Wheeler

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Responding to a *Wheeler/Batson* Motion

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The Motion

I consider Trial by Jury as the only anchor yet imagined by man, by which a government can be held to the principles of its constitution.
- Thomas Jefferson.

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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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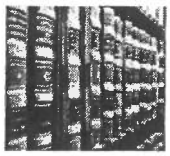
The Framework

- *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 a 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

- 14th 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

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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)

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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)

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So…What Makes a Good "Prima Facie Case"? (Or…What Should D/P Point Out?)

- *People v. Scott* (2015) 61 Cal. 4th 363, 384, lists the following "particularly relevant" evidence:
- 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";
- 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

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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. 4th 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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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* (9th 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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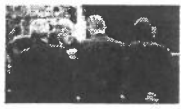
Mechanics of the Objection

- 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
  - (*People v. Ortega* (1984) 156 Cal.App.3d 63, 70)

- But can still *Wheeler* as to entire panel if alternates not yet sworn!
  - (*People v. Gore* (1993) 18 Cal.App.4th 692, 703)

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If at First They Don't Succeed… Can They Try, Try Again?

- *People v. Avila* (2006) 38 Cal.4th 491, 548-552:
  - Where TC found no Prima Facie case as to Black Juror S.A.
  - But did find Prima Facie case as to Black Juror V.J.
  - Held: TC *not* required to go back and ask for P's reasons for excusing S.A.
  - *But….*

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Try, Try Again (Cont'd)

"Although we hold that the court has no sua sponte duty to revisit earlier *Batson/Wheeler* challenges that it had previously denied, upon request it may appropriately do so when the prosecutor's subsequent challenge to a juror of a protected class casts the prosecutor's earlier challenges of the jurors of that same protected class in a new light, such that it gives rise to a prima facie showing of group bias as to those earlier jurors. But the burden is on the party making the later motion to so clarify, for that party ultimately has the burden of proof." (*Avila* at 552.)

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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)

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

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

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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* (7th Cir. 1999) 197 F.3d 870 (rational basis test applied; kick of MS patient ok'd b/c med's cause drowsiness)

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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 12th grade or less) people and "blue collar workers" (*see People v. Estrada* (1979) 93 Cal.App.3d 76 (grand jury exclusion))

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Religion: *People v. Jones* (2011) 51 Cal. 4th 346

- Where P excused black juror partly b/c she attended the 1st 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. 4th 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

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Bilinguals #3: *P. v. Gonzales* (2008) 165 Cal. App. 4th 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. 4th 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-El (cont'd)

Statistics

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

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Miller-El (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-El (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-El (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-El (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

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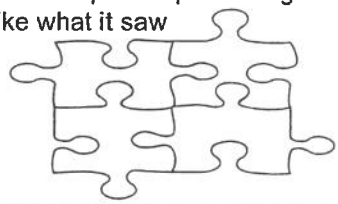
Miller-El (cont'd) Cumulative Weight of All-of-the-Above

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



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Miller-El's Progeny

Fleshing Out the New Evidence Rules

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Williams v. Runnels (9th Cir. 2006) 432 F.3d 1102

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

(But note: how to overcome the "inference" thereof at the Prong 1 Level rather than the Prong 2-3 Levels—risky, but can be done)

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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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Prima Facie Case: Weighing Bare Statistics Against Other Facts in Record in Prong 1

- How much can TC look to other circumstances to see if the inference raised by the bare statistics actually has a patent neutral explanation without proceeding to Prong 2?
- *Williams v. Runnels*: "[T]o rebut an inference of discriminatory purpose based on statistical disparity, the 'other relevant circumstances' must do more than indicate that the record would support race-neutral reasons for the questioned challenges." (*Williams* at 1108.)

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People v. Sanchez (2016) 63 Cal.4th 411: Bare Statistics Refutation in Prong 1

- *Williams v. Runnels*: It's possible to refute the statistical inference at Prong 1 stage, but not on facts of that case; TC can't just presume what was in challenger's head, because the issue is the challenger's TRUE reason, not some POSSIBLE reason.
- *Sanchez* (at 434): In Prong 1, "[a] court may…consider nondiscriminatory reasons for a peremptory challenge that are apparent from and 'clearly established' in the record." (Citation omitted.)

