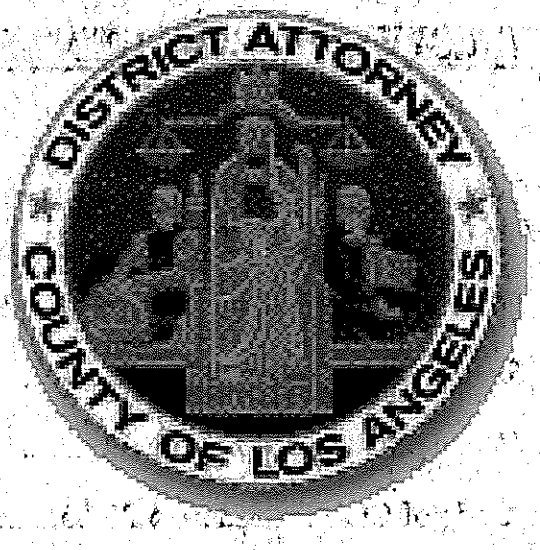

Wheeler/Batson

Related Materials

Presented by the

Habeas Corpus Litigation Team

Saturday Seminar

November 17, 2018

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CALIFORNIA DEPARTMENT OF JUSTICE

OFFICE OF THE ATTORNEY GENERAL

CAPITAL CASE COMPENDIUM

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PREFACE

This Capital Case Compendium was compiled by Deputy Attorney General Robin Urbanski and Supervising Deputy Attorney General Holly Wilkens.[1]

The Compendium contains case updates pertaining to decisions issued through February 26, 2017.

The organization of the Compendium follows the chronological order of a capital prosecution.

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[1] Special appreciation is owed to Deputy Attorneys General Theodore Cropley, Ronald Jakob and Michael Murphy, Legal Assistant Monica Seda, and Legal Secretary Stephen McGee for their assistance in preparing the Compendium.

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(*People v. Davis* (2009) 46 Cal.4th 539, 582; *People v. Alfaro* (2007) 41 Cal.4th 1277, 1314.)

§ 4.55.3.1 Restricted Death-Qualification Voir Dire

Error in restricting death-qualification voir dire does not require reversal if the defense was permitted to use general voir dire to further explore the prospective jurors' responses to facts and circumstances of the case or if the record otherwise establishes that none of the jurors had views about the circumstances of the case which would disqualify them. (*People v. Cash* (2002) 28 Cal.4th 703, 722.)

In order to demonstrate error by the trial court in declining to allow an appropriate death-qualification question, the defense must seek to ask the omitted question during general voir dire. (*People v. Vieira* (2005) 35 Cal.4th 264, 286.)

In order to demonstrate prejudice from a trial court's erroneous restriction of voir dire, the defendant must explain what additional inquiry was necessary for an intelligent exercise of peremptory challenges in light of the responses to questions the court did permit. (*People v. Ramos* (1997) 15 Cal.4th 1133, 1158.)

§ 4.55.4 Erroneous Exclusion for Cause

Erroneously excluding a juror for cause *based on his views on imposition of the death penalty* requires the reversal of the death sentence, even where the prosecutor was wrongly forced to use peremptory challenges on properly excludable jurors, and even where the prosecutor had peremptories remaining. (*Gray v. Mississippi* (1987) 481 U.S. 648 [107 S.Ct. 2045, 95 L.Ed.2d 622]; *Davis v. Georgia* (1976) 429 U.S. 122, 123 [97 S.Ct. 399, 50 L.Ed.2d 339]; *People v. Covarrubias* (2016) 1 Cal.5th 838, 866; *People v. Zaragoza* (2016) 1 Cal.5th 21, 41; *People v. Leon* (2015) 61 Cal.4th 569, 724-725; *People v. Pearson* (2012) 53 Cal.4th 306, 333; *People v. Whalen* (2013) 56 Cal.4th 1, 26, disapproved on other grounds, *People v. Romero & Self* (2015) 62 Cal.4th 1, 44, fn. 17.) However, the erroneous exclusion of a juror for cause based on his death penalty views does not require reversal of the guilt judgment or special circumstances findings. (*People v. Pearson* (2012) 53 Cal.4th 306, 333; *People v. Clark* (2011) 52 Cal.4th 856, 895; *People v. Tate* (2010) 49 Cal.4th 635, 672.)

V. PEREMPTORY CHALLENGES [§ 4.60]

"Peremptory challenges are intended to promote a fair and impartial jury, but they are not a right of direct constitutional magnitude." (*People v. Webster* (1991) 54 Cal.3d 411, 438, citing *Ross v. Oklahoma* (1988) 487 U.S. 81, 88-89 [108 S.Ct. 2273, 101 L.Ed.2d 80, 90].)

There is a presumption that peremptory challenges are properly exercised. A challenger must rebut the presumption of constitutionality before the other party is required to state reasons for exercising peremptories. (***People v. Crittenden*** (1994) 9 Cal.4th 83, 114; ***People v. Clair*** (1992) 2 Cal.4th 629, 652.)

The trial court's jury selection method of calling prospective jurors in groups of 18 and requiring the parties to exercise challenges for both cause and peremptory challenges before a new group was called did not violate the defendant's right of peremptory challenge. "[A]lthough knowledge of the composition of the entire panel can be relevant to the exercise of a peremptory challenge against an individual juror, the fact that a particular procedure used might have made exercising initial peremptory challenges less informed does not in itself require reversal." (***People v. Covarrubias*** (2016) 1 Cal.5th 838, 867-868 [internal quotation marks and citations omitted].)

A. NUMBER OF PEREMPTORY CHALLENGES [§ 4.61]

In a retrial, the defendant was not entitled to greater number of peremptory challenges because, at time of his first trial, Code of Civil Procedure section 1070 provided for 26 peremptory challenges in a capital case, but subsequently enacted Code of Civil Procedure section 231(a) entitled him to 20 peremptory challenges in a capital case. Laws governing the conduct of trials are prospective in application when applied to a trial occurring after the effective date of the statute, regardless of when the underlying crime was committed. (***People v. Ledesma*** (2006) 39 Cal.4th 641, 663-664.)

Code of Civil Procedure section 231, subdivision (a), does not entitle each defendant in a multi-defendant capital case to 20 individual peremptory challenges. (***People v. Lewis*** (2008) 43 Cal.4th 415, 493, overruled on other grounds, *People v. Black* (2014) 58 Cal.4th 912, 919.) Likewise, under the former rules, Code of Civil Procedure sections 1070 and 1070.5, the 26 challenges allotted to the defense were to be exercised jointly, not individually. (***People v. Hardy*** (1992) 2 Cal.4th 86, 129.)

The requirement of joint use of peremptory challenges in multi-defendant cases does not violate due process, equal protection, the right to an impartial jury, or the right to a reliable determination of penalty. (***People v. Pinholster*** (1992) 1 Cal.4th 865, 911, overruled on other grounds, *People v. Williams* (2010) 49 Cal.4th 405, 459.)

"To establish a constitutional entitlement to additional peremptory challenges, defendant must at least show that he is likely to receive an unfair trial before a biased jury if the request is denied." (***People v. DePriest*** (2007) 42 Cal.4th 1, 23; see also ***People v. Ledesma*** (2006) 39 Cal.4th 641, 665.)

The defendant was not deprived of a state-created liberty interest in 20 peremptory challenges (see Code of Civil Procedure, § 231) because he was required to use peremptory challenges to cure "error" in the court refusing to remove a prospective juror for cause. (***People v. Clark*** (2011) 52 Cal.4th 856, 902, citing ***People v. Weaver*** (2001) 26 Cal.4th 876, 913, and ***People v. Gordon*** (1990) 50 Cal.3d 1223, 1248, fn. 4 [use of

peremptory challenge to cure "error" in denying challenge for cause does not violate right to fair and impartial jury, citing *Ross v. Oklahoma* (1988) 487 U.S. 81, 85-88 [108 S.Ct. 2273, 101 L.Ed.2d 80], overruled on other grounds, *People v. Edwards* (1991) 54 Cal.3d 787, 835.)

§ 4.61.1 Waiver / Forfeiture

Counsel's agreement to the allocation of peremptory challenges in multi-defendant case constitutes a waiver by the defense as to the allocation of the challenges. There is no requirement of a personal waiver by the defendant. (*People v. Webster* (1991) 54 Cal.3d 411, 439.)

B. EXERCISE OF PEREMPTORY CHALLENGES BASED ON RACE OR GROUP BIAS (*Batson / Wheeler*) [§ 4.62]

§ 4.62.1 Generally

The United States Supreme Court, in *Batson v. Kentucky* (1986) 476 U.S. 79, 93-94 [106 S.Ct. 1712, 90 L.Ed.2d 69], established three steps to guide a trial court's constitutional review of peremptory strikes. "First, the defendant must make out a prima facie case by 'showing that the totality of the relevant facts give 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, 'if 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. Blacksher* (2011) 52 Cal.4th 769, 801, quoting *Johnson v. California* (2005) 545 U.S. 162 [125 S.Ct. 2410, 2416, 162 L.Ed.2d 129, 138].)

Batson and its progeny hold that exercising peremptory challenges solely on the basis of a prospective juror's race offends the Fourteenth Amendment's guaranty of the equal protection of the laws. (*Miller-El v. Dretke* (2005) 545 U.S. 231, 241 [125 S.Ct. 2317, 162 L.Ed.2d 196]; *United States v. Martinez-Salazar* (2000) 528 U.S. 304, 315 [120 S.Ct. 774, 145 L.Ed.2d 792]; *J.E.B. v. Alabama ex rel. T.B.* (1994) 511 U.S. 127 [114 S.Ct. 1419, 128 L.Ed.2d 89].)

Wheeler holds that exercising peremptory challenges solely on the basis of race violates a defendant's right to trial by a jury drawn from a representative cross-section of the community under Article I, section 16, of the California Constitution. (*People v. Huggins* (2006) 38 Cal.4th 175, 226; *People v. Wheeler* (1978) 22 Cal.3d 258, 276-277, overruled on other grounds by *Johnson v. California* (2005) 545 U.S. 162 [125 S.Ct. 2410, 162 L.Ed.2d 129].)

It is a rebuttable presumption that a peremptory challenge is being exercised properly, and the burden is on the moving party to demonstrate impermissible discrimination. (***People v. Duff*** (2014) 58 Cal.4th 527, 545, citing ***Purkett v. Elem*** (1995) 514 U.S. 765, 768-769 [115 S.Ct. 1769, 131 L.Ed.2d 834].)

"The ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike." (***People v. Winbush*** (2017) 2 Cal.5th 402, 434 [internal quotation marks and citations omitted].)

Excluding even a single juror for impermissible reasons under *Batson/Wheeler* requires reversal. (***People v. Huggins*** (2006) 38 Cal.4th 175, 227; ***People v. Silva*** (2001) 25 Cal.4th 345, 386.)

Improper use of peremptory challenges on the basis of race does not require "systematic" discrimination and is not negated simply because both sides have dismissed minority jurors or because the final jury is "representative." (***People v. Arias*** (1996) 13 Cal.4th 92, 136-137.)

A white defendant cannot claim he was deprived of a fair jury under the Sixth Amendment right to impartial jury where the prosecutor used peremptory challenges to exclude Black jurors. (***Holland v. Illinois*** (1990) 493 U.S. 474 [110 S.Ct. 803, 107 L.Ed.2d 905].) However, under the Equal Protection Clause of the Fourteenth Amendment, a defendant has a constitutional claim where peremptory challenges are used by the prosecution to exclude prospective jurors based on race. (***Powers v. Ohio*** (1991) 499 U.S. 400 [111 S.Ct. 1364, 113 L.Ed.2d 411].)

Purposeful racial discrimination in the selection of grand jurors in violation of equal protection requires reversal without a showing of prejudice. (***Vasquez v. Hillary*** (1986) 474 U.S. 254, 260-264 [106 S.Ct. 617, 88 L.Ed.2d 598].)

§ 4.62.1.1 Impact of *Johnson v. California*

A party will establish a prima facie case of racial discrimination with respect to the use of peremptory challenges if the totality of the relevant facts "'gives rise to an inference of discriminatory purpose.'" (***Johnson v. California*** (2005) 545 U.S. 162, 168 [125 S.Ct. 2410, 162 L.Ed.2d 129].) *Johnson* reversed the California Supreme Court's decision in ***People v. Johnson*** (2003) 30 Cal.4th 1302, 1318, holding that a prima facie case was established where it was "more likely than not" that purposeful discrimination had occurred. (***People v. Thomas*** (2012) 53 Cal.4th 771, 794.)

In cases where a trial predated the Supreme Court's decision in ***Johnson v. California*** (2005) 545 U.S. 162, and "it is not clear from the record whether the trial court analyzed the *Batson/Wheeler* motion with [*Batson*'s] low threshold [of reasonable inference"] in mind" the reviewing court will independently determine whether the record demonstrates a prima facie case of racial discrimination. (***People v. Scott*** (2015) 61 Cal.4th 363, 384; ***People v. Thomas*** (2012) 53 Cal.4th 771, 794.)

In cases where the trial court necessarily relied upon the holding in *Wheeler* and pronouncements by the California Supreme Court that the standard enunciated in *Wheeler* ("strong likelihood") were essentially the same as the *Batson* standard ("reasonable inference"), reversal is not automatic as the reviewing court can review the record and apply the standard in *Johnson* to resolve the legal question of "whether the record supports an inference that the prosecutor excused a juror on the basis of race." (*People v. Cornwell* (2005) 37 Cal.4th 50, 73, overruled on other grounds; *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

§ 4.62.2 Cognizable Groups

The use of a peremptory challenge to strike prospective jurors based on religious affiliation violates defendant's right to equal protection under the California Constitution. But the United States Supreme Court has not similarly extended the *Batson* rule to religious groups. (*People v. Schmeck* (2005) 37 Cal.4th 240, 266, abrogated on other grounds as stated in *People v. McKinnon* (2011) 52 Cal.4th 610, 637.)

African-American women constitute a cognizable group for purposes of an improper exercise of peremptory challenge based on a discriminatory purpose. (*People v. Cornwell* (2005) 37 Cal.4th 50, 70-71, fn. 4, overruled on other grounds, *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; *People v. Young* (2005) 34 Cal.4th 1149, 1173.)

"Whether 'Asians' can or do constitute a cognizable group is an unsettled issue. [The California Supreme Court has] previously observed, however, that 'it is at least questionable whether the generic description Asian ... can constitute a "cognizable group."' " (*People v. Burney* (2009) 47 Cal.4th 203, 227.)

"Spanish surnamed" sufficiently describes the cognizable class Hispanic only where no one knows at the time of the challenge whether the prospective juror is Hispanic. Where the record indicates the juror twice stated she was not Hispanic, the prosecutor's peremptory challenge to remove her was not based on race within the meaning of the defendant's *Wheeler* challenge. (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1123.)

While the California Supreme Court has held that Hispanic-surnamed jurors are a cognizable class even if it is not known at the time of the challenge whether an individual is Hispanic, the prosecutor's description of prospective jurors in question "as 'Caucasian' weakens any inference of group bias that can be drawn from [the prosecutor's] exercise of peremptory challenges." (*People v. Davis* (2009) 46 Cal.4th 539, 584.)

§ 4.62.3 Timely Motion

"A motion attacking the use of a peremptory challenge on the basis of group bias must be timely raised." (***People v. Roldan*** (2005) 35 Cal.4th 646, 701, overruled on other grounds, *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

The motion is timely if made before jury impanelment is completed, which does not occur until the alternates are selected and sworn. (***People v. Scott*** (2015) 61 Cal.4th 363, 384-384; ***People v. McDermott*** (2002) 28 Cal.4th 946, 969.)

A *Batson/Wheeler* claim should be raised in a motion to quash or dismiss the jury venire, not a motion for mistrial. (***People v. Williams*** (1997) 16 Cal.4th 635, 662, fn. 9.)

A *Batson/Wheeler* motion brought after the jury is sworn could be deemed a mistrial motion, which operates to waive any double-jeopardy defense. (***People v. Jurado*** (2006) 38 Cal.4th 72, 108.)

§ 4.62.4 Prima Facie Showing (First Stage)

"A prima facie case of racial discrimination in the use of peremptory challenges is established if the totality of the relevant facts 'gives rise to an inference of discriminatory purpose.'" (***People v. Scott*** (2015) 61 Cal.4th 363, 382, quoting ***Johnson v. California*** (2005) 545 U.S. 162, 168 [125 S.Ct. 2410, 162 L.Ed.2d 129, 137]; ***People v. Blacksher*** (2011) 52 Cal.4th 769, 801.)

A prima facie case is established when a defendant produces "'evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred.'" "An inference is a logical conclusion based on a set of facts." (***People v. Lancaster*** (2007) 41 Cal.4th 50, 74, quoting and citing ***Johnson v. California*** (2005) 545 U.S. 162, 168, fn. 4, 170 [125 S.Ct. 2410, 162 L.Ed.2d 129, 137].)

