ACLU
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
Northern California

July 29, 2019

Transmitted by email

San Mateo County District Attorney's Office
400 County Center
Redwood City, CA 94063
Email: scushere@smcgov.org

Re: Request for Records Pursuant to the California Public Records Act

To Whom it May Concern:

I am writing on behalf of the American Civil Liberties Union of Northern California to request records pursuant to the California Public Records Act, California Government Code sections 6250 to 6270 and article 1 section 3(b) of the California Constitution.

I seek copies of the following materials in the agency's possession, regardless of who wrote them, from 1990 onwards:

1. Any training materials related to jury selection
2. Any training materials related to the constitutional requirements under *Batson v. Kentucky* and *People v. Wheeler*, including training materials related to handling *Batson-Wheeler* claims or motions.

Batson v. Kentucky (1986) 476 U.S. 79; *People v. Wheeler* (1978) 22 Cal.3d 258. This request construes "materials" to mean any records[1], publications, memoranda, writings, electronic data, mail, media files, nonstandard documents, or other forms of communication.

In the case that this request is found to be insufficiently focused or effective, California Government Code Section 6253.1(a) requires (1) Assistance in identifying the records and information that are responsive to this request or to the purpose of this request; (2) Description of

[1] The term "records" as used in this request is defined as "any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics." Cal. Gov't Code § 6252, subsection (e). "Writing" is defined as "any handwriting, typewriting, printing, photostating, photographing, photocopying, transmitting by electronic mail or facsimile, and every other means of recording upon any tangible thing any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof, and any record thereby created, regardless of the manner in which the record has been stored." Cal. Gov't Code § 6252, subsection (g).

the information technology and physical location in which the records exist; and (3) that suggestions be provided for overcoming any practical basis for denying access to the records or information sought.

Pursuant to Government Code Section 6253(b), the requested records must be "promptly available," for inspection and copying, based on payment of "fees covering direct costs of duplication, or statutory fee, if applicable." No express provisions of law exist that exempt the record(s) from disclosure. As it is determined whether this request seeks copies of disclosable public records, be mindful that Article I, Section 3 (b)(2) of the California Constitution requires that a statute, court rule, or other authority be broadly construed if it furthers the right of access to the information requested and that a statute, court rule, or other authority limiting right of access be narrowly construed.

If a portion of the information requested is exempt from disclosure by express provisions of law, Government Code Section 6253(a) additionally requires segregation and deletion of that material in order that the remainder of the information may be released. If it is determined that an express provision of law exists to exempt from disclosure all or a portion of the material requested, Government Code Section 6253(c) requires notification of the reasons for the determination not later than 10 days from receipt of this request. Moreover, Government Code Section 6253(d) prohibits the use of the 10-day period, or any provisions of the Public Records Act "to delay access for purposes of inspecting public records."

Please send copies of the requested records to me at the address shown above or email them to me at sagarwal@aclunc.org. We request that you waive any fees that would be normally applicable to a Public Records Act request. In addition, if you have the records in electronic form you can simply email them to me without incurring any copying costs. *See* Gov't. Code § 6253.9. Should you be unable to do so, however, the ACLU will reimburse your agency for the direct costs of copying these records plus postage. *See* Gov't. Code § 6253(b). To assist with the prompt release of responsive material, we ask that you make records available to me as you locate them, rather than waiting until all responsive records have been collected and copied.

If you have any questions regarding this request, please feel free to contact me at (415) 621-2493 or at sagarwal@aclunc.org. Thank you in advance for you time and attention to this request.

Sincerely,

Shilpi Agarwal
Senior Staff Attorney

101 CASES EVERY PROSECUTOR SHOULD KNOW

With annotations

Compiled by: Misty L. Compton

Merced County Deputy District Attorney

With thanks to:

Bernie Brown retired Asst. City Atty: LA County

Richard Chrystie retired DDA: LA County

Michael Quesnel Riverside County DA's office

Judge Prickett Orange County (document provided by Riverside county DA's office)

Ryan Couzens Yolo County DA's office

DISCLAIMER: MOST, IF NOT ALL, ARE "BASE" CASES, I.E. THEY STARTED AN IDEA, SUCH AS GIVING A MIRANDA WAIVER BEFORE GETTING A STATEMENT. BECAUSE THEY ARE "BASE" CASES, MOST, IF NOT ALL, HAVE LARGE AMOUNTS OF CITING CASES THAT CARVE OUT EXCEPTIONS OR MAKE DISTICTIONS. REALIZE YOUR CASE FACTS MAY NOT PRECISELY FIT THE "BASE" CASE AND YOU WILL NEED TO SEE IF THERE IS AN EXCEPTION CARVED OUT THAT BENEFITS THE PEOPLE OR THE DEFENSE.

October 16, 2017

TABLE OF CONTENTS

BAIL

1) **In re Alberto** (2002) 102 Cal.App. 4th 421 Mini treatise on bail hearings. A second Judge cannot reconsider and change the prior Judge's ruling on bail. Cal. Penal Code § 1289 expressly provides for subsequent motions to increase or reduce bail upon a showing of good cause. However, the good cause must be founded on changed circumstances relating to the defendant or the proceedings, not on the conclusion that another judge in previously setting bail committed legal error. Factors to be considered in setting, reducing or denying bail are set forth in Cal. Penal Code § 1275: protection of the public -the primary consideration, seriousness of the offense, previous criminal record, and probability of defendant appearing in court. (*This may change effective 2020, if a pending bill is signed into law*)

See also *In re York* (1995) 9 Cal.4th 1133 Allowing reasonable conditions as part of release on own recognizance, including search and seizure in a drug case, citing PC 1318.

CONFESSIONS

2) **Miranda v. Arizona** (1966) 384 US 436 Defendant in custody must be informed of his right to remain silent, his right to an attorney-provided free of charge, and that anything he says can be used against him. Three legal prerequisites 1) suspect is in custody 2) is interrogated 3) interrogated by law enforcement.

see also *Edwards v. Arizona* (1981) 451 US 477 Once a defendant has invoked, the interrogation must stop, however he may reinitiate questioning himself-he must reopen the dialogue.

Minnick v. Mississippi (1990) 498 US 146 interrogation must stop if suspect asks for counsel until counsel appears, or suspect reinitiates conversation. Also: *People v. Jiles* (2004) 122 Cal.App.4th 504)

People v. Gonzalez (2005) 34 Cal.4th 1111 Invocation of right to counsel must be unambiguous and unequivocal. *People v. Sauceda-Contreras* (2012) 54 Cal.4th 203 An officer may clarify ambiguous statements of the suspect.

People v. May (1988) 44 Cal.3d 309 Statements obtained in violation of Miranda (if otherwise voluntary) may be introduced to impeach defendant's testimony.

California v. Beheler (1983) 462 US 1121 A suspect is not in custody unless he has been formally arrested, or there exists a restraint on freedom of movement of the degree associated with a formal arrest. It is based on the totality of the circumstances, the fact the interview was at the police station is not dispositive.

Stansbury v. California (1994) 511 US 318 "In custody " depends on the objective view of the circumstances, not the subjective views harbored by either the suspect or the officer.

Rhode Island v. Innis (1980) 446 US 291 Interrogation consists of words or actions by the police that they knew or should have known were reasonably likely to elicit an incriminating response.

People v. Elizalde (2015) 61 Cal.4th 523 Admitting gang membership to booking officer cannot be used against him if the defendant had invoked Miranda.

3) **Massiah v. United States** (1964) 377 US 201 Once an adversarial criminal proceeding has been initiated against the accused, and the defendant's constitutional right to the assistance of counsel has attached, any incriminating statement the government deliberately elicits from the defendant in the absence of counsel is inadmissible at trial against that defendant, under the 6th Amendment.

see also *In Re Wilson* (1992) 3 Cal.4th 945 Attachment of the right to counsel with regard to one charge does not immunize a defendant from investigation of other criminal conduct. Incriminating statements pertaining to other crimes, as to which the Sixth Amendment right has not yet attached, are … admissible at a trial of those offenses, but not in the trial on the charges where the right had attached.

In re Neely (1993) 6 Cal.4th 901 In order to prevail on a *Massiah* claim involving use of a government informant, defendant must demonstrate both the government and the informant took some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks. Specifically, the evidence must establish that the informant (1) was acting as a government agent, i.e., under the direction of the government pursuant to a preexisting arrangement, with the expectation of some resulting benefit or advantage, and (2) deliberately elicited incriminating statements.

CONSTITUTIONAL ERROR

5) **Chapman v. California** (1967) 386 U.S. 18 The court fashioned a "harmless error" rule for constitutional errors in a trial. Some constitutional rights so basic to a fair trial that their infractions mandate reversal, however in some cases it can be found harmless. Before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt. The prosecution bears the burden of proving it was harmless beyond a reasonable doubt.

See also *Weaver v. Massachusetts* (2017) 137 S.Ct. 1899 A constitutional error that did not contribute to the verdict obtained is deemed harmless, which means the defendant is not entitled to a reversal. (defendant's mother excluded from courtroom during voir dire=harmless)

CONTINUANCES

6) **People v. Ferrer** (2010) 184 Cal.App.4th 873 Mini treatise on continuances, good cause and dismissals, which held a prosecutor's request for a continuance may not be denied where the probable consequence of the denial would be dismissal of the case. (subject to no time waiver limitations)

7) **Smith v. Superior Court** (2012) 54 Cal.4th 592 A discussion on permissible continuances to maintain joinder of codefendant cases.

CORPUS

8) **People v. Alvarez** (2002) 27 Cal.4th 1161 Because of Proposition 8, there no longer exists a trial objection to the *admission* in evidence of the defendant's out-of-court statements on grounds that independent proof of the corpus delicti is lacking. Section 28(d) did not eliminate the independent-proof rule insofar as that rule prohibits *conviction* where the only evidence that the crime was committed is the defendant's own statements outside of court. Thus, section 28(d) did not affect the rule to the extent it requires an instruction to the jury that no person may be convicted absent evidence of the crime independent of his or her out-of-court statements. The independent proof may be circumstantial and need not be beyond a reasonable doubt, but is sufficient if it permits an inference of criminal conduct, even if a noncriminal explanation is also plausible. There is no requirement of independent evidence "of every physical act constituting an element of an offense," so long as there is some slight or prima facie showing of injury, loss, or harm by a criminal agency. In every case, once the necessary quantum of independent evidence is present, the defendant's extrajudicial statements may then be considered for their full value to strengthen the case on all issues.

DISCOVERY

9) **Brady v. Maryland** (1963) 373 US 83 Prosecution has an absolute duty to disclose exonerating, impeaching or mitigating evidence, applying to guilt or sentencing, to the defense.

> See also: *People v. Superior Court (Meraz)* (2008) 163 Cal.App.4th 28 Three components to a *Brady* violation 1) evidence must be favorable to the accused either because it is exculpatory, or because it is impeaching; [2] that evidence must have been suppressed by the State, either willfully or inadvertently; and [3] prejudice must have ensued. The prosecution must disclose evidence that is actively or constructively in its possession. Further, the duty applies to evidence the prosecutor or the prosecution team knowingly possesses or has the right to possess, which includes investigative agencies. The determination of 'prosecution team' is whether the person or agency has been acting on the government's behalf or assisting the government's case.
>
> *In re Miranda* (2008) 43 Cal. 4th 451 Evidence is favorable if it helps the defense or hurts the prosecution, it's material only if there is a reasonable probability, that had it been disclosed, the result would have been different.
>
> *People v. Superior Court (Johnson)* (2015) 61 Cal.4th 696 The prosecutor had no constitutional duty to conduct defendant's investigation for him. Because *Brady* and its progeny serve 'to restrict the prosecution's ability to suppress evidence rather than to provide the accused a right to criminal discovery,' the *Brady* rule does not displace the adversary system as the primary means by which truth is uncovered. Consequently, 'when information is fully available to a defendant at the time of trial and his only reason for not obtaining and presenting the evidence to the Court is his lack of reasonable diligence, the defendant has no *Brady* claim.

Youngblood v. West Virginia (2006) 547 US 867 *Brady* suppression occurs when the government fails to turn over evidence that is known only to police investigators and not to the prosecutor.

People v. Edwards (1993) 17 Cal.App4th 1248 Excluding evidence based on a discovery violation is only appropriate where defense shows prejudice and there is a willful violation by the prosecutor. Court must require defendant to show prejudice and should use the least restrictive sanction-exclusion being a last resort.

10) **Pitchess v. Superior Court** (1974) 11 Cal.3d 531 Allows criminal defendants to seek a discovery order from the court of potentially exculpatory information, such as complaints of excessive force, dishonesty, violence or moral turpitude, located in otherwise confidential peace officer personnel records. (see also Evidence Code 1043 and 1045)

see also *People v. Superior Court (Johnson)* (2015) 61 Cal.4th 696 The Prosecution does not have unfettered access to personnel records of police officers-they would have to make a Pitchess motion just as a defendant would, if a police department informs the prosecutor there may be Brady material in those records, the prosecution fulfills its duty by telling defense there may be Brady materials in the personnel records. The prosecution does not have an obligation to file the Pitchess motion for the defense.

Alford v. Superior Court (2003) 29 Cal.4th 1003 The prosecution is not entitled to information disclosed to the defense pursuant to a pitches motion.

11) **Schaffer v. Superior Court** (2010) 185 Cal.App.4th 1235 Defense objected to paying fees for copies of discovery, the court found an "open file policy" of allowing the defense to review discovery fulfilled the prosecutions duty under Brady and discovery laws, and that the DA's office could charge for copies.

see also *People v. Shrier* (2010) 190 Cal.App.4th 400 In the event a defendant or his counsel chooses not to pay reasonable duplication fees, the district attorney must make reasonable accommodations for the defense to view the discoverable items in a manner that will protect attorney-client privileges and work product.

DUI SPECIFC CASES

12) **People v. Komatsu** (1989) 212 Cal.App.3rd Supp.1 Corpus Delicti of driving for dui purposes was established when defendant was found asleep in the car obstructing the roadway.

13) **Missouri v. McNeely** (2013) 113 S.Ct. 98 Nonconsensual withdrawal of blood is not proper if there are no facts of emergency other than natural dissipation of blood-but you can get a warrant.

See also: *Birchfield v. North Dakota* (2016) 136 S.Ct. 2160 4th amendment permits warrantless breath tests incident to DUI arrest, but not a warrantless blood test, further defendant can be criminally punished for refusing the breath test but not the blood test (ie. the enhancement for refusing a chemical test)

See also *People v. Municipal Court (Gonzales)* (1982) 137 Cal.App.3d 114 PAS results are admissible even when the officer fails to inform the defendant he can refuse the test.

14) **People v. Watson** (1981) 30 Cal.3d 290 Known as the Watson advisement- DUI is extremely dangerous to life and if you continue to drive under the influence and as a result of your driving someone is killed, you can be charged with murder.

15) **Berkemer v. McCarty** (1984) 468 US 420 A traffic stop; the officer asked the defendant questions prior to any arrest, which the defendant answered. One such answer was an admission that he had used intoxicants. The court held the roadside questioning of a motorist detained pursuant to a routine traffic stop does not constitute custodial interrogation for purposes of the *Miranda* doctrine and thus the defendant's prearrest statements were admissible against him.

16) **Ingersoll v. Palmer** (1987) 43 Cal.3d 1321 Holds dui checkpoints are legal and discusses the standards to be used in setting up a checkpoint.

EVIDENCE

17) Harvey-Madden Rule **People v. Harvey** (1958) 156 Cal.App.2d 516 **People v. Madden** (1970) 2 Cal.3d 1017 While arrest could be based on information through "official channels," the state was required to show that the original officers had probable cause to believe defendant committed a felony. It is well settled that while it may be perfectly reasonable for officers in the field to make arrests on the basis of information furnished to them by other officers, 'when it comes to justifying the total police activity in a court, the People must prove that the source of the information is something other than the imagination of an officer who does not become a witness.

18) **People v. Kelly** (1976) 17 Cal.3d 24 (aka kelly-frye test) Admissibility of expert testimony based upon the application of a new scientific technique involves a two-step process: (1) the reliability of the method must be established, usually by expert testimony, and (2) the witness furnishing such testimony must be properly qualified as an expert to give an opinion on the subject. Additionally, the proponent of the evidence must demonstrate that correct scientific procedures were used in the particular case.

19) **California v. Trombetta** (1984) 467 US 479/**Arizona v. Youngblood** (1988) 488 US 51 Used as a motion to dismiss a case for the prosecution's intentional bad faith destruction of exonerating evidence. "Whatever duty the Constitution imposes on the States to preserve evidence, that duty must be limited to evidence that might be expected to play a significant role in the suspect's defense. To meet this standard…evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and also be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably comparable means."

See also *People v. Alvarez* (2014) 229 Cal.App. 4th 761 Unless a defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute **a** denial of due process of law. There is a distinction between the "exculpatory value that was apparent" criterion and the standard for "potentially useful" evidence. If the higher standard of apparent

exculpatory value is met, a *Trombetta/Youngblood* motion is granted in the defendant's favor. But if the best that can be said of the evidence is it was potentially useful, the defendant must also establish bad faith on the part of the police or prosecution.

20) **People v. Karis** (1988) 46 Cal.3d 612 The prejudice which exclusion of evidence under Evidence Code section 352 is designed to avoid is not the prejudice or damage to a defendant that naturally flows from relevant, highly probative evidence. All evidence which tends to prove guilt is prejudicial or damaging to the defendant's case. The 'prejudice' referred to in EC 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues. In applying section 352, 'prejudicial' is not synonymous with 'damaging.'

21) **People v. Twiggs** (1963) 223 Cal.App.2d 455 The law does not require that a conviction may be had only on the testimony of the immediate victims who are often dead, absent from the jurisdiction, or unknown to the police. Witnesses other than the victim can be used to establish the elements of the crime charged. Victims can be listed in the complaint as Jane Doe/John Doe.

22) **People v. Hall** (2010) 187 Cal.App.4th 282 A criminalist who tested defendant's blood alcohol level testified she received a sealed evidence envelope indicating the date and time of the blood draw and identifying the hospital and the person who took the blood. She stated that there was no indication the evidence envelope or the blood vial had previously been opened. The testimony was permissible. A chain of custody is adequate when the party offering the evidence shows to the satisfaction of the trial court that, taking all the circumstances into account, including the ease or difficulty with which the particular evidence could have been altered, it is reasonably certain there was no alteration. That requirement is not met when some vital link in the chain of possession is not accounted for, because then it is as likely as not that the evidence analyzed was not the evidence originally received. Left to such speculation the court must exclude the evidence. However, when there is only the barest speculation that the evidence was altered, it is proper to admit the evidence and let what doubt remains go to its weight.

23) **People v. Ghebretensae** (2013) 222 Cal. App. 4th 741 The prosecution cannot be compelled to accept a stipulation for purposes of rendering evidence irrelevant if the effect would be to deprive the prosecution's case of its persuasiveness and forcefulness, unless the evidence is more prejudicial than probative. However, if a defendant offers to admit the existence of an element of a charged offense, the prosecutor must accept that offer and refrain from introducing evidence of other crimes to prove that element to the jury, except if evidence remains relevant to an issue not covered by the stipulation, or where the stipulation would drain the prosecution's case of its persuasive or forceful value.

24) **People v. Atkins** (2001) 25 Cal.4th 76 Evidence of voluntary intoxication is inadmissible to negate the existence of general intent, it is relevant to negate the existence of specific intent.

25) **People v. Castro** (1985) 38 Cal.3d 301 The law authorizes the use of any felony conviction which necessarily involves moral turpitude, even if the immoral trait is one other than dishonesty, to impeach any and all witnesses, the prosecution witnesses, defense witnesses, the defendant, as well as the court's own. This is subject to the trial courts discretion under Evidence Code 352.

26) **People v. Wheeler** (1992) 4 Cal.4th 84 If past criminal conduct amounting to a misdemeanor has some logical bearing upon the veracity of a witness in a criminal proceeding, that conduct is admissible, subject to trial court discretion. The conduct, not a certified minute order showing the conviction. The conviction itself is inadmissible hearsay.

> See also *People v. Capistrano* (2014) 59 Cal.4th 830 A witness had misdemeanor convictions for petty theft. The California Supreme Court ruled the fact of Santos's convictions was inadmissible hearsay but evidence of the underlying criminal conduct was admissible "if any witnesses are prepared to testify to exactly what she did on those occasions." The court reiterated the standard in *Wheeler*, evidence of the underlying conduct was admissible, subject to the trial courts discretion, but the certified documents showing a conviction was not.

27) **People v. Hall** (1986) 41 Cal.3d 826 (See also *People v. Prince* (2007) 40 Cal.4th 1179) Discusses admissibility of the SODDI defense (some other dude did it) To be admissible, the third-party evidence need not show "substantial proof of a probability" that the third person committed the act; it need only be capable of raising a reasonable doubt of defendant's guilt. At the same time, we do not require that any evidence, however remote, must be admitted to show a third party's possible culpability. Evidence of mere motive or opportunity to commit the crime in another person, without more, will not suffice to raise a reasonable doubt about a defendant's guilt: there must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime. Admissibility still turns on EC 352.

28) **People v. Ewoldt** (1994) 7 Cal.4th 380 Discussion of admission of uncharged acts under 1101b: Evidence of common plan/scheme vs. intent vs. evidence of identity. The least degree of similarity is needed to prove intent, a greater degree of similarity is needed for common plan/scheme and the greatest degree is necessary for identity. For intent: the uncharged misconduct must be sufficiently similar to support the inference that the defendant probably harbored the same intent in each instance. For common plan: the evidence must demonstrate not merely a similarity in the results, but such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations. The common features must indicate the existence of a plan rather than a series of similar spontaneous acts, but the plan thus revealed need not be distinctive or unusual. For identity: For identity to be established, the uncharged misconduct and the charged offense must share common features that are sufficiently distinctive so as to support the inference that the same person committed both acts. The pattern and characteristics of the crimes must be so unusual and distinctive as to be like a signature (***NOTE: In one respect it was superseded by statute: the similarity analysis does not apply when the evidence is admitted pursuant to Evidence Code 1108-it is still a consideration, but plays a lesser role. *People v. Robertson* (2012) 208 Cal.App.4th 965)

> See also *People v. Steele* (2002) 27 Cal.4th 1230 The admissibility of other crimes evidence depends on (1) the materiality of the facts sought to be proved, (2) the tendency of the uncharged crimes to prove those facts, and (3) the existence of any rule or policy requiring exclusion of the evidence

29) **People v. Johnson** (1988) 199 Cal.App.3d 868 Bifurcation is not required if proof of a prior is an element of the offense, generally however, the defendant is permitted to bifurcate the prior when it is not an element of the offense.

FILING CASES

30) **Kellett v. Superior Court** (1966) 63 Cal. 2nd 822 When the prosecution is or should be aware of more than one offense in which the same act or course of conduct plays a significant part, all such offenses must be prosecuted in a single proceeding unless joinder is prohibited or severance permitted for good cause. Failure to unite all such offenses will result in a bar to subsequent prosecution of any offense omitted if the initial proceedings culminate in either acquittal or conviction and sentence.

> See also *In re Dennis* (1976) 18 Cal.3d 687 We determine here that absent evidence of timely prosecutorial knowledge of multiple offenses, a person's violation of the Vehicle Code resulting in punishment for a mere infraction does not bar the People from trying him on homicide charges arising out of the same prohibited act.

31) **People v. Ramirez** (2008) 168 Cal.App. 4th 65 The doctrine that a specific statute precludes any prosecution under a general statute is a rule designed to carry out legislative intent. The fact that the legislature has enacted a specific statute covering much the same ground as a more general law is a powerful indication the legislature intended the specific provision alone to apply. The People may not prosecute under a general statute that covers the same conduct, but which prescribes a more severe penalty, unless a legislative intent to permit such alternative prosecution clearly appears. (Swann-Gilbert rule *People v. Swann* (1963) 213 Cal.App.2d 447 and *People v. Gilbert* (1969) 1 Cal.3d 475)

32) **People v. Burris** (2005) 34 Cal.4th 1012 It is permissible to dismiss a misdemeanor case and refile as felony when new evidence is discovered, the best measure of the seriousness of a crime--and the corresponding societal interest in its prosecution and punishment--is not how the crime was originally charged, based on possibly limited evidence, but how the prosecution currently seeks to charge it, based on the most current and best available evidence.

> See also *People v. Traylor* (2009) 46 Cal.4th 1205 The filing and dismissal of the originally charged felony, followed in immediate succession by the filing of a *lesser misdemeanor charge* that lacked elements essential to the felony, did not constitute successive filings "for the same offense." Accordingly, section 1387(a) did not preclude the People from proceeding on the misdemeanor complaint.

33) **People v. Snook** (1997) 16 Cal.4th 1210 It does not matter in which order the dui's were committed or convicted, so long as they are within 10 years of each other, the others can enhance the case that remains open.

> See also *People v. Casillas* (2001) 92 Cal.App.4th 171 It is improper to file a felony DUI based on pending but not resolved cases listed as priors.

34) **People v. Kahanic** (1987) 196 Cal.App. 3d 461 Vandalism is of property "not his/her own" however, jointly owned property meets that definition because someone else has an interest in it.

35) **People v. Goolsby** (2015) 62 Cal. 4th 360 An information may be amended for any defect or insufficiency, at any stage of the proceedings, so long as the amended information does not charge an offense not shown by the evidence taken at the preliminary examination. (PC§ 1009.) If the substantial rights of the defendant would be prejudiced by the amendment, a reasonable postponement not longer than the ends of justice require may be granted. If there is no prejudice, an amendment may be granted "up to and including the close of trial."

36) **People v. Mendoza** (2000) 24 Cal.4th 130 A discussion of the consolidation of cases based on PC 954, when allowed, what is considered. Offenses committed at different times and places with different victims can still be consolidated if the crimes are connected together in their commission-linked together by a common element of substantial importance. Factors a court can consider: cross-admissibility of evidence; whether some of the charges are likely to unusually inflame the jury against the defendant; if a weak case is joined with a strong one.

JURY ISSUES

37) **People v. Nesler** (1977) 16 Cal.4th 561 When juror misconduct involves the receipt of information about a party or the case from extraneous sources, the verdict will be set aside only if there appears a substantial likelihood of juror bias. Such bias may appear in either of two ways: (1) if the extraneous material, judged objectively, is so prejudicial that it is inherently and substantially likely to have influenced a juror; or (2) even if the information is not "inherently" prejudicial, if, from the nature of the misconduct and the surrounding circumstances, the court determines that it is substantially likely a juror was "actually biased" against the defendant. If we find a substantial likelihood that a juror was actually biased, we must set aside the verdict, no matter how convinced we might be that an unbiased jury would have reached the same verdict, because a biased adjudicator is one of the few structural trial defects that compel reversal without application of a harmless error standard.

38) **People v. Armstrong** (2016) 1 Cal.5th 432 Trial court may discharge a juror if the juror is unable to perform his or her duty, which can include a refusal to deliberate. The inability to perform must appear in the record as a demonstrable reality.

> see also *People v. Cleveland* (2001) 25 Cal.4th 466 Discussion of what might show a refusal to deliberate-use caution: it's the conduct of the jurors, not the content of the deliberations.

39) **People v. Butler** (2009) 46 Cal.4th 847 Discussion of what to say to a deadlocked jury regarding continuing deliberations, referencing *Allen v. United States* (1896) 164 US 492 and *People v. Gainer* (1997) 19 Cal.3d 835. It is error for a trial court to give an instruction to continue trying to reach a verdict that either (1) encourages jurors to consider the numerical division or preponderance of opinion of the jury in forming or reexamining their views on the issues before them; or (2) states or implies that if the jury fails to agree the case will necessarily be retried.

40) **People v. Gutierrez** (2003) 29 Cal.4th 1196 A defendant's right to be present at a criminal trial is not absolute. A defendant's privilege may be lost by consent or at times even by misconduct. Under Penal Code 977(b)(1), a defendant "at all other proceedings" may waive in writing the right to be personally present with leave of court. Also, a defendant's absence in a felony case after the trial has commenced in his presence shall not prevent continuing the trial up to, and including, the return of the verdict in any prosecution for an offense which is not punishable by death in which the defendant is voluntarily absent. A trial court may continue with a criminal trial in a defendant's absence if, after warning the defendant with the threat of removal, the defendant continues to be disruptive.

JURY INSTRUCTIONS

41) **People v. Prince** (2007) 40 Cal.4th 1179 Instructions on lesser included offenses are required whenever evidence that the defendant is guilty only of the lesser offense is substantial enough to merit consideration by the jury. The court alone decides whether the such evidence exists, neither the prosecution nor the defense should be allowed, based on their trial strategy to preclude a jury from considering the lesser included. Even absent a request, even over the parties objection, the court must instruct on a lesser offense that is necessarily included in the charged offense. If the court should give into a request from the defense to not give the lesser included, they are prevented from appealing that issue.

> See also *People v. Waidla* (2000) 22 Cal.4th 690 Instruct only on lesser included if there is substantial evidence, which if accepted would absolve the defendant from guilt on the greater offense, but not the lesser. Speculation is not evidence.

42) **People v. Russo** (2001) 25 Cal.4th 1124 Good discussion on when the unanimity instructions should and should not be given, with examples.

JURY VOIR DIRE

43) Wheeler/Baston motion: **People v. Wheeler** (1978) 22 Cal.3d 258 Use of peremptory challenges to remove juror's based on a group bias is improper. **Batson v. Kentucky** (1986) 476 US 79 Party may challenge opponent's use of peremptory challenges to jurors 1) challenging party must first make prima facie case showing that the totality of the circumstances infer a discriminatory purpose for opponent's challenges 2) opponent must give race neutral reasons for kicking juror. 3) court must decide if purposeful discrimination has been proven.

> See also *People v. Gutierrez* (2017) 2 Cal.5th 1150 Allowing comparative analysis between jurors kicked and jurors kept, which may be probative of purposeful discrimination at *Batson's* third stage. In that third step, the trial court evaluates the credibility of the prosecutor's neutral explanation. Credibility may be gauged by examining factors including but not limited to the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy. Even the excusal of one juror for impermissible reasons can require reversal.

People v. Scott (2015) 61 Cal.4th 363 A thorough discussion of *Baston/Wheeler*. It held: "In sum, where (1) the trial court has determined that no prima facie case of discrimination exists, (2) the trial court allows or invites the prosecutor to state his or her reasons for excusing the juror for the record, (3) the prosecutor provides nondiscriminatory reasons, and (4) the trial court determines that the prosecutor's nondiscriminatory reasons are genuine, an appellate court should begin its analysis of the trial court's denial of the *Batson*/*Wheeler* motion with a review of the first-stage ruling... "it is the better practice to have the State respond, and then for the court to make a determination on whether the reasons are racially neutral," which "would eliminate remands for such a determination if the trial court is held to have erred in holding the defendant had failed to make the prima facie showing" this is undoubtedly the better practice".

44) **People v. Abilez** (2007) 41 Cal.4th 474 The examination of prospective jurors should not be used to educate the jury panel to the particular facts of the case, to compel the jurors to commit themselves to vote a particular way, to prejudice the jury for or against a particular party, to argue the case**,** to indoctrinate the jury, or to instruct the jury in matters of law.

MISTRIAL

45) **Paulson v. Superior Court** (1962) 58 Cal.2d 1 Once the jury is impaneled and sworn, the defendant is in jeopardy. Without legal necessity, or the defendant's consent a court discharging a jury is equivalent to a verdict of acquittal and there can be no retrial.

See also *People v. Davis* (2005) 36 Cal.4th 510 A trial court should grant a defendant's motion for a mistrial only if the defendant will suffer prejudice that is incurable by admonition or instruction.

NEW TRIAL MOTION/MOTION TO ACQUIT

46) **People v. McGarry** (1954) 42 Cal.2d 429 The elements of the standard by which a trial court in its discretion may properly grant a new trial on the ground of newly discovered evidence are 1. That the evidence, and not merely its materiality, be newly discovered**;** 2. That the evidence be not merely cumulative; 3. That it be such as to render a different result probable on retrial of the cause; 4. That the party could not with reasonable diligence have discovered and produced it at the trial; and 5. That these facts be shown by the best evidence of which the case admits**.** (See also pc 1181(8))

see also *People v. Soojian* (2010) 190 Cal.App.4th 491 Discusses concept of "different result probable" as meaning a reasonable chance, more than an abstract possibility. The point of the "different result" is one that is more favorable to the defendant, and a hung jury counts as a more favorable result, since it isn't a conviction.

People v. Long (1940) 15 Cal.2d 590 It has been ruled that newly-discovered evidence which would tend merely to impeach a witness is not of itself sufficient ground for granting a new trial. To warrant the granting of a new trial on the ground of newly-discovered evidence it must be such as to render a different verdict reasonably probable on a new trial.

47) **People v. Cole** (2004) In ruling on a motion for judgment of acquittal pursuant to section 1118.1, a trial court decides whether from the evidence, including all reasonable inferences to be drawn there from, there is any substantial evidence of the existence of each element of the offense charged. If so, the case should proceed to a verdict.

OPEN COURTROOM

48) **Press-Enterprise v. Superior Court** (1984) 464 US 501 Closed proceedings, although not absolutely precluded, must be rare and only for cause shown that outweighs the value of openness.

> See also *People v. Prince* (2007) 40 Cal.4th 1179 The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough, and in writing, so a reviewing court can determine whether the closure order was properly entered. In *Prince*, the only portion of the trial closed to the public was a bit of testimony on an unsolved homicide case, including facts unknown to the public, and it was done to ensure the integrity of the ongoing murder investigation.
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> See also *People v. Scott* (2017) 10 Cal.App.5th 524 Members of the defendant's family were excluded from the courtroom while the victim's testified. His right to a public trial was violated as there was no substantial evidence that any member of the defendant's family was involved in purported threats against the witnesses. Four requirements necessary to justify exclusion: (1) the existence of an overriding interest that is likely to be prejudiced absent the closure; (2) the closure is narrowly tailored, i.e., no broader than necessary to protect that interest; (3) no reasonable alternatives to closing the proceeding are available; and (4) the trial court must make findings adequate to support the closure.

PLEAS

49) **Boykin v. Alabama** (1969) 395 US 238 **In re Tahl** (1969) 1 Cal.3d 122 (referred to as *Boykin/Tahl* rights) To comply with *Boykin/Tahl* when a guilty or no contest plea is entered the record must show that the defendant was aware or made aware of, and voluntarily waived his constitutional rights to a 1)a trial by jury 2) confrontation of the witnesses 3) privilege against self incrimination 4) right to issue subpoenas on his behalf and 5) right to counsel (if pro per) An affirmative showing of knowingly, intelligently, and voluntary waivers on the record was necessary in order to conclude that defendant had waived his constitutional rights. A defendant must also be aware or made aware of the nature of the charges he faces.

> see also *People v. Wright* (1987) Failure to advise, or misadvise, the defendant of the direct consequences of his plea is error, but requires the plea be set aside only if the error is prejudicial.

50) **People v. Roden** (2000) 75 Cal.App.4th 1346 A prosecutor may withdraw from a plea bargain before a defendant pleads guilty or otherwise detrimentally relies on that bargain. Reliance may not be shown

by the mere passage of time. Also, it may not be shown where the defendant stopped preparing his defense, absent a showing of specific prejudice. Nor may detrimental reliance be shown by the prospect of a longer sentence.

PROBATION CONDITIONS

51) **People v. Lent** (1975) 15 Cal.3d 481 (Superseded on other grounds) A condition of probation will not be held invalid unless it (1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality … All three prongs must be satisfied before a reviewing court will invalidate a probation term. Even if a condition of probation has no relationship to the crime of which a defendant was convicted and involves conduct that is not itself criminal, the condition is valid as long as the condition is reasonably related to preventing future criminality. (See also *People v. Moran* (2016) 1 Cal.5th 398)

PROSECUTORIAL MISCONDUCT

52) **Doyle/Griffen** error: **Doyle v. Ohio** (1976) 426 US 610 Prosecutor cannot question or argue defendant's post arrest, post-Miranda silence (Which includes "failure to give alibi") **Griffin v. California** (1965) 380 US 609 Prosecutor cannot comment on defendant's failure to take the stand and testify.

> see also: *People v. Bradford* (1997) 15 Cal.4th 1229 *Griffin* doesn't bar prosecution comments based upon the state of the evidence or upon the failure of the defense to introduce material evidence or to call anticipated witnesses: note it can be *Griffin* error if the prosecutor argues certain testimony is uncontradicted if such contradiction could be provided ONLY by the defendant, who has the right not to testify. See also *People v. Lewis* (2004) 117 Cal.App. 4th 246.

53) **People v. Bain** (1971) 5 Cal.3d 839 The unsupported implication by the prosecutor that defense counsel fabricated a defense constitutes misconduct. Nor may a prosecutor express a personal opinion or belief in a defendant's guilt, where there is substantial danger that jurors will interpret this as being based on information at the prosecutor's command, other than evidence adduced at trial. When the district attorney declared that he would not prosecute any man he did not believe to be guilty he thereby wrongfully placed his personal opinion of the guilt of the defendant in evidence in the case.

54) **People v. Hill** (1998) 17 Cal.4th 800 A discussion of the incredibly numerous ways the prosecutor committed misconduct in her closing arguments (numerous being over 10 different ways-including reference to biblical teachings) Case also notes threatening a defense witness with a perjury prosecution constitutes prosecutorial misconduct that violates a defendant's constitutional rights.

> See also *People v. Lopez* (2008) 42 Cal.4th 960 A prosecutor may not invite the jury to view the case through the victim's eyes because to do so appeals to the jury's sympathy for the victim, it is misconduct.

People v. DePriest (2007) 42 Cal.4th 1 To show misconduct if a prosecutor interferes with a defense witness, the defendant must show the following: First, the misconduct must be so egregious and improper as to turn a willing defense witness into an unwilling one. Second, the misconduct must deprive the defendant of the witness's testimony, or be a substantial cause of such deprivation. Third, the lost testimony must be material and favorable to the defense.

55) **Murgia v. Municipal Court** (1975) 15 Cal.3d 286 Motion to dismiss for selective/discriminatory prosecution; Defendant must show "some evidence" in support of his claim of discriminatory prosecution to obtain discovery under the United States Constitution." *People v. Superior Court (Baez)* (2000) 79 Cal.App.4th 1177 (modifying *Murgia* which did not require a showing prior to obtaining discovery)

56) **People v. Grimes** (2016) 1 Cal.5th 698 Vindictive prosecution: Prosecutors may not take certain actions against a defendant, such as increasing the charges, in retaliation for the defendant's exercise of constitutional rights. It is not a constitutional violation, however, for a prosecutor to offer benefits, in the form of reduced charges, in exchange for a defendant's guilty plea, or to threaten to increase the charges if the defendant does not plead guilty. In the pretrial setting, there is no presumption of vindictiveness when the prosecution increases the charges or the potential penalty. Rather, the defendant must prove objectively that the prosecutor's charging decision was motivated by a desire to punish him for doing something the law plainly allowed him to do.