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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
- 9th Circuit said it was P's responsibility to make record, b/c prima facie case was shown
- Guess what? P no longer remembered why.

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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

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People v. Lenix (2008) 44 Cal. 4th 602

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

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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.)

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 sufficient questions." (*Id.* at 625.)

*Amended Law Alert: AB 1541 (2017) Amending CCP 223

Prior to AB 1541

- "The court may specify the maximum amount of time that counsel for each party may question an individual juror, or may specify an aggregate amount of time for each party[.]"

Eff. January 2018

- "The trial judge shall not impose specific unreasonable or arbitrary time limits or establish an inflexible time limit policy for voir dire."
- "As voir dire proceeds, the trial judge shall permit supplemental time…based on individual responses or conduct[.]"

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

- *Lenix*: Dicta re: *Miller-El*'s 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* (9th 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-El*'s note of that.

**New(ish) 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, at 1766.)
- The issue should be whether TC had good reason to credit P's stated reasons, which often rests on a credibility determination. (*Id.* at 1766-67.)

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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." (*Id.* at 1767.)
- "New evidence should not justify the relitigation of *Batson* claims." (*Id.*)

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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 9th Circuit's credibility rehash)

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

- US Supremes *unanimously* overturned 9th Circuit for going too far in second-guessing TC's 3rd 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 9th 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...
- Consider noting for the record the final racial composition of the jury that was seated
- (Deputy Attorneys General are starting to ask us to do this for appellate record purposes.)

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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

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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 Bad Motive w/ Good and the *Douglas* Rehearing

- *People v. Douglas* 2018 WL 2057237 (5/3/18 3rd DCA), which overturned *People v. Douglas* (2017) 10 Cal.App.5th 834 after Reh'g (facts taken from both cases)
- 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 Facts (cont'd): Mixed Motives

- P kicked "two openly gay jurors" for multiple reasons:
  - Juror "J" had close PD friend who didn't like DA's
  - Juror "L" had positive body language toward def. counsel, and negative toward P
  - Then gave the fateful 3rd reason: in a case wherein 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'" juror might be biased against the testimony of that victim.

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Douglas: the Trial Court's "Ruling" & *Douglas* #2's Finding

- TC found kicking J due to PD friend justified
- TC found kicking L due to demeanor reasons justified
- But TC apparently never bothered to rule on the 3rd proffered reason
- *Douglas* #2 found P's 3rd reason to have been discriminatory on sexual orientation grounds, as it was based on "his *assumption* that the only two openly gay veniremen would look askance at the victim's lifestyle simply because they were openly gay and he was not." (at WL/Cal.Rptr.*312-13.)

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Jurisdictional Split on Mixed Motives and CA's Rule

- *Douglas* #1 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
- 9th Circuit: "substantial motivating factor approach" to see if kicker substantially motivated by the bad reason
- And the winner (per *Douglas* #2) is…

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The *Douglas* #2 Rule on Mixed Motives in CA

- **Winner: The Per Se Unconstitutional Approach!**
- Whereas *Douglas* #1 had accepted the "mixed motive" approach and rejected the "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."), and had rejected 9th Circuit's substantial factor test, disagreeing w/its reading of other case law...
- *Douglas* #2 on reh'g rejected the "mixed motive" approach "which arose in employment discrimination cases[,]" unlike jury selection situations, "which should be free of *any* bias." (at WL/Cal.Rptr.*307.)

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Douglas #2 (3rd DCA) versus *Rice v. Collins* (SCOTUS)

- Does *Douglas* #2, a 3rd DCA opinion, conflict with the possible tacit finding of the U.S. Supreme Court in *Rice v. Collins*?
- Perhaps, someday, we shall see!
- For now at least, *Douglas* #2 is the law in California.

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Side Note in *Douglas* #2: "Prosecutorial Misconduct"?

- Footnote 6: "We use the term 'prosecutorial error' rather than the at times misleading term 'prosecutorial misconduct,' because we are not concerned with the prosecutor's culpable mental state, but with the lawfulness of the reasons given for exercising the peremptory challenges."