The proof of a prima facie case may depend upon all relevant evidence in a trial court record, including a "pattern" of striking jurors of a specific race and "'the prosecutor's questions and statements during voir dire examination.'" (***People v. Bell*** (2007) 40 Cal.4th 582, 597, disapproved on other grounds, *People v. Sanchez* (2016) 63 Cal.4th 665, 686, fn. 13, quoting ***Batson v. Kentucky*** (1986) 476 U.S. 79, 96-97 [106 S.Ct. 1712, 90 L.Ed.2d 69].)

While acknowledging that the existence of a prima facie showing at the first stage of *Batson* "depends on consideration of the entire record of voir dire at the time the motion was made" the California Supreme Court has mentioned "certain types of evidence may prove particularly relevant" and "[a]mong these are that a party has struck most or all of the members of the identified group from the venire, that a party has used a disproportionate number of strikes against the group, that the party has failed to engage these jurors in more than desultory voir dire, that the defendant is a member of the

identified group, and that the victim is a member of the group to which the majority of the remaining jurors belong." (*People v. Scott* (2015) 61 Cal.4th 363, 384.)

In determining whether or not there is a prima facie showing at the first stage of *Batson*, the court may "consider, as part of the overall relevant circumstances, nondiscriminatory reasons clearly established in the record that necessarily dispel any inference of bias" as distinguished from where the record "simply ... suggests grounds for valid challenge." (*People v. Sanchez* (2016) 63 Cal.4th 411, 435 & fn. 5.)

While the defendant need not be a member of the excluded group, it is significant if the defendant is; and it is also significant, if, in addition, his victims are members of the group to which the majority of the remaining jurors belong. (*People v. Clark* (2011) 52 Cal.4th 856, 906; *People v. Davis* (2009) 46 Cal.4th 539, 583.)

The trial court has no sua sponte duty to reexamine rulings on previous *Wheeler/Batson* motions once it has determined a prima facie case of discrimination has been made as to one juror. (*People v. Williams* (2006) 40 Cal.4th 287, 311.)

A defendant's showing that the prosecutor had exercised a peremptory challenge against an African-American in an unrelated case involving an African-American defendant was relevant to a prima facie showing, but was not very probative in light of the isolated nature of the prior conduct. (*People v. Crittenden* (1994) 9 Cal.4th 83, 119.)

§ 4.62.4.1 Circumstances Refuting Discriminatory Motive

"Where, "after extensive questioning, the prosecutor successfully rehabilitated two African-American jurors ... staving off defense challenges for cause" ..., '[t]he prosecutor's desire to keep African-American jurors on the jury tended to show that the prosecutor was motivated by the jurors' individual views instead of their race.'" (*People v. Streeter* (2012) 54 Cal.4th 205, 225, quoting *People v. Hartsch* (2010) 49 Cal.4th 472, 487.)

The prosecutor's effort to rehabilitate an African-American juror by engaging in questioning obviously designed to elicit answers that would make her not subject to a challenge for cause evidences the prosecutor wanted that juror on the jury and is probative on the question of whether a prima facie case existed, as well as the third-stage *Wheeler/Batson* inquiry (whether purposeful discrimination occurred). (*People v. Jones* (2011) 51 Cal.4th 346, 362.)

The trial court did not err in finding an absence of a prima facie showing, where the prosecutor repeatedly passed without challenging female jurors. The prosecution's pattern of excusals and acceptances during the peremptory challenge process does not reveal an obvious discrimination towards female jurors and is "patently inconsistent with any such inference." (*People v. Carasi* (2008) 44 Cal.4th 1263, 1294-1295.)

The prosecutor's acceptance of the jury with one African-American juror and one African-American alternate juror, as well as his desire to have three African-American jurors on the jury who were excused for hardship or cause, combined with only 3 African-American prospective jurors being challenged out of the prosecution's 22 total peremptory challenges, "strongly suggests that race was not a motive" in the prosecutor's challenges. (***People v. Lenix*** (2008) 44 Cal.4th 602, 629.)

Circumstances demonstrating a lack of discriminatory purpose include the prosecutor not challenging several other African-American jurors and the fact that six African-Americans ultimately served on the jury. (***People v. Blacksher*** (2011) 52 Cal.4th 769, 801.)

The prosecutor accepting the jury five times with up to four African-American prospective jurors seated in the jury box, while not conclusive, is an indication of the prosecutor's good faith and an appropriate consideration for the trial court in ruling on a *Wheeler* objection. (***People v. Streeter*** (2012) 54 Cal.4th 205, 224.)

The prosecutor's acceptance of a jury containing three African-American jurors is an indication of the prosecutor's good faith in exercising peremptory challenges. (***People v. Huggins*** (2006) 38 Cal.4th 175, 236.)

The presence of minority jurors on the panel is an indication of a prosecutor's good faith in exercising his or her peremptories. (***People v. Lewis*** (2008) 43 Cal.4th 415, 480, overruled on other grounds, *People v. Black* (2014) 58 Cal.4th 912, 919.)

Although the prosecutor ultimately excused four of five African-American jurors called to the jury box, there was no discernible pattern from which to infer discrimination. The prosecutor passed without challenging African-American prospective jurors during several rounds of peremptory challenges before finally excusing them. The prosecutor also repeatedly passed without challenging a prospective female African-American juror who ultimately served as a juror in the guilt phase. (***People v. Clark*** (2011) 52 Cal.4th 856, 906.)

"[T]he ultimate composition of the predominantly female jury, along with the relatively modest number of prosecution strikes used against women throughout jury selection, makes it difficult to infer purposeful discrimination under *Wheeler/Batson*." (***People v. Garcia*** (2011) 52 Cal.4th 706, 748.)

The circumstance that a peremptory challenge was exercised against a juror who was not subject to exclusion for cause "certainly did not support an inference that the exercise of a peremptory challenge against her was motivated by group bias." (***People v. Cornwell*** (2005) 37 Cal.4th 50, 70, overruled on other grounds, *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

"'As a practical matter, however, the challenge of one or two jurors can rarely suggest a pattern of impermissible exclusion.'" (*People v. Bell* (2007) 40 Cal.4th 582, 598, disapproved on other grounds, *People v. Sanchez* (2016) 63 Cal.4th 665, 686, fn. 13, quoting *People v. Harvey* (1984) 163 Cal.App.3d 90, 111.)

Where the prosecutor exercised peremptory challenges as to all three of the African-American prospective jurors available to challenge, the "circumstances certainly justify the trial court's finding of a prima facie case" and "warrant close scrutiny of the prosecutor's reasons" by the trial court. (*People v. Melendez* (2016) 2 Cal.5th 1, 15.)

Improper discrimination was not suggested where, before accepting the panel, the prosecutor exercised a total of 15.4 percent of her challenges (2 out of 13) against African-American prospective jurors. One African-American sat on the jury – representing 8.3 percent of the jury, which was approximately the same percentage of African-Americans on the venire, and one African-American sat as an alternate. "While not conclusive, the fact that the jury included an African-American is an indication of good faith by the prosecutor in exercising peremptories." While "not persuaded [by the statistics] that a disproportionate number of African-Americans were excluded from the jury… because even a lone race-based challenge is unconstitutional, we [nevertheless] bear in mind those statistics while examining the prosecutor's explanation for challenging [two African-American prospective jurors]." (*People v. Chism* (2014) 58 Cal.4th 1266, 1315-1316 [omitting internal quotes & citations].)

At the time of the motion, four of the 12 prospective jurors on panel – exactly one-third – were black. Given the small sample size at issue, the trial court reasonably refused to infer a discriminatory intent on the basis of these statistics." (*People v. Banks* (2014) 59 Cal.4th 1113, 1147, overruled on other grounds by *People v. Scott* (2015) 61 Cal.4th 363, 391, fn. 3.)

"Defendant's statistical analysis does not raise an inference of racial discrimination. The numbers are subject to a variety of interpretations, by one of which Whites were actually underrepresented on the panel as compared to African-Americans." (*People v. Hartsch* (2010) 49 Cal.4th 472, 487-488.)

"Standing alone, defendant's statistics do not raise an inference of discrimination. Notably, African-Americans comprised 5 percent of the jury pool but represented nearly 10 percent of the selected jury." (*People v. Clark* (2011) 52 Cal.4th 856, 905.)

The statistics regarding the exercise of peremptory challenges were "not particularly troubling where the prosecutor exercised peremptory challenges of 60 percent of African-American prospective jurors called into the box – three out of five – and a little less than a third of the non-African-American jurors called in the box – 19 out of 62. The prosecutor challenged African-American jurors at a rate that was only slightly higher than their percentage on the jury. One less challenge would have resulted

in a challenge rate lower than their percentage on the jury. (***People v. Jones*** (2011) 51 Cal.4th 346, 362.)

There was no prima facie showing where the only stated bases for disputing the peremptory challenges were (1) four of the first five peremptory challenges were against African-Americans, and (2) a small minority of the panel members were African-American. (***People v. Farnam*** (2002) 28 Cal.4th 107, 136-137.)

A prima facie showing of group bias was not made where the only basis was that one of two African-American jurors excused would not have been subject to excusal for cause, particularly in view of the circumstance that the other African-American juror had been repeatedly passed without challenge by the prosecutor from the beginning of voir dire and ultimately served on the jury. (***People v. Cornwell*** (2005) 37 Cal.4th 50, 69-70, overruled on other grounds, *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

The defense failed to show the prosecution struck most or all members of an identified group or used a disproportionate number of challenges against the group where the prosecutor had excused two African-American female jurors. Two African-Americans remained on the panel, and the defense had exercised one of its challenges against an African-American juror. The defendant offered no circumstances relevant to his claim of discriminatory intent and "made no attempt to argue that the excused jurors were not, apart from their race, as 'heterogeneous as the community as a whole' or that the prosecution engaged them in desultory voir dire." (***People v. Blacksher*** (2011) 52 Cal.4th 769, 801-802.)

§ 4.62.4.3 Desultory Voir Dire

A party's failure to engage in meaningful voir dire on a topic the party says is important can suggest the stated reason for the exercise of a peremptory challenge is pretextual. (***People v. Lewis*** (2008) 43 Cal.4th 415, 476, overruled on other grounds, *People v. Black* (2014) 58 Cal.4th 912, 919, citing ***Miller-El v. Dretke*** (2005) 545 U.S. 231, 250 fn. 8 [125 S.Ct. 2317, 162 L.Ed.2d 196].)

While "[u]nder certain circumstances perfunctory voir dire can be indicative of hidden bias," where the prosecutor's sole question focused on the prospective juror's ambivalence about the death penalty, which that juror confirmed, the inquiry did "not constitute 'powerful circumstantial evidence that the challenge was exercised upon a prohibited race basis.'" Notably, before oral voir dire, the prosecutor had the benefit of the prospective juror completing a 14-page questionnaire containing 38 questions with subparts. "Under these circumstances, [the California Supreme Court] places little weight on the prosecutor's failure to more thoroughly question a prospective juror before exercising a peremptory challenge." (***People v. Edwards*** (2013) 57 Cal.4th 658, 698-699, internal quotation marks & citations omitted.)

Where the prosecutor questions a prospective juror only briefly on a relevant subject, "it is of little significance ... where the prosecutor had a detailed jury

questionnaire to review and heard the attorneys for both defendants question [the prospective juror] at some length." (*People v. Melendez* (2016) 2 Cal.5th 1, 19, citing *People v. Dement* (2011) 53 Cal.4th 1, 20-21; *People v. Taylor* (2010) 48 Cal.4th 574, 615-616.)

The fact that a prosecutor asked few questions before excusing a juror is of "limited significance" in a case in which the prosecutor reviewed the jurors' questionnaires and was able to observe their responses and demeanor during extensive individual questioning by the court and later during group voir dire. (*People v. Clark* (2011) 52 Cal.4th 856, 906-907; *People v. Taylor* (2010) 48 Cal.4th 574, 615-616.)"

§ 4.62.4.4 Circumstances Where Prosecutor Is Asked for Reasons Notwithstanding Trial Court Finding No Prima Facie Showing

Where the trial court finds no prima facie case of discrimination, invites the prosecutor to state reasons, the prosecutor does so, and then the trial court credits those reasons in an alternative ruling, the United States Supreme Court has not indicated whether an appellate court reviews the trial court's first-stage ruling finding no prima facie case, or instead, reviews the third-stage alternative ruling that there was no purposeful discrimination. The California Supreme Court acknowledged its lack of consistency on the issue, and has now clarified: "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." (*People v. Scott* (2015) 61 Cal.4th 363, 386-387, 391.)

§ 4.62.5 Prosecutor's Reasons for Exercising Peremptory Challenge (Second Stage)

A prosecutor asked to explain his conduct must provide a clear and reasonably specific explanation of his legitimate reasons for exercising the challenges." (*People v. DeHoyos* (2013) 57 Cal.4th 79, 102, internal quotation marks & citations omitted.)

A prosecutor is not obligated to state his reasons for challenging any prospective juror where the trial court concludes that the defendant had not made a prima facie case of discrimination. (*People v. Banks* (2014) 59 Cal.4th 1113, 1147 [holding that even where trial court allows prosecutor to state reasons and then passes upon those reasons, first stage determination will be reviewed on appeal], overruled on another ground by *People v. Scott* (2015) 61 Cal.4th 363, 391, fn. 3; *People v. Carasi* (2008) 44 Cal.4th 1263, 1292.)

"Once the trial court concludes that the defendant has produced evidence raising an inference of discrimination, the court should not speculate as to the prosecutor's reasons – it should inquire of the prosecutor." (*People v. Cornwell* (2005) 37 Cal.4th 50, 73, overruled on other grounds, *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22, citing ***Johnson v. California*** (2005) 545 U.S. 162 [125 S.Ct. 2410, 2417, 162 L.Ed.2d 129].)

When the trial court determines the defendant has made a prima facie showing that a particular prospective juror has been challenged because of group bias, it need not ask the prosecution to justify its challenges to other prospective jurors of the same group for which the *Batson/Wheeler* motion has been denied. (***People v. Avila*** (2006) 38 Cal.4th 491, 549, disapproving to the extent inconsistent, *People v. McGee* (2002) 104 Cal.App.4th 559.)

"There is nothing suspect about any reluctance the prosecutor may have had to state his reasons" in response to the trial court indicating, after finding no prima facie case had been made, that the prosecutor was permitted, but not required, to state his reasons for the challenges on the record. (***People v. Banks*** (2014) 59 Cal.4th 1113, 1148 [holding that even where trial court allows prosecutor to state reasons and then passes upon those reasons, first stage determination will be reviewed on appeal], overruled on another ground by *People v. Scott* (2015) 61 Cal.4th 363, 391, fn. 3.)

"[T]he absence of a reason that is apparent on the record does not, in the context of all the other circumstances, suggest that the reason was race." "Even if the struck African–American jurors had nothing in common with each other besides their race, that circumstance does not, in itself, create an inference that they were excused because of their race where, as here, obvious bases for the prosecutor's decision to excuse many of the jurors appear in the record." (***People v. Thomas*** (2012) 53 Cal.4th 771, 795.)

Except in rare cases where the prosecutor's explanation will entail confidential communications or reveal trial strategy, it is error under state law to permit the prosecutor to give his or her reasons for the disputed peremptory challenge in an *ex parte, in camera* hearing. (***People v. Silva*** (2001) 25 Cal.4th 345, 384; ***People v. Ayala*** (2000) 24 Cal.4th 243, 262.)

"Although the prosecutor must present a comprehensible reason, 'the second step of this process does not demand an explanation that is persuasive, or even plausible'; so long as the reason is not inherently discriminatory, it suffices. [Citation.]" (***Rice v. Collins*** (2006) 546 U.S. 333 [126 S.Ct. 969, 973-974, 163 L.Ed.2d 824].)

The reviewing court is not obligated to consider the persuasiveness of the prosecutor's reasons where it finds that the defendant failed to meet the standard imposed by *Batson*. It is not until the third step of the process that the persuasiveness of the prosecutor's reasons becomes relevant, i.e., when the trial court determines whether the opponent of the strike has carried his burden of proving purposeful discrimination.

(*People v. Cornwell* (2005) 37 Cal.4th 50, 67, overruled on other grounds, *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

The prosecutor's reasons need not be sufficient to justify a challenge for cause, and even a trivial, arbitrary, or idiosyncratic reason, if it is genuine and neutral, is sufficient justification for exercising a peremptory challenge. Peremptory challenges may be based on hunches, gestures, or facial expressions. (*People v. Duff* (2014) 58 Cal.4th 527, 547; *People v. Jones* (2013) 57 Cal.4th 899, 917; *People v. Jones* (2011) 51 Cal.4th 346, 360; *People v. Lenix* (2008) 44 Cal.4th 602, 613; see also *Purkett v. Elem* (1995) 514 U.S. 765 [115 S.Ct. 1769, 131 L.Ed.2d 834, 839-840].)

"A peremptory challenge is not a challenge for cause but may be exercised whenever a legitimate reason appears for a party to worry whether that juror will be impartial." The circumstance where a juror hesitates over whether he would favor one side over another provides a valid reason for the use of a peremptory challenge. (*People v. Jones* (2011) 51 Cal.4th 346, 367.)