REPRESENTATION

57) **Faretta v. California** (1975) 422 US 806 *Faretta* Waiver. The defendant has a right to represent himself. He has to request it knowingly, intelligently and voluntarily, having been advised of the dangers and disadvantages of representing himself and of the consequences of a conviction. *People v. Ruffin* 2017 Cal.App.Lexis 516

see also: *People v. Espinoza* (2017) 1 Cal.5th 61 The right to self-representation is not absolute, it can be terminated. Deliberate dilatory or obstructive behavior threatens the court's ability to conduct a fair trial. Can also terminate self representation for in court misconduct.

People v. Bradford (2010) 187 Cal.App.4th 1345 Court can deny the request if made untimely.

58) **People v. Marsden** (1970) 2 Cal.3d 118 *Marsden* motion. Defendant's motion to replace appointed counsel. An *in camera* hearing is to be held to determine if a new attorney should be appointed.

59) **Strickland v. Washington** (1984) 466 US 668 Defining ineffective assistance of counsel. There are two components to proving such a claim 1) defendant must show that counsel failed to act in a manner to be expected of reasonably competent attorneys acting as diligent advocates; overcoming strong presumption that counsel's conduct falls within a wide range of reasonable professional assistance, 2) the defendant must demonstrate it is reasonably probable a more favorable result would have been obtained in the absence of counsel's failings.

SEARCH AND SEIZURE

60) **Terry v. Ohio** (1968) 392 US 1 *Terry* Stop: Officer believed the defendant was about to commit a daytime robbery, and was armed. Officers may approach a person on the street and ask questions; however he may decline to answer questions and walk away. Where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him. Such a search is a reasonable search under U.S. Const. amend. IV, and any weapons seized may properly be introduced in evidence against the person from whom they were taken.

see also *Florida v. Royer* (1982) 460 U.S. 491 Police confinement that goes beyond the limited restraint of a *Terry* investigatory stop may be constitutionally justified only by probable cause. In the name of investigating a person who is no more than suspected of criminal activity, the police may not conduct a full search of the person, his car, or his effects. A person is effectively seized if a reasonable person would not feel free to leave.

People v. Brown (2015) 61 Cal.4th 968 *Terry* recognizes that it may be the essence of good police work to adopt an intermediate response. A brief stop of a suspicious individual, in order to determine his or her identity or to maintain the status quo while obtaining more information may be most reasonable in light of the facts known to the officer at the time.

Florida v. Bostick (1991) 501 US 429 A seizure does not occur simply because a police officer approaches an individual and asks a few questions. So long as a reasonable person would feel free to disregard the police and go about his business, the encounter is consensual and no reasonable suspicion is required. The crucial test is whether, taking into account all of the circumstances surrounding the encounter, the police conduct would have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business.

61) **Schneckloth v. Bustamonte** (1972) 412 US 218 There is nothing constitutionally suspect in a person's voluntarily allowing a search. The question whether a consent to a search was in fact "voluntary" or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances. Knowledge of the right to refuse is only one of those factors and not dispositive.

See also: *Georgia v. Randolph* (2006) 547 US 103 The Court recognizes the validity of searches with the voluntary consent of an individual possessing authority. That person might be the householder against whom evidence is sought or a fellow occupant who shares common authority over property, when the suspect is absent, and the exception for consent extends

even to entries and searches with the permission of a co-occupant whom the police reasonably, but erroneously, believe to possess shared authority as an occupant. However, if a potential defendant with self-interest in objecting is in fact at the door and objects, the co-tenant's permission does not suffice for a reasonable search, whereas the potential objector, nearby but not invited to take part in the threshold colloquy, loses out and the co-tenant's permission is sufficient -so long as there is no evidence the police removed someone to avoid giving them the opportunity to object.

62) **Chimel v. California** (1969) 395 US 752 When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. And the area into which an arrestee might reach in order to grab a weapon or evidentiary items must, of course, be governed by a like rule. This rule does not extend to areas beyond the reach of the person arrested.

See also *Arizona v. Gant* (2008) 556 US 332 A search incident to arrest is justified by either the interest in officer safety or the interest in preserving evidence. Police may search incident to arrest only the space within an arrestee's "immediate control," meaning the area from within which he might gain possession of a weapon or destructible evidence. The safety and evidentiary justifications underlying *Chimel*'s reaching-distance rule does not authorize a vehicle search incident to a recent occupant's arrest after the arrestee has been secured and cannot access the interior of the vehicle.

63) **Harris v. United States** (1968) 390 US 234 The Fourth Amendment does not require the police to obtain a search warrant when acting pursuant to a police department regulation that requires an officer who impounds a vehicle to search the vehicle thoroughly, to remove all valuables from it, and to attach to the vehicle a property tag listing certain information about the circumstances of the impounding. Furthermore, objects falling in the plain view of an officer who has a right to be in the position to have that view, are subject to seizure and may be introduced in evidence.

64) **Maryland v. Buie** (1990) 494 US 325 The Fourth Amendment permits a properly limited protective sweep in conjunction with an in-home arrest when the searching officer possesses a reasonable belief based on specific and articulable facts that the area to be swept harbors an individual posing a danger to those on the arrest scene. A "protective sweep" is a quick and limited search of premises, incident to an arrest and conducted to protect the safety of police officers or others. It is narrowly confined to a cursory visual inspection of those places in which a person might be hiding. Arresting officers are permitted to take reasonable steps to ensure their safety after, and during, the arrest.

65) **New Jersey v. TLO** (1985) 469 US 325 Under ordinary circumstances, a search of a student by a teacher or other school official will be justified at its inception when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the

law or the rules of the school. Such a search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction

66) **In re Lance W**. (1985) 37 Cal. 3d 873 Section 1538.5 continues to provide the exclusive procedure by which a defendant may seek suppression of evidence obtained in a search or seizure that violates "state constitutional standards," a court may exclude the evidence on that basis only if exclusion is also mandated by the federal exclusionary rule applicable to evidence seized in violation of the Fourth Amendment.

See also *Proposition 8* (codified as Cal.Const. Art.1 Sec.28(d))

People v. McKay (2002) 27 Cal.4th 601 Violation of state arrest laws does not equal suppression unless there is a Constitutional violation

67) **Nix v. Williams** (1984) 467 US 431 The exclusionary rule begins with the premise that the challenged evidence is in some sense the product of illegal government activity. If the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means then the deterrence rationale has so little basis that the evidence should be received.

See also: *People v. Boyer* (2006) 38 Cal.4th 412 Evidence need not be suppressed as fruit of the poisonous tree, when procured in violation of the Fourth Amendment, if it inevitably would have been obtained by lawful means. The question is whether the evidence was obtained by the government's exploitation of the illegality or whether that illegality has become attenuated so as to dissipate the taint.

Davis v. United States (2011) 564 US 229 The purpose of the exclusionary rule is to deter deliberate or reckless disregard of the Fourth Amendment. If a search is found to violate the Fourth Amendment under new precedent, the evidence is still admissible if an officer conducts the search in objectively reasonable reliance on existing and binding precedent.

68) **Riley v. California** (2014) 134 S.Ct. 2473 The U.S. Supreme Court unanimously held that the police officers generally could not, without a warrant, search digital information on the cell phones seized from the defendants as incident to the defendants' arrests. While the officers could examine the phones' physical aspects to ensure that the phones would not be used as weapons, digital data stored on the phones could not itself be used as a weapon to harm the arresting officers or to effectuate the defendants' escape. Further, the potential for destruction of evidence by remote wiping or data encryption was not shown to be prevalent and could be countered by disabling the phones.

See also: *Cal ECPA* (electronics communications protection act) which goes even further in protecting all types of electronic information-which is not subject to Proposition 8 limitations.

69) **Mincey v. Arizona** (1978) 437 US 385 Exigent circumstances: The Fourth Amendment does not bar officers from making warrantless entries and searches when they reasonably believe that a person

within needs immediate aid. Similarly, when the police come upon the scene of a homicide they may make a prompt warrantless search of the area to see if there are other victims or if the killer is still there. The need to protect or preserve life, or avoid serious injury, is justified for what would otherwise be illegal absent the exigency. Further, the police may seize any evidence that is in plain view during the course of their legitimate emergency activities. Once a scene is secure, get a search warrant.

> See also *Kentucky v. King* (2011) 563 US 452It Exigent circumstances, including the need to prevent the destruction of evidence, permit officers to conduct a search without obtaining a warrant. Court discusses various exigent circumstance exceptions including that officers can enter a premises without a warrant when they are in hot pursuit of a fleeing suspect.
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> *People v. Ray* (1999) 21 Cal.4th 464 Officers learned an apt. was in shambles and door open all day. They entered to see if a crime occurred or if anyone was hurt. They knocked, then entered and saw cocaine in plain view. The court affirmed the denial of the suppression motion, holding that a warrantless entry of a dwelling was constitutionally permissible where the officers' conduct was prompted by the motive of preserving life; and the appropriate standard under the community caretaking exception was one of reasonableness. Under the community caretaking exception, circumstances short of a perceived emergency may justify a warrantless entry, including the protection of property, as where the police reasonably believe the premises have recently been or are being burglarized.

70) **People v. Robles** (2002) 23 Cal.4th 789 A person may validly consent in advance to warrantless searches and seizures in exchange for the opportunity to avoid going to prison. To justify a search based upon probation terms, the officer must have know the search condition exists prior to conducting the search.

> See also *United States v. Knights* (2001) 534 US 112 Officer can conduct a probation search for investigation purposes not probation compliance so long as there is knowledge a search clause exists.
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> *People v. Reyes* (1998) 19 Cal.4th 743 Can conduct a search unsupported by reasonable suspicion based on a parole search condition, so long as it wasn't arbitrary, capricious or harassing, and the officer knew the condition existed.

SEARCH WARRANTS

71) **Franks v. Delaware** (1978) 438 US 154 A defendant has the right to challenge the veracity of a sworn statement used by police to obtain a search warrant, and then the search can be subject to a motion to suppress the evidence.

72) **People v. Hobbs** (1994) 7 Cal.4th 948 Part or all of a search warrant affidavit can be sealed to protect the identity of a confidential informant or other confidential information. To challenge the basis of the search warrant, the Court must hold an *in camera* hearing to determine if the original sealing order should be maintained in whole, or in part. All efforts must be made to maintain the

confidentiality during the hearing. The defense can submit questions for the court to ask the officer/confidential witness.

73) **Illinois v. Gates** (1983) 462 US 213 Determining probable cause for SW; use totality of the circumstances-common sense approach, not hyper technical. The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.

> See also *Hudson v. Michigan* (2006) 547 US 586 The officers violated the "knock notice rule" of the search warrant. The court held the exclusionary rule was inapplicable and suppression of the evidence was not warranted. Also discusses the requirement for knock notice can be waived if the officers have a reasonable suspicion the circumstances present a threat of physical violence, or if there is reason to believe evidence would likely be destroyed, or if knocking/announcing would be futile.

74) **United States v. Leon** (1984) 468 US 897 The Court held the exclusionary rule should be modified to allow the admission of evidence seized in reasonable, good-faith reliance on a search warrant, even if the warrant was subsequently found to be defective.

75) **People v. Lenart** (2004) 32 Cal.4th 1107 The court held items in plain view, but not described in a valid warrant, may be seized when their incriminating nature is immediately apparent. The incriminating nature is not immediately apparent if some further search of the object is required.

SENTENCING

76) **People v. Arbuckle** (1978) 22 Cal.3d 749 *Arbuckle* waiver. States the defendant has the right to be sentenced by the judge who accepted the guilty plea. Waiving means any judge can sentence.

> See also: *People v. Martinez* (2005) 127 Cal.App.4th 1156- no *Arbuckle* error to have vop/resentence done by different judge

77) **People v. Cruz** (1988) 44 Cal. 3d 1247 When a plea bargain is reached, the defendant can give a "*Cruz* waiver" to obtain OR release pending sentencing. Meaning, if he fails to return for sentencing the judge can impose a sentence in excess of the bargained for term. It must be a knowing and intelligent waiver, on the record and obtained at the time of the plea.

78) **People v. Ghebretensae** 222 Cal.App.4th 741 A defendant may not be penalized for exercising his right to a jury trial. However, increased sentence after trial conviction is appropriate where there were legitimate factors revealed during the course of the trial that support the increase, these legitimate facts may come to the court's attention either through the personal observations of the judge during trial or through the presentence report by the probation department. The mere fact that following trial defendant received a more severe sentence than he was offered during plea negotiations does not in itself support the inference that he was penalized for exercising his constitutional rights.

79) **People v. Clancy** (2013) 56 Cal.4th 562 Discusses when and how a court can give indicated sentences, including if there is a plea to the sheet for the indicated, the court can't dismiss a count under PC 1385.

80) **People v. Harvey** (1979) 25 Cal.3d 754 *Harvey* waiver. When the defendant is entering a plea to some counts and others are being dismissed, the waiver allows the sentencing Judge to consider the dismissed counts in pronouncing sentence. The defendant agrees to this as a condition of the plea. (Usually used for restitution or stay away orders on the dismissed counts)

81) **People v. Superior Court (Romero)** (1996) 13 Cal.4th 497 *Romero* motion: an invitation by defendant to strike a prior strike conviction. Section 1385 does permit a court, acting on its own motion, to strike prior felony convictions brought under the three strikes law.

> See also: *People v. Williams* (1998) 17 Cal.4th 148 When deciding whether to strike a prior strike offense the court must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies.

STATUTE OF LIMITATIONS/DISMISSAL FOR FAILURE TO TIMELY PROSECUTE

82) **Serna v. Superior Court** (1985) 40 Cal.3d 239 *Serna* motion. When an offense is charged as a misdemeanor it is the filing of the complaint (or earlier arrest) which triggers the defendant's Sixth Amendment right to a speedy trial. If the length of the delay is over 1 year, that being the statute of limitations for filing a misdemeanor complaint, it is presumptively prejudicial. The defendant does not need to establish actual prejudice.

> see also: *People v. Leaututufu* (2011) 202 Cal.App.4th Supp.1 The delay of more than 1 year between arrest and arraignment is presumed prejudicial, thus giving rise to the *Barker* test.

83) **Barker v. Wingo** (1970) 407 US 514 Describes the balancing test for motion to dismiss based on violation of speedy trial rights. 4 part test: 1) Length of delay; 2) justifications for the delay; 3) defendant's assertion of his speedy trial rights; and 4) actual prejudice to the defendant.

84) **People v. Mincey** (1992) 2 Cal.4th 408 A wobbler, charged as felony, has a 3 year statute of limitations, without regard to the ultimate reduction to a misdemeanor, however, if convicted of the necessarily lesser included misdemeanor, the 1 year statute of limitations apples.

> See also *People v. Ongley* (1987) 195 Cal.App.3d 165 3 year statute of limitations still applies to a wobbler filed as a felony, but reduced by court under 17b of the Penal Code.

TESTIMONY

85)**Aranda/Bruton**

People v. Aranda (1965) 63 Cal.2d 518; If prosecution wants to use co-defendant's admissions then the court must sever the trial or delete portions of the statement that are damaging to the other defendant. **Bruton v. United States** (1968) 391 US 123 Co-defendant's out of court statement is not admissible because the defendant has no right to cross-examine the co-defendant.

> See also *People v. Stevens* (2007) 41 Cal.4th 182 Can redact statements by deleting any reference to another person -which also would satisfy *Crawford* (below)

86) **Crawford v. Washington** (2004) 541 US 36 Hearsay statements are inadmissible at trial as a violation of the confrontation clause. Hearsay is inadmissible if: 1) offered for truth; 2) declarant did not testify and defendant had no opportunity to cross examine declarant 3) declarant is unavailable 4) evidence is testimonial-ie made for the purpose of using at trial.

> see also: *Davis v. Washington* (2006) 547 US 813 Court defines non-testimonial statements, which are admissible, as those made in response to interrogation or questioning whose primary purpose is to enable officers to meet an ongoing emergency. 911 call was admissible.
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> *Michigan v. Bryant* (2011) 131 S.Ct. 1143 Police believed there was ongoing emergency when victim, who was mortally wounded and later died, told them the name of the shooter. The statement was admissible.

87) **People v. Sanchez** (2016) 63 Cal.4th 665 Redefines rules on hearsay with expert opinions, prior to this, a gang expert could rely on hearsay-and repeat that hearsay to the jury, to form his opinion that the defendant was a gang member. Now, he can rely on it, but can only cite in general terms the evidence he relied on, the expert cannot state the specific basis unless the hearsay declarant actually testifies.

> see also *People v. Stamps* (2016) 3 Cal.App.5th 988 Criminalist testified he identified the pills found in defendant's possession based on a visual comparison between the pill and those displayed on a website Indent-A-Drug. This is case specific hearsay under *Sanchez*, and not allowed.
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> contrary *People v. Darrell Mooring* (Sept. 27, 2017; A143470) The Ident-A-Drug website comes within the published exception to the hearsay rule as noted in EC 1340. It did not violate *Sanchez* to allow the Criminalist to testify regarding the content of Indent-A-Drug. EC 1340 was not raised in *Stamps*.

88) **People v. Schiers** (1971) 19 Cal.App.3d 102 A prosecutor has the duty to guard against statements by his witnesses containing inadmissible evidence. If the prosecutor believes a witness may give an

inadmissible answer during his examination, he must warn the witness to refrain from making such a statement.

89) **People v. Fuiava** (2012) 53 Cal.4th 622 The confrontation right is not absolute. An exception exists when a witness is unavailable and, at a previous court proceeding against the same defendant, has given testimony that was subject to cross-examination. Under federal constitutional law, such testimony is admissible if the prosecution shows it made "a good-faith effort" to obtain the presence of the witness at trial.

> See also *Hardy v. Cross* (2011) 565 US 65 When a witness disappears before trial, it is always possible to think of additional steps the prosecution might have taken to secure the witness' presence, but the Sixth Amendment does not require the prosecution to exhaust every avenue of inquiry, no matter how unpromising. The lengths to which the prosecution must go is a question of reasonableness.

90) **People v. Linton** (2013) 56 Cal.4th 1146 It is generally prohibited for a prosecutor to act as both an advocate and a witness. Only in extraordinary circumstances should a prosecutor in an action be called as a witness, and before the attorney is called, defendant has an obligation to demonstrate that there is no other source for the evidence he seeks.

91) **People v. Mincey** (1992) 2 Cal.4th 408 If a witness is going to take the 5th, the court should hold a hearing outside the presence of the jury. A witness should not be allowed to assert the privilege in front of the jury.

92) **People v. Lujan** (2012) 211 Cal.App. 4th 1499 The confrontation clause guarantees a defendant a face-to-face meeting with witnesses appearing before the trier of fact. But this rule has never been absolute. A child witness is allowed to testify remotely over closed-circuit television when face-to-face confrontation would cause trauma.

93) **People v. Williams** (1957) 151 Cal.App.2d 173 A statement made by the defendant to the police is not admissible if being offered on his behalf. It is objectionable as being self serving hearsay.

TRAFFIC STOPS/ARRESTS

94) **Atwater v. City of Lago Vista** (2001) 532 US 318 In this case, the custodial arrest was for a misdemeanor failure to wear a seat belt, which in Texas carried a maximum punishment of a fine only, no jail. The standard of probable cause applies to all arrests, without the need to "balance" the interests and circumstances involved in particular situations. If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender.

> See also: *People v. Macabeo* (2016) 1 Cal.5th 1206 Defendant rolled through a stop sign on his bike. Officers stopped him. A search happened, based on the theory of a search incident to arrest. When a custodial arrest is made, supported by independent probable cause, a search

incident to arrest may be permitted. Only a citation was permitted under California law, and there is no search incident to citation, suppression granted.

In Re D.W. (2017) 13 Cal.App.5th 1249 A broadcast went out, someone in area may have gun. Officers went to that area, saw several individuals known to them as having gang ties. Contact was made. Officer noted smell of marijuana on one of the folks, who admitted he had just smoked some. Officer decided to search for more mj. Officer finds gun. Gun suppressed. Under California law, mj is an infraction and a minor, non jailable offense. The officers had neither cause to make a custodial arrest nor evidence that he was guilty of anything other than an infraction.

95) **Navarette v. California** (2014) 134 S.Ct. 1683 A CHP officer stopped defendant shortly after a 911 caller reported that she had been run off the road by a pickup truck that fit the description of the truck the defendant was driving. The U.S. Supreme Court held that the traffic stop complied with the Fourth Amendment because, under the totality of the circumstances, the officer had reasonable suspicion that the truck's driver was intoxicated. The behavior described by the 911 caller, viewed from the standpoint of an objectively reasonable police officer, amounted to reasonable suspicion of drunk driving.

See also*: People v. Dolly* (2007) 40 Cal.4th 458 An investigatory detention of an individual in a vehicle is permissible under the Fourth Amendment if supported by reasonable suspicion that the individual has violated the law. If law enforcement could not rely on information conveyed by anonymous 911 callers, their ability to respond effectively to emergency situations would be significantly curtailed. There is no inherent reason to discount anonymous 911 calls reporting contemporaneous violent conduct observed firsthand merely because of the theoretical possibility the caller may be motivated to make a false report because of a vendetta.

96) **Devenpeck v. Alford** (2004) 543 US 146 The court concluded that an arrest will not be rendered unconstitutional if there is probable cause to arrest for an offense, simply because an officer at the time of the arrest identifies a different offense unsupported by probable cause and not "'closely related'" to the offense for which there *was* probable cause. An arresting officer's state of mind (except for the facts that he knows) is irrelevant to the existence of probable cause.

97) **People v. Brendlin** (2008) 45 Cal.4th 262 The discovery of an outstanding arrest warrant prior to a search incident to arrest constitutes an intervening circumstance that may—and, in the absence of purposeful or flagrant police misconduct, *will*—attenuate the taint of the antecedent unlawful traffic stop.

98) **People v. Vibanco** (2007) 151 Cal.App.4th 1 Officers may order a passenger or passengers either to get out of the car or to remain in the car during a lawful traffic stop if the officers deem it necessary for officer safety, without violating the Fourth Amendment. Whether the passenger is ordered to stay in or get out of the vehicle is a distinction without a difference. An officer making a traffic stop may immediately take the reasonable steps he or she deems necessary to secure the officer's safety.

See also *Pennsylvania v. Mimms* (1977) 434 US 106 Officers can order a legally stopped driver out of the car.

99) **People v. Saunders** (2006) 38 Cal.4th 1129 Lack of front California license plate is a legitimate reason to stop a car. The possibility of an innocent explanation for a missing front license plate does not preclude an officer from effecting a stop to investigate the ambiguity.

However, *People v. Reyes* (2011) 196 Cal.App.4th 856 Stopped car had a rear Florida plate, none on front, which Florida does not require. If Florida required two plates, and the officer knew of that requirement it would be ok to stop. If the officer does not know if two plates are required in another state, he cannot initiate a stop.

100) **People v. Bracken** (2000) 83 Cal.App.4th Supp.1 Weaving within the lane, while not a vehicle code violation, can justify a traffic stop because it may indicate the driver is under the influence of alcohol or drugs.

See also *People v. Spriggs* (2014) 224 Cal.App.4th 150 23123(a) only prohibits a driver from holding a cell phone while conversing on it. The legislature did not intend to extend the prohibition to other uses, especially the using the cell to look at a map, so there was no violation when the defendant held the cell and looked at a map application while driving.

VERDICTS

101) **People v. Palmer** (2001)24 Cal.4th 856 Inconsistency in a verdict is not a sufficient reason for setting it aside. This is so with respect to inconsistency between verdicts on separate charges against one defendant, and also with respect to verdicts that treat codefendants in a joint trial inconsistently. An acquittal of one or more counts shall not be deemed an acquittal of any other count. The fact that certain defendants may escape conviction for their crimes is not any legal or logical reason why another defendant, where substantial evidence has been introduced to sustain his conviction, should be exonerated and be permitted to escape punishment for his crime. Accordingly, the general rule is that acquittal of one codefendant normally will not require acquittal of another

APPENDIX

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

DAVIS, ACTING WARDEN *v.* AYALA

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 13–1428. Argued March 3, 2015—Decided June 18, 2015

During jury selection in respondent Ayala's murder trial, Ayala, who is Hispanic, objected that seven of the prosecution's peremptory challenges were impermissibly race-based under *Batson* v. *Kentucky*, 476 U. S. 79. The judge permitted the prosecution to disclose its reasons for the strikes outside the presence of the defense and concluded that the prosecution had valid, race-neutral reasons for the strikes. Ayala was eventually convicted and sentenced to death. On appeal, the California Supreme Court analyzed Ayala's challenge under both *Batson* and its state-law analogue, concluding that it was error, as a matter of state law, to exclude Ayala from the hearings. The court held, however, that the error was harmless under state law and that, if a federal error occurred, it too was harmless beyond a reasonable doubt under *Chapman* v. *California*, 386 U. S. 18. Ayala subsequently pressed his claims in federal court. There, the District Court held that even if the *ex parte* proceedings violated federal law, the state court's harmlessness finding could not be overturned because it was not contrary to or an unreasonable application of clearly established federal law under 28 U. S. C. §2254(d). A divided panel of the Ninth Circuit disagreed and granted Ayala habeas relief. The panel majority held that the *ex parte* proceedings violated Ayala's federal constitutional rights and that the error was not harmless under *Brecht* v. *Abrahamson*, 507 U. S. 619, as to at least three of the seven prospective jurors.

Held: Any federal constitutional error that may have occurred by excluding Ayala's attorney from part of the *Batson* hearing was harmless. Pp. 9–29.

(a) Even assuming that Ayala's federal rights were violated, he is entitled to habeas relief only if the prosecution cannot demonstrate

harmlessness. *Glebe* v. *Frost*, 574 U. S. ___, ___. Under *Brecht*, federal habeas petitioners "are not entitled to habeas relief based on trial error unless they can establish that it resulted in 'actual prejudice.' " 507 U. S., at 637. Because Ayala seeks federal habeas corpus relief, he must meet the *Brecht* standard, but that does not mean, as the Ninth Circuit thought, that a state court's harmlessness determination has no significance under *Brecht*. The *Brecht* standard subsumes the requirements that §2254(d) imposes when a federal habeas petitioner contests a state court's determination that a constitutional error was harmless under *Chapman*. *Fry* v. *Pliler*, 551 U. S. 112, 120. But *Brecht* did not abrogate the limitation on federal habeas relief that the Antiterrorism and Effective Death Penalty Act of 1996 plainly sets out. There is no dispute that the California Supreme Court held that any federal error was harmless under *Chapman*, and this decision was an "adjudication on the merits" of Ayala's claim. Accordingly, a federal court cannot grant Ayala relief unless the state court's rejection of his claim was contrary to or involved an unreasonable application of clearly established federal law as determined by the Supreme Court, or was based on an unreasonable determination of the facts. Pp. 9–12.

(b) Any federal constitutional error was harmless with respect to all seven prospective jurors. Pp. 12–28.

(1) The prosecution stated that it struck Olanders D., an African-American man, because it was concerned that he could not impose the death penalty and because of the poor quality of his responses. As the trial court and State Supreme Court found, the record amply supports the prosecution's concerns, and Ayala cannot establish that the *ex parte* hearing prejudiced him. The Ninth Circuit misunderstood the role of a federal court in a habeas case. That role is not to conduct *de novo* review of factual findings and substitute the federal court's own opinions for the determination made on the scene by the trial judge. Pp. 14–18.

(2) The prosecution stated that it struck Gerardo O., a Hispanic man, because he had a poor grasp of English, his answers suggested an unwillingness to impose the death penalty, and he did not appear to get along with other jurors. Each of these reasons was amply supported by the record, and there is no basis for finding that the absence of defense counsel affected the trial judge's evaluation of the strike. Ayala cannot establish that the *ex parte* hearing actually prejudiced him or that no fairminded jurist could agree with the state court's application of *Chapman*. Once again, the Ninth Circuit's decision was based on a misapplication of basic rules regarding harmless error. The inquiry is not whether the federal habeas court could definitively say that the defense could make no winning arguments,

Syllabus

but whether the evidence in the record raised "grave doubt[s]" about whether the trial judge would have ruled differently. *O'Neal* v. *McAninch*, 513 U. S. 432, 436. That standard was not met in this case. Pp. 18–24.

(3) The prosecution stated that it struck Robert M., a Hispanic man, because it was concerned that he could not impose the death penalty and because he had followed a controversial murder trial. Not only was the Ninth Circuit incorrect to suppose that the presence of Ayala's counsel at the hearing would have made a difference in the trial court's evaluation of the strike, but the Ninth Circuit failed to mention that defense counsel specifically addressed the issue during *voir dire* and reminded the judge that Robert M. also made several statements favorable to the death penalty. Thus, the trial judge heard counsel's arguments and concluded that the record supplied a legitimate basis for the prosecution's concern. That defense counsel did not have the opportunity to repeat that argument does not create grave doubt about whether the trial court would have decided the issue differently. Pp. 24–26.

(4) With regard to Ayala's *Batson* objection about the four remaining prospective jurors who were struck, he does not come close to establishing "actual prejudice" under *Brecht* or that no fairminded jurist could agree with the California Supreme Court's decision that excluding counsel was harmless. Pp. 26–28.

756 F. 3d 656, reversed and remanded.

ALITO, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, KENNEDY, and THOMAS, JJ., joined. KENNEDY, J., and THOMAS, J., filed concurring opinions. SOTOMAYOR, J., filed a dissenting opinion, in which GINSBURG, BREYER, and KAGAN, JJ., joined.

SUPREME COURT OF THE UNITED STATES

No. 13–1428

RON DAVIS, ACTING WARDEN, PETITIONER *v.* HECTOR AYALA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[June 18, 2015]

JUSTICE ALITO delivered the opinion of the Court.

A quarter-century after a California jury convicted Hector Ayala of triple murder and sentenced him to death, the Court of Appeals for the Ninth Circuit granted Ayala's application for a writ of habeas corpus and ordered the State to retry or release him. The Ninth Circuit's decision was based on the procedure used by the trial judge in ruling on Ayala's objections under *Batson* v. *Kentucky*, 476 U. S. 79 (1986), to some of the prosecution's peremptory challenges of prospective jurors. The trial judge allowed the prosecutor to explain the basis for those strikes outside the presence of the defense so as not to disclose trial strategy. On direct appeal, the California Supreme Court found that if this procedure violated any federal constitutional right, the error was harmless beyond a reasonable doubt. The Ninth Circuit, however, held that the error was harmful.

The Ninth Circuit's decision was based on the misapplication of basic rules regarding harmless error. Assuming without deciding that a federal constitutional error occurred, the error was harmless under *Brecht* v. *Abraham-*

son, 507 U. S. 619 (1993), and the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U. S. C. §2254(d).

I

A

Ayala's conviction resulted from the attempted robbery of an automobile body shop in San Diego, California, in April 1985. The prosecution charged Ayala with three counts of murder, one count of attempted murder, one count of robbery, and three counts of attempted robbery. The prosecution also announced that it would seek the death penalty on the murder counts.

Jury selection lasted more than three months, and during this time the court and the parties interviewed the prospective jurors and then called back a subset for general *voir dire*. As part of the jury selection process, more than 200 potential jurors completed a 77-question, 17-page questionnaire. Potential jurors were then questioned in court regarding their ability to follow the law. Jurors who were not dismissed for cause were called back in groups for *voir dire*, and the parties exercised their peremptory challenges.

Each side was allowed 20 peremptories, and the prosecution used 18 of its allotment. It used seven peremptories to strike all of the African-Americans and Hispanics who were available for service. Ayala, who is Hispanic, raised *Batson* objections to those challenges.

Ayala first objected after the prosecution peremptorily challenged two African-Americans, Olanders D. and Galileo S. The trial judge stated that these two strikes failed to establish a prima facie case of racial discrimination, but he nevertheless required the prosecution to reveal the reasons for the strikes. The prosecutor asked to do this outside the presence of the defense so as not to disclose trial strategy, and over Ayala's objection, the judge

granted the request. The prosecution then offered several reasons for striking Olanders D., including uncertainty about his willingness to impose the death penalty. The prosecution stated that it dismissed Galileo S. primarily because he had been arrested numerous times and had not informed the court about all his prior arrests. After hearing and evaluating these explanations, the judge concluded that the prosecution had valid, race-neutral reasons for these strikes.

Ayala again raised *Batson* objections when the prosecution used peremptory challenges to dismiss two Hispanics, Gerardo O. and Luis M. As before, the judge found that the defense had not made out a prima facie case, but ordered the prosecution to reveal the reasons for the strikes. This was again done *ex parte*, but this time the defense did not expressly object. The prosecution explained that it had challenged Gerardo O. and Luis M. in part because it was unsure that they could impose the death penalty. The prosecution also emphasized that Gerardo O.'s English proficiency was limited and that Luis M. had independently investigated the case. The trial court concluded a second time that the prosecution had legitimate race-neutral reasons for the strikes.

Ayala raised *Batson* objections for a third and final time when the prosecution challenged Robert M., who was Hispanic; George S., whose ethnicity was disputed; and Barbara S., who was African-American. At this point, the trial court agreed that Ayala had made a prima facie *Batson* showing. Ayala's counsel argued that the strikes were in fact based on race. Ayala's counsel contended that the challenged jurors were "not significantly different from the white jurors that the prosecution ha[d] chosen to leave on the jury both in terms of their attitudes on the death penalty, their attitudes on the criminal justice system, and their attitudes on the presumption of innocence." App. 306. Ayala's counsel then reviewed the questionnaire

answers and *voir dire* testimony of Barbara S. and Robert M., as well as the statements made by three of the prospective jurors who had been the subject of the prior *Batson* objections, Galileo S., Gerardo O., and Luis M. Counsel argued that their answers showed that they could impose the death penalty. The trial court stated that it would hear the prosecution's response outside the presence of the jury, and Ayala once more did not object to that ruling. The prosecution then explained that it had dismissed the prospective jurors in question for several race-neutral reasons, including uncertainty that Robert M., George S., or Barbara S. would be open to imposing the death penalty. The prosecution also emphasized (among other points) that Robert M. had followed a controversial trial, that George S. had been a holdout on a prior jury, and that Barbara S. had given the impression during *voir dire* that she was under the influence of drugs. The trial court concluded, for a third time, that the prosecution's peremptory challenges were based on race-neutral criteria.

In August 1989, the jury convicted Ayala of all the charges except one of the three attempted robberies. With respect to the three murder convictions, the jury found two special circumstances: Ayala committed multiple murders, and he killed during the course of an attempted robbery. The jury returned a verdict of death on all three murder counts, and the trial court entered judgment consistent with that verdict.

B

Ayala appealed his conviction and sentence, and counsel was appointed to represent him in January 1993. Between 1993 and 1999, Ayala filed 20 applications for an extension of time, 11 of which requested additional time to file his opening brief. After the California Supreme Court eventually ruled that no further extensions would be

granted, Ayala filed his opening brief in April 1998, nine years after he was convicted. The State filed its brief in September 1998, and Ayala then asked for four extensions of time to file his reply brief. After the court declared that it would grant him no further extensions, he filed his reply brief in May 1999.

In August 2000, the California Supreme Court affirmed Ayala's conviction and death sentence. *People* v. *Ayala*, 24 Cal. 4th 243, 6 P. 3d 193. In an opinion joined by five justices, the State Supreme Court rejected Ayala's contention that the trial court committed reversible error by excluding the defense from part of the *Batson* hearing. The court understood Ayala to challenge the peremptory strikes under both *Batson* and its state-law analogue, *People* v. *Wheeler*, 22 Cal. 3d 258, 583 P. 2d 748 (1978). The court first concluded that the prosecution had not offered matters of trial strategy at the *ex parte* hearing and that, "as a matter of state law, it was [error]" to bar Ayala's attorney from the hearing. 24 Cal. 4th, at 262, 6 P. 3d, at 203.

Turning to the question of prejudice, the court stated:

> "We have concluded that error occurred under state law, and we have noted [the suggestion in *United States* v. *Thompson*, 827 F. 2d 1254 (CA9 1987),] that excluding the defense from a *Wheeler*-type hearing may amount to a denial of due process. We nonetheless conclude that the error was harmless under state law (*People* v. *Watson* (1956) 46 Cal.2d 818, 836), and that, if federal error occurred, it, too, was harmless beyond a reasonable doubt (*Chapman* v. *California* (1967) 386 U. S. 18, 24) as a matter of federal law. On the record before us, we are confident that the challenged jurors were excluded for proper, race-neutral reasons." *Id.*, at 264, 6 P. 3d, at 204.

The court then reviewed the prosecution's reasons for

striking the seven prospective jurors and found that "[o]n this well-developed record, . . . we are confident that defense counsel could not have argued anything substantial that would have changed the court's rulings. Accordingly, the error was harmless." *Id.*, at 268, 6 P. 3d, at 207. The court concluded that the record supported the trial judge's implicit determination that the prosecution's justifications were not fabricated and were instead "grounded in fact." *Id.,* at 267, 6 P. 3d, at 206. And the court emphasized that the "trial court's rulings in the ex parte hearing indisputably reflect both its familiarity with the record of voir dire of the challenged prospective jurors and its critical assessment of the prosecutor's proffered justifications." *Id.,* at 266–267, 6 P. 3d, at 206.

The California Supreme Court also rejected Ayala's argument that his conviction should be vacated because most of the questionnaires filled out by prospective jurors who did not serve had been lost at some point during the decade that had passed since the end of the trial. The court wrote that "the record is sufficiently complete for us to be able to conclude that [the prospective jurors who were the subject of the contested peremptories] were not challenged and excused on the basis of forbidden group bias." *Id.*, at 270, 6 P. 3d, at 208. And even if the loss of the questionnaires was error under federal or state law, the court held, the error was harmless under *Chapman* and its state-law analogue. Two justices of the State Supreme Court dissented. We then denied certiorari. 532 U. S. 1029 (2001).

C

After the California Supreme Court summarily denied a habeas petition, Ayala turned to federal court. He filed his initial federal habeas petition in 2002, but then went back to state court to exhaust several claims. In December 2004, he filed the operative federal petition and ar-

gued, among other things, that the *ex parte* hearings and loss of the questionnaires violated his rights under the Sixth, Eighth, and Fourteenth Amendments.

In 2006, the District Court denied Ayala relief on those claims. The District Court read the decision of the California Supreme Court to mean that the state court had not decided whether the *ex parte* proceedings violated federal law, and the District Court expressed doubt "whether the trial court's procedure was constitutionally defective as a matter of clearly established Federal law." App. to Pet. for Cert. 145a. But even if such a violation occurred, the District Court held, the state court's finding of harmlessness was not contrary to or an unreasonable application of clearly established law and thus could not be overturned under AEDPA. The District Court also rejected Ayala's argument about the lost questionnaires, concluding that, even without them, the record was sufficient to resolve Ayala's other claims.