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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; 2nd 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)

80

Vague Demeanor Reasons Unsupported by Record

- *People v. Allen* (2004) 115 Cal. App. 4th 542, 546

  (reversed where P gave demeanor reason of "her very response to your answers, and her demeanor, and not only dress but how she took her seat" being indicative of an independent thinker; App. Ct. had no idea what P was talking about)

A Ray of Hope… But Don't Forget *Habeas*

- *People v. Reynoso* (2003) 31 Cal. 4th 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.

82

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.

84

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?"*

85

Demeanor-Based Tips & Strategies

- During 2nd 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?"*

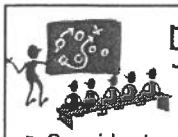
  -*"Does the Court agree with my observation that Juror A rolled his eyes when the bailiff asked him to take his hat off?"*

86

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* (9th Cir. 2004) 371 F.3d 1083)
- So make sure you give all your reasons
  - But "per se rule of unconstitutionality" per *Douglas* 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

87



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
- 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)
- BUT NOTE: This shouldn't be needed if you ask to make your record anyway
- AND NOTE: *Foster v. Chatman* (*supra*)

89

Remedies

(Yes, we're almost done!)

90

The Good, Old-Fashioned Remedies

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

91

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

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

92

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)

93

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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(Incidentally…Here's the Law on "Pre-*Wheeler*" Motions…)

- Where defense complains that the venire is not a representative cross-section of the community and thus moves to challenge it:
- *See People v. Bell* (1989) 49 Cal. 3d 502 (relying extensively on *Duren v. Missouri* (1979) 439 U.S. 357).

95

Potential State Bar Reporting Requirements

96

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

97

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

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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))

99

THE END

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100

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SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF SAN JOAQUIN

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, vs. DEFENDANT(S) Defendant(s)	Case No.: 12-3-456789-1 PEOPLE'S TRIAL BRIEF: *WHEELER/BATSON* OBJECTIONS

POINTS AND AUTHORITIES

I. "GROUP BIAS" CHALLENGES AND THE THREE-PART INQUIRY

In the context of jury selection, "group bias" is 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, *overruled on other grounds by Johnson v. California* (2005) 545 U.S. 162.) When trial counsel utilizes a peremptory challenge to excuse a potential juror from the panel based on a pre-conceived notion of "group bias," the trial court will entertain opposing counsel's objection thereto by utilizing a three-part inquiry established

by *People v. Wheeler*, (1978) 22 Cal.3d 258, and refined in *Batson v. Kentucky*, (1986) 476 U.S. 79, and *Johnson v. California*, (2005) 545 U.S. 162.

The first portion of the inquiry consists of the opponent making a prima facie case by showing that the totality of the circumstances raises an inference that counsel's challenge was unlawfully discriminatory. (*Johnson*, *supra*, at 168.) If the prima facie case has been made, the court will proceed to the second part of the inquiry, wherein the burden shifts to the challenging party to justify the challenge, showing legally neutral grounds for the attempted exclusion. (*Id.*) Finally, if the challenging party gives an ostensibly neutral justification, "the trial court must then decide…whether the opponent of the strike has proved purposeful racial [or other impermissible] discrimination." (*Id.* (internal quotation marks and citation omitted).)

II. THE MAKING OF THE PRIMA FACIE CASE

The question often arises in the first prong whether the opposing party has made the requisite prima facie case. In establishing "a prima facie case, the moving party should…make as complete a record as possible;" "establish that the persons excluded are members of a cognizable group; and…show [by a totality of the circumstances] that the persons are being excluded because of group association." (*People v. Fuentes* (1991) 54 Cal.3d 707, 714.) The case of *People v. Scott*, (2015) 61 Cal.4th 363, gives a number of factors opposing counsel may point out and a trial court may consider in ruling on whether an appropriate prima facie case has been made:

-That the "party has struck most or all of the members of the identified group";

-That the "party has used a disproportionate number of strikes against the group";

-That the party has not engaged in significant questioning of those jurors;

-"[T]hat the defendant is a member of the identified group"; and

-That the victim is a member of the group of the majority of the remaining jurors.

