. (10/20-L)  
Must have jury box **FULL** before exercising.  
Passing for Cause does not cost you the Peremptory.

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## Proper Excuse of Jurors

- Peremptory challenges are a historic right, provided "to insure that criminal trials are conducted before **jurors** ~~who not only proclaim their impartiality,~~ but **whose ability to be evenhanded is not seriously questioned by the parties.**
- Peremptory challenges excusing jurors **MUST** be for **genuine**, reasonably specific, **race- or group-neutral** explanation *related to the particular case being tried*  
**Hernandez v. New York** (1991) 500 U.S. 352
- Reasons need not amount to a challenge for cause

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## People v. Jennell Wright

242 Cal.App.4th 1461 - (modified 1/6/2016)

- **Female** defendant in a child custody battle
- Defendant claimed the victim threatened to take the child
- D. was lying in wait with a gun and a speed loader
- D. had previous suicide attempts
- Defendant testified in both trials
- First jury asked terrifying questions on manslaughter (footnote 2) – mistrial on 187
- Second jury – Lying in Wait LWOP (affirmed)
- Issue: Jury instructions on lessors – opinion discusses BOTH imperfect self-defense and heat of PASSION ROUSED OVER A LONG PERIOD of TIME —  
LESSON: **GIVE ALL LESSORS + 347!**

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## Safety Net - Bias Question 1

- ①
- Magic Question to ask of **EVERY JUROR**:  
**"Have you ever been in a courtroom for any reason?"**
  - This question uncovers the juror who:
    - attended her boyfriend's murder trial,
    - attended his father's molestation trial,
    - testified as a character witness for defense
    - was prosecuted for welfare fraud years ago (*oh, is fraud a crime?*)
    - was wrongfully arrested & arraigned for murder
    - was in juvenile court with their "innocent" son

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## Safety Net - Bias Question 2

- Magic Question to ask of **EVERY JUROR**:  
"Please describe any contact you have had with law enforcement?"
- This question uncovers the juror who:
  - was misidentified for a crime and later released,
  - was involved in or witnessed a protest,
  - had a juvenile child brought home by the police
  - was harassed by the police
  - who fought a traffic ticket
  - went with her boyfriend to register as sex-offender

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## Safety Net - Bias Question 3

- Magic Question to ask of **EVERY JUROR**:  
"Have you or anyone you know ever been in custody?"
- This question uncovers the juror who:
  - Is furious with police because he/she was arrested and never charged,
  - Is a woman who becomes pen pals with death row inmates, (not her, not her family, just a friend)
  - Arrested for participating in an anti-war protest, but not charged
  - Brother doing time because he took a plea bargain, but he is not good for the crime

- ④ Have you ever been in a protest
- were they treated unfairly, were they railroaded,
- 
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## Proper to Excuse Jurors for Attitudes About Law Enforcement

- A peremptory challenge made on the basis of a prospective juror's **negative experience with law enforcement** (or DA or CJ system) is **proper**.  
*People v. Windbush* (1/26/17) #S117489
- *People v. Scott* (2015) 61 Cal.4th 363  
 However, if you have a potential juror who has had a bad experience with police and you have a police witness, I would develop their bias against law enforcement during questioning and try to have them removed for implied bias or actual bias on a challenge for cause

- only do cause if
- it makes me feel better you + it + didn't have
- 
- 
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- 
- 
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## The Jury Questionnaire and/or Topics for Voir Dire

### Regardless of Whether You Use a Questionnaire:

#### •Introduction -

- Answers are under penalty of perjury (must have been sworn)
- Always offer to allow them to speak in "PRIVATE"

#### •Employment -

- Supervise others?
- Discipline or fire others?

•Mother and Father's Occupation

•Former Spouse's Employment

Any answers & pry

right juror for this case

- anything uncomfortable we can go in  
chamber

Divorced (ex) Briefly or longer

## The Jury Questionnaire and/or Topics for Voir Dire

• What do you do in your spare time?

Hobbies, sports, interests, movies, books...

#### •Media:

• What newspapers, magazines, or periodicals do you subscribe to or regularly read?

• Follow news on current events? Source of news?

• What television and radio programs do you frequently watch or listen to?

Have you seen "Making a Murderer" on Netflix?

• Is there any subject matter or genre that you try to avoid?

- What type of books do you read?

Have you seen making a murderer?

- realize TV show

- Prosecutor talked about all the  
evidence & in the movie →

What impressions do you have.

- any genre of movies or try David

## The Jury Questionnaire and/or Topics for Voir Dire

• Bumper Stickers or Personalized license plates or license holders on your car?

• Name three people (living or deceased) that you respect the most (and why):

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

• Who is the one person who most influenced your life and how?



## The Jury Questionnaire and/or Topics for Voir Dire

### • Media:

- What criminal cases have you followed in the media? \*\*\*
- Which protests have you followed on the news?

### • The Internet:

- Access to the Internet
- For what purpose do you use the internet?
- What type of Internet sites do you frequent?
- Will you follow the **COURT'S ADMONITIONS?**

## The Jury Questionnaire and/or Topics for Voir Dire

- Alcohol: Has alcohol abuse touched your life or the life of anyone you know in any way?
- Did alcohol result in any arrests or court?
- Did alcohol result in any type of treatment?
- Drugs: Have drugs touched your life or the life of anyone you know in any way?
- Did drugs result in any arrests or court?
- Did drugs result in any type of treatment?
- Do you believe that drugs and alcohol make you do things that are *contrary to your nature*?

## The Jury Questionnaire and/or Topics for Voir Dire

### • Registered to Vote:

- Religious beliefs that would prevent you from judging another person?
- Civic, political, social or charitable organizations, including, but not limited to, groups involved with
  - victim's rights
  - prisoner's rights
  - protests (on-line or in person)
- Have you ever visited a jail or prison or juvenile hall? \*
- Have you ever put money on an inmate's books? \*
- Have you ever corresponded with an inmate? \*

→ Has drugs or alcohol touched your life in any way?

→ Do you believe <sup>alcohol</sup> <sup>drugs</sup> make you do things that are contrary to your nature?

\* Parents of addicts believe diff.

demon lives in you - when - open door for demon to come out -

Protests → has to do w/ relationship w/ police -

- Did y see Police do anything inappropriate "Protestor"

Poster →

- deadwps - when person next for you called for murder of police

## *The Jury Questionnaire and/or Topics for Voir Dire*

- **The Criminal Justice System:**
- Have you, a family member or anyone you know ever been accused of, arrested for, charged with or convicted of a crime, including driving under the influence of drugs or alcohol?
- Have you ever known, anyone, (not already mentioned) who was investigated for a crime? (a suspect)
- What are your feelings about the effectiveness of our criminal justice system? (leave space to explain)

- police

- prison population a reflection of unfairness

## *The Jury Questionnaire and/or Topics for Voir Dire*

- **The Criminal Justice System con't:**
- In general, how would you rate the job the police in your city are doing in dealing with crime?

☐ Excellent job    ☐ Good job    ☐ Only a fair job    ☐ Less than a fair job

Please state your belief regarding the following 3 statements:

- "I trust the criminal justice system in Alameda County."  
☐ Strongly Agree    ☐ Agree    ☐ Uncertain    ☐ Disagree    ☐ Strongly Disagree
- "Criminal laws treat criminal defendants too harshly."  
☐ Strongly Agree    ☐ Agree    ☐ Uncertain    ☐ Disagree    ☐ Strongly Disagree
- "Persons determine their destiny or fate by the choices they make in life."  
☐ Strongly Agree    ☐ Agree    ☐ Uncertain    ☐ Disagree    ☐ Strongly Disagree

how do you

how do you feel about this statement?

## *The Jury Questionnaire and/or Topics for Voir Dire*

- **The Criminal Justice System con't:**
- "What is the first thing that comes to your mind when you think of:

a. Prosecutors: \_\_\_\_\_

b. Defense Attorneys \_\_\_\_\_

c. Police Officers \_\_\_\_\_

## ***The Jury Questionnaire and/or Topics for Voir Dire***

- **Psychological Testimony (or any "EXPERT"):**
- Studied, trained or worked in area of psychology, psychiatry, counseling or mental health?
- Have you or any family member or friend ever been involved with the mental health field or received mental health services of any sort? \* can be private
- Do you have an opinion about the value and validity of psychiatric/psychological testimony in legal matters?
  - Note: This question has a down side to it...

*feeling about Brink's testimony in courtroom*

*-hard on me for grilling an hired expert →*

*-can you separate how*

## ***Aiding and Abetting***

- **A Bank Robbery**
- Defendant A - steals floor plan of bank
- Defendant B - tells D of security guard's habits
- Defendant C - getaway driver (goes to scene)
- Defendant D - actual robber with a gun
- A, B, C, D are all guilty of armed robbery because they knew a robbery was going to happen and they did something by act or advice to assist the robbery

*about the fair-*

## ***Any Legal Concept***

- Take any legal concept that will apply to your case (i.e. No corroboration, Aiding/Abetting, Felony Murder, Single Witness, Child Witness, Police Witness, Delayed Reporting, Recanting Witness . . .)
- Explain to the Court that this line of questioning goes to a challenge for **CAUSE**
- Explain if a potential juror has a problem with the legal concept, they may not follow the law and they have either an actual or an implied bias (CAUSE)

*-any concept*

*-perjury*

*-delayed*

### Felony Murder Rule

- Under the law, when a person is killed during the commission or attempted commission of certain felonies, that killing is a **murder in the first degree** if the perpetrator had the specific intent to commit the certain felony. This law applies no matter whether the killing is intentional, unintentional or accidental.
- How do you feel about this law called the felony murder rule? Please explain.

