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April 27, 2022

Ellen Leonida, Esq.
PRA Responses
Braunhagey & Borden, LLP
351 California Street, 10th Floor
San Francisco, CA 94104

RE: Public Records Act Request re: CPRA Request Dated July 23, 2021

Dear Ellen:

This letter serves to follow-up on the above-referenced California Public Records Act Request and responds to your letter of July 23, 2021. This Office hereby offers the following clarifying responses:

Page One, Batson-Wheeler training materials regarding jury selection, constitutional requirements and handling of Batson-Wheeler claims:

The responsive documents are contained in Attachment "A."

Page Two, Category One:

This Office has no records responsive to this request as set forth in sub-parts "a" through "l."

Page Two, Category Two:

This Office has no records responsive to this request as set forth in sub-parts "a" and "b."

The responsive documents pertaining to sub-part "c" are contained in Attachment "B" and "C."

The responsive documents pertaining to sub-part "d" are contained in Attachment "D" and "E."

Page Two, Category Two - Continued:

This Office has no records responsive to this request as set forth in sub-parts "e."

Page Three, Category Three:

This Office has no records responsive to this request as set forth in sub-parts "a" through "c."

Page Four, Category Four:

This Office has no records responsive to this request as set forth in sub-parts "a" through "d."

We believe that this letter and the attached documentation answer the aforementioned CRPA. Please feel free to reach out to discuss further should the need arise.

Best Regards,



Matthew D. Rogers
District Attorney

Attachment “A”



CALIFORNIA
DISTRICT
ATTORNEYS
ASSOCIATION

Surviving *Wheeler* A Live Demonstration

Cindy DeSilva

Deputy District Attorney
San Joaquin County

WHEELER/BATSON: A SUMMARY

By Cindy De Silva
Deputy District Attorney
County of San Joaquin
December 2019

What Is a "Wheeler/Batson" Objection Based On?

- **"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.)

The Tripod and the Three-Part Inquiry

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

Prong 1: What Makes a Good "Prima Facie Case"?

- *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
- See also *P v. Fuentes* (1991) 54 Cal.3d 707 (but overturned re: "strong likelihood" language)

Prong 1: Cognizable Groups

- **UPDATED 2016 CCP 231.5/GC 11135:** Race, color, ancestry, national origin, ethnic group identification, religion, sex, sexual orientation, medical condition, age, marital status, mental disability, physical disability, genetic information (GC 12926)
- **NOT** People Newly Residing in the community (*Adams v. Superior Court* (1974) 12 Cal.3d 55, 60)
- **NOT** "People of Color" as a combined group (*People v. Davis* (2009) 46 Cal.4th 539, *People v. Neuman* (2009) 176 Cal.App.4th 571)

Prong 2: Reasons, Comparative Analysis, Statistics, Etc.

- *Miller-Ei v. Dretke* (2005) 545 U.S. 231:
 - Statistics
 - Disparate Questioning
 - Comparative Analysis
 - Notations on Post-Its
 - Past DA's Office Practice
 - Cumulative Weight of All-of-the-Above

Prong 3: "Sincere and Reasoned Attempt"

- *People v. Hall* (1983) 35 Cal.3d 161, 167
- 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 (*Id.* at 167)

Prong 3: "Demeanor" Reasons and How They Figure Into Credibility

- When otherwise belied by the record and demeanor not in record, we tend to lose. (See, e.g., *People v. Silva* (2001) 25 Cal.4th 345; *Snyder v. Louisiana* (2008) 552 U.S. 472)
- When demeanor reason vague & non-sensical, we lose. (See, e.g., *People v. Allen* (2004) 115 Cal.App.4th 542, 546)
- When demeanor not in record or not seen by judge but nothing belies us, we can win. (See, e.g., *People v. Reynoso* (2003) 31 Cal.4th 903; *Thaler v. Haynes* (2010) 559 U.S. 43)

Mechanics of the Motion



- Consider Limine/Trial Brief (see materials)
- Best Practice: "Objection, may we approach?"
- Hearing outside jury's presence
- Either P or D can make motion (*Georgia v. McCollum* (1992) 505 U.S. 42)
- D need not share same classification as kicked juror(s) (*Powers v. Ohio* (1991) 499 U.S. 400)
- Reasons: NEVER ex parte (See *United States v. Thompson* (9th Cir. 1987) 827 F.2d 1254; *Davis v. Ayala* (2015) 576 U.S. ___, 135 S.Ct. 2187)

Remedies at Voir Dire Level

- **Traditional Wheeler:** dismiss entire panel and start over fresh
- **Batson:** simply remanded for TC to conduct 3-Part inquiry, but specifically left open the possibility of:
 - Traditional Wheeler
 - Re-seating offended juror
- **People v. Willis (2002) 27 Cal.4th 811:** If opponent agrees...
 - Monetary sanctions
 - Re-seat offended juror (dicta)
 - Give opponent extra peremptories (dicta)

Potential State Bar Reporting

- | | |
|--|---|
| <p>At Trial</p> <ul style="list-style-type: none">■ If monetarily sanctioned \$1000 or more:■ BP 6086.7(a)(3): TC must report you■ BP 6068(o)(3): You must report yourself within 30 days | <p>After Losing on Appeal</p> <ul style="list-style-type: none">■ If judgment reversed "in whole or in part" b/c of attorney misconduct■ BP 6086.7(a)(2): TC must report you■ BP 6068(o)(7): You must report yourself within 30 days |
|--|---|

But...is Wheeler/Batson violation "attorney misconduct"???

- Retired SFDDA Jerry Coleman thinks so!
- But...did a recent case in a different Wheeler context foreshadow something?
- "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." (*People v. Douglas* (2018) 22 Cal.App.5th 1162, n.6 at 1176)
- Be on the safe side: report self until we know for sure.

Thank you!

Cindy De Silva
Deputy District Attorney
County of San Joaquin
cindy.desilva@sjcda.org



Attachment “B”

Voir Dire

Picking a Murder Minded Jury

Britt Imes
Supervising Deputy DA
San Bernardino County



PARTICIPANT
ADVISORY
OFFENSIVE CONTENT

The following presentation is not suitable for all ages.

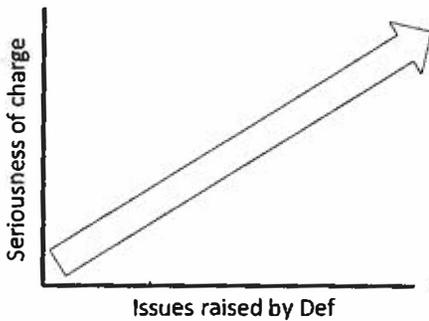
The following presentation does not reflect the views or opinions of the provider.

The following presentation will contain offensive or graphic language.

The presenter will be rude, offensive, humorless and cynical.

Participant discretion is advised.

Voir Dire Basics



Voir Dire Basics

- CCP §197: randomly selected panel
- CCP §203: All persons eligible
 - Except, non US citizens, under 18, not CA residents, not resident of county, felons, insufficient language skills, serving as jurors, subject of conservatorship
 - Undue hardship
- CCP §204(b): undue hardship (see CRC 2.1008)



Voir Dire Basics Cnt'd.

- Defense questions first ?
- CCP §231(a): 10 preemptory challenges; 20 for life/death cases
- Co-Def's 10 joint + 5 separate each
- CCP §231(d): People use preemptory first



Voir Dire Basics Cnt'd. Challenges CCP§225

- To entire panel for cause
 - Prior to swearing of panel
 - In writing with plain and distinct grounds
 - Serve jury commissioner
- Challenge for cause for:
 - General disqualification
 - Actual bias
 - Implied bias
- Peremptory challenge

**Voir Dire Basics Cnt'd.
Challenges for Cause**

- **General Disqualification – CCP §225(b)(1)(A) & 228**
 - “a want of any of the qualifications prescribed by this code to render a person competent as a juror” (see CCP §203)
 - Incapacity to perform duties as a juror without prejudice
- **Implied Bias – CCP§225(b)(1)(B)**
 - As, when the existence of the facts as ascertained, in judgment of law disqualifies the juror.
- **Actual Bias – CCP§225(b)(1)(C)**
 - “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.”

**Voir Dire Basics Cnt'd.
CCP§ 229 Implied Bias**

- Juror related within four degrees of consanguinity to a party or witness
- Legal relationship to attorney, party or witness
- Previous jury relationship with same party or offense
- Financial outcome – except as taxpayer
- Unqualified opinion as to merits
- Bias towards either party
- Action pending which would utilize same jury
- “Conscientious opinions” on death penalty

Voir Dire Basics Cnt'd.

- Court has broad discretion to control or limit voir dire
- CCP §223: “shall be conducted *only* in aid of the exercise of challenges for cause”
 - Contrast civil cases CCP §222.5: “permit liberal and probing examination calculated to discovery bias or prejudice with regard to the circumstances of the particular case”

Voir Dire Basics Cnt'd.

- Get them talking
- Be personable
- Always listen, write, observe
- Get them comfortable with you
- Get yourself comfortable with them
- Maintain professionalism
- Maintain seriousness of case



Proper Questions

- Only in aid of the exercise of challenges for cause. CCP §223; *People v. Noguera* (1992) 4 Cal.4th 599
 - Prior to Prop 115 in 1990: Any question "reasonably designed to assist in the intelligent exercise of peremptory challenges" *People v. Williams* (1981) 29 Cal.3d 392
- "A reasonable inquiry into specific legal prejudices" *People v. Balderas* (1985) 41 Cal.3d 144

Proper Questions

- Do you belong to any religious sect whose teachings might interfere with the consideration of the case? *People v. Daily* (1958) 157 Cal.App.2d 649
- Do you have any inherent belief based upon any church's teachings that might interfere with a fair consideration of the case? *Daily*
- Do you belong to any political, religious, social, industrial, fraternal, law enforcement or other organization whose beliefs or teachings would prejudice you for or against either party to the case? *People v. Boyle* (1937) 22 Cal.App.2d 143

Proper Questions

- What is your occupation? *People v. Boorman* (1956) 142 Cal.App.2d 85
- May ask about a juror's willingness to apply legal principles. *Williams*
- If you were faced with this charge, would you be willing to be tried with jurors who had the same attitude toward the charge and the defendant as you do now? *People v. Estorga* (1928) 206 Cal. 81

Proper Questions

- Explanation of the law applicable to the case as a basis for hypothetical questions to determine whether the jurors would follow the instructions of the court, and to ascertain their state of mind on the issues presented. *People v. Wein* (1958) 50 Cal.2d 383
- Ability to draw inferences from circumstantial evidence. *People v. Mendoza* (2000) 24 Cal.4th 130

Proper Questions

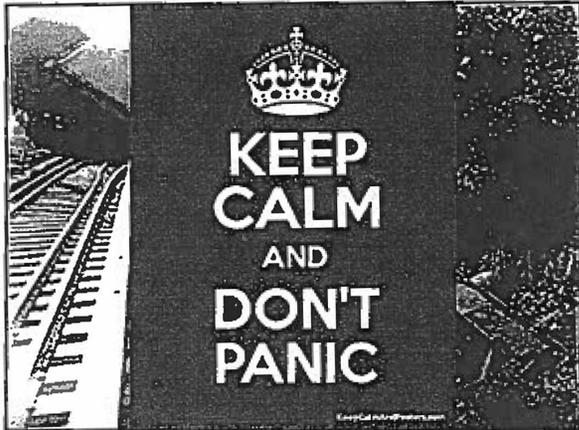
- Will you follow the judge's instructions? *People v. Modell (1956) 143 Cal.App.2d 724*
- May ask about a juror's willingness to apply legal principles. *Williams*
- Willingness to consider death as a penalty. *People v. Fields (1983) 35 Cal.3d 329; Nogeura*