"Although this is not a conclusive factor, we have stated that 'the passing of certain jurors may be an indication of the prosecutor's good faith in exercising his peremptories, and may be an appropriate factor for the trial judge to consider in ruling on a *Wheeler* objection.'" (*People v. Williams* (2013) 56 Cal.4th 630, 659, quoting *People v. Snow* (1987) 44 Cal.3d 216, 225; *People v. Hartsch* (2010) 49 Cal.4th 472, 487 [same].)

The fact that at the time of the motion, "the jury's racial composition exactly matched the venire's and ..., the fact that half of the jurors ultimately seated were black, a higher ration than in the venire" is a "significant indication of the prosecution's good faith in exercising peremptories." (*People v. Banks* (2014) 59 Cal.4th 1113, 1149, internal quotation marks omitted, overruled on other grounds by *People v. Scott* (2015) 61 Cal.4th 363, 391, fn. 3.)

The trial court's determination that the prosecutor's statement of nondiscriminatory reasons for dismissing five African-American jurors were sincere, and no purposeful discrimination was established was supported by the record where none of the seated jurors "expressed views so starkly similar to those of the excused prospective jurors as to expose, on the face of a cold record, any pretext in the prosecutor's stated reasons for excusals" and where the defendant pointed to "no disparate or trick questioning by the prosecutor, designed to create pretexts for retaining nonminority panelists while excusing those belonging to a minority racial group." (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1118, overruled on other grounds, *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22, citing *Miller-El v. Dretke* (2005) 545 U.S. 231, 260-263, 265 [125 S.Ct. 2317, 162 L.Ed.2d 196].)

In reviewing the record it is "clear that the prosecutor was looking without regard to race, for sober-minded jurors who led orderly lives and could impose the death penalty if the evidence warranted it. The prospective jurors, including Latinos and African-

Americans, whom he accepted were of that type, and those he rejected were lacking in the essentially pro-death-penalty qualities he was seeking." (***People v. Huggins*** (2006) 38 Cal.4th 175, 236.)

The credibility of the prosecutor's justifications for exercising a peremptory challenge "'can be measured by how reasonable, or how improbable, the explanations are, and by whether the proffered rationale has some basis in accepted trial strategy.'" (***People v. Schmeck*** (2005) 37 Cal.4th 240, 271, abrogated on other grounds as stated in *People v. McKinnon* (2011) 52 Cal.4th 610, 637, quoting ***Miller-El v. Dretke*** (2005) 545 U.S. 231 [125 S.Ct. 2317, 2342, 162 L.Ed.2d 196].)

It does not matter whether it was reasonable for the prosecutor to doubt the desirability of prospective jurors for reasons that are neutral for *Batson/Wheeler* purposes. Considerations such as whether the prospective jurors were born in Berkeley or linked to dilapidated automobiles are not so closely connected with a protected group so as to be surrogates for membership in the protected group and thus arguably impermissible considerations. (***People v. Huggins*** (2006) 38 Cal.4th 175, 231, fn. 14.)

An advocate may legitimately be concerned about a potential juror who does not answer questions. (***People v. Howard*** (2008) 42 Cal.4th 1000, 1019.)

"A concern with a juror's ability to understand the proceedings and anticipated testimony is another proper basis for a challenge." (***People v. DeHoyos*** (2013) 57 Cal.4th 79, 106; ***People v. Turner*** (1994) 8 Cal.4th 137, 169 [same], abrogated on other grounds, *People v. Griffin* (2004) 33 Cal.4th 536, 555.)

"While [the] reason might not be sufficient in isolation to support a challenge, the absence of any significant questioning by defense counsel is relevant and may legitimately support a prosecutor's feeling that the panelist would favor the defense." (***People v. Winbush*** (2017) 2 Cal.5th 402, 437.)

While the court and the parties were never made aware of the prosecutor's possible error in excusing the prospective juror, where the record presented "the possibility that the prosecutor mistook [the juror who was the subject of the *Batson/Wheeler* motion] for another prospective juror, ... also an African-American woman, who happened to have the same last name" the California Supreme Court concluded, based on a review of the entire record, "that this act of mistaken identity is the most probable explanation of the events disclosed in the record and that there was no violation of *Batson/Wheeler*." (***People v. Williams*** (2013) 56 Cal.4th 630, 659; ***People v. Williams*** (1997) 16 Cal.4th 153, 188-189 [mistake in excusing prospective juror can be genuine race-neutral reason.)

§ 4.62.5.1 Death Penalty Views

"A juror's reluctance to impose the death penalty has long been considered a legitimate, race-neutral basis for excusal in a capital case." (***People v. Winbush*** (2017) 2 Cal.5th 402, 436.)

A juror's reservations regarding the death penalty is a valid race-neutral reason for the exercise of a peremptory challenge. (***People v. Booker*** (2011) 51 Cal.4th 141, 167; ***People v. Lomax*** (2010) 49 Cal.4th 530, 572; ***People v. Davenport*** (1995) 11 Cal.4th 1171, 1202 [peremptory challenge against a death-penalty skeptic – i.e., a prospective juror who is not excusable for cause under *Witherspoon* but expresses reservations about the death penalty – is not improper], abrogated on other grounds by *People v. Griffin* (2004) 33 Cal.4th 536, 555, fn. 5.)

"[E]ven when jurors have expressed neutrality on the death penalty, neither the prosecutor nor the trial court is required to take the jurors' answers at face value. [Citation.] If other statements or attitudes of the juror suggests that the juror has reservations or scruples about imposing the death penalty, this demonstrated reluctance is a race-neutral reason that can justify a peremptory challenge, even if it would not be sufficient to support a challenge for cause." (***People v. Lomax*** (2010) 49 Cal.4th 530, 572, internal quotation marks omitted.)

A prospective juror's "expressed preference for leniency constituted a neutral basis for the prosecutor to doubt his ability to return a verdict of death." (***People v. Johnson*** (2015) 61 Cal.4th 734, 756.)

Peremptory challenges may be used to exclude jurors based on their attitudes toward capital punishment. (***People v. Mendoza*** (2016) 62 Cal.4th 856, 913 [defendant's constitutional rights not violated by prosecutor excusing prospective juror based on reservations about death penalty]; ***People v. Salcido*** (2008) 44 Cal.4th 93, 144 [skepticism about death penalty permissible basis for prosecutor's exercise of peremptory challenge]; ***People v. Ledesma*** (2006) 39 Cal.4th 641, 678.)

A juror conditioning imposition of the death penalty on multiple murders, describing his feelings concerning the death penalty as neutral, and expressing an opinion that life in prison without parole was the harshest sentence was a sufficient race-neutral basis for exercising a peremptory challenge. (***People v. Ledesma*** (2006) 39 Cal.4th 641, 678.)

A prospective juror's statement in responding to the questionnaire that he was "only moderately" in favor of death penalty and believed a life sentence to be a more severe penalty supports a race-neutral reason for exercising a peremptory challenge. Another prospective juror's "ambivalent feelings" toward the death penalty and discomfort with the role of deciding whether to impose a death sentence supports a race-neutral basis for a peremptory challenge of that prospective juror. (***People v. Blacksher*** (2011) 52 Cal.4th 769, 802.)

"Obvious race-neutral grounds" for peremptory challenges include the fact that a prospective juror "voiced strong opposition towards the death penalty" or considered life imprisonment a more severe penalty than death or had a criminal record. (***People v. Davis*** (2009) 46 Cal.4th 539, 584.)

A juror's equivocal response about an ability to impose the death penalty is relevant to a challenge for cause, but does not undercut the race-neutral basis for a prosecutor's decision to excuse the prospective juror peremptorily. (***People v. Johnson*** (2015) 61 Cal.4th 734, 757; ***People v. Hoyos*** (2007) 41 Cal.4th 872, 902, abrogated on other grounds, *People v. McKinnon* (2011) 52 Cal.4th 610, 641; ***People v. Catlin*** (2001) 26 Cal.4th 81, 118.)

§ 4.62.5.2 Jurors' Age / Attire

"A potential juror's youth and apparent immaturity are race-neutral reasons that can support a peremptory challenge.... [I]t is not unreasonable for a prosecutor to believe a young person with few ties to the community might be less willing than an older, more permanent resident to impose a substantial penalty. Likewise, a slovenly appearance can reveal characteristics that are legitimately undesirable to the prosecution." (***People v. Lomax*** (2010) 49 Cal.4th 530, 575, citations omitted.)

The prosecutor's wariness of the "young and rootless" could be seen as race-neutral, for she used a peremptory strike on a white male juror with the same characteristics. (***Rice v. Collins*** (2006) 546 U.S. 333 [126 S.Ct. 969, 975, 163 L.Ed.2d 824].)

The prosecutor's combined concern with the prospective juror's "limited life experience" and intellectual capacity constituted race-neutral explanations for a peremptory challenge. (***People v. DeHoyos*** (2013) 57 Cal.4th 79, 108-109.)

§ 4.62.5.3 Criminal Justice Contacts/Opinions

"A juror's prior arrest is an accepted race-neutral reason for peremptory challenge." (***People v. Winbush*** (2017) 2 Cal.5th 402, 436.)

A juror's negative experience with the criminal justice system or a criminal conviction constitute valid, race-neutral reasons for a prosecutor to dismiss a potential juror from the jury. (***People v. Melendez*** (2016) 2 Cal.4th 1, 18; ***People v. Lomax*** (2010) 49 Cal.4th 530, 575; accord, ***People v. Garcia*** (2011) 52 Cal.4th 706, 749 [negative contacts with criminal justice system].)

A prospective juror's "recent domestic violence conviction – unquestionably constituted a valid, race-neutral ground for the challenge." (***People v. McKinzie*** (2012) 54 Cal.4th 1302, 1321, abrogated on other grounds by *People v. Scott* (2015) 61 Cal.4th 363.)

The arrest of a juror or a close relative is an accepted race-neutral reason for exercising a peremptory challenge. (*People v. Riccardi* (2012) 54 Cal.4th 758, 795, abrogated on other grounds *People v. Rangel* (2016) 62 Cal.4th 1192, 1216.)

Even if the defendant's argument is factually correct that more African-Americans would have relatives in prison than members of other groups, that would "not establish that criterion is not race neutral." Instead, that "circumstance is only relevant to the inquiry as to whether the reasons were sincere and not merely pretextual." (*People v. Melendez* (2016) 2 Cal.5th 1, 18.)

"Skepticism about the fairness of the criminal justice system to indigents and racial minorities has also been recognized as a valid race-neutral ground for excusing a juror." (*People v. Winbush People v. Winbush* (2017) 2 Cal.5th 402, 439.)

"When a prospective juror's hostility to law enforcement and the criminal justice system is not sufficient to support a dismissal for cause, it may well justify a prosecutor's peremptory challenge." (*People v. Winbush* (2017) 2 Cal.5th 402, 441.)

§ 4:62.5.4 Occupation / Education / Affiliations

A prospective juror's background as a psychology major supported a race-neutral reason for a peremptory challenge by the prosecutor because the prospective juror "posed the danger of having her own specialized knowledge influence her decisionmaking regarding the significance of the claims of defendant's mental illness." (*People v. Blacksher* (2011) 52 Cal.4th 769, 802.)

A prospective juror's "educational background, interest and experience in the field of psychology was a race-neutral reason justifying his excusal." (*People v. DeHoyos* (2013) 57 Cal.4th 79, 110.)

A prospective juror's educational background (psychology courses) or experience in counseling or social services (master's degree in theology and helping homeless obtain social service benefits) are race-neutral reasons for a prosecutor to challenge prospective jurors. (*People v. Clark* (2011) 52 Cal.4th 856, 907.)

The prosecutor reasonably could have believed that given the prospective juror's profession (administrative law judge), she "might consciously or unconsciously exert undue influence during the deliberative process, or that fellow jurors would ascribe to her a special legal expertise." (*People v. Clark* (2011) 52 Cal.4th 856, 907.)

The prosecutor's apprehension about the prospective juror's connection to the Job Corps, which defendant had at one time attended, appeared to be legitimate concern unrelated to race. (*People v. Jones* (2013) 57 Cal.4th 899, 917.)

A prosecutor's genuine subjective distrust of the fairness of a juror based on affiliations with certain organizations can be sufficient to support the peremptory challenge of a juror. (*People v. Jones* (2013) 57 Cal.4th 899, 917.)

§ 4.62.5.5 Prior Jury Experience

"Prior service on a deadlocked jury is an accepted neutral reason for excusing a prospective juror." (***People v. Johnson*** (2015) 61 Cal.4th 734, 757-758; ***People v. Winbush*** (2017) 2 Cal.5th 402, 438-39 ["[M]any cases have held service on a hung jury to be an appropriate, race-neutral reason for excusing a juror, and this reason alone" can justify excusal."])

Concern over a potential juror who had been responsible for a failure to reach a verdict in another case, who felt harassed by other jurors during those deliberations and who indicated she learned from that experience to avoid being swayed by the views of others, is a non-discriminatory reason for excusing a prospective juror. (***People v. Garcia*** (2011) 52 Cal.4th 706, 749.)

§ 4.62.5.6 Inattentiveness

A prospective juror's "failure to disclose information in response to the jury questionnaire and her later claim of forgetfulness in explanation supply a factual basis for the prosecutor's concern that she was not paying enough attention to the process and to her responsibilities. A genuine concern that a prospective juror is not forthcoming or is not paying sufficient attention to the proceedings is a race-neutral basis for a peremptory challenge." (***People v. DeHoyos*** (2013) 57 Cal.4th 79, 114.)

§ 4.62.6 Evaluating Prosecutor's Reasons (Third Stage)

The third step in a *Batson* analysis "involves evaluating 'the persuasiveness of the justification proffered by the prosecutor, but 'the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike.' [Citation.]" (***Rice v. Collins*** (2006) 546 U.S. 333 [126 S.Ct. 969, 974, 163 L.Ed.2d 824].)

When the trial court finds a prima facie case, then the reviewing court "must determine whether the trial court correctly ruled that the defense did not demonstrate discriminatory purpose at the third stage. The prosecutor's justification does not have to support a challenge for cause, and even a trivial reason, if genuine and race neutral, is sufficient. The inquiry is focused on whether the proffered neutral reasons are subjectively genuine, not on how objectively reasonable they are. The reasons need only be sincere and nondiscriminatory. [The reviewing cour considers] the trial court's determination with restraint, presume[s] the prosecutor has exercised the challenges in a constitutional manner, and defer[s] to the trial court's ability to distinguish genuine reasons from sham excuses. When the trial court makes a sincere and reasoned effort to evaluate the prosecutor's reasons, the reviewing court defers to its conclusions on appeal, and examines only whether substantial evidence supports them." (***People v. Melendez***

(2016) 2 Cal.5th 1, 15-16, citing *People v. O'Malley* (2016) 62 Cal.4th 944, 975; *People v. Lenix* (2008) 44 Cal.4th 602, 613.)

Reasons for exercising a peremptory challenge should be viewed in combination, as a party may decide to exercise a peremptory challenge for a variety of reasons, with no single characteristic being dispositive. (*People v. Ledesma* (2006) 39 Cal.4th 641, 678.)

The proper inquiry regarding a prosecutor's reasons for excusing a prospective juror is not whether the reviewing court finds the challenged prospective jurors similarly situated to those who were accepted, but whether the record shows that the party making the peremptory challenge honestly believed the juror not to be similarly situated in legitimate respects. If the stated reason does not hold up, its pretextual significance does not fade because an appellate court can imagine a reason that might not have been shown as false. (*People v. Huggins* (2006) 38 Cal.4th 175, 233.)

A third-stage inquiry is deferential and examines "only whether substantial evidence supports [the trial court's] conclusions. The identical standard applies to a comparative juror analysis." The reviewing court presumes "that a prosecutor uses peremptory challenges in a constitutional manner and give[s] great deference to the trial court's ability to distinguish bona fide reasons from sham excuses. As long as the trial court makes a sincere and reasoned effort to evaluate the nondiscriminatory justifications offered, its conclusions are entitled to deference on appeal." (*People v. Johnson* (2015) 61 Cal.4th 734, 755, internal quotation marks & citations omitted.)

"The critical question in determining whether a prisoner has proved purposeful discrimination at a third-stage inquiry is the persuasiveness of a prosecutor's justification for his peremptory strike. At this stage, implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination. In that instance the issue comes down to whether the trial court finds the prosecutor's race-neutral explanations to be credible. Credibility can be measured by, among other factors, 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. In the typical peremptory challenge inquiry the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed. There will seldom be much evidence bearing on that issue and the best evidence will often be the demeanor of the attorney who exercises the challenge. As with the state of mind of a juror, evaluation of the prosecutor's state of mind based on demeanor and credibility lies peculiarly within in a trial judge's province." (*People v. Riccardi* (2012) 54 Cal.4th 758, 787, internal quotation marks & citations omitted, abrogated on other grounds, *People v. Rangel* (2016) 62 Cal.4th 1192, 1216.)

When the prosecutor's stated reasons are either unsupported by the record or inherently implausible, or both, more is required of the trial court than a finding that the prosecutor's reasons appear sufficient. (*People v. Silva* (2001) 25 Cal.4th 345, 386.)