- arson for \$

- drunk driving, kill

- vacant - your house

- homeless person dies,

- 1st degree murder

- How do you feel about it?

### Defense Hypotheticals

- *People v. Cash* (2002) 28 C.4th 703, 718- 723  
"Thus, we affirmed the principal that either party is entitled to ask prospective jurors questions that are specific enough to determine if those jurors harbor bias, as to some fact or circumstance shown by the trial evidence, that would cause them not to follow an instruction directing them to determine a penalty after considering aggravating and mitigating evidence." (*Cash* citing *Kirkpatrick*)

- any fact that would cause a juror to vote a certain way that goes to cause ~

### Inquiry Re Defendant's Youth or Appearance

- Imperative to ask potential jurors about a young defendant- information goes to a challenge for CAUSE
- DA: "Some jurors have told us that they would not be able to convict a defendant of murder, if he was only 18 at the time he committed the murder, is that how you feel? (Develop a Challenge for Cause)
- When you heard the murder charge, did you look over at the defendant and say to yourself, he doesn't look like a murderer?

→ Did you look over & see a young handsome man & think he couldn't possibly go 1st degree murder? I mean I would convict him b/c of how he looks

### ***Asking for a Promise in a non-capital case***

- Asking a juror to promise to return a verdict of guilty if they are convinced of the defendant's guilt beyond a reasonable doubt is **NOT improper**.  
(This is about the juror's ability to fulfill their duty, not about the evidence)

"Q. Will you promise me that if you sit on this jury and you believe beyond a reasonable doubt that the defendant is guilty of murder, that you will return a verdict finding him guilty of murder?"

**Proper**, seeking a commit from her to do her duty

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### ***Making Sure the Juror Has the Courage to Do Justice***

- 12<sup>th</sup> Juror
- Signing the Verdict Form
- Returning to Court and Owning your verdict

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Paint worst case, skinniest version -  
the issue - by rd - can you convict based on  
single witness -

### ***The Jury Questionnaire and/or Topics for Voir Dire***

- **Judging Credibility of Witnesses/Evidence:**  
(This is the beginning of educating the jury about the perceived weaknesses in your case)
- "Is it possible for you to return a verdict of guilty in a..."
- **Case with only one witness** (except an accomplice)
- Case with no fingerprints
- Case with no medical findings
- Case with delayed reporting
- Case with a recanting witness?"
- These questions all go to actual or implied bias - **CAUSE!**

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## The Jury Questionnaire and/or Topics for Voir Dire

### • Judging Credibility of Witnesses/Evidence:

(This is the beginning of educating the jury about the *perceived* weaknesses in your case – these go to CAUSE)

- Is it possible for you to believe the testimony of a witness if you knew that the witness was under the influence of drugs or alcohol at the time of the event about which he/she is testifying? Yes \_\_\_ No \_\_\_ Please explain:
- If you believed a person lied on a previous occasion, would you automatically disregard anything else they have to say? Yes \_\_\_ No \_\_\_ Please explain: *cause*

*open mind*

## The Jury Questionnaire and/or Topics for Voir Dire

### • Judging Credibility of Witnesses/Evidence:

(This is the beginning of educating the jury about the *perceived* weaknesses in your case – these go to cause)

- Is it possible for you to believe the testimony of an individual, if you thought he/she was somehow involved in the crime about which he/she is testifying? Yes \_\_\_ No \_\_\_ Please explain:
- Is it possible for you to return a verdict of murder, if there is no DNA evidence presented? Please explain:
- Is it possible for you to return a verdict of murder, if the murder weapon was never recovered? Please explain:

## The Jury Questionnaire

### • Pro's:

- Obtain more information
- Obtain more honest answers
- Spares juror of embarrassment in group setting
- Chance to educate the jurors about the law and the case
- Jurors don't "learn" "right" answers from other jurors
- Jurors aren't poisoned by other jurors comments

### • Con's:

- Time
- Money
- Deprives you of "face-time" with the juror
- Can't read body language or hesitation when juror is writing answers on the questionnaire

*- emotional  
- skill living with me  
- would you like to talk in private*

*- Jurors & learn the right answer*

*- Jurors & poison Panel?*

*- ask you a ? judge feels uncomfortable about*

### The "Discount" Question

- You may find out that my victim...
    - Is married to the defendant...
    - Delayed in reporting...
    - Has a criminal record...
    - Is a prostitute ...(or a gang member...)
    - Was drinking a lot that night...
    - Has previously lied about this incident...
    - Pretended that nothing happened afterward... →
- If I prove the charges to you beyond a reasonable doubt, will you nonetheless "discount" the crime because the victim has issues? (... example)

handsome Alge

Ask Discount ?!

if I prove <sup>my</sup> BYRD <sup>for charges</sup> but you found out victim was a would you discount, crime, would you come back w/ something less?

~if yes, would Discount, then Discount?'s,

### The "Discount" Question

- **Cause questions:**
- Will you automatically disregard the testimony of a witness who was intoxicated at the time of the crime?
- Will you automatically disregard the testimony of a witness who had previously lied about that happened that night?
- Will you automatically disregard the testimony of a witness who is a prostitute?
- Will you automatically disregard the testimony of a witness who did not disclose the assault right away?

### Safety Net Question #4

(may be answered in private)

- Have you or anyone you know ever been the victim of sexual assault/DV or molestation?
- Was it reported to anyone?
- (May follow up in private)
- \_\_\_\_\_
- Have you or anyone you know ever been accused of sexual assault/DV or molestation?
- Was it reported to anyone?
- (May follow up in private)

How does this go to cause?

### Safety Net Question #5

- Have you ever followed any rape or sexual assault or domestic violence cases in the news?
- Which case? What was the outcome?
- Did you think it was a fair outcome?
- Do you know about *Audrie Pott* case at Saratoga H.S.?
- *Brock Turner* – Stanford rape of unconscious V.
- Do you know about the Richmond High Homecoming dance gang rape case?

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### Safety Net Question #6

- When you heard the charges, did you look over at the defendant and say to yourself, hmmm, he doesn't look like a rapist?
- What does a (child molester or) rapist look like?
- Do you have some preconceived idea of what a (child molester or) rapist would look like?
- What if I prove my case to you beyond a reasonable doubt, would you hesitate to convict because he doesn't look like your idea of a rapist?

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### A Single Witness

The testimony of  
a single witness  
is sufficient  
for the proof of any fact.

Caveat: This must be discussed in person! CALCRIM 301  
(Obviously does not apply in cases that require corroboration!)

if you believe  
A reasonable  
person...

never talk about J. F. first  
w/o ready entry instruction -  
first -

→ he said / she said →  
law says 1

- will you promise me you can't find by R.A.



Now, should we treat women as independent agents, responsible for themselves?  
Of course.  
But being responsible has nothing to do with being raped.  
Women don't get raped because they were drinking or took drugs.  
Women do not get raped because they weren't careful enough.  
Women get raped  
**because someone raped them.**

The Purity Myth - Jessica Valenti

tell me how you feel?

### ***Blame***

- Stranger Rape
- Blame the rapist  
vs.
- Non-Stranger Rape/DV (85% of all rapes)
- Blame the victim

we immediately distrust by a person  
they now - It's a pre-conceived notion

permeate me you won't start out  
disbelieving my witness just b/c  
x42 lived with them?

Robbery victim - Streetlight → robbery victim?

### ***Robbery Victims: Lessons Learned***

- When a robbery victim reports that someone took their belongings by force or fear, do we automatically disbelieve them, until they prove otherwise?
- Do we assume they did something to deserve getting robbed?
- Why do we have this double standard in NON-stranger sexual assault/DV cases?

## Duty Trumps Doubt-video →

### ***Child Molest Cases: Lessons Learned***

- Parent or Fresh Complaint Witness
- We teach ALL parents and Fresh Complaint Witnesses that the first thing you do when a child says they were hurt/assaulted/something bad happened to them ----- is you tell them **YOU BELIEVE THEM!!!!**
- You tell them they are safe NOW and
- They did the right thing by telling an adult

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### ***Jane Doe No More | Duty Trumps Doubt***

- When investigating rape/DV/molest cases, it is so important to always start out believing the victim  
**UNTIL**
- *Every witness* has been interviewed and
- *All the available evidence* has been gathered
- And **ONLY THEN** decide if she is telling the truth (*Duty Trumps Doubt* – 8 minute 2012 training video)

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### ***WHAT NOT TO DO to Jane Doe!!!!***

- What is your reason for coming forward?
- What do you want done?
- Do you want him to go to jail?
- What is your ultimate goal?
- How do you want the police to intervene?
- You can't say I guess, because you are 18, so you need to make an adult decision.
- If I deem that a crime occurred, you will **HAVE** to do a pretext call...

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Missoula - Rape +  
Rok -

### ***Why Victims Do NOT Report***

- ...Did you drink?...How much do you usually drink?...What were you wearing? Why were you going to this party? What does this text mean? Who were you texting? When did you urinate? Who was with you when you urinated? Did you drink in college? How many times did you black out? Did you go to Frat parties? Are you serious with your boyfriend? Are you sexually active with your boyfriend? Would you ever cheat? Do you have a history of cheating? ...Brock Turner victim

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### ***AAU Campus Climate Survey***

- The Association of American Universities on Monday released the overall results of a survey that asked students at 27 universities about their experiences with sexual assault and sexual misconduct, drawing responses from more than 150,000 students.
- Survey: More than 1 in 5 female undergrads at top schools suffer sexual attacks.
- More than 20 percent of female undergraduates at an array of prominent universities said this year they were victims of sexual assault and misconduct, echoing findings elsewhere, according to one of the largest studies ever of college sexual violence.