In 2013, a divided panel of the Ninth Circuit granted Ayala federal habeas corpus relief and required California either to release or retry him. *Ayala* v. *Wong*, 756 F. 3d 656 (2014). Because Ayala's federal petition is subject to the requirements of AEDPA, the panel majority began its analysis by inquiring whether the state court had adjudicated Ayala's claims on the merits. Applying *de novo* review,[1] the panel held that the *ex parte* proceedings violated the Federal Constitution, and that the loss of the questionnaires violated Ayala's federal due process rights if that loss deprived him of "the ability to meaningfully appeal the denial of his *Batson* claim." *Id.,* at 671. The

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[1] The panel decided this question *de novo* because it concluded that the California Supreme Court either did not decide whether the *ex parte* proceedings violated the Federal Constitution or silently decided that question in Ayala's favor. 756 F. 3d, at 666–670.

panel folded this inquiry into its analysis of the question whether the error regarding the *ex parte* proceedings was harmless.

Turning to the question of harmlessness, the panel identified the applicable standard of review as that set out in *Brecht* and added: "We apply the *Brecht* test without regard for the state court's harmlessness determination." 756 F. 3d, at 674 (internal quotation marks omitted).[2] The panel used the following complicated formulation to express its understanding of *Brecht*'s application to Ayala's claims: "If we cannot say that the exclusion of defense counsel with or without the loss of the questionnaires likely did not prevent Ayala from prevailing on his *Batson* claim, then we must grant the writ." 756 F. 3d, at 676. Applying this test, the panel majority found that the error was not harmless, at least with respect to three of the seven prospective jurors. The panel asserted that the absence of Ayala and his counsel had interfered with the trial court's ability to evaluate the prosecution's proffered justifications for those strikes and had impeded appellate review, and that the loss of the questionnaires had compounded this impairment.

Judge Callahan dissented. She explained that the California Supreme Court's decision that any federal error was harmless constituted a merits adjudication of Ayala's federal claims. She then reviewed the prosecution's explanations for its contested peremptory challenges and concluded that federal habeas relief was barred because "fairminded jurists can concur in the California Supreme Court's determination of harmless error." *Id.,* at 706.

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[2] In a footnote, however, the panel stated: "In holding that Ayala has demonstrated his entitlement to relief under *Brecht*, we therefore also hold to be an unreasonable application of *Chapman* the California Supreme Court's conclusion that Ayala was not prejudiced by the exclusion of the defense." *Id.,* at 674, n. 13.

The Ninth Circuit denied rehearing en banc, but Judge Ikuta wrote a dissent from denial that was joined by seven other judges. Like Judge Callahan, Judge Ikuta concluded that the California Supreme Court adjudicated the merits of Ayala's federal claims. Instead of the panel's "de novo review of the record that piles speculation upon speculation," she would have found that the state court's harmlessness determination was not an unreasonable application of *Chapman*. 756 F. 3d, at 723.

We granted certiorari. 574 U. S. ___ (2014).

II

Ayala contends that his federal constitutional rights were violated when the trial court heard the prosecution's justifications for its strikes outside the presence of the defense, but we find it unnecessary to decide that question. We assume for the sake of argument that Ayala's federal rights were violated, but that does not necessarily mean that he is entitled to habeas relief. In the absence of "the rare type of error" that requires automatic reversal, relief is appropriate only if the prosecution cannot demonstrate harmlessness. *Glebe* v. *Frost*, 574 U. S. ___, ___ (2014) (*per curiam*) (slip op., at 3). The Ninth Circuit did not hold—and Ayala does not now contend—that the error here falls into that narrow category, and therefore Ayala is entitled to relief only if the error was not harmless.

The test for whether a federal constitutional error was harmless depends on the procedural posture of the case. On direct appeal, the harmlessness standard is the one prescribed in *Chapman*, 386 U. S. 18: "[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Id.,* at 24.

In a collateral proceeding, the test is different. For reasons of finality, comity, and federalism, habeas petitioners "are not entitled to habeas relief based on trial

error unless they can establish that it resulted in 'actual prejudice.'" *Brecht*, 507 U. S., at 637 (quoting *United States* v. *Lane*, 474 U. S. 438, 449 (1986)). Under this test, relief is proper only if the federal court has "grave doubt about whether a trial error of federal law had 'substantial and injurious effect or influence in determining the jury's verdict.'" *O'Neal* v. *McAninch*, 513 U. S. 432, 436 (1995). There must be more than a "reasonable possibility" that the error was harmful. *Brecht*, *supra*, at 637 (internal quotation marks omitted). The *Brecht* standard reflects the view that a "State is not to be put to th[e] arduous task [of retrying a defendant] based on mere speculation that the defendant was prejudiced by trial error; the court must find that the defendant was actually prejudiced by the error." *Calderon* v. *Coleman*, 525 U. S. 141, 146 (1998) (*per curiam*).

Because Ayala seeks federal habeas corpus relief, he must meet the *Brecht* standard, but that does not mean, as the Ninth Circuit thought, that a state court's harmlessness determination has no significance under *Brecht*. In *Fry* v. *Pliler*, 551 U. S. 112, 120 (2007), we held that the *Brecht* standard "subsumes" the requirements that §2254(d) imposes when a federal habeas petitioner contests a state court's determination that a constitutional error was harmless under *Chapman*. The *Fry* Court did not hold—and would have had no possible basis for holding—that *Brecht* somehow abrogates the limitation on federal habeas relief that §2254(d) plainly sets out. While a federal habeas court need not "formal[ly]" apply both *Brecht* and "AEDPA/*Chapman,*" AEDPA nevertheless "sets forth a precondition to the grant of habeas relief." *Fry*, *supra*, at 119–120.

Under AEDPA, 28 U. S. C. §2254(d):

> "An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a

> State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> "(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."

Section 2254(d) thus demands an inquiry into whether a prisoner's "claim" has been "adjudicated on the merits" in state court; if it has, AEDPA's highly deferential standards kick in. *Harrington* v. *Richter*, 562 U. S. 86, 103 (2011).

At issue here is Ayala's claim that the *ex parte* portion of the *Batson* hearings violated the Federal Constitution. There is no dispute that the California Supreme Court held that any federal error was harmless beyond a reasonable doubt under *Chapman*, and this decision undoubtedly constitutes an adjudication of Ayala's constitutional claim "on the merits." See, *e.g., Mitchell* v. *Esparza*, 540 U. S. 12, 17–18 (2003) (*per curiam*). Accordingly, a federal habeas court cannot grant Ayala relief unless the state court's rejection of his claim (1) was contrary to or involved an unreasonable application of clearly established federal law, or (2) was based on an unreasonable determination of the facts. Because the highly deferential AEDPA standard applies, we may not overturn the California Supreme Court's decision unless that court applied *Chapman* "in an 'objectively unreasonable' manner." *Id.*, at 18 (quoting *Lockyer* v. *Andrade*, 538 U. S. 63, 75 (2003)). When a *Chapman* decision is reviewed under AEDPA, "a

federal court may not award habeas relief under §2254 unless *the harmlessness determination itself* was unreasonable." *Fry*, *supra*, at 119 (emphasis in original). And a state-court decision is not unreasonable if "'fairminded jurists could disagree' on [its] correctness." *Richter*, *supra*, at 101 (quoting *Yarborough* v. *Alvarado*, 541 U. S. 652, 664 (2004)). Ayala therefore must show that the state court's decision to reject his claim "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." 562 U. S., at 103.

In sum, a prisoner who seeks federal habeas corpus relief must satisfy *Brecht*, and if the state court adjudicated his claim on the merits, the *Brecht* test subsumes the limitations imposed by AEDPA. *Fry*, *supra*, at 119–120.

III

With this background in mind, we turn to the question whether Ayala was harmed by the trial court's decision to receive the prosecution's explanation for its challenged strikes without the defense present. In order for this argument to succeed, Ayala must show that he was actually prejudiced by this procedure, a standard that he necessarily cannot satisfy if a fairminded jurist could agree with the California Supreme Court's decision that this procedure met the *Chapman* standard of harmlessness. Evaluation of these questions requires consideration of the trial court's grounds for rejecting Ayala's *Batson* challenges.

A

Batson held that the Equal Protection Clause of the Fourteenth Amendment prohibits prosecutors from exercising peremptory challenges on the basis of race. 476 U. S., at 89. When adjudicating a *Batson* claim, trial courts follow a three-step process:

"First, a defendant must make a prima facie showing

> that a peremptory challenge has been exercised on the basis of race; second, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question; and third, in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination." *Snyder* v. *Louisiana*, 552 U. S. 472, 476–477 (2008) (internal quotation marks and alterations omitted).

The opponent of the strike bears the burden of persuasion regarding racial motivation, *Purkett* v. *Elem*, 514 U. S. 765, 768 (1995) (*per curiam*), and a trial court finding regarding the credibility of an attorney's explanation of the ground for a peremptory challenge is "entitled to 'great deference,'" *Felkner* v. *Jackson*, 562 U. S. 594, 598 (2011) (*per curiam*) (quoting *Batson*, 476 U. S., at 98, n. 21). On direct appeal, those findings may be reversed only if the trial judge is shown to have committed clear error. *Rice* v. *Collins*, 546 U. S. 333, 338 (2006). Under AEDPA, even more must be shown. A federal habeas court must accept a state-court finding unless it was based on "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." §2254(d)(2). "State-court factual findings, moreover, are presumed correct; the petitioner has the burden of rebutting the presumption by 'clear and convincing evidence.'" *Collins*, *supra*, at 338–339 (quoting §2254(e)(1)).

In this case, Ayala challenged seven of the prosecution's peremptory challenges. As explained above, the Ninth Circuit granted relief based on the dismissal of three potential jurors. The dissent discusses only one, Olanders D. We will devote most of our analysis to the three individuals discussed by the Ninth Circuit, but we hold that any error was harmless with respect to all seven strikes.

B

1

Ayala first contests the prosecution's decision to challenge Olanders D., an African-American man. The prosecution stated that its "primary" reason for striking Olanders D. was uncertainty about whether he could impose the death penalty, and the prosecutor noted that Olanders D. had written on his questionnaire that he did not "believe in the death penalty." 50 Reporter's Tr. on Appeal 6185 (hereinafter Tr.). Providing additional reasons for this strike, the prosecutor first stated that Olanders D.'s responses "did not make a lot of sense," "were not thought out," and "demonstrate[d] a lack of ability to express himself well." App. 283. The prosecutor also voiced doubt that Olanders D. "could actively participate in a meaningful way in deliberations with other jurors" and might have lacked the "ability to fit in with a cohesive group of 12 people." *Ibid.*

The trial court concluded that the strike was race-neutral. The judge stated: "Certainly with reference to whether or not he would get along with 12 people, it may well be that he would get along very well with 12 people. I think the other observations of counsel are accurate and borne out by the record." 50 Tr. 6186. The California Supreme Court found that the evidence of Olanders D.'s views on the death penalty provided adequate support for the trial judge's finding that the strike exercised against him was not based on race, and the court further found that defense counsel's presence would not have affected the outcome of the *Batson* hearing. The Ninth Circuit reversed, but its decision rested on a misapplication of the applicable harmless-error standards.

2

As the trial court and the State Supreme Court found, Olanders D.'s *voir dire* responses amply support the prose-

cution's concern that he might not have been willing to impose the death penalty. During *voir dire*, Olanders D. acknowledged that he wrote on his questionnaire, "'I don't believe in the death penalty,'" App. 179, and he agreed that he had at one time "thought that [the death penalty] was completely wrong," *id.,* at 177. Although he stated during the *voir dire* that he had reconsidered his views, it was reasonable for the prosecution and the trial court to find that he did not clearly or adequately explain the reason or reasons for this change. When asked about this, Olanders D. gave a vague and rambling reply: "Well, I think it's—one thing would be the—the—I mean, examining it more closely, I think, and becoming more familiar with the laws and the—and the behavior, I mean, the change in the people, I think. All of those things contributed to the changes." *Id.,* at 178.

The Ninth Circuit reversed because it speculated that defense counsel, if present when the prosecution explained the basis for this strike, "could have pointed to seated white jurors who had expressed similar or greater hesitancy" in imposing the death penalty. 756 F. 3d, at 678. The Ninth Circuit wrote that a seated white juror named Ana L. was "indistinguishable from Olanders D. in this regard" and that she had "made almost precisely the same statement in her questionnaire." *Ibid.*

The responses of Olanders D. and Ana L., however, were by no means "indistinguishable." Olanders D. initially voiced unequivocal opposition to the death penalty, stating flatly: "I don't believe in the death penalty." He also revealed that he had once thought it was "completely wrong." Ana L., by contrast, wrote on the questionnaire that she "*probably* would not be able to vote for the death penalty," App. 109 (emphasis added), and she then later said at *voir dire* that she could vote for a verdict of death.

In a capital case, it is not surprising for prospective jurors to express varying degrees of hesitancy about voting

for a death verdict. Few are likely to have experienced a need to make a comparable decision at any prior time in their lives. As a result, both the prosecution and the defense may be required to make fine judgment calls about which jurors are more or less willing to vote for the ultimate punishment. These judgment calls may involve a comparison of responses that differ in only nuanced respects, as well as a sensitive assessment of jurors' demeanor. We have previously recognized that peremptory challenges "are often the subjects of instinct," *Miller-El* v. *Dretke*, 545 U. S. 231, 252 (2005) (citing *Batson*, 476 U. S., at 106 (Marshall, J., concurring)), and that "race-neutral reasons for peremptory challenges often invoke a juror's demeanor," *Snyder*, 552 U. S., at 477. A trial court is best situated to evaluate both the words and the demeanor of jurors who are peremptorily challenged, as well as the credibility of the prosecutor who exercised those strikes. As we have said, "these determinations of credibility and demeanor lie peculiarly within a trial judge's province," and "in the absence of exceptional circumstances, we [will] defer to the trial court." *Ibid.* (alterations and internal quotation marks omitted). "Appellate judges cannot on the basis of a cold record easily second-guess a trial judge's decision about likely motivation." *Collins*, 546 U. S., at 343 (BREYER, J., concurring).

The upshot is that even if "[r]easonable minds reviewing the record might disagree about the prosecutor's credibility, . . . on habeas review that does not suffice to supersede the trial court's credibility determination." *Id.,* at 341–342 (majority opinion). Here, any similarity between the responses of Olanders D. and Ana L. is insufficient to compel an inference of racial discrimination under *Brecht* or AEDPA.

Ayala contends that the presence of defense counsel might have made a difference because defense counsel might have been able to identify white jurors who were

not stricken by the prosecution even though they had "expressed similar or greater hesitancy" about the death penalty. We see no basis for this argument. The questionnaires of all the jurors who sat and all the alternates are in the record, and Ana L., whom we just discussed, is apparently the white juror whose answers come the closest to those of Olanders D. Since neither Ayala nor the Ninth Circuit identified a white juror whose statements better support their argument, there is no reason to think that defense counsel could have pointed to a superior comparator at the *ex parte* proceeding.

3

In rejecting the argument that the prosecutor peremptorily challenged Olanders D. because of his race, the California Supreme Court appears to have interpreted the prosecutor's explanation of this strike to mean that Olanders D.'s views on the death penalty were alone sufficient to convince him to exercise a strike, see 24 Cal. 4th, at 266, 6 P. 3d, at 206, and this was certainly an interpretation of the record that must be sustained under 28 U. S. C. §2254(d)(2). As a result, it is not necessary for us to consider the prosecutor's supplementary reason for this strike—the poor quality of Olanders D.'s responses—but in any event, the Ninth Circuit's evaluation of this reason is also flawed.

The Ninth Circuit wrote that its independent "review of the voir dire transcript reveal[ed] nothing that supports the prosecution's claim: Olanders D.'s answers were responsive and complete." 756 F. 3d, at 679. The record, however, provides sufficient support for the trial court's determination. Olanders D.'s incoherent explanation during *voir dire* of the reasons for his change of opinion about the death penalty was quoted above. He also provided a chronology of the evolution of his views on the subject that did not hold together. He stated that he had

been "completely against the death sentence" 10 years earlier but seemed to suggest that his views had changed over the course of the intervening decade. See App. 176–177. However, on the questionnaire, which he had completed just a month before the *voir dire*, he wrote unequivocally: "I don't believe in the death penalty." *Id.*, at 179. And then, at the time of the *voir dire*, he said that he would be willing to impose the death penalty in some cases. *Id.*, at 180. He explained his answer on the questionnaire as follows: "I answered that kind of fast[.] [N]ormally, I wouldn't answer that question that way, but I mean, I really went through that kind of fast. I should have done better than that." *Id.,* at 179–180. These answers during *voir dire* provide more than sufficient support for the prosecutor's observation, which the trial court implicitly credited, that Olanders D.'s statements "did not make a lot of sense," "were not thought out," and "demonstrate[d] a lack of ability to express himself well."

In ordering federal habeas relief based on their assessment of the responsiveness and completeness of Olanders D.'s answers, the members of the panel majority misunderstood the role of a federal court in a habeas case. The role of a federal habeas court is to " 'guard against extreme malfunctions in the state criminal justice systems,' " *Richter*, 562 U. S., at 102–103 (quoting *Jackson* v. *Virginia*, 443 U. S. 307, 332, n. 5 (1979) (Stevens, J., concurring in judgment)), not to apply *de novo* review of factual findings and to substitute its own opinions for the determination made on the scene by the trial judge.

C

Ayala next challenges the prosecution's use of a peremptory challenge to strike Gerardo O., a Hispanic man. The prosecution offered three reasons for this strike: Gerardo O. had a poor grasp of English; his answers during *voir dire* and on his questionnaire suggested that he might

not be willing to impose the death penalty; and he did not appear to get along with the other prospective jurors. The trial judge accepted this explanation, as did the State Supreme Court.

The Ninth Circuit, however, rejected the state courts' determinations based on speculation that defense counsel, if present at the *in camera* hearing, "likely could have called into question all of the prosecution's stated reasons for striking Gerardo O." 756 F. 3d, at 680. The Ninth Circuit thought that it could grant Ayala relief simply because it "[could not] say that Ayala would not have shown that the trial court would or should have determined that the prosecution's strike of Gerardo O. violated *Batson*." *Id.,* at 682. But that is not the test. The inquiry under *Brecht* is not whether the federal habeas court could definitively say that there were no winning arguments that the defense could have made. Instead, the evidence in the record must raise "grave doubt[s]" about whether the trial judge would have ruled differently. *O'Neal*, 513 U. S., at 436. This requires much more than a "reasonable possibility" that the result of the hearing would have been different. *Brecht*, 507 U. S., at 637 (internal quotation marks omitted). And on the record in this case, Ayala cannot establish actual prejudice or that no fairminded jurist could agree with the state court's application of *Chapman*.

We begin with the prosecution's explanation that it challenged Gerardo O. because of his limited English proficiency. During *voir dire*, Gerardo O. acknowledged that someone else had written the answers for him on his questionnaire "[b]ecause I couldn't—I cannot read—I cannot spell that well." App. 163. He added that he "didn't get" some of the words on the questionnaire. *Ibid.* Gerardo O.'s testimony also revealed that he might well have been unable to follow what was said at trial. When asked whether he could understand spoken English, he

responded: "It depends if you make long words. If you make—if you go—if you say it straight out, then I might understand. If you beat around the bush, I won't." *Id.,* at 166. At that point, defense counsel and Gerardo O. engaged in a colloquy that suggests that defense counsel recognized that he lacked the ability to understand words not used in basic everyday speech, "legal words," and rapid speech in English:

> "Q: I'll try not to talk—use any legal words or lawyer talk—
>
> "A: Okay.
>
> "Q: —and talk regular with you. If you don't understand anything I say, stop me and tell me, okay?
>
> "A: Okay.
>
> "Q: If you're selected as a juror during the trial, and you know you're serving as a juror and listening to witnesses, can we have your promise that if a witness uses a word you don't understand, you'll put your hand up and let us know?
>
> "A: Yeah.
>
> . . . . .
>
> "Q: There's one more problem that you're going to have with me, and that is that sometimes . . . I talk real fast . . . ." *Id.,* at 166–167.

It is understandable for a prosecutor to strike a potential juror who might have difficulty understanding English.[3] The jurors who were ultimately selected heard

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[3]The California Supreme Court has held that "[i]nsufficient command of the English language to allow full understanding of the words employed in instructions and full participation in deliberations clearly . . . render[s] a juror 'unable to perform his duty'" within the meaning of the California Penal Code. *People* v. *Lomax*, 49 Cal. 4th 530, 566, 234 P. 3d 377, 407 (2010) (citation omitted). See also Cal. Code Ann.

many days of testimony, and the instructions at both the guilt and the penalty phases included "legal words" and words not common in everyday speech. The prosecution had an obvious reason to worry that service on this jury would have strained Gerardo O.'s linguistic capability.

The Ninth Circuit reached a contrary conclusion by distorting the record and the applicable law. The Ninth Circuit first suggested that Gerardo O.'s English-language deficiencies were limited to reading and writing, 756 F. 3d, at 680, but as the portions of the *voir dire* quoted above make clear, that was not true; the record shows that his ability to understand spoken English was also limited. The Ninth Circuit then suggested that "[t]he prosecution's purported reason for striking Gerardo O. . . . was directly related to his status as someone who spoke Spanish as his first language," *ibid.*, but the prosecutor voiced no concern about Gerardo O.'s ability to speak Spanish or about the fact that Spanish was his first language. The prosecution's objection concerned Gerardo O.'s limited proficiency in *English*. The Ninth Circuit quoted the following statement from *Hernandez* v. *New York*, 500 U. S. 352, 363 (1991) (plurality opinion): "'[T]he prosecutor's frank admission that his ground for excusing th[is] juror[ ] related to [his] ability to speak and understand Spanish raised a plausible, though not a necessary, inference that language might be a pretext for what in fact [was a] race-based peremptory challenge[ ].'" 756 F. 3d, at 680 (alterations in original). This statement, however, did not concern a peremptory exercised due to a prospective juror's lack of English proficiency. Instead, it concerned the dismissal of

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Civ. Proc. §203(a)(6) (West 2006). The seating of jurors whose lack of English proficiency was only somewhat more pronounced than Gerardo O.'s has been held to be error. See *People* v. *Szymanski*, 109 Cal. App. 4th 1126, 135 Cal. Rptr. 2d 691 (2003).

Spanish-speaking members of the venire for fear that, if seated, they might not follow the English translation of testimony given in Spanish. See 500 U. S., at 360. The Ninth Circuit's decision regarding Gerardo O. was thus based on a misreading of the record and a distortion of our case law. And neither Ayala nor the Ninth Circuit has identified anything that defense counsel might have done at the *ex parte* hearing to show that the prosecutor's concern about Gerardo O.'s limited English proficiency was pretextual.

The prosecution's second proffered reason for striking Gerardo O. was concern about his willingness to impose the death penalty, and as the trial court found, this observation was also supported by the record. Indeed, when asked in *voir dire* how he felt about imposing the death penalty, Gerardo O. responded that he was "[k]ind of shaky about it. . . . I'm not too sure if I can take someone else's life in my hands and say that; say, you know, 'death,' or something." App. 168. In response to another question about his thoughts on the death penalty, he replied: "I don't know yet. It's kind of hard, you know, to pick it up like that and say how I feel about the death penalty." 15 Tr. 1052. Answering a question about whether his thoughts on the death penalty would affect how he viewed the evidence presented at trial, he responded, "I don't know, sir, to tell you the truth." App. 165. And when asked if he had "any feeling that [he] would be unable to vote for the death penalty if [he] thought it was a case that called for it," Gerardo O. responded once again, "I don't know." 15 Tr. 1043. While Gerardo O. did say at one point that he might be willing to impose the death penalty, he qualified that statement by adding that he would be comforted by the fact that "there's eleven more other persons on the jury." App. 170.

What we said above regarding jurors who express doubts about their openness to a death verdict applies as

well here. The prosecution's reluctance to take a chance that Gerardo O. would ultimately be willing to consider the death penalty in accordance with state law did not compel the trial judge to find that the strike of Gerardo O. was based on race.

Nor is there a basis for finding that the absence of defense counsel affected the trial judge's evaluation of the sincerity of this proffered ground for the strike. Defense counsel had a full opportunity during *voir dire* to create a record regarding Gerardo O.'s openness to the death penalty. And defense counsel had the opportunity prior to the *ex parte* proceeding on the Gerardo O. strike to compare the minority jurors dismissed by the prosecution with white jurors who were seated. Counsel argued that the answers on the death penalty given by the minority jurors were "not significantly different from [those of] the white jurors that the prosecution ha[d] chosen to leave on the jury." *Id.,* at 306. The trial judge asked counsel for "particulars," and counsel discussed Gerardo O., albeit briefly. *Id.,* at 307–308. Thus, there is no reason to believe that counsel could have made a more persuasive argument at the *ex parte* proceeding than he made during this exchange.

The prosecution's final reason for striking Gerardo O. was that he appeared to be "a standoffish type of individual" whose "dress and . . . mannerisms . . . were not in keeping with the other jurors" and who "did not appear to be socializing or mixing with any of the other jurors." *Id.*, at 298. The trial judge did not dispute that the prosecution's reflections were borne out by the record. The California Supreme Court affirmed and also emphasized that "the trial court's rulings in the ex parte hearing indisputably reflect both its familiarity with the record of voir dire of the challenged prospective jurors and its critical assessment of the prosecutor's proffered justifications." 24 Cal. 4th, at 266–267, 6 P. 3d, at 206.

In light of the strength of the prosecution's first two reasons for striking Gerardo O., it is not at all clear that the prosecution proffered this final reason as an essential factor in its decision to strike, but in any event, there is no support for the suggestion that Ayala's attorney, if allowed to attend the *ex parte* hearing, would have been able to convince the judge that this reason was pretextual. The Ninth Circuit, however, was content to speculate about what might have been. Mixing guesswork with armchair sociology, the Ninth Circuit mused that "[i]t is likely that Gerardo O.'s dress and mannerisms were distinctly Hispanic. Perhaps in the late 1980's Hispanic males in San Diego County were more likely than members of other racial or ethnic groups in the area to wear a particular style or color of shirt, and Gerardo O. was wearing such a shirt." 756 F. 3d, at 680–681. As for the prosecution's observation that Gerardo O. did not socialize with other jurors, the Ninth Circuit posited that, "perhaps, unbeknownst to the trial judge, Gerardo O. did 'socializ[e] or mix[ ]' with a number of other jurors, and had even organized a dinner for some of them at his favorite Mexican restaurant." *Id.,* at 681.

This is not how habeas review is supposed to work. The record provides no basis for the Ninth Circuit's flight of fancy. *Brecht* requires more than speculation about what extrarecord information defense counsel might have mentioned. And speculation of that type is not enough to show that a State Supreme Court's rejection of the argument regarding Gerardo O. was unreasonable.

D

The final prospective juror specifically discussed in the Ninth Circuit's decision was Robert M., who is Hispanic. The prosecution's primary proffered reason for striking Robert M. was concern that he would not impose the death penalty, though the prosecution added that it was troubled

that he had followed the Sagon Penn case, a high-profile prosecution in San Diego in which an alleged murderer was acquitted amid allegations of misconduct by police and prosecutors. In addition, the prosecution also explained to the trial court that Robert M. scored poorly on its 10-point scale for evaluating prospective jurors. The trial court accepted the prosecutor's explanation of the strike.

With respect to the prosecution's concern that Robert M. might not be willing to impose the death penalty, the Ninth Circuit found that defense counsel, if permitted to attend the *in camera* proceeding, could have compared Robert M.'s statements about the death penalty to those of other jurors and could have reminded the judge that Robert M. had "repeatedly stated during voir dire that he believed in the death penalty and could personally vote to impose it." 756 F. 3d, at 682. But as with Olanders D. and Gerardo O., we cannot say that the prosecution had no basis for doubting Robert M.'s willingness to impose the death penalty. For example, when asked at one point whether he could vote for death, Robert M. responded: "Well, I've though[t] about that, but it's a difficult question, and yeah, it is difficult for me to say, you know, one way or the other. I believe in it, but for me to be involved in it is—is hard. It's hard to accept that aspect of it, do you know what I mean?" App. 149–150. In response to another question, he said: "It would be hard, but I think I could, yes. It's—it's hard to say, you know—and I don't care who the person is—to say that they have to put somebody away, you know. It's very hard." *Id.,* at 154. These are hardly answers that would inspire confidence in the minds of prosecutors in a capital case.

While the Ninth Circuit argued that defense counsel's absence at the *in camera* hearing prejudiced the trial judge's ability to assess this reason for the strike of Robert M., the Ninth Circuit failed to mention that defense coun-

sel specifically addressed this issue during *voir dire*. At that time, he pointedly reminded the judge that Robert M. had made several statements during *voir dire* that were favorable to the death penalty. *Id.*, at 307. The trial judge thus heard defense counsel's arguments but nevertheless concluded that the record supplied a basis for a legitimate concern about whether Robert M. could impose the death penalty. That Ayala's attorney did not have the opportunity to repeat this same argument once more at the *in camera* proceeding does not create grave doubt about whether the trial court would have decided the issue differently.

As for the prosecution's second proffered reason for striking Robert M.—that he had followed the Sagon Penn case[4]—the Ninth Circuit placed great emphasis on the fact that a seated white juror had followed a different murder trial, that of Robert Alton Harris.[5] But the Penn and Harris cases were quite different. Harris was convicted while Penn was acquitted; and since the Harris case was much older, the experience of following it was less likely to have an effect at the time of the trial in this case.

E

Ayala raised a *Batson* objection about the prosecution's use of peremptory challenges on four additional jurors, George S., Barbara S., Galileo S., and Luis M. The Ninth Circuit did not address these prospective jurors at length, and we need not dwell long on them. With respect to all four of these prospective jurors, we conclude that any constitutional error was harmless.

Of these four additional jurors, Ayala's brief in this Court develops an argument with respect to only two,

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[4] See Man Acquitted of Killing Officer, N. Y. Times, July 17, 1987, p. B8.

[5] See *People* v. *Harris*, 28 Cal. 3d 935, 623 P. 2d 240 (1981).

George S. and Barbara S. And while Ayala's attorney claimed that George S. was Hispanic, the prosecutor said that he thought that George S. was Greek. In any event, the prosecution offered several reasons for striking George S. The prosecutor noted that one of his responses "was essentially, 'you probably don't want me to be a juror on this case.'" *Id.*, at 312. The prosecutor was also concerned about whether he would vote for death or even a life sentence and whether he would follow the law as opposed to his personal religious beliefs. In addition, the prosecutor noted that George S. had previously been the sole holdout on a jury and that his prior application to be a police officer had been rejected, for reasons that were not clear. The trial court accepted these explanations.

Ayala contests only two of these justifications. He quibbles that George S. had not been a "'holdout,'" but instead had been the dissenting juror in a civil case on which unanimity was not required. This observation does not render the prosecution's proffered justification "false or pretextual." Brief for Respondent 46. The fact that George S. had been willing to dissent from a jury verdict could reasonably give a prosecutor pause in a capital case since a single holdout juror could prevent a guilty verdict or death sentence. The most that Ayala can establish is that reasonable minds can disagree about whether the prosecution's fears were well founded, but this does not come close to establishing "actual prejudice" under *Brecht*. Nor does it meet the AEDPA standard. Ayala also points out that a seated white juror, Charles C., had been rejected by a police force, but George S. admitted that he had applied to law enforcement because he was "trying to get out of the Army," App. 222, and the reasons for his rejection were not clear. Charles C., by contrast, had received a qualifying score on a law enforcement exam but was not hired because a position was not available.

As for Barbara S., the prosecution struck her because,

during *voir dire*, she appeared to be "under the influence of drugs" and disconnected from the proceedings. *Id.*, at 314. The prosecution emphasized that she had "an empty look in her eyes, slow responses, a lack of really being totally in tune with what was going on." *Ibid.* It added that she appeared "somewhat angry," "manifest[ed] a great deal of nervousness," and seemed like someone who would be unlikely to closely follow the trial. *Ibid.* The trial judge thought that Barbara S. appeared nervous rather than hostile, but he agreed that she gave incomplete answers that were sometimes "non sequiturs." *Id.*, at 315. He concluded, "I certainly cannot quarrel . . . with your subjective impression, and the use of your peremptory challenge based upon her individual manifestation, as opposed to her ethnicity." *Ibid.* Ayala points to the trial court's disagreement with the prosecutor's impression that Barbara S. was hostile, but this ruling illustrates the trial judge's recollection of the demeanor of the prospective jurors and his careful evaluation of each of the prosecutor's proffered reasons for strikes. And the fact that the trial judge's impression of Barbara S.'s demeanor was somewhat different from the prosecutor's hardly shows that the prosecutor's reasons were pretextual. It is not at all unusual for individuals to come to different conclusions in attempting to read another person's attitude or mood.

IV

The pattern of peremptory challenges in this case was sufficient to raise suspicions about the prosecution's motives and to call for the prosecution to explain its strikes. As we have held, the Fourteenth Amendment prohibits a prosecutor from striking potential jurors based on race. Discrimination in the jury selection process undermines our criminal justice system and poisons public confidence in the evenhanded administration of justice.

In *Batson*, this Court adopted a procedure for ferreting

out discrimination in the exercise of peremptory challenges, and this procedure places great responsibility in the hands of the trial judge, who is in the best position to determine whether a peremptory challenge is based on an impermissible factor. This is a difficult determination because of the nature of peremptory challenges: They are often based on subtle impressions and intangible factors. In this case, the conscientious trial judge determined that the strikes at issue were not based on race, and his judgment was entitled to great weight. On appeal, five justices of the California Supreme Court carefully evaluated the record and found no basis to reverse. A Federal District Judge denied federal habeas relief, but a divided panel of the Ninth Circuit reversed the District Court and found that the California Supreme Court had rendered a decision with which no fairminded jurist could agree.

For the reasons explained above, it was the Ninth Circuit that erred. The exclusion of Ayala's attorney from part of the *Batson* hearing was harmless error. There is no basis for finding that Ayala suffered actual prejudice, and the decision of the California Supreme Court represented an entirely reasonable application of controlling precedent.

* * *

The judgment of the Court of Appeals for the Ninth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 13–1428

RON DAVIS, ACTING WARDEN, PETITIONER *v.*
HECTOR AYALA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[June 18, 2015]

JUSTICE KENNEDY, concurring.

My join in the Court's opinion is unqualified; for, in my view, it is complete and correct in all respects. This separate writing responds only to one factual circumstance, mentioned at oral argument but with no direct bearing on the precise legal questions presented by this case.

In response to a question, respondent's counsel advised the Court that, since being sentenced to death in 1989, Ayala has served the great majority of his more than 25 years in custody in "administrative segregation" or, as it is better known, solitary confinement. Tr. of Oral Arg. 43–44. Counsel for petitioner did not have a clear opportunity to enter the discussion, and the precise details of respondent's conditions of confinement are not established in the record. Yet if his solitary confinement follows the usual pattern, it is likely respondent has been held for all or most of the past 20 years or more in a windowless cell no larger than a typical parking spot for 23 hours a day; and in the one hour when he leaves it, he likely is allowed little or no opportunity for conversation or interaction with anyone. *Ibid.*; see also *Wilkinson* v. *Austin*, 545 U. S. 209, 218 (2005); Amnesty International, Entombed: Isolation in the U. S. Federal Prison System (2014). It is estimated that 25,000 inmates in the United States are currently serving their sentence in whole or substantial part in

solitary confinement, many regardless of their conduct in prison. *Ibid.*

The human toll wrought by extended terms of isolation long has been understood, and questioned, by writers and commentators. Eighteenth-century British prison reformer John Howard wrote "that criminals who had affected an air of boldness during their trial, and appeared quite unconcerned at the pronouncing sentence upon them, were struck with horror, and shed tears when brought to these darksome solitary abodes." The State of the Prisons in England and Wales 152 (1777). In literature, Charles Dickens recounted the toil of Dr. Manette, whose 18 years of isolation in One Hundred and Five, North Tower, caused him, even years after his release, to lapse in and out of a mindless state with almost no awareness or appreciation for time or his surroundings. A Tale of Two Cities (1859). And even Manette, while imprisoned, had a work bench and tools to make shoes, a type of diversion no doubt denied many of today's inmates.

One hundred and twenty-five years ago, this Court recognized that, even for prisoners sentenced to death, solitary confinement bears "a further terror and peculiar mark of infamy." *In re Medley*, 134 U. S. 160, 170 (1890); see also *id.*, at 168 ("A considerable number of the prisoners fell, after even a short [solitary] confinement, into a semi-fatuous condition . . . and others became violently insane; others, still, committed suicide"). The past centuries' experience and consideration of this issue is discussed at length in texts such as The Oxford History of the Prison: The Practice of Punishment in Western Society (1995), a joint disciplinary work edited by law professor Norval Morris and professor of medicine and psychiatry David Rothman that discusses the deprivations attendant to solitary confinement. *Id.,* at 184.

Yet despite scholarly discussion and some commentary from other sources, the condition in which prisoners are

kept simply has not been a matter of sufficient public inquiry or interest. To be sure, cases on prison procedures and conditions do reach the courts. See, *e.g., Brown* v. *Plata*, 563 U. S. ___ (2011); *Hutto* v. *Finney*, 437 U. S. 678, 685 (1978) ("Confinement in a prison or in an isolation cell is a form of punishment subject to scrutiny under the Eighth Amendment"); *Weems* v. *United States*, 217 U. S. 349, 365–367 (1910). Sentencing judges, moreover, devote considerable time and thought to their task. There is no accepted mechanism, however, for them to take into account, when sentencing a defendant, whether the time in prison will or should be served in solitary. So in many cases, it is as if a judge had no choice but to say: "In imposing this capital sentence, the court is well aware that during the many years you will serve in prison before your execution, the penal system has a solitary confinement regime that will bring you to the edge of madness, perhaps to madness itself." Even if the law were to condone or permit this added punishment, so stark an outcome ought not to be the result of society's simple unawareness or indifference.

Too often, discussion in the legal academy and among practitioners and policymakers concentrates simply on the adjudication of guilt or innocence. Too easily ignored is the question of what comes next. Prisoners are shut away—out of sight, out of mind. It seems fair to suggest that, in decades past, the public may have assumed lawyers and judges were engaged in a careful assessment of correctional policies, while most lawyers and judges assumed these matters were for the policymakers and correctional experts.

There are indications of a new and growing awareness in the broader public of the subject of corrections and of solitary confinement in particular. See, *e.g.,* Gonnerman, Before the Law, The New Yorker, Oct. 6, 2014, p. 26 (detailing multiyear solitary confinement of Kalief Browder,

who was held—but never tried—for stealing a backpack); Schwirtz & Winerip, Man, Held at Rikers for 3 Years Without Trial, Kills Himself, N. Y. Times, June 9, 2015, p. A18. And penology and psychology experts, including scholars in the legal academy, continue to offer essential information and analysis. See, *e.g.,* Simon & Sparks, Punishment and Society: The Emergence of an Academic Field, in The SAGE Handbook of Punishment and Society (2013); see also Venters et al., Solitary Confinement and Risk of Self-Harm Among Jail Inmates, 104 Am. J. Pub. Health 442 (March 2014); Metzner & Fellner, Solitary Confinement and Mental Illness in U. S. Prisons: A Challenge for Medical Ethics, 38 J. Am. Academy Psychiatry and Law 104–108 (2010).