Improper Questions

- What religion do you belong to? *People v. Daily (1958) 157 Cal.App.2d 649*
- Questions that seek to ascertain juror's views on death penalty in actual or hypothetical cases not before him (i.e. Hitler) *People v. Fields (1983) 35 Cal.3d 329*
- Questions that attempts to indoctrinate the jury as to the meaning or applicability of particular rules of law
 - Example: "Do you have any personal objection to a rule of criminal jurisprudence which provides that those jurors entertaining a reasonable doubt of the defendant's guilt should vote for acquittal?" *People v. Parker (1965) 235 Cal.App.2d 86*

The last words you really want to hear during jury selection:

OBJECTION YOUR HONOR, I WOULD LIKE TO MAKE A BATSON MOTION



Batson v. Kentucky
(1986) 476 US 79

Batson Challenges
Practical Tips for Prong 1



- Make Defense articulate challenge
 - Which juror(s)
 - Which cognizable group
- Make clear record of:
 - All participants' classification
 - Panel composition
 - Final jury composition

Batson Challenges

Practical Tips for Prong 2



- Use your reputation with court to advantage
- Invite comparisons to other kicks or defense kicks
- Invite court to document its observations
- Should insist on justifying kicks even if court doesn't think prima facie shown

Batson Challenges

Practical Tips for Prong 3



- Make court make express finding of NO purposeful discrimination
- Make sure record is clear
- Maintain all jury lists and notes

Batson Challenges

Neutral Justifications



- | | |
|-----------------------------|---------------------------|
| ● Life experience | ● Sympathetic looks to D |
| ● Inability to understand | ● Family members arrested |
| ● Prior hung jury | ● No eye contact with you |
| ● Hostile body language | ● Teachers are liberal |
| ● Nervous | ● Poor grooming |
| ● Smiled at defendant | ● Non-responsive |
| ● Good rapport w/ Def atty. | ● Better jurors coming |

Batson Challenges

Neutral Justifications



- Distrust law enforcement
- Age—youth is not a class
- Lack of seriousness
- Law Student
- Lack of ability to understand legal concepts
- Battered woman
- Anti-death penalty
- Limited education / intelligence
- Translation—would not follow
- Lives close to crime scene
- Hunch/Gut feeling are valid
- Resident alien

Batson Challenges

Practical Tips



- Make your record with voir dire
 - Be thorough in questioning
- Take good notes on each juror
 - Body language
 - Facial expressions
 - Attentiveness
 - Age
 - Specific issues
 - Interaction with court, counsel and other jurors
 - Dress and reading material

Batson Challenges

Practical Tips



- Be aware of comparative analysis
 - Side-by-side comparison of justifications
 - Note unique factors that differentiate
 - See *Miller-el v. Dretke* (2005) 545 US 231
 - Relevant circumstantial evidence, but not dispositive *People v. Lomax* (2010) 49 Cal.4th 530

Batson Challenges Practical Tips



- Note racial/gender make up of panel?
 - Specific numbers?
- Make record of nonverbal reasons
 - "There is more to human communication than mere linguistic content. On appellate review, a voir dire answer sits on a page of transcript. In the trial court, however, advocates and trial judges watch and listen as the answer is delivered. Myriad subtle nuances may shape it, including attitude, attention, interest, body language, facial expression and eye contact." *People v. Lenix* (2008) 44 Cal. 4th 602

What's Good for the Goose

Is Good for the Gander

Batson Challenges Offensive Use



- Don't be afraid to challenge defense tactics
 - Principles apply regardless of which party uses. *P v. Willis* (2002) 27 Cal.4th 811
- Establish solid prima facie showing
 - Specific numbers challenged, in box, in venir
 - Inconsistent questioning
 - Unequal questioning
 - Historical facts
 - Office
 - Defense attorney
- Use comparative analysis
- Use *Miller-el v. Dretke* (2005) 545 US 231 analysis to your advantage

Objections to Voir Dire

- Does not go to cause or the use of a peremptory challenge
- Attempts to indoctrinate jurors on the law
- Asks jurors to prejudge the evidence
- Tests jurors understanding of the law
- Attempt to prejudice juror for or against a particular party or witness



- Arguing the case or educating to particular version of facts
 - *People v. Williams* (1981) 29 Cal.3d 392 (overruled in part)
- Incorrect statement of the law
 - *People v. Tibbetts* (1929) 102 Cal.App. 787
- Improper form

Picking a Murder Minded Jury

- Use a questionnaire?
- Larger groups (12, 18, 24)?
- Case introduction? By whom?
- Show photos?
- Have others observe (Case agent!)

Dispel the CSI / Law & Order Effect



- Fictional TV standards
 - Science or procedure doesn't exist
 - Evidence doesn't exist in every case
- All questions not answered 24 minutes
 - Courtroom theatrics
- Expectation will happen/be in this case
- Our victim won't be in next week's episode

Dispel Mystery of Circumstantial Evidence

- More powerful than direct evidence
- Replaces thought bubbles
- Actions speak louder than words
- Relies on common sense
- Ability to draw reasonable conclusions
- Use of analogy (heart beat, rain, cookie jar)
- Will they want more?

In most cases, a mistake in jury selection will not lose your case for you, unless you picked this schmuck:



It will, however, almost certainly hang it.

Rat Out the Hanger



- Obligation of each juror to openly discuss the evidence and the instructions
- Talk about duty to follow law
- Willing and able to listen to each other, discuss the evidence received during the trial, and work together to reach a decision?
- If at some point you realize either yourself or one of your fellow jurors refuses to follow law, has a bias, just can't be fair, willing to notify the court.
 - Caution: *People v. Engelman* (2002) 28 Cal.4th 436 invalidating snitch jury instruction CalJic 17.41.1

Mental Defenses

- Exposure to mental health or substance abuse issues
- Believe it is an infallible science?
- Willingness to accept concept of malingering
- Can be crazy and still have intent to kill
- Knowledge of "abuse excuse"

Knowledge of the System

- From TV or real life
- Friends or family involved in:
 - Law enforcement
 - Corrections
 - Legal field
 - Victim, witness
 - Charged, convicted
- Employed in corrections system
 - Counselor, nurse, food service, vocational training, religious services

Standard of Proof

- Same for all crimes
- Do they think should be higher
- Should 187 be different?
- Avoid talk about what standard is, examples, metaphors, etc.

Victim / Witness Issues

- The undesirable victim
 - Drug dealer/user
 - Gang member
 - Pedophile
 - Gang cases
 - recantation
 - Credibility issues
 - Priors
 - Drug/alcohol use
- Not automatically unbelievable.**
Focus back on following the law dealing with evaluating evidence and testimony

Defendant Specific

- Sympathy Factors
 - Age
 - Appearance
 - Gender
 - Relationship to Victim
 - Status
- Fear Factors
 - Gang member
 - Killer
- Defenses

Focus back on duty to be fair and impartial; not to be influenced by sympathy for or bias against

DISCOUNT

- Status of victim
- Conduct not amounting to a defense
- Intangible factors
 - Credibility of wits/vics
 - Likeability of parties/attys.
 - "Social justice"



Money Questions

- Wrap up voir dire with a powerful question
- Get them to commit to being a good murder minded juror
- Purpose is to seek the truth
- Is there anything about you [personal philosophy, political beliefs, religious convictions, etc] that would prevent you from [following the law, finding a defendant guilty]?

Warning Signs



Bonding

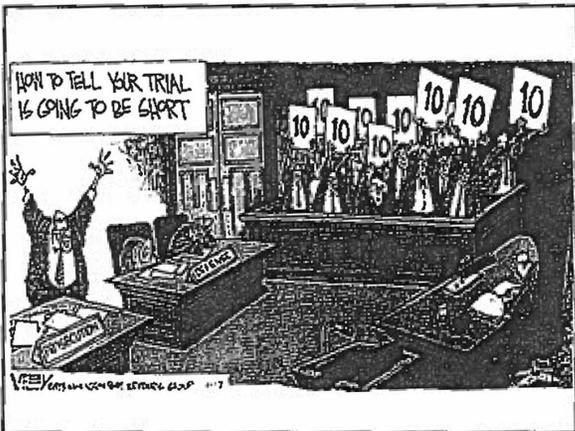


Indifference



Loathing





Britt P. Imes
Supervising Deputy DA
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The seal of the San Bernardino County District Attorney, featuring a star in the center with the words "SAN BERNARDINO COUNTY DISTRICT ATTORNEY" around it and "IN PURSUIT OF JUSTICE" at the bottom.

Attachment “C”

Jury Selection in Death Penalty Cases

1

Proof beyond a
reasonable doubt is proof
that leaves you with an
abiding conviction that
the charge is true...

2

*A juror's job in a trial
is to*

3

***It is appropriate to
educate jurors on:***

1. Difficult legal concepts

(People v. Balderas (1985) 41 Cal.3d 144)

***2. Hypotheticals to explain
difficult concepts***

4

- *Aider and Abettor*
- *Circumstantial Evidence*
- *Making Calculated Decisions (length of time)*
- *Testifying Informants*
- *Self Defense*
- *Following the Law*

5

3. *Broad, general statements agreeing to set aside one's biases are inadequate.
("Can you be fair and judge the evidence in an unbiased manner?")*

(People v. Williams (1981) 29 Cal.3d 392)

6

4. Air out your dirty laundry!

(Don't hide the weaknesses in your case, i.e. witnesses with faulty memories, testifying informants, jail-house snitches, criminal backgrounds, plea deals, etc.)

7

Main Goals of General Jury Selection

Establish Credibility

Listen More Than You Speak

Select Jurors who possess Intelligence, Common Sense and an Appropriate Ego in relation to their Intelligence and Common Sense

8

No matter how persuasive you are, you're not going to change a juror's belief system or biases in the few minutes you have with them. Attempting to do so is a waste of time.

9

I.C.E.

Intelligence

Common Sense (Sophistication)

Ego

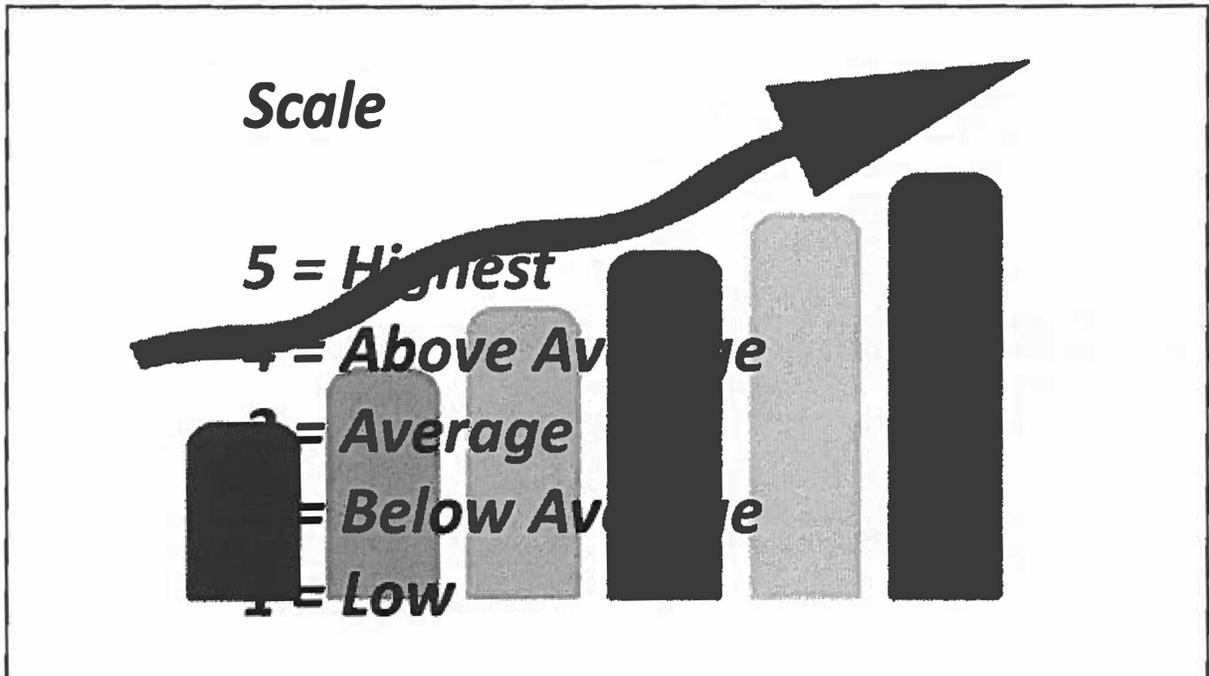
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Intelligence = Smart (Education/Training)