"'The proper focus of a *Batson/Wheeler* inquiry ... is on the subjective genuineness of the race-neutral reasons given for the peremptory challenge, not on the objective reasonableness of those reasons.'" (***People v. Jones*** (2013) 57 Cal.4th 899, 917, quoting ***People v. Reynoso*** (2003) 31 Cal.4th 903, 924.)

The denial of the defendant's *Batson/Wheeler* motion after defense counsel declined the court's invitation to comment on the prosecutor's explanation did not constitute a failure to make a sincere and reasoned attempt to evaluate the prosecutor's credibility. Defense counsel's declining to comment on the prosecutor's explanation suggests he found the prosecutor's explanation credible. (***People v. Jones*** (2011) 51 Cal.4th 346, 361.)

"All that matters is that the prosecutor's reason for exercising the peremptory challenge is sincere and legitimate, legitimate in the sense of being nondiscriminatory. A reason that makes no sense is nonetheless sincere and legitimate as long as it does not deny equal protection." (***People v. DeHoyos*** (2013) 57 Cal.4th 79, 102, internal quotation marks & citations omitted.)

"In assessing credibility, the court draws upon its contemporaneous observations of the voir dire. 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." (***People v. DeHoyos*** (2013) 57 Cal.4th 79, 102, quoting ***People v. Lenix*** (2008) 44 Cal.4th 602, 613, fn. omitted, quoting ***Miller-El v. Cockrell*** (2003) 537 U.S. 322, 339, 123 S.Ct. 1029, 154 L.Ed.2d 931, internal quotation marks & citations omitted; ***People v. Jones*** (2011) 51 Cal.4th 346, 360 [same].)

The trial court properly relied on "casewide factors" in crediting the prosecutor's explanations including the fact that "the same prosecutor had tried this case previously; the court was not aware of the prosecutor ever deliberately misleading the court about a matter of importance in that trial; the prosecutor did not use all of his peremptory challenges during that trial, and one juror who identified herself as Mexican-American actually sat as a juror in that trial." (***People v. DeHoyos*** (2013) 57 Cal.4th 79, 115-116.)

An honest mistake of fact is "quite plausible" where a prosecutor keeping track of dozens of prospective jurors, thousands of pages of jury questionnaires, and days of voir dire, had to make challenges without the luxury of checking facts as appellate attorneys and reviewing courts are able to do. An isolated mistake or misstatement does not, standing alone, compel the conclusion the prosecutor's reason was insincere. (***People v. Jones*** (2011) 51 Cal.4th 346, 366.)

Where the trial court indicated in evaluating the prosecutor's reasons "'I'm going to assume that the lawyers are upfront with me – [¶] ... [¶] – until they prove that they can't be trusted. And so, therefore, you get the benefit of the doubt...,'" the reviewing court concluded that based on the record, the trial court made a sincere and reasoned effort to evaluate the nondiscriminatory justifications offered by the prosecution and its conclusions were entitled to deference. (***People v. Williams*** (2013) 58 Cal.4th 197, 283.)

The defendant asserted the trial court's evaluation of the prosecutor's proffered reasons was not entitled to deference because the trial court itself was biased against African-American women based on its comment "'I have to say in my other death penalty cases I have found that the black women are very reluctant to impose the death penalty; they find it very difficult no matter what it is.'" The California Supreme Court rejected the assertion and accorded deference to the trial court's rulings on the *Batson/Wheeler* motion since the comment was isolated and made in specific response to a question from trial counsel, the court expressly noted its ruling was not influenced by the observation, and the record as a whole did not support the assertion the trial court was biased against African-American women. (***People v. Williams*** (2013) 56 Cal.4th 630, 652.)

It is not necessary to decide "whether the policies of certain organizations are liberal or not, the prosecutor's subjective distrust of jurors affiliated with such organizations – if genuine – is sufficient to support the juror challenge." Accordingly, on appeal, the court deferred to the trial judge's assessment as to whether the prosecutor's expressed concerns were subjectively genuine. (***People v. Jones*** (2013) 57 Cal.4th 899, 917.)

A significant indication of a prosecutor's good faith in exercising peremptory challenges includes the jury's racial composition at the time of the motion matching the venire, and the ratio of the jury actually seated exceeding the racial composition of the venire. (***People v. Banks*** (2015) 59 Cal.4th 1113, 1149.)

Although not conclusive, it is an indication of good faith in exercising peremptory challenges that the jury included a member of the group purportedly being discriminated against. (***People v. Johnson*** (2015) 61 Cal.4th 734, 760.)

The trial court is not required to explain on the record its ruling. If 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. (***People v. Vines*** (2011) 51 Cal.4th 830, 849-850.)

On appeal, the defendant relied on statistics, i.e, "African-Americans comprised only about 6 percent of the panel, the prosecutor used 30 percent of his peremptory challenges against them, excusing 100 percent of the African-American panelists called into the jury box," to challenge the validity of the prosecutor's race neutral explanations. "By the third step, the court has already found that exclusion of jurors from a particular group requires explanation. The question at the third step is not whether the defendant can plausibly urge systematic exclusion, but whether any particular panelist was, in fact, excused due to group bias. While statistical facts may retain some relevance at *Batson*'s third step as part of the universe of evidence bearing on the plausibility of asserted justifications for a strike, no case has suggested such facts alone could be sufficient to establish pretext." (***People v. Winbush*** (2017) 2 Cal.5th 402, 446-47 [internal citations omitted].)

§ 4.62.6.1 Demeanor

A judge's "firsthand observations" are of "even greater importance" in evaluating a race-neutral reason based on the demeanor of a prospective juror. (***Snyder v. Louisiana*** (2008) 552 U.S. 472, 477 [128 S.Ct. 1203, 170 L.Ed.2d 175].)

Where an explanation for a peremptory challenge is based on the demeanor of a prospective juror, a judge should take into account, among other things, any observations the judge was able to make during voir dire. However, nothing in *Batson* or *Snyder* requires that a demeanor-based explanation must be rejected if the judge either did not observe, or does not recall, the prospective juror's demeanor. (***Thaler v. Haynes*** (2010) 559 U.S. 43, 47-49 [130 S.Ct. 1171, 175 L.Ed.2d 1003] (per curiam); see also ***People v. Williams*** (2013) 56 Cal.4th 630, 657-658 [reviewing court does not discount trial court's ability to assess prosecutor's credibility even absent trial court's recollection of the prospective juror's demeanor],)

"Appellate courts recognize that a trial judge who observes and speaks with a prospective juror and hears that person's responses (noting, among other things, the person's tone of voice, apparent level of confidence, and demeanor) gleans valuable information that simply does not appear on the record." (***People v. Scott*** (2015) 61 Cal.4th 363, 378-379, quoting ***People v. Jones*** (2012) 54 Cal.4th 1, 41, internal quotation marks omitted.)

Substantial evidence supporting the trial court's determination that the prosecutor properly exercised peremptory challenges included the fact that "the trial court had the opportunity to see the demeanor of all of the relevant jurors, and it stated on the record that the challenged jurors had demonstrated more reluctance to impose the death penalty than other jurors whom the prosecution did not challenge." (***People v. Banks*** (2014) 59 Cal.4th 1113, 1150, overruled on other grounds by *People v. Scott* (2015) 61 Cal.4th 363, 391, fn. 3.)

§ 4.62.7 Comparative Analysis

The United States Supreme Court has concluded that a comparative analysis may be a useful tool in proving purposeful discrimination. (***People v. Lewis*** (2008) 43 Cal.4th 415, 472, overruled on other grounds, *People v. Black* (2014) 58 Cal.4th 912, 919, citing ***Miller-El v. Dretke*** (2005) 545 U.S. 231, 241 [125 S.Ct. 2317, 162 L.Ed.2d 196]; ***Snyder v. Louisiana*** (2008) 552 U.S. 472, 483-484 [128 S.Ct. 1203, 170 L.Ed.2d 175].)

"The rationale for comparative juror analysis is that a side-by-side comparison of a prospective juror struck by the prosecutor with a prospective juror accepted by the prosecutor may provide relevant circumstantial evidence of purposeful discrimination by the prosecutor." (***People v. Winbush*** (2017) 2 Cal.5th 402, 442 [internal quotation marks and citations omitted]; ***People v. Huggins*** (2006) 38 Cal.4th 175, 233, citing ***Miller-El v. Dretke*** (2005) 545 U.S. 231, 241-252 [125 S.Ct. 2317, 162 L.Ed.2d 196].)

Both *Snyder v. Louisiana* (2008) 552 U.S. 472 [128 S.Ct. 1203, 170 L.Ed.2d 175], and *Miller-El v. Dretke* (2005) 545 U.S. 231 [125 S.Ct. 2317, 162 L.Ed.2d 196], "demonstrate that comparative juror analysis is but one form of circumstantial evidence that is relevant, but not necessarily dispositive on the issue of intentional discrimination." (*People v. Lenix* (2008) 44 Cal.4th 602, 622; *People v. Cruz* (2008) 44 Cal.4th 636, 658.)

"'In order for a comparison to be probative, jurors need not be identical in all respects (*Miller-El v. Dretke* (2005) 545 U.S. 231, 247, fn. 6 [162 L. Ed. 2d 196, 125 S. Ct. 2317]), but they must be materially similar in the respects significant to the prosecutor's stated basis for the challenge.'" (*People v. Melendez* (2016) 2 Cal.5th 1, 18, quoting *People v. DeHoyos* (2013) 57 Cal.4th 79, 107.)

"Pretext is established . . . when the compared jurors have expressed a substantially similar combination of responses, in all material respects, to the jurors excused. Although jurors need not be completely identical for a comparison to be probative, they must be materially similar in the respects significant to the prosecutor's stated basis for the challenge." (*People v. Winbush* (2017) 2 Cal.5th 402, 443 [internal quotation marks and citations omitted].)

§ 4:62.7:1 Comparative Analysis on Appeal

Following the high court's decision in *Miller-El v. Dretke* (2005) 545 U.S. 231 [125 S.Ct. 2317, 162 L.Ed.2d 196], the California Supreme Court declined to engage in comparative juror analysis as an initial matter on appeal. Following the high court's decision in *Snyder v. Louisiana* (2008) 552 U.S. 472 [128 S.Ct. 1203, 170 L.Ed.2d 175], the California Supreme Court assumed, without deciding, that it must undertake comparative juror analysis for the first time on appeal under the same circumstances as in *Snyder*. (*People v. Salcido* (2008) 44 Cal.4th 93, 141.) The California Supreme Court has now held that "evidence of comparative juror analysis must be considered in the trial court and even for the first time on appeal if relied upon by defendant and the record is adequate to permit the urged comparisons." (*People v. Lenix* (2008) 44 Cal.4th 602, 622; *People v. Cruz* (2008) 44 Cal.4th 636, 638.)

The California Supreme Court has concluded that the two United States Supreme Court cases in which the high court conducted comparative juror analysis for the first time on appeal (*Snyder v. Louisiana* (2008) 552 U.S. 472 [128 S.Ct. 1203, 170 L.Ed.2d 175], and *Miller-El v. Dretke* (2005) 545 U.S. 231 [125 S.Ct. 2317, 162 L.Ed.2d 196]) "stand for the unremarkable principle that reviewing courts must consider all evidence bearing on the trial court's factual finding regarding discriminatory intent." (*People v. Lenix* (2008) 44 Cal.4th 602, 607; *People v. Cruz* (2008) 44 Cal.4th 636, 658.)

"[A] defendant may engage in 'comparative juror analysis'; that is, may compare the responses of the challenged jurors with those of similar unchallenged jurors who were not members of the challenged jurors' racial group. Such analysis is not necessarily

dispositive, but it is one form of relevant circumstantial evidence." (***People v. Melendez*** (2016) 2 Cal.5th 1, 15.)

In undertaking comparative analysis on appeal, "'[t]he reviewing court need not consider responses by stricken panelists or seated jurors other than those identified by the defendant in the claim of disparate treatment.'" (***People v. Cruz*** (2008) 44 Cal.4th 636, 659, quoting ***People v. Lenix*** (2008) 44 Cal.4th 602, 624.)

For purposes of comparative analysis, the responses to questionnaires by prospective jurors "who never made it into the jury box are irrelevant because they do not prove that the prosecutor would have accepted such jurors." (***People v. Banks*** (2014) 59 Cal.4th 1113, 1149, overruled on other grounds by *People v. Scott* (2015) 61 Cal.4th 363, 391, fn. 3.)

"[C]omparative juror analysis on a cold appellate record has inherent limitations. In addition to the difficulty of assessing tone, expression and gesture from the written transcript of voir dire, we attempt to keep in mind the fluid character of the jury selection process and the complexity of the balance involved. Two panelists might give a similar answer on a given point. Yet the risk posed by one panelist might be offset by other answers, behavior, attitudes or experiences that make one juror, on balance, more or less desirable. These realities, and the complexity of human nature, make a formulaic comparison of isolated responses an exceptionally poor medium to overturn a trial court's factual finding." (***People v. DeHoyos*** (2013) 57 Cal.4th 79, 103, internal quotation marks & citations omitted.)

When a comparative juror argument is made for the first time on appeal and the prosecutor was not asked to explain reasons for challenging other jurors that are the subject of comparison on appeal, "the reviewing court must keep in mind that exploring the question at trial might have shown that the jurors were not really comparable ... [and] consider such evidence in light of the deference due to the trial court's ultimate finding of no discriminatory purpose." (***People v. Melendez*** (2016) 2 Cal.5th 1, 15, citing ***People v. O'Malley*** (2016) 62 Cal.4th 944, 975–976.)

"'One of the problems of comparative juror analysis not raised at trial is that the prosecutor generally has not provided, and was not asked to provide, an explanation for nonchallenges.'" (***People v. DeHoyos*** (2013) 57 Cal.4th 79, 106-107, quoting ***People v. Jones*** (2011) 51 Cal.4th 346, 365.)

"In order for a comparison to be probative, jurors need not be identical in all respects (*Miller–El v. Dretke* (2005) 545 U.S. 231, 247, fn. 6, 125 S.Ct. 2317, 162 L.Ed.2d 196), but they must be materially similar in the respects significant to the prosecutor's stated basis for the challenge." (***People v. DeHoyos*** (2013) 57 Cal.4th 79, 106-107.)

If a prosecutor's proffered reason for striking a Black panelist applied just as well to an otherwise-similar non-Black who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson*'s third step. (***People v. Lewis***

(2008) 43 Cal.4th 415, 472, overruled on other grounds, *People v. Black* (2014) 58 Cal.4th 912, 919.)

While both the trial court and the reviewing court examine only those reasons actually given by the prosecutor in judging why a prosecutor exercised a particular challenge, that does not mean that the reviewing court cannot consider reasons not stated on the record for the prosecutor having accepted *other* jurors. "[N]o authority has imposed the additional burden of anticipating all possible unmade claims of comparative juror analysis and explaining why *other* jurors were *not* challenged." (*People v. Jones* (2011) 51 Cal.4th 346, 365.)

The timing and use of peremptory challenges are subjects of trial strategy and in terms of refuting inferences being drawn by the defense through comparative analysis on appeal. The record demonstrated the prosecutor likely assumed the defense had its own reservations concerning prospective jurors and would excuse them. Consequently, it would not have been unreasonable to accept those jurors before the defense exhausted its own peremptory challenges in an effort to conserve the prosecution's peremptory challenges for "maximum usefulness." Mere delay in dismissing prospective jurors is not reliable evidence in determining whether the prosecutor properly exercised a peremptory challenge. (*People v. Riccardi* (2012) 54 Cal.4th 758, 790, abrogated on other grounds, *People v. Rangel* (2016) 62 Cal.4th 1192, 1216.)

§ 4.62.7.2 Compare: First Stage *Batson/Wheeler* Analysis

Comparative juror analysis has little or no use where a group bias analysis does not hinge on the prosecution's actual proffered rationales for peremptory challenges. Moreover, *Miller-El v. Dretke* (2005) 545 U.S. 231 [125 S.Ct. 2317, 162 L.Ed.2d 196], does not mandate comparative analysis when a *Batson/Wheeler* motion was denied after the trial court concluded defendant had not made a prima facie showing of discriminatory exercise of peremptory challenges. (*People v. Howard* (2008) 42 Cal.4th 1000, 1019.)

A trial court's denial of a *Batson/Wheeler* claim, without making a prima facie finding, is reviewed with "considerable deference" because such a motion calls upon the trial court's personal observations. If the record suggests grounds upon which the prosecutor might have reasonably challenged the jurors in question, the reviewing court affirms. (*People v. Cleveland* (2004) 32 Cal.4th 704, 732-733; *People v. Crittenden* (1994) 9 Cal.4th 83, 117.)

While it is proper for the trial court to examine the responses of other jurors in considering whether the defendant has made a prima facie case of a *Wheeler* violation, "such an examination for the first time on appeal is unreliable." (*People v. Cornwell* (2005) 37 Cal.4th 50, 71, overruled on other grounds, *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; see also *People v. Carasi* (2008) 44 Cal.4th 1263, 1295.)