These are but a few examples of the expert scholarship that, along with continued attention from the legal community, no doubt will aid in the consideration of the many issues solitary confinement presents. And consideration of these issues is needed. Of course, prison officials must have discretion to decide that in some instances temporary, solitary confinement is a useful or necessary means to impose discipline and to protect prison employees and other inmates. But research still confirms what this Court suggested over a century ago: Years on end of near-total isolation exact a terrible price. See, *e.g.,* Grassian, Psychiatric Effects of Solitary Confinement, 22 Wash. U. J. L. & Pol'y 325 (2006) (common side-effects of solitary confinement include anxiety, panic, withdrawal, hallucinations, self-mutilation, and suicidal thoughts and behaviors). In a case that presented the issue, the judiciary may be required, within its proper jurisdiction and authority, to determine whether workable alternative systems for long-term confinement exist, and, if so, whether a correctional system should be required to adopt them.

Over 150 years ago, Dostoyevsky wrote, "The degree of civilization in a society can be judged by entering its pris-

ons." The Yale Book of Quotations 210 (F. Shapiro ed. 2006). There is truth to this in our own time.

SUPREME COURT OF THE UNITED STATES

No. 13–1428

RON DAVIS, ACTING WARDEN, PETITIONER *v.*
HECTOR AYALA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[June 18, 2015]

JUSTICE THOMAS, concurring.

I join the Court's opinion explaining why Ayala is not entitled to a writ of habeas corpus from this or any other federal court. I write separately only to point out, in response to the separate opinion of JUSTICE KENNEDY, that the accommodations in which Ayala is housed are a far sight more spacious than those in which his victims, Ernesto Dominguez Mendez, Marcos Antonio Zamora, and Jose Luis Rositas, now rest. And, given that his victims were all 31 years of age or under, Ayala will soon have had as much or more time to enjoy those accommodations as his victims had time to enjoy this Earth.

SUPREME COURT OF THE UNITED STATES

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[June 18, 2015]

JUSTICE SOTOMAYOR, with whom JUSTICE GINSBURG, JUSTICE BREYER, and JUSTICE KAGAN join, dissenting.

At Hector Ayala's trial, the prosecution exercised its peremptory strikes to dismiss all seven of the potential black and Hispanic jurors. In his federal habeas petition, Ayala challenged the state trial court's failure to permit his attorneys to participate in hearings regarding the legitimacy of the prosecution's alleged race-neutral reasons for its strikes. See *Batson* v. *Kentucky*, 476 U. S. 79, 97–98 (1986). The Court assumes that defense counsel's exclusion from these proceedings violated Ayala's constitutional rights, but concludes that the Ninth Circuit erred in granting habeas relief because there is insufficient reason to believe that counsel could have convinced the trial court to reject the prosecution's proffered reasons. I respectfully dissent. Given the strength of Ayala's prima facie case and the comparative juror analysis his attorneys could have developed if given the opportunity to do so, little doubt exists that counsel's exclusion from Ayala's *Batson* hearings substantially influenced the outcome.

I

My disagreement with the Court does not stem from its discussion of the applicable standard of review, which simply restates the holding of *Fry* v. *Pliler*, 551 U. S. 112

(2007). *Fry* rejected the argument that the Antiterrorism and Effective Death Penalty Act of 1996, 28 U. S. C. §2254, compels federal courts to apply any standard other than that set forth in *Brecht* v. *Abrahamson*, 507 U. S. 619 (1993), when assessing the harmlessness of a constitutional error on habeas review. 551 U. S., at 120. *Brecht*, in turn, held that the harmlessness standard federal courts must apply in collateral proceedings is more difficult to meet than the "'beyond a reasonable doubt'" standard applicable on direct review. 507 U. S., at 622–623 (quoting *Chapman* v. *California*, 386 U. S. 18, 24 (1967)). More specifically, under *Brecht*, a federal court can grant habeas relief only when it concludes that a constitutional error had a "'substantial and injurious effect or influence'" on either a jury verdict or a trial court decision. 507 U. S., at 623. Later, *O'Neal* v. *McAninch*, 513 U. S. 432 (1995), clarified that this standard is satisfied when a reviewing judge "is in grave doubt about whether" the error is harmless; that is, when "the matter is so evenly balanced that [a judge] feels himself in virtual equipoise as to the harmlessness of the error." *Id.,* at 435 (emphasis deleted). See also *ante,* at 10 (quoting *O'Neal*, 513 U. S., at 436). Put differently, when a federal court is in equipoise as to whether an error was actually prejudicial, it must "treat the error, not as if it were harmless, but as if it affected the verdict (*i.e.,* as if it had a 'substantial and injurious effect or influence in determining the jury's verdict')." *O'Neal*, 513 U. S., at 435.

In addition to confirming the *Brecht* standard's continued vitality, *Fry* established its exclusivity. *Fry* expressly held that federal habeas courts need not first assess whether a state court unreasonably applied *Chapman* before deciding whether that error was prejudicial under *Brecht*. Such a requirement would "mak[e] no sense . . . when the latter [standard] obviously subsumes the former." *Fry*, 551 U. S., at 120. Nothing in the Court's opin-

ion today calls into question this aspect of *Fry*'s holding. If a trial error is prejudicial under *Brecht*'s standard, a state court's determination that the error was harmless beyond a reasonable doubt is necessarily unreasonable. See *ante,* at 11–12.

II

A

To apply *Brecht* to the facts of this case, it is essential to understand the contours of Ayala's underlying constitutional claim or—perhaps more importantly—to appreciate what his claim is not. Trial judges assess criminal defendants' challenges to prosecutors' use of peremptory strikes using the three-part procedure first announced in *Batson*. After a defendant makes a "prima facie showing that a peremptory challenge [was] . . . exercised on the basis of race," the prosecution is given an opportunity to "offer a race-neutral basis for striking the juror in question," *Miller-El* v. *Cockrell*, 537 U. S. 322, 328 (2003). The court then "decid[es] whether it was more likely than not that the challenge was improperly motivated." *Johnson* v. *California*, 545 U. S. 162, 169, 170 (2005). This determination is a factual one, which—as the Court correctly notes—reviewing courts must accord "'great deference.'" See *ante,* at 13 (quoting *Felkner* v. *Jackson*, 562 U. S. 594, 598 (2011) (*per curiam*)).

Here, Ayala does not claim that the trial court wrongly rejected his *Batson* challenges based on the record before it. Rather, Ayala's claim centers on the exclusion of his attorneys from the *Batson* hearings. Ayala contends that there is at least a grave doubt as to whether the trial or appellate court's consideration of his *Batson* challenges was substantially influenced by the trial court's erroneous refusal to permit his attorneys to appear at the hearings at which those challenges were adjudicated. Ayala's conviction must be vacated if there is grave doubt as to

whether even just one of his *Batson* challenges would have been sustained had the defense been present. *Snyder* v. *Louisiana*, 552 U. S. 472, 478 (2008) (reversing a conviction after concluding that use of one peremptory strike was racially motivated).

B

The Court's *Brecht* application begins and ends with a discussion of particular arguments the Ninth Circuit posited Ayala's lawyers could have raised had they been present at his *Batson* hearings. This approach fails to account for the basic background principle that must inform the application of *Brecht* to Ayala's procedural *Batson* claim: the "[c]ommon sense" insight "that secret decisions based on only one side of the story will prove inaccurate more often than those made after hearing from both sides." *Kaley* v. *United States*, 571 U. S. ___, ___ (2014) (ROBERTS, C. J., dissenting) (slip op., at 16). Our entire criminal justice system was founded on the premise that "[t]ruth . . . is best discovered by powerful statements on both sides of the question." *United States* v. *Cronic*, 466 U. S. 648, 655 (1984) (internal quotation marks omitted). There is no reason to believe that *Batson* hearings are the rare exception to this rule. Instead, defense counsel could have played at least two critical roles had they been present at Ayala's *Batson* hearings.

First, Ayala's attorneys would have been able to call into question the credibility of the prosecution's asserted race-neutral justifications for the use of its peremptory strikes. Of course, a trial court may identify some pretextual reasons on its own, but *Snyder* held that when assessing a claimed *Batson* error, "all of the circumstances that bear upon the issue of racial animosity must be consulted." *Snyder*, 552 U. S., at 478. Absent an adversarial presentation, a diligent judge may overlook relevant facts or legal arguments in even a straightforward case. There is

also great probative force to a "comparative juror analysis"—an analysis of whether the prosecution's reasons for using its peremptory strikes against nonwhite jurors apply equally to white jurors whom it would have allowed to serve. *Miller-El* v. *Dretke*, 545 U. S. 231, 241 (2005). See also *Snyder*, 552 U. S., at 483 (emphasizing importance of conducting a comparative juror analysis in the trial court). Trial courts are ill suited to perform this intensive inquiry without defense counsel's assistance.

The risk that important arguments will not be considered rises close to a certainty in a capital case like Ayala's, where jury selection spanned more than three months, involved more than 200 prospective jurors, and generated a record that is massive by any standard. See *Ayala* v. *Wong*, 756 F. 3d 656, 660, 676 (CA9 2014) (case below). It strains credulity to suggest that a court confronted with this mountain of information necessarily considered all of the facts that would have informed its credibility determination without the presence of defense counsel to help bring them to its attention.

Second, not only did the exclusion of defense counsel from Ayala's *Batson* hearings prevent him from making his strongest arguments before the person best situated to assess their merit, it also impeded his ability to raise these claims on appeal. Because Ayala's lawyers were not afforded any opportunity to respond to the prosecution's race-neutral reasons, we are left to speculate as to whether the trial court actually considered any of the points the defense would have made before it accepted the prosecution's proffered explanations. Moreover, even if we could divine which of the possible considerations the trial judge took into account, our review would still be unduly constrained by a record that lacks whatever material facts the defense would have preserved had it been on notice of the assertions that it needed to challenge. Perhaps some of these facts, such as the jurors' appearance and demeanor,

were known to the trial judge, but appellate courts "can only serve [their] function when the record is clear as to the relevant facts" or when they can rely on "defense counsel['s] fail[ure] to point out any such facts after learning of the prosecutor's reasons." *United States* v. *Thompson*, 827 F. 2d 1254, 1261 (CA9 1987). Neither of these conditions is met here.

For the reasons described above, the fact that counsel was wrongfully excluded from Ayala's *Batson* hearings on its own raises doubt as to whether the outcome of these proceedings—or the appellate courts' review of them—would have been the same had counsel been present.[1] This doubt is exacerbated by the loss of the vast majority of the questionnaires that jurors completed at the start of *voir dire*, including those filled out by the seven black and Hispanic jurors against whom the prosecution exercised its peremptory strikes. The prosecution cited these questionnaires in support of its alleged race-neutral reasons at the *ex parte Batson* hearings. See *e.g.,* App. 283, 298, 312, 314, 316. Without the underlying documents, however, it is impossible to assess whether the prosecution's characterizations of those prospective jurors' responses were fair and accurate. The loss of the questionnaires has also precluded every court that has reviewed this case from performing a comprehensive comparative juror analysis. The Court today analyzes how the prosecution's statements at the *ex parte Batson* hearings regarding the black and Hispanic jurors' questionnaires stack up against the

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[1] Indeed, in a future case arising in a direct review posture, the Court may have occasion to consider whether the error that the Court assumes here gives rise to "circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." *United States* v. *Cronic*, 466 U. S. 648, 658 (1984). See also *Mickens* v. *Taylor*, 535 U. S. 162, 166 (2002) (noting that we have "presumed [prejudicial] effec[t] where assistance of counsel has been denied entirely or during a critical stage of the proceeding").

actual questionnaires completed by the white seated jurors and alternates. But there is no way to discern how these representations compare with the answers that were given by white jurors whom the prosecution would have permitted to serve but whom the defense ultimately struck. See *Miller-El* v. *Dretke*, 545 U. S., at 244–245 (comparing a juror struck by the prosecution with a juror challenged only by the defense).

C

The above-described consequences of the trial court's procedural error and the fact that the prosecution struck every potential black or Hispanic juror go a long way toward establishing the degree of uncertainty that *Brecht* requires. Keeping these considerations in mind, the next step is to assess the arguments that Ayala's attorneys may have raised had they been allowed to participate at his *Batson* hearings. As explained above, Ayala is entitled to habeas relief if a reviewing judge is in "equipoise" as to whether his lawyers' exclusion from the *Batson* hearings had an "injurious effect" on the trial court's failure to find by a preponderance of the evidence that any of the prosecution's peremptory strikes was racially motivated. With the inquiry so framed, it is easy to see that the Ninth Circuit correctly found that Ayala was actually prejudiced by the trial court's constitutional error. In particular, there is a substantial likelihood that if defense counsel had been present, Ayala could at least have convinced the trial court that the race-neutral reasons the prosecution put forward for dismissing a black juror, Olanders D., were pretextual.[2]

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[2] Because Ayala was actually prejudiced by his counsel's exclusion from the *Batson* hearing on Olanders D., there is no need to address his claims concerning the other black and Hispanic jurors. That said, Ayala's attorneys may have had strong arguments with respect to those jurors too. Moreover, Ayala's *Batson* challenge to Olanders D. would

The prosecution offered three justifications for striking Olanders D.: (1) he might be unable to vote for the death penalty because he had written in his questionnaire that "he does not believe [in] it" and had failed to fully explain a subsequent change in position; (2) his questionnaire answers were poor; and, (3) he might lack the "ability to fit in with a cohesive group of 12 people." App. 283. The trial court rejected the third of these reasons outright, noting that "it may well . . . be that he would get along very well with 12 people." *Id.,* at 283–284. I have grave misgivings as to whether the trial judge would have found it more likely than not that the first two purported bases were legitimate had defense counsel been given an opportunity to respond to them.

Ayala's attorneys could have challenged the prosecution's claim that Olanders D. would hesitate to impose the death penalty by pointing to a seated juror—Ana L.—who made remarkably similar statements concerning capital punishment. Based on his remarks during *voir dire*, it appears that Olanders D. suggested on his questionnaire that he was or had been opposed to the death penalty.[3] *Id.,* at 176, 179. Ana L.'s questionnaire contained numerous comparable statements. When asked to express her "feelings about the death penalty," she wrote: "I don't believe in taking a life." *Id.,* at 108. And, in response to a question regarding whether she "would like to serve as a

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have been even stronger had counsel been given the opportunity to demonstrate that some of the reasons given for striking the other black and Hispanic jurors were pretextual. See *Snyder* v. *Louisiana*, 552 U. S. 472, 478 (2008) (observing that courts should "consider the strike of [one juror] for the bearing it might have upon the strike of [a second juror]").

[3]It is, of course, impossible to verify what Olanders D. said in his questionnaire because that document is not in the record. If Ayala's lawyers had been present at Olanders D.'s *Batson* hearing, they may have argued that his questionnaire showed that his position on capital punishment had changed over time. See Part III, *infra.*

juror and why?", Ana L. said: "no—If I am selected as a Juror and all Jurors voted for the death penalty I probably would not be able to vote for the death penalty." *Id.,* at 109. Finally, on her questionnaire, Ana L. indicated that she believes the death penalty is imposed "[t]oo often" and that she strongly disagrees with the "adage, 'An eye for any eye,'" which she understood to mean,"[a] criminal took a life[,] now [it] is our turn to take his." *Id.,* at 108–109.

A direct comparison of Olanders D.'s and Ana L.'s *voir dire* answers is equally telling. During *voir dire*, Olanders D. clarified that he had not intended his questionnaire to reflect that he was categorically opposed to the death penalty, but only that his views on the topic had evolved over the prior decade and that he had come to believe that the death penalty "would be an appropriate sentence under certain circumstances." *Id.,* at 176. To account for this change in his position, Olanders D. cited a number of considerations, including a new understanding of what his religion required, *ibid.,* "more familiar[ity] with the laws," *id.,* at 178, increased violence in our society, *ibid.,* and conversations with his immediate family, *id.,* at 180. Ana L., by contrast, stated at *voir dire* that she "strongly . . . did not believe in the death penalty" up until she "[f]illed out the questionnaire." *Id.,* at 193. And, only after repeated attempts by both the defense and the prosecution to get her to pinpoint what caused this sudden about face, Ana L. said that she had "listen[ed] to the Bundy evidence that was said and his being put to death, and I started to think; and I said if they were guilty maybe there is a death sentence for these people." *Id.,* at 202.[4]

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[4]The Court claims that Olanders D. was less than eloquent in describing his thought process. *Ante,* at 15. But it is not difficult to understand what he meant. In any event, as the Court later concedes, prospective jurors are likely to struggle when asked to express their views on the death penalty. *Ante,* at 16. Ana L. was no exception. For instance, when defense counsel first asked her to describe her thought

Based on this record, it requires little speculation to see that defense counsel could have made a powerful argument that Ana L. was equally or even less likely to impose the death penalty than Olanders D. While both jurors had opposed the death penalty at some point in the past, Olanders D. stated that he had come to believe in capital punishment after a period of sustained deliberation. Ana L., however, purported to change her view due only to one recent execution and the fact that she had been called to serve as a juror on a capital case. Moreover, there is no basis to think that the trial court accounted for the similarities between Ana L. and Olanders D. Approximately two months passed between Olanders D.'s and Ana L.'s *voir dire* hearings and the date on which the prosecution exercised its peremptory strike against Olanders D. Without the benefit of defense counsel to help jog his recollection, it is absurd to proceed as if the trial judge actually considered one of more than 200 prospective jurors' statements concerning the death penalty when ruling on Ayala's *Batson* motion. Taken together, it seems highly likely that these arguments—had they been raised—would have convinced the trial judge that the prosecution's first alleged reason for striking Olanders D. was pretextual.

As for the prosecution's second purported justification—that his questionnaire responses "were poor," *id.,* at 283—it is impossible to know what winning arguments the defense could have raised because the questionnaire itself is missing from the record.[5] Indeed, for all that is known,

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process, she responded, "Up to [when I filled out my questionnaire], I did not believe in putting someone to death." App. at 194. She continued: "But being that you've given me the—the opportunity to come over here, seeing something that is not correct in the system, it wouldn't be no problem . . . for me to give to come to a decision on the death penalty anymore." *Ibid.*

[5]The Court states that the prosecution's second purported race-

counsel may have had a compelling argument that Olanders D.'s answers were cogent and complete. Even if some of them were lacking, however, counsel could still have drawn the trial judge's attention to weak questionnaires completed by several of the seated jurors. For instance, if the prosecution's claim was that Olanders D.'s questionnaire answers were conclusory, Ayala's counsel could have referred the Court to seated juror Charles G.'s questionnaire. In response to a prompt asking prospective jurors to explain why they would or would not like to be empaneled in Ayala's case, Charles G. wrote only "No." *Id.,* at 71. Alternatively, if the prosecution's concern was that Olanders D.'s answer to a particular question demonstrated an inability to clearly express himself, the defense could have directed the court's attention to the questionnaire completed by seated juror Thomas B. When asked to share his "impressions or feelings . . . about gangs based on what [he had] read or s[een]," Thomas B. stated: "I feel the only media coverage they get is bad, however, those whom do constructive events usually seek out positive media coverage." *Id.,* at 30. Finally, it bears noting that if Ayala's lawyers had been able to respond at the *Batson* hearing, they would have had the questionnaires of many more comparable jurors at their disposal. It is entirely possible that some of the questionnaires completed by prospective jurors who were accepted by the prosecution but dismissed by the defense were weaker than those completed by Charles G. and Thomas B.

In short, it is probable that had Ayala's lawyers been present at the *Batson* hearing on Olanders D., his strong

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neutral reason for striking Olanders D. was that his "responses" were poor, but it conveniently neglects to mention that the responses to which the prosecution referred were clearly those Olanders D. gave on his questionnaire. *Ante*, at 14; see App. 283 ("My observations in reading his questionnaire and before even making note of his racial orientation was that his responses were poor").

Batson claim would have turned out to be a winning one. The trial judge rejected one of the reasons advanced by the prosecution on its own and the defense had numerous persuasive arguments that it could have leveled against the remaining two justifications had it been given the opportunity to do so.

III

The Court concludes that Ayala is not entitled to habeas relief because it finds that there is little or no reason to doubt that the trial judge would have accepted both of the above-discussed reasons for striking Olanders D. even if counsel participated at Ayala's *Batson* hearings. The Court's analysis, however, misunderstands the record and mistakes Ayala's procedural *Batson* claim for a direct challenge to a trial court's denial of a *Batson* motion.

In defense of the prosecution's first basis for striking Olanders D.—that he was uncomfortable with the death penalty—the Court begins by asserting that Ana L. was insufficiently similar to Olanders D. to have cast any doubt on the prosecution's position. Olanders D., the Court maintains, "initially voiced unequivocal opposition to the death penalty," whereas Ana L. "wrote on [her] questionnaire that she '*probably* would not be able to vote for the death penalty.'" *Ante,* at 15–16 (emphasis in original). But the Court has plucked one arguably ambiguous statement from Ana L.'s questionnaire while ignoring others (described above) suggesting that she fundamentally opposed capital punishment. More importantly, the Court is not comparing apples with apples. Because Olanders D.'s questionnaire has been lost, there is no way to know the extent to which the views he expressed there were "unequivocal." Consequently, in support of its contention that Olanders D. originally wrote that he was categorically opposed to the death penalty, the Court relies on his response to a question posed by the prosecu-

tion during *voir dire*. To be sure, when asked whether he had stated that he did not "believe in the death penalty" on his questionnaire, Olanders D. responded: "That's correct." App. 179. During *voir dire*, however, Ana L. described the position she had taken in her questionnaire in identical terms, stating: "I remember saying [on my questionnaire] that I didn't believe in the death penalty." *Id.,* at 201.

Given the difficulty of differentiating between Ana L.'s and Olanders D.'s views toward the death penalty based on the record before us, the Court understandably does not press this factual point further. Instead, it commits a legal error by contending that the trial court's determination is entitled to deference because the judge—unlike this Court—had the benefit of observing both Olanders D.'s and the prosecution's demeanor. *Ante,* at 16. Deference may be warranted when reviewing a substantive *Batson* claim. By suggesting that a trial judge can make a sound credibility determination without the benefit of an adversarial proceeding, however, the Court ignores the procedural nature of the constitutional error whose existence it purports to assume. Courts defer to credibility findings not only because of trial judges' proximity to courtroom events, but also because of the expectations regarding the procedures used in the proceedings that they oversee. A decision to credit a prosecution's race-neutral basis for striking a juror is entitled to great weight if that reason has "survive[d] the crucible of meaningful adversarial testing." *Cronic*, 466 U. S., at 656. It warrants substantially less—if any—deference where, as here, it is made in the absence of the "fundamental instrument for judicial judgment: an adversary proceeding in which both parties may participate." *Carroll* v. *President and Comm'rs of Princess Anne*, 393 U. S. 175, 183 (1968); see also *Kaley*, 571 U. S., at ___ (ROBERTS, C. J., dissenting) (slip op., at 16) ("It takes little imagination to see that . . . *ex parte*

proceedings create a heightened risk of error").[6]

The Court's analysis of the second reason put forward for striking Olanders D.—that his questionnaire was faulty— fares no better. As a preliminary matter, perhaps because Olanders D.'s questionnaire has been lost, the Court characterizes the prosecution's second proffered reason for dismissing Olanders D. as an objection to *all* of his "responses" as opposed to simply the responses on his *questionnaire*. *Ante*, at 14. But even if the prosecution had relied on the rationale that the Court now substitutes, there is a real likelihood that the defense would still have been able to undermine its credibility.

The Court asserts that Olanders D.'s "responses" were misleading because he had "unequivocally" stated that he did not believe in the death penalty on his questionnaire, but at *voir dire* he said that his views on capital punishment had changed over the previous 10 years. *Ante,* at 18. The Court's argument thus hinges on the premise that Olanders D.'s questionnaire clearly stated that he was opposed to the death penalty. At least one person, however, did not construe Olander D.'s questionnaire to express such a categorical view: defense counsel. During *voir dire*, one of Ayala's lawyers remarked that she thought Olanders D.'s questionnaire "indicated that [he] had had some change in [his] feelings about the death penalty." App. 176. "[M]y understanding," she said, "is that at one time [he] felt one way, and—and then at some point [he] felt differently." *Ibid.* Thus, if (as the Court now hypothesizes) the trial court was inclined to accept the prosecution's second reason for striking Olanders D. based on apparent tension between his questionnaire and his

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[6] None of the cases the Court cites are inconsistent with this logic. *Miller-El* v. *Dretke*, 545 U. S. 231, 236–237 (2005), *Snyder*, 552 U. S., at 474, and *Rice* v. *Collins*, 546 U. S. 333, 336 (2006), all concerned direct challenges to a trial court's denial of a *Batson* motion as opposed to procedural *Batson* claims.

statements during *voir dire* (a proposition that is itself uncertain), the defense may have been able to argue persuasively that any claimed inconsistency was illusory.

* * *

Batson recognized that it is fundamentally unfair to permit racial considerations to drive the use of peremptory challenges against jurors. When the prosecution strikes every potential black and Hispanic juror, a reviewing court has a responsibility to ensure that the trial court's denial of the defendant's *Batson* motion was not influenced by constitutional error. But there is neither a factual nor a legal basis for the Court's confidence that the prosecution's race-neutral reasons for striking Olanders D. were unassailable. Because the Court overlooks that Ayala raised a procedural *Batson* claim, it scours the record for possible support for the trial court's credibility determination without accounting for the flaws in the process that led to it. The proper inquiry is not whether the trial court's determination can be sustained, but whether it may have been different had counsel been present. Given the strength of Ayala's prima facie case and the arguments his counsel would have been able to make based even on the limited existing record, grave doubts exist as to whether counsel's exclusion from Ayala's *Batson* hearings was harmless. Accordingly, I respectfully dissent.

BATSON / WHEELER

WHAT IT MEANS TO REPRESENT THE PEOPLE OF THE STATE OF CALIFORNIA?

It is suggested that no particular stigma or dishonor results if a prosecutor uses the raw fact of skin color to determine the objectivity or qualifications of a juror. We do not believe a victim of the classification would endorse this view; the assumption that no stigma or dishonor attaches contravenes accepted equal protection principles. Race cannot be a proxy for determining juror bias or competence. "A person's race simply 'is unrelated to his fitness as a juror.'"

Powers v. Ohio (1991) 499 U.S. 400, 410.

Business & Profession Code § 6068

It is the duty of an attorney to do all of the following:

(a) To support the Constitution and laws of the United States and of this state

THE SEMINAL CASES

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

RULE OF PROFESSIONAL CONDUCT
RULE 8.4.1

(a) In representing a client, or in terminating or refusing to accept the representation of any client, a lawyer shall not:

(1) unlawfully harass or unlawfully discriminate against persons* on the basis of any protected characteristic;

"PROTECTED CHARACTERISTIC" DEFINED

(c) For purposes of this rule:

(1) "protected characteristic" means race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, sexual orientation, age, military and veteran status, or other category of discrimination prohibited by applicable law, whether the category is actual or perceived;

POLICY AND PROCEDURE #1-04

ETHICAL DUTIES

POLICY

The San Mateo County District Attorney's Office requires that all of its members exercise their duties with the highest degree of ethics and integrity without regard to race, color, national or ethnic origin, age, religion, disability, sex, sexual orientation or gender identity and expression.

Public Policy Underpinnings

- Allows juries to reflect diverse beliefs to avoid tyranny of the majority.
- Combat governmental oppression.
- Promote the perception of courts as legitimate.
- Encourage citizen participation in government.
- Stem the tide of minority stigmatization.

People v. Cleveland (2004) 32 Cal.4th 704, 734

"[A] SINGLE RACE-BASED CHALLENGE IS IMPROPER."

P v. Wheeler (1978) 22 Cal.3d 258

Co-Δ Murder Case involving the killing of a white grocery store owner during the commission of a robbery.

Both Δs were black.

JURY SELECTION

[A] number of blacks were in the venire summoned to hear the case, were called to the jury box, were questioned on voir dire, and were passed for cause; yet the prosecutor proceeded to strike each and every black from the jury by means of his peremptory challenges, and the jury that finally tried and convicted these defendants was all white.

The Defense Claim

"[T]HE PROSECUTOR WAS UTILIZING HIS PEREMPTORY CHALLENGES IN A SYSTEMATIC EFFORT TO EXCLUDE ANY AND ALL OTHERWISE QUALIFIED BLACK JURORS FROM SERVING ON MY CLIENT'S PETIT JURY."

The Prosecutor's Response

"The trial court asked the prosecutor if he desired to respond, but advised him that "you don't have to respond if you don't wish to." The prosecutor declined to explain his conduct . . ."

U.S. SUPREME COURT PRECEDENT
SMITH v. TEXAS (1940) 311 U.S. 128

A state conviction was reversed where a showing was made that blacks had been "systematically excluded from grand jury service."

Justice Black: "It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community. For racial discrimination to result in the exclusion from jury service of otherwise qualified groups not only violates our Constitution and the laws enacted under it but is at war with our basic concepts of a democratic society and a representative government."

Cal. Supremes: "We add that in such a war the courts cannot be pacifists."

HOLDING

We conclude that the use of peremptory challenges to remove prospective jurors on the sole ground of group bias violates the right to trial by a jury drawn from a representative cross-section of the community under article I, section 16, of the California Constitution.

WHICH GROUPS GENERATE CONSTITUTIONAL CONCERN?

- RACIAL
- RELIGIOUS
- ETHNIC
- OR SIMILAR GROUNDS

REMEDY

"The error is prejudicial per se: 'The right to a fair and impartial jury is one of the most sacred and important of the guaranties of the constitution. Where it has been infringed, no inquiry as to the sufficiency of the evidence to show guilt is indulged and a conviction by a jury so selected must be set aside.'"

IMPORTANT SIDENOTE IN WHEELER

"[W]HEN AN ISSUE OF THIS NATURE DOES ARISE IN ANY CASE IT IS INCUMBENT UPON COUNSEL, HOWEVER DELICATE THE MATTER, TO MAKE A RECORD SUFFICIENT TO PRESERVE THE POINT FOR REVIEW."

MAKE SURE THE COURT DOES ITS JOB!

"[W]HEN A TRIAL COURT FAILS TO MAKE EXPLICIT FINDINGS OR TO PROVIDE ANY ON-THE-RECORD ANALYSIS OF THE PROSECUTION'S STATED REASONS FOR A STRIKE, A REVIEWING COURT HAS NO ASSURANCE THAT THE TRIAL COURT HAS PROPERLY EXAMINED "ALL OF THE CIRCUMSTANCES THAT BEAR UPON THE ISSUE" OF PURPOSEFUL DISCRIMINATION."

PEOPLE V. WILLIAMS (2013) 56 CAL.4TH 630, 717

BATSON V. KENTUCKY (1986) 476 U.S. 79

Charges: Second Degree Burglary and Receipt of Stolen Property

Defendant was black.

The prosecutor used his peremptory challenges "to strike all four black persons on the venire, and a jury composed only of white persons was selected."

Defense moved to discharge the jury before it was sworn asserting the prosecution's use of peremptory challenges violated the Defendant's Sixth and Fourteenth Amendment rights.

The trial court denied the Defendant's motion without argument.

The Court examined precedent and observed,

That decision laid the foundation for the Court's unceasing efforts to eradicate racial discrimination in the procedures used to select the venire from which individual jurors are drawn. In *Strauder*, the Court explained that the central concern of the recently ratified Fourteenth Amendment was to put an end to governmental discrimination on account of race. Exclusion of black citizens from service as jurors constitutes a primary example of the evil the Fourteenth Amendment was designed to cure.

3 PART INQUIRY

- Endorses a 3 part Inquiry by the Trial Court to examine a claim of racially motivated peremptory challenges:

1. Prima Facie showing that "all relevant circumstances" raises an inference of discrimination.
2. Person exercising the challenge is then given an opportunity to provide permissible justification for their use of a peremptory challenge.
3. Trial Court decides whether the moving party has proven a discriminatory purpose.

Prima Facie Showing

- Defendant must show that he is a member of a cognizable racial group

AND

- The Prosecutor exercised peremptory challenges to remove from the venire members of the Defendant's race.

JOHNSON V. CALIFORNIA (2005) 545 U.S. 162

- 2ND DEGREE MURDER CASE
- Δ WAS BLACK.
- PROSECUTOR USED 3 OF HIS 12 EXERCISED PEREMPTORY CHALLENGES TO REMOVE ALL BLACK PROSPECTIVE JURORS.
- THE COURT OF APPEAL REVERSED.
- THE CALIFORNIA SUPREME COURT REINSTATED THE CONVICTION.

PRIMA FACIE SHOWING UNDER *WHEELER*

- After using his second of three peremptory challenges to remove black prospective jurors, defense counsel objected.
- Court found utilizing the standard in Wheeler that defense counsel failed to make a *prima facie* showing.
- The prosecutor was not asked and did not provide his justification for the challenges.
- After striking 3rd juror defense renewed the motion.
- The Court was satisfied that the challenges could be justified by race neutral reasons.
- In finding there was no prima facie case made, the court stated that there was no showing of "a strong likelihood" that the challenges had been impermissibly based on race.

HOLDING

- Defendant meets their burden of making a prima facie showing if they **"raise an inference"** a party used challenges to exclude prospective jurors on account of race.
- The Batson framework is designed to produce actual answers to suspicions and inferences that discrimination may have infected the jury selection process.
- In other words, California's standard is too high.
- Case reversed and remanded.

WHO CAN MAKE THE MOTION?

- Either the prosecution or defense can bring a *Batson* motion.

Georgia v. McCollum (1992) 505 U.S. 42.

OUR BATSON/WHEELER REMEDIES

- "It seems more appropriate and, consistent with the ends of justice to permit the complaining party to waive the usual remedy of outright dismissal of the remaining venire."
- Reseating of improperly challenged jurors.
- Monetary sanctions.
- Granting the aggrieved party additional challenges.

People v. Willis (2002) 27 Cal. 4th 811

WHAT IF THE COURT MAKES NO MENTION OF WHETHER OR NOT IT HAS FOUND A *PRIMA FACIE* CASE?

- If a trial court denies a *Batson* challenge after hearing the prosecutor's reasons for exercise of the challenge without mentioning whether or not a *prima facie* showing has been made . . .

"Review of those rulings necessarily begin with the third stage."

- People v. Scott (2015) 61 Cal.3d 363, 392

WHAT IF COURT FINDS NO *PRIMA FACIE* SHOWING HAS BEEN MADE?

- "[I]t is the better practice to have the State respond, and then for the court to make a determination on whether the reasons are racially neutral," which "would eliminate remands for such a determination if the trial court is held to have erred in holding the defendant had failed to make the prima facie showing"]; State v. Joe (La.Ct.App. 1996) 678 So. 2d 586, 591 ["this is undoubtedly the better practice]"

Cited with approval by the California Supreme Court in:

People v. Scott (2015) 61 Cal.4th 363, 391 [188 Cal.Rptr.3d 328, 349 P.3d 1028].)

JUSTIFYING CHALLENGES DOES NOT ALWAYS WAIVE APPELLATE CONSIDERATION OF PRIMA FACIE SHOWING

[W]hen [...] the trial court states that it does not believe a prima facie case has been made, and then invites the prosecution to justify its challenges for purposes of completing the record on appeal, the question whether a prima facie case has been made is not mooted, nor is a finding of a prima facie showing implied.

People v. Welch (1999) 20 Cal.4th 701, 746.

MAKE A COMPLETE RECORD OF YOUR REASONS

- Hostile looks from a prospective juror can themselves support a peremptory challenge. People v. Gutierrez (2002) 28 Cal. 4th 1083

- Having a Hispanic surname is not a cognizable class. People v. Gutierrez (2002) 28 Cal. 4th 1083
  - However, if the ethnicity of the juror is unknown it sufficiently describes a cognizable class. People v. Trevino (1985) 39 Cal.3d 667, 684.

- FILE A DECLARATION DESCRIBING OR EXPANDING UPON REASONS FOR A CHALLENGE (IF NECESSARY).

SINCERITY MATTERS

"The justification need not support a challenge for cause, and even a 'trivial' reason, if genuine and neutral, will suffice."

People v. Arias (1996) 13 Cal.4th 92, 136.

NON-VERBAL COMMUNICATION

A prospective juror may be excused based upon facial expressions, gestures, hunches, and even for arbitrary or idiosyncratic reasons.

"Experienced trial lawyers recognize what has been borne out by common experience over the centuries. 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, 613

WHAT IF YOU CANNOT REMEMBER THE REASON FOR THE CHALLENGE?

- Gonzalez v. Brown (2009) 585 F.3d 1202:

The trial court can still make a finding that a challenge was exercised in a constitutionally permisible manner if the totality of the circumstances supports a race neutral reason.

1. Were members of the cognizable group left on the jury.
2. Did the prosecutor accept the juror prior to exercising the challenge against them.
3. Non-Discriminatory reasons proffered as to other challenges.

THIRD PRONG – HAS A DISCRIMINATORY PURPOSE BEEN PROVEN?

- The 3rd Prong "demands of the trial judge a sincere and reasoned attempt to evaluate" the truthfulness of the race-neutral reason.

People v. Hall (1983) 35 Cal.3d 161.

Miller-El v. Cockrell (2003) 537 U.S. 322, 339

"The issue comes down to whether the trial court finds the prosecutor's race-neutral explanations to be credible."

Factors Considered

1. The prosecutor's demeanor;
2. [H]ow reasonable, or how improbable, the explanations are;
3. [W]hether the proffered rationale has some basis in accepted trial strategy."
4. In assessing credibility, the court draws upon its contemporaneous observations of the voir dire.
5. It may also rely on the court's own experiences as a lawyer and bench officer in the community, and even the common practices of the advocate and the office that employs him or her.

Powers v. Ohio (1991) 499 U.S. 400

- Aggravated Murder case.
- White Δ.
- Prosecutor removed 7 black potential jurors with peremptory challenges.

Held: Racial identity between the objecting defendant and the excluded jurors does not constitute a relevant precondition for a *Batson* challenge.

WHAT DOES "COGNIZABLE GROUP" MEAN?

"'A group to be "cognizable" . . . must have a definite composition . . . there must be some factor which defines and limits the group. A cognizable group is not one whose membership shifts from day to day or whose members can be arbitrarily selected. . . . There must be a common thread which runs through the group, a basic similarity in attitudes or ideas or experience. . . .'"

U.S. v. Guzman (S.D.N.Y. 1972) 337 F. Supp. 140, 143-144 cited by People v. Motton (1985) 39 Cal. 3d 596, 606.