Common Sense = Life Experiences, logical, sophistication about life in general

Ego = Must bear a reasonable relationship to intelligence and common sense

11



12

You generally want Intelligent jurors with a high degree of Common Sense

Ego is trickier – A highly intelligent person can be expected to possess a substantial ego ... Listen to your juror's responses

13

<i>2-3-5 =</i>	<i>Desirable</i>	<i>Undesirable</i>
<i>5-4-3 =</i>	<i>Desirable</i>	<i>Undesirable</i>
<i>4-5-4 =</i>	<i>Desirable</i>	<i>Undesirable</i>
<i>4-3-4 =</i>	<i>Desirable</i>	<i>Undesirable</i>
<i>3-3-3 =</i>	<i>Desirable</i>	<i>Undesirable</i>

14

***Desirable = Flat or falling curve
With the E in proper balance
with I and C***

***Undesirable = Rising curve
identifies a juror whose E
exceeds his or her I and C***

15

*Why Common Sense
(sophistication) is key:*

*An unsophisticated person can be
easily misled*

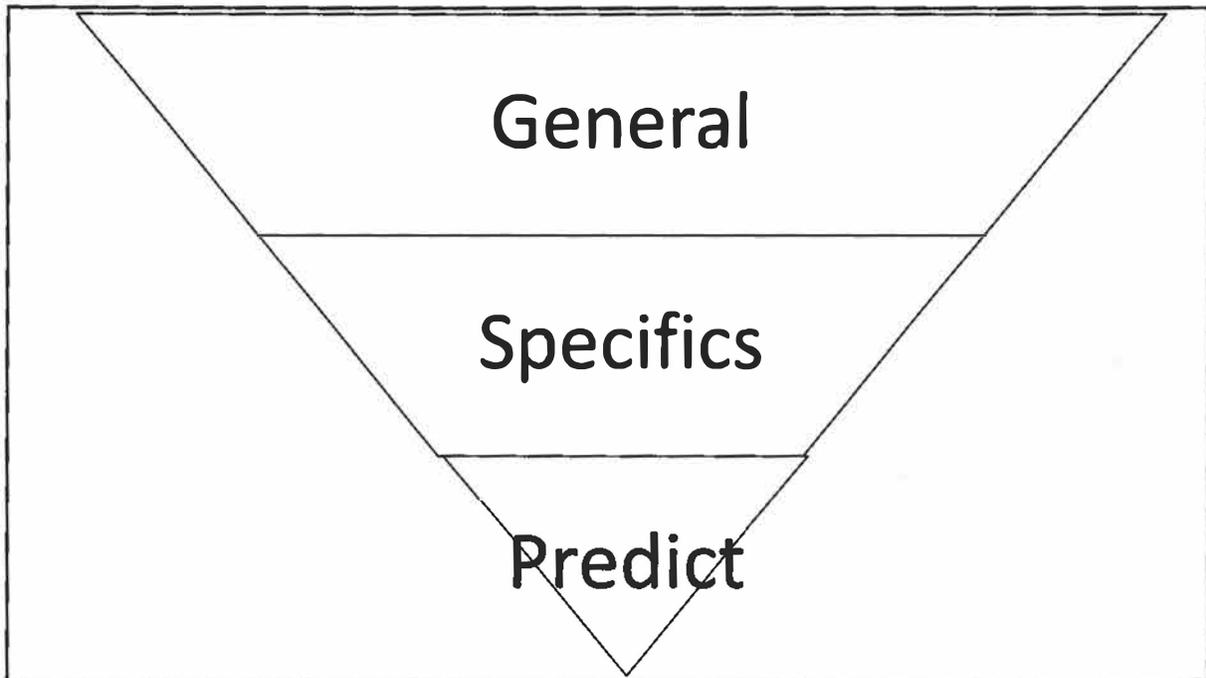
16

I – look for signs of intelligence – job, schooling, position, life experiences, well-read, travels ...

C – look for jurors with the ability to perceive, understand and judge things shared by nearly all people

E – is the juror’s self-importance warranted?

17



18

Jury Questionnaires -

1. Get the judge to give you the random list
2. Request not to re-randomize the list every time changes occur like removing jurors for cause or stips
3. Use Questionnaires to set up the juror selection table
4. Grading your jurors
5. Prediction table helps in selection of death qualified jurors and allows you to see how defense will stack their favorable jurors.

19

JUROR NUMBER

 JUROR NAME (Last, First - please print)

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff,

CASE NO. RIF 104023

v.

JEFFREE BUETTNER and GLEN JONES,

Defendant.

JUROR QUESTIONNAIRE

You have been sworn as a prospective juror in this case and are instructed by the court to answer this questionnaire. You must fill out the questionnaire with no assistance from any other person. Please write legibly and use a **BLACK INK PEN** to answer the questions.

You must sign your questionnaire at the bottom of this page. Your answers will have the weight of a statement given to the court under **PENALTY OF PERJURY.**

20

Jury Selection People v. Jeff Burston - RIF 161613					Jury Selection People v. Jeff Burston - RIF 164926				
No.	Name	Comments	ICR	Grade	No.	Name	Comments	ICR	Grade
1	W. Linda	<p># 65 year old white female</p> <p># 4 adult children</p> <p># Retired - Ex: Co Tax Collector</p> <p># Married the View, Oprah, Dr. Phil</p> <p># Deduct - why do they distrust these guys?</p> <p># 0 jury duty</p> <p># 27 Daughter victim of date rape and 211</p> <p># 4 Scared of gangs</p> <p># 56 Drugs - personal responsibility</p> <p># 77 9 on DP</p> <p># 86 87 Yes on (Def. Upholding and Viol Impact)</p>	4-4-4	A	16	K. Chas	<p># 34 year old Hispanic White female</p> <p># 10 Davis - no degree</p> <p># Unemployed - worked at research company</p> <p># Ellen, The View, Stephanie Miller Show</p> <p># 0 jury duty</p> <p># 27 Victim of commercial 211</p> <p># 56 Drugs - 50/50 on environment v. live shows</p> <p># 77 - 7 on DP</p> <p># 86 87 Yes on DU and VI</p>	3-3-3	B-
2	V. Burton	<p># 52 year old Filipino male</p> <p># 3 female daughters 24-26</p> <p># BA in Theology</p> <p># Has criminal justice background</p> <p># Medical Board Investigator</p> <p># 0 jury duty</p> <p># Works with law enforcement and AG</p> <p># 56 Drugs - others at fault</p> <p># 77 9 on DP</p> <p># 86 87 Yes on DU and VI</p>	4-4-3	A	17	P. Carmen	<p># 65 year old Spanish female</p> <p># 18 year old son</p> <p># Contingent care service Cable TV & Internet</p> <p># Grand</p> <p># Lives on Island - v. short</p> <p># 29 Suspicion in prison on gang related crime</p> <p># 52 Tony Pastore - organized Gang crime - felt justice was done</p> <p># 56 Drugs - 50/50 on others v. choice</p> <p># 77 - 4 on DP</p> <p># 86 87 Yes on DU and VI</p>	3-3-3	B-
4	T. Candice	<p># 30 year old black female</p> <p># 2 year old daughter</p> <p># Attended some community college</p> <p># Instruction Assistant Special Ed</p> <p># Grand, Dr. Phil, Tony Banks</p> <p># 0 jury duty</p> <p># 27 Cousin murdered in Long Beach</p> <p># 29 Used family member in prison - and</p> <p># 52 Gangs need to feel like they belong</p> <p># 56 Drugs - places emphasis on environment vs. personal responsibility</p> <p># 77 - 5 on DP</p> <p># 86 87 Sympathetic on DU / No #86 for VI</p>	3-3-3	C	18	A. Susan	<p># 38 year old white female</p> <p># 16 year old daughter, 21 and 23 sons</p> <p># 38 on Adam Service</p> <p># Teaches 7th grade gym classes</p> <p># Grand</p> <p># Living on 187 - v. direct</p> <p># 31 Nothing positive about gangs</p> <p># 56 Did not kill out drug responsibility</p> <p># 77 - 4 on DP - "leaning toward LWOP"</p> <p># 86 87 Yes on DU and VI</p>	3-3-3	C
					21	S. Christopher	<p># 18 year old black male</p> <p># 15 year old daughter 3 sons under 17</p> <p># Maintenance supervisor for telephone lines</p> <p># 15M - Okinawa</p> <p># 0 jury duty</p> <p># 56 Gangs are because of bad home life</p> <p># 56 Drugs - Poor Pressure</p> <p># 77 - 5 on DP</p> <p># 86 87 No on DU and VI</p>	3-3-4	B-

21

2	V. Burton	<ul style="list-style-type: none"> ● <u>52</u> year old Filipino male ● <u>3</u> female daughters 24-26 ● <u>BA</u> in Theology ● <u>Has</u> criminal justice background ● <u>Medical Board</u> Investigator ● <u>0</u> jury duty ● <u>Works</u> with law enforcement and AG ● <u>#56</u> Drugs – others at fault ● <u>#77 9</u> on DP ● <u># 86 / 87</u> Yes on DU and VI 	4-4-3	A
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22

5	T, Lynette	<ul style="list-style-type: none"> ● <u>63</u> year old white female ● <u>2</u> adult children ● <u>BA</u> in Foreign Language / MA Admin ● <u>Curriculum</u> coach / Alternative Schools ● <u>Rush Limbaugh</u> / Hugh Hewitt ● <u>Juror</u> in 664/187 – verdict ● <u># 27</u> Victim of ID theft ● <u>#51</u> Doesn't like gangs ● <u>#56</u> Drugs – Environment + Personal Choice ● <u>5</u> on DP ● <u># 86 / 87</u> Would consider DU and VI 	4-4-4	B
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23

23	S, Divina	<ul style="list-style-type: none"> ● <u>46</u> year old Filipino female ● <u>21</u> and <u>18</u> year old daughters / son <u>17</u> ● <u>CSU</u> DH – no degree accounting ● <u>Supervisor</u> payroll staff ● <u>Juror</u> on DUI – verdict ● <u>#56</u> Drugs – Environment ● <u>#77</u> - 3 on DP ● <u>#80</u> “don't want to have to decide someone's fate” ● <u># 86 / 87</u> Yes on DU / Maybe on VI 	2-2-2	C
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24

People v. Lewis Gray - RIF 127539

A = 53 B = 20

No.	Name	Comments	ICE	Grade
1	V. Ouy, Hebert	4-4-4		B
2	Walley, Teagan Sue	4-3-3		B
3	Olson, Joshua	4-3-4		A
4	Kirk, Theresa	4-3-3		A
5	Romney, Lawrence	5-4-3		A
6	Jacobs, Alvaro	4-4-3		A
8	Ferguson, Jocelyn	4-4-4		A
9	Farrell, Taylor			
11	Balbuena, Mary	3-3-2		B
12	Kiser, Laura	3-4-4		B-
14	Geay, Jeffrey	4-3-2		A-
15	DaCosta, Ashley	2-3-3		B-
17	Cheatham, Richard	5-5-3		A
18	Herman, Mary	4-2-3		B-
19	Asuay, David			
20	Hollerud, Brenda	4-4-3		A
22	Shaw, Kristofer	3-3-3		B-
23	Winters, Edward			
24	Ernst, Frederick	3-3-3		B-
25	Taylor, Letova	3-3-3		B
26	Sloan, Michael	2-4-3		B
27	DeCarro, Dennis			
29	Shanabasser, Sean	4-3-3		A-/B+
30	Castro, David			
31	Reynolds, Kevin	5-5-4		A+
32	Hwang, Hyun	3-4-3		B-
33	Hersev, Vonice	5-5-5		A
35	Prillwitz, Tanya	3-4-4		A
37	Sivan, Sonia	5-5-4		A+
38	Young, Ian	4-4-3		A
39	Vielma, David	4-4-3		A
41	Davis, Donald	4-3-3		A
42	Green, Nina	3-4-3		A
43	Nasse, Rebecca			T
46	Martinez, Katy			T
		4-5-4		A+
48	Perez, Denise			T
49	Herrera, Steve			T
52	Berry, Kathleen	3-4-3		B+
55	Munoz, Christopher	3-4-3		B+
56	Ferrando, Leonardo	5-5-4		A+