§ 4.62.8 Remedies

While the United States Supreme Court has not expressed any view as to whether it would be more appropriate to discharge the venire or disallow the discriminatory challenges and resume selection with improperly challenged jurors reinstated on the venire, the California Supreme Court has held that "if a jury 'has been partially or totally stripped of members of a cognizable group by the improper use of peremptory challenges,' the trial court 'must dismiss the jurors thus far selected' and 'quash any remaining venire.'" (***People v. Mata*** (2013) 57 Cal.4th 178, 182-183, quoting ***People v. Wheeler*** (1978) 22 Cal.3d 258, 282, and citing ***Batson v. Kentucky*** (1986) 476 U.S. 79, 99 [106 S.Ct. 1712, 90 L.Ed.2d 69].)

Following the granting of a *Batson/Wheeler* motion, defense counsel can consent to an alternative remedy of reseating the improperly discharged juror, as opposed to dismissing the entire venire. (***People v. Mata*** (2013) 57 Cal.4th 178, 187-188.)

Where the trial court found defense counsel had been exercising peremptory challenges to strike White males from the jury in order to provoke a mistrial and obtain a fresh venire, the remedy of a mistrial and dismissal of the voir dire would only serve to reward the improper challenges and postpone the trial. Accordingly, under such circumstances, the trial court should have the discretion, with the consent of the complaining party, to order alternatives short of outright dismissal of the remaining venire, including sanctions against counsel and reseating any improperly discharged jurors who remain available to serve. (***People v. Willis*** (2002) 27 Cal.4th 811, 821.)

§ 4.62.9 Standards of Review

On appeal, the court reviews the denial of a *Wheeler* motion, without a finding of a prima facie case, in light of the entire record of voir dire. (***People v. Young*** (2005) 34 Cal.4th 1149, 1172, fn. 7; ***People v. Crittenden*** (1994) 9 Cal.4th 83, 116.)

The trial court's ruling is reviewed deferentially with consideration given to whether substantial evidence supports the trial court's conclusions. (***People v. Avila*** (2006) 38 Cal.4th 491, 551.)

Where it is unclear whether the court applied the disapproved "strong likelihood" standard in finding no prima facie case of group bias, instead of applying the correct "reasonable inference" standard, the reviewing court independently reviews the record to determine whether the defendant's showing met the "reasonable inference" standard. (***People v. Blacksher*** (2011) 52 Cal.4th 769, 801; ***People v. Howard*** (2008) 42 Cal.4th 1000, 1017; ***People v. Bell*** (2007) 40 Cal.4th 582, 597, disapproved on other grounds, *People v. Sanchez* (2016) 63 Cal.4th 665, 686, fn. 13.)

It is the defendant's burden to show that the prosecutor's justifications for exercising peremptories were a pretext for invidious racial discrimination, not merely to

show that one or more nondiscriminatory reasons are unsupported by the record. (*People v. Duff* (2014) 58 Cal.4th 527, 548.)

The record did not provide any indication of a discernible racial pattern to the prosecutor's questioning since the racial identity of each prospective juror was not in the record. Also, while "the prosecutor questioned some prospective jurors at greater length than [the prospective juror at issue], he also engaged in perfunctory questioning of other prospective jurors, and at times declined to ask any questions at all." (*People v. Edwards* (2013) 57 Cal.4th 658, 699.)

When a trial court erroneously denies a *Batson/Wheeler* motion at the first stage, the appropriate remedy is to remand the matter in order for the trial court to undertake the second and third stage analysis required under *Batson/Wheeler*. If, upon remand, the trial court finds that due to the passage of time, or other reasons, it cannot make a reliable determination, or if it finds the prosecutor exercised peremptory challenges improperly, then the matter should be set for a new trial. (*People v. Johnson* (2006) 38 Cal.4th 1096, 1103-1104.)

§ 4.62.10 Waiver / Forfeiture

A *Batson/Wheeler* claim is forfeited if not raised by a timely objection in the trial court because the trial court is deprived of the opportunity to create a record and "correct potential error in the first instance." (*People v. Lewis* (2008) 43 Cal.4th 415, 481, overruled on other grounds, *People v. Black* (2014) 58 Cal.4th 912, 919; *People v. Morrison* (2004) 34 Cal.4th 698, 709-710; *People v. Bolin* (1998) 18 Cal.4th 297, 316.)

An objection at trial referencing only *Wheeler* is sufficient to preserve a *Batson* claim being raised for the first time on appeal because the claims are so closely related. (*People v. Cornwell* (2005) 37 Cal.4th 50, 66, fn. 3, overruled on other grounds, *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

The failure to clearly articulate the *Batson/Wheeler* objection to a prospective juror forfeited the claim on appeal. (*People v. Cunningham* (2015) 61 Cal.4th 609, 786 [defendant failed to provide a factual basis for objection or make any record as to what cognizable class a prospective juror allegedly belonged to, and the individual was never identified as African-American during voir dire and self-identified as "Caucasian" and "Danish" in his jury questionnaire].)

Defense counsel's failure to object to the trial court's proposed alternative remedy of reseating the improperly discharged juror, operated as an implied waiver to the defendant's right to quash the entire venire and implied consent to the alternative remedy. (*People v. Mata* (2013) 57 Cal.4th 178, 188.)

Where the defendant suggests for the first time on appeal that the cognizable group was African-American women (as opposed to African-Americans), the claim is

forfeited on appeal. (***People v. Cornwell*** (2005) 37 Cal.4th 50, 70-71, fn. 4, overruled on other grounds, *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

The defendant forfeited his *Wheeler* claim when he abandoned his *Wheeler* motion in the trial court prior to a prima facie finding and accepted the jury. (***People v. Fudge*** (1994) 7 Cal.4th 1075, 1096-1097.)

Document: People v. Douglas, 22 Cal. App. 5th 1162

People v. Douglas, 22 Cal. App. 5th 1162

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Court of Appeal of California, Third Appellate District

May 3, 2018, Opinion Filed

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Reporter

22 Cal. App. 5th 1162 * | 232 Cal. Rptr. 3d 305 ** | 2018 Cal. App. LEXIS 403 *** | 2018 WL 2057237

THE PEOPLE, Plaintiff and Respondent, v. BRADY DEE DOUGLAS, Defendant and Appellant.

Prior History: [***1] APPEAL from a judgment of the Superior Court of Yolo County, No. CRF120516, Paul K. Richardson, Judge.

People v. Douglas, 10 Cal. App. 5th 834, 217 Cal. Rptr. 3d 1, 2017 Cal. App. LEXIS 330 (Apr. 11, 2017)

Disposition: Reversed.

Core Terms

juror, mixed motives, motivation, trial court, reasons, prospective juror, openly, impermissible, bias, peremptory challenge, challenges, cases, discriminatory, sexual orientation, confidence, questions, jury selection, circumstances, sexuality, excused, grounds, justice system, homosexuals, italics, dual, public defender, peremptory, reversal, firearm, biased

Case Summary

Overview

HOLDINGS: [1]-In a criminal trial, the prosecutor's exclusion of two jurors because they were openly gay, and on that basis alone might be biased against a closeted victim, was invidious discrimination and under Cal. Const., art. I, §§ 7, 16, required reversal for an untainted trial, even though the prosecutor also had facially valid reasons for challenging both jurors.

Outcome

Judgment reversed.

▼ LexisNexis® Headnotes

Criminal Law & Procedure > Juries & Jurors ▾ > Peremptory Challenges ▾

> Proving Discriminatory Use ▾

HN1 **Peremptory Challenges, Proving Discriminatory Use**
When a party exercises a peremptory challenge against a prospective juror for an invidious reason, the fact that the party may also have had one or more legitimate reasons for challenging that juror does not eliminate the taint to the process. The court rejects the application in these circumstances of the so-called mixed motive or dual motive analysis. It is not appropriate to use that test when considering the remedy for invidious discrimination in jury selection, which should be free of any bias. More like this Headnote

Shepardize - Narrow by this Headnote

Constitutional Law > ... > Fundamental Rights ▾ > Criminal Process ▾

> Right to Jury Trial ▾

Criminal Law & Procedure > Juries & Jurors ▾ > Peremptory Challenges ▾ > Prohibitions ▾

HN2 **Criminal Process, Right to Jury Trial**
Both the California and United States Constitutions prohibit using peremptory challenges to remove prospective jurors based solely on group bias. A prosecutor's use of peremptory challenges to strike prospective jurors on the basis of group bias—that is, bias against members of an identifiable group distinguished on racial, religious, ethnic, or similar grounds—violates the right of a criminal defendant to trial by a jury drawn from a

representative cross-section of the community under Cal. Const. art. 1, § 16, such a practice also violates the defendant's right to equal protection under the U.S. Const. 14th Amend. More like this Headnote

Shepardize - Narrow by this Headnote

Criminal Law & Procedure > Juries & Jurors > Peremptory Challenges > Prohibitions

HN3 **Peremptory Challenges, Prohibitions**
Excluding prospective jurors solely on the basis of sexual orientation runs afoul of the principles espoused in Batson and Wheeler. More like this Headnote

Shepardize - Narrow by this Headnote

Criminal Law & Procedure > Juries & Jurors > Peremptory Challenges > Proving Discriminatory Use

HN4 **Peremptory Challenges, Proving Discriminatory Use**
To determine whether a prosecutor impermissibly used peremptory challenges to remove prospective jurors based on a group bias such as sexual orientation, courts engage in a three-part analysis. A defendant must first make a prima facie case by demonstrating that the facts give rise to an inference of discriminatory purpose. If that showing is made, the burden next shifts to the prosecution to explain its challenge on the basis of permissible, group-neutral justifications. If such an explanation is offered, the trial court then decides whether purposeful group discrimination occurred. More like this Headnote

Shepardize - Narrow by this Headnote

Criminal Law & Procedure > Juries & Jurors > Peremptory Challenges > Proving Discriminatory Use

HN5 **Peremptory Challenges, Proving Discriminatory Use**
The court presumes that a prosecutor uses peremptory challenges in a constitutional manner and gives great deference to the trial court's ability to distinguish bona fide reasons from sham excuses. A prosecutor's justification, moreover, need not support a challenge for cause, and even a trivial reason, a hunch, or an arbitrary exclusion, if genuine and neutral, will suffice. More like this Headnote

Shepardize - Narrow by this Headnote

Criminal Law & Procedure > Juries & Jurors > Peremptory Challenges > Appellate Review

HN6 **Peremptory Challenges, Appellate Review**
The court reviews a trial court's determination regarding the sufficiency of a prosecutor's justifications for exercising peremptory challenges with restraint. The trial court's determination is a factual one, and so long as the trial court makes a sincere and reasoned effort to evaluate the justifications offered, its conclusions are entitled to deference on

appeal when they are supported by substantial evidence. The issue is whether the trial court finds the prosecutor's explanation to be credible, based on factors such as the reasonableness of the explanation, the prosecutor's demeanor, and the trial court's own observations of the voir dire. More like this Headnote

Shepardize - Narrow by this Headnote

Criminal Law & Procedure > Juries & Jurors > Peremptory Challenges > Prohibitions

HN7 **Peremptory Challenges, Prohibitions**
Normally a successful Wheeler motion requires dismissal of the panel and restarting jury selection, but if the movant consents, a trial court may implement lesser remedies. More like this Headnote

Shepardize - Narrow by this Headnote

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

HN8 **Procedural Due Process, Scope of Protection**
California's due process clause, Cal. Const., art. I, § 7, subd. (a), has independent—and greater—force than its federal analog: It protects the dignity interest in obtaining an untainted adjudication. Even in cases in which the decision-making procedure will not alter the outcome of governmental action, due process may nevertheless require that certain procedural protections be granted the individual in order to protect important dignitary values, or, in other words, to ensure that the method of interaction itself is fair in terms of what are perceived as minimum standard of political accountability—of modes of interaction which express a collective judgment that human beings are important in their own right and that they must be treated with understanding, respect, and even compassion. More like this Headnote

Shepardize - Narrow by this Headnote

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

HN9 **Procedural Due Process, Scope of Protection**
Although perfection is neither required nor possible, the judicial system must not only reach correct results, it must maintain its own dignity, or as the point has been phrased before: Not only must justice be done, but it must appear to have been done. More like this Headnote

Shepardize - Narrow by this Headnote

▼ Headnotes/Syllabus

Summary

[*1162] CALIFORNIA OFFICIAL REPORTS SUMMARY

The trial court denied defendant's *Batson/Wheeler* motion after the prosecutor peremptorily excused the only two openly gay prospective jurors. The jury found defendant guilty of attempted second degree robbery, assault with a semiautomatic firearm, shooting at an occupied vehicle, exhibiting a firearm against a person in a vehicle, and carrying a loaded firearm with intent to commit a felony. (Superior Court of Yolo County, No. CRF120516, Paul K. Richardson, Judge.)

The Court of Appeal reversed the judgment. The prosecutor's exclusion of two jurors because they were openly gay, and on that basis alone might be biased against a closeted victim, was invidious discrimination and required reversal for an untainted trial, even though the prosecutor also had facially valid reasons for challenging both jurors. The court rejected the application of the so-called mixed motive or dual motive analysis. It is not appropriate to use that test when considering the remedy for invidious discrimination in jury selection, which should be free of any bias. (Opinion by Duarte, J., with Blease, Acting P. J., concurring. Dissenting opinion by Hull, J. (see p. 1177).)

Headnotes

CALIFORNIA OFFICIAL REPORTS HEADNOTES

CA(1) (1) Jury § 47.8—Challenges—Peremptory—Group Bias—Improper Exclusion.

Both the California and United States Constitutions prohibit using peremptory challenges to remove prospective jurors based solely on group bias. A prosecutor's use of peremptory challenges to strike prospective jurors on the basis of group bias—that is, bias against members of an identifiable group distinguished on racial, religious, ethnic, or similar grounds—violates the right of a criminal defendant to trial by a jury drawn from a representative cross-section of the community under Cal. Const., art. I, § 16. Such a practice also violates the defendant's right to equal protection under the U.S. Const., 14th Amend. Excluding prospective jurors solely on the basis of sexual orientation runs afoul of the principles espoused in *Batson* and *Wheeler*.

CA(2) (2) Jury § 47.8—Challenges—Peremptory—Group Bias—Prima Facie Case.

To determine whether a prosecutor impermissibly used peremptory challenges to remove prospective jurors based on a group bias such as sexual orientation, courts engage in a three-part analysis. A defendant must first make a prima facie case by demonstrating that the facts give rise to an inference of discriminatory purpose. If that showing is made, the burden next shifts to the prosecution to explain its challenge on the basis of permissible, group-neutral justifications. If such an explanation is offered, the trial court then decides whether purposeful group discrimination occurred. The court presumes that a prosecutor uses peremptory challenges in a constitutional manner and gives great deference to the trial court's ability to distinguish bona fide reasons from sham excuses. A prosecutor's justification, moreover, need not support a challenge for cause, and even a trivial reason, a hunch, or an arbitrary exclusion, if genuine and neutral, will suffice.

CA(3) **(3) Constitutional Law § 107—Procedural Due Process—Scope.**

California's due process clause (Cal. Const., art. I, § 7, subd. (a)) has independent—and greater—force than its federal analog: It protects the dignity interest in obtaining an untainted adjudication. Even in cases in which the decisionmaking procedure will not alter the outcome of governmental action, due process may nevertheless require that certain procedural protections be granted the individual in order to protect important dignitary values, or, in other words, to ensure that the method of interaction itself is fair in terms of what are perceived as minimum standards of political accountability—of modes of interaction which express a collective judgment that human beings are important in their own right, and that they must be treated with understanding, respect, and even compassion. Although perfection is neither required nor possible, **[*1164]** the judicial system must not only reach correct results, it must maintain its own dignity, or as the point has been phrased before: Not only must justice be done, but it must appear to have been done.

CA(4) **(4) Jury § 47.8—Challenges—Peremptory—Group Bias—Sexual Orientation—Reversible Error.**

A prosecutor's exclusion of two jurors because they were openly gay, and on that basis alone might be biased against a closeted victim, was discriminatory and required reversal for an untainted trial, even though the prosecutor also had facially valid reasons for challenging both jurors. When a party exercises a peremptory challenge against a prospective juror for an invidious reason, the fact that the party may also have had one or more legitimate reasons for challenging that juror does not eliminate the taint to the process. The court rejects the application in these circumstances of the so-called mixed motive or dual motive analysis; it is not appropriate to use that test when considering the remedy for invidious discrimination in jury selection, which should be free of any bias.

[Cal. Forms of Pleading and Practice (2018) ch. 322, Juries and Jury Selection, § 322.42; Erwin et al., Cal. Criminal Defense Practice (2018) ch. 81, § 81.04.]

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Attorneys General, for Plaintiff and Respondent.

Judges: Opinion by Duarte ▼, J., with Blease ▼, Acting P. J., concurring. Hull ▼, J.

Opinion by: Duarte ▼, J.

Opinion

[**307] **DUARTE, J.**—This case is about fairness and equality in our criminal justice system. *HN1*↑ When a party exercises a peremptory challenge against a prospective **[*1165]** juror for an invidious reason, the fact that the party may also have had one or more legitimate reasons for challenging that juror does not eliminate the taint to the process. We reject the application in these circumstances of the so-called "mixed motive" [***2] or "dual motive" analysis, which arose in employment discrimination cases as a way for defendant-employers to show that they would have taken an adverse action against a plaintiff-employee whether or not an impermissible factor also animated the employment decision. We hold it is not appropriate to use that test when considering the remedy for invidious discrimination in jury selection, which should be free of *any* bias.