WHICH GROUPS QUALIFY AS "COGNIZABLE?"

- Race: Batson v. Kentucky (1986) 476 U.S. 76, 84-89
- Gender: J. E. B. v. Alabama ex rel. T. B. (1994) 511 U.S. 127
- Ethnicity: People v. Wheeler (1978) 22 Cal.3d 258, 276
- Sexual Orientation: People v. Douglas (2018) 22 Cal. App. 5th 1162
- Race + Gender: People v. Motton (1985) 39 Cal.3d 596, 605
- Religion: People v. Schmeck (2005) 37 Cal. 4th 240

- National Origin: Likely, but not squarely decided. See Castaneda v. Partida (1977) 430 U.S. 482 – Exclusion of Mexican-American from selection of grand jury.
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CAL. CODE OF CIVIL PROCEDURE SEC. 231.5

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.

Cited in People v. Trinh (2014) 59 Cal.4th 216, 241.

GOVERNMENT CODE SECTION 11135
SIMILAR GROUNDS

1. Sex
2. Race
3. Color
4. Religion
5. Ancestry
6. National Origin
7. Ethnic Group Identification
8. Age
9. Mental Disability
10. Physical Disability
11. Medical Condition
12. Genetic Information
13. Marital Status
14. Sexual Orientation

WHICH GROUPS DO NOT QUALIFY AS "COGNIZABLE?"

- Low Income: People v. Burgener (2003) 29 Cal.4th at p. 856
- Young People: People v. Stansbury (1993) 4 Cal.4th 1017, 1061
- Blue Collar: People v. Estrada (1979) 93 Cal.app.3d 76, 93

& Low Income

- Newly Residing in Community: Adams v. Superior Court (1974) 12 Cal. 3d 55, 60.
- People of color: People v. Davis (2009) 46 Cal.4th 539, 583; People v. Neuman (2009) 176 Cal.App.4th 571

BE AWARE OF THE BOUNDARIES

PEOPLE V. JONES (2011) 51 CAL.4TH 346

PROSPECTIVE BLACK JUROR WAS EXCUSED BECAUSE SHE ATTENDED THE 1ST AME CHURCH, WHICH THE PROSECUTOR BELIEVED TO BE A "CONSTANTLY CONTROVERSIAL" ORGANIZATION.

THE CALIFORNIA SUPREME COURT FOUND NO ERROR IN THE EXERCISE OF THIS CHALLENGE.

BILINGUAL JURORS

HERNANDEZ V. NEW YORK (1991) 500 U.S. 352
PLURALITY OPINION

- FOUND NO CLEAR ERROR IN STRIKING BILINGUAL JUROR BECAUSE FEAR THAT THEY WOULD REJECT THE INTERPRETERS'S VERSION IN FAVOR OF THEIR OWN.

- EXPRESSED CONCERNS ABOUT POTENTIAL PRETEXT FOR RACIAL DISCRIMINATION.

- IF FEAR IS NOT SUPPORTED BY THE RECORD, THIS GROUND MAY BE VIEWED AS A RUSE. SEE PEOPLE V. GONZALES (2008) 165 CAL.APP.4TH 620.

MILLER-EL I & II

- CAPITAL MURDER CASE IN TEXAS.
- 10 OF 11 BLACK JURORS WERE STRICKEN BY PROSECUTOR.
- THE CASE WAS REMANDED BY TEXAS COURT OF APPEALS TO ALLOW PROSECUTOR TO STATE THEIR REASONS.
- TRIAL COURT FOUND RACE NEUTRAL REASONS "COMPLETELY CREDIBLE"

UNITED STATES SUPREME COURT'S INVOLVEMENT

- FOUND TRIAL COURT'S FINDINGS UNSUPPORTED STATING THE REASONS PROVIDED BY THE PROSECUTOR "REEK[ED] OF AFTERTHOUGHT."

- THE UNITED STATES SUPREME COURT CONDUCTED A DEEP DIVE INTO THE RECORD AND PROVIDED STANDARDS BY WHICH A COURT SHOULD REVIEW "ALL RELEVANT CIRCUMSTANCES."

BARE STATISTICS

THE PROSECUTOR STRUCK 91% OF BLACK PROSPECTIVE JURORS, BUT ONLY 12% OF NON-BLACK PROSPECTIVE JURORS.

DISPARATE QUESTIONING

PROSECUTOR PRESSED BLACK PROSPECTIVE JURORS HARDER AND WORDED QUESTIONS TO THEM IN A WAY THAT COULD PRESUMED BIAS.

DID NOT EMPLOY THE SAME RHETORICAL TACTICS WITH OTHER JURORS.

CHARACTERIZED QUESTIONG AS “MANIPULATIVE” AND “TRICKERY.:

EVIDENCE OF FORMER DA'S POLICY OF JURY SELECTION DISCRIMINATION

- The Court reviewed testimony of former prosecutors regarding the office climate related to race-based voir dire.

- Considered a prosecutor written manual (the "Sparling manual") discussing types of people not to choose in voir dire. The manual outlined reasons for excluding minority panelists from jury service.

NOTATION OF RACE ON JURY SELECTION CARDS

PROSECUTORS ANNOTATED RACE OF PROSPECTIVE JURORS ON NOTE CARDS.

COMPARATIVE ANALYSIS

COMPARISON OF RESPONSES BETWEEN THOSE WHO WERE STRICKEN VERSUS THOSE WERE EMPANELED.

IF THE SAME QUALITY APPLIED TO NON-BLACK POTENTIAL JURORS WHOM THE PROSECUTION DID NOT STRIKE THAT COULD SERVE AS EVIDENCE OF RACE BASED DISCRIMINATION.

MAY BE CONSIDERED FOR THE FIRST TIME ON APPEAL.

REVERSAL

"[W]HEN THE EVIDENCE ON THE ISSUES RAISED IS VIEWED CUMULATIVELY ITS DIRECTION IS TOO POWERFUL TO CONCLUDE ANYTHING BUT DISCRIMINATION."

CALIFORNIA CODES
CODE OF **CIVIL PROCEDURE**
SECTION 190-237

190. This chapter shall be known and may be cited as the **Trial Jury Selection and Management Act.**

191. The Legislature recognizes that trial by jury is a cherished constitutional right, and that jury service is an obligation of citizenship.

It is the policy of the State of California that all persons selected for jury service shall be selected at random from the population of the area served by the court; that all qualified persons have an equal opportunity, in accordance with this chapter, to be considered for jury service in the state and an obligation to serve as jurors when summoned for that purpose; and that it is the responsibility of jury commissioners to manage all jury systems in an efficient, equitable, and cost-effective manner, in accordance with this chapter.

192. This chapter applies to the selection of jurors, and the formation of trial juries, for both **civil** and criminal cases, in all trial courts of the state.

194. The following definitions govern the construction of this chapter:

(a) "County" means any county or any coterminous city and county.

(b) "Court" means a superior court of this state, and includes, when the context requires, any judge of the court.

(c) "Deferred jurors" are those prospective jurors whose request to reschedule their service to a more convenient time is granted by the jury commissioner.

(d) "Excused jurors" are those prospective jurors who are excused from service by the jury commissioner for valid reasons based on statute, state or local court rules, and policies.

(e) "Juror pool" means the group of prospective qualified jurors appearing for assignment to trial jury panels.

(f) "Jury of inquest" is a body of persons summoned from the citizens before the sheriff, coroner, or other ministerial officers, to inquire of particular facts.

(g) "Master list" means a list of names randomly selected from the source lists.

(h) "Potential juror" means any person whose name appears on a source list.

(i) "Prospective juror" means a juror whose name appears on the master list.

(j) "Qualified juror" means a person who meets the statutory qualifications for jury service.

(k) "Qualified juror list" means a list of qualified jurors.

(l) "Random" means that which occurs by mere chance indicating an unplanned sequence of selection where each juror's name has substantially equal probability of being selected.

(m) "Source list" means a list used as a source of potential jurors.

(n) "Summons list" means a list of prospective or qualified jurors who are summoned to appear or to be available for jury service.

(o) "Trial jurors" are those jurors sworn to try and determine by verdict a question of fact.

(p) "Trial jury" means a body of persons selected from the citizens of the area served by the court and sworn to try and determine by verdict a question of fact.

(q) "Trial jury panel" means a group of prospective jurors assigned to a courtroom for the purpose of voir dire.

195: generally--selection and duty of jury commissioners for each county

196. (a) The jury commissioner or the court shall inquire as to the qualifications of persons on the master list or source list who are or may be summoned for jury service. The commissioner or the court **may require any person to answer, under oath, orally or in written form, all questions as may be addressed to that person, regarding the person's qualifications and ability to serve as a prospective trial juror.** The commissioner and his or her assistants shall have power to administer oaths and shall be allowed actual traveling expenses incurred in the performance of their duties.

(b) Response to the jury commissioner or the court concerning an inquiry or summons may be made by any person having knowledge that the prospective juror is unable to respond to such inquiry or summons.

(c) Any person who fails to respond to jury commissioner or court inquiry as instructed, may be summoned to appear before the jury commissioner or the court to answer the inquiry, or may be deemed to be qualified for jury service in the absence of a response to the inquiry. Any information thus acquired by the court or jury

commissioner shall be noted in jury commissioner or court records.

197. Sources for Jury Lists
(a) All persons selected for jury service shall be selected at random, from a source or sources inclusive of a representative cross section of the population of the area served by the court. Sources may include, in addition to other lists, customer mailing lists, telephone directories, or utility company lists.

(b) The list **of registered voters and the Department of Motor Vehicles' list of licensed drivers and identification cardholders** resident within the area served by the court, are appropriate source lists for selection of jurors. These two source lists, when substantially purged of duplicate names, shall be considered inclusive of a representative cross section of the population, within the meaning of subdivision (a).

(c) The Department of Motor Vehicles shall furnish the jury commissioner of each county with the current list of the names, addresses, and other identifying information of persons residing in the county who are age 18 years or older and who are holders of a current driver's license or identification card issued pursuant to Article 3 (commencing with Section 12800) of, or Article 5 (commencing with Section 13000) of, Chapter 1 of Division 6 of the Vehicle Code. The conditions under which these lists shall be compiled semiannually shall be determined by the director, consistent with any rules which may be adopted by the Judicial Council. This service shall be provided by the Department of Motor Vehicles pursuant to Section 1812 of the Vehicle Code. The jury commissioner shall not disclose the information furnished by the Department of Motor Vehicles pursuant to this section to any person, organization, or agency.

198. (a) Random selection shall be utilized in creating master and qualified juror lists, commencing with selection from source lists, and continuing through selection of prospective jurors for voir dire.

198.5. If sessions of the superior court are held in a location other than the county seat, the names for master jury lists and qualified jury lists to serve in a session may be selected from the area in which the session is held, pursuant to a local superior court rule that divides the county in a manner that provides all qualified persons in the county an equal opportunity to be considered for jury service. Nothing in this section precludes the court, in its discretion, from ordering a countywide venire in the interest of justice.
NOTE: good idea, but we don't do this. Big counties like Riverside might?

203. Qualifications to be a Juror
(a) All persons are eligible and qualified to be prospective trial jurors, except the following:
(1) Persons who are not citizens of the United States.
(2) Persons who are less than 18 years of age.
(3) Persons who are not domiciliaries of the State of California, as determined pursuant to Article 2 (commencing with Section 2020) of Chapter 1 of Division 2 of the Elections Code.
(4) Persons who are not residents of the jurisdiction wherein they are summoned to serve.
(5) Persons who have been convicted of malfeasance in office *or a felony, and whose civil rights have not been restored.*
(6) Persons who are not possessed of sufficient knowledge of the English language, provided that no person shall be deemed incompetent solely because of the loss of sight or hearing in any degree or other disability which impedes the person's ability to communicate or which impairs or interferes with the person's mobility.
(7) Persons who are serving as grand or trial jurors in any court of this state.
(8) Persons who are the subject of conservatorship.
(b) No person shall be excluded from eligibility for jury service in the State of California, for any reason other than those reasons provided by this section.

204. **(a) No eligible person shall be exempt from service as a trial juror by reason of occupation, economic status, or any characteristic listed or defined in Section 11135 of the Government Code, or for any other reason**. No person shall be excused from service as a trial juror **except as specified in subdivision (b).**
(b) An eligible person **may be excused from jury service only for undue hardship, upon themselves or upon the public**, as defined by the Judicial Council.

205. Questionnaires
(a) **If a jury commissioner requires a person to complete a questionnaire, the questionnaire shall ask only questions related to juror identification, qualification, and ability to serve as a prospective juror.**
(b) Except as ordered by the court, the questionnaire referred to in subdivision (a) shall be used solely for qualifying prospective jurors, and for management of the jury system, and not for assisting in the courtroom voir dire process of selecting trial jurors for

specific cases.

(c) The court may require a prospective juror to complete such additional questionnaires as may be deemed relevant and necessary for assisting in the voir dire process or to ascertain whether a fair cross section of the population is represented as required by law, if such procedures are established by local court rule.

(d) The trial judge may direct a prospective juror to complete additional questionnaires as proposed by counsel in a particular case to assist the voir dire process.

206. **(a) Prior to discharging the jury from the case, the judge in a criminal action shall inform the jurors that they have an absolute right to discuss or not to discuss the deliberation or verdict with anyone**. The judge shall also inform the jurors of the provisions set forth in subdivisions (b), (d), and (e).

(b) Following the discharge of the jury in a criminal case, the defendant, or his or her attorney or representative, or the prosecutor, or his or her representative, may discuss the jury deliberation or verdict with a member of the jury, provided that the juror consents to the discussion and that the discussion takes place at a reasonable time and place.

(c) If a discussion of the jury deliberation or verdict with a member of the jury pursuant to subdivision (b) occurs at any time more than 24 hours after the verdict, prior to discussing the jury deliberation or verdict with a member of a jury pursuant to subdivision (b), the defendant or his or her attorney or representative, or the prosecutor or his or her representative, shall inform the juror of the identity of the case, the party in that case which the person represents, the subject of the interview , the absolute right of the juror to discuss or not discuss the deliberations or verdict in the case with the person, and the juror's right to review and have a copy of any declaration filed with the court.

(d) Any unreasonable contact with a juror by the defendant, or his or her attorney or representative, or by the prosecutor, or his or her representative, without the juror's consent shall be immediately reported to the trial judge.

(e) Any violation of this section shall be considered a violation of a lawful court order and shall be subject to reasonable monetary sanctions in accordance with Section 177.5 of the Code of Civil Procedure**.**

(f) Nothing in the section shall prohibit a peace officer from investigating an allegation of criminal conduct.

(g) Pursuant to Section 237, a defendant or defendant's counsel may, following the recording of a jury's verdict in a criminal

proceeding, petition the court for access to personal juror identifying information within the court's records necessary for the defendant to communicate with jurors for the purpose of developing a motion for new trial or any other lawful purpose. This information consists of jurors' names, addresses, and telephone numbers. The court shall consider all requests for personal juror identifying information pursuant to Section 237.

209. (a) **Any prospective trial juror who has been summoned for service, and who fails to attend as directed or to respond to the court or jury commissioner and to be excused from attendance, may be attached and compelled to attend**. Following an order to show cause hearing, the court may find the prospective juror in contempt of court, punishable by fine, incarceration, or both, as otherwise provided by law.

(b) In lieu of imposing sanctions for contempt as set forth in subdivision (a), the court may impose reasonable monetary sanctions, as provided in this subdivision, on a prospective juror who has not been excused pursuant to Section 204 after first providing the prospective juror with notice and an opportunity to be heard. If a juror fails to respond to the initial summons within 12 months, the court may issue a second summons indicating that the person failed to appear in response to a previous summons and ordering the person to appear for jury duty. Upon the failure of the juror to appear in response to the second summons, the court may issue a failure to appear notice informing the person that failure to respond may result in the imposition of money sanctions. If the prospective juror does not attend the court within the time period as directed by the failure to appear notice, the court shall issue an order to show cause. Payment of monetary sanctions imposed pursuant to this subdivision does not relieve the person of his or her obligation to perform jury duty.

(c) (1) The court may give notice of its intent to impose sanctions by either of the following means:

(A) Verbally to a prospective juror appearing in person in open court.

(B) The issuance on its own motion of an order to show cause requiring the prospective juror to demonstrate reasons for not imposing sanctions. The court may serve the order to show cause by certified or first-class mail.

(2) The monetary sanctions imposed pursuant to subdivision (b) may not exceed two hundred fifty dollars ($250) for the first violation, seven hundred fifty dollars ($750) for the second violation, and one thousand five hundred dollars ($1,500) for the third and any subsequent violation. Monetary sanctions may not be imposed on a

prospective juror more than once during a single juror pool cycle. The prospective juror may be excused from paying sanctions pursuant to subdivision (b) of Section 204 or in the interests of justice. The full amount of any sanction paid shall be deposited in a bank account established for this purpose by the Administrative Office of the Courts and transmitted from that account monthly to the Controller for deposit in the Trial Court Trust Fund, as provided in Section 68085.1 of the Government Code. It is the intent of the Legislature that the funds derived from the monetary sanctions authorized in this section be allocated, to the extent feasible, to the family courts and the civil courts. The Judicial Council shall, by rule, provide for a procedure by which a prospective juror against whom a sanction has been imposed by default may move to set aside the default.

(d) On or before December 31, 2008, the Judicial Council shall report to the Legislature regarding the effects of the implementation of subdivisions (b) and (c). The report shall include, but not be limited to, information regarding any change in rates of response to juror summons, the amount of moneys collected pursuant to subdivision (c), the efficacy of the default procedures adopted in rules of court, and how, if at all, the Legislature may wish to alter this chapter to further attainment of its objectives.

(e) This section shall remain in effect only until January 1, 2010, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2010, deletes or extends that date.

Contempt for FTA as Juror:

209. Any prospective trial juror who has been summoned for service, and who fails to attend the court as directed or to respond to the court or jury commissioner and to be excused from attendance, may be attached and compelled to attend. Following an order to show cause hearing, the court may find the prospective juror in contempt of court, punishable by fine, incarceration, or both, as otherwise provided by law.

This section shall become operative on January 1, 2010.

211. When a court has no prospective jurors remaining available for voir dire from panels furnished by, or available from, the jury commissioner, and finds that not proceeding with voir dire will place a party's right to a trial by jury in jeopardy, the court may direct the sheriff or marshal to summon, serve, and immediately attach the person of a sufficient number of citizens having the qualifications of jurors, to complete the panel.

213. Unless excused by reason of undue hardship, all or any portion of the **summoned prospective jurors shall be available on one-hour notice by telephone to appear for service**, when the jury commissioner determines that it will efficiently serve the operational requirements of the court.

Jurors available on one-hour telephone notice shall receive credit for each day of such availability towards their jury service obligation, but they shall not be paid unless they are actually required to make an appearance.

215. (a) Except as provided in subdivision (b), on and after July 1, 2000, **the fee for jurors in the superior court, in** civil **and criminal cases, is fifteen dollars ($15) a day** for each day's attendance as a juror after the first day.

(b) A juror who is employed by a federal, state, or local government entity, or by any other public entity as defined in Section 481.200, and who receives regular compensation and benefits while performing jury service, may not be paid the fee described in subdivision (a).

(c) All jurors in the superior court, in civil and criminal cases, shall be reimbursed for mileage at the rate of thirty-four cents ($0.34) per mile for each mile actually traveled in attending court as a juror after the first day, in going only.

217**. In criminal cases only, while the jury is kept together, either during the progress of the trial or after their retirement for deliberation, the court may direct the sheriff or marshal to provide the jury with suitable and sufficient food and lodging, or other reasonable necessities.** The expenses incurred under this section shall be charged against the Trial Court Operations Fund of the county in which the court is held. All those expenses shall be paid on the order of the court.

218. The jury commissioner shall hear the excuses of jurors summoned, in accordance with the standards prescribed by the Judicial Council. It shall be left to the discretion of the jury commissioner to accept an excuse under subdivision (b) of Section 204 without a personal appearance. All excuses shall be in writing

setting forth the basis of the request and shall be signed by the juror.

219. Cops on Juries (see (b) below)

(a) Except as provided in subdivision (b), the jury commissioner shall randomly select jurors for jury panels to be sent to courtrooms for voir dire.

(b) (1) Notwithstanding subdivision (a), no peace officer, as defined in Section 830.1, subdivision (a) of Section 830.2, and subdivision (a) of Section 830.33, of the Penal Code, shall be selected for voir dire in civil **or criminal matters.**

(2) Notwithstanding subdivision (a), no peace officer, as defined in subdivisions (b) and (c) of Section 830.2 of the Penal Code, shall be selected for voir dire in criminal matters.

220. A trial jury shall consist of 12 persons, except that in civil **actions and cases of misdemeanor, it may consist of 12 or any number less than 12, upon which the parties may agree.**

223**. Right to Voir Dire for For Cause Challenges**

In a criminal case, the court shall conduct an initial examination of prospective jurors. The court may submit to the prospective jurors additional questions requested by the parties as it deems proper. **Upon completion of the court's initial examination, counsel for each party shall have the right to examine, by oral and direct questioning, any or all of the prospective jurors**. The court may, in the exercise of its discretion, limit the oral and direct questioning of prospective jurors by counsel. The court may specify the maximum amount of time that counsel for each party may question an individual juror, or may specify an aggregate amount of time for each party, which can then be allocated among the prospective jurors by counsel. Voir dire of any prospective jurors shall, where practicable, occur in the presence of the other jurors in all criminal cases, including death penalty cases. **Examination of prospective jurors shall be conducted only in aid of the exercise of challenges for cause.**

The trial court's exercise of its discretion in the manner in which voir dire is conducted, including any limitation on the time which will be allowed for direct questioning of prospective jurors by counsel and any determination that a question is not in aid of the exercise of challenges for cause, shall not cause any conviction to be reversed unless the exercise of that discretion has resulted in a miscarriage of justice, as specified in Section 13 of Article VI of

the California Constitution.

224. (a) If a party does not cause the removal by challenge of an individual juror who is deaf, hearing impaired, blind, visually impaired, or speech impaired and who requires auxiliary services to facilitate communication, the party shall (1) stipulate to the presence of a service provider in the jury room during jury deliberations, and (2) prepare and deliver to the court proposed jury instructions to the service provider.

(b) As used in this section, "service provider" includes, but is not limited to, a person who is a sign language interpreter, oral interpreter, deaf-blind interpreter, reader, or speech interpreter. If auxiliary services are required during the course of jury deliberations, the court shall instruct the jury and the service provider that the service provider for the juror with a disability is not to participate in the jury's deliberations in any manner except to facilitate communication between the juror with a disability and other jurors.

(c) The court shall appoint a service provider whose services are needed by a juror with a disability to facilitate communication or participation. A sign language interpreter, oral interpreter, or deaf-blind interpreter appointed pursuant to this section shall be a qualified interpreter, as defined in subdivision (f) of Section 754 of the Evidence Code. Service providers appointed by the court under this subdivision shall be compensated in the same manner as provided in subdivision (i) of Section 754 of the Evidence Code.

225. **Definition of Types of Challenges & Reasons Allowed**
A challenge is an objection made to the trial jurors that may be taken by any party to the action, and is of the following classes and types:

(a) A challenge to the trial jury panel for cause.

(1) A challenge to the panel may only be taken before a trial jury is sworn. The challenge shall be reduced to writing, and shall plainly and distinctly state the facts constituting the ground of challenge.

(2) Reasonable notice of the challenge to the jury panel shall be given to all parties and to the jury commissioner, by service of a copy thereof.

(3) The jury commissioner shall be permitted the services of legal counsel in connection with challenges to the jury panel.

(b) A challenge to a prospective juror by either:

(1) A challenge for cause, for one of the following reasons:

(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.

(2) A **peremptory** challenge to a prospective juror.

226. (a) **A challenge to an individual juror may only be made *before* the jury is sworn.**

(b) A challenge to an individual juror may be taken orally or may be made in writing, but no reason need be given for a **peremptory** challenge, and the court shall exclude any juror challenged peremptorily.

(c) All challenges for cause shall be exercised before any **peremptory** challenges may be exercised.

(d) **All challenges to an individual juror, except a peremptory challenge, shall be taken, first by the defendants, and then by the people or plaintiffs.**

227. The challenges of either party for cause need not all be taken at once, but they may be taken separately, in the following order, including in each challenge all the causes of challenge belonging to the same class and type:

(a) To the panel.

(b) To an individual juror, for a general disqualification.

(c) To an individual juror, for an implied bias.

(d) To an individual juror, for an actual bias.

228. **Challenges for general disqualification** may be taken on one or both of the following grounds, and for no other:

(a) A want of any of the qualifications prescribed by this code to render a person competent as a juror.

(b) The existence of any incapacity which satisfies the court that the challenged person is incapable of performing the duties of a juror in the particular action without prejudice to the substantial rights of the challenging party.

229. A **challenge for implied bias** may be taken for one or more of the following causes, and for no other:

(a) Consanguinity or affinity within the fourth degree to any party, to an officer of a corporation which is a party, or to any alleged witness or victim in the case at bar.

(b) Standing in the relation of, or being the parent, spouse, or child of one who stands in the relation of, guardian and ward, conservator and conservatee, master and servant, employer and clerk, landlord and tenant, principal and agent, or debtor and creditor, to either party or to an officer of a corporation which is a party, **or being a member of the family of either party**; or a partner in business with either party; or surety on any bond or obligation for either party, or being the holder of bonds or shares of capital stock of a corporation which is a party; or having stood within one year previous to the filing of the complaint in the action in the relation of attorney and client with either party or with the attorney for either party. A depositor of a bank or a holder of a savings account in a savings and loan association shall not be deemed a creditor of that bank or savings and loan association for the purpose of this paragraph solely by reason of his or her being a depositor or account holder.

(c) Having served as a trial or grand juror or on a jury of inquest in a civil or criminal action or been a witness on a previous or pending trial between the same parties, or involving the same specific offense or cause of action; or having served as a trial or grand juror or on a jury within one year previously in any criminal or civil action or proceeding in which either party was the plaintiff or defendant or in a criminal action where either party was the defendant.

(d) Interest on the part of the juror in the event of the action, or in the main question involved in the action, except his or her interest as a member or citizen or taxpayer of a county, city and county, incorporated city or town, or other political subdivision of a county, or municipal water district.

(e) **Having an unqualified opinion or belief as to the merits of the action founded upon knowledge of its material facts or of some of them.**

(f) **The existence of a state of mind in the juror evincing enmity against, or bias towards, either party.**

(g) That the juror is party to an action pending in the court for which he or she is drawn and which action is set for trial before the panel of which the juror is a member.

(h) **If the offense charged is punishable with death, the entertaining of such conscientious opinions as would preclude the**

juror finding the defendant guilty; in which case the juror may neither be permitted nor compelled to serve.

230. Challenges for cause shall be tried by the court. The juror challenged and any other person may be examined as a witness in the trial of the challenge, and shall truthfully answer all questions propounded to them.

231. Number of Peremptory Challenges Allowed
(a) In criminal cases, if the offense charged is punishable with death, or with imprisonment in the state prison for life, the defendant is entitled to 20 and the people to 20 peremptory **challenges. Except as provided in subdivision (b), in a trial for any other offense, the defendant is entitled to 10 and the state to 10** peremptory **challenges. When two or more defendants are jointly tried, their challenges shall be exercised jointly, but each defendant shall also be entitled to five additional challenges which may be exercised separately, and the people shall also be entitled to additional challenges equal to the number of all the additional separate challenges allowed the defendants.**

****(b) If the offense charged is punishable with a maximum term of imprisonment of 90 days or less, the defendant is entitled to six and the state to six peremptory challenges**. When two or more defendants are jointly tried, their challenges shall be exercised jointly, but each defendant shall also be entitled to four additional challenges which may be exercised separately, and the state shall also be entitled to additional challenges equal to the number of all the additional separate challenges allowed the defendants.

(c) In civil cases, each party shall be entitled to six peremptory challenges. If there are more than two parties, the court shall, for the purpose of allotting peremptory challenges, divide the parties into two or more sides according to their respective interests in the issues. Each side shall be entitled to eight peremptory challenges. If there are several parties on a side, the court shall divide the challenges among them as nearly equally as possible. If there are more than two sides, the court shall grant such additional peremptory challenges to a side as the interests of justice may require; provided that the peremptory challenges of one side shall not exceed the aggregate number of peremptory challenges of all other sides. If any party on a side does not use his or her full share of peremptory challenges, the unused challenges may be

used by the other party or parties on the same side.

(d) Peremptory challenges shall be taken or passed by the sides alternately, commencing with the plaintiff or people; and each party shall be entitled to have the panel full before exercising any peremptory challenge. When each side passes consecutively, the jury shall then be sworn, unless the court, for good cause, shall otherwise order. The number of peremptory challenges remaining with a side shall not be diminished by any passing of a peremptory challenge.

(e) If all the parties on both sides pass consecutively, the jury shall then be sworn, unless the court, for good cause, shall otherwise order. The number of peremptory challenges remaining with a side shall not be diminished by any passing of a peremptory challenge.

NOTE: see (b), above: on 11357(b), 23222(b), 415, etc., we get fewer peremptories??

231.5. A party may 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 his or her race, color, religion, sex, national origin, sexual orientation, or similar grounds.

232. (a) **Prior to the examination of prospective trial jurors in the panel assigned for voir dire, the following perjury acknowledgement and agreement shall be obtained from the panel, which shall be acknowledged by the prospective jurors with the statement "I do":**

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

(b) As soon as the selection of the trial jury is completed, the following acknowledgment and agreement shall be obtained from the trial jurors, which shall be acknowledged by the statement "I do":

"Do you and each of you understand and agree that you will well and truly try the cause now pending before this court, and a true verdict render according only to the evidence presented to you and to the instructions of the court."

233. If, before the jury has returned its verdict to the court, a juror becomes sick or, upon other good cause shown to the court, is found to be unable to perform his or her duty, the court may order the juror to be discharged. If any alternate jurors have been selected as provided by law, one of them shall then be designated by the court to take the place of the juror so discharged. If after all alternate jurors have been made regular jurors or if there is no alternate juror, a juror becomes sick or otherwise unable to perform the juror's duty and has been discharged by the court as provided in this section, the jury shall be discharged and a new jury then or afterwards impaneled, and the cause may again be tried. Alternatively, with the consent of all parties, the trial may proceed with only the remaining jurors, or another juror may be sworn and the trial begin anew.

234. Whenever, in the opinion of a judge of a superior court about to try a **civil** or criminal action or proceeding, the trial is likely to be a protracted one, or upon stipulation of the parties, the court may cause an entry to that effect to be made in the minutes of the court and thereupon, immediately after the jury is impaneled and sworn, the court may direct the calling of one or more additional jurors, in its discretion, to be known as **"alternate jurors."**

These alternate jurors shall be drawn from the same source, and in the same manner, and have the same qualifications, as the jurors already sworn, and shall be subject to the same examination and challenges. However, each side, or each defendant, as provided in Section 231, shall be entitled to as many **peremptory** challenges to the alternate jurors as there are alternate jurors called.

The alternate jurors shall be seated so as to have equal power and facilities for seeing and hearing the proceedings in the case, and shall take the same oath as the jurors already selected, and shall, unless excused by the court, attend at all times upon the trial of the cause in company with the other jurors, but shall not participate in deliberation unless ordered by the court, and for a failure to do so are liable to be punished for contempt.

They shall obey the orders of and be bound by the admonition of the court, upon each adjournment of the court; but if the regular jurors are ordered to be kept in the custody of the sheriff or marshal during the trial of the cause, the alternate jurors shall also be kept in confinement with the other jurors; and upon final submission of the case to the jury, the alternate jurors shall be kept in the custody of the sheriff or marshal who shall not suffer

any communication to be made to them except by order of the court, and shall not be discharged until the original jurors are discharged, except as provided in this section.

If at any time, whether before or after the final submission of the case to the jury, a juror dies or becomes ill, or upon other good cause shown to the court is found to be unable to perform his or her duty, or if a juror requests a discharge and good cause appears therefor, the court may order the juror to be discharged and draw the name of an alternate, who shall then take his or her place in the jury box, and be subject to the same rules and regulations as though he or she has been selected as one of the original jurors.

All laws relative to fees, expenses, and mileage or transportation of jurors shall be applicable to alternate jurors, except that in **civil** cases the sums for fees and mileage or transportation need not be deposited until the judge directs alternate jurors to be impaneled.

237. (a) (1) The names of qualified jurors drawn from the qualified juror list for the superior court shall be made available to the public upon request unless the court determines that a compelling interest, as defined in subdivision (b), requires that this information should be kept confidential or its use limited in whole or in part.

(2) Upon the recording of a jury's verdict in a criminal jury proceeding, the court's record of personal juror identifying information of trial jurors, as defined in Section 194, consisting of names, addresses, and telephone numbers, shall be sealed until further order of the court as provided by this section.

(3) For purposes of this section, "sealed" or "sealing" means extracting or otherwise removing the personal juror identifying information from the court record.

(4) This subdivision applies only to cases in which a jury verdict was returned on or after January 1, 1996.

(b) Any person may petition the court for access to these records.

The petition shall be supported by a declaration that includes facts sufficient to establish good cause for the release of the juror' s personal identifying information. The court shall set the matter for hearing if the petition and supporting declaration establish a prima facie showing of good cause for the release of the personal juror identifying information, but shall not set the matter for hearing if there is a showing on the record of facts that establish a compelling interest against disclosure. A compelling interest includes, but is not limited to, protecting jurors from threats or danger of physical harm. If the court does not set the matter for hearing, the court shall by minute order set forth the reasons and

make express findings either of a lack of a prima facie showing of good cause or the presence of a compelling interest against disclosure.

(c) If a hearing is set pursuant to subdivision (b), the petitioner shall provide notice of the petition and the time and place of the hearing at least 20 days prior to the date of the hearing to the parties in the criminal action. The court shall provide notice to each affected former juror by personal service or by first-class mail, addressed to the last known address of the former juror as shown in the records of the court. In a capital case, the petitioner shall also serve notice on the Attorney General. Any affected former juror may appear in person, in writing, by telephone, or by counsel to protest the granting of the petition. A former juror who wishes to appear at the hearing to oppose the unsealing of the personal juror identifying information may request the court to close the hearing in order to protect the former juror's anonymity.

(d) After the hearing, the records shall be made available as requested in the petition, unless a former juror's protest to the granting of the petition is sustained. The court shall sustain the protest of the former juror if, in the discretion of the court, the petitioner fails to show good cause, the record establishes the presence of a compelling interest against disclosure as defined in subdivision (b), or the juror is unwilling to be contacted by the petitioner. The court shall set forth reasons and make express findings to support the granting or denying of the petition to disclose. The court may require the person to whom disclosure is made, or his or her agent or employee, to agree not to divulge jurors' identities or identifying information to others; the court may otherwise limit disclosure in any manner it deems appropriate.

(e) Any court employee who has legal access to personal juror identifying information sealed under subdivision (a), who discloses the information, knowing it to be a violation of this section or a court order issued under this section, is guilty of a misdemeanor.

(f) Any person who intentionally solicits another to unlawfully access or disclose personal juror identifying information contained in records sealed under subdivision (a), knowing that the records have been sealed, or who, knowing that the information was unlawfully secured, intentionally discloses it to another person is guilty of a misdemeanor.

Labor Code re: Rights of Potential Jurors and/or Victims and Witnesses

230. **(a)** An employer may not discharge or in any manner discriminate against an employee for taking time off to serve as required by law on an inquest jury or trial jury, if the employee, prior to taking the time off, gives reasonable notice to the employer that he or she is required to serve.

(b) An employer may not discharge or in any manner discriminate or retaliate against an employee, including, but not limited to, an employee who is a victim of a crime, for taking time off to appear in court to comply with a subpoena or other court order as a witness in any judicial proceeding.

(c) An employer may not discharge or in any manner discriminate or retaliate against an employee who is a victim of domestic violence or a victim of sexual assault for taking time off from work to obtain or attempt to obtain any relief, including, but not limited to, a temporary restraining order, restraining order, or other injunctive relief, to help ensure the health, safety, or welfare of the victim or his or her child.

(d) (1) As a condition of taking time off for a purpose set forth in subdivision (c), the employee shall give the employer reasonable advance notice of the employee's intention to take time off, unless the advance notice is not feasible.

(2) When an unscheduled absence occurs, the employer shall not take any action against the employee if the employee, within a reasonable time after the absence, provides a certification to the employer. Certification shall be sufficient in the form of any of the following:

(A) A police report indicating that the employee was a victim of domestic violence or sexual assault.

(B) A court order protecting or separating the employee from the perpetrator of an act of domestic violence or sexual assault, or other evidence from the court or prosecuting attorney that the employee has appeared in court.

(C) Documentation from a medical professional, domestic violence advocate or advocate for victims of sexual assault, health care provider, or counselor that the employee was undergoing treatment for physical or mental injuries or abuse resulting in victimization from an act of domestic violence or sexual assault.

(3) To the extent allowed by law, the employer shall maintain the confidentiality of any employee requesting leave under subdivision (c).

(e) Any employee **who is discharged, threatened with discharge, demoted, suspended, or in any other manner discriminated or retaliated against in the terms and conditions of employment by his or her employer because the employee has taken time off for a purpose**

set forth in subdivision (a), (b), or (c) shall be entitled to reinstatement and reimbursement for lost wages and work benefits caused by the acts of the employer. Any employer who willfully refuses to rehire, promote, or otherwise restore an employee or former employee who has been determined to be eligible for rehiring or promotion by a grievance procedure or hearing authorized by law is guilty of a misdemeanor.

(f) (1) Any employee who is discharged, threatened with discharge, demoted, suspended, or in any other manner discriminated or retaliated against in the terms and conditions of employment by his or her employer because the employee has exercised his or her rights as set forth in subdivision (a), (b), or (c) may file a complaint with the Division of **Labor** Standards Enforcement of the Department of Industrial Relations pursuant to Section 98.7.

(2) Notwithstanding any time limitation in Section 98.7, an employee filing a complaint with the division based upon a violation of subdivision (c) shall have one year from the date of occurrence of the violation to file his or her complaint.

(g) An employee may use vacation, personal leave, or compensatory time off that is otherwise available to the employee under the applicable terms of employment, unless otherwise provided by a collective bargaining agreement, for time taken off for a purpose specified in subdivision (a), (b), or (c). The entitlement of any employee under this section shall not be diminished by any collective bargaining agreement term or condition.

(h) For purposes of this section:

(1) "Domestic violence" means any of the types of abuse set forth in Section 6211 of the Family **Code**, as amended.

(2) "Sexual assault" means any of the crimes set forth in Section 261, 261.5, 262, 265, 266, 266a, 266b, 266c, 266g, 266j, 267, 269, 273.4, 285, 286, 288, 288a, 288.5, 289, or 311.4 of the Penal **Code**, as amended.