25

31	Reynolds, Kevin	5-5-4	A+
32	Hwang, Hyun	3-4-3	B-
33	Hersev, Vonice	5-5-5	A
35	Prillwitz, Tanya	3-4-4	A
37	Sivan, Sonia	5-5-4	A+
38	Young, Ian	4-4-3	A
39	Vielma, David	4-4-3	A
41	Davis, Donald	4-3-3	A
42	Green, Nina	3-4-3	A
43	Nasse, Rebecca		T
46	Martinez, Katy		T
		4-5-4	A+
48	Perez, Denise		T
49	Herrera, Steve		T
52	Berry, Kathleen	3-4-3	B+
55	Munoz, Christopher	3-4-3	B+
56	Ferrando, Leonardo	5-5-4	A+

26

Main Goals of Selecting a Death Qualified Jury

Excusing all non-death qualified jurors

Removing jurors for cause – death is not an option for them as a verdict – cannot set aside their strong beliefs temporarily

Expose juror's bias toward life without parole

A death qualified juror is usually a guilt qualified juror

27

Jury Selection – Witherspoon/Witt

Error requires automatic penalty phase reversal: “[T]he erroneous excusal of a prospective juror for cause based on that person’s views concerning the death penalty automatically compels the reversal of the penalty phase without any inquiry as to whether the error actually prejudiced defendant’s penalty determination. (*People v. Buenrostro* (2018) 6 Cal.5th 367, 417–418, citing *Gray v. Mississippi* (1987) 481 U.S. 648, 659–667.) Does not compel reversal of guilt phase verdict. (*People v. Tate* (2010) 49 Cal.4th 635, 666–667.)

28

Jury Selection – Witherspoon/Witt

Witherspoon/Witt standard:

Cannot systematically remove all potential jurors who are morally opposed to the death penalty. “[A] man who opposes the death penalty, no less than one who favors it, can make the discretionary judgment entrusted to him by the State and can thus obey the oath he takes as a juror. (*Witherspoon v. Illinois* (1968) 391 U.S. 510, 519-520.)

Proper Standard = juror’s views would “**prevent or substantially impair the performance of his duties** as a juror in accordance with his instructions and his oath.” (*Wainwright v. Witt* (1985) 469 U.S. 412, 414, 424.)

29

Jury Selection – Witherspoon/Witt

Inquiry Must be Sufficient: “Before granting a challenge for cause, the ‘court must have sufficient information regarding the prospective juror’s state of mind to permit a **reliable determination** as to whether the juror’s views would “ ‘prevent or substantially impair’ ” performance as a capital juror. [Citation.] Trial courts must therefore make ‘a **conscientious attempt** to determine a prospective juror’s views regarding capital punishment to ensure that any juror excused from jury service meets the constitutional standard.’ ” (*People v. Buenrostro* (2018) 6 Cal.5th 367, 412.)

30

Jury Selection – Witherspoon/Witt

Can base dismissal for cause on questionnaire, BUT be careful. Juror must make clear that he or she is unwilling to set aside beliefs and follow the law.

“[A] prospective juror may be discharged for cause solely on the basis of written questionnaire responses only if it is ‘clear’ from those responses that the juror is unable or unwilling to temporarily set aside the juror’s beliefs and follow the law. [Citations.] Where a prospective juror’s written responses are ambiguous with respect to the individual’s willingness or ability to follow the court’s instructions in a potential penalty phase, the record does not support a challenge for cause.” (*People v. Buenrostro* (2018) 6 Cal.5th 367, 412–413; see also *People v. Wilson* (2008) 44 Cal. 4th 758, 786.)

31

The jury determines the penalty by weighing factors in aggravation and mitigation, which will be defined at the appropriate time. There is a wide spectrum of possible evidence that you may be asked to consider if this case should go into a penalty phase. We cannot, of course, tell you now what that evidence will be. Nor, can you be expected to tell us the weight, if any, that you might give particular evidence.

66. On a scale of 1-10, with 10 being strongly in favor of the death penalty, 5 having no opinion, and 1 being strongly against the death penalty, how would you rate yourself?

(Circle a number)

strongly against				no opinion						strongly in favor
1	(2)	3	4	5	6	7	8	9	10	

67. Is there a particular reason why you feel as you do about the death penalty?

Yes No

If yes, please explain: DNA technology has reversed 100 or so convictions per year freeing innocent individuals. If they are dead it does no good, you can't take it back.

68. If you are **against** the death penalty, would you automatically vote for life without parole without regard to any of the evidence that might be presented in this case?

Yes No

Please explain: evidence dictates my decision.

32

73. It is important that you have the ability to approach this case with an open mind and a willingness to fairly consider whatever evidence is presented as opposed to having such strongly held opinions that you would be unable to fairly consider all the evidence presented during the possible penalty phase. There are no circumstances under which the court instructs a jury that they must return a verdict of death. No matter what the evidence shows, the jury is always given the option in a penalty phase of choosing life in prison without the possibility of parole.

Assuming the defendant was convicted of intentional murder and the special circumstances of lying in wait, murdering a witness, intentional murder while engaged in the commission of a kidnapping and killing for a gang purpose, would you:

- a. No matter what the evidence was, **ALWAYS** vote for the death penalty.
 b. No matter what the evidence was, **ALWAYS** vote for life in prison without possibility of parole.
 c. I would consider all of the evidence and the jury instructions as provided by the court and impose the penalty I personally feel is appropriate.

33

78. If the trial reached a penalty phase, would you be willing to consider evidence relating to the defendant's upbringing, family background, experiences, etc. in determining whether to impose the death penalty or life in prison without the possibility of parole?

Please explain: Yes, but regardless of the upbringing, background, experiences everyone has an individual choice to make. Everyone makes their choice, good or bad and consequences result.

79. If the trial reached a penalty phase, would you be willing to consider how this crime has affected the victim's relatives/friends (victim impact evidence) in determining whether to impose the death penalty or life in prison without the possibility of parole?

Please explain: I would consider it but I would imagine they are destroyed emotionally, physically and mentally. Every trial I have read about is the same!

34

Hypothetical Question at Heart of Issue

Before I ask you the next set of questions, I need you to search your conscience, your religious beliefs, your moral beliefs, your intellect and consider whether based on what you've been asked here today, based on the questionnaire you've filled out, taking into account what you've heard and seen here in court, do you believe that you can take part in our system of justice that outlines a process that may result in the death of a real live human being? This is not just a legal exercise – you must believe that whatever sentence you decide to render at the end will be carried out – death or LWOP.

35

Hypothetical Questions at Heart of Issue

Assume that you have found a defendant guilty of murder and the special circumstances found true beyond a reasonable doubt. You then proceed to the penalty phase and after a careful and thoughtful deliberation you, individually, believe that the aggravating factors and circumstances so substantially outweigh the mitigating factors and circumstances such that the death penalty is an appropriate punishment. Can you vote to put a person to death?

Can you participate in a process that may result in taking the life of a human being?

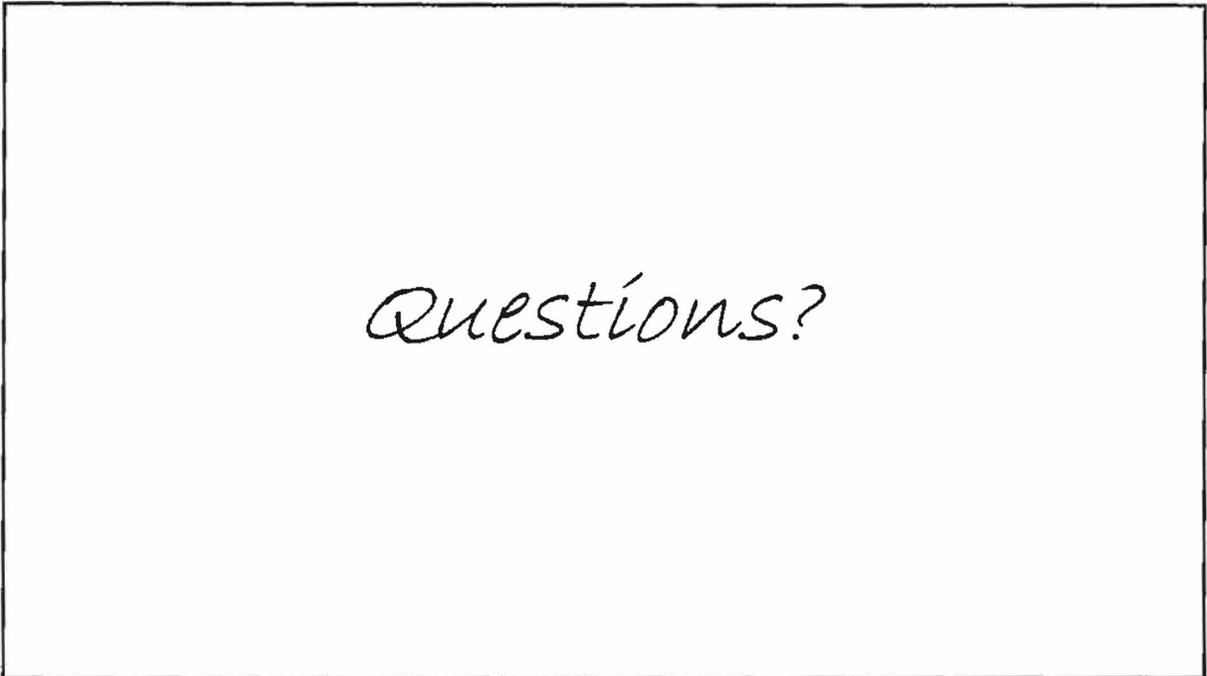
Is the death penalty a reasonable option for you if selected as a juror? Conversely, is life without parole a reasonable option for you as a punishment if you find that the aggravating factors and circumstances do not so substantially outweigh the mitigating factors and circumstances?

36



Please refer to video titled,
"James Jordan" at this time.

37



QUESTIONS?

38

Attachment “D”

Answering the Call: Avoiding Bias in Prosecution THE CALIFORNIA RACIAL JUSTICE ACT

Sherry Thompson-Taylor, Sophia Roach, Thienvu Ho & Chuck Hughes



1

How did we get here?

Sherry Thompson-Taylor
San Diego County

2

AB 2542 – Legislative Digest

- Would prohibit the state from seeking a criminal conviction or sentence on the basis of race, ethnicity or national origin (RFNO).
- Would allow a habeas corpus to be prosecuted
- Would require the defendant to appear at the evidentiary hearing by video.
- Would permit a defendant to file a motion requesting disclosure of all evidence relevant to a potential violation that is in the possession or control of the prosecutor
- Would require the court upon a showing of good cause to order those records released
- Would authorize a court to impose remedies.

3

The Legislature Finds

Section (d)

- Current legal precedent results in courts sanctioning racism in criminal trials.
- Existing Precedent provides no recourse for a defendant who's attorney harbors racial animus.
- Existing Precedent holds appellate courts must defer to rulings of judges who make racially based comments during jury selection.

Section (e)

- Existing precedent tolerates the use of racially inflammatory or racially coded language, images, and racial stereotypes in criminal trials.

Section (f)

- Existing precedent also accepts racial disparities in our criminal justice system as inevitable.

4

United States v. Shah 768 Fed. Appx. 637

Courts sanctioning racism in criminal trials

- Defendant was a psychiatrist. Failed to pay federal taxes in 2006/2007.
- As audit closed, Def. started to offer free medical care, free prescriptions, potential jobs for IRS Agent and his wife.
- Agent declined. Reported offers to Inspector General.
- Def. was determined to owe \$410K in back taxes. Def. again offered money and employment to reduce or eliminate back taxes.
- Sting operation Def. agreed to give Agent \$30,000 to eliminate the debt.
- Def. indicted.