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### ***sexual assaults or DV on college campuses?***

- In court papers that Florida State University fought to keep confidential, the former director of the school's Victim Advocate Office testified that in 2014, a total of 113 students reported being sexually battered, which is the same as rape in Florida. But the college reported only 14 cases to the federal government, records show.
- The former official, Melissa Ashton, who ran the advocate office in 2014, also testified that in the nine years she worked in that office, an estimated 40 football players had been accused of either sexual assault or "intimate partner" violence, and that to the best of her recollection, only one person had been found responsible. She said most of the women chose not to pursue the cases "based on fear." Ms. Ashton said the number of sexual battery cases was so much higher than the total that university reported because most of the encounters occurred off campus, and the federal Clery Act, which requires colleges to report sexual misconduct cases as part of its overall crime statistics, did not require that those off-campus cases be included.

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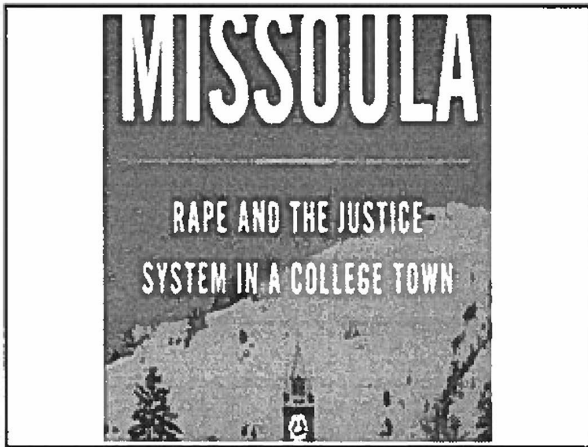
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### ***The Myth***

- Do you have a feeling or preconceived idea about the frequency of false reporting in crimes of sexual assault, DV or molest?
- In other words, do you have a notion on how common it is for victim's to make a FALSE claim of sexual assault, DV or molest?
- Would you start out disbelieving a victim in a date rape or an acquaintance rape or spousal rape or domestic violence (as opposed to a stranger rape)?
- Would you require more proof in an acquaintance rape/DV/molest than a stranger rape?

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### ***Preconceived Notions***

- Do you believe it is possible to consent to one act but not consent to another?
- Kissing...but not intercourse
- Fondling...but not sex
- One sex act...but not another
- Do you believe a person always has the right to withdraw consent?  
To say "No" at any time?

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### ***Blaming the Victim***

- Why were you at a house party?
- What were you doing out at 2:30 a.m.?
- Why did you have so much to drink?
- Why did you accept a ride home from him afterward?

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### ***Blaming the Victim***

- Do you have a boyfriend?
  - Are you a virgin?
  - Why did you ask him to use a condom?
  - He cried when I interviewed him...
  - It's **only** your word against his...
  - You will ruin his reputation if you follow through with this
- Would you say that to a robbery victim?*

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### ***BLAME in Non-stranger RAPE: Have you ever thought...?***

- Boy, she is looking for trouble!
- Why is she dressed like that, what message is she trying to send?
- She shouldn't be doing shots, she's asking for it?
- Why didn't she stay sober enough to drive home, if she crashed on his couch, she must have known this would happen?

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### ***BLAME in Domestic Violence:***

*Have you ever thought...?*

It's just her word against his...

She must have done something to provoke him...

Why didn't she just leave him?

She didn't tell anybody...

Afterward, she acted like nothing happened...

Afterward, she lied about what caused her injury

*Would you automatically disbelieve a DV victim who did any one of these things?*

- would it be impossible for you to believe a victim

- if it's his word vs. her word -

only if you are going to put his statement.

Do you think it should not be enough to try case for word?

- would you automatically disbelieve a DV victim who called a GF instead of police -

### ***Blame***

- Non-Stranger Rape by family member or family friend
- Blame the victim/victim blames self
- Why would your trusted childhood friend suddenly rape you?
- Why would your beloved cousin rape you?
- Why would your brother-in-law molest you?

### ***Blame***

- Non-Stranger Rape of a Prostitute
- Blame the victim
- It goes with the territory (her job)
- Part of the game (working the streets)
- Part of the risk of her job
- She's out there giving it away anyway - it's not that big of a crime when it happens to "her"
- *Would you automatically "discount" this crime?*

### ***We Need to Educate Ourselves***

- **A Prosecutor:** a woman would fight to her death before letting a man rape her
- **Reality:** Most women who are sexually assaulted do not resist. The fear is overwhelming. They feel helpless. They make a conscious choice not to resist, because they are afraid that if they resist they will be hurt even worse. Many victims try to placate the rapist to avoid further harm...

- death before Dishonor →

- ~~Victim~~ - Fight or resist

give it up

- Do you think I should have to prove  
she resisted?

### ***We Need to Educate Ourselves, the Courts and our Jurors***

- **Myth:** a woman would resist any violence
- **Reality:** Most women who are assaulted do not resist. The fear is overwhelming. They feel helpless. They make a conscious choice not to resist, because they are afraid that if they resist they will be hurt even worse. (211 - give it up!)
- *Would you automatically disbelieve a victim if she did not resist her batterer?*
- *Would you require me to prove resistance, even though the law does not?*

### ***Rape By Itself is Terror***

- ...there doesn't have to be a gun or a knife...there doesn't have to be a verbalized threat for the ACT ITSELF to be enormously TERRIFYING AND THREATENING...
- Sexual violence is so intimate that it INDUCES a UNIQUELY POWERFUL KIND OF TERROR

### ***Post Sexual Assault Behavior by the Victim***

- It is common for the victim to have extensive interaction with the person who assaulted her "as an attempt to try to undo it"
- If I interact with this person normally, I can tell myself that it didn't really happen.
- It is common for a victim to give her perpetrator a ride home afterward...

\*normalize it -

\*compartmentalize -

### ***Sexual Assault By Someone You Trust***

- If you have been assaulted by someone you thought you could trust, how do you restore your sense of trust in the world or in people?
- After being betrayed and violated by a person you were sure would never harm you, "how do you then trust your own judgment thereafter?"

### ***We Are The Voice***

- Victims need social acknowledgement and support
- Victims need to establish power and control
- Victims need an opportunity to tell their stories in their own way, in a setting of their choice
- We are called to create this setting and be the vessel for their voice



**Seeking Justice,  
Doing Justice**

“There can be no justice  
until those uninjured  
by crime  
become as indignant  
as those who are.”

Solon, the lawmaker of Athens (died 559 B.C.)

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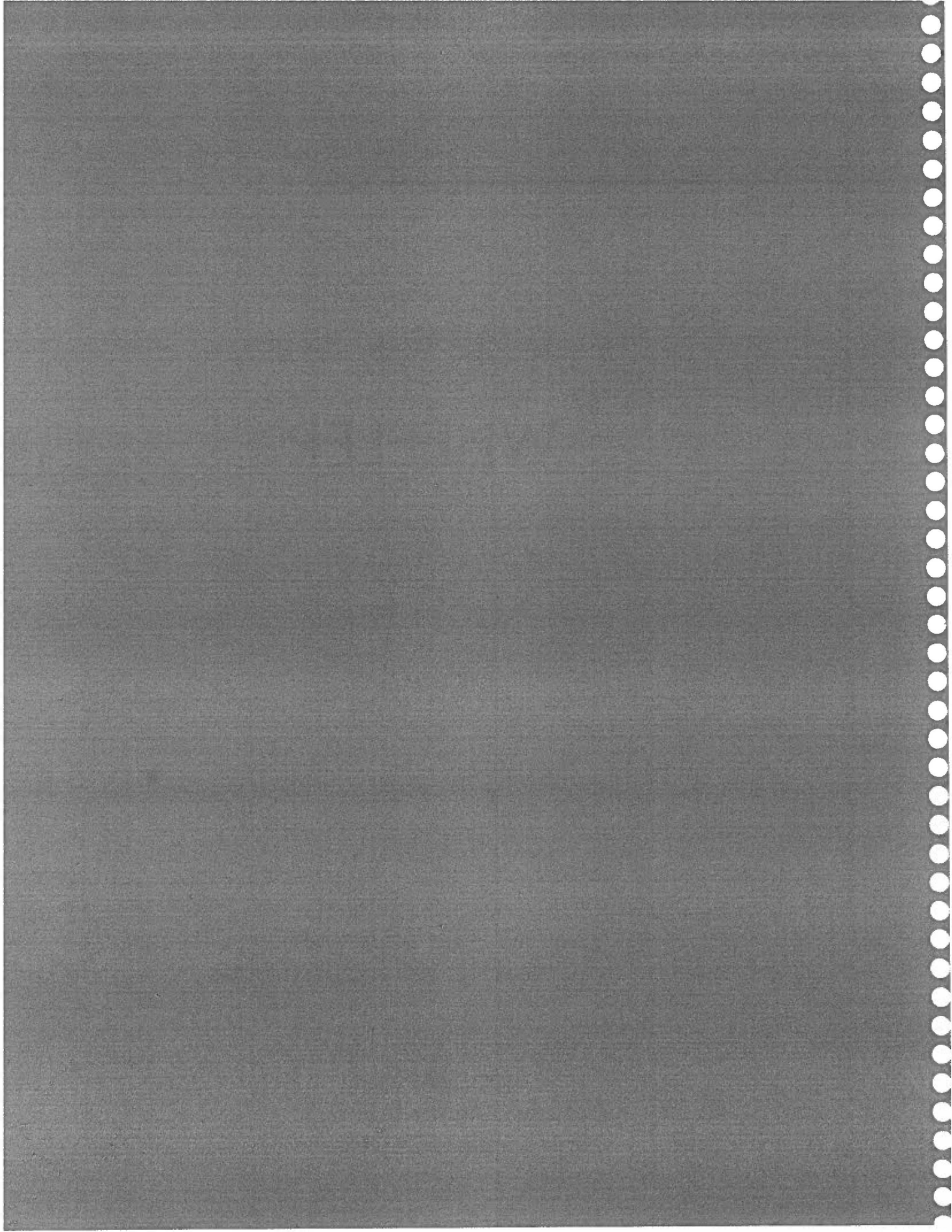
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# WHEELER