230.1. (a) In addition to the requirements and prohibitions imposed on employees pursuant to Section **230**, an employer with 25 or more employees may not discharge or in any manner discriminate or retaliate against an employee who is a victim of domestic violence or a victim of sexual assault for taking time off from work to attend to any of the following:

(1) To seek medical attention for injuries caused by domestic violence or sexual assault.

(2) To obtain services from a domestic violence shelter, program, or rape crisis center as a result of domestic violence or sexual assault.

(3) To obtain psychological counseling related to an experience of

domestic violence or sexual assault.

(4) To participate in safety planning and take other actions to increase safety from future domestic violence or sexual assault, including temporary or permanent relocation.

(b) (1) As a condition of taking time off for a purpose set forth in subdivision (a), the employee shall give the employer reasonable advance notice of the employee's intention to take time off, unless the advance notice is not feasible.

(2) When an unscheduled absence occurs, the employer may not take any action against the employee if the employee, within a reasonable time after the absence, provides a certification to the employer. Certification shall be sufficient in the form of any of the following:

(A) A police report indicating that the employee was a victim of domestic violence or sexual assault.

(B) A court order protecting or separating the employee from the perpetrator of an act of domestic violence or sexual assault, or other evidence from the court or prosecuting attorney that the employee appeared in court.

(C) Documentation from a medical professional, domestic violence advocate or advocate for victims of sexual assault, health care provider, or counselor that the employee was undergoing treatment for physical or mental injuries or abuse resulting in victimization from an act of domestic violence or sexual assault.

(3) To the extent allowed by law, employers shall maintain the confidentiality of any employee requesting leave under subdivision (a).

(c) Any employee who is discharged, threatened with discharge, demoted, suspended, or in any other manner discriminated or retaliated against in the terms and conditions of employment by his or her employer because the employee has taken time off for a purpose set forth in subdivision (a) is entitled to reinstatement and reimbursement for lost wages and work benefits caused by the acts of the employer. Any employer who willfully refuses to rehire, promote, or otherwise restore an employee or former employee who has been determined to be eligible for rehiring or promotion by a grievance procedure or hearing authorized by law is guilty of a misdemeanor.

(d) (1) Any employee who is discharged, threatened with discharge, demoted, suspended, or in any other manner discriminated or retaliated against in the terms and conditions of employment by his or her employer because the employee has exercised his or her rights as set forth in subdivision (a) may file a complaint with the Division of **Labor** Standards Enforcement of the Department of Industrial Relations pursuant to Section 98.7.

(2) Notwithstanding any time limitation in Section 98.7, an employee filing a complaint with the division based upon a violation

of subdivision (a) has one year from the date of occurrence of the violation to file his or her complaint.

(e) An employee may use vacation, personal leave, or compensatory time off that is otherwise available to the employee under the applicable terms of employment, unless otherwise provided by a collective bargaining agreement, for time taken off for a purpose specified in subdivision (a). The entitlement of any employee under this section may not be diminished by any collective bargaining agreement term or condition.

(f) This section does not create a right for an employee to take unpaid leave that exceeds the unpaid leave time allowed under, or is in addition to the unpaid leave time permitted by, the federal Family and Medical Leave Act of 1993 (29 U.S.C. Sec. 2601 et seq.).

(g) For purposes of this section:

(1) "Domestic violence" means any of the types of abuse set forth in Section 6211 of the Family **Code**, as amended.

(2) "Sexual assault" means any of the crimes set forth in Section 261, 261.5, 262, 265, 266, 266a, 266b, 266c, 266g, 266j, 267, 269, 273.4, 285, 286, 288, 288a, 288.5, 289, or 311.4 of the Penal **Code**, as amended.

230.2. (a) As used in this section:

(1) "Immediate family member" means spouse, child, stepchild, brother, stepbrother, sister, stepsister, mother, stepmother, father, or stepfather.

(2) "Registered domestic partner" means a domestic partner, as defined in Section 297 of the Family **Code**, and registered pursuant to Part 2 (commencing with Section 298) of Division 2.5 of the Family **Code**.

(3) "Victim" means a person against whom one of the following crimes has been committed:

(A) A violent felony, as defined in subdivision (c) of Section 667.5 of the Penal **Code**.

(B) A serious felony, as defined in subdivision (c) of Section 1192.7 of the Penal **Code**.

(C) A felony provision of law proscribing theft or embezzlement.

(b) An employer, and any agent of an employer, shall allow an employee who is a victim of a crime, an immediate family member of a victim, a registered domestic partner of a victim, or the child of a registered domestic partner of a victim to be absent from work in order to attend judicial proceedings related to that crime.

(c) Before an employee may be absent from work pursuant to subdivision (b), the employee shall give the employer a copy of the notice of each scheduled proceeding that is provided to the victim by the agency responsible for providing notice, unless advance notice

is not feasible. When advance notice is not feasible or an unscheduled absence occurs, the employer shall not take any action against the employee if the employee, within a reasonable time after the absence, provides the employer with documentation evidencing the judicial proceeding from any of the following entities:

(1) The court or government agency setting the hearing.

(2) The district attorney or prosecuting attorney's office.

(3) The victim/witness office that is advocating on behalf of the victim.

(d) An employee who is absent from work pursuant to subdivision (b) may elect to use the employee's accrued paid vacation time, personal leave time, sick leave time, compensatory time off that is otherwise available to the employee, or unpaid leave time, unless otherwise provided by a collective bargaining agreement, for an absence pursuant to subdivision (b). The entitlement of any employee under this section shall not be diminished by any collective bargaining agreement term or condition.

(e) An employer shall keep confidential any records regarding the employee's absence from work pursuant to subdivision (b).

(f) An employer may not discharge from employment or in any manner discriminate against an employee, in compensation or other terms, conditions, or privileges of employment, including, but not limited to the loss of seniority or precedence, because the employee is absent from work pursuant to this section.

(g) (1) Any employee who is discharged, threatened with discharge, demoted, suspended, or in any other manner discriminated or retaliated against in the terms and conditions of employment by his or her employer because the employee has exercised his or her rights as set forth in subdivision (b) may file a complaint with the Division of **Labor** Standards Enforcement of the Department of Industrial Relations pursuant to Section 98.7.

(2) Notwithstanding any time limitation in Section 98.7, an employee filing a complaint with the division based upon a violation of subdivision (b) shall have one year from the date of occurrence of the violation to file his or her complaint.

(h) District attorney and victim/witness offices are encouraged to make information regarding this section available for distribution at their offices.

ETHICS

SOURCES FOR ETHICAL GUIDANCE

- The United States and California Constitutions and the cases that interpret them:
  - Brady v. Maryland (1963) 373 U.S. 83
  - Griffin v. California (1965) 380 U.S. 609
  - Batson v. Kentucky (1986) 476 U.S. 79
- California Rules of Professional Conduct
- Statutory Rules (PC§1054 *et seq.*)
- Caselaw Related to Trial Practice
- Office Policies and Procedures Manual

Business & Profession Code § 6068

It is the duty of an attorney to do all of the following:

(a) To support the Constitution and laws of the United States and of this state

Policies and Procedures

All prosecutors employed by this office will be guided by this Manual, the California Rules of Professional Conduct, office and County policy and procedure memoranda, the State Bar Act in Business and Professions Code sections 6000-6228, and case law regarding professional responsibility.

POLICY AND PROCEDURE #1-04
ETHICAL DUTIES

All members of the District Attorney's Office shall treat members of the public, victims and witnesses of crime with respect, courtesy, honesty, compassion, and dignity.

COMMENT FOLLOWING RULE 3.8
Special Responsibilities of a Prosecutor

"A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons.*"

POLICY AND PROCEDURE #1-04
ETHICAL DUTIES

A prosecutor must not personally prosecute a case where he or she personally has a reasonable doubt regarding the defendant's guilt.

POLICY AND PROCEDURE #1-04
ETHICAL DUTIES

The San Mateo County District Attorney's Office requires that all of its members exercise their duties with the highest degree of ethics and integrity without regard to race, color, national or ethnic origin, age, religion, disability, sex, sexual orientation or gender identity and expression.

RULE 3.1

(a) A lawyer shall not:

(1) Bring or continue an action, conduct a defense, assert a position in litigation, or take an appeal without probable cause and for the purpose of harassing or maliciously injuring any person. (Further amplified Rule 3.8)

(b) A lawyer for the defendant in a criminal proceeding . . . May nevertheless defend the proceeding by requiring that every element of the case be established.

CHARGING – RULE 3.8

The prosecutor in a criminal case shall:

(a) not institute or continue to prosecute a charge that the prosecutor knows is not supported by probable cause;

OFFICE POLICY 1-04

A prosecutor shall maintain his or her objectivity in exercising the charging decision. A prosecutor shall not institute or cause to be instituted criminal charges when the member knows or should know that the charges are not supported by a reasonable probability that there is admissible evidence to prove the defendant guilty beyond a reasonable doubt.

§ 1054.1. Information to be Disclosed by Prosecution

(a) The names and addresses of persons the prosecutor intends to call as witnesses at trial.

(b) Statements of all defendants.

(c) All relevant real evidence seized or obtained as a part of the investigation of the offenses charged.

(d) The existence of a felony conviction of any material witness whose credibility is likely to be critical to the outcome of the trial.

(e) **Any** exculpatory evidence.

(f) Relevant written or recorded statements of witnesses or reports of the statements of witnesses whom the prosecutor intends to call at the trial, including any reports or statements of experts made in conjunction with the case, including the results of physical or mental examinations, scientific tests, experiments, or comparisons which the prosecutor intends to offer in evidence at the trial.

§ 1054.7. Time for Disclosures; Motion for Denial or Regulation of Disclosures

Upon the request of any party, the court may permit a showing of good cause for the denial or regulation of disclosures, or any portion of that showing, to be made in camera. A verbatim record shall be made of any such proceeding. If the court enters an order granting relief following a showing in camera, the entire record of the showing shall be sealed and preserved in the records of the court, and shall be made available to an appellate court in the event of an appeal or writ. In its discretion, the trial court may after trial and conviction, unseal any previously sealed matter.

DISCOVERY

Brady v. Maryland(1963) 373 U.S. 83

Under Brady, and its progeny, the prosecution has a constitutional duty to disclose to the defense material exculpatory evidence, including potential impeaching evidence. The duty extends to evidence known to others acting on the prosecution's behalf, including the police.

People v. Superior Court (Johnson), 61 Cal. 4th 696

DISCOVERY RULE 3.8

- (d) make timely disclosure to the defense of all evidence or information known* to the prosecutor that the prosecutor knows* or reasonably should know* tends to negate the guilt of the accused, mitigate the offense, or mitigate the sentence, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;* and

- Broader than Brady (there is no requirement that the evidence be material only that it "tend to negate / mitigate")

POLICY AND PROCEDURE #1-04
ETHICAL DUTIES

- A prosecutor discloses all exculpatory evidence in a case. Brady v. Maryland (1963) 373 U.S. 83, 87.

DISCOVERY
RULE 3.8

(f) When a prosecutor knows* of new, credible and material evidence creating a reasonable* likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:

(1) promptly disclose that evidence to an appropriate court or authority, and

DISCOVERY
RULE 3.8

(2) [I]f the conviction was obtained in the prosecutor's jurisdiction,

(i) promptly disclose that evidence to the defendant unless a court authorizes delay, and

(ii) undertake further investigation, or make reasonable* efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.

DISCOVERY RULE 3.8

(g) When a prosecutor knows* of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.

PENAL CODE SECTION 141

- (c) A prosecuting attorney who intentionally and in bad faith alters, modifies, or withholds any physical matter, digital image, video recording, or relevant exculpatory material or information, knowing that it is relevant and material to the outcome of the case, with the specific intent that the physical matter, digital image, video recording, or relevant exculpatory material or information will be concealed or destroyed, or fraudulently represented as the original evidence upon a trial, proceeding, or inquiry, is guilty of a felony punishable by imprisonment pursuant to subdivision (h) of Section 1170 for 16 months, or two or three years.

HOW TO GUARD AGAINST MISCONDUCT?

- Make sure that your discovery practices comply with the requirements of the law?
  - Brady v. Maryland
  - PC 1054 et seq
- Institute processes which make sure that you have the necessary materials you need to comply with your obligations . . . DO NOT BE PASSIVE.
- DOCUMENTATION IS CRITICAL . . . You need to what has been provided and when it has been provided.
- Dealing with a boilerplate request – Require clarification
- Do not let allegations go unanswered / Require the defense makes a record
- Find a Supervisor if it proceeds from there
- Ask for a special hearing or an opportunity to respond a finding.
- Ask the Court to make a finding

POLICY AND PROCEDURE #1-04
ETHICAL DUTIES

The San Mateo County District Attorney's Office requires that all of its members exercise their duties with the highest degree of ethics and integrity without regard to race, color, national or ethnic origin, age, religion, disability, sex, sexual orientation or gender identity and expression.

No member of the office shall exhibit bias or discriminatory conduct.

JURY SELECTION

Batson / Wheeler – It is improper to exercise a peremptory challenge based on an individual's membership (perceived or actual) in a constitutionally cognizable group.

What are you really concerned about???

-Anti-Police / Prosecution sentiments

-Racial Injustice

-Identifying with Defendant

THEN ASK ABOUT IT!!!!

SENTENCING

Consistency vs. Individualized Treatment

- Why is this case distinguishable or not from a typical case?
- California Rules of Court
  - Rule 4.414 (Criteria Affecting Probation)
  - Rule 4.421 (Circumstances in Aggravation)
  - Rule 4.423 (Circumstances in Mitigation)

RULE 3.3 Candor Toward the Tribunal

- (a) A lawyer shall not
  - (1) Knowingly make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer.
  - (2) Fail to disclose to the tribunal legal authority in the controlling jurisidiction know to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel or knowingly misquote to a tribunal the language of a book statute, decision or other authority (CITE AND DISTINGUISH)
  - (3) Offer evidence that the lawyer knows to be false.

POLICY AND PROCEDURE #1-04
ETHICAL DUTIES

"A prosecutor shall not mislead the court or counsel. (California Rules of Professional Conduct, Rule 5-200)."

CLOSING ARGUMENT
Griffin v. California (1965) 380 U.S. 609

For comment on the refusal to testify is a remnant of the "inquisitorial system of criminal justice," Murphy v. Waterfront Comm'n, 378 U.S. 52, 55, which the Fifth Amendment outlaws. It is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly.

CLOSING ARGUMENT cont.

[W]hen prosecutors engage in jury intimidation instead of relying on the evidence presented, they strike a "foul blow" and take advantage of their unique function by "greatly demean[ing] the office they hold and the People in whose name they serve."
…

[H]owever, it is prosecutorial misconduct to "'make arguments to the jury that give [the jury] the impression that "emotion may reign over reason," and to present "… inflammatory rhetoric that diverts the jury's attention from its proper role, or invites an irrational, purely subjective response."

People v. Sanchez (2014) 228 Cal.App.4th 1517, 1529.

Rule 8.4 Misconduct

It is professional misconduct for a lawyer to:

(a) violate these rules or the State Bar Act, knowingly* assist, solicit, or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects;

Rule 8.4 Misconduct cont.

(c) engage in conduct involving dishonesty, fraud,* deceit, or reckless or intentional misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official, or to achieve results by means that violate these rules, the State Bar Act, or other law;

CONDUCT DURING TRIAL

'It is, of course, misconduct for a prosecutor to "intentionally elicit inadmissible testimony." [Citations.]' [Citation.] Such misconduct is exacerbated if the prosecutor continues to attempt to elicit such evidence after defense counsel has objected." (People v. Smithey (1999) 20 Cal.4th 936, 960 [86 Cal. Rptr. 2d 243, 978 P.2d 1171].) However, a prosecutor cannot be faulted for a witness's nonresponsive answer that the prosecutor neither solicited nor could have anticipated. (People v. Valdez (2004) 32 Cal.4th 73, 125 [8 Cal. Rptr. 3d 271, 82 P.3d 296].)

People v. Tully (2012) 54 Cal.4th 952, 1035

CONDUCT DURING TRIAL cont.

When a prosecutor's intemperate behavior is sufficiently egregious that it infects the trial with such a degree of unfairness as to render the subsequent conviction a denial of due process, the federal Constitution is violated. Prosecutorial misconduct that falls short of rendering the trial fundamentally unfair may still constitute misconduct under state law if it involves the use of deceptive or reprehensible methods to persuade the trial court or the jury.

People v. Panah (2005) 35 Cal.4th 395, 462.

CONDUCT DURING TRIAL cont.

It is misconduct, however, "for a prosecutor to violate a court ruling by eliciting or attempting to elicit inadmissible evidence in violation of a court order. [Citation.]"

People v. Crew (2003) 31 Cal.4th 822, 839.

LAWYER AS A WITNESS
RULE 3.7

(a) A lawyer shall not act as an advocate in a trial in which the lawyer is likely to be a witness unless:

(3) the lawyer has obtained informed written consent* from the client. If the lawyer represents the People or a governmental entity, the consent shall be obtained from the head of the office or a designee of the head of the office by which the lawyer is employed.

POLICY AND PROCEDURE #1-04
ETHICAL DUTIES

A prosecutor shall not testify as a witness in a case in which the San Mateo County District Attorney's office is prosecuting except when acting in compliance with all applicable ethical and legal rules and with the approval of the District Attorney or his or her designee. (California Rules of Professional Conduct, Rule 5-210).

CONTACT WITH JURORS
RULE 3.5

(g) After discharge of the jury from further consideration of a case a lawyer shall not communicate directly or indirectly with a juror if:

(1) the communication is prohibited by law or court order;

(2) the juror has made known* to the lawyer a desire not to communicate; or

(3) the communication involves misrepresentation, coercion, or duress, or is intended to harass or embarrass the juror **or to influence the juror's actions in future jury service.**

CONTACT WITH THE MEDIA
RULE 3.6

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows* or reasonably should know* will

(i) be disseminated by means of public communication and

(ii) have a substantial* likelihood of materially prejudicing an adjudicative proceeding in the matter.

CONTACT WITH THE MEDIA
RULE 3.6 Cont.

- (e) exercise reasonable* care to prevent persons* under the supervision or direction of the prosecutor, including investigators, law enforcement personnel, employees or other persons* assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under rule 3.6.

POLICY AND PROCEDURE #1-04
ETHICAL DUTIES

A prosecutor shall not try his or her case in the media or attempt to take any unlawful or unethical advantage in the trial of an accused

Rule 3.8 Special Responsibilities of a Prosecutor

Communications with Unrepresented Defendants

The prosecutor in a criminal case shall:

(b) make reasonable* efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable* opportunity to obtain counsel;

(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights unless the tribunal* has approved the appearance of the accused in propria persona;

RESOURCES

- Ethics Hotline 1-800-238-4427 (1-800-2ETHICS)
- Online Ethics Resources: www.calbar.ca.gov/ethics

Wheeler / Batson Guide

SrDDA Robert Mestman
Orange County District Attorney's Office

Seminal Cases

P v. Wheeler (1978) 22 C3 258; *Batson v. Kentucky* (1986) 476 US 79

3 Prong Test

1. Party objecting to challenge (defense) must make a prima facie case
   - Showing that the totality of facts gives rise to an inference of discriminatory purpose
2. If prima facie case shown, burden shifts and party (DA) must explain adequately the challenge
   - Offer permissible race-neutral justification
3. Court then makes decision
   - Whether party objecting (defense) has proved purposeful discrimination

(*Johnson v. California* (2005) 545 US 162, 168)

Burden of Proof

- Defense has ultimate burden of proof. (*Gonzalez v. Brown* (9th Cir. 2009) 585 F3 1202, 1207; *Purkett v. Elem* (1995) 514 US 765, 768)
- Defense must show purposeful discrimination by a preponderance of the evidence. (*P v. Hutchins* (2007) 147 CA4 992; *Paulino v. Harrison* (9th Cir. 2008) 542 F3 692, 703)
- Consider totality of circumstances. (*P v. Lenix* (2008) 44 C4 602, 626)
- Presumption that challenge is proper. (*P v. Neuman* (2009) 176 CA4 571)

Rebut Prima Facie Case (1st Prong)

- Whether members of group discriminated against were challenged/excused by defense. (*People v. Wheeler* (1978) 22 C3 258, 283)
- DA passed with excused juror on panel. (*P v. Williams* (2013) 56 C4 630)
- Whether jury includes members of group discriminated against (*P v. Ward* (2005) 36 C4 186, 203)
- DA did not know juror was member of cognizable group. (*P v. Barber* (1988) 200 CA3 378, 389)
- Admit mistake (if challenge was made in error). (*P v. Williams* (1997) 16 C4 153, 188-190)
- Justify prospective challenges before you even make them. (*US v. Contreras* (9th Cir. 1988) 83 F3 1103)

Justifications (2rd Prong)

- Justification need not support a challenge for cause. (*P v. Thomas* (2011) 51 C4 449, 474)
- "Trivial" reason (if genuine) will suffice. (*P v. Arias* (1996) 13 C4 92, 136)
- Reasons must be inherently plausible & supported by the record. (*P v. Silva* (2001) 25 C4 345, 386)
- Must state reasons for each challenge. (*P v. Cervantes* (1991) 223 CA3 323 ["I don't recall" fatal]; but see *Gonzalez v. Brown* (9th Cir. 2009) 585 F3 1202 [based on totality of circumstances, "I don't recall" not fatal])
- Could be combination of factors (change in dynamic of jury, change in mix of jurors, number of preemptory challenges left, etc.). (*P v. Johnson* (1989) 47 C3 1194, 1220-1221)
- Give your justifications even if prima facie showing is not made (necessary for appellate review).

Factors in Court's Analysis (3rd Prong)

- Statistical evidence (percentage of jurors excused, remaining, etc.). (*P v. Garcia* (2011) 52 C4 706, 744)
- Comparative analysis (see box below).
- Disparate questioning (court looks at differences in the way questions were phrased to different jurors). (*Miller-El v. Dretke* (2005) 545 US 231, 254)
- Historical evidence of discrimination (by individual prosecutor and/or office). *(Miller-El v. Dretke* (2005) 545 US 231)
- Credibility of prosecutor. (*P v. Williams* (2013) 56 C4 630)

Comparative Analysis

- Side-by-side comparison of jurors who were struck vs. jurors serving.
- If DA's proffered reason for striking juror applies just as well to an otherwise-similar juror, that is evidence tending to prove purposeful discrimination. (*Miller-El v. Dretke* (2005) 545 US 231, 241)
- Comparative juror analysis is but one form of circumstantial evidence that is relevant, but not necessarily dispositive. (*P v. Lomax* (2010) 49 C4 530, 572)

Remedy

- Traditional: mistrial → draw an entirely different jury panel and start selection anew.
- Other alternatives (need consent of aggrieved party): disallow discriminatory challenge and reseat wrongfully excluded juror; monetary fines; allow aggrieved party additional peremptory challenges. (*P v. Willis* (2002) 27 C4 811; *P v. Mata* (2012) 203 CA4 898 [Def's personal waiver])

Cognizable Groups

- There must be an identifiable group distinguished on racial, religious, ethnic or similar grounds. (*P v. Wheeler* (1978) 22 C3 258, 276)
- Protected groups: "race, color, religion, sex, national origin, sexual orientation, or similar grounds." (CCP § 231.5)
- Defendant need not be member of excluded group. (*Wheeler* @ 281)

Race
- African-Americans (*P v. Wheeler* (1978) 22 C3 258)
- Hispanics (*P v. Perez* (1996) 48 CA4 1310; but see *P v. Gutierrez* (2002) 28 C4 1083, 1123 [Hispanic-surnamed jurors not necessarily Hispanic])
- Asian-Americans (*P v. Lopez* (1991) 3 CA4 Supp. 11)

Ethnicity
- Native Americans (*US v. Bauer* (9th Cir. 1996) 84 F3 1549)
- Irish/Italian-Americans (See 20 ALR 5th 398 at § 6)

National origin
- Spanish surnamed jurors (*P v. Trevino* (1985) 39 C3 667)

Religion
- Jews (*P v. Johnson* (1989) 47 C3 1194, 1217)
- But see *P v. Martin* (1998) 64 CA4 378 [permissible if valid reason related to religion (e.g., Jehovah's Witness); *US v. DeJesus* (3rd Cir. 2003) 347 F3d 500 [permissible for heighted religious involvement or beliefs vs. affiliation]

Gender
- Women (*P v. Garcia* (2011) 52 C4 706; *P v. Crittenden* (1994) 9 C4 83, 115)

Sexual Orientation
- Gay & Lesbian (*P v. Garcia* (2000) 77 CA4 1269, 1272)

Disability
- *US v. Harris* (7th Cir. 1999) 197 F3 870 [but permissible if disability would affect jury service (e.g., medication that causes drowsiness would interfere)]

Non-Cognizable Groups (Examples)

- Poor people / low income (*P v. Johnson* (1989) 47 C3 1194, 1214)
- Less educated (*P v. Estrada* (1979) 93 CA3 76, 90-91)
- Blue collar workers *(P v. Estrada* (1979) 93 CA3 76, 92)
- Battered women (*P. Macioce* (1987) 197 CA3 262, 280)
- Young adults (*P v. Ayala* (2004) 24 C4 243, 277-278)
- Older adults *(P v. McCoy* (1995) 40 CA4 778, 783)
- Death penalty skeptics (*P v. Johnson* (1989) 47 C3 1194, 1222)
- Ex-felons (*P v. Karis* (1988) 46 C3 612, 631-633)
- Resident aliens (*P v. Karis* (1988) 46 C3 612, 631-633)
- Naturalized citizens (*P v. Gonzalez* (1989) 211 CA3 1186, 1202 [but can't be pretext for challenge based on race/national origin])
- Insufficient English spoken (*P v. Lesara* (1988) 206 CA3 1304, 1307)
- New community resident (*Adams v. Sup. Court* (1974) 12 C3 55, 60)
- Men who wear toupees (*P v. Motton* (1985) 39 C3 596, 606)
- Retired correctional officers (*P v. England* (2000) 83 CA4 772)
- Support jury nullification (*Merced v. McGrath* (9th Cir. 2005) 426 F3 1076)
- People of color (as a group) (*P v. Neuman* (2009) 176 CA4 571)
- Obese people (*US v. Santiago-Martinez* (9th Cir. 1995) 58 F3d 422)
- Non-Hispanic with Spanish surname (*P v. Gutierrez* (2002) 28 C4 1083, 1122)

Requirements / Rules

- Wheeler/Batson objection may be raised by the defense or prosecution. (*P v. Wheeler* (1978) 22 C3 258, 280-283, fn.29)
- Must raise the issue in a timely fashion (i.e., before jury is sworn). (*P v. Perez* (1996) 48 CA4 1310, 1314)
- A single discriminatory exclusion will be a violation. (*P v. Fuentes* (1991) 54 C3 707, 716, fn.4)

Race-Neutral Justifications (Examples)

Distrust of law enforcement
- Negative experience[1, 6]
- Relative in jail or prison[2, 6]
- Refused employment by police[3]
- Ex-husband is cop[15]
- Divorce with police officer[3]
- Juror or friend/family arrested/prosecuted[4, 6, 8]
- Relative involved with drugs[8, 9]

Prior Jury Experience
- Previously sat on hung jury[1, 2]
- No prior jury experience[5]

Occupation
- Social worker[1]
- Teacher[9]
- Juvenile Counselor[13]
- Tractor Driver[9]
- Pastor[18]

Other
- Views on death penalty[6, 7]
- Rely too heavily on experts[6]
- Close-mindedness[6]

Stupid
- Ability to comprehend[1, 4, 9]
- Answered only 2 of 10 questions[5]
- Inattentive[10]
- Inconsistent answers[11]

Limited Life Experiences
- Young, single, no children[5]
- Few ties to community[16]

Relativity
- Next juror(s) looks better[17]

Appearance / Demeanor
- Unconventional appearance[12]
- Wearing "Coors" jacket[9]
- Long hair, facial hair[14]
- Weird[15]
- Too eager[13]
- Soft spoken, reluctant[4]
- Frowning, hostile looks[6, 8]
- Emmotional[6]
- Defensive body language[15]
- Overweight[15]

1) *P v. Turner* (1994) 8 C4 137; 2) *P v. Farnam* (2002) 28 C4 107; 3) *Hayes v. Woodford* (9th Cir. 2002) 301 F3d 1054; 4) *P v. Arias* (1996) 13 C4 92; 5) *P v. Perez* (1994) 29 CA4 1313; 6) *P v. Gutierrez* (2002) 28 C4 1083; 7) *P v. Williams* (2013) 56 C4 630; 8) *P v. Dunn* (1995) 40 CA4 1039; 9) *P v. Barber* (1988) 200 CA3 378; 10) *US v. Power* (9th Cir. 1989) 881 F2d 733; 11) *P v. Mayfield* (1997) 14 C4 668; 12) *P v. Ward* (2005) 36 C4 186; 13) *P v. Ervin* (2000) 22 C4 48; 14) *Purkett v. Elem* (1995) 514 US 765; 15) *P v. Johnson* (1989) 47 C3 1194; 16) *Rice v. Collins* (2006) 546 US 333; 17) *P v. Alvarez* (1996) 14 C4 155; 18) *P v. Semien* (2008) 162 CA4 701.

VOIR DIRE
THE ART AND ALCHEMY OF
ARTICHOKE AVOIDANCE

Al Giannini
Deputy District Attorney
San Mateo County

A JURY TRIAL IS A PROCESS WHERE TWELVE PEOPLE ARE SELECTED AT RANDOM TO DETERMINE WHO HIRED THE BEST LAWYER – Mark Twain

Know your objectives

Objective One – avoid the hang

- in most cases, you have evidence enough to convince at least eight or nine of the jurors, even if they were selected at random with no challenges. You are looking to avoid "the artichoke" – the unusual, standout, or even bizarre juror who will hang up the verdict in the face of ten or eleven other jurors who disagree.

Tactics:

Watch your jurors as they come into the Courtroom. Are they conversing with others? Do they sit alone? Are they reading when others are conversing around them? (If so, what are they reading?) How do they answer the roll? How do they take the oath? Does their body language, demeanor or eye contact (or failure to make eye contact) suggest they will be standoffish from the other jurors? Jurors with extreme attitudes may be EAGER to show how little they care when they walk in, but "tone it down" when seated in the box because of embarrassment in front of a group of people.

Avoid aggressive personalities who will offend other jurors, even if they are on your side.

Voir dire in a fashion that suggests and promotes commonality. "Mr. Smith, you heard Mr. Jones say he was on a jury that hung, and he really hated it. You were on a hung jury, how do you feel about that?" "Ms. Smith, you work for PG&E and so does Ms. Jones. I know it's a huge company, but do you two happen to know each other?"

Avoid splitting up pairs who have bonded: if one goes, they both go.

In most instances, exercise a challenge to eliminate an objectionable juror, not merely to try and get a better one. (However, see below – game theory and the value of a challenge) But, "When in doubt, kick 'em out". The question is always, "Will this guy hang it up 11 to 1?" This means kicking out interesting people with whom you might like to have lunch.

Check Cjis/facebook for criminal contacts and other personal information – once you get your jury list, ask your secretary/i.o. to check into your jurors for criminal contacts and prior jury service. And as a courtesy to the next lawyer, be sure to enter your comments about your jurors into Cjis at the end of every trial. And someone whose public image on facebook has them throwing gang signs might not be your preferred juror type.

My personal biases – **Against:** lawyers of all sorts (who are always the foreperson, and legal advisor to the jury, never get past the burden of proof, and analyze the evidence to death) Psychiatrists, psychologists (well, what really WAS he thinking?) and social workers (the poor man won't be helped by prison). Overly emotional or analytical jurors, overtly cheerful or comedic jurors. People with close relatives convicted of crime in most instances, regardless of whether they say they can be fair.

- For: the appropriate convicted drunk driver, provided that they say they felt treated fairly, took the blood/breath/urine test, and pled guilty early into the proceedings

Objective two – command the courtroom

You are the person running the show. Everyone is there because you have brought charges and insist on proving them. The Defendant would surely like to go home, and the judge is just a referee. Without being overbearing, make it clear that you are confident in yourself, your evidence, and your roll in the Courtroom.

Tactics:

Stand and face the jurors when they come in. You watch carefully as roll is taken, standing in front of the prosecution table (where defense counsel cannot go without abandoning the client) You are obviously standing, watching jurors take the oath (because, as noted later, if everyone does what they have sworn to do, they will vote guilty). If possible, you have a little joke with the clerk, a word with the court reporter, a nod to the bailiff while the jury is there. If possible, just when the clerk or the bailiff is about to go get the judge, you give them a visible nod as if you are telling them to do it.

Memorize the jurors names, and voir dire without notes. (Memorize in groups of three – its not as hard as it seems) With each juror, you ask at least one specific question that tells the juror you know what they have said before. (Mrs. Jones, your daughter goes to ASU – what's her major?")

Try not to interact with defense counsel – if you or your investigating officer are yucking it up with Defense counsel in the presence of the jury, then this whole thing can't be that serious. It becomes that much easier for the jury to hang and still get along with each other--or even vote not guilty–you didn't seem to take it personally during the trial.

Make an obvious promise to excuse a distressed juror – "Ms. Jones, I can tell you're very distressed about missing your first day teaching kindergarten. Of course the judge has explained that he can only excuse someone for hardship in a very limited set of circumstances, but we attorneys can let a certain number of people go for no reason. So just relax and take it easy for a minute, you're not going to miss any class, okay?"

In the appropriate case, let your body language demonstrate that you do not trust the Defendant, without appearing paranoid - Keep a distrustful eye on Defendant, and just as a matter of common sense, never let a Defendant get behind you, especially if you are seated at Counsel table.

Objective Three - You are the fair one; all you want is honesty

"Subconsciously, Jurors think they are contestants in a quiz show. They feel that everyone in the Courtroom knows the "right" answer but them. They want desperately not to appear foolish in front of the Court personnel or others. They must therefore guess which side is trying to fool them. They use a variety of cues, conscious and unconscious to do so." – anon. trial lawyer

By insisting that you are only interested in an unbiased jury that will follow the law, you communicate your confidence that any unbiased jury that follows the law will convict.

Tactics

The "Just be honest" Preamble

"Ladies and Gentlemen, I'm going to ask a few questions, but I'm not going to try and read your minds. One question I will ask everyone is whether they can be a fair juror. That's not a throwaway question. I ask only that you be honest if this simply isn't a case where you can be impartial, and I count on you to tell me if that's the case.

You've heard this case involves (guns/drugs/drunk driving/domestic violence). We all have experiences and opinions about such matters. If we tried to have a jury without any opinions about such things we'd end up with twelve people who lived in a cave. The question is whether there is something so strong about your opinion or experience that you can't set it aside and review the evidence honestly and follow the law. Perhaps you had a relative who was arrested for drunk driving and you don't think they were treated fairly, so that you wouldn't give the People a fair trial in this case. Perhaps a friend or loved one was killed by a drunk driver, and you can't give the Defendant a fair trial. Either way, it doesn't mean you're not a fair person in general, just that you probably

can't sit on this jury. Remember we have a whole lot of other criminal cases, if you can't sit here, and plenty of civil cases if you can't sit on a criminal case."

What we want to avoid is a note from the jury room during deliberations after a week of trial: "Juror number three won't follow the law. Juror number six says something happened to him when he was a child, and he's going to vote a certain way no matter what" That would mean we might have to do the whole trial over again, and more to the point, it would be a serious violation of that juror's oath. So if you can't be a fair juror to either side, please, just tell us now"

Taking on someone biased <u>in your favor,</u> if you think they're going to be excused for cause anyway

"Mr. Smith, your entire family was killed by a drunk driver and you were yourself left a quadriplegic. I know you told the judge you'd try to be fair in this drunk driving case, and I respect that. But you understand I'm concerned not just about convicting this Defendant, but also making sure he gets a fair trial. If this Defendant doesn't get a fair trial, the Court of Appeal could just send any conviction back again, so I really have to ask you. Given your background, do you really think you can take an oath to follow the law and find the facts impartially in this case?"

"Mr. Jones, you've said you think the Defendant did it and should be hanged. You understand we need to get a fair jury here, not a lynch mob. If you can't give this man a fair trial, you understand we need to excuse you. It sounds to me like that's the case. Am I right?"

Objective Four – pinning down objectionable jurors to challenge for cause

Often, we find jurors who are dead biased against the prosecution, but are reluctant to admit it. We need to develop the bias on the record to get a challenge for cause and protect our precious peremptories. This is particularly important if the particular juror is a member of a group that could cause Defendant to advance a Batson/Wheeler challenge in the event your peremptory is unsuccessful. One of the criteria the Court might use to determine if your reason for the challenge was pretextual was the extent of the voire dire.

Tactics

"**I think I can be fair"**

Well Ms. Jones, you've said you think you could be fair, and I respect that. But you're talked about a lot of experiences you've had that might be hard to set aside. It's not just a matter of "thinking", you're going to have to stand and raise your right hand and take an oath to find a verdict based on the law and evidence, and not based on something that happened to you previously. So, really, the question is "Can you in good

conscience take that oath, knowing for a fact, not thinking perhaps, that you can set aside your feelings in this case?

"**I'll try to be fair"**

"Mr. Smith, you've said you'll try to be fair, and I don't doubt that, and I appreciate your candor for raising the issue. But there's "trying" and there's "trying". If I said I'd try to be on time for court in the morning, and I really did try, I could probably do it. Sure, there could be an auto accident or something, but it's really pretty much in my power to control.

But if I said I would try to run a mile in four minutes – well, you could probably take one look and you'd know I could try all I wanted and it just wouldn't happen. That it's simply not in my power to do, no matter how hard I try.

Now only you know your own mind. Can you take an oath to be fair in this case, and know you're going to keep that oath?

I think I can follow the law – typically becomes an issue after the defense delivers a long and slightly distorted version of reasonable doubt and/or the charges and defenses in the case.

"You understand that Mr. Jones is not the one who will tell you what the law is? The court will give you the law at the end of the case. So I'm not going to waste your time by arguing with Mr. Jones or trying to convince you what the law is right now. I just want to be sure you won't form any opinions as to what the law is until you hear it from the judge.

But what is important is that you will have to follow the law, no matter what it is, and no matter whether you agree with it or not. You've heard some of the issues in the case. Drugs, guns, gangs, drunk driving. People have opinions on what the law should be in these areas, and you're all entitled to those opinions. But once you take the oath here, you are bound to accept the law the judge gives you whether you agree with it or not. So the question is whether you have such a strong feeling about the law in some area that is going to interfere with your ability to be a fair juror on this case.

If selected as a juror, you will have to raise your hand and swear an oath to follow the law, no matter what it is – can you do that in good conscience, knowing what you know now?

The tentative or weak juror – Mr. Smith, you seem a little uncomfortable that you might have to make a decision in this case. You understand that if you find this Defendant guilty, the jury is going to be polled by the Judge. You are going to have to come out and sit in front of this Defendant, and each juror is going to be asked "Mr. Smith, is that your true verdict as read. Mr. Jones, is that your true verdict as read" Not everybody can do that. Will you be able to do that?