(*Id.* at 384.) This list is neither exclusive nor mandatory—for example, the case of *Powers v. Ohio*, (1991) 499 U.S. 400, makes clear that the defendant and challenged juror need not share the same

classification—but it provides a list of "particularly relevant" evidence that may aid the court in coming to a conclusion on the prima facie case element. (*Scott*, *supra*, at 384.)

Further, the undersigned knows of no published California decision or United States Supreme Court decision declaring that a single peremptory challenge to a single member of a particular racial or other cognizable group, without more, constitutes a valid prima facie case. The Ninth Circuit case of *Williams v. Runnels*, (9th Cir. 2006) 432 F.3d 1102, found a prima facie case was made based on statistics when the prosecutor exercised "three of his first four peremptory challenges to remove African-Americans from the jury[]" and the record did not sufficiently dispel the inference raised by the statistical disparity (*id.* at 1107-09); however, "three of his first four" is not the same as a single peremptory used to strike a single member. *Williams* provides a list of Ninth Circuit cases finding "that a defendant can make a prima facie showing based on a statistical disparity alone[,]" as a single illegally discriminatory strike would be unconstitutional, but those cases listed most certainly did not find a prima facie case based solely on a single strike. (*Id.* at 1107; *see id.*) Rather, they included finding "an inference of bias where the prosecutor had used five out of six peremptory challenges to strike African-Americans[;…] where four of seven Hispanics and two African-Americans were excused by the prosecutor[;… and] where the prosecutor exercised peremptory challenges to exclude five out of a possible nine African-Americans." (*Id.* (citations omitted).)

Furthermore, the recent California Supreme Court case of *People v. Sanchez*, (2016) 63 Cal.4th 411, found no prima facie case was made when "the prosecution had used two of its first eight peremptory challenges to excuse two of the five Hispanic jurors then available for challenge[.]" (*Id.* at 435.) Indeed, the Court stated:

> Exercising two of eight peremptory challenges to excuse two of the five Hispanic prospective jurors then subject to challenge did not itself provide an inference of discriminatory purpose. The prosecution had not excused most or all of the group and did not use a significantly

> disproportionate number of strikes against that group. Nothing indicates the questioning was desultory.

(*Id.* at 436.) The *Sanchez* court found a second time that no prima facie case existed when "defendant made his second *Batson/Wheeler* objection, pointing out that the prosecution had challenged four of the six prospective Hispanic jurors subject to peremptory challenge." (*Id.* at 438.) The Court held that "[t]he totality of the circumstances…did not support an inference of discriminatory purpose[]" despite the fact that "the prosecution had exercised four of its 10 peremptory challenges to challenge four out of six (i.e., two-thirds) of the prospective Hispanic jurors, which meant that, after defendant challenged another of the Hispanic prospective jurors, only one Hispanic individual was actually on the jury." (*Id.* at 438-39.) The Court elaborated:

> It appears that, as of this time, 19 percent of the jurors subject to challenge (six of 32) were Hispanic. Considered alone, these circumstances might suggest a discriminatory purpose, but under the totality of the circumstances, they do not. The prosecution challenged R.F. immediately after defendant himself had challenged R.F. for cause, and the court, while denying the cause challenge, had stated the wish that someone would excuse him. This circumstance strongly suggests a nondiscriminatory purpose for the challenge.
>
> Additionally, before the prosecution finally challenged T.M. (as well as R.F.) it had accepted the jury several times with three and then, after defendant challenged one, two Hispanic jurors on it. This circumstance, although not dispositive, "strongly suggests that race was not a motive behind the challenge." [Citations omitted.]

> Additionally, the record clearly establishes nondiscriminatory reasons for challenging T.M. [based on her questionnaire answers showing a reluctance to impose the death penalty].

(*Id.* at 439.) Therefore, though the threshold for making a prima facie case is a totality-of-the-circumstances burden rather than a burden of a higher mold, neither is the burden non-existent or extremely low. It is indeed a burden that the objecting party must meet before the trial court proceeds to the second and third prongs.