5

United States v. Shah 768 Fed. Appx. 637

Courts sanctioning racism in criminal trials

- Defendant ultimately raised the defense of entrapment.
 - DA must prove either defendant was PREDISPOSED or not INDUCED
- To defeat the defense of entrapment DA offered testimony of first IRS Agent assigned to the case, Agent Raghaven.
- Agent Raghaven is native to India.
- Def. made several comments including
 - Both being from India
 - Being "brother" & "sister"
 - "Make this audit go away"

6

United States v. Shah
768 Fed. Appx. 637

- Defendant's testimony was not the product of bias.
- The district court based its finding of conspiracy and finding of guilty verdict on the accused defendant's own testimony. The district court's finding of guilty verdict was not based on the defendant's testimony.
- The fact that the defendant was a witness and that he had a motive to testify.
- The fact that the defendant was a witness and that he had a motive to testify.
- On cross, the government asked Agent questions about race, culture, language.
- The government did not ask the defendant if he had any bias against the defendant.
- The fact that the defendant was a witness and that he had a motive to testify.
- The fact that the defendant was a witness and that he had a motive to testify.
- The fact that the defendant was a witness and that he had a motive to testify.

7

United States v. Shah
768 Fed. Appx. 637

- **Holding:** government did not commit structural error in eliciting allegedly racist testimony from witness.
- Raghaven's testimony was NOT in the same category of testimony that a criminal defendant is predisposed to commit violence because of race.
- **But Legislative History reflects:** Current legal precedent results in courts sanctioning racism in criminal trials.

8

United States v. Shah
768 Fed. Appx. 637

- **Takeaway:** If this case is cited by defense counsel in your case – first point out of the gate is that the representation in the legislative history is
- Misleading,
- misleading,
- Misrepresented,
- misrepresented,
- is different than the actual finding of the court.

Courts'll Legislature: 0

9

Mayfield v. Woodford
270 F.3d 915

Existing Precedent provides no recourse for a defendant whose attorney harbors racial animus.

- Mayfield had unfettered access to a friend's car (Wafer).
- Wafer took off and the car was repossessed.
- Mrs. Pope, a neighbor, bought the car for her son Bryson.
- The car was missing and Bryson reported it stolen.
- Mayfield and his friends were arrested in the car the next day.
- Mayfield pled guilty.
- Mayfield was told it would be 365.
- Mayfield FTAd at PHS.

10

Mayfield v. Woodford
270 F.3d 915

Defendant whose attorney harbors racial animus.

- Two months later, Mayfield over hears Mrs. Pope talking to a friend, John Moreno, about Mayfield.
- Mayfield doesn't like what he hears & tells a friend, "he's going to show them".
- Mayfield gets a shotgun, climbs in her window and confronts Mrs. Pope & Moreno.
- They argue for 15-20 minutes, she stands to light a cigarette and he shoots her and then kills Moreno because he was a witness.
- Mayfield tells friend, he didn't mean to do it, it was an accident.

11

Mayfield v. Woodford
270 F.3d 915

Defendant whose attorney harbors racial animus.

- Mayfield leaves friend's house returns to Pope house, replaces screen window, Drags bodies of Mrs. Pope and Moreno outside to a storage closet, washes the blood from the walk.
- He then waited for Byron to come home. Confronts Byron. During the argument one of Byron's friend drives up and intervenes.
- Byron wasn't able to get into the house so he left with his friend.
- Mayfield was arrested the next day, confessed and retracted the crime.
- After 3 days in trial, the jury convicted him in 2 1/2 hours and recommended death.

12

Mayfield v. Woodford
270 F.3d 915

Defendant whose attorney harbors racial animus.

- Defendant asserted an ineffective assistance of counsel due to a conflict of interest arising out of defense counsel's racial prejudice.
- Defendant submitted six declarations.
- None of the declarations alleged that defense counsel used racial epithets described by the defendant or that the alleged prejudice affected his representation of the defendant.
- In order to establish IAC resulting from a COI, the defendant must show an actual COI adversely affected his lawyer's performance.

13

Mayfield v. Woodford
270 F.3d 915

- Def counsel's daughter, his contempt for his family was extended only by his contempt for people of other races and ethnic groups.
- He used such terms as n****r, schwartz, jig, jungle bunnies, trigger the n****r, shoot the coon to the moon.
- His secretary stated he constantly referred to clients, secretary, and a fellow lawyer as n****r.
- "Because his client was black he did not trust him and did not care what happened to him".
- "Another black client deserve to try"
- Case was reversed on other grounds – IAC in the penalty phase as to investigation and preparation.

14

Mayfield v. Woodford
270 F.3d 915

- Takeaway: The court finds that def counsel's personal animus against African-Americans is not sufficient to prove IAC.
- Legislature is saying, come on now.
- If this is your defense attorney, you can make the same arguments, but..... you'd be straining your own credibility.

Courts: 1 Legislature: 1

15

People v. Williams
56 Cal.4th 630

Appellate courts must defer to rulings of judges who make racially biased comments during jury selection.

- Defense counsel made 3 Batson/Wheeler motions.
- 1st motion after prosecutor excused three black female prospective jurors
- Trial court said, "I have to say that I did have some of them marked that I expected to be excused".
- Prosecutor said, he employed a rating system by which he rated the reluctance of the prospective juror toward answering questions he posed about the death penalty, which he considered reflective of a reluctance to impose the death penalty.

16

People v. Williams
56 Cal.4th 630

Appellate courts must defer to rulings of judges who make racially biased comments during jury selection.

- The prosecutor's general impression from their answers was that IN SPITE OF WHAT THEY SAID, they wouldn't have the ability to impose it when it actually came down to it.
- At this point, there were 40 prospective jurors called to the box. Four were black and the prosecutor dismissed three (all of whom were women).
- The court denied the Batson/Wheeler motion.

17

People v. Williams
56 Cal.4th 630

Appellate courts must defer to rulings of judges who make racially biased comments during jury selection.

- 2nd motion – At this point four out of the six African-Americans called to the box had been challenged and all four were women
- The prosecutor noted the juror as ambivalent, which was distinctive because he usually did not write anything next to the names.
- Trial court said that she indicated she was willing to impose the death penalty.
- Prosecutor replied that his impression had a lot more to do with not what she said but how he read what she was saying from observing her demeanor and the way she answered the questions.
- Trial court denied the motion.

18

People v. Williams
56 Cal.4th 630

Appellate courts must defer to rulings of judges who make racially biased comments during jury selection.

- 3rd motion – Five out of six African-American prospective jurors had been challenged.
- The prosecutor had accepted the panel, the subsequently kicked a black juror.
- Prosecutor said, "I reread my notes and noted her reluctant to impose the death penalty. Not formed only from her answers, but her demeanor and the fashion in which she answered them. She would not be able to impose the death penalty."
- The court denied the motion. Court had stopped taking notes, but accepted prosecuter's explanation.

19

People v. Williams
56 Cal.4th 630

Appellate courts must defer to rulings of judges who make racially biased comments during jury selection.

- Defense counsel said the numbers speak for themselves.
- Trial court said, in my other death penalty cases I have found that the black women are very reluctant to impose the death penalty, they find it very difficult no matter what it is. I am just making a little point, I just wanted to tell you my observation that I have seen this before and I can understand why. That's why. But I am not making my ruling based on that.
- The final composition of the jury was seven whites and five blacks, four of which were men and one woman.

20

People v. Williams
56 Cal.4th 630

Holding:

- Apparent reluctance to impose death penalty was valid neutral reason for striking African-American female prospective jurors.
- Takeaway: The court may allow you to kick jurors based on your impression of demeanor and the way someone answers questions.
- Legislature is saying, based on appearances, this doesn't look good.
 - The Legislature used this case to take issue with appellate court because it sanctioned the trial court and in turn the trial courts acceptance of the prosecuter's kicks.

Courts: 1 Legislature: 2

21

Duncan v. Ornoski
286 Fed. Appx. 361

Prosecutor's closing argument:

[Y]ou have seen the defendant sitting there in a suit, and in the sanitized area of a courtroom, you have jurors, court reporters, people in the audience. You have a bailiff who is armed. Sometimes we lose sight of what it must have been like at a little after midnight...

People v. Duncan, 53 Cal. 3d 955, 976, 810 P.2d 131, 142 (1991)

22

Duncan v. Ornoski
286 Fed. Appx. 361

You have friends come in from out of town. And so one of the things you do with them, you take them to the San Diego Zoo. And as you walk along with your friends, these high steel bars and moats, you look back there; there are large striped animals lolling in the sun, looking like kittens. And this little brass plaque up here says, 'Bengal tiger.' And you tell your friends that that's a Bengal tiger. Wrong, wrong, wrong. That's a Bengal tiger in captivity, behind bars, and is being fed so much meat every day.

People v. Duncan, 53 Cal. 3d 955, 976, 810 P.2d 131, 142 (1991)

23

Duncan v. Ornoski
286 Fed. Appx. 361

However, if you and your friends were on a houseboat in Pakistan or India, and the boat comes up to the shoreline in the evening; and you get off the boat; you're walking along; and you push a big palm frond aside; and there you see a huge striped animal with blazing eyes, with cubs, that's a Bengal tiger. And that's a Bengal tiger in its natural habitat.

People v. Duncan, 53 Cal. 3d 955, 976, 810 P.2d 131, 142 (1991)

24

Duncan v. Ornoski
286 Fed. Appx. 361

...If you were there that night, you wouldn't see the defendant in his suit, the way you have seen him in this trial. You would see him with a butcher knife, out to get money. You would be seeing him in a very natural habitat.

People v. Duncan, 53 Cal. 3d 955, 976, 810 P.2d 131, 142 (1991)

25

Duncan v. Ornoski
286 Fed. Appx. 361

- We find no impropriety in the argument.
- The prosecutor was attempting to focus the jury's attention on the vicious nature of the crime. He clearly wanted the jury not to be misled by defendant's benign and docile appearance at trial, but to remember him as the murderer.
- The prosecutor was entitled to point out that modest behavior in the courtroom was not inconsistent with violent conduct under other less structured and controlled circumstances. We find no error in this argument.
- Defendant's complaint that the Bengal tiger argument was a thinly veiled racist allusion does not withstand scrutiny. Likening a vicious murderer to a wild animal does not invoke racial overtones.

26

Duncan v. Ornoski
286 Fed. Appx. 361

- Takeaway: (in 1991) Courts may sanction this language, so it may not be prosecutorial misconduct.
- But that's the point the legislature is making – Court's shouldn't allow this language.
 - Find other ways to describe the defendant and the crime, because if you use this language now, you stand a chance of being accused of using race to obtain a conviction

Courts: 1 Legislature: 3

27

McCleskey v. Kemp
481 US 279

- The Racial Justice Act uses this case as its foundation
- 1987 case out of Georgia
- A black man convicted of armed robbery and murder of a white police officer was convicted at trial and the jury recommended the death penalty

Holding:

- Baldus Study conclusion black defendants who killed white victims have the greatest likelihood of receiving the death penalty.
- The petition must prove that the decision maker in his case acted with discriminatory purpose.
- Petitioner offered no evidence specific to his own case that racial considerations played a part in his sentence.