Cindy DeSilva  
Deputy District Attorney  
San Joaquin County



## Responding to a *Wheeler/Batson* Motion



by Cindy De Silva  
Deputy District Attorney, San Joaquin County  
(Rev. Ed. June 2017)

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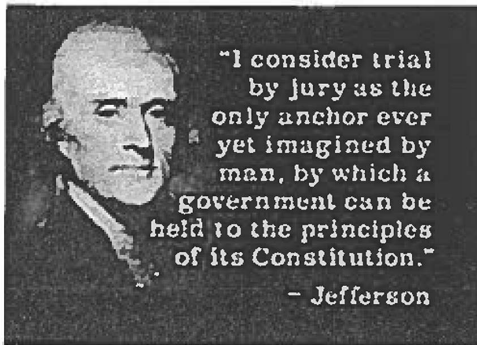
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## The Motion



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## What is "Group Bias?"

- **"Group Bias":** The presumption "that certain jurors are biased merely because they are members of an identifiable group distinguished on racial, religious, ethnic, or similar grounds" (*People v. Wheeler* (1978) 22 Cal.3d 258, 276)

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## Clear Case of Group Bias

- Massachusetts 2010  
"Sal Esposito"  
Summoned for Jury  
Duty



- Disqualification  
request DENIED.

- "Maybe the defendant  
will be a cat burglar  
and Sal will be  
relieved of his duties  
due to bias."

- (Guest comment to news  
story, Jan. 2010)
- [www.14wfm.com/global/story.asp?s=11790300](http://www.14wfm.com/global/story.asp?s=11790300)

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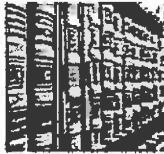
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## The Framework

- *People v. Wheeler* (1978) 22  
Cal. 3d 258

- *Batson v. Kentucky* (1986)  
476 U.S. 79



- *Johnson v. California* (2005)  
545 U.S. 162

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## *People v. Wheeler*

- Article 1, Section 16 of the California  
Constitution contains a "right to trial by jury  
drawn from a representative cross-section  
of the community . . . ." (*Wheeler, supra*, at  
276-77.)
- Using peremptory challenges to kick jurors  
based solely on "group bias" violates that  
right. (*Id.*)

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## Public Policy Underpinnings

- Allow juries to reflect diverse beliefs to avoid tyranny of the majority
- Combat governmental oppression
- Promote perception of courts as legitimate
- Encourage citizen participation in gov't
- Stem the tide of minority stigmatization



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## *Batson v. Kentucky*

- 14<sup>th</sup> Amendment's Equal Protection Clause requires that jurors not be peremptorily challenged solely based on race (or protected classification) or due to assumption of group bias (*id.* at 89)
- Promulgated Three-Part Inquiry for Trial Court to use in monitoring a *Batson*-type challenge

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## Three-Part Inquiry



- PRONG 1: Opponent must make prima facie case that *totality of circumstances* raises an *inference* of discriminatory kick
- PRONG 2: Burden shifts to proponent to give permissible reasons
- PRONG 3: Trial Court decides whether opponent has proven discriminatory purpose

①

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① Prima Facie case  
must show by totality of circumstances  
persons excluded because of  
causality group

### Prong 1: *Johnson v. California* (2005) 545 U.S. 162

- Prong 1 of the original *Wheeler* test required opponent to show "strong likelihood" that jurors being kicked due to group bias
- *Johnson* held that standard too high; CA should be using mere "inference" language of *Batson* (totality of the circumstances)



→ use totality of circumstances

*Johnson* applies

### So...What Makes a Good "Prima Facie Case"? (Or...What Should D Be Doing?)

- *People v. Fuentes* (1991) 54 Cal.3d 707, 714—The moving party should:
  - 1. "[M]ake as complete a record as possible;"
  - 2. "[E]stablish that the persons excluded are members of a cognizable group;" and
  - 3. [S]how [by totality of the circumstances] that the persons are being excluded because of group association."
- (Opinion says "strong likelihood; that part was overruled by *Johnson v. California* in 2005)

### So...What Makes a Good "Prima Facie Case"? (Or...What Should P Point Out?)

- *People v. Scott* (2015) 61 Cal. 4th 363, 384, lists the following "particularly relevant" evidence:
  - The party has not engaged in significant questioning of those jurors;
  - D is a member of the identified group; and
  - V is a member of the group of the majority of the remaining jurors
- That the "party has struck most or all of the members of the identified group";
- The "party has used a disproportionate number of strikes against the group";



### Tip for Prong 1, Prima Facie Case: Don't Skip First Step!

- Make Trial Court put on the record whether it's finding a Prima Facie Case
- If Court doesn't expressly so find, and you jump to giving your reasons, Prong 1 will be deemed MOOT on appeal
  - (But see *P. v. Scott* (2015) 61 Cal. 4<sup>th</sup> 363 (if TC expressly finds no PF case, but allows P to give reasons just in case, NOT moot; appellate court to first consider whether PF case made)

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### What if No Prima Facie Case Found Against You?

- If Trial Court finds no prima facie case...
- Ask to put your classification-neutral reasons on the record for purposes of appeal
  - If says no, file them in a written declaration
  - This way, you won't forget your reasons later

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-Thank you  
→ in abundance of caution for appellate reasons  
I would like to state on record why I  
excused juror  
→ file motion -

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### Tip for Prong 2, Analysis Prong: Enunciation of Neutral Reasons

- Calmly remember and state your reasons
- Put your evidence on the record (see *infra* re: Comparative Analysis, etc.)
- List *all* your reasons, for *each* juror you're accused of kicking unfairly

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## Prong 2: What If You Forget Why You Kicked the Jurors?

- If you absolutely can't remember your reasons...see *Gonzalez v. Brown* (9<sup>th</sup> Cir. 2009) 585 F.3d 1202:
- Which found that while not forgetting is preferable, a TC can still credit as neutral a reason not stated b/c attorney can't remember the reason for the kick when other factors showed the attorney to be non-discriminatory, such as:
  - (a) remembering neutral reasons for kicking others in the class;
  - (b) not kicking many in the class; and
  - (c) having others in the class remain on the panel

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## Prong 3: Weighing the Scales



- Third prong is a credibility determination
- It "demands of the trial judge a sincere and reasoned attempt to evaluate" the truthfulness of the proffered race-neutral reason  
(*People v. Hall* (1983) 35 Cal. 3d 161, 167)

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## Who Can Make the Motion?

- Either the prosecution or the defense can bring a *Batson* motion. (*Georgia v. McCollum* (1992) 505 U.S. 42.)
- Doesn't matter if D and the challenged juror share the same classification or not. (*Powers v. Ohio* (1991) 499 U.S. 400.)



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## Mechanics of the Objection

- **Best: make motion at bench** (consider limine)
- **Hearing: out of jury's presence**
- **Reasons: not ex parte!**  
*See United States v. Thompson* (9th Cir. 1987) 827 F.2d 1254; *but see Davis v. Ayala* (2015) 576 U.S. \_\_\_, 135 S. Ct. 2187 (assumed true Cal Sup's holding that it was error, but agreeing that it was harmless in that case)



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## Timing: When Is it Too Late to Object?

- Too late to *Wheeler* if jury AND alternates sworn
- But can still *Wheeler* as to entire panel if alternates not yet sworn!



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## What is a "Cognizable Group"?



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### ALERT: \*\*New Law Change!\*\*

- CCP 231.5 has for years defined in CA the classifications for which peremptory challenges may not be used due to a "group bias" stereotype.
- A 2015 amendment changed it (fairly radically in three instances) in 2016.

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### CCP 231.5: Pre-2016 Version

- Race, Color, National Origin
- Religion (note that this is different from kicking someone who, due to religious views, can't sit in judgment)
- Sex (and, per case law, sex in combination with race/ethnicity/etc.)
- Sexual Orientation
- "Similar Grounds"



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### Pre-2016 Non-Cognizable Group Examples

- The Young (see, e.g., *People v. Estrada* (1979) 93 Cal.App.3d 76, 93)
- The Old (see, e.g., *People v. McCoy* (1995) 40 Cal.App.4th 778, 783)

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## CCP 231.5: 2016 Version (The 2015 Amendment)

- Took away the "simple" laundry list and gave us...
- "[A] characteristic listed or defined in Section 11135 of the Government Code, or similar grounds."
- (GC § 11135 outlaws govt discrim./equal access re: benefits)

## Gov't Code § 11135 (amended 2015 and again 2016)

- |                               |   |
|-------------------------------|---|
| ▪ Race                        | → Age   |
| ▪ Color                       | → Marital Status  |
| ▪ Ancestry                    | → Mental Disability   |
| ▪ National Origin             | → Physical Disability   |
| ▪ Ethnic Group Identification | → Genetic Information (per Government Code § 12926 [§51(e)(2) defines it as: genetic test info of the person or their family, a disease/disorder manifesting within the person/family, or genetic services info]) |
| ▪ Religion                    |   |
| ▪ Sex                         |   |
| ▪ Sexual Orientation          |   |
| ♥ Medical Condition           |   |

can't deny govt housing? - leg made sense?