III. THE THIRD PRONG: A CREDIBILITY DETERMINATION

Once the matter proceeds to the third part of the inquiry, the trial court judge essentially makes a credibility determination. This stage "demands of the trial judge a sincere and reasoned attempt to evaluate" the truthfulness of the proffered legally neutral reason. (*People v. Hall* (1983) 35 Cal.3d 161, 167.) Indeed, the fact that this stage calls for a genuine credibility determination, rather than a mechanical weighing or application of factors upon a scale, is shown in the case of *Gonzalez v. Brown*, wherein the Ninth Circuit countenanced a trial court's crediting as neutral a reason not stated because the attorney could not remember the reasons for the challenge when other factors tended to show the attorney to be non-discriminatory, such as: remembering neutral reasons for excluding others in the class; not excluding many members of the class; and having other members of that class remain on the panel. (*See Gonzalez v. Brown* (9th Cir. 2009) 585 F.3d 1202.) Therefore, a trial court need not make a finding of discrimination simply because the factors listed in the prima facie case are numerous or persuasive on their own; rather, the trial court may, and indeed must, engage in "a sincere and reasoned attempt" to determine if the challenging attorney is being truthful in stating his or her legally neutral reasons.

//

IV. WHAT CONSTITUTES A "COGNIZABLE GROUP"

California Code of Civil Procedure 231.5, along with California Government Code section 11135, propounds the list of classifications upon which a *Wheeler/Batson* challenge may be premised. This list includes classifications such as race, religion, sex, sexual orientation, and age, among other categories. Notably, however, it does not outlaw excluding members who have the trait in question; it simply outlaws prohibiting peremptorily challenging such potential jurors "on the basis of *an assumption* that the prospective juror is *biased merely because of*" the characteristic in question. (CAL. CODE CIV. PROC. § 231.5 (emphasis added).)

Furthermore, the courts have determined that several classifications do not constitute cognizable groups for *Wheeler/Batson* prima facie case purposes, including, as notable examples, people newly residing in the community (*Adams v. Superior Court* (1974) 12 Cal.3d 55, 60), and "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). With regard to the latter, an opposing attorney may not simply object based on the fact or the argument that the challenging attorney has attempted to excuse "people of color" or a few individuals of different and varying ethnic or racial backgrounds, and have the trial court rule that such has satisfied the prima facie case element; such does not a prima facie case make.

V. GIVING THE TRIAL ATTORNEYS SUFFICIENT TIME TO CONDUCT VOIR DIRE

Of course, a trial court judge has the ability to restrict attorney-conducted voir dire time in its goal of facilitating an orderly trial, as witnessed in California Code of Civil Procedure section 223 (*see id.* (allowing the trial judge to set "reasonable limits" on attorney-conducted voir dire, so long as such limits are otherwise consistent with that code section). However, because one of the factors a court may consider in terms of determining whether a peremptory challenge was exercised based on unlawful discrimination is the extent to which the challenging attorney engaged in meaningful questioning of the potential juror (*see, e.g.*, *Snyder v. Louisiana* (2008) 552 U.S. 472, 481 (noting, in

eventually finding a discriminatory purpose, that "the prosecution did not choose to question [the challenged juror] more deeply about this matter" that the prosecution later claimed caused it concern)), the trial attorneys should be given adequate time in order to engage in such questioning.

This truism has been highlighted by both the California Supreme Court as well as a recent amendment to the California Code of Civil Procedure by the Legislature. On January 1, 2018, an amendment to section 223 went into effect based on 2017's AB 1541, and the law now specifies that "[t]he trial judge shall not impose specific unreasonable or arbitrary time limits or establish an inflexible time limit policy for voir dire." It further clarifies, "[a]s voir dire proceeds, the trial judge shall permit supplemental time for questioning based on individual responses or conduct of jurors that may evince attitudes inconsistent with suitability to serve as a fair and impartial juror in the particular case." (CAL. CODE CIV. PROC. § 223). This amendment ultimately followed in time the plea by the California Supreme Court in the case of *People v. Lenix* to trial courts: "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 sufficient questions." (*People v. Lenix* (2008) 44 Cal.4th 602, 625.)

Therefore, the People respectfully request some latitude with regard to time to conduct voir dire, consistent with *Lenix* and the 2018 amendment to section 223 of the California Code of Civil Procedure, especially when a situation appears to be developing wherein the established time limits, if any, do not seem to be giving enough time for follow-up questioning based on answers or conduct that call for more dialogue.

Dated: _____

Respectfully Submitted,

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By:

_____
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