INTRODUCTION

After defendant Brady Dee Douglas's former boyfriend, a male prostitute, told him victim Jeffrey B. had shorted him money following a prearranged sexual encounter, defendant and codefendant Clifton Damarcus Sharpe tracked down Jeffrey and demanded payment. During a high-speed freeway chase, defendant pointed a gun at Jeffrey and shot at his car several times.

A jury found defendant guilty of attempted second degree robbery, assault with a semiautomatic firearm, shooting at an occupied vehicle, exhibiting a firearm against a person in a vehicle, and carrying a loaded firearm with intent to commit a felony, and found true certain firearm enhancements. (Pen. Code, §§ 664, 211, 245, subd. (b), 246, 417.3, 12022, subd. (a)(1), 12022.5, subd. (a); *id.*, former § 12023, subd. (a).) The trial court sentenced [***3] defendant to prison for six years. [1]

On appeal, defendant contends the trial court erred in denying his *Batson/Wheeler* motion after the prosecutor peremptorily excused the only two openly gay prospective jurors. (See *Batson v. Kentucky* (1986) 476 U.S. 79 [90 L.Ed.2d 69; 106 S.Ct. 1712] (*Batson*); *People v. Wheeler* (1978) 22 Cal.3d 258 [148 Cal. Rptr. 890, 583 P.2d 748] (*Wheeler*).) He also argues the trial court erroneously instructed the jury with CALCRIM No. 460, the pattern jury instruction for attempt, which he asserts is unconstitutionally vague and impermissibly creates a mandatory presumption of intent.

We initially rejected defendant's instructional challenge, but found the trial court did not properly evaluate defendant's *Batson/Wheeler* motion. We ordered a remand for the trial court to apply a mixed motive analysis to the prosecutor's proffered reasons to determine whether those veniremen would **[*1166]** have been challenged regardless of their sexuality. We then granted [**308] defendant's rehearing petition and obtained supplemental briefing by the parties and by amici curiae. [2]

We now reverse for a new trial before a jury uninfected by discrimination. In light of this holding, we need not address defendant's instructional challenge again.

BACKGROUND

An information jointly charged defendant and Sharpe with various counts. During jury selection, [***4] the prosecutor and defense attorneys asked the prospective jurors questions about their feelings or perceptions about homosexuality. No one on the venire responded that she or he would have a problem deciding the case based on the facts. Two veniremen, J. and L., were openly homosexual and lived with their partners.

J. had a doctorate in science, and was friends with a local deputy public defender. They had had lunch the previous day, and J. had recently attended her baby shower. He saw her about once a week, she had visited his home, and she had discussed her work with him. She talked to J. about local deputy prosecutors and public defenders, but not about the prosecutor in this case. She told J. "she would never go to the dark side," meaning become a prosecutor. J. said he could make a decision based on the facts of the case. J. conceded he was biased against firearms and thought the Second Amendment should be repealed, but said his personal views about firearms would not prevent him from following the judge's instructions. After the prosecutor probed the topic of firearms further, J. said he had no other biases: "No, I think that's about it, you know, based on what I know about this case, that would [***5] be [the] only thing." He was then reminded by the prosecutor that he would need to examine "all the evidence together" and asked, "you are *comfortable with that only bias that you [sic] had indicated was the issue with the second amendment* ... , correct?" J. answered: "Yes, that would be *absolutely correct*." (Italics added.) A short time later, the prosecutor exercised a peremptory challenge against him.

After seven other prospective jurors were questioned and some were challenged by different sides, L. was questioned. He had graduated from high school and owned a travel agency. He said there was "absolutely no reason why [he could not] be fair."

[*1167]

The prosecutor asked whether L. could listen to testimony from a witness who visited a male prostitute and judge that person's credibility fairly. L. said he "definitely" could do so without prejudging the witness. L. responded "no" when asked whether he believed that persons engaged in illegal activities deserved what they get. He said "yes" when asked whether he could share his opinion about the facts of the case, work with others in applying those facts to the law, and use common sense to reach a decision.

When the prosecutor challenged L., codefendant [***6] Sharpe's counsel made a *Wheeler* motion, arguing the prosecutor systematically used peremptory challenges to excuse the only two openly gay men in the venire. Defendant's counsel joined the motion. The trial court "at this point" found sexuality was a protected category and considered the motion. 3

[**309] The prosecutor then gave his reasons for striking these two prospective jurors.

The prosecutor said he challenged J. because of J.'s close relationship with a public defender, particularly because she had discussed the personality traits of local prosecutors with J. and told J. she considered prosecutors to be on "the dark side."

The prosecutor said he challenged L. based on demeanor, stating that when defendant's counsel got up, L. leaned forward and seemed more attentive, but when the prosecutor spoke, L. leaned back and gave answers that were short and not descriptive.

The prosecutor then added the following rationale about both men:

"In addition, in a case in which the victim in the case is in a relationship and is not in a relationship with a female but is not out of the closet and actually was untruthful with the police about the extent of his relationship with a male [***7] prostitute, *I think that that particular [persons'] testimony may be viewed with bias [by] those who are willing to be openly gay* and not—not lie about it and can be frank about it, and he would view that as a negative character trait, and an individual who attempts to maintain given whatever grave idea, sexuality he has, but is willing to lie about it.

"So I think there is a number of reasons, both specific to the case that are sexuality neutral, not—I'm not asserting [*sic*, conceding?] in any way that is an adequate basis for [a] *Wheeler* motion, but even given that *I think there [*1168] are [bases] not only in their reaction in court in answering questions, but also given the specific facts of this case.*" (Italics added.)

To this explanation, Sharpe's counsel responded that "[u]nder that justification, anyone who is openly gay" would automatically be challenged.

The trial court denied the defense motion, questioning in passing whether a *Wheeler* motion based on sexuality discrimination was appropriate.

Citing J.'s relationship with the public defender and her "dark side" comment about prosecutors, the trial court found the prosecutor's challenge to J. was justified. As for L., the trial court accepted [***8] the prosecutor's demeanor-based rationale for the challenge. Because the trial court made no response to Sharpe's counsel's pointed objection, we presume the trial court simply found the facially nondiscriminatory reasons were sufficient and had no need to address the effect of the last reason. In effect, that was the rough equivalent to applying a mixed motive analysis to the challenges.

DISCUSSION

Defendant contends the trial court erred in denying his *Batson/Wheeler* motion because, in his view, the prosecutor impermissibly excused two openly gay jurors based on unsupported assumptions predicated on their sexual orientation. We agree.

I

General Principles for Evaluating Peremptory Challenges

CA(1)↑ (1) *HN2*↑ Both the state and federal Constitutions prohibit using peremptory challenges to remove prospective jurors based solely on group bias. (*Wheeler, supra,* 22 Cal.3d at p. 272; [**310] *Batson, supra,* 476 U.S. at pp. 85–88.) "It is well settled that '[a] prosecutor's use of peremptory challenges to strike prospective jurors on the basis of group bias—that is, bias against "members of an identifiable group distinguished on racial, religious, ethnic, or similar grounds"—violates the right of a criminal defendant to trial by a jury drawn from a representative cross-section of the community [***9] under article I, section 16 of the California Constitution.'" (*People v. Hamilton* (2009) 45 Cal.4th 863, 898 [89 Cal. Rptr. 3d 286, 200 P.3d 898] (*Hamilton*); see *Wheeler,* at p. 272.) "Such a practice also violates the defendant's right to equal protection under the Fourteenth Amendment to the United States Constitution." (*Hamilton,* at p. 898.)

[*1169]

Although the United States Supreme Court has yet to address whether *Batson* extends to sexual orientation, the Ninth Circuit held in *SmithKline Beecham Corp. v. Abbott Labs.* (9th Cir. 2014) 740 F.3d 471, 484, that it does, relying heavily on the high court's decision in *United States v. Windsor* (2013) 570 U.S. 744 [186 L.Ed.2d 808, 133 S.Ct. 2675], which held that the Defense of Marriage Act's (Pub.L. No. 104-199 (Sept. 21, 1996) 110 Stat. 2419) definition of marriage as excluding same-sex partners violated equal protection and due process. (See also *Obergefell v. Hodges* (2015) 576 U.S. ____ [192 L.Ed.2d 609, 135 S. Ct. 2584] [recognizing a federal constitutional right for same-sex marriages]; *In re Marriage Cases* (2008) 43 Cal.4th 757, 840–844 [76 Cal. Rptr. 3d 683, 183 P.3d 384] [sexual orientation is a suspect classification for purposes of California's equal protection clause].) Our colleagues in the Fourth District have found that excluding homosexuals on the basis of group bias violates the California Constitution. (See *People v. Garcia* (2000) 77 Cal.App.4th 1269, 1275, 1280–1281 [92 Cal. Rptr. 2d 339].)

Like *Garcia* and *SmithKline*, we, too, find that ***HN3*** excluding prospective jurors solely on the basis of sexual orientation runs afoul of the principles espoused in *Batson* and *Wheeler*.

CA(2) **(2)** ***HN4*** To determine whether a prosecutor impermissibly used peremptory challenges to remove prospective jurors based on a group bias such as sexual orientation, courts engage in a three-part analysis. (See *Hamilton, supra*, 45 Cal.4th at pp. 899–900.) A defendant must first make [***10] a prima facie case by demonstrating that the facts give rise to an inference of discriminatory purpose. (See *People v. Cornwell* (2005) 37 Cal.4th 50, 66 [33 Cal. Rptr. 3d 1, 117 P.3d 622], disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22 [87 Cal. Rptr. 3d 209, 198 P.3d 11].) If that showing is made, the burden next shifts to the prosecution to explain its challenge on the basis of permissible, group-neutral justifications. (See *Cornwell*, at pp. 66–67.) If such an explanation is offered, the trial court then decides whether purposeful group discrimination occurred. (See *Cornwell*, at p. 67; *Johnson v. California* (2005) 545 U.S. 162, 168 [162 L.Ed.2d 129, 138, 125 S. Ct. 2410].)

In this case, because the prosecutor gave reasons for his peremptory challenges, we proceed to the second and third steps to determine whether the trial court erred in concluding that they were valid. (See *People v. Zambrano* (2007) 41 Cal.4th 1082, 1106 [63 Cal. Rptr. 3d 297, 163 P.3d 4], [**311] disapproved on other grounds in *People v. Doolin, supra*, 45 Cal.4th at p. 421, fn. 22.)

[*1170]

HN5 "'We presume that a prosecutor uses peremptory challenges in a constitutional manner and give great deference to the trial court's ability to distinguish bona fide reasons from sham excuses.'" (*Hamilton, supra*, 45 Cal.4th at p. 901.) A prosecutor's justification, moreover, need not support a challenge for cause (see *Batson, supra*, 476 U.S. at p. 97), and even a trivial reason, a hunch, or an arbitrary exclusion, if genuine and neutral, will suffice (see *Hamilton*, at p. 901).

HN6 We review a trial court's determination regarding the sufficiency of a prosecutor's justifications for exercising peremptory challenges with [***11] restraint. (See *People v. Thomas* (2011) 51 Cal.4th 449, 474 [121 Cal. Rptr. 3d 521, 247 P.3d 886].) The trial court's determination is a factual one, and so long as the trial court makes a sincere and reasoned effort to evaluate the justifications offered, its conclusions are entitled to deference on appeal when they are supported by substantial evidence. (See *Hamilton, supra*, 45 Cal.4th at pp. 900–901; *Thomas*, at p. 474.) The issue is whether the trial court finds the prosecutor's explanation to be credible, based on factors such as the reasonableness of the explanation, the prosecutor's demeanor, and the trial court's own observations of the voir dire. (See *Lenix, supra*, 44 Cal.4th at p. 613.) With these principles in mind, we turn to the specific challenges under review.

II

The Peremptory Challenges In This Case

We have no trouble upholding the trial court's findings that the prosecutor had facially valid reasons for challenging these jurors. J.'s relationship with a deputy public defender who thought prosecutors worked for the "dark side" could trouble any prosecutor, and L.'s terse answers and negative body language (something the trial court could observe but that we cannot second-guess on a cold transcript) could also give reasonable cause for concern. (See *Lenix, supra*, 44 Cal.4th at p. 623 [perceived bias against prosecution]; see also *id.* at p. 613 ["facial expressions, gestures, hunches"]; [***12] *People v. Reynoso* (2003) 31 Cal.4th 903, 924–925 [3 Cal. Rptr. 3d 769, 74 P.3d 852] [where prosecutor sees "the potential juror glare at him, or smile at the defendant or defense counsel"].)

But the prosecutor then proffered another reason applicable to *both* prospective jurors. The prosecutor explained that *because both of these jurors were openly gay*, he thought they might be biased against the closeted victim, the main witness.

Defendant argues this additional reason is baldly discriminatory and no different from a similar one rejected in *Batson*: A prosecutor cannot assume a **[*1171]** prospective juror would be more partial to a defendant of the same race. (*Batson, supra*, 476 U.S. at p. 97 [recognizing that the equal protection clause "forbids the States to strike black veniremen on the assumption that they will be biased in a particular case simply because the defendant is black"].) We agree.

We acknowledge that a challenge based solely on a prospective juror's membership in a particular group is different from a challenge "'which may find its roots in [**312] part [in] the juror's attitude about the justice system and about society which may be [group] related.'" (*Hamilton, supra* 45 Cal.4th at pp. 901–902.) In *Hamilton*, for example, our Supreme Court upheld a peremptory challenge where the prosecutor said one of the reasons he struck a prospective juror was because he had "'considerable [***13] sympathy for Black people on trial' and thought the justice system was unfair to Blacks." (*Id.* at p. 901.) In finding substantial evidence supported the challenge, the court implicitly rejected the defendant's argument that the reason was not race neutral but rather based on race itself. (*Id.* at pp. 901–902.) The court found the juror's responses to several questions on a questionnaire indicated he was skeptical about the fair treatment of Blacks by the criminal justice system, thus supporting the prosecutor's concerns, even if they were tangentially related to race. (*Id.* at p. 902.) Similarly, in *People v. Martin* (1998) 64 Cal.App.4th 378 [75 Cal. Rptr. 2d 147], the prosecutor struck a Jehovah's Witness because, in his experience, "'they couldn't judge anybody at all.'" (*Id.* at p. 381.) Although the prospective juror "did not express actual reservations about her ability to deliberate," the court nevertheless found the "prosecutor's perception that the juror's religious views might render her uncomfortable with sitting in judgment of a fellow human being was a specific bias related to the individual juror's suitability for jury service." (*Id.* at p. 384.)

Hernandez v. New York (1991) 500 U.S. 352 [114 L.Ed.2d 395, 111 S.Ct. 1859] affirmed a finding that a prosecutor's reason for striking two Latino jurors was race neutral and genuine; the prosecutor had excused them because their demeanor [***14] and responses caused him to doubt their ability to defer to the official translation of Spanish-language testimony anticipated at trial. (*Id.* at pp. 356–357 (plur. opn.).) The fact such reasoning might disproportionately impact prospective Latino jurors did not make it improper. (*Id.* at pp. 361–363.) In a concurring opinion, Justice O'Connor, joined by Justice Scalia, aptly observed that *Batson* "does not require that the [prosecutor's] justification be unrelated to race. *Batson* requires only that the prosecutor's reason for striking a juror not *be* the juror's race." (*Id.* at p. 375 (conc. opn. of O'Connor, J.).)

Following this line of reasoning, we can certainly imagine a case where an openly gay venireperson *who expressed contempt for or distrust of* closeted **[*1172]** homosexuals could properly be stricken, because the reason would not be their sexuality, but their inability to fairly judge testimony of closeted homosexuals, simply because they have chosen to remain closeted. But that is not what happened here.

Both veniremen said they could be fair, and neither expressed concerns about closeted homosexuals. The bias alleged by the prosecutor was a product of the prosecutor's impermissible group assumptions, unsupported by the record and based [***15] solely on the two jurors' sexuality. The prosecutor specifically asked the panel whether "anybody [had] an automatic reaction where they would vote guilty or not guilty because some of the people involved in this case, either witnesses or people who are accused are homosexual." No one responded in the affirmative. Thus, this is not a case where a challenge touching on homosexuality, but not based on it, is in play. The prosecutor gave as a reason for his challenge his *assumption* that the only two openly gay veniremen would look askance at the victim's lifestyle simply because [**313] they were openly gay and he was not. Whether intended or not, that rationale reflects invidious sexuality discrimination that is not permissible.