## Point to Consider re: Mental/Physical Disability (etc.)

- CCP § 231.5 (emph. added) prohibits using peremptories "on the basis of *an assumption* that the...juror is *biased merely because of* the characteristic in question
- If kicking because disability will prevent effective service (e.g., blind and can't see important details in crime photos), perhaps ok.
  - (see, e.g., *United States v. Harris* (7<sup>th</sup> Cir. 1999) 197 F.3d 870 (rational basis test applied; kick of MS patient ok'd b/c med's cause drowsiness))

- interrupt flow of proceedings, take in an ordinal amount of time

- crazy - b/c mental disability less smoothly, ~~less~~ more difficult to communicate w/ other jurors

him biased.

- Ball x are going to vote for D.  
- I want anyone controversial,

### Mental Disability Tips & Strategies

- If the potential juror seems mentally unbalanced...
- And you peremptorily challenge her/him due to this...
- Flesh out in your stated reasons how their imbalance is problematic, and not your assumption of group bias.
- E.g., possible difficulties interacting with other jurors, etc.

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### Still-Valid Case Law Examples of Non-Cognizable Groups

- People newly residing in the community (see *Adams v. Superior Court* (1974) 12 Cal.3d 55, 60)
- "People of Color" as a combined group (see *People v. Davis* (2009) 46 Cal.4th 539; *People v. Neuman* (2009) 176 Cal.App.4th 571)
- Less-educated (only 12<sup>th</sup> grade or less) people and "blue collar workers" (see *People v. Estrada* (1979) 93 Cal App.3d 76 (grand jury exclusion))

invalid classification →

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### Religion: *People v. Jones* (2011) 51 Cal. 4<sup>th</sup> 346

- Where P excused black juror partly b/c she attended the 1<sup>st</sup> A.M.E. Church, which P called a "controversial" organization, and said he didn't want anyone "controversial". . .
- Cal Sup's said P "did not excuse her because of her religious views but because he believed she belonged to a controversial organization." (*Id.* at 368.)

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**Bilinguals #1: *Hernandez v. New York*  
(1991) 500 U.S. 352**

**\*\*PLURALITY OPINION\*\***

- 4-justice opinion stated the Trial Court did not commit clear error in believing DA's claim that he kicked the Spanish-speaking jurors because they gave him reason to think they would reject the interpreter's version in favor of their own, and not because he wanted Latinos off the jury
- BUT: "[A] policy of striking all who speak a given language, without regard to the particular circumstances of the trial or the individual responses of the jurors, may be found by the trial judge to be a pretext for racial discrimination. But that case is not before us." (*Id.* at 371-72.)

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**Bilinguals #2: *People v. Cardenas*  
(2007) 155 Cal. App. 4<sup>th</sup> 1468**

- Recognized the U.S. Supreme Court's plurality in *Hernandez*
- Upheld the TC's decision that "the prosecutor had put forth a valid, race-neutral reason for excluding" the Spanish-speaking jurors on grounds DA thought they'd reject the official translation, and not as a pretext for racial kick

Judge must make a  
Sincere Reasoned attempt - judge

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**Bilinguals #3: *P. v. Gonzales*  
(2008) 165 Cal. App. 4<sup>th</sup> 620**

- BUT SEE *People v. Gonzales*, where DDA stated several reasons to kick the juror, including his fear the juror would reject the official interpreter's version...
- But the record did not support that fear and also didn't support the other stated reasons, so appellate court found TC erred in accepting DDA's stated reasons
- As the appellate court said, "the stated basis is strongly suspicious of being a ruse for excusing those persons who may be perceived as more closely identifying with their national origin and/or their Hispanic ethnicity, i.e., those who still speak Spanish." (*Id.* at 631.)

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## Moving on...What are "similar grounds"?

- Hard to find a case law definition that's cited with regularity

(see *People v. Garcia* (2000) 77 Cal. App. 4<sup>th</sup> 1269, 1275-76 (drawing upon a Cal. Sup. plurality opinion's definition in the absence of something with more authority))

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## "Similar Grounds": Federal

- Here's a pre-*Batson* definition in grand jury context: whether "the group is one that is a recognizable, distinct class, singled out for different treatment under the laws, as written or as applied."

(*Castaneda v. Partida* (1977) 430 U.S. 482, 494; see *Garcia*, *supra*, at 1273 (noting that this is likely the US Supreme's standard b/c they cited this case in *Batson*))

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## "Similar Grounds": State

- CCP 231.5 was meant "to codify the decision in" *Garcia*.  
(CAL. CODE CIV. PROC 231.5 (2000 Note).)
- *Garcia* recites plurality language in *Rubio v. Superior Court*, (1979) 24 Cal. 3d 93, suggesting the following as the first prong of a two-prong definition:
- Groups whose members "share a common perspective arising from their life experience in the group, i.e., a perspective gained precisely *because* they are members of that group."  
(*Garcia*, *supra*, at 1276 (quoting *Rubio* (lead op.), *supra*, at 98).)

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## "Similar Grounds": State (cont'd)



- *Garcia* notes the *Rubio* court gave a two-prong test, but only the first part seemed to have majority support
- Still, *Garcia* also used the second prong in its analysis ("that no other members of the community are capable of adequately representing the perspective of the group" in question) (*Id.* at 1278 (quoting *Rubio*, *supra*, at 98))

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## Statistics, Comparative Analysis, and Disparate Questioning

New Forms of Evidence to Prove  
or Disprove Discriminatory Intent

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## *Miller-El v. Dretke* (2005) 545 U.S. 231

The Majority Used the Following  
Methods to Find the Stated Race-  
Neutral Reasons to be Pretextual

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## Miller-EI (cont'd)

### Statistics

P struck 91% of black potential jurors, but only 12% of non-black potential jurors



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## Miller-EI (cont'd): Disparate Questioning

### "The Graphic Script"

- P pressed black potential jurors harder in questioning



### Trick Questions

- Also, asked trick questions of them more often



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## Miller-EI (cont'd)



### Evidence of Past DA's Office Policy of Jury Selection Discrimination

Testimony of former prosecutors of office  
climate of race-based voir dire

Prosecutor-written manual discussing  
types of people not to choose (written  
1968, circulated through 1976, at least one had  
access to it during trial)

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*Miller-EI* (cont'd)

Notation of Race on Jury  
Selection Cards

P annotated race on cards; but trial was  
before *Batson*, so Ct. not impressed with  
excuse of annotating to avoid *Batson* error

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*Miller-EI* (cont'd)

Comparative Analysis

Compared P's stated reasons for striking black  
potential jurors

If same quality applied to non-black potential jurors  
whom P didn't strike, evidence of discrimination

*articulate why x + y ar/ho both  
have z, articulate how x had more  
(+) 's that outweighed z, so that  
x stayed + y went.*

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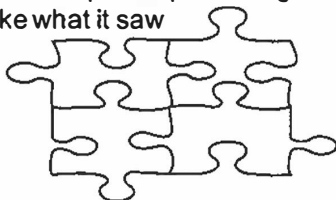
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*Miller-EI* (cont'd)

Cumulative Weight of  
All-of-the-Above

Court put all the puzzle pieces together and  
didn't like what it saw



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## Miller-EI's Progeny

Fleshing Out the New  
Evidence Rules

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*Williams v. Runnels* (9<sup>th</sup> Cir. 2006)  
432 F.3d 1102

Bare Statistics OK to  
Establish Prong 1's Prima  
Facie Case

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### Statistics in *Williams v. Runnels*

- D pointed out P used 3 of first 4 kicks against blacks, and only 4 of first 49 potential jurors were black (*id.* at 1107)
- Found "these bare facts present a statistical disparity" (*id.*)
- Noted line of other cases where PF case shown based on using 5 of first 6 peremptories against blacks, where 4 of 7 Hispanics and 2 blacks kicked, etc. (*id.*)

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### Another Lesson from *Williams v. Runnels*: Make Your Record!

- TC found no Prima Facie case
- P tried to put reasons on record, just in case, for appeal
- TC said no thanks
- 9<sup>th</sup> Circuit said it was P's responsibility to make record, b/c prima facie case was shown
- Guess what? P no longer remembered why.

### *Snyder v. Louisiana* (2008) 552 U.S. 472: Ask Follow-Up Q's

- Court suggests P should have followed up with more Q's when black potential juror's hardship request was denied after school said service ok
- P said kicked b/c thought juror would still worry; but no follow-up Q's, so Ct. disbelieved P
- Further, others whose hardships were denied were not stricken by P...and they were white

### *People v. Lenix* (2008) 44 Cal. 4<sup>th</sup> 602

- Cal Sup's Recognize Comparative Analysis Required for First Time on Appeal
- So long as record contains enough information to so engage

ask the person you are going to take  
more follow up Q's.

### Lenix: Make Your Record

- Cal Sup's prefer we make our own record and do our own Comparative Analysis at trial
- So that "defendant can make an inclusive record, [and] the prosecutor can respond to the alleged similarities"

(Id. at 624.)



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### Lenix: Don't Cut Off Voir Dire Time

Lenix recognizes TC's CCP 223 power to limit voir dire time, but said this:

"If the trial court truncates the time available or otherwise overly limits voir dire, unfair conclusions might be drawn based on the advocate's perceived failure to follow up or ask questions."