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McCleskey v. Kemp
481 US 279

Takeaway:

- But legislature is saying = Court's shouldn't do this.
- You may now be required to provide statistics to show refine discriminatory purpose or discriminatory impact.
- And the legislature has told you why these changes are necessary and how they're going to tell you how this is going to effect:
 - the way you charge cases,
 - the way you question witnesses,
 - the way you prep your expert,
 - the way you argue closing and
 - the way you sentence cases.
- Introducing Penal Code Section 705

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**How do we answer the call for
Racial Justice?**

Sophia Roach
San Diego County

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The Racial Justice Act

- PC 745(a) The state shall not seek or obtain a criminal conviction or seek, obtain, or impose a sentence on the basis of race, ethnicity, or national origin.
 - Creates new code sections regulating language and conduct of judges, attorneys, officers, experts & jurors.
 - Provides new discovery and hearing rights.
 - Creates mandatory remedies for conduct and language violations as well as disparate outcomes based on RENO.
 - Effective January 1, 2021 for all pre-judgment cases.
- CAVEAT: AB 3070

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Penal Code Section 745(a)(1) Violation

The judge, an attorney, officer, expert witness or juror in the case exhibited bias or animus toward D due to their RACE, ETHNICITY or NATIONAL ORIGIN

- Bias: Implicit and Explicit
 - Legislative findings discuss bias in judicial context
 - Williams, Shah & Duncan (facts vs. interpretations)
 - Implicit bias may be unintentional and unconscious but still requires remedy
- Animus
 - Legislative findings discuss animus in extrajudicial context impacting trial conduct
 - Mayfield
- Can be isolated incident: "Some toxins deadly in small doses"
- Applies to a limited group of actors IN THE CASE
- Based on actual RENO of D according to statutory language

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Penal Code Section 745(a)(2) Violation

Judge, attorney, officer, expert witness or juror in the case uses racially discriminatory language about D's RENO

1. Explicitly or implicitly appeals to racial bias
2. Racially charged or coded language
3. Language that compares the defendant to an animal
4. Language that references the defendant's physical appearance, culture, ethnicity, or national origin

Exceptions

Relevant, racially neutral and unbiased physical description
Language used by another that is relevant to the case

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PROHIBITED LANGUAGE

Racially charged or coded language:

Super Predator, Thug, Urban, Ghetto, Hood Rat, Welfare Queen, Spade, Gyped, Svengali, Shyster, Macho, Illegal, Illegal Immigrant*

Animals, animal attributes:

Gorilla Pimp, Bottom Bitch, Coyote, Snake, Pack of dogs, etc...
Hunt, Pack, Prey Predator
Brute, Savage, Feral

Us-them-they language

Descriptors demeaning entire communities

Pro Tip: Learn to use PEOPLE FIRST language
(Person with a conviction vs Felon)

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Questions we need to ponder

- What stylistic changes can I make to combat bias?
- What is a racially neutral description?
- How do we accurately describe relevant subcultures while being mindful of the systemic impact of our words?
- How do we cull non-essential information that could lead to violations?

LE will need instruction

- Gangs & HT will need extra thoughtfulness and sensitivity
 - "I am responsible for documenting Asian gangs in the city" vs. "I am responsible for documenting a gangs in the city"
 - "A bottom bitch is a recruiter for other prostitutes," vs. "When the victim described herself as a bottom bitch, she was referring to her role as a recruiter or other women into prostitution."
- Strip unnecessary references to RENO from search warrants, reports and testimony to avoid allegations of systematic practice moving forward.

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Penal Code Section 745(a)(3-5)

VIOLATION OCCURS WHEN A COMPARISON TO SIMILARLY SITUATED DEFENDANTS IN THE SAME COUNTY SHOWS DEFENDANT WAS:

- 3) Charged or convicted of a more serious offense than others of different RENO's and data shows prosecutors seek or obtain more serious offenses for defendants with same RENO.
Black D's charged with sale while other RENO D's charged with possession of same quantity of narcotics.
- 4) Sentenced to a longer/more severe penalty than others of different RENO's and data shows prosecutors seek or obtain longer/more severe sentences for defendants with same RENO.
Latinx D's sentenced to 25 life for single victim murders while other RENO D's charged with single victim murders receive determinate terms.
- 5) Sentenced to a longer/more severe penalty for a victim of a specific RENO and data shows prosecutors seek or obtain longer/more severe sentences when other victims of the same RENO.
D's who rape white V's are sentenced to prison while D's who rape other RENO V's are sentenced to probation.

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Hearings, Post-Judgment Procedure & Remedies

Thienvu Ho
Sacramento County

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PC 745 Hearing

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PC 745 Hearing

- Statistical Evidence
- Aggregate Data
- Expert Testimony
- Sworn Witnesses
- Court Expert

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PC 745 Hearing

Statistical Evidence
Aggregate Data
Expert Testimony
Sworn Witnesses
Court Expert

Rules of Evidence Apply:
???????

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PC 745 Hearing

Statistical Evidence
Aggregate Data
Expert Testimony
Sworn Witnesses
Court Expert

Burden of Proof:
Defense must prove by a preponderance

County Specific:
PC 745(a)(3)

Court:
- Make findings
- Appellate Review

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PC 745 Hearing

Statistical Evidence
Aggregate Data
Expert Testimony
Sworn Witnesses
Court Expert

Litigating the Hearing:

- Turn the tide
- Scrutinize the Stats
 - Small sample size
 - Data dredging
 - Confusing correlation for causation
 - Apples vs. Oranges

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Data Dredging/Data Fishing

- The misuse of data analysis to find patterns that are then presented as statistically significant
- More data & more variables can result in more false positives
- Testing multiple hypotheses/theories using the same data set can cause false positives

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Example: Testing Hypotheses



- Flip a coin 5 times
- Theory:
 - "Tails Never Fails"
 - The coin is bias
 - To test this theory you cannot rely on just those 5 flips, you need more data

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Correlation is NOT Causation

When statistics show a correlation between A & B, there are usually 6 possibilities:

1. A causes B
2. B causes A
3. A & B both partly cause each other
4. A & B are both caused by a third factor, C
5. B is caused by C, which is correlated to A
6. The correlation was due purely to chance

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Correlation is NOT Causation

Example:

- The number of people who buy ice cream at the beach correlates/relates to the number of people who drown at the beach.
- Does ice cream cause drowning?
- Of course not, both ice cream and drowning are related to a third factor: the number of people at the beach.

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Disparity is demonstrated when statistical evidence or aggregate data demonstrate a significant difference in seeking or obtaining convictions or in imposing sentences comparing individuals who have committed similar offenses and are similarly situated, and the prosecution cannot establish race-neutral reasons for the disparity.

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Race Neutral Factors

- ✓ Mitigating & Aggravating Factors (Rules 4.421 & 4.423)
- ✓ Criminal History
 - ✓ Strikes
 - ✓ Prison
 - ✓ Felony vs. Misdemeanor
 - ✓ Recent vs. Stale
 - ✓ Probation vs. Parole vs. None
 - ✓ Concurrent Cases
- ✓ Injuries
 - ✓ GBI vs. Other vs. None

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Race Neutral Factors

- ✓ Enhancements
 - ✓ Gangs
 - ✓ Crime Specific: sex, embezzlement, etc.
- ✓ Victim
 - ✓ None vs. One vs. Multiple
 - ✓ Vulnerable & Impact Statements
- ✓ Planning and Sophistication
- ✓ Principal vs. Aider/Abettor
- ✓ Age of Defendant
- ✓ Fact Specific

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Rules of Evidence: ???

- Testimony of Prosecutor(s)
 - Assigned Prosecutor
 - Expert Witness – Prosecutor With Experience Charging, Negotiating And Trying Cases
- Declarations
- Probation Report/Recommendation
- Statistics
- Best Practice: PC 745 Hearing Prosecutor Different Than The Assigned Prosecutor

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PC 745 (e)(1): Remedies Sustained Violations Before Judgment

The court shall impose a remedy specific to the violation found from the following list:

- Declare a mistrial, if requested the by the defendant
- Discharge the jury panel and empanel a new jury
- Dismiss enhancements, special circumstances, or special allegations
- Reduce charges
- Ineligibility for death penalty

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Post-Judgment Litigation

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Example: Defense Attorney

- Source: Alameda County DA
- 25+ years after trial, D found out his lawyer was a racist. Attorney called his defendants and African-American court staff the n-word; once said an Asian judge was a "f***ing J** who should remember Pearl Harbor."
- 9th Circuit granted a new trial to the D, an African-American, because his lawyer's racism deprived him of a fair trial.
- Today, D could use habeas section of PC 745 for relief.

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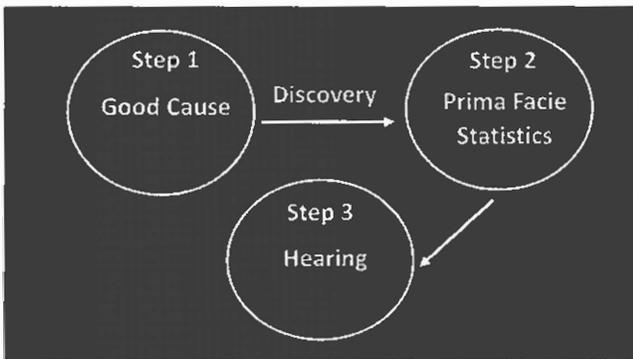
Example: Juror

- Source: Alameda County DA
- After trial, two jurors reported that another juror made racially charged statements against D, who was charged with sexually assaulting two teenagers. The juror said, "Mexican men have a bravado that makes them think they can do whatever they want with women."
- U.S. Supreme Court remanded case to investigate juror bias.
- Defendant could now make motion under PC 745.

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Post-Judgment Motions

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- ### Remedies: Post-Judgment
- 745(e)(2)(A)
 - Wide Discretion
 - Shall Vacate Conviction & Sentence
 - Shall Find Conviction Legally Invalid
 - May Order A New Trial Or
 - Modify The Sentence
 - ❖ Cannot Impose A New Sentence Greater Than That Previously Imposed
 - Not Eligible For The Death Penalty

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Habeas Corpus

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PC 1473: Habeas Corpus

- Provides post-conviction remedies for *in* custody D
- AB 2542 added subsection (f) to the habeas law:
 - A writ of habeas corpus may now be prosecuted upon a PC 745(a) violation if judgment was entered on or after 1/1/2021.
 - ❖ Allows for amending existing petitions
 - ❖ Not considered successive or abusive
 - ❖ Counsel shall be appointed
 - ❖ Video appearance permitted

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PC 1473.7: Habeas Corpus

- Provides post conviction remedies for *out* of custody defendants
- AB 2542 added subsection (a)(3):
 - A defendant can now file a motion to vacate a conviction or sentence for a PC 745(a) violation even after the defendant is released from actual or constructive custody.

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The Role of Data

Chuck Hughes
Ventura County

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The Role of Data – PC 745(a)(3)&(4)

- Disparate charge, conviction, or sentence based on RENO
- Two questions:
 - Is D being treated significantly worse than similar others?
 - Does the data show D's RENO receives more severe treatment?
- Goal – Data from which accurate conclusions can be drawn

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Developing a Data Strategy

- Every county is different
- Challenges to consider:
 - Qualification to collect, analyze data – Statistician?
 - Available data & resources
 - Quality of data
 - Definitions / terminology
 - Complexity of factors to analyze
 - Timeframe for data

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1. Determine Data Availability

- Case management system
- Case files
- Other agencies' data to which you have access
 - Law enforcement
 - Probation
 - Jail
 - Courts
- Other agencies' data they will give you

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Data Availability – Key Factors

- D's race
- V's race
- Requested charges
- Filed charges
- Convicted charges
- Sentences
- Priors
- Weapons (by type)
- Injuries (by severity)
- Gangs
- Other enhancements
- Probation/parole status
- Other pending cases
- Age (18-29; 30-54; 55+)

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2. Decide Initial Approach

- It's not entirely up to you
 - Involve your PDO, bench?
- Data alone or with case file analysis
- Broad vs. narrow comparisons
 - All 211 cases, broken down by race
 - All 211 cases, broken down by race, other listed factors

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2. Decide Initial Approach

- Timeframe for analysis – compare apples to apples
- Plus or minus 6 months from charge, conviction, sentence?
- If too long or short, won't account for
 - Changes in law (e.g. 667.5(b), 667(a) priors; misdemeanors)
 - Changes to DA administrations
 - COVID
 - New programs
 - Statistical significance

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3. Collect Data

- Run / collect sample data?
 - Broad and narrow comparison
 - Varied timeframes
- How long does it take?

