

Habeas Corpus Litigation Team

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KEY POINTS



- Comparative analysis
- Capital cases
- Prosecutor's jury notes/ Discovery
- Implicit Bias & *Wheeler/Batson*

COMPARATIVE ANALYSIS



- Comparative analysis or “If you are truly seeking to kick Juror A because of (fill in the blank), why then did you accept Juror(s) B, C, etc. whose background(s) is/are substantially similar to Juror A’s **EXCEPT FOR (fill in the blank)** [the color of Juror A’s skin, his/her ethnicity, gender, sexual orientation, etc.]

CAPITAL CASES



- A) Separately rating prospective jurors for guilt/penalty issues.
- B) Differentiating a “2” on penalty—the juror you seek to “kick”—from a “3”—a juror you have accepted—if lack of willingness to vote death is basis for peremptory challenge.

PROSECUTOR'S NOTES/JURY DISCOVERY



- A) Notes are work product protected—*People v. Boehm* (1969) 270 Cal.App.2d 13, 21-22
- B) Statutory, **NOT CONSTITUTIONAL**, privilege—see, Penal Code § 1054.6 & Code of Civil Procedure § 2018.030, subd. (a) ; see also, Penal Code § 1054, subd. (e)—only discovery available is under § 1054 **UNLESS CONSTITUTIONALLY REQUIRED**

PROSECUTOR'S NOTES/JURY DISCOVERY



- C) *Pena-Rodriguez*—
constitutional
obligation of courts to
eliminate invidious
discrimination in
justice system—at
p. 142

The duty to confront racial animus in the justice system is not the legislature's alone. Time and again, this Court has been called upon to enforce the Constitution's guarantee against state-sponsored racial discrimination in the jury system. Beginning in 1880, the Court interpreted the Fourteenth Amendment to prohibit exclusion of jurors on the basis of race. [Citation.] The Court has repeatedly struck down laws and practices that systematically exclude racial minorities from juries. [Citations.] **To guard against discrimination in jury selection, the Court has ruled that no litigant may exclude a prospective juror on the basis of race.** [Citing *Batson v. Kentucky*, *Edmonson v. Leesville Concrete Co.*, and *Georgia v. McCollum*.]

PROSECUTOR'S NOTES/JURY DISCOVERY



- D) Discovery request after *W/B* motion made—by Δ attorney **or DDA (*McCollum*)**—AND prima facie showing [i.e., Prong 1 of *W/B* claim] established.
- E) Discovery of **any other cases involving the same attorney** where *W/B* motion **GRANTED**—*Miller-El v. Cockrell* [Dallas, Tx. DA's Office practice to exclude African-Americans; *People v. Fuentes* (1991) 54 Cal. 3d 707, 722 (conc. opn., Mosk, J.) & *People v. Turner* (1994) 8 Cal. 4th 137, 162-172 [former LA DDA Robert Martin]

PROSECUTOR'S NOTES/JURY DISCOVERY



- F) Training on *W/B* undertaken by or available to attorney exercising the peremptory challenge; e.g., Saturday Seminars
- G) Discovery on Habeas Corpus *W/B* claim not limited to Penal Code § 1054—*In re Scott* (2003) 29 Cal.4th 783, 812-814; Penal Code § 1484

IMPLICIT/UNCONSCIOUS BIAS



- “FOOD FOR THOUGHT”—Can argument of implicit/unconscious bias support *W/B* motion **REQUIRING INTENTIONAL INVIDIOUS DISCRIMINATION**
- Concept of implicit/unconscious bias based on theory **ACTIONS TAKEN WITHOUT PERSON’S AWARENESS ACTION ANIMATED BY BIAS**; see, Penal Code § 26-Four [act committed without person being conscious thereof not criminal]

IMPLICIT/UNCONSCIOUS BIAS



- Implicit/unconscious bias “Hot Topic” in areas of race, ethnicity and gender; see, LA Times 8-26-18 “Bill Targets Racial Gap in Maternal Mortality” (p. 162) [Higher maternal mortality rate for women of color [“Black women in the United States are three to four times more likely than White women to die immediately before or after childbirth”] to be studied for possible effect of implicit/unconscious bias held by healthcare providers] & Daily Journal 9-28-18 “Greenberg Traurig Hosts Talk on Disrupting Implicit Gender Bias” (p. 163) [Challenges facing women attorneys in the workplace “are not typically reflective of explicit bias but rather implicit bias, which is harder to address in many ways. The reason: It is bias that is hidden, unseen and unrecognized in each of us. Many of us do not even believe that this implicit bias exists, which makes it much more difficult to root out”]

IMPLICIT/UNCONSCIOUS BIAS



- **SUGGESTIONS:**

- a) Be aware of this concept

- b) The more subjective the reasons given at Prong 2 stage for exercising the peremptory, the greater the risk implicit bias at play.