(Id. at 625.)



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Part of notes

### Lenix and Green v. Lamarque: Notations on Juror Cards

- Lenix: Dicta re: *Miller-Efs* disapproval of race notations on juror cards:
- "We emphasize, however, that post-*Batson*, recording the race of each juror is an important tool to be used by the court and counsel in mounting, refuting or analyzing a *Batson* challenge." (Id. at 617 n.12.)
- BUT SEE *Green v. Lamarque* (9<sup>th</sup> Cir. 2008) 532 F.3d 1028, 1033, finding a *Batson* violation because, inter alia, P "had noted the race of each venire member he struck from the jury pool; when the trial judge asked him who he struck and why, the prosecutor was able to read off a list," then cited *Miller-Efs*, note of that.

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**\*\*New Case Alert: *Foster v. Chatman* (2016) 136 S.Ct. 1737**

- 1986 facts and 1987 trial
- D, a black man in Georgia, confessed to beating, raping, strangling & killing a 79-year-old widow
- Convicted & death penalty imposed
- 29 years later, U.S. Sup.'s remanded to Georgia's Sup. Ct. their decision not to let D continue to appeal his *Batson* claim

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***Foster*. "New Evidence" of Notes on Jury Cards**

- Trial occurred just months after *Batson* decided; *Batson* objection denied after 4 black jurors removed by P
- During appeals process, D filed Georgia Open Records Act Request for P's file
- Found notations seeming to suggest jurors were kicked b/c black, and not b/c of the race-neutral reasons given by P

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***Foster* and "New Evidence": An Extension of *Miller-El***

- Holding based on:
  - Comparative Analysis of similarly situated white jurors who were kept
  - Record Belied some of P's stated reasons
  - New Evidence of Notes in P's File indicated race consciousness ("B" by black jurors' names, "No Black Church," etc.)

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### Notations to "Help" with *Batson* Objections?

- Noted P's argument that they notated the juror cards b/c "*Batson*, after all, had come down only months before Foster's trial. The prosecutors, according to the State, were uncertain what sort of showing might be demanded of them and wanted to be prepared."
- Rejected argument b/c the notes showed preoccupation w/keeping blacks off jury

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### Justice Thomas's Lone Dissent in *Foster*

- "The notion that this 'newly discovered evidence' [of P's file notes] could warrant relitigation of a *Batson* claim is flabbergasting." (Thomas, J., dissenting.)
- The issue should be whether TC had good reason to credit P's stated reasons, which often rests on a credibility determination. (*Id.*)

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### Thomas's Dissent: A Warning Shot

- "[T]he Court today invites state prisoners to go searching for new 'evidence' by demanding the files of the prosecutors who long ago convicted them. If those prisoners succeed, then apparently this Court's doors are open to conduct the credibility determination anew."
- "New evidence should not justify the relitigation of *Batson* claims."

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So Where Does THIS Leave Us for App. Ct.  
Credibility Rulings in Hindsight?

- We've come a long way since the case discussed on the next slide...
- But it's still on the books, so maybe it can still help us...
- (*Rice v. Collins*, unanimous overturning of 9<sup>th</sup> Circuit's credibility rehash)

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**Comparative Analysis Shield:**  
*Rice v. Collins* (2006) 546 U.S. 333

- US Supremes *unanimously* overturned 9<sup>th</sup> Circuit for going too far in second-guessing TC's 3<sup>rd</sup> prong credibility determination where P kicked due to:
  - eye-roll not seen by court, and
  - P's "wariness of the young and the rootless" (*id.* at 341)
  - (There was a reason 9<sup>th</sup> didn't like P—we'll address it in a few slides!)
- US Sup's Used **Comp. Analysis as a Shield** rather than a Sword 
- Noted P struck similarly situated young/rootless white potential juror (challenge on appeal was to strike of black potential juror)

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**Tips on Comparative Analysis:**  
**List of Attributes**

- Keep a list of the attributes leading you to kick 
- If you kept someone with that attribute, have a list of juror # and why you didn't kick them (why they were distinguishable)
- Perform your own Comparative/Distinguishing Analysis proactively!

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## Tips on Comparative Analysis Make Your Own Record!

- Don't wait for D; make your own Comp. Analysis argument, or App. Ct. will draw judgment on an artificially short record
- Shield rather than a Sword—point out when you kicked others w/same attribute




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## Tips on Comparative Analysis: Final Composition

- If a *Wheeler/Batson* objection was made against you and overruled...
- (Deputy Attorneys General are starting to ask us to do this for appellate record purposes.)
- Consider noting for the record the final racial composition of the jury that was seated



after w/ Batson  
note final racial comp

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## Tips on Statistics and Follow-Up Questions: Make Your Record!

- Ask follow-up Q's—or point out that Trial Court kept strict timetable and you didn't have time
- Bring a calculator to do statistics

Follow-up




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### More on *Rice v. Collins*: Mixing a Bad Reason w/a Good One

- A second issue in *Collins*:
- Prosecutor gave MULTIPLE reasons for kick
  - Demeanor Reason (eye roll)
  - Youth and Lack of Community Ties
  - To "achiev[e] gender balance on the jury" (*id.* at 340)
- TC "disallowed any reliance on that ground" but allowed the demeanor kick even though didn't see the demeanor, based on giving P benefit of doubt (*id.* at 336)
- Sup. Ct. (tacitly?) approved this approach

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### \*\*New Case Alert: Mixing a Bad Motive with a Good One

- *People v. Douglas* (2017) 10 Cal.App.5th 834 (point pages currently unavailable):
- D-Douglas's ex-bf Andrade, a male prostitute, told him V had "shorted him money" after a trick
- Douglas and roommate co-D Sharpe hunted V down and shot him
- At first, V lied to cops about circumstances of the events
- Voir Dire: P asked a lot of Q's about how venire felt about homosexuality

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### *Douglas* (Cont'd): Mixed Motives

- P kicked "two openly gay jurors" for multiple reasons:
  - Juror DJ had close PD friend who didn't like DA's
  - Juror SL had positive body language toward def. counsel, and negative toward P
  - Then gave the fateful 3<sup>rd</sup> reason: "in a case like this where the victim was 'not out of the closet and actually was untruthful with the police about the extent of his relationship with a male prostitute,' that he believed an openly gay person might hold a biased view of the testimony of such a witness..."

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### *Douglas*: the Trial Court's "Ruling"

- TC found kicking DJ due to PD friend justified
  - *Douglas* appellate court agreed
- TC found kicking SL due to demeanor reasons justified
  - *Douglas* appellate court agreed
- But TC apparently never bothered to rule on the 3<sup>rd</sup> proffered reason
  - So *Douglas* appellate court REMANDED for TC to conduct further inquiry (*see infra* on how...)

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### Was the 3<sup>rd</sup> Reason a Bad Motive?

- Found 3<sup>rd</sup> reason "troubling," as it could be read as being based on assumption of group bias that openly gay people are hostile toward those not "out"
- But conceded it might also just have shown P's concern about V being perceived as a liar
- Because TC didn't flesh out the reason or rule on it, "we err on the side of constitutional caution by finding that the prosecutor's third reason was sexual orientation-based as defendant argues."

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### Jurisdictional Split on Mixed Motives and CA's Rule

- *Douglas* noted JX split, unresolved by CA & US, re: "how to evaluate a *Batson/Wheeler* challenge when a party gives both permissible and impermissible reasons[.]"
- Some States: "per se rule of unconstitutionality" (one bad reason spoils the bunch)
- Other Jx's, esp. Federal: "mixed-motive approach" allows kicker to show would have kicked even w/o the bad motive existing
- 9<sup>th</sup> Circuit: "substantial motivating factor approach" to see if kicker substantially motivated by the bad reason
- And the winner is...

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## The *Douglas* Rule on Mixed Motives in CA

- **Winner: The Mixed-Motive Approach!**
- Rejected "per se" approach, based on *Rice v. Collins* ("[h]ad the per se approach applied, the Supreme Court would have found the improper gender justification controlling ... It did not.").
- Rejected 9<sup>th</sup> Circuit's substantial factor test, disagreeing w/its reading of other case law

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## *Douglas* on Remand...

- 3<sup>rd</sup> DCA instructed TC on remand "to apply a mixed-motive analysis to the peremptory challenges."
- "On remand, the prosecutor shall have the opportunity to show that he would have stricken both jurors even without considering their sexual orientation."
- "If the prosecutor makes the necessary showing, the challenges stand."

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## Demeanor Strikes and the Cold Appellate Record

So what happens when you kick because of the juror's demeanor, but that demeanor is not reflected in the record?



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## Demeanor Strikes Without Record Support



- *People v. Silva* (2001) 25 Cal. 4th 345 (guilt-phase jury hung on death; 2<sup>nd</sup> death jury's death penalty verdict reversed when P's non-demeanor reasons belied by record, and demeanor reason not supported by it)
- *Snyder v. Louisiana, supra* (reversed where P gave 2 reasons, 1 of which belied by Comp. Analysis and 1 was demeanor not in record; TC didn't state which it credited)

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## Vague Demeanor Reasons Unsupported by Record

- *People v. Allen* (2004) 115 Cal. App. 4<sup>th</sup> 542 (reversed where P gave demeanor reason of "her very response to your answers, and her demeanor, and . . . how she took her seat" being indicative of an independent thinker; App. Ct. had no idea what P was talking about)



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## A Ray of Hope... But Don't Forget *Habeas*



- *People v. Reynoso* (2003) 31 Cal. 4<sup>th</sup> 903 (accepted TC's non-detailed credibility ruling when P's demeanor reason not in record but P's other reason not belied by it)
- NOTE: *Reynoso* can be a helpful decision, but the better practice is to make a demeanor record and have TC give a detailed ruling. Leave no stone unturned.