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4. Analyze the Data

- Qualified analyst
- Sample sizes, averages, ranges, curves, std. deviations, factors
- Broad vs. narrow comparison
 - All 211 cases, broken down by race
 - All 211 cases, broken down by race, other listed factors
- What if there are racial discrepancies?
- Feasibility of further case file analysis?

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5. Discovery

- Format
 - Databases, spreadsheets, proprietary software, etc.
 - Aggregates
- Privileges apply
- Privacy concerns
- Your interpretation
- Timing

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Overcharge Claims under 745(a)(3)

- Common discretion scenarios
 - Wobblers
 - DUI / Wet (if applicable)
 - 211 / 487(c) – Especially *Estes*
 - 459 1st / 2nd
 - Murder degree
 - Possession for sales / Sales / Simple possession

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Overcharge Claims under 745(a)(3)

- Compare charges at discretionary stages by race and factors
 - LE requested vs. diverted
 - LE requested vs. filed
 - Filed vs. convicted of same charge
 - Filed vs. convicted of lesser charge
 - Filed vs. dismissed

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Sentencing Claims under 745(a)(4)

- Compare sentences imposed by race and factors
- Compare sentences at different stages of the proceedings
 - Arraignment, pre-prelim, Info arraign., pre-trial, post-trial
- What is a significant difference?
 - Averages, ranges, etc.

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Future Data Collection Practices

- Develop a tracking system for some/all of the above?
- Document data items above, plus:
 - Washed out priors
 - Injuries not amounting to GBI
 - Gang related offenses
 - Other aggravating / mitigating factors
 - Reasons for sentence increase / decrease
- Complexity can cause problems - GIGO

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Q & A

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Attachment “E”

**Peremptory Challenges
After AB 3070
(CCP §231.7)**

MDDA IVY FITZPATRICK
RIVERSIDE COUNTY DISTRICT ATTORNEY'S OFFICE

This slide features a dark, textured background with a large, light-colored circle on the right side. The text is centered and presented in a bold, white, sans-serif font.

1

Goodbye Batson/Wheeler

Example: You are prosecuting a PC 69. This is your prosecutive juror:

- ▶ Wearing a "Defund the Police" shirt
- ▶ Unkempt, long ponytail
- ▶ Unemployed
- ▶ Lives in high crime neighborhood
- ▶ Says he distrusts police
- ▶ Says he believes that the criminal justice system is unfair to minorities
- ▶ His brother is in prison
- ▶ He had a terrible experience being harassed by police

These reasons are now presumptively invalid.

This slide features a dark, textured background with a large, light-colored circle on the right side. The text is centered and presented in a bold, white, sans-serif font.

2

Code of Civil Procedure 231.7

- ▶ New statute that changes the rules regulating use of peremptory challenges
- ▶ Applies to defense use of peremptory challenges
- ▶ Effective **January 1, 2022**
- ▶ Breaks with Batson/Wheeler

3

Batson/Wheeler

- ▶ *People v. Wheeler* (1978) 22 Cal.3d 258 – State constitutional right to fair/impartial cross section
- ▶ *Batson v. Kentucky* (1986) 476 U.S. 79 – 14th Amendment right to equal protection
- ▶ Cannot exercise peremptory challenge to discriminate against “cognizable groups”
- ▶ Constitutional rule applies to civil cases, and the defense use of peremptory challenges

4

Batson/Wheeler

- ▶ **Stage 1:** Defendant makes prima facie showing of purposeful discrimination
 - ▶ Burden of production
- ▶ **Stage 2:** DA offers a non-discriminatory reason for exercising strike(s)
 - ▶ Burden of production
- ▶ **Stage 3:** Court determines whether the defendant proved purposeful discrimination
 - ▶ Burden of persuasion

5

Major Changes

- ▶ Eliminates 3 step process
- ▶ Reduces burden on moving party
- ▶ Presumes certain reasons are impermissible
- ▶ Requires court confirmation of certain reasons
- ▶ Unconscious bias, not just purposeful
- ▶ Actual reasons only, no inferences
- ▶ Timing
- ▶ Appellate review

6

Complete Overhaul of Jury Selection

- ▶ CCP 231.7 was meant to overrule Batson/Wheeler
- ▶ Batson/Wheeler case law will not be helpful on many aspects and should not be relied upon
- ▶ Must wait for future courts to give us clarity (see Washington State for now)
- ▶ "broadly construed"

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Complete Overhaul of Jury Selection

I apologize in advance for saying
"I don't know..."

It's 1978 again

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How did we get here?

- ▶ From the beginning there was doubt that Batson went far enough
- ▶ Justice Liu has been calling on legislative reform for years
- ▶ Cal Supreme Court created a jury selection working group in 2020
- ▶ Washington state enacted nearly the same law in 2018
- ▶ California Legislature copied Washington law with a few modifications and rushed it through without waiting on the working group recommendations

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How did we get here?

- ▶ Legislature found Batson/Wheeler did not go far enough and certain groups are still being excluded
- ▶ Not just concerned with purposeful discrimination - directed toward implicit/accidental/non-intentional discrimination
- ▶ Read legislative history
 - leginfo.legislature.ca.gov – Assembly Bill 3070
- ▶ Justice Liu's dissents
 - *People v. Triplett* (S262052)

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How did we get here?

AB 242 passed in 2019 requires education for attorneys and judges on implicit bias. Legislature declared:

- (1) **All persons** possess implicit biases, defined as positive or negative associations that affect their beliefs, attitudes, and actions towards other people.
- (2) Those biases develop during the course of a lifetime, beginning at an early age, through exposure to messages about groups of people that are socially advantaged or disadvantaged.
- (3) In the United States, studies show that most people have an implicit bias that disfavors African Americans and favors Caucasian Americans, resulting from a long history of subjugation and exploitation of people of African descent.
- (4) People also have negative biases toward members of other socially stigmatized groups, such as Native Americans, immigrants, women, people with disabilities, Muslims, and members of the LGBTQ community.

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Timeliness

CCP 231.7(b): "The objection shall be made before the jury is impaneled, ***unless information becomes known that could not have reasonably been known before the jury was impaneled***"

Batson/Wheeler – Had to be done before impaneling.

Don't forget if jury is impaneled, jeopardy has attached.
Defendant must consent to mistrial.

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Cognizable Groups

Batson/Wheeler: Race, national origin, Spanish surname, religion, gender, sexual orientation

CCP 231.7(a): "A party shall not use a peremptory challenge to remove a prospective juror on the basis of the prospective juror's race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, **or the perceived membership of the prospective juror in any of those groups.**"

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Cognizable Groups

- ▶ Includes "white" (*People v. Willis* (2002) 27 Cal.4th 811)
- ▶ Defendant does not have to be a member of the cognizable group, but it is a factor to consider when deciding whether peremptory exercised properly.
- ▶ Everyone is a member of some cognizable group.

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CCP 231.7 Process - Overview

1. Defendant or court object to use of a peremptory challenge.
2. DA offers actual reasons the peremptory challenge was made (outside presence of jurors).
3. Judge evaluates the reasons in light of the totality of the evidence. "If the court determines there is a **substantial likelihood that an objectively reasonable person would view race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or perceived membership in any of those groups, as a factor in the use of the peremptory challenge, then the objection shall be sustained.**"

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CCP 231.7(b) – The Objection

Defendant **or the court** object to the use of peremptory challenge on a particular juror.

Nothing further should be said in front of the jurors. (Might want to mention this prior to jury selection.)

Court will have to clear out all prospective jurors and conduct an inquiry **every time**. **No prima facie requirement!**

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CCP 231.7(c) – The Reasons

DA provides actual reasons for the peremptory strike

- ▶ Take your time
- ▶ Consult your notes
- ▶ Give ALL your reasons (see next slide)
- ▶ Don't let the defense attorney interrupt
- ▶ Cannot do this ex parte
- ▶ Have a court reporter



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CCP 231.7 – The Reasons

Give **ALL** your reasons.

Court is prohibited from considering circumstances/reasons that you do not articulate:

“The court shall consider only the reasons actually given and shall not speculate on, or assume the existence of other possible justifications for the use of the peremptory challenge.”
CCP 231.7(d)(1)

No matter how obvious, you must say it, or it doesn't count.



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CCP 231.7 – The Reasons Presumptively Invalid Reasons

13 reasons that were considered OK are now presumptively invalid
CCP 231.7(e)

- (1) Distrust of/having a negative experience with law enforcement or the criminal legal system.
- (2) Expressing a belief that law enforcement officers engage in racial profiling or that criminal laws have been enforced in a discriminatory manner.
- (3) Having a close relationship with people who have been stopped, arrested, or convicted of a crime.

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CCP 231.7 – The Reasons Presumptively Invalid Reasons

Example: Negative experience with law enforcement/legal system

Q: Do you know anybody who has been treated badly by the police or the court?

A: Yes. Just growing up in L.A.

Q: Can you elaborate?

A: A Black woman in L.A. with young Black brothers, I have been harassed many times by police.

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CCP 231.7 – The Reasons Presumptively Invalid Reasons

- (4) A prospective juror's neighborhood.
- (5) Having a child outside of marriage.
- (6) Receiving state benefits.

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CCP 231.7 – The Reasons Presumptively Invalid Reasons

- (7) Not being a native English speaker.
- (8) The ability to speak another language. (This does not mean inability to speak English.)

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CCP 231.7 – The Reasons Presumptively Invalid Reasons

(9) Dress, attire, or personal appearance.

No more trivial, idiosyncratic reasons.

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CCP 231.7 – The Reasons Presumptively Invalid Reasons

(10) Employment in a field that is disproportionately occupied by members listed in subdivision (a) or that serves a population disproportionately comprised of members of a group or groups listed in subdivision (a)

But (a) says "race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation"

Wouldn't that be every occupation? Anyone have an example?

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CCP 231.7 – The Reasons Presumptively Invalid Reasons

Employment?

Doesn't define disproportionate – what percentage, what area (county, state, national)?

Social work, minister work, defense counsel? Law enforcement?

Remember – doesn't matter if you did not know that it was disproportionate. And remember that if you use occupation, it needs to be specifically related to your case.



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CCP 231.7 – The Reasons Presumptively Invalid Reasons

(11) Lack of employment or underemployment of the prospective juror or prospective juror's family member.

(12) A prospective juror's apparent friendliness with another prospective juror of the same group as listed in subdivision (a).

- Meant to limit justification based on juror dynamics?



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CCP 231.7 – The Reasons Presumptively Invalid Reasons

(13) Any justification that is similarly applicable to a questioned prospective juror or jurors, who are not members of the same cognizable group as the challenged prospective juror, but were not the subject of a peremptory challenge by that party. The unchallenged prospective juror or jurors need not share any other characteristics with the challenged prospective juror for peremptory challenge relying on this justification to be considered presumptively invalid.

Comparative Juror Analysis?

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Comparative Juror Analysis

- ▶ Created by USSC in Batson case of *Miller-El v. Drefke* (2005) 545 U.S. 231
- ▶ Appears it is intended to be incorporated in CCP 231.7
- ▶ Compare the excused juror(s) with the jurors accepted by the DA
 - ▶ Circumstantial evidence of intent
 - ▶ E.g., DA says don't like teachers, but left teachers on jury = circumstantial evidence that reason given is pretextual

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Comparative Juror Analysis

- ▶ Defense can ask for comparative analysis for the first time on appeal even if never mentioned below
- ▶ Don't wait for the defense – anticipate it and make it work for you
- ▶ Point out your consistencies as evidence that your reason is genuine
- ▶ If any juror you failed to excuse shares quality with the excused juror – explain the different treatment.

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CCP 231.7 – The Reasons Presumptively Invalid Reasons

Presumption can be overcome. CCP 231.7(e)-(f)

"A peremptory challenge for any of the following reasons is presumed to be invalid unless the party exercising the peremptory challenge can show by clear and evidence that an objectively reasonable person the rationale is unrelated to a prospective juror's race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or perceived membership in any of those groups, and that the reasons articulated bear on the prospective juror's ability to be fair and impartial in the case."

