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

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

POINTS AND AUTHORITIES

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

In the context of jury selection, "group bias" is the presumption "that certain jurors are biased merely because they are members of an identifiable group distinguished on racial, religious, ethnic, or similar grounds[.]" (*People v. Wheeler*, (1978) 22 Cal.3d 258, 276, *overruled on other grounds by Johnson v. California* (2005) 545 U.S. 162.) When trial counsel utilizes a peremptory challenge to excuse a potential juror from the panel based on a pre-conceived notion of "group bias," the trial court will entertain opposing counsel's objection thereto by utilizing a three-part inquiry established

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

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

II. THE MAKING OF THE PRIMA FACIE CASE

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. THE THIRD PRONG: A CREDIBILITY DETERMINATION

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

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IV. WHAT CONSTITUTES A "COGNIZABLE GROUP"

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

Furthermore, the courts have determined that several classifications do not constitute cognizable groups for *Wheeler/Batson* prima facie case purposes, including, as notable examples, people newly residing in the community (*Adams v. Superior Court* (1974) 12 Cal.3d 55, 60), and "people of color" as a combined group (*see People v. Davis* (2009) 46 Cal.4th 539; *People v. Neuman* (2009) 176 Cal.App.4th 571). With regard to the latter, an opposing attorney may not simply object based on the fact or the argument that the challenging attorney has attempted to excuse "people of color" or a few individuals of different and varying ethnic or racial backgrounds, and have the trial court rule that such has satisfied the prima facie case element; such does not a prima facie case make.

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

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

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

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

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

Dated: _____

Respectfully Submitted,

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