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## Another Ray of Hope—From the Supremes! *Thaler v. Haynes*

- Sup's upheld TC's crediting of P's race-neutral demeanor reason even when the TC wasn't the judge who was present for voir dire, and therefore couldn't have seen the complained-of demeanor.
- "[T]he best evidence of the intent of the attorney exercising a strike is often that attorney's demeanor." (*Id.* (2010) 559 U.S. 43, 49.)

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## *Thaler v. Haynes* (cont'd)

- While "the trial judge's 'first hand observations' are of great importance," *Batson* does not "hold that a demeanor-based explanation must be rejected if the judge did not observe or cannot recall the juror's demeanor." *Id.* at 48-49.
- But Note: *Haynes* involved no evidence in the record that would have undermined the prosecutor's stated reasons.

- matter if judge saw it  
- matter if judge believes you

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## Demeanor-Based Tips & Strategies

- Weave your observations into voir dire record
  - "I realized you were smiling at D. I'm curious as to why?"
  - "You seem a little upset with me. Have we met before?"
  - "So I noticed you looking around during questioning. Is there something else on your mind besides these proceedings?"

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## Demeanor-Based Tips & Strategies



- During 2<sup>nd</sup> Prong, specifically ask TC to tell you whether she/he saw the same thing you did

*-“Did the Court also see that Juror A kept coming in late after the breaks?”*

*-“Does the Court agree with my observation that Juror A rolled his eyes when the bailiff asked him to take his hat off?”*

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## Demeanor-Based Tips & Strategies

- App. Ct.'s won't consider a reason that you didn't give (and TC can't, either)  
(*Paulino v. Castro* (9<sup>th</sup> Cir. 2004) 371 F.3d 1083)
- So make sure you give all your reasons
  - “Mixed-Motive Analysis” in CA if one of your reasons ends up being judged bad
- Make TC specify its findings—which reasons accepting, and which rejecting
  - To avoid unnecessary remand and clarify record

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## Demeanor-Based Tips & Strategies



- Consider turning chair around and watching panel from minute they walk in until the first 12 are seated in the box

*-It might look weird, but panel will think you're conscientious and care who is selected*

*-You won't miss anything—who is snoozing, who won't let others squeeze past them, who didn't take hat off until admonished, etc.*

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## Demeanor-Based Tips & Strategies

- Keep ALL your jury notes—for retained jurors as well as kicked jurors
- BUT NOTE: This shouldn't be needed if you ask to make your record anyway
- If remanded to do Prong 2, you can't rebut prima facie case if you can't remember your reasons (*Paulino v. Harrison* (9th Cir. 2008) 542 F.3d 692)
- AND NOTE: *Foster v. Chatman* (*supra*)




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## Remedies

(Yes, we're almost done!)




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## The Good, Old-Fashioned Remedies

- *Wheeler*: Dismiss entire panel and start over with new panel
- *Batson*: US Supremes remanded to allow TC to engage in 3-Part Inquiry
- Because opponent "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 . . . ." (*Wheeler, supra*, at 282.)
- EXPLICITLY LEFT OPEN possible remedies of:
  - Discharging entire panel and starting over
  - Re-seating the offended juror

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***Wheeler Gone Wild:***  
***People v. Willis (2002)***  
**27 Cal. 4<sup>th</sup> 811**



But what if the opponent doesn't  
want to dismiss the panel?  
Opponent holds all the cards...

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***Willis: Wheeler Gone Wild***

- Defense attorney purposely violated *Wheeler* b/c didn't like mostly white panel
- Rather than reward defense w/ new panel, TC fined defense attorney \$1500 as an alternate remedy
- (To the chagrin of the higher courts, TC later vacated the sanction order)



- new panel  
more pre-emptive dicta  
- reset jurors →  
- my call -

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***Willis: Cal Sup's Expand  
Wheeler's Remedies***

- Cal Sup's affirmed use of \$\$ sanctions
- Gave nod to re-seating offended juror
- Hinted ok to give opponent extra peremptories instead of re-seating, if offended juror already gone (dicta)
- THE CATCH: the opponent has to AGREE to the alternative remedy. OPPONENT HOLDS THE CARDS.



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## Potential State Bar Reporting Requirements



## State Bar Reporting: At Trial

- BP 6086.7(a)(3): TC must report if monetarily sanctions you for \$1000 or more
- BP 6068(o)(3): You must report self w/in 30 days if TC monetarily sanctions you for \$1000 or more

## State Bar Reporting: On Appeal

- BP 6086.7(a)(2): TC must report if judgment reversed "in whole or in part" b/c of attorney misconduct
- BP 6068(o)(7): You must report self w/in 30 days if judgment reversed "in whole or in part" b/c of misconduct

O'Casey says w B error

- requires you to report +

- but expect self report yourself +

## State Bar Reporting: On Appeal cont'd

- Coleman thinks *Wheeler* error means attorney made Jury Trial unfair—and if pretext finding, deceptive; thinks reporting duty.

(JERRY P. COLEMAN, MR. *WHEELER* GOES TO WASHINGTON—THE FULL FEDERALIZATION OF JURY CHALLENGE PRACTICE IN CALIFORNIA 43 (2006))

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## THE END

- DDA Cindy De Silva, San Joaquin County, [cindy.desilva@sjcda.org](mailto:cindy.desilva@sjcda.org), (209) 468-2404



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# IMPEACHMENT

Chuck Gillingham  
Deputy District Attorney  
Santa Clara County

1044- tell them ~~is~~ every instruction is relevant,  
- TRIAL is a search for truth

all studies say would change my mind on agreement.

\* Keep a closing file →

○ prove anything By 2 about 4 elements →

○ just what they said, but how they said it  
why did they say it?

## IMPEACHMENT FUNDAMENTALS

Prove your case with Prior Inconsistent Statements

Think DV, Gangs, Sex

Start with end in mind

- 12 people get along, can you ~~beat~~ lock them in a roll ↑

- important

Is there someone you can't get along with or work with?

## Your Toolbox

Go to crime - 780/226

could they hear & see what they said -

Oath - could you think of why someone would lie, why someone might tell the truth

ⓧ Juror log evidence

ⓧ Don't ever talk to victim alone

direct w/ #1's.

Everyone gets a fair trial

- just b/c I don't have someone next to me, <sup>if de</sup> get fair  
if I fail, you don't have a choice.

when I meet my burden you don't have a choice

Keep logs of evidence

- logs, foundation, admitted  
- have multiple copies

My witness went sideways\*&\*#!!



- Every <sup>bullet</sup> Q. to closing
- Jurors won't change my mind, arguing to give ammo to your best jurors
- Focus on a few to give them bits -
- every



INFLUENCE - Red it / P  
Persuasion - Keuhit

### SIDEWAYS WITNESS

- ANTICIPATE
- BE PREPARED
- MOTIONS IN LIMINE 765(a); 767; 1044
- VOIR DIRE
- OPENING
- CALCRIM
- 780-----NEVER GO TO JUDGE, NEVER NEVER NEVER NEVER
- CLOSING

most efficient manner to get to truth -

- Calcrim 226 + 780 -

if someone wants answers simple

Question, why is that?, what

are they lying? - what motives -

special needs

### Motions in Limine to lead on direct

- P v. Williams 56 Cal.4th 165
- P v. Collins 49 Cal.4th 175
- P v. Harris 43 Cal.4th 1269
- P v. Williams 43 Cal.4th 584
- P v. Augustin 112 Cal.App4th 444-special needs witness
- 765 (b) child witnesses -

- age Name - etc + precise.

chronological took. start w/ statements today + then goes back -

- prior consistent statement & allowed to use ->

- Can't use prelim -> prior inconsistent statements @ prelims, - testimony today - inconsistent 770 know procedure ->

### 1235

- Not just to impeach—also for TRUTH
- MAY PROVE CASE WITH PIS ALONE
- Statement is the one at trial.
- Impeaching statement is PRIOR to trial

Why can't they use prior consistent @  
consistence has to be before event, or motive to lie →

### 1235

- Procedure 770
- Witness is either:
- Confronted on the stand and given opportunity to explain or deny statement, or
- Subject to recall
  - DOES NOT APPLY TO THE DEFENDANT
- Always subject to recall

Δ watch entire anything

- gone all over all the evidence

Was the defendant right?

- you had opp to review all evidence ← read P. R. taken notes

- watched everyone testify + took notes

You a liar - Cops? did not tell the truth

### Evidence Code Section 769

You don't have to educate witness about prior statement before using it to impeach

Tactics - sometimes you don't want to

769 -

### PREPARATION

Fail to Prepare. Prepare  
To Fail.

### Preparation

Your outline of questions for the witness should include citations to all impeachment material

I like four sided folders

PX - 1 July

- outline every statement & on Ln 12 pg 9.  
- follow along

Read this line

- it says my & punched

- Prelim do not.

### Preparation

"Husband slapped me." PX recant

Def slapped her in face

911 (tape 00:48 - TX 2:4)

Written (Atkins p2)

ER (RN Lang - meds 98)

Det 01-04-08 (Krup - tape 05:24 - TX 6:8)

TRO dec (2:26)

Me & Insp. Tejada (02-22-08)

### Mechanics

Jump in - start asking questions

Maybe witness will tell the whole truth

But then again . . .