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CCP 231.7 – The Reasons

Presumptively Invalid Reasons

Presumption can be overcome

" 'clear and convincing' refers to the degree of certainty the factfinder must have in determining whether the reasons given for the exercise of a peremptory challenge are unrelated to the prospective juror's cognizable group membership, bearing in mind conscious and unconscious bias. To determine that a presumption of invalidity has been overcome, the factfinder shall determine that it is **highly probable** that the reasons given for the exercise of a peremptory challenge are unrelated to conscious or unconscious bias and are instead specific to the juror and bear on that juror's ability to be fair and impartial in the case."

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CCP 231.7 – The Reasons

Reasons Requiring Court Confirmation CCP 231.7(g)

The following reasons for peremptory challenges have historically been associated with improper discrimination in jury selection:

- (A) The prospective juror was inattentive, or staring or failing to make eye contact.
- (B) The prospective juror exhibited either a lack of rapport or problematic attitude, body language, or demeanor.
- (C) The prospective juror provided unintelligent or confused answers.

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CCP 231.7 – The Reasons Reasons Requiring Court Confirmation

Those reasons are presumptively invalid unless the trier of fact is able to confirm that the asserted behavior occurred, based on the court's own observations or the observations of counsel for the objecting party.

Even with that confirmation, the counsel offering the reason shall explain why the asserted demeanor, behavior, or manner in which the prospective juror answered questions matters to the case to be tried.

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CCP 231.5 (preexisting statute)

"A party shall not use a peremptory challenge to remove a prospective juror on the basis of an assumption that the prospective juror is biased merely because of a characteristic listed or defined in Section 11135 of the Government Code, or similar grounds."

"sex, race, color, religion, ancestry, national origin, ethnic group identification, age, mental disability, physical disability, medical condition, genetic information, marital status, or sexual orientation"

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CCP 231.7 – The Reasons

So what reasons can I give?

Can still use the prospective juror's answers.

Take careful and extensive notes of what is said.

Probably need to move beyond the sticky note.

Case specific is the key!

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CCP 231.7 – The Reasons

So what reasons can I give?

- ▶ You can still point out that a more favorable juror is coming, but follow.
- ▶ *People v. Cisneros* (2015) 234 Cal.App.4th 1111. DA's reason was I want the next juror in line; nothing else. Court of Appeal found this is the same as giving no reason at all.
- ▶ Anytime you strike a juror, it necessarily means that you prefer the next prospective juror to the one being struck. There are 12 jurors available to reach that next prospective juror. You must explain why you chose to strike that particular juror in order to reach the next prospective juror.

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CCP 231.7 – The Reasons

So what reasons can I give?

Make a Record!

- ▶ Defendant's race, gender
- ▶ Victim/witness race, gender etc.
- ▶ Type of case and why race, gender, etc. is not an issue
- ▶ Number of group members struck by defense counsel
- ▶ Number of group members in the venire, in the box, etc.
- ▶ Number of group members in the panel that you accepted
- ▶ OK if you don't know someone's race, gender identity, religion...

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Should Your Notes Document Group Membership?

- ▶ *Miller-El v. Dretke* (2005) 545 U.S. 231: In a case tried pre-Batson, USSC found notes documenting race are evidence of discrimination.
- ▶ *People v. Lenix* (2008) 44 Cal.4th 602, 671, fn. 12: "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."
- ▶ *Green v. Lamarque* (9th Cir. 2008) 532 F.3d 1028: "[T]he prosecutor 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, and he had noted the race of each venire member next to the member's name."
- ▶ Recommendation: when you refer to your notes for race/gender notations, make clear you documented race/gender in case of a Batson/231.7 challenge

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CCP 231.7(d) – The Ruling

The court shall evaluate the reasons given to justify the peremptory challenge in light of the "fairness of the circumstances."

Only actual reasons are considered.

In making its determination, the court may consider the circumstances, but are not limited to, any of the following:

(A) Whether any of the following circumstances exist:

- (i) The objecting party is a member of the same perceived cognizable group as the challenged juror.
- (ii) The alleged victim is not a member of that perceived cognizable group.
- (iii) Witnesses or the parties are not members of that perceived cognizable group.

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CCP 231.7(d) – The Ruling

Court can consider:

(B) Whether race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or perceived membership in any of these categories, or any combination thereof, bear on the facts of the case to be tried.

(C) The number and types of questions posed to the prospective juror, including but not limited to, any the following:

- (i) Consideration of whether the party exercising the peremptory challenge failed to ask the prospective juror about the concern later stated by the party as the reason for the peremptory challenge pursuant to subdivision (C).
- (ii) Whether the party exercising the peremptory challenge engaged in cursory questioning of the challenged potential juror.
- (iii) Whether the party exercising the peremptory challenge asked different questions of the potential juror as to the concern for which the peremptory challenge was used in contrast to questions asked of other jurors from different perceived cognizable groups about the same topic or whether the party phrased those questions differently.

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CCP 231.7(d) – The Ruling

Court can consider:

(D) Whether other prospective jurors, who are not members of the same cognizable group as the challenged prospective juror, provided similar, but not necessarily identical, answers but were not the subject of a peremptory challenge by that party. [comparative analysis]

(E) Whether a reason might be disproportionately associated with race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or perceived membership in any of those groups.

(F) Whether the reason given by the party exercising the peremptory challenge was contrary to or unsupported by the record.

(G) Whether the counsel or counsel's office exercising the challenge has used peremptory challenges disproportionately against a given race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or perceived membership in any of those groups, in the present case or in past cases, including whether the counsel or counsel's office who made the challenge has a history of prior violations under *Batson v. Kentucky* (1986) 476 U.S. 79, *People v. Wheeler* (1978) 22 Cal.3d 258, Section 231.5, or this section.

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CCP 231.7(d) – The Ruling

If the court determines there is a **substantial likelihood** that an **objectively reasonable person** would view race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or perceived membership in any of those groups, **as a factor in the use of the peremptory challenge**, then the objection shall be sustained.

Batson/Wheeler was focused on your conscious intent; this is a big change to account for unconscious bias.

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CCP 231.7 – The Ruling

An objectively reasonable person = someone who is aware that unconscious bias, in addition to purposeful discrimination, have resulted in the unfair exclusion of potential jurors in the State of California.

Substantial likelihood = more than a mere possibility but less than a standard of more likely than not.

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CCP 231.7 – The Ruling

The court need NOT find purposeful discrimination to sustain the objection.

Unconscious bias is sufficient.

This is completely different from Batson/Wheeler.

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CCP 231.7 – The Ruling

For purposes of this section, "unconscious bias" includes implicit and institutional biases.

No longer a presumption that the prosecutor exercised peremptory challenges in a constitutional manner.

45

CCP 231.7 – The Ruling

"The court shall explain the reasons for its ruling on the record."

If don't, will affect deference on appeal.

Make sure you get the court to articulate why it is finding that an objectively reasonable person would not find one of the impermissible reasons was a factor in the strike, or that the presumption has been overcome because the reason is case specific and not group membership.

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CCP 231.7(h) - Remedy

Upon a court granting an objection to the improper exercise of a peremptory challenge, the court shall do one or more of the following:

- (1) Quash the jury venire and start jury selection anew. This remedy shall be provided if requested by the objecting party.
- (2) If the motion is granted after the jury has been impaneled, declare a mistrial and select a new jury *if requested by the defendant*.
- (3) Seat the challenged juror.
- (4) Provide the objecting party additional challenges.
- (5) Provide another remedy as the court deems appropriate.

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CCP 231.7 - Appellate Review

- ▶ Eliminate: Bolson//Wester deference/presumption of constitutionality
- ▶ Court of Appeal reviews de novo
- ▶ Express factual findings reviewed for substantial evidence:
 - ▶ That's why the trial court must articulate reasons for the decision
- ▶ "The reviewing court shall consider only reasons actually given and shall not speculate as to or consider reasons that were not given to explain either the party's use of the peremptory challenge or the party's failure to challenge similarly situated jurors who are not members of the same cognizable group as the challenged juror, regardless of whether the moving party made a comparative analysis argument in the trial court." (CCP 231.7(j))
 - ▶ If you don't use comparative analysis to explain any inconsistency, the court of appeal cannot consider any obvious differences between the jurors.

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Ramifications

- ▶ If reversed by Court of Appeal for Batson/Wheeler, you must report to the state bar.
 - ▶ BP 6086.7(a)(2), 6068(b)(7).
 - ▶ CCP 231.7 does not speak to this, but likely same.
- ▶ If granted by trial court, immediately notify your chain of command.

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For Cause Challenges

CCP 225

For cause challenges can be:

(A) General disqualification—that the juror is disqualified from serving in the action on trial.

(B) Implied bias—as, when the existence of the facts as ascertained, in judgment of law disqualifies the juror.

(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.

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For Cause Challenges

People v. Henderson (C088883)

Improper to excuse a juror for cause based on concern about the racial fairness of the criminal justice system.

Was Ok to excuse for cause when jurors said would consider race in deliberations because defendant reminded her of her sons.

Was Ok to remove a juror who said would consider race and could not be a part of convicting defendant.

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For Cause Challenges

People v. Henderson (C088883)

Court asked further questions:

Could you limit your deliberations to what was presented in the courtroom?

Can you separate your feelings from the evidence?

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Using CCP 231.7 Offensively

- ▶ Applies to the defense.
- ▶ Especially if race, gender, sexual orientation, religion, etc. play a role in your case, be on alert whether the defense is seeking to exclude based on an impermissible ground.
- ▶ Police officer defendant cases.
- ▶ A prosecutive juror who had a negative experience with criminal justice system by virtue of being a victim of crime.

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Washington State

- ▶ Washington Supreme Court General Rule 37 – While not identical to CCP 231.7, there are sufficient similarities to reasonably predict that California Courts will consider Wash. St. appellate decisions.
- ▶ Notably, the test under GR 37 is whether “an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge,” whereas CCP 231.7 asks whether there “is a substantial likelihood that an objectively reasonable person would view [group membership or perceived group membership] as a factor in the use of the peremptory challenge.”

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Washington State

- ▶ *State v. O'Neal* (Wash. Ct. App. 2021) 55 P.3d 1002, 11/2/21
 Prosecutor personally prosecuted African-American female juror for minor crimes. was aware her name appeared in multiple police reports with people prosecutor believed engaged in criminal activity.
- ▶ The personal attacks upon juror was race neutral justification for juror being struck with a presumptively invalid (i.e., prior contact with law enforcement and close relationship with people who have been stopped, arrested, or convicted of a crime).
- ▶ So, objective observer could view race as a factor in the use of the prosecutor's peremptory strike.

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Washington State

- ▶ *State v. Lomana* (Wash. App. 2021) 436 P.3d 331 = D charged with DV crimes
 - ▶ Prosecutor challenged 23-year-old male juror with Asian surname who worked at Target and appeared to be one of the few racial minorities on the panel, citing his age, lack of life experience (including with DV), and limited answers from him during questioning.
 - ▶ In reversing the conviction, court found the prosecutor not adequately questioned about his life experiences and prosecutor posed very few questions that would allow the juror the opportunity to explain himself.
 - ▶ While juror did not have DV experience, neither did 22 other members of the venire, nine of whom sat on the jury.

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Arizona

- ▶ Via Arizona's Supreme Court rule, starting January 1, 2022, there are no peremptory challenges in civil or criminal cases in the state courts.
- ▶ "Eliminating peremptory strikes of jurors will reduce the opportunity for misuse of the jury selection process and will improve jury participation and fairness," Chief Justice Robert Brulini said in a statement.
- ▶ As part of the changes, Arizona will focus on "sharpening the process for removing potential jurors for cause, such as conflicts of interest or personal biases that prevent impartiality." Trial judges also will be trained to make sure lawyers have enough time to argue why a juror should be removed for cause.
- ▶ Thoughts???

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QUESTIONS???

- ▶ Of course you have questions, we all do!
- ▶ Remember to tie your reasons to the case, avoid generalizations, and make an adequate record.
- ▶ Breathe. This is uncharted territory, but we've been through uncharted territory before.
- ▶ ivyfitzpatrick@ivcoda.org

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