III

The Remedy for Invalid Challenges

We must now consider the effect, if any, of the trial court's finding that the prosecutor's *other* reasons were sufficient to continue with jury selection, or whether the trial court erred by not implementing a remedy for the *Batson/Wheeler* violation. 5

Although many jurisdictions have considered whether to apply a per se, mixed motive, or substantial motivating factor approach in the face of an invalid challenge, neither the United [***16] States Supreme Court nor our Supreme Court has done so. (See *Snyder v. Louisiana* (2008) 170 U.S. 472, 485 [170 L.Ed.2d 175, 186, 128 S.Ct. 1203] [not deciding whether mixed motive analysis applies in *Batson* context]; *People v. Schmeck* (2005) 37 Cal.4th 240, 276–277 [33 Cal. Rptr. 3d 397, 118 P.3d 451] [declining to address whether a mixed motive analysis should be used], overruled on other grounds in *People v. McKinnon* (2011) 52 Cal.4th 610, 637–638 [130 Cal. Rptr. 3d 590, 259 P.3d 1186].) Accordingly, we must decide which approach to adopt.

[*1173]

Some jurisdictions, primarily federal, have adopted a mixed motive or dual motive analysis derived from non-*Batson* equal protection or statutory-based cases. (See e.g., *Howard v. Senkowski* (2d Cir. 1993) 986 F.2d 24, 26–27 & see especially fns. 1 & 2; *Gattis v. Snyder* (3d Cir. 2002) 278 F.3d 222, 232–235; *Jones v. Plaster* (4th Cir. 1995) 57 F.3d 417, 420–422; *U.S. v. Darden* (8th Cir. 1995) 70 F.3d 1507, 1531–1532; *Wallace v. Morrison* (11th Cir. 1996) 87 F.3d 1271, 1274–1275.) Under the mixed motive approach, "[o]nce the claimant has proven improper motivation, dual motivation analysis is available to the person accused of discrimination to avoid liability by showing that the same action would have been taken in the absence of the improper motivation that the claimant has proven." (*Howard*, at p. 27; see *Gattis*, at p. 233.) But phrased another way, under the mixed motive analysis, "the Court allows those accused of unlawful discrimination to prevail, *despite clear evidence of racially discriminatory motivation*, if they can show that the challenged decision would have been made even absent the impermissible motivation, or, put another way, that the discriminatory motivation was not a 'but for' cause of [***17] the challenged decision." (*Kesser v. Cambra* (9th Cir. 2006) 465 F.3d 351, 372 (conc. opn. of Wardlaw, J.), italics added (*Kesser*).)

The Ninth Circuit has instead adopted a substantial motivating factor approach, limiting its inquiry to "whether the prosecutor was 'motivated in substantial part by discriminatory intent.'" (*Cook v. LaMarque* (9th Cir. 2010) 593 F.3d 810, 814–815.) Under this test, if a bad reason is given, it can be ignored so long as the prosecutor's motivation is not substantially driven by it. (*Id.* at p. 826 ["the prosecutor gave both persuasive and unpersuasive justifications for his strikes. Even assuming the unpersuasive grounds were actually pretext, we cannot conclude his strikes were ultimately motivated in substantial part by race"].)

[**314] Defendant and amicus curiae Equality California urge us to adopt the per se rule, contending that when a party offers multiple rationales for a peremptory strike, only some of which are permissible, the taint from the impermissible reason(s) mandates reversal. The LA Public Defender urges us to adopt the Ninth Circuit's substantial motivating factor approach, arguing the per se rule may be too restrictive in some cases and the mixed motive approach may be too permissive in others. The Attorney General urges us to adopt the mixed motive approach, [***18] if we must choose one.

As indicated, both the substantial factor and mixed motive approaches permit strikes based in part on invalid reasons. In this case, the prosecutor admitted to striking the only two gay veniremen known to be on the jury, expressly because they were known to be gay. We endorse the following view, while acknowledging that it is not precedential: "To excuse such **[*1174]** prejudice when it does surface, on the ground that a prosecutor can also articulate [valid] nonracial factors for his challenges, would be absurd." (*Wilkerson v. Texas* No. 89-5072, Supreme Ct. Mins., Oct. 16, 1989 (Marshall, J., dissenting from den. of cert.).)

The "mixed motive" concept arose in non-*Batson* contexts, such as in employment discrimination lawsuits, where a defendant-employer seeks to show that the adverse action would have been taken against the plaintiff-employee regardless of any racial or other invidious animus. (See *Mt. Healthy City Board of Ed. v. Doyle* (1977) 429 U.S. 274, 287 [50 L.Ed.2d 471, 483–484, 97 S. Ct. 568] [district court should have determined whether the board could show it would not have rehired a teacher who engaged in constitutionally protected speech in the absence of the teacher's protected conduct]; *Kesser, supra*, 465 F.3d at p. 373 [in non-*Batson* contexts, the high court "has consistently and repeatedly applied mixed-motive analysis where

both permissible [***19] and impermissible motivations are present"]; Note, *The "Tainted Decision-Making Approach": A Solution for the Mixed Messages* Batson *Gets from Employment Discrimination* (2006) 56 Case W.Res. L.Rev. 769, 782–789 [describing the civil law origin of mixed motive analysis, and arguing it should not be extended to *Batson* error].)

"[A]lthough the initial three-step framework of *Batson* does derive from Title VII jurisprudence, the 'but for' causation requirement that has been applied in those contexts [citations], is not appropriate in the distinct *Batson* context. The difficult task of 'ferreting out discrimination' would be made nearly impossible by a 'but for' causation requirement, which would require a court to engage in counterfactual reasoning, often with only a sparse record to guide it. [Citation.]" (*Cook v. LaMarque, supra*, 593 F.3d at p. 828 (conc. & dis. opn. of Hawkins, J.).) Further, the mixed motive approach does not translate well to a *Batson* situation where the question is not *only* whether a prospective juror would have been challenged anyway, but also implicates systemic fairness.

For this reason, many—if not most—of our sister state courts have rejected application of a "mixed motive" or "dual motivation" analysis. (See, e.g., *McCormick v. State* (Ind. 2004) 803 N.E.2d 1108, 1113 ["It is not appropriate to apply [***20] the dual motivation analysis in the *Batson* context;" one biased "challenge tainted any nondiscriminatory reasons"]; *State v. Lucas* (2001) 199 Ariz. 366, 369 [18 P.3d 160, 163] ["any consideration of a discriminatory factor directly conflicts with the purpose of *Batson* and taints the entire jury selection process"]; *Payton v. Kearse* (1998) 329 S.C. 51, 59 [495 S.E.2d 205, 210] [**315] ["Once a discriminatory reason has been uncovered—either inherent or pretextual—this reason taints the entire jury selection procedure"]; *Riley v. Commonwealth* (1995) 21 Va.App. 330, 336 [464 S.E.2d 508, 510] [gender bias; "The fact that the Commonwealth [also] used age to identify which [*1175] women to strike does not overcome the constitutional infirmity"]; *Rector v. State* (1994) 213 Ga.App. 450, 454 [444 S.E.2d 862, 865] [trial court erred in ruling a "purportedly race neutral explanation[] cured the element of the stereotypical reasoning employed by the State's attorney"]; *Ex parte Sockwell* (Ala. 1995) 675 So.2d 38, 41; *McCray v. State* (Ala.Crim.App. 1998) 738 So.2d 911, 914 [following *Sockwell*; "In Alabama, a race-neutral reason ... will not 'cancel out' a race-based reason"]; *Strozier v. Clark* (1992) 206 Ga.App. 85, 88 [424 S.E.2d 368, 371] ["Even though [appellee's counsel] may have given one racially neutral explanation, the racially motivated explanation 'vitiates the legitimacy of the entire (jury selection) procedure'"]; *State v. King* (1997) 215 Wis.2d 295, 306–309 [572 N.W.2d 530, 535–536] [rejecting "dual motivation" test]; *U.S. v. Greene* (C.M.A.1993) 36 M.J. 274, 280–281 [reviewing federal cases and agreeing "with the untainted approach"]; see also *Robinson v. U.S.* (D.C. App. 2006) 890 A.2d 674, 679–681 [if racial bias is a "substantial part" of challenge, it is wrong despite partially [***21] unbiased reasons]; cf. *People v. Turner* (2001) 90 Cal.App.4th 413, 421 [109 Cal. Rptr. 2d 138] (dis. opn. of Ortega ▼, J.) ["I feel it is improper to use race as even a partial reason for exercising a peremptory, even if there are myriad other valid grounds for excusing a juror."]; *Guzman v. State* (Tex.Crim.App. 2002) 85 S.W.3d 242, 256–258 [dis. opn. rejecting mixed motive analysis]; (*Kesser, supra*, 465 F.3d at pp. 376–377 (conc. opn. of Wardlaw ▼, J.) [questioning mixed motive test].)

Thus, the per se approach—while not universally held—is well grounded in the law.

CA(3)↑ **(3)** Further, *Wheeler* was based on independent state grounds—the right to a jury composed of a representative cross-section of the community under article I, section 16 of our Constitution. (*Wheeler, supra*, 22 Cal.3d at pp. 265–272.) Although our Supreme Court has since followed high court decisions after *Batson*, this circumstance leads us to consider the application of another independent ground: *HN8*↑ Our own due process clause (Cal. Const., art. I, § 7, subd. (a)) has independent—and greater—force than its federal analog: It protects the dignity interest in obtaining an untainted adjudication (see *Saleeby v. State Bar* (1985) 39 Cal.3d 547, 563–565 [216 Cal. Rptr. 367, 702 P.2d 525]). As stated by our Supreme Court: "'*[E]ven in cases in which the decision-making procedure will not alter the outcome of governmental action*, due process may nevertheless require that certain procedural protections be granted the individual in order to protect important dignitary values, or, in other words, "to ensure that the [***22] method of interaction itself is fair in terms of what are perceived as minimum standards of political accountability—of modes of interaction which express a collective judgment that *human beings* are important in their own right, and that they must be treated with understanding, respect, and even compassion."'" ([*1176] *Today's Fresh Start, Inc. v. Los Angeles County Office of Education* (2013) 57 Cal.4th 197, 213 [159 Cal. Rptr. 3d 358, 303 P.3d 1140], quoting *People v. Ramirez* (1979) 25 Cal.3d 260, 268 [158 Cal. Rptr. 316, 599 P.2d 622], first italics added, second italics added by *Today's Fresh Start*; see *In re Vicks* (2013) 56 Cal.4th 274, 310 [153 Cal. Rptr. 3d 471, 295 P.3d 863].) [**316]

Finally, and connected to the previous point, ***HN9*** although perfection is neither required nor possible (see, e.g., *People v. Cunningham* (2001) 25 Cal.4th 926, 1009 [108 Cal. Rptr. 2d 291, 25 P.3d 519] [defendant "was entitled to a fair trial but not a perfect one"]), the judicial system must not only reach correct results, it must maintain its own dignity, or as the point has been phrased before: "'"Not only must justice be done, but it must appear to have been done ... ."'" (*People v. Gordon* (1991) 229 Cal.App.3d 1523, 1526–1527 [281 Cal. Rptr. 12].) "Taints of discriminatory bias in jury selection—actual or perceived—erode confidence in the adjudicative process, undermining the public's trust in courts." (*People v. Gutierrez* (2017) 2 Cal.5th 1150, 1154 [218 Cal. Rptr. 3d 289, 395 P.3d 186].) Indeed, *Batson* itself addresses this institutional concern: "The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. Selection procedures that purposefully exclude black persons from [***23] juries undermine public confidence in the fairness of our system of justice. [Citations.] Discrimination within the judicial system is most pernicious because it is 'a stimulant to that race prejudice which is an impediment to securing to [black citizens] that equal justice which the law aims to secure to all others.'" (*Batson, supra*, 476 U.S. at pp. 87–88; see also *Miller-El v. Dretke* (2005) 545 U.S. 231, 238 [162 L.Ed.2d 196, 212, 125 S. Ct. 2317] ["the very integrity of the courts is jeopardized when a prosecutor's discrimination 'invites cynicism respecting the jury's neutrality,' [citation], and undermines public confidence in adjudication"].)

Although this case does not involve race-based discrimination in challenges, as in *Batson*, the same concern for preserving the integrity—and *perceived* integrity—of the judicial system is present.

CA(4) **(4)** The remedy for the error in this case is reversal for an untainted trial.6

DISPOSITION

The judgment is reversed.

Blease, Acting P. J., concurred.

Dissent by: Hull, J.

Dissent

[*1177] HULL, J., Dissenting.—Defendant was tried before an impartial judge and found guilty beyond a reasonable doubt by an unbiased jury while represented by competent counsel. Even so, the majority mandates per se reversal of defendant's convictions because the prosecutor offered a "nonneutral" reason in addition to stating two facially [***24] valid reasons for challenging two openly gay jurors during voir dire. (See maj. opn., *ante*, at p. 1175.) The majority reaches this conclusion even though the record is devoid of any evidence showing the nonneutral reason was determinative in striking the prospective jurors or that the two facially valid reasons were unsupportable.

In our analysis of this assertion of error, it is important to focus on what exactly occurred in the trial court. The People did not strike the two jurors because they [**317] were gay men. The People exercised peremptory challenges against these two prospective jurors, in part, because of a perhaps unwarranted concern that the two prospective jurors who had openly acknowledged their sexual orientation would be biased against the People's victim who apparently, until the events that unfolded leading to this prosecution, had *not* openly acknowledged his sexual orientation.

To put the issue before us further into perspective, given the prosecutor's apparent concerns regarding how jurors would view the victim of this crime, the prosecutor would have been in fair

territory during voir dire if the prosecutor, after noting for the prospective jurors that the victim of this crime was a [***25] gay man who had not before openly acknowledged his sexual orientation, had inquired of *all* the prospective jurors whether there was any reason why this victim, and thus the prosecution, could not receive a fair trial simply because the victim was a gay man, or because the victim had not acknowledged his sexual orientation openly before the events leading to the commission of this crime. Had the prosecution done so and had *any* of the prospective jurors answered those questions in a way that legitimately placed into question whether that prospective juror could be fair and impartial to both sides in judging the facts of the case, a valid challenge would have been the result.

Put simply, the majority reverses defendant's conviction for a serious crime, otherwise fairly obtained, because the prosecutor exercised a peremptory challenge that *may have* been based solely on an unwarranted assumption concerning the views of openly gay men.

In any event, the per se test the majority adopts today misses a proper balance; the prosecutor may well have legitimately stricken the two prospective jurors *regardless of* their sexual orientation. The mixed motive approach, by contrast, strikes the proper [***26] balance between protecting a defendant's constitutional rights, preserving the public's confidence in the fairness of our **[*1178]** system of justice, and recognizing the institutional interest in the finality of judgments. As we originally concluded, I would adopt the mixed motive approach whenever a party offers both neutral and nonneutral reasons for exercising a peremptory strike, and I would remand the matter here for the trial court to apply the mixed motive approach in the first instance.

I therefore dissent.

An argument can be made that there is no *Batson/Wheeler* violation here at all. (See e.g., *Hernandez v. New York* (1991) 500 U.S. 352 [114 L. Ed. 2d 395, 111 S. Ct. 1859]; *People v. Hamilton* (2009) 45 Cal.4th 863 [89 Cal. Rptr. 3d 286, 200 P.3d 898]; *People v. Martin* (1998) 64 Cal.App.4th 378 [75 Cal. Rptr. 2d 147].) *Batson/Wheeler*, as this field of jurisprudence has become known, is a nebulous area of the law. (*Batson v. Kentucky* (1986) 476 U.S. 79 [90 L.Ed.2d 69; 106 S. Ct. 1712]; *People v. Wheeler* (1978) 22 Cal.3d 258 [148 Cal. Rptr. 890, 583 P.2d 748] (*Batson/Wheeler*).) Where the line is drawn between constitutionally legitimate informed guesses about an individual juror's mindset given that juror's demographics and answers during jury selection (a guess that drives nearly every peremptory challenge a trial lawyer makes and a guess that has given rise to an industry predicting the mindset of given jurors based on demographics) and unconstitutional discrimination in jury selection is often unclear. One hopes for some added clarity in [***27] the future.

But the parties and amici curiae and the majority have litigated and decided this matter on the assumption that the *Batson/Wheeler* doctrine is here in play and I will address only the proper remedy in this case.

[**318] I note at this point the majority characterizes the trial court's failure to address the sexuality-related reason as the "rough equivalent" to applying a mixed motive analysis to the challenges. (Maj. opn., *ante*, at p. 1168.) Not so. Because the trial court never considered the sexuality-related reason for the challenge at all, it did not engage in the analysis required by the mixed motive approach. That is, the court never placed the burden on the prosecutor to show that the potential jurors would have been excused even had the impermissible purpose not been considered; that is, put differently, that an impermissible reason was not the determining factor in excusing the two jurors from the panel.

The majority has "no trouble upholding the trial court's findings that the prosecutor had facially valid reasons for challenging" the two jurors (maj. opn., *ante*, at p. 1170), but concludes that defendant's convictions must be reversed nonetheless. The majority does so for several reasons, none of [***28] which are convincing.