## Mechanics

Let the witness talk

Get a feel for what you are in for

Don't start impeaching at the first sign of inconsistency

Let them get the whole BS story out

Take notes – your guide to what topics will require impeachment

BUT YOU SHOULD KNOW WHAT YOU HAVE TO DO

## Mechanics

You only get to impeach on the inconsistent parts

Easy – “I wasn't there. I have no idea what you are talking about”

Typical – Select inconsistencies all over the map

## 1235

- Refusal to answer---no prior inconsistent statement (*People v. Rios* 163 Cal.App.3d 852.)
- Even if W says prior statements are lies, may come in for truth. (*People v. Brown* 35 Cal.App.4th 1585.)
- Multiple levels of hearsay okay, if exception at every level. (*People v. Zapien*)

still can find that statement true, even if lied before, might need to impeach

Don't ask Do you recall, Don't  
say Do you remember?

- Did you say X

or you said X (if not you, correct?)

~~Disability~~ you said X happened, right

- Refreshing recollection

- Impeaching

Ability to tell truth, they don't want to

## Asking the Right Questions

Be direct

Be precise - repeat it

Impeach with the actual prior inconsistent statements

## Wrong

Q: Do you recall telling Officer Jones that you saw the defendant with a gun?

## Wrong

Q: Do you recall telling Officer Jones that you saw the defendant with a gun?

### Wrong

Q: Do you recall telling Officer Jones that you saw the defendant with a gun?

Assumes facts not in evidence

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### Wrong

Q: Do you recall telling Officer Jones that you saw the defendant with a gun?

Invites "I don't remember"

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### Asking the Right Questions

You are not refreshing recollection!

You are impeaching with a prior inconsistent statement

The witness does not have difficulty remembering . . . He has difficulty telling the truth

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1400 to 1400 - foundation →  
lowest standard

6/8/2017

coulda been. Jury didn't sit  
it purports to be?

### Asking the Right Questions

Q: On 01-02-08, did you tell Officer Jones the following, quote, I saw Darrell with a gun in his hand, end quote?

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### Wrong

A: I never saw no gun.

Q: Let me show you a copy of your statement, and let's see if it refreshes your recollection of whether you saw a gun.

Ask Question Again

Lets read your statement

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### Right

A: I never saw no gun.

Q: On 01-02-08, did Sgt. Jones ask you this question and did you give this answer?

Question: Who did you see with a gun?

Answer: I saw Darrell with a gun in his hand.

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### Asking the Right Questions

Do not accept equivocal answers

"I was high"

"I was confused"

"I may have"

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### Asking the Right Questions

Do not accept equivocal answers

Follow up with other questions

Did you or did you not make that statement?

Do you deny making that statement?

Explain why People are saying this?  
about you if it's true?  
what reason do they have to lie.

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### Pretty it up

- All the reasons prior statement is better
- You called 911, Why?
- You needed help?
- You wanted the police to come because you were in danger?
- They came pretty quickly?
- They separated you and let you tell them what happened?
- They were writing it all down?

How many times have you called 911 <sup>- 50 times.</sup>  
You were scared, injured, they came quick  
most people don't call 911,

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1231 - ADPHE Admissions  
wife says X-1, 10 & say uh  
Salinas vs. Texas,



### Pretty it up

- You felt safe with the officers there?
- The ambulance came?
- They paramedics asked you what happened?
- What did you tell them?
- Why would you lie to a paramedic?  
You went to a SALT exam,

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### Asking the Right Questions

If witness does not unequivocally admit making prior statement, don't forget to finish the job

Prove it up *bring it up*

If prior testimony – use judicial notice 452

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### Cooperative Witnesses

Impeach when necessary

Try to take care of this in pre-trial interviews

Everyone makes mistakes

Offer explanation

Was your memory of these events better when you talked to the police?

Get them to admit they told the truth

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I don't remember  
SURE YOU DON'T!

can be inconsistent  
228- jury makes decision whether it is inconsistent

- IF I Don't Remember is answered  
- Must try to refresh First?

405 & gen.

### 771 Refresh

- ANYTHING
- W says does not remember
- Show to D—do not mark
- Give to W
- Direct W to portion
- Read it, see it etc.
- Ask if that refreshes

### "I DON'T REMEMBER"

- MUST ATTEMPT TO REFRESH 771
- Court must make determination in a 405 whether genuine or a ploy.
- Preponderance of Evidence Ev. 115
- CALCRIM

if genuine fast re collection re word-

### I don't remember

- If genuine---past recollection recorded, if at all
- If a ploy---Then may use PIS to get in prior statement as truth.
- If W is evasive, but ultimately gives consistent statement, may not impeach.

impeach on what is consistent +

### 1237 Past Recollection Recorded

- Written statement admissible if:
  - Statement admissible if W testifying
  - W had inadequate recollection and
- Writing was:
  - Made when fresh in W's recollection
  - Made by W, at W's direction, or someone while W made statement
  - Offered after W testifies that this statement was true *--- must say true*
  - W says exhibit is accurate

- Instruct jury that from reading is  
evidence & can come into trial.

### 1237

- Refreshing will not work
- Written statement moved into evidence, read to jury
- EC 250
- Admissible for truth
- W MUST say they were telling truth

People lie

### 1237

- W says does not remember
- Refresh—if ineffective
  - Court determines real or fake
- If real
- W id's prior statement Mark as exhibit
- Authentication—Make statement while incident fresh
  - Right it down soon
  - Honest at time of statement
  - Is this statement a truthful account
- Confirm need for prior statement
- READ IT.

good  
 he about get out of his  
 → he together another people in trouble?

### 1235 if not genuine

- Q: A is the truth right
- A: if yes—you win
  - If no—continue
- Q: Did you speak to someone
  - Get out the circumstances
  - Especially all the reasons it is better than trial testimony
- Identify the prior statement

– socio econ, children, change,

shame, devastation,

– mom –


– historic is lying, in the way,

### 1235

- Re-ask about A
- Q: The truth is A, right?
- A: If yes—you win
  - If maybe, or I don't know, you probably won
  - If no—continue
- Then read the Prior statement
  - Follow along while I read this
  - Did I read that correctly?

Follow mom. Did I read it correctly.

## Ploy

 People v. Green (1971) 3 Cal.3d 981

Witness gave evasive answers and claimed some memory lapses

In context, the witness' answers amounted to an implied denial

Court found sufficient inconsistency to allow impeachment with prior statement

<sup>any</sup> bigger is ~~not~~ you <sup>with</sup> his trial  
- You never talked to him about it.

## Prove the Ploy

How do you prove that the lack of recall is more likely feigned than truthful?

Witness has a relationship with, or bias towards, the defendant.

Family member, friend, fellow gang member, etc.

## Prove the Ploy

How do you prove that the lack of recall is more likely feigned than truthful?

Evidence that witness is reluctant to testify against defendant.

Admissions of reluctance, failure to appear in past hearings, etc.

### Prove the Ploy

Witness given an opportunity to read or listen to his prior statement—won't or says it doesn't help

Implausible explanation—shocking event, recent, inconsistent explanation, has details surrounding incident

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### Prove the Ploy

Get witness talking

Elicit everything the witness won't fight you on before and after the event

Bias, fear, whom she has talked to about case

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### Proving the Ploy

In re Deon D. (1989) 208 Cal.App.3d 953, 958-962.

Witness refused to answer most questions asked by DA – “I’m no snitch”

People v. Homick (2012) 55 Cal.4th 816.

Witness claimed that his prior statements admitting his participation in the murders were lies he had been coerced into making by police and prosecutors—acted like a jerk on the stand

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The witness, having been duly sworn, testified as follows:

DA: Good morning.

Witness: (No response)

DA: You know the defendant here, Mr. Jones, isn't that true?

Witness: (No response)

### Witness Stands Mute

You cannot impeach with prior inconsistent statements where the witness simply refuses to answer questions

People v. Rios (1985) 163 Cal.App.3d 852

### Witness Stands Mute

#### Preparation

Witness tells you he won't talk.

Put him up there anyway.

Tell the witness to complain to the judge.

Do NOT tell the wit what may happen if he doesn't speak. Not our job.

- talk about perjury  
- Don't tell them what's going to happen if they don't tell the truth

### Witness Stands Mute

In court

Find topics witness is willing to talk about

- Custody status
- Dislike of police
- Witness not here willingly
- Humor?

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### Witness Stands Mute

In court

Insist that judge order the witness to answer the question.

Judge can hold witness in contempt for failure to answer questions.

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The witness, having been duly sworn, testified as follows:

DA: me            Good morning. Would you state your name and spell it for the record.

Witness: F%&\* you! FAT ASS, YOU KNOW MY NAME. You know the cops made me lie. I ain't saying nothing.

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1294

- MUST PUT IN PRIOR INCONSISTENT STATEMENT AT PX
- IF YOU CONFRONT THE WITNESS AT AN EARLIER HEARING THEN YOU MAY USE THEIR PIS AT TRIAL
- IF YOU DO NOT—MAY NOT USE AT TRIAL
- P v. Martinez 113 Cal.App.4<sup>th</sup> 400

→ Px Don't object /

1202 78 Cal App 4th 1444

- You can impeach + Hearsay declare  
as though they were on the stand

1523

- Must play the tape unless it results in a great loss of time
- Or testimony would gather the result of the whole.

356-only portion that gets,

-Impeach as though they are testifies -

if everything comes + I get to get it

911- 1240- im

## Impeachment

Watch it

Practice it

Do it, whenever you get a chance

Confidence = credibility