Objective Five – protecting jurors from inappropriate questions/influences

Tactics

Recitation of Facts Prohibited – a detailed recitation of facts in a hypothetical, followed by asking a juror how he might vote is inappropriate. (P. v. Sanders (1995) 11 Cal.4th 475, 539; P. v. Fudge (1994) 7 Cal.4th 1075, 795)

If you were sitting where Defendant is sitting, would you want yourself as a juror – improper attempt to get the juror to identify with a party. Also presupposes Defendant wants a fair trial. It's a variant of the "Golden Rule" error in argument: it is inappropriate at any time in the trial to ask jurors to put themselves in the position of a party to the proceedings, Defendant or victim.

Obviously hostile jurors – because of a questionnaire, hardship application or otherwise, you become aware a juror is prepared to unload on you. "My ex-husband was a police officer, and before I divorced him for being an abusive drunk, he told me stories about beating up minorities and planting evidence and how all the cops did it. But I can be fair". Consider approaching the bench and asking the Court to do further voir dire in chambers. (P. v. Keenan (1988) 46 Cal.3d 478, 543-44)

Should that fail, try telling the Court you do not intend to try to disqualify the juror for cause, but intend to exercise a peremptory no matter what. At that point the Court should find that there is no reason to permit Defendant further voir dire of that juror except to bias the remaining jurors, and should at very least prohibit Defense counsel from exploring the inflammatory area.

Long intrusive questionnaires – the only permissible purpose for voir dire is to develop grounds for challenge for cause. (P. v. Godlewski (1993) 17 Cal.App.4th 940) So questions about what a juror reads, what he thinks are the root causes for crime, what his hobbies are and similar rubbish should not be permitted, nor should efforts to indoctrinate about reasonable doubt, the burden of proof, etc. At best, they turn the discussion from what the Defendant did or did not do to a discussion of how the jurors FEEL about what he did. At worst, they are a perjury trap, since failure to list an incident on a questionnaire could later be termed juror misconduct in an effort to overturn a verdict. (P. v. Diaz 152 C.A.3d. 926, 934-36; Clark v. U.S. 289 U.S. 1, 10-11)

Objective Six – Rehabilitating Your Jurors

Tactics

Ms. Smith, you've said you couldn't be fair because murder was such a serious crime. I think everyone here would agree with you. But you understand I have to prove the

Defendant committed murder. Surely you wouldn't vote guilty if you didn't think the Defendant was guilty, would you?

Mr. Jones you said you got broadsided by a drunk driver so you couldn't give the Defendant a fair trial. But the Defendant here says he wasn't drunk. Surely you wouldn't convict someone who wasn't drunk just because someone else totally unrelated to this Defendant who was drunk did you an injury? You'd still require me to prove the Defendant was a drunk driver, correct?

Mr. Johnson, you say you couldn't be fair because Defendant is charged with drunk driving, and you are against drunk driving. I think probably we all are. This isn't a vote on whether we approve of drunk driving, but whether Defendant was drunk when he drove. Surely you wouldn't convict him of drunk driving if you didn't think that's what he did…?

Objective Seven - Education on the Law/Attacking Problem Areas in the Case

Verdict on a charge of horse theft: "We the jury find the Defendant not guilty if he gives back the horse". Upon being instructed that this was not an appropriate verdict, and sent back to continue deliberations, the jury then returned the following verdict: "We the jury find the Defendant not guilty and he can keep the horse."

Tactics

Questions on specific cases/issues – check the voire dire folder on the shared drive. A really terrific compilation of individual voire dire questions for particular cases

Sympathetic Appearing Defendants

"Do you have any preconception of what a spousal abuser looks like? Were you surprised when you heard the charges? Do you think you can tell a book by its cover?

"You will be told you have nothing to do with penalty or punishment. Your entire job is to decide if the Defendant did what he is alleged to have done. What happens after that is up to the Judge.

Some people would find it tough to do that. Before they voted guilty they would want to have a say in whether the Defendant got probation or community service or jail time or whatever. In California, the jury decides what the Defendant did, and the judge decides what happens after that. Will you be able to take the oath and decide what Defendant did, and leave what happens after that to Judge Jones, here?"

Unsympathetic/Unattractive Victim -

"You understand this is a criminal case – it's not John Jones against Bill Smith. It's about whether Bill Smith did or did not break the law of this community on _____ date.

Nowhere in this case will you be asked if you like the victim or the Defendant. It's a case about the conduct of each. Can you be a fair juror in such a case?"

Immunized, Accomplice, Snitch or Unsympathetic or Suspect Witnesses –

You've heard that some of the witnesses in this case will be (gang members; children). Nobody expects you to take any witness testimony on blind faith. You'll have to evaluate the testimony of everyone on the stand. The Judge will give you instructions on a list of things to consider in evaluating that testimony, and one of those things will be _____.

Now some people have such strong feelings about (gang members; children) they just aren't going to listen to a thing they say. And that's fine, and they're entitled to their opinions. But they really can't sit on this jury because their opinions would make it impossible for them to base their verdict on all the evidence. So my question, as it has been all along, is can you take an oath to follow the law the judge gives you, and at least listen to all the evidence with an open mind and reach your verdict?"

Problems in Evidence or Defenses – eyewitness cases, self defense, circumstantial evidence, conflicts in testimony, aider and abettor liability, sufficiency of testimony of one witness. See above. The approach is always: if you follow the law and do what you're supposed to do, you will convict.

Objective Eight – Winning the Numbers Game

Each side has the same number of challenges, but the challenges increase in value as they become scarce.

Consider, if you have used no challenges and your opponent has used three you are three challenges ahead. If you have used three and your opponent has used six, you are likewise three challenges ahead. Finally, if you have used seven challenges, and your opponent has used all ten, you remain three challenges ahead. But in the latter situation, your three challenges have much more value than in the first. You might unilaterally be able to pick up to 3 of the twelve jurors, and get rid of the three you like least, while your opponent sits helplessly by.

So your tactics for challenge should change as the number of remaining challenges changes. You should attempt to get ahead of your opponent early, if possible. You may be aided by your opponent's intuitive, but mistaken, idea that one can challenge early with impunity, because one has more challenges left.

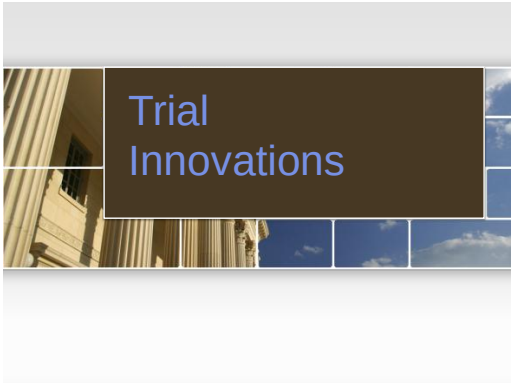
Thus, in early stages one should hoard challenges, only kicking jurors when it seems they would genuinely upset the apple cart.

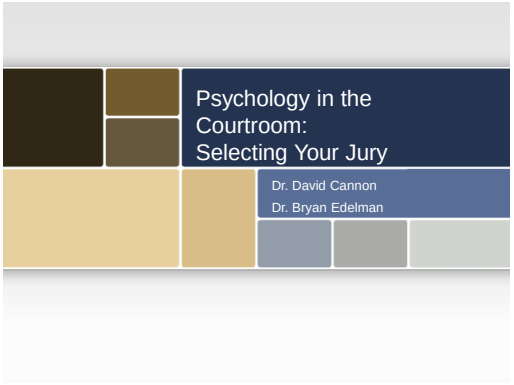
OF COURSE YOU MUST USE EXTREME CAUTION IN PLAYING THIS GAME. NEVER PASS WITH A TRULY UNACCEPTABLE JUROR STILL ON THE PANEL. RATHER, YOU MAY WISH TO PASS WITH ACCEPTABLE BUT NOT GREAT JURORS, HOPING TO IMPROVE YOUR HAND LATER

But to that end, if you can identify a prospective juror that you are certain the defense will excuse, you may decide to pass as long as that person is on the jury, secure in the knowledge that the defense will keep kicking jurors as long as that person is there.

Once the defense has expended about two thirds of the challenges, you can then keep pressure on him by using your challenges to improve the jury, rather than just to eliminate obvious misfits. With a lucky draw, you might find yourself with a number of challenges left while your opponent has one or none. You can then substantially reshape the jury without opposition.

This is not to say that such a tactic can be employed without caution. An experienced defense counsel, having a jury where he is certain at least one of the jurors will hang up the case, might abruptly pass early leaving many more prosecution jurors untouched. Nevertheless, given a careful analysis of your opponents level of craft and the makeup as the jury was drawn, the decision to pass early to try to "turn the corner" on your opponent may well pay a huge dividend down the line.





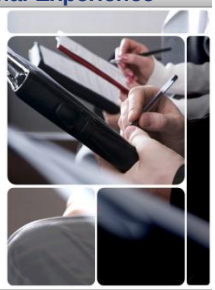
David Cannon, Ph.D. & Bryan Edelman, Ph.D.

Professional Credentials
- Education
- Research
- Experience

Professional Experience
- Number of years
- Number of cases
- Number of jury deliberations

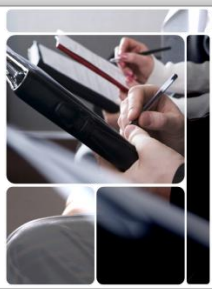
Drawing Upon Professional Experience

- Mock trials
- Courtroom observations of actual trials
- Post trial juror interviews



Program Outline

I. Intro
II. Understanding the Jury
III. Voir Dire
IV. Jury Selection



Emphasis is on
UNDERSTANDING
the jury

Understanding the Audience

- **Who** they are…
- **What** they think…
- **Why** they think what they think…
- **What** they experience on the other side of the rail…

Understanding the Audience

Only Then Can We Learn

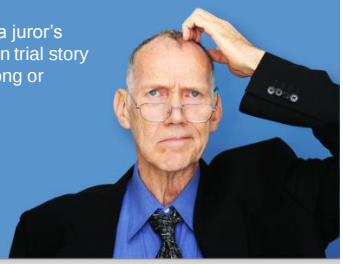
- How to **communicate**
- How to **educate**
- How to **persuade**

"Men & Women From the Community"

Tasks to Reach a Verdict

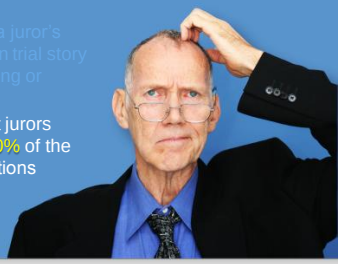
- **Assimilate** new information (evidence)
- **Evaluate** the information critically (weigh)
- **Learn** the law (comprehend instructions)
- **Apply** the instructions (law) to solve a problem (reach a verdict)

About 40% of a juror's pre-deliberation trial story is factually wrong or incomplete



About 40% of a juror's pre-deliberation trial story is factually wrong or incomplete

Likewise, most jurors forget about 70% of the judge's instructions



Jurors Spend 50% of their time in deliberations discussing…

Personal Experiences!

What Colors Our Perceptions of New Information?

"Filters" of Human Perception:

- Personal experiences ➡ Attitudes
- Acquired attitudes
- Beliefs

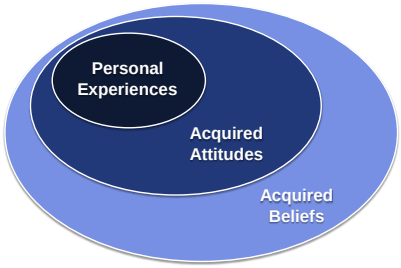
"Filters" of Human Perception

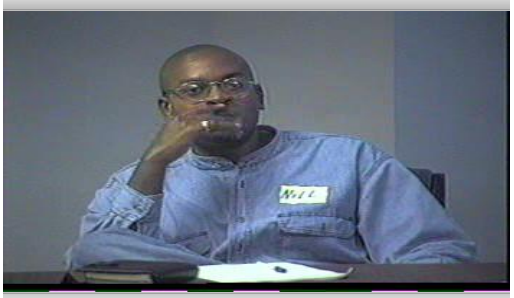
What Colors Our Perceptions of New Information?

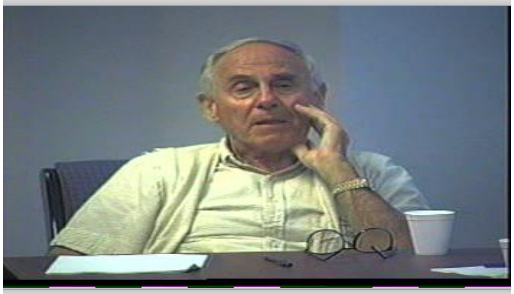
Conceptual Filters

- Result in selective perceptions of the evidence
- We accept or attend to things that agree with our preconceptions
- We fail to hear or ignore things that disagree with them

How Malleable Are Jurors' Attitudes and Beliefs?







The Process of Deliberation

Voir Dire

Voir Dire

"The trial is won or lost in jury selection!"

True or False?

Voir Dire

It's not the voir dire **EXAMINATION**,
rather, think of it as voir dire **INTERVIEW**

Voir Dire

Remember: During the process of asking for information you are conveying information about…

- Yourself
  - trustworthiness
  - Competence
- Your Case
- Your Themes

Voir Dire

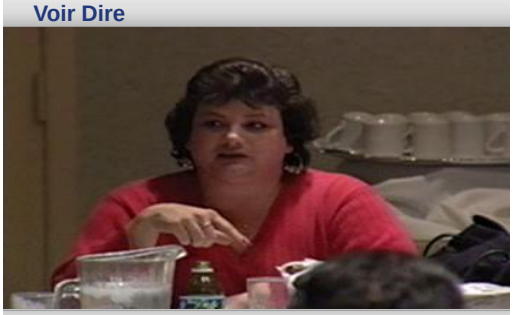
Don't Do It Alone

- Bring a scribe
- Organization is key

Voir Dire

The Jury Is Always Watching…

Voir Dire



Voir Dire

- One of the opportunities you have to 'testify!'
- **Don't waste it!**

Voir Dire

In Listening to Jury Deliberations:

- It is clear that jurors often confuse the source of "testimony"
- They frequently attribute to witnesses statements that were made by the attorneys

Voir Dire

Obtain Information About:

- **Personal experiences** related to the issues
- **Attitudes** toward your client and themes
- **Attitudes & experiences** of those close to the individual
- **Beliefs** about relevant case issues

Voir Dire

The Sphere of Influence Is Large in Our Lives!

Always ask about the experiences of:

- The individual juror
- Their family members
- Their close friends

Voir Dire

Voir Dire

Voir Dire

You Can't Change Attitudes & Beliefs in a Short Time

- "Can you set aside…?" is a meaningless question
- Don't be seduced by your desire to keep a juror

Voir Dire

Suggestion

Inoculate

Voir Dire Preparation

The best tool to use for preparing voir dire questions (and ultimately) your jury profile:

- Your opening statement

Voir Dire Preparation

Undertake a case assessment (inventory) with the jury in mind:

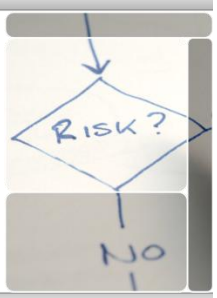
- Direct relationships to the **parties**
  - Indirect relationships
- Direct relationships to the **issues**
  - Indirect relationships

Voir Dire Preparation

- Life experiences related to issues in the case
- 'Expertise' with respect to any of the issues in the case

Voir Dire Checklist

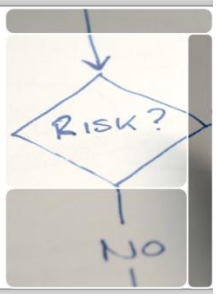
- Opening Statement
- Basic Demographic information:
  - About prospective juror
  - About other adults in his/her household
  - About grown children
  - About his/her parents



Voir Dire Checklist

Description of Work

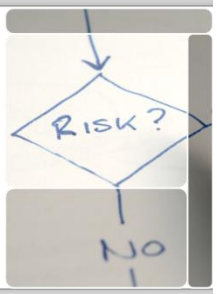
- Supervise or manage others?
- Satisfaction with job/career?



Voir Dire Checklist

Ask About Previous Occupations:

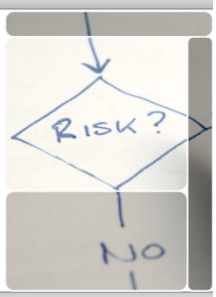
In one survey in Washington prospective jurors held an average of 3.5 jobs within the prior ten years



Voir Dire Checklist

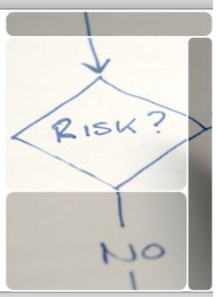
Educational Background

Special training (expertise as it might relate to the case)



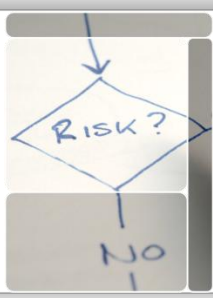
Voir Dire Checklist

- Reactions to hearing the description of the case?
- Ever had a similar situation?
  - Any friends or family members had such an experience or anything remotely like it?



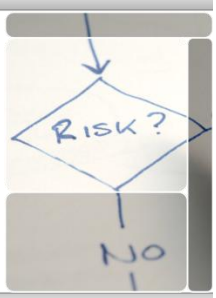
Voir Dire Checklist

- Ever been involved in the legal system?
- Ever been involved in litigation as a plaintiff or a defendant?
  - Any close friends or family members?



Voir Dire Checklist

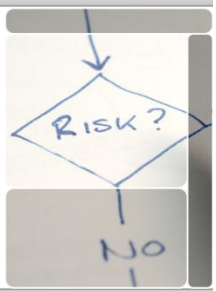
- Ever been a juror before?
  - Foreperson?
- Feelings about the experience?



Voir Dire Checklist

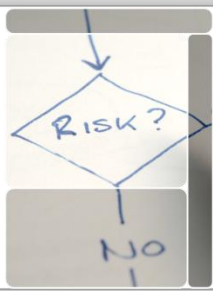
Assessing Leadership

- Management/supervisory experience at work
- Membership in social, political or religious organizations
  - Leadership positions
- Military experience



Voir Dire Checklist

- Law enforcement attitudes
- Criminal justice system attitudes
- Rooting for the underdog
- Emotionality
- Forgiveness
- Punitiveness
- Locus of control
- Victimization history
- Government attitudes
- Feelings about authority
- Antisocial tendencies



De Facto Experts

Voir Dire

Jurors will use
PERSONAL LIFE EXPERIENCES
to Assert Authority in the Jury Room

De Facto Experts

Jurors will apply the skills they use in their daily activities to
'SEARCH FOR THE TRUTH'

Conducting Voir Dire

SEARCHING FOR THE TRUTH

Voir Dire Tactics

Educate

Explain **your** role:

- To be non-judgmental
- To help the juror reflect on his/her life experiences
- To help **the juror** decide if he/she ought to be a juror on this case

Voir Dire Tactics

- Set the tone
  - Use self disclosure to elicit reciprocity effect
  - Express empathy
- Individual questions are better than group questions
  - Talk show host style
- 'Loop back' - open the discussion to the whole group when it is fitting

Voir Dire Tactics

Notes to Self…

- Tell **me** (not us or the court)
- Listen and reinforce — "I admire"

Voir Dire Extreme Questions:

Get quiet jurors talking by asking broad questions that will apply to most

Ever been a victim of crime or known a victim?

Final Voir Dire Question

"Is there anything you'd like to mention that hasn't come up in our conversation thus far?"

"Is there anything anyone would like to speak to us about in private?"

Jury Selection

Jury Selection

What's the Best Predictor of Future Behavior?

It's not "Jury **Selection**"

- It's a process of elimination
- We "strike jurors"
- We want to remove the worst possible jurors

Jury Selection

Rate Jurors on Two Dimensions:

1. Constellation of attitudes, beliefs and personal experiences
2. Leadership or "Influence Quotient"

The ultimate question you must ask yourself is, in light of the constellation of all relevant information…

The ultimate question you must ask yourself is, in light of the constellation of all relevant information…

Is he/she likely to be PREDISPOSED against me?

People **DO** change their minds, but they would **RATHER** not

Dimension One:

Constellation of Attitudes, Beliefs and Personal Experiences

Dimension Two:

"Influence Quotient"

What Is the First Question Raised in the Jury Deliberation Room?

What Is the First Question Raised in the Jury Deliberation Room?

Who's done this before?

How to Spot a Potential Foreperson:

How to Spot a Potential Foreperson:

- Both male and female forepersons generally come from white collar occupations (50%)

How to Spot a Potential Foreperson:

Demographic Traits of Forepersons:

- Male (7 times out of 10)
- White (95%)
- Age 47
- With 2 ½ years of college
- Politically middle of the road

How to Spot a Potential Foreperson:

If the Foreperson is Female:

- Average age is 33
- Two years of college
- Slightly liberal politically

First Task During Jury Striking?

First Task During Jury Striking?

Identifying the Persuaders!

First Task During Jury Striking?

Identifying the Persuaders!

- Males tend to speak more than females
- Higher socioeconomic status jurors participate more than lower SES jurors
- People with leadership/ management experience tend to lead or manage in new situations

During Deliberations

Identifying the Persuaders!

- On average, 25% of the jurors make 50% of the statements. These jurors are “persuaders”
- About 25% say little or nothing. These are the “non-participants”
- The remaining 50% are opinion generators but not leaders. They are the “participants”

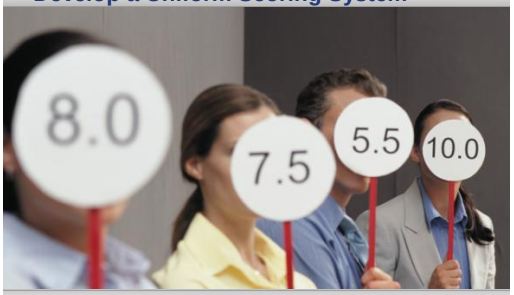
Wish List

- Leaders who have had favorable experiences, or hold favorable attitudes and beliefs
- Participants who have had favorable experiences or hold favorable attitudes
- Participants who have no relevant experiences and have relatively neutral attitudes and beliefs

Strike List

- Leaders who have had unfavorable experiences, or hold unfavorable attitudes and beliefs
- Leaders who have close friends or family members who have had unfavorable experiences or hold unfavorable attitudes
- "Experts" we are unsure about

Develop a Uniform Scoring System



What to Do?

1	5	?
5	5	?
1	1	?
3	5	?
5	1	?

Final Review of Your Challenge Decisions

- When in doubt, remove de facto experts who are 3's, 4's or 5's on leadership
- Double check for "malcontents"

Getting the Inside Track on the Jury Pool:

- Remember, the length of the trial will significantly impact the final pool

Employment; Leadership Potential

6. Current Employment Status:
   - __Employed full-time
   - __Employed part-time
   - __Homemaker
   - __Retired
   - __Student
   - __Disabled
   - __Unemployed, looking for work
   - __Unemployed, not looking for work
7. Current occupation:_____
8. Employer:_____ How long:_____
   Title or position:_____
   Please describe your duties at work:_____
   _____

Employment Satisfaction; Employment History; Business Ownership

9. Generally, how would you describe your experiences (or dealings) with your current or most recent employer?
   __Very satisfactory
   __Satisfactory
   __Neutral
   __Unsatisfactory
   __Very Unsatisfactory
10. If retired, what was your last occupation?_____
    Your last employer?_____
    What do you do at present?_____
11. Have you ever owned your own business? Yes__ No__
    If **"yes,"** what type of business:_____
    Number of Employees:_____ Dates of operation:_____

Skill Sets; Leadership; De Facto Expertise

14. Please list all previous occupations and indicate how many years you worked in each.

Occupation	Employer	Number of Years

15. In your work, do you have management or supervisory responsibilities? Yes__ No__
    If **"yes,"** please describe:_____
    Number of people supervised:_____
16. Have you had management or supervisory responsibilities in the past? Yes__ No__
    If **"yes,"** please describe:_____
    Number of people supervised:_____

Union Membership — Grievance History; Leadership

24. Have you or any members of your family ever belonged to a union?
    ____Yes, self ____Yes, family member ____No.
    If **"yes,"** which one_____
    If **"yes,"** offices held_____
25. Have you ever filed a grievance with a union?
    Yes____ No____
    If **"yes,"** please describe:_____
    _____
26. Have you ever participated in a grievance investigation?
    Yes____ No____
    If **"yes,"** please describe:_____
    _____

Socioeconomic Status

27. Do you own ___or rent ___ your current residence?

Educational Background; Leadership; De Facto Expertise

28. Highest grade you completed in school: (Check one)
    ___High School ___College 3 years
    ___College 1 year ___College 4 years
    ___College 2 years ___Post-Graduate
29. Major area of study:_____
30. What colleges, if any, did you attend?_____
31. Other educational programs (vocational schools, night schools, part-time study, correspondence schools, etc.) _____
32. Have you ever taken any courses or had any training in any of the following areas? If so, please describe when and where you studied.
    a. Legal matters generally _____
    b. Personnel or Human Resources _____
    c. Psychology/Psychiatry _____
    d. Auditing/Accounting _____
    e. Labor relations _____

Potential Leadership; Activism

33. What type(s) of volunteer work do you do?_____
34. Have you ever belonged to any organizations which were designed to promote or protect the rights of different groups or individuals, such as civil rights groups, women's or minority groups, environmental action groups? Yes___ No___
    If **"yes,"** please describe:_____

Political Attitudes

35. How would you describe your political style: **(Check one)**

___Very liberal
___Somewhat liberal
___Middle of the road
___Somewhat conservative
___Very conservative

Other Adults at Home; Possible Sources of Influence/Information

36. Marital status:

___Single and never married
___Single, but living with non-marital mate for _____years
___Single, but married in the past for _____years
___Currently married and have been for _____years
___Widowed

37. What is your spouse's occupation?_____
By whom is he/she employed?_____

38. Other than as indicated above, does any other adult live in your household? Yes__ No___
If **"yes,"** please state his/her occupation(s)_____

Other Sources of Influence/Information

39. Please list the occupations of your extended family (parents, brothers, sisters, close relatives). (Please **do not** give their names, but identify their relationship to you.)

Relationship	**Occupation**

40. If you have children, please list:

NAME	**AGE**	**SEX**	**OCCUPATION**	**EMPLOYER**

Leadership

41. Have you ever served in the armed services? Yes___ No___
If **"yes,"** what branch(s)__
Dates:_____ Rank:_____

42. Would you describe yourself as a leader:
___Infrequently ____Occasionally ____Frequently

Source of Attitudes or Beliefs

59. Do you have any close friends or family members who are in the legal profession?
Yes__ No___
If **"yes,"** please state the name(s) of the law firms or courts by which they are employed?
_____

Leadership; Potential Foreperson

60. Have you ever served as a juror before? Yes__ No___
If **"yes"**, what court(s)? _____
What were the cases about?_____
How would you describe your experience(s) as a juror?_____
_____
Have you ever served as foreperson of a jury? Yes__ No___

Clean-up Questions

61. Is there anything which you feel should be brought to the court's attention that might affect your ability to be as fair and impartial a juror as you would like to be, or any reason why you may not want to serve as a juror in a case involving an employment dispute? Yes___No___

If "yes," please explain:_____

62. Is there any matter you would prefer to discuss privately with the court? Yes___ No___

If "yes," please explain:_____

63. Is there any information not asked in this questionnaire which you feel the judge or attorneys should know about?

Thank You,

COUNTY OF SAN MATEO
DISTRICT ATTORNEY'S OFFICE
TRAINING MEMO

DATE: June 15, 2005

TO: Deputy District Attorneys

FROM: Martin Murray, Asst. D.A.

SUBJECT: Wheeler/Batson Motions

The United States Supreme Court held that California's standard for finding prima facie evidence of discrimination in exercising peremptory challenges is too stringent. In *Johnson v. California* (June 13, 2005), ___ U.S. ___; 2005 U.S. LEXIS 4842, the Court held that the objecting party need only establish an "inference" of discrimination to require the other party to offer an explanation. California's standard of "strong likelihood" presents a lower standard of scrutiny of peremptory challenges than the federal Constitution permits.

Facts: Johnson, a black male, was convicted of second-degree murder of a 19-month-old child. During jury selection, a number of prospective jurors were removed for cause until 43 eligible jurors remained, 3 of whom were black. The prosecutor used 3 of his 12 peremptory challenges to remove all the black prospective jurors. The resulting jury, including alternates, was all white.

After the prosecutor exercised the second of his three peremptory challenges against the prospective black jurors, defense counsel made a *Wheeler/Batson* motion. The trial judge did not ask the prosecutor to explain the rationale for his strikes. Instead, the judge simply found that petitioner had failed to establish a prima facie case. The trial court stated that, "There's not been shown a strong likelihood that the exercise of the peremptory challenges were based upon a group rather than an individual basis." The judge did, however, warn the prosecutor that, "We are very close."

Another *Wheeler/Batson* motion was made when the prosecutor struck the final remaining prospective black juror. The trial judge still did not seek an explanation from the prosecutor. Instead, he explained that his own examination of the record

had convinced him that the prosecutor's strikes could be justified by race-neutral reasons. Specifically, the judge opined that the black venire members had offered equivocal or confused answers in their written questionnaires. Therefore, even considering that all of the prospective black jurors had been stricken from the pool, the judge determined that petitioner had failed to establish a prima facie case.

The California Supreme Court affirmed the conviction, setting aside the DCA reversal, and held that "Wheeler's terms 'strong likelihood' and 'reasonable inference' state the same standard" -- one that is entirely consistent with *Batson.* The Court concluded that the objector must present evidence that it is more likely than not that the challenges are being exercised in a discriminatory manner.

The U.S. Supreme Court reversed.

Holding: California's "more likely than not" standard is an inappropriate standard by which to measure the sufficiency of a prima facie case. The objector need only raise an inference of discrimination.

Analysis: When a *Wheeler/Batson* motion is made, there are three steps in the process:

1. The defendant must establish a prima facie case "by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose." 2. Once the defendant has made out a prima facie case, the burden shifts to the State to explain adequately the racial exclusion by offering permissible race-neutral justifications for the strikes. 3. If a race-neutral explanation is tendered, the trial court must then decide whether the opponent of the strike has proved purposeful racial discrimination.

California courts have long required the objector to prove a “strong likelihood” or “more likely than not” that discrimination has occurred in order to establish a prima facie case. The U.S. Supreme Court reasoned that it did not intend the first step to be so onerous that a defendant would have to persuade the judge -- on the basis of all the facts, some of which are impossible to know with certainty -- that the challenge was more likely than not the product of purposeful discrimination. Instead, a party satisfies the requirements of *Batson's* first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred.

The Court stated that, "The *Batson* framework is designed to produce actual answers to suspicions and inferences that discrimination may have infected the jury selection process. The inherent uncertainty present in inquiries of discriminatory purpose counsels against engaging in needless and imperfect speculation when a direct answer can be obtained by asking a simple question."

In addition to deciding that California's standard was set too high, the Court also concluded that the fact that all three African-American prospective jurors were challenged was sufficient to establish the prima facie case.

In another **Batson** case decided the same day, the Court analyzed not only the reasons given for excluding minorities but also the fact that white jurors who answered questions similarly were not challenged. See *Miller-El v. Dretke* (2005) ___ U.S. ___;2005 U.S. LEXIS 4658.

In the concurring opinion in *Miller-El v. Dretke* Justice Breyer seems to agree with Justice Thurgood Marshall's observation in *Batson* that the only way to prevent racial discrimination in the exercise of peremptory challenges is to eliminate peremptory challenges entirely.

Training Tip: When a *Wheeler/Batson* motion is made, make sure that the court articulates the proper standard for determining whether a prima facie showing of discrimination has been proven. We risk reversal if the court uses the old standard of "strong likelihood" instead of an "inference" that the challenges were improperly based on discrimination.

It is both unethical and unconstitutional to exercise a peremptory challenge based on improper group bias. Even though your challenge is based on proper criteria, it will probably be necessary to justify any challenges to minority jurors.

Take careful notes as to *every* juror. Be prepared to articulate race-neutral reasons for excluding the jurors. Since the Court has set a very low standard, it is likely that trial courts will require an explanation whenever more than one or two minorities are challenged. Also, be prepared to explain why a challenge was *not* used on non-minority jurors since it is likely that the court's inquiry may encompass a comparative analysis.

Filed 10/29/10

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. KHOA KHAC LONG, Defendant and Appellant.	H033197 (Santa Clara County Super. Ct. No. CC775750)

I. INTRODUCTION

While working as a Vietnamese prostitute, Amy "Doe"[1] was robbed on two occasions and raped on the second occasion by a Vietnamese male who was identified as defendant Khoa Khac Long through investigation by a Vietnamese police detective. A jury was seated after a Vietnamese prosecutor exercised some of her peremptory challenges against the only three Vietnamese prospective jurors. After trial, the jury convicted defendant of two counts of first degree robbery (counts 1, 3; Pen. Code, §§ 212, 212, subd (a)(2))[2] and one count of rape (count 2, § 261, subd. (a)(2)) of the same victim, while finding not true that he personally used a firearm in the commission of

[1] At trial the victim was generally identified as Amy "Doe." Intending no disrespect, we will use her first name for clarity and to preserve her privacy. For simplicity, we will also use another witness's nickname.

[2] Unspecified section references are to the Penal Code.

these offenses (§§ 667.61, 12022.3, 12022.53).[3] The trial court sentenced defendant to prison for 14 years, including a six-year upper term on count 1 with a full consecutive eight-year upper term on count 2, and a six-year concurrent term on count 3. The trial court also required defendant to register as a sex offender, to provide samples for DNA and AIDS testing, and to pay various fines and fees, including a restitution fine of $7,800.

On appeal, defendant contends that (1) there was insufficient evidence that the motel rooms that were the scenes of the crimes were inhabited, (2) the trial court erred in upholding the prosecutor's use of peremptory challenges against prospective Vietnamese jurors, and (3) his sentence is unconstitutional. As we explain below, we will reverse the judgment, finding no evidence in the record substantiating one of the peremptory challenges. In light of this conclusion, we need not review the prosecutor's challenges to the two other jurors or the constitutionality of the sentence. We will consider whether the evidence was sufficient.

II. THE EVIDENCE AT TRIAL

At trial it was undisputed that Amy was working as a prostitute both times that defendant came to her room in each of two motels on September 19 and December 3, 2006. Surveillance videos from the motels showed defendant and Amy outside her rooms at different times. It was also undisputed that they engaged in sexual intercourse on December 3. DNA testing revealed that defendant's semen was on Amy's chest. What was in dispute at trial was whether defendant robbed Amy on both occasions using a firearm and whether he raped her on the second occasion.

Defendant testified that he was a regular customer of hers, and that, on both occasions, they had consensual sex for which he paid her, as they had several times

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[3] A fourth count of penetration by a foreign object was dismissed on the prosecutor's motion after the presentation of the prosecutor's case in chief.

before. On the last occasion, contrary to her prior practice, she did not encourage to him to wear a condom.

According to Amy, she sometimes stayed at hotels in San Jose where she worked as a prostitute. On September 19, she was staying at the Best Western Inn. She got to the room around noon. She had other customers before defendant arrived in the evening. She could not recall if he had made an appointment by telephone. He was no one she had seen before. They spoke in Vietnamese. He asked to use the restroom and came out holding a small handgun. She said he could take whatever he wanted. He threatened to kill her if she did not shut her eyes, keep her mouth closed, and lie face down on the bed. She complied. He asked her where the money was. She heard him gathering up her belongings, and, when she opened her eyes, she realized he had taken her laptop, purse, her wallet and its contents, jewelry, a watch, two cell phones, and over $1,000 in cash. She noticed that everything was gone, but she could not remember everything she had. She could not remember if any luggage was missing from her room. He ignored her plea to not take her passport and driver's license. He said that he knew where she lived and would come after her if she called the police. She talked him out of tying her up, but he had her disrobe and took photos of her with a cell phone, saying he would put them on the Internet if she called the police.

After he left, she looked out the door and called for help. Then she dressed and went to the hotel lobby, from which she telephoned a male friend, Vahidin "Max" Maksumic. After Max arrived, Amy or a hotel employee called the police.

Max had befriended Amy a few months before September 19, 2006, after meeting her in a nightclub.[4] They sometimes went shopping or out to eat. At the beginning he

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[4] Amy testified that Max was initially a customer of hers who fell in love with her. He admitted that he gave her gifts, but he denied being a customer.

was not that aware of "what she was doing." She told him that she gave massages and worked in hotels. After the police came and talked to both of them on September 19, Max learned "what she does." He did not approve of it, but he had strong feelings for her. Occasionally, when she said she was hungry, he brought her a meal, lunch or dinner, at a hotel. Sometimes he visited her three or four consecutive days. Other times he would not see her for a week or two, because he traveled a lot.

San Jose Police Officer Luu Pham, the only certified bilingual Vietnamese detective, assigned himself the case and interviewed Amy. He met with her twice at a two-story house in San Jose, which was also occupied by a Vietnamese family, a husband and wife and two toddlers.[5]

The robbery frightened Amy, but a few months later, on December 3, 2006, she was working as a prostitute and staying the night in the Days Inn hotel. She arrived at the room in the daytime. Later that day, her friend Max rented the room across the hall so that he could offer her protection. He had not done that before.

Amy had some customers that day before she opened the door in the evening to find defendant standing outside. She started to scream when she saw him, but he pulled out a hand gun, held it to her head, and pulled her down on the floor. He said he was a bad man. He told her to shut up and close her eyes. He said he was going to kill her. She complied with his demand to remove her clothes. She got on the bed face down without him telling her to. He told her to keep her eyes closed or he would shoot her right away. She told him she had hidden money in the bathroom. When he came out of the bathroom, he said that he knew she had more money than that, $500 or $600. He

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[5] Pham testified that Amy told him that she was renting a room from the family. Defendant successfully objected to this testimony as hearsay and it was stricken.

pressed the gun against her vagina. He asked where the rest of her money was. She said that was all she had in the room. More was in her car. She told him to take the key.

He said he would rape her if she did not give him more. He turned her over and put his penis in her vagina. She felt the gun against her face several times, which was why she did not scream for help. He ejaculated outside of her. Defendant took her cell phone but not her clothes.

After defendant left, Amy called out for help and crossed the hall to knock on Max's door, but he was not there. By that time Max had been at the hotel around four hours and was bringing things to his car so he could leave. She encountered him in the hallway and told him she had been robbed again by the same man. Max went out into the parking lot and recorded the license plate and description of a car leaving the parking lot. Amy gave this information to the police. She submitted to a medical examination.