First, as support for rejecting the mixed motive approach that we initially adopted, the majority cites **[*1179]** *Wilkerson v. Texas* No. 89-5072, Supreme Ct. Mins., Oct. 16, 1989 (Marshall, J., dissenting from den. of cert.), in which the United States Supreme Court denied certiorari over the dissent of Justice Marshall. (Maj. opn., *ante*, at pp. 1173-1174.) The prosecutor in *Wilkerson* conceded that race was one of many factors in his peremptory strikes of several Black jurors, and Justice Marshall would have granted the petition to determine whether a prosecutor's exercise of peremptory challenges based in part on racial considerations violates the equal protection clause. (*Wilkerson, supra*, No. 89-5072, Supreme Ct. Mins., Oct. 16, 1989.) In his

dissent, Justice Marshall argued that the mixed motive analysis was inappropriate in the *Batson* context, and that excusing prejudice when it surfaces on the ground that a prosecutor can also articulate neutral reasons for a strike would be "absurd." (*Ibid.*)

The majority's reliance on *Wilkerson* rests on shaky grounds. Statements accompanying denials of certiorari have no binding or precedential value. As Justice Stevens emphasized in an opinion respecting the denial of the petition for writ of certiorari in *Singleton v. Commissioner of Internal Revenue* No. 78-78 Supreme Ct. Mins., Oct. 30, 1978, all opinions dissenting from the denial of certiorari are "totally unnecessary" and [***29] are "examples of the purest form of dicta, since they have even less legal significance" than the court's order denying certiorari which has no precedential significance at all. (*Singleton, supra*, No. 78-78 Supreme Ct. Mins., Oct. 30, 1978; see also *In re I.F.* (2018) 20 Cal.App.5th 735, 764 [229 Cal. Rptr. 3d 462].) Justice Stevens further noted that such opinions are also "potentially misleading." (*Singleton, supra*, No. 78-78 Supreme Ct. Mins., Oct. 30, 1978.) Because the court "provides no explanation of the reasons for denying certiorari, the dissenter's arguments in favor of a grant are not answered and therefore typically appear to be more persuasive than most other opinions." (*Ibid.*)

Next, the majority rejects the mixed motive approach because, in the majority's view, it has been adopted only in non-*Batson* contexts such as employment discrimination lawsuits. (Maj. opn., *ante*, at p. 1174.) But *Batson* itself states that, "[a] recurring question in these [jury discrimination] cases, *as in any case alleging a violation of the Equal Protection Clause*, was whether the defendant had met his burden of proving purposeful discrimination on the part of the State." (*Batson, supra*, 476 U.S. at p. 90, italics added.) Thus, as the Second Circuit recognized in *Howard v. Senkowski* (2d Cir. 1993) 986 F.2d 24, 27 (*Howard*), *Batson* "[p]lac[ed] [**319] the issue squarely within the tradition of equal protection jurisprudence."

Batson, moreover, explicitly relied on the court's prior equal protection jurisprudence [***30] as articulated in cases such as *Arlington Heights v. Metropolitan Housing Corp.* (1977) 429 U.S. 252, 271 [50 L.Ed.2d 450, 468, 97 S. Ct. 555] (*Arlington Heights*). (See, e.g., *Batson, supra*, 476 U.S. at pp. 93–94.) There, **[*1180]** the plaintiffs had failed to carry their burden of showing that a racially discriminatory purpose was a substantial motivating factor in an agency's decision to deny a rezoning application. (*Arlington Heights*, at p. 271.)

Arlington Heights expressly recognized the following: "[p]roof that the decision by the Village was motivated in part by a racially discriminatory purpose would not necessarily have required invalidation of the challenged decision. Such proof would, however, have shifted to the Village the burden of establishing that the same decision would have resulted even had the impermissible purpose not been considered. If this were established, the complaining party in a case of this kind no longer fairly could attribute the injury complained of to improper consideration of a discriminatory purpose. In such circumstances, there would be no justification for judicial interference with the challenged decision." (*Arlington Heights, supra*, 429 U.S. at p. 271, fn. 21.) The high court was undoubtedly aware of its decision in *Arlington Heights*, including the mixed motive analysis the opinion expressly sanctions, when favorably citing the opinion in *Batson*. (*Batson, supra*, 476 U.S. at pp. 93–94.)

And contrary to the majority's implicit suggestion [***31] that the mixed motive approach is better suited in the employment discrimination context rather than in the jury selection context (maj. opn., *ante*, at pp. 1173-1174), the Supreme Court has applied the mixed motive approach in other areas of similar constitutional magnitude to selecting an impartial jury.

For example, in *Hunter v. Underwood* (1985) 471 U.S. 222, 228 [85 L.Ed.2d 222, 105 S. Ct. 1916] (*Hunter*), the Supreme Court applied a mixed motive analysis when determining the constitutionality of a provision in the Alabama Constitution that disenfranchised persons convicted of crimes involving moral turpitude. Evidence showed that although the law was neutral on its face, applying equally to anyone convicted of one of the enumerated crimes, the purpose of the law was to disenfranchise Blacks. (*Hunter*, at pp. 227–229.)

Notably, in *Hunter* the state argued that the existence of a permissible motive for the state constitutional provision, the disenfranchisement of poor Whites, trumped any proof of a parallel impermissible motive of disenfranchising Blacks. (*Hunter, supra*, 471 U.S. at pp. 231–232.) Without deciding whether the intentional disenfranchisement of poor Whites would qualify as a "'permissible motive,'" the court found that "where both impermissible racial motivation and racially discriminatory impact are demonstrated, *Arlington* [***32] Heights and *Mt. Healthy* [*City Board of Ed. v. Doyle* (1977) 429 U.S. 274, 287 [50 L.Ed.2d 471, 483–484, 97 S. Ct.

568]] supply the proper analysis." (*Id*, at p. 232.) An additional purpose to discriminate against poor [*1181] Whites, even if considered permissible, "would not render nugatory the purpose to discriminate against all blacks," since the evidence showed the latter was the true motivation for the provision. (*Ibid.*)

In a government by the people and for the people, the critical nature of the right [**320] to vote is manifest. (*Reynolds v. Sims* (1964) 377 U.S. 533, 555 [12 L.Ed.2d 506, 523, 84 S. Ct. 1362] ["The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government"].) So, too, is the right to a trial by an impartial jury selected pursuant to nondiscriminatory criteria. (*Batson, supra*, 476 U.S. at pp. 85–86.) The mixed motive approach, relied upon by the court in *Hunter* to protect the sacred right to vote, is equally capable of protecting a defendant's right to a fair trial by determining if an impermissible motive was the determinative factor, or a "but for" cause, in exercising a peremptory challenge even though other permissible motives were also present.

I stress at this point that nothing in this record suggests or demonstrates that, unlike the situation in *Hunter* [***33] , the prosecutor's motivation in exercising these challenges was to discriminate against gay men.

In *Mt. Healthy City Board of Ed. v. Doyle, supra*, 429 U.S. 274 (*Mt. Healthy*) an untenured teacher brought an action for reinstatement to his teaching position claiming that, in fact, he had been dismissed from his teaching position for exercising his right to free speech.

In its holding the Supreme Court set forth a portion of the district court's findings:

"The District Court made the following conclusions on this aspect of the case:

"'1) If a non-permissible reason, e. g., exercise of First Amendment rights, played a substantial part in the decision not to renew—even in the face of other permissible grounds—the decision may not stand (citations omitted).

"'2) A non-permissible reason did play a substantial part. That is clear from the letter of the Superintendent immediately following the Board's decision, which stated two reasons—the one, the conversation with the radio station clearly protected by the First Amendment.

"At the same time, though, [the District Court] stated that [¶] '[i]n fact, as this Court sees it and finds, both the Board and the Superintendent were faced with a situation in which there did exist in fact reason ... independent of any [*1182] First Amendment rights or exercise thereof, [***34] to not extend tenure.'" (*Mt. Healthy, supra*, 429 U.S. at pp. 284–285.)

Ultimately, the Supreme Court held that: "Initially, in this case, the burden was properly placed upon respondent to show that his conduct was constitutionally protected, and that this conduct was a 'substantial factor'—or, to put it in other words, that it was a 'motivating factor' in the Board's decision not to rehire him. Respondent having carried that burden, however, the District Court should have gone on to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's reemployment even in the absence of the protected conduct." (*Mt. Healthy, supra*, 429 U.S. at p. 287, fn. omitted.)

The Supreme Court returned the matter to the district court to reconsider its holding applying that test.

The majority's concern that ferreting out discrimination is a "'difficult task'" (maj. opn., *ante*, at p. 1174) does not present an insurmountable problem of proof for trial courts and shows little faith in trial court judges' abilities in ferreting out impermissible discrimination. Trial courts already face such demands when evaluating *Batson/Wheeler* challenges. Just as I am confident in a "'trial court's ability to distinguish bona [**321] fide reasons from sham [***35] excuses'" for a strike (*People v. Hamilton* (2009) 45 Cal.4th 863, 901 [89 Cal. Rptr. 3d 286, 200 P.3d 898]), I am equally confident that the trial court, after considering the totality of the circumstances in each particular case, will be able to discern whether an improper reason for striking a potential juror was determinative even though other permissible reasons for the strike also motivated the peremptory challenge. Our Supreme Court has "asked trial courts to undertake possibly even more difficult tasks." (*People v. Johnson* (2006) 38 Cal.4th 1096, 1101–1102 [45 Cal. Rptr. 3d 1, 136 P.3d 804] [acknowledging difficulties in ordering limited remand for trial court to determine the second and third steps of *Batson* analysis after the trial court

erroneously concluded nearly eight years earlier that the defendant had failed to make a prima facie showing of racial discrimination]; see *Marks v. Superior Court* (2002) 27 Cal.4th 176 [115 Cal. Rptr. 2d 674, 38 P.3d 512] [remand of capital case to the trial court over seven years after trial to settle the appellate record in various ways].)

"As with all other inquiries concerning mental state, the ultimate determination is an inference from all the pertinent circumstances, whether or not an acknowledgement [that an improper reason was a determinative factor in motivating a strike] occurs." (*Howard, supra*, 986 F.2d at p. 31.) "Simply because fact-finding on an issue of mental state like motivation is difficult is no reason [***36] to alter the normal approach to fact-finding nor to diminish **[*1183]** confidence in the force of a witness's oath or in a trier's ability to ascertain facts." (*Ibid.*) Like the Second Circuit in *Howard*, I "have every confidence that trial judges can be relied upon to determine the true facts of the prosecutor's motive, just as they are relied upon to determine subjective mental states of parties and witnesses in all manner of cases." (*Ibid.*)

Nor do I accept the cynical view that the mixed motive approach is a gateway to extensive abuse. Although amici curiae suggest that mixed motive analysis will allow myriads of prosecutors to exhibit obvious unlawful bias against potential jurors and then cure the violation by offering vague, neutral explanations, I am "unwilling to accept the premise of this argument that prosecutors will readily disregard the obligations of their office and violate the requirements of an oath by swearing false denials of [discriminatory group bias] motivation." (*Howard, supra*, 986 F.2d at p. 31.) Based on the trial court's observations of a trial lawyer's demeanor, questioning, and the overall voir dire process, I believe trial courts are well equipped for those instances, where such dissembling may occur, to [***37] recognize that vague neutral reasons for a particular strike were not in fact the true motivation behind that strike.

That other states have adopted the per se test does not convince me the mixed motive approach is improper in the *Batson* context. (Maj. opn., *ante*, at p. 1174-1175.) Several federal courts that have considered the issue, as the majority concedes (maj. opn., *ante*, at p. 1172), have found no impediment to applying the mixed motive approach in similar cases. (See, e.g., *Howard, supra*, 986 F.2d at p. 27; *Gattis v. Snyder* (3d Cir. 2002) 278 F.3d 222, 233; *Jones v. Plaster* (4th Cir. 1995) 57 F.3d 417, 420-422; *U.S. v. Darden* (8th Cir. 1995) 70 F.3d 1507, 1530-1532; *Wallace v. Morrison* (11th Cir. 1996) 87 F.3d 1271, 1274-1275.)

And, unlike the mixed motive approach, the per se approach permits a court to disregard all of the circumstances present in a particular case by focusing on a single reason for a strike even though more than one reason may have motivated a party to challenge a specific juror. (*Howard, supra*, 986 F.2d at p. 26 ["A person may act for [**322] more than one reason"].) At the final stage of a *Batson/Wheeler* analysis, however, "courts must consider '"*all relevant circumstances*"' in determining whether a strike was improperly motivated, and this requires *a careful 'review of the entire record.'*" (*People v. Gutierrez* (2017) 2 Cal.5th 1150, 1176 [218 Cal. Rptr. 3d 289, 395 P.3d 186] (conc. opn. of Liu, J.), italics added.) *Batson* teaches that "[w]hen circumstances suggest the need, the trial court must undertake a 'factual inquiry' that '*takes into account [***38] all possible explanatory factors*' in the particular case." **[*1184]** (*Batson, supra*, 476 U.S. at p. 95, italics added.) One such relevant circumstance is whether a party would have properly stricken a prospective juror for a valid reason regardless of an invalid reason that partially motivated the strike.

In choosing the mixed motive approach, I am also guided by United States Supreme Court precedent. The United States Supreme Court's decision in *Rice v. Collins* (2006) 546 U.S. 333, 336 [163 L.Ed.2d 824, 830, 126 S. Ct. 969] (*Rice*) convinces me that the per se approach need not apply when evaluating dual motivation cases. In that case, the prosecutor gave several race-neutral reasons for striking a Black juror including the prosecutor's effort to obtain gender balance on the jury. (*Id.* at p. 340.) On a habeas corpus petition, the Ninth Circuit found the trial court should have questioned the prosecutor's credibility in citing other race-neutral reasons for striking the juror once the prosecutor attempted to use gender as a race-neutral reason for striking the juror in question. (*Ibid.*)

After first acknowledging that discrimination in the jury selection process based on gender violates the equal protection clause (*Rice, supra*, 546 U.S. at p. 340, citing *J. E. B. v. Alabama ex rel. T. B.* (1994) 511 U.S. 127 [128 L.Ed.2d 89, 114 S. Ct. 1419]), the Supreme Court nevertheless concluded that the Ninth Circuit had "assigned the gender justification more weight than it [***39] can bear." (*Rice*, at pp. 340-341.) The courted noted that, "[t]he prosecutor provided a number of other permissible and plausible race-neutral reasons, and [the defendant] provide[d] no argument why this portion of the colloquy demonstrates that a reasonable

factfinder must conclude the prosecutor lied about the eye rolling and struck [the juror] based on her race." (*Id.* at p. 341.) Had the per se approach applied, the improper justification for the strike (gender neutrality) would have mandated reversal even if the other reasons given were nondiscriminatory.

While I do not imply that *Rice* silently adopted a mixed motive analysis, since the Supreme Court has made clear that it has not decided the issue (*Snyder v. Louisiana* (2008) 552 U.S. 472, 485 [170 L.Ed.2d 175, 128 S.Ct. 1203] [discussing but not deciding whether mixed-motive analysis applies in *Batson* context]), I merely point out that *Rice* implicitly shows that a per se approach is not necessarily mandated for evaluating dual motivation *Batson/Wheeler* challenges.

The Supreme Court's recent decision in *Tharpe v. Sellers* (2018) 583 U.S. ___ [199 L.Ed.2d 424, 138 S.Ct. 545], also provides guidance here. The Black defendant in *Tharpe* moved to reopen his federal habeas corpus proceeding regarding his claim that the Georgia jury that convicted him of murdering his Black sister-in-law included a White juror who was biased [*1185] against [***40] him and voted for the death penalty because he was Black. (*Id.* at pp. 424–426.) In returning the matter to the court of appeals, and after noting that the district court had denied the certificate of appealability on several grounds (and noting that the court expressed no opinion as to those issues) the [**323] majority found it *debatable* whether the defendant had shown prejudice after he produced an affidavit from the White juror that expressed racist opinions about Blacks. (*Id.* at pp. 424–425, 429.) The court did not hold that the affidavit alone demonstrating racial animus required a per se finding that supported the defendant's petition much less an automatic reversal of his sentence to death.

While it is unclear whether the fact that the White juror later recanted what was set forth in his first affidavit had a bearing on the court's observation regarding the defendant's showing of prejudice, *Tharpe*, at a basic level, shows, at least, that a judgment of conviction need not be automatically, and always, set aside whenever discriminatory animus is shown even though the evidence also shows that such animus may not have been the determinative factor that ultimately lead to that conviction.

I am also not persuaded that our own state Constitution's [***41] due process clause (Cal. Const., art. I, § 7, subd. (a)) dictates adopting the per se test. (Maj. opn., *ante*, at p. 1175.) The dignitary interest discussed in the cases cited by the majority is the interest, through a hearing, of "'informing individuals of the nature, grounds and consequences of the action and in enabling them to present their side of the story before a responsible governmental official.'" (*Saleeby v. State Bar* (1985) 39 Cal.3d 547, 565 [216 Cal. Rptr. 367, 702 P.2d 525]; see *Id.* at pp. 563–564; *Today's Fresh Start, Inc. v. Los Angeles County Office of Education* (2013) 57 Cal.4th 197, 213 [159 Cal. Rptr. 3d 358, 303 P.3d 1140].) To the extent the cases cited apply at all here, under the mixed motive test, the trial judge, an impartial government official, must consider all of a prosecutor's proffered reasons, both permissible and impermissible, and decide the determinative factor that motivated a strike. The burden is on the prosecutor. The