Police investigation led to the car's registered owner, Bao Tran, an associate of defendant. On December 14, 2006, Tran reluctantly admitted to Detective Pham that defendant had borrowed his car 10 days earlier, and that when defendant returned it, he told Tran to get rid of it right away because it might have been identified by witnesses as involved in a robbery and shooting. Pham recovered one of Amy's cell phones on December 14, 2006, in a crash pad crack house located where defendant had returned the car.

III. SUFFICIENCY OF THE EVIDENCE OF ROBBERY

On appeal defendant contends that the prosecution failed to prove one element of first degree robbery, namely that the crime occurred in either "an inhabited dwelling house" or "the inhabited portion of any other building." (§ 212.5, subd. (a).)

The jury in this case was instructed in terms of CALJIC No. 9.42: "There are two degrees of robbery. Every robbery of any person which is perpetrated in an inhabited portion of any building is robbery of the first degree. All other robberies are of the second degree." In opening argument, the prosecutor asserted, "I do not believe that you

will hear any argument from the defense that this is, if a robbery, anything other than a first degree robbery. This is an inhabited place, even if it is just for a night. A jail cell can be a inhabited [*sic*] place. Anything where someone is actually living or staying, even temporarily, is a robbery of first degree." Indeed, defense counsel did not dispute this point in argument.

This is not the first time a California state court has been asked to decide when a hotel or motel room qualifies as "inhabited." The issue has sometimes arisen in the context of burglary convictions, because section 460 defines first degree burglary as involving, among other things, "an inhabited dwelling house" or "the inhabited portion of any other building." Section 459 provides in part that " 'inhabited' means currently being used for dwelling purposes, whether occupied or not."[6] Since the statutes use the same phrases, they should receive the same interpretation. (*People v. Fleetwood* (1985) 171 Cal.App.3d 982, 987 (*Fleetwood*).)

An issue on appeal in *Fleetwood* was whether there was sufficient evidence that a prostitute's room in a boarding hotel qualified as a "dwelling house." (*Fleetwood, supra*, 171 Cal.App.3d at p. 985.)[7] Although the robbery victim had engaged in acts of prostitution in the room and it was furnished with only two mattresses and a television set, the appellate court concluded that there was substantial evidence that she also resided there. Prior to the robbery, she had been staying in the room for a week to a week and a half and she had paid up to two weeks' rent. (*Id.* at pp. 988-989.)

The contention on appeal in *People v. Villalobos* (2006) 145 Cal.App.4th 310 (*Villalobos*) was " that an occupied motel room, such as that where these crimes took

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[6] This 1977 amendment of the statute codified long-standing case law. (*People v. Guthrie* (1983) 144 Cal.App.3d 832, 839-840.)

[7] This was before the statute provided, as it now does, that a first degree robbery may occur in the inhabited portion of any building.

place, is not an 'inhabited dwelling house' within the meaning of the relevant statutes, if the room is rented only for one night." (*Id.* at p. 313.) In order to define "inhabited," the court considered the purpose of the burglary and robbery statutes. The burglary statutes were intended to give security and peace of mind to people in their residences. (*Id.* at p. 317.)

"In keeping with the purpose of the statute, the term '"inhabited dwelling house"' has been given a 'broad, inclusive definition.' (*People v. Cruz* [(1996)] 13 Cal.4th [765,] 776, 779.) Thus, although an inhabited dwelling house is a place where people '"ordinarily live and which is currently being used for dwelling purposes"' (*People v. DeRouen* (1995) 38 Cal.App.4th 86, 91, disapproved on other grounds in *People v. Allen* (1999) 21 Cal.4th 846, 865-866), it 'need not be the victim's regular or primary living quarters' in order to be deemed an inhabited dwelling house. (*People v. Fond* (1999) 71 Cal.App.4th 127, 130) Rather, the '"'"inhabited-uninhabited dichotomy" turns . . . on the character of the use of the building.'" [Citation.] . . . "[T]he proper question is whether the nature of a structure's composition is such that a reasonable person would expect some protection from unauthorized intrusion." [Citation.]' (*People v. DeRouen*, *supra*, 38 Cal.App.4th at pp. 91-92, italics omitted.) Thus, a temporary place of abode, such as a weekend fishing retreat (*U.S. v. Graham* (8th Cir.1992) 982 F.2d 315), a hospital room (*People v. Fond, supra,* at pp. 131-132) or even a jail cell (*People v. McDade* (1991) 230 Cal.App.3d 118, 127-128), may qualify." (*Villalobos*, *supra*, 145 Cal.App.4th at pp. 317-318.)

"People have an expectation of freedom from unwarranted intrusions into a room in which they intend to store their personal belongings, sleep, dress, bathe and engage in other intimate, personal activities." (*Villalobos*, *supra*, 145 Cal.App.4th at p. 318.) This described "a hotel room, even if it is only rented for one night." (*Ibid.*)

Villalobos disagreed with emphasis placed by several cases on the occupant's intent to return to the structure. (*Villalobos*, *supra*, 145 Cal.App.4th at pp. 319-321.)

"Neither *Fleetwood* nor any other case of which we are aware provides any rational basis for making habitation dependent upon the occupant's intention to continue using the structure as a habitation in the future. If the person is using the structure as a habitation when the burglary or robbery occurs, his possible intent to abandon the habitation in the future does not alter its character as an inhabited dwelling." (*Id.* at p. 320.)

Villalobos, supra, 145 Cal.App.4th concluded on page 321: "Of course, a motel room may be 'occupied' for purposes other than use as a temporary dwelling, and thus not be 'inhabited' for purposes of the burglary and robbery statutes. (See *People v. Guthrie, supra*, 144 Cal.App.3d at p. 838 [distinguishing between 'occupied' and 'inhabited'].) As implied in *Fleetwood, supra*, 171 Cal.App.3d 982, a motel room can be rented as a place to transact business, licit or illicit–in that case, prostitution. It is also not uncommon for people to rent motel rooms to conduct legitimate business meetings or transactions. The rooms are 'occupied' while these transactions or meetings take place, but they are not 'inhabited' unless, as in *Fleetwood*, they are also being used as a place of repose. Here, it was undisputed that Miller intended to stay overnight in the motel room and to sleep there as well as 'partying.'"

Looking at this passage in *Villalobos*, defendant argues that whether Amy "'inhabited' the rooms turns on the use or uses she was making of" them. Defendant contends that the evidence in this case proved merely that the victim was occupying the hotel rooms in order to ply her trade, but not that she inhabited either room. "[T]here was no evidence that Doe had luggage, an overnight bag, or other belongings that would indicate she was inhabiting the motel rooms as opposed to just working out of them."

Forgetting that his own objection to the testimony was sustained, defendant asserts that we know that Amy was renting a room from a family and living there.[8]

The Attorney General responds that "[n]o single factor is determinative, not even whether the victim has slept in the structure." That Amy brought her passport to the first room and that she could not remember if any luggage was missing after the first robbery provide substantial evidence that she was using the rooms "as a habitation, even if only for one night."

People v. Hughes (2002) 27 Cal.4th 287 stated at pages 354 and 355: "The use of a house as sleeping quarters is not determinative, but instead is merely a circumstance used to determine whether a house is inhabited. As observed in *People v. Hernandez* (1992) 9 Cal.App.4th 438, 441, 'statutory amendments have eliminated the requirement that a burglary take place at night for it to be first degree burglary. [Citation.] Thus, the Legislature has rejected the view, expressed in prior case law, that the use of a house as sleeping quarters is critical.' The court in *Hernandez* upheld a conviction for first degree burglary even though the victims of the burglary had just moved into the apartment, had not unpacked their belongings, and had not yet slept there. (*Id.*, at pp. 440-442.)"

People v. Meredith (2003) 174 Cal.App.4th 1257 reviewed precedent as follows on page 1266. " 'For purposes of the California first degree burglary statute, a structure "need not be occupied *at the time;* it is inhabited if someone lives there, *even though the person is temporarily absent.*" (2 Witkin & Epstein, Cal.Criminal Law [(3d ed. 2000)], Crimes Against Property, § 114, p. 144; see *People v. Hughes* (2002) 27 Cal.4th 287, 354-355 [apartment was inhabited even though occupant was in process of moving; her furnishings remained there, and she was present in apartment during daytime hours];

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[8] In defendant's reply brief, this house in San Jose inexplicably becomes a house in Sacramento.

People v. Hernandez (1992) 9 Cal.App.4th 438 [apartment was inhabited when tenants moved all of their belongings into it, but had not yet slept in it or unpacked]; *People v. Jackson* (1992) 6 Cal.App.4th 1185 [dwelling continued to be inhabited because tenant who intended to move out had not vacated premises and was still using the house at time of robbery]; *People v. Marquez* (1983) 143 Cal.App.3d 797, 800, 802 [house inhabited even though resident, under conservatorship, had been absent for two and a half years, because resident intended to return]; CALJIC No. 14.52 ["[an inhabited dwelling house] is inhabited although the occupants are temporarily absent"].) A structure that was once used for dwelling purposes is no longer inhabited when its occupants permanently cease using it as living quarters, and no other person is using it as living quarters. (*People v. Cardona* (1983) 142 Cal.App.3d 481, 483 [house no longer inhabited when residents had moved and no identifiable person was currently using it as sleeping quarters]; *People v. Valdez* (1962) 203 Cal.App.2d 559 [house not inhabited when previous tenant had moved out a week earlier and new tenant had not moved any belongings into house].)' (*People v. Rodriguez* (2004) 122 Cal.App.4th 121, 132, italics added.)"

This survey of precedent tells us that a popular test for whether a building is "inhabited" is whether someone is using it as a temporary living quarters; in other words, whether the building is serving as the functional equivalent of a home away from home. This characterization should be made from the perspective of the victim (*People v. Aguilar* (2010) 181 Cal.App.4th 966, 970), not the criminal. (*People v. Parker* (1985) 175 Cal.App.3d 818, 824 ["in a prosecution for first degree burglary, the fact that a defendant does not know that the building he is about to burglarize is a residence is irrelevant"].)

In this case it does not appear that the prosecutor felt a need to introduce much evidence on the status of Amy's occupancy of the hotel rooms. She elicited from Amy that she sometimes stayed in San Jose hotels when she was working as a prostitute, she was staying at the Best Western Inn on September 19, 2006, she got to the hotel around

noon that day, and she had other customers before defendant arrived that evening. Amy was staying the night of December 3, 2006, in a room in the Days Inn. She did not recall exactly when she arrived, but it was in the day time. She had some customers before defendant arrived. The prosecutor did not ask Amy if she had prepaid for either room, how long she intended to stay, how long she customarily stayed, what she brought to each room, or whether she intended to do anything in either room other than engage in prostitution.

"In assessing a claim of insufficiency of evidence, the reviewing court's task is to 'review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' (*People v. Johnson* (1980) 26 Cal.3d 557, 578.)" (*People v. Singleton* (2007) 155 Cal.App.4th 1332, 1339 [no substantial evidence of presence in residence during burglary].) "When reviewing the sufficiency of evidence on appeal, as long as circumstances reasonably justify the fact finder's determination, we must accept it, even though another fact finder may have reasonably determined the opposite." (*People v. Rodriguez* (2000) 77 Cal.App.4th 1101, 1106.)

The Attorney General asserts that because Amy could not remember if any luggage was missing, it is reasonable to infer that she had luggage in the room. We consider this too speculative. However, there was other evidence of Amy's hotel routine that the Attorney General has not emphasized. Her friend Max occasionally visited her three or four nights in a row in hotels and sometimes brought her meals. That Amy was dining in and socializing at hotels on other occasions is substantial evidence that she was not using the hotel rooms simply as places of business or offices, but as temporary living quarters. There was no evidence of her sleeping at a hotel, but that is merely one circumstance among many relevant to showing habitation.

In our view, a couple on a honeymoon who uses a motel bed for sexual activity instead of sleeping is still inhabiting the room. They are engaging in the kind of intimate, personal, and private activities indicative of a living quarters and not a workplace. This is also true of other couples not on a honeymoon. Notwithstanding the implications of *Fleetwood* and *Villalobos*, we question whether the fact that Amy was compensated for her sexual activity should be regarded as transforming her motel room into some kind of uninhabited office. Surely a business traveler who takes advantage of free wi-fi and Internet connections available in a hotel room to transact some business and make some money is entitled to the same protection from robbery as the motel occupant in *Villalobos*, who was using methamphetamine in the room in anticipation of the arrival of a female with whom he hoped to have sex. (*Villalobos*, *supra*, 145 Cal.App.4th 310, 314.) We would conclude that the business traveler's room is inhabited while he or she is doing business as well as resting.

However, we are not required to decide whether a motel room is "inhabited" within the meaning of section 212.5, subdivision (a), if the occupant has rented it "solely for purposes of consummating prostitution transactions." (*Jennings v. U.S.* (D.C. Cir. 1981) 431 A.2d 552, 555.) Here there was substantial evidence that the victim, by socializing with a friend and eating meals, used hotel rooms as living quarters, thereby inhabiting the rooms at the time defendant robbed her.

IV. THE PROSECUTOR'S PEREMPTORY CHALLENGES

Defendant asserts that the trial court erred in denying his motion challenging the Vietnamese prosecutor's use of peremptory challenges against prospective jurors who appeared Vietnamese. We will set out aspects of the jury voir dire where relevant to our discussion.

A. *The Prosecutor's Explanations and the Court's Ruling*

Upon exercise of the prosecutor's ninth peremptory challenge to a prospective juror, defendant made a motion questioning the basis for the prosecutor's challenging of

three individuals with "Vietnamese names." Defendant asserted there was no apparent reason for the challenges other than "because they're apparently Vietnamese."

The court asked if the prosecutor wanted to respond and the prosecutor offered the following explanations. As to T. N., he did not contribute to or participate in any of the discussion that ensued when the court asked questions of the entire panel. "Obviously, participating in a discussion doesn't necessarily mean that he is not a juror. It was my sense that he would not be a participating member of the jury. He was not contributing to our conversations. It was impossible for me to figure out where he stood on any of the issues that I think are at least relevant" and should provoke some dialog. Moreover, he "did not make eye contact with me during the time throughout the entire process of us questioning the first 12 jurors, and it was based on that that I did not feel he was a participating member of the jury, and I did not feel comfortable with his body language and the way that he was expressing himself, or able to express himself in the context of a juror."

As to K. P., who was called after other prospective jurors were excused, the prosecutor stated that she was concerned about his language abilities. He "seemed to answer the questions in the affirmative or negative that did not correspond with the question that was being asked. [¶] For instance, the court would say, is it correct that you can follow the law, and he would say no. [¶] So I was significantly concerned about that. English was clearly his second language, and I am concerned in a case like this where we have special allegations, and I think we have lesser included offenses and things like that, I was concerned that his language ability could present a challenge to the jury deliberation process."[9] The prosecutor also asserted her belief that K. P. was Cambodian, not Vietnamese.

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[9] What the prosecutor was referring to presumably were these exchanges.

(Continued)

As to C. H., who was also called after other prospective jurors were excused, the prosecutor stated that she was excused because her sister, one year different in age, was a defendant in a criminal fraud prosecution by the prosecutor's office. "[A]lthough she [C. H.] said she [her sister] was treated with respect, at this point when someone close to you is involved in a criminal process and is being treated as a defendant, is being prosecuted by my office, it's appropriate to excuse her."

At the conclusion of the hearing on May 12, 2008, the trial court stated: "I had the People respond because it was the court's feeling that there was some pattern. I am satisfied by the People's explanation" that the reasons given were "legitimate" and not based on the individual's national origins.

The following day, the court put the following on the record in order to give "any reviewing court the benefit of my thinking. [¶] I would note a couple of things parenthetically. One is is that both [*sic*] the defendant, the accused, and the prosecutrix

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"The court: Any problem with the idea that the prosecutor must prove the charges beyond a reasonable doubt?"

"Juror [K. P.]: Yes.

"The Court: Yes, do you have a problem?

"Juror [K. P.]: No.

"The Court: I think I can tell that's what you mean when you said the word?

"Juror [K. P.]: Yeah."

After some other questions, this exchange occurred.

"[The Prosecutor]: And the one witness rule, any problems with the idea that one witness, if that witness is believed to be beyond a reasonable doubt that should be a basis for a guilty verdict?

"Juror [K. P.]: Yes.

"[The Prosecutor]: Yes, you have a problem with it, or no?

"Juror [K. P.]: Can you repeat the question again?"

K. P. answered yes when asked if he could base a guilty verdict on one witness's testimony.

are Vietnamese. Secondly, I've taught *Wheeler*[10] analysis to both the Public Defender's office in L.A. as well as the District Attorney's office here in Santa Clara County when I was in those offices. So I have the analysis firmly entrenched in my mind, but it occurred to me that I'd—when I denied the *Wheeler* motion, it really didn't afford review or the basis of my reasoning. So here it goes.

"First, I determined that a reasonable inference existed of a pattern of peremptory challenges against an identifiable group, to wit, Vietnamese. And I believe that all three of the individuals were, in fact, Vietnamese.

"Secondly, the prosecutor volunteered, which I found appropriate, to give her reasons for removing each of those individuals. After hearing those reasons, I reviewed my notes and observations and concluded that they were each removed for a nonrace-based reason; therefore, I concluded the removals were a legitimate exercise of peremptory challenges by the People and not a violation of the *Wheeler-Batson*.[11]"

B. *The Standards Applicable to Trial and Appellate Courts*

In *People v. Watson* (2008) 43 Cal.4th 652, a decision issued on May 8, 2008, just four days before the motion in this case, on page 670 the California Supreme Court stated the standards to be applied in the trial and appellate courts in reviewing such motions. "Both the state and federal Constitutions prohibit the use of peremptory challenges to remove prospective jurors based solely on group bias. (*Batson, supra,* 476 U.S. at p. 89; *Wheeler, supra,* 22 Cal.3d pp. 276-277.) In *Johnson v. California* (2005) 545 U.S. 162 (*Johnson*), 'the United States Supreme Court reaffirmed that *Batson* states the procedure and standard to be employed by trial courts when challenges such as defendant's are

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[10] *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*).

[11] *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*).

made. "First, the defendant must make out a prima facie case 'by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose.' [Citations.] Second, once the defendant has made out a prima facie case, the 'burden shifts to the State to explain adequately the racial exclusion' by offering permissible race-neutral justifications for the strikes. [Citations.] Third, '[i]f a race-neutral explanation is tendered, the trial court must then decide . . . whether the opponent of the strike has proved purposeful racial discrimination.' [Citation.]"' (*People v. Cornwell* (2005) 37 Cal.4th 50, 66-67, quoting *Johnson*, *supra*, 545 U.S. at p. 168; see also *Snyder v. Louisiana* (2008) 552 U.S. 472 [(*Snyder*)].)

"Moreover, as *Johnson* explains, 'a defendant satisfies the requirements of *Batson's* first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred.' (*Johnson, supra,* 545 U.S. at p. 170.) At step three, 'the trial court "must make 'a sincere and reasoned attempt to evaluate the prosecutor's explanation in light of the circumstances of the case as then known, his knowledge of trial techniques, and his observations of the manner in which the prosecutor has examined members of the venire and has exercised challenges for cause or peremptorily . . . .' [Citation.]"' (*People v. Reynoso* (2003) 31 Cal.4th 903, 919 [*Reynoso*].) A prosecutor's reasons for exercising a peremptory challenge 'need not be sufficient to justify a challenge for cause.' (*People v. Turner* (1994) 8 Cal.4th 137, 165.) 'Jurors may be excused based on "hunches" and even "arbitrary" exclusion is permissible, so long as the reasons are not based on impermissible group bias.' (*Ibid.;* see also *People v. Box* (2000) 23 Cal.4th 1153, 1186, fn. 6.)"

"The ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike." (*People v. Lenix* (2008) 44 Cal.4th 602, 612-613 (*Lenix*); *Purkett v. Elem* (1995) 514 U.S. 765, 768.)

Regarding the need for findings by the trial court, *Reynoso, supra*, 31 Cal.4th 903, 923 quoted the following from *People v. Silva* (2001) 25 Cal.4th 345, 385-386:

" 'Although we generally "accord great deference to the trial court's ruling that a particular reason is genuine," we do so only when the trial court has made a sincere and reasoned attempt to evaluate each stated reason as applied to each challenged juror. [Citations.] When the prosecutor's stated reasons are both inherently plausible and supported by the record, the trial court need not question the prosecutor or make detailed findings. But when the prosecutor's stated reasons are either unsupported by the record, inherently implausible, or both, more is required of the trial court than a global finding that the reasons appear sufficient." (Emphasis omitted.) But *Reynoso* later explained on page 929, "Neither [*People v.*]*Fuentes* [(1991) 54 Cal.3d 707] nor *Silva* requires a trial court to make explicit and detailed findings for the record in every instance in which the court determines to credit a prosecutor's demeanor-based reasons for exercising a peremptory challenge." (*Id.* at p. 929.) Recently, in *Thaler v. Haynes* (2010) 559 U.S. ___, ___, [130 S.Ct. 1171], the court explained that *Snyder, supra*, 552 U.S. 472 does not forbid a judge from accepting a prosecutor's demeanor-based explanation though the judge neither recollected nor even observed the jury voir dire. (*Thaler v. Hayes, supra*, 559 U.S. at p. ___ [130 S.Ct. at pp. 1174-1175].)

"The existence or nonexistence of purposeful racial discrimination is a question of fact." (*People v. Lewis* (2008) 43 Cal.4th 415, 469.) On appeal, "[w]e review a trial court's ruling at step three for substantial evidence." (*People v. Watson, supra*, 43 Cal.4th 652, 671.) Trial judges have a superior vantage point in hearing and seeing both the prospective jurors' demeanor in answering questions and the manner in which prosecutors exercise peremptory challenges, and their express and implied factual determinations based on these personal observations are accordingly owed deference by appellate courts that review merely the recorded transcript of the proceedings. (Cf. *Reynoso, supra*, 31 Cal.4th 903, 926; *Lenix, supra*, 44 Cal.4th 602, 613-614; contra, *People v. Alvarez* (1996) 14 Cal.4th 155, 198, fn. 9 [independent review].)

When a trial court does "not satisfy its *Batson/Wheeler* obligations, . . . the conviction . . . must be reversed. Such 'error is prejudicial per se: "The right to a fair and impartial jury is one of the most sacred and important of the guaranties of the constitution. Where it has been infringed, no inquiry as to the sufficiency of the evidence to show guilt is indulged and a conviction by a jury so selected must be set aside."' (*People v. Wheeler*, *supra*, 22 Cal.3d at p. 283.)" (*People v. Allen* (2004) 115 Cal.App.4th 542, 553; fn. omitted.) "The exclusion by peremptory challenge of a single juror on the basis of race or ethnicity is an error of constitutional magnitude requiring reversal." (*Silva*, *supra*, 25 Cal.4th 345, 386.)

C. *The Challenge to T. N.*

The prosecutor stated that she excused T. N. because, during questioning of the entire panel, he did not participate in the discussion. Also he "did not make eye contact with me during the time throughout the entire process of us questioning the first 12 jurors, and it was based on that that I did not feel he was a participating member of the jury, and I did not feel comfortable with his body language and the way that he was expressing himself, or able to express himself in the context of a juror."

Neither defense counsel nor the court questioned the prosecutor's general assertions about her subjective discomfort and she did not further describe what in particular it was about T. N.'s body language or the way he expressed himself that made her uncomfortable, unless it was the lack of eye contact or purported nonparticipation. In ruling on defendant's motion, the court generally pronounced itself satisfied that the prosecutor's reasons as to all three prospective Vietnamese jurors were "legitimate." Later recognizing that this ruling "really didn't afford review or the basis of my reasoning," the following day the court stated, "I reviewed my notes and observations and concluded that they were each removed for a nonrace-based reason; therefore, I concluded the removals were . . . legitimate."

On appeal, defendant disputes the accuracy of the prosecutor's recollection, asserting that T. N. twice volunteered information in response to general questions to the jury panel, stating that his father was a retired attorney and that a sexual assault victim might not immediately report a crime because she was afraid. The Attorney General concedes that the prosecutor's comment about Nguyen's nonparticipation "might not have been correct." Indeed, the assertion is demonstrably false from the reporter's transcript.

The Attorney General notes that T. N. was the last to answer a question about family members or close friends in the court system. From this the Attorney General claims to discern that T. N. hesitated in answering the group questions and asserts, "The fact that defense counsel did not challenge the prosecutor's explanation also suggest[ed] that he agreed with the prosecutor's assessment that [T.N.'s] hesitation was tantamount to not coming forward at all."

It is hard to know what to make of defense counsel's silence. Occasionally, similar silence has been treated as acquiescence in a prosecutor's characterization of a prospective juror. (Cf. *People v. Adanandus* (2007) 157 Cal.App.4th 496, 510 ["Additionally, neither the trial court nor defense counsel below contradicted the prosecutor's account of any of the challenged jurors' demeanor or manner of responding to his questions, suggesting the prosecutor's description was accurate."]; *People v. Davis* (2009) 46 Cal.4th 539, 584 ["the prosecutor's unrefuted description of three of the prospective jurors in question as 'Caucasian' weakens any inference of group bias that can be drawn from his exercise of peremptory challenges against them"].) In this case, however, where T. N.'s responsiveness to group questions was clearly documented, defense counsel may have thought that the prosecutor's misstatement spoke for itself.

As to the Attorney General's suggestions that the prosecutor actually meant that T. N. was hesitant, reluctant, or fearful when she said that he did not participate, we will not ascribe these unstated reasons to her. Adapting language from *Miller-El v. Dretke* (2005)

545 U.S. 231 at page 252 (quoted by *Lenix*, *supra*, 44 Cal.4th 602, 624-625), we observe: "It is true that peremptories are often the subjects of instinct [citation], and it can sometimes be hard to say what the reason is. But when illegitimate grounds like race are in issue, a prosecutor simply has got to state his [or her] reasons as best he [or she] can and stand or fall on the plausibility of the reasons he [or she] gives. A *Batson* challenge does not call for a mere exercise in thinking up any rational basis. If the stated reason does not hold up, its pretextual significance does not fade because a trial judge, [the Attorney General,] or an appeals court, can imagine a reason that might not have been shown up as false."

Lenix, *supra*, 44 Cal. 4th 602 stated: "*Miller-El* [] and *Snyder* demonstrate that an adequate record is critical for meaningful review. Counsel and the trial court bear responsibility for creating such a record. *Miller-El* [] admonishes prosecutors faced with a *Wheeler/Batson* claim to provide as complete an explanation for their peremptory challenge as possible." (*Id.* at p. 624.)

We note that the prosecutor gave other reasons for challenging T. N. than his nonparticipation, namely his body language, the way he was expressing himself, and his lack of eye contact.

Appellate courts are aware of the limitations of the appellate record in revealing the various methods of human communication. As *Lenix*, *supra*, 44 Cal.4th 602 stated: "Experienced trial lawyers recognize what has been borne out by common experience over the centuries. 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. 'Even an inflection in the voice can make a difference in the meaning. The sentence, "She never said she missed him," is susceptible of six different meanings, depending on which word is emphasized.' [Citation.]" (*Id.* at p. 622.)

Depending on intonation and facial expression, the same or similar answers coming from different prospective jurors may have very different meanings, and "those differences may legitimately impact the prosecutor's decision to strike or retain the prospective juror." (*Id.* at p. 623.)

Without audio-visual recordings of jury voir dire, appellate courts must review a prosecutor's exercise of peremptory challenges without all the behavioral information available to the trial court. This institutional limitation is part of what underlies the deference traditionally accorded the trial court, exemplified by the following comments of the California Supreme Court. "Since the trial court was in the best position to observe the prospective jurors' demeanor and the manner in which the prosecutor exercised his peremptory challenges, the implied finding, that the prosecutor's reasons for excusing [a prospective juror], including the demeanor-based reason, were sincere and genuine, is entitled to 'great deference' on appeal." (*Reynoso*, *supra*, 31 Cal.4th 903, 926.)

Doubt may undermine deference, however, when the trial judge makes a general, global finding that the prosecutor's stated reasons were all "legitimate," and at least one of those reasons is demonstrably false within the limitations of the appellate record. A trial court "should be suspicious when presented with reasons that are unsupported or otherwise implausible." (*Silva*, *supra*, 25 Cal.4th 345, 385.) "Although an isolated mistake or misstatement that the trial court recognizes as such is generally insufficient to demonstrate discriminatory intent (*People v. Williams* (1997) 16 Cal.4th 153, 189), it is another matter altogether when, as here, the record of voir dire provides no support for the prosecutor's stated reasons for exercising a peremptory challenge and the trial court has failed to probe the issue [citations]. We find nothing in the trial court's remarks indicating it was aware of, or attached any significance to, the obvious gap between the prosecutor's claims reasons for exercising a peremptory challenge against M. and the facts as disclosed by the transcripts of M.'s voir dire responses. **On this record, we are**

unable to conclude that the trial court met its obligations to make 'a sincere and reasoned attempt to evaluate the prosecutor's explanation [citation] and to clearly express its findings [citation]." (*Silva, supra*, 25 Cal.4th 345, 385.)

Even without a provably wrong statement, the United States Supreme Court has expressed concerns about what implied findings may reasonably be inferred. *Snyder*, *supra*, 552 U.S. 472 observed: "deference is especially appropriate where a trial judge has made a finding that an attorney credibly relied on demeanor in exercising a strike. Here, however, the record does not show that the trial judge actually made a determination concerning Mr. Brooks' demeanor. The trial judge was given two explanations for the strike. Rather than making a specific finding on the record concerning Mr. Brooks' demeanor, the trial judge simply allowed the challenge without explanation. It is possible that the judge did not have any impression one way or the other concerning Mr. Brooks' demeanor. Mr. Brooks was not challenged until the day after he was questioned, and by that time dozens of other jurors had been questioned. Thus, the trial judge may not have recalled Mr. Brooks' demeanor. Or, the trial judge may have found it unnecessary to consider Mr. Brooks' demeanor, instead basing his ruling completely on the second proffered justification for the strike. For these reasons, we cannot presume that the trial judge credited the prosecutor's assertion that Mr. Brooks was nervous." (*Id.* at p. 479)

In *Reynoso*, *supra*, 31 Cal.4th 903, the California Supreme Court labored to reconcile its prior pronouncements about how to conduct *Wheeler/Batson* hearings, with a particular focus on the implications of *Silva*, *supra*, 25 Cal.4th 345. In reviewing *People v. Johnson* (1989) 47 Cal.3d 1194, the court commented that the opinion reiterated the trial court's obligation to make a sincere and reasoned attempt to evaluate the prosecutor's reasons. The court continued, "But in fulfilling that obligation, the trial court is not required to make specific or detailed comments for the record to justify every instance in which a prosecutor's race-neutral reason for exercising a peremptory

challenge is being accepted by the court as genuine. This is particularly true where the prosecutor's race-neutral reason for exercising a peremptory challenge is based on the prospective juror's demeanor, or similar intangible factors, while in the courtroom." (*Reynoso*, *supra*, 31 Cal.4th at p. 919.) Later, the court stated, "The impracticality of requiring a trial judge to take note for the record of each prospective juror's demeanor with respect to his or her ongoing contacts with the prosecutor during voir dire is self-evident." (*Id.* at p. 929.)

Reynoso, *supra*, 31 Cal.4th 903 reached a highly qualified conclusion on page 929. "Where, as here, the trial court is fully apprised of the nature of the defense challenge to the prosecutor's exercise of a particular peremptory challenge, where the prosecutor's reasons for excusing the juror are neither contradicted by the record nor inherently implausible (*Silva*, *supra*, 25 Cal.4th at p. 386), and where nothing in the record is in conflict with the usual presumptions to be drawn, i.e., that all peremptory challenges have been exercised in a constitutional manner, and that the trial court has properly made a sincere and reasoned evaluation of the prosecutor's reasons for exercising his peremptory challenges, then those presumptions may be relied upon, and a *Batson/Wheeler* motion denied, notwithstanding that the record does not contain detailed findings regarding the reasons for the exercise of each such peremptory challenge."

This conclusion is inapplicable by its terms when, as in this case, one of the stated reasons deemed by the trial court to be a "legitimate" basis for excusing a prospective juror is contradicted by the record. In reviewing the trial court's ruling, we find a lack of substantial evidence supporting the prosecutor's stated reasons as to T. N. In particular, any implied finding that T. N. failed to answer general questions was erroneous. This casts doubt on other arguably implied findings confirming T. N.'s lack of eye contact, adverse body language, and way of expressing himself.

The trial court's inquiry in the face of a *Batson/Wheeler* motion is always factual—was the peremptory challenge based on the prospective juror's race or another

impermissible ground? **Here the prosecutor only offered her opinion, and then only impliedly, on something the juror did when she said "body language." Nothing factual about T.N.'s body language has been made to appear in the record. To credit such a general utterance would nullify the principle of law and would constitute the functional equivalent of "take my word for it," with the trial judge saying, "Yes, I will." Where a nonverifiable utterance is made sufficient to satisfy a principle of law, the principle is usually lost.**

"[S]imply saying that a peremptory challenge is based on 'her demeanor' without a fuller description of what the prospective juror was or was not doing provides no indication of what the prosecutor observed, and no basis for the court to evaluate the genuineness of the purported non-discriminatory reason. '[H]er very response to your answers,' her 'dress' and 'how she took her seat' without additional elaboration are not responses that can be evaluated by the trial judge, and they certainly cannot be evaluated on appeal." (*People v. Allen*, *supra*, 115 Cal.App.4th 542, 551; fn. omitted.) "While specific findings were not required, probing into what specifically about Mr. W.'s body language, dress and demeanor the prosecutor disliked presumably would have provided descriptions which the court could have evaluated in determining the genuineness of the proffered explanation." (*Id.* at p. 553; fn. omitted.)

We do not expect trial judges to provide a continuous recorded narrative during jury voir dire of the appearance, behavior, and intonation of each prospective juror. However, when the prosecutor bases a peremptory challenge on an unrecorded aspect of a prospective juror's appearance or behavior, we must and will look for some support in the record for the prosecutor's observation. In this case, the record is devoid of any mention, let alone description, by the trial judge or the prosecutor of what was disturbing or unseemly about T. N.'s body language or his way of expressing himself. We are unable to extend normal deference to the trial court's implied finding on this point when another stated reason, though pronounced

"legitimate" by the trial court, was demonstrably inaccurate. We must conclude that the trial court erred in accepting the prosecutor's virtually unverifiable and unverified explanation for challenging T. N. This "conclusion makes it unnecessary to determine whether the trial court erred in denying the *Batson/Wheeler* motion as to the other" two Vietnamese prospective jurors. (*Silva, supra,* 25 Cal.4th 345, 386.)

DISPOSITION

The judgment is reversed.

_____
RUSHING, P.J.

WE CONCUR:

_____
PREMO, J.

_____
ELIA, J.

People v. Long
H033197

Trial Court:	Santa Clara County Superior Court No.: CC775750
Trial Judge:	The Honorable Gilbert T. Brown
Attorney for Defendant and Appellant E.O.:	John P. Dwyer under appointment by the Court of Appeal for Appellant
Attorneys for Plaintiff and Respondent The People:	Edmund G. Brown, Jr., Attorney General Dane R. Gillette, Chief Assistant Attorney General Gerald A. Engler, Senior Assistant Attorney General Seth K. Schalit, Supervising Deputy Attorney General William M. Kuimelis, Deputy Attorney General Christopher Grove, Deputy Attorney General

People v. Long
H033197

COUNTY OF SAN MATEO
DISTRICT ATTORNEY'S OFFICE
TRAINING MEMO

DATE: August 28, 2002

TO: Deputy District Attorneys

FROM: Martin Murray, Asst. D.A.

SUBJECT: Voir Dire: *Wheeler* Motions

Since the *Wheeler*[1] decision in 1978, there has been only one remedy for a finding that peremptory challenges were exercised to exclude persons of a cognizable class: dismiss the selected jurors and the remaining panel and begin jury selection with a new panel. In *People v. Willis* (2002) 27 Cal. 4th 811, the California Supreme Court has authorized judges to impose a less disruptive remedy, *with the consent of the complaining party.*

Facts: Defense counsel made a motion to quash the jury panel and obtain a new venire on the grounds that there was an under-representation of minorities. Later the prosecutor made a *Wheeler* motion based on the defense peremptories to white males. The trial court denied the motion, however, the judge stated his suspicion that defense counsel was deliberately committing *Wheeler* error so that the court would dismiss the existing panel and bring up a new venire. After defense counsel used eight of his next nine peremptories to excuse white males, the prosecutor again made a *Wheeler* motion, which was granted. Instead of dismissing the jury panel, the court imposed a monetary sanction of $1500 (which, of course, was lifted after the trial). The defendant appealed, urging that the court was limited to granting a mistrial and empanelling a new jury. The court of appeal agreed and reversed the conviction.

Analysis: The California Supreme Court reversed the court of appeal and held that trial judges have discretion to fashion alternate remedies for *Wheeler* violations as long as the aggrieved party consents. The court agreed with the trial judge that to

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[1] *People v. Wheeler* (1978) 22 Cal.3d 258.

dismiss the panel would simply reward the defense for his unethical conduct and encourage unscrupulous counsel to do so in the future. Additionally, the remedy of dismissing the panel causes considerable delay in the proceedings.

The court agreed that trial judges should have discretion to impose appropriate remedies short of dismissal of the jury panel. Some of the remedies suggested by the court are:

-Assessment of sanctions severe enough to deter the prohibited conduct
-Reseat improperly excused jurors
-Allow additional peremptory challenges to the other party
-Require the offending party to make peremptories at sidebar so that the court can deny the challenge if it finds that it was made for discriminatory purposes. The challenge and the decision must later be put on the record out of the presence of the jury.

The court was clear that these lesser sanctions are only permissible if the complaining party waives the right to a dismissal of the entire panel. The complaining party has the absolute right to a mistrial and a jury drawn from an entirely new venire. The court lacks discretion to impose a lesser remedy unless the complaining party consents.

TRAINING TIP: When the prosecution is the victim of the improper exercise of peremptory challenges by the defense, the granting of a mistrial and obtaining a new panel of jurors can result in substantial delay and perhaps a continuance of the trial. Usually, it would be in our interest to seek one of the other sanctions in order to avoid delaying the trial. If, however, you believe that the improper challenges have so impacted the panel that you cannot get a fair trial with the remaining venire, insist on a new venire.

If a defense *Wheeler* motion is granted, before the judge can impose a remedy other than dismissal of the venire, an "effective" waiver must be taken. The court did not specify what constitutes an "effective" waiver. Since the defendant has a constitutional right to a properly selected jury, I suggest that the defendant personally enter the waiver.

The *Wheeler* motion must be made before the jury is sworn. A *Wheeler* motion made after the jury is sworn and the subsequent mistrial and discharge of the jury

is untimely and not based on legal necessity. If it were to be granted, double jeopardy would prevent the defendant from being tried.[2]

[2] *United States v. Sammaripa* (9th Cir. 1995) 55 F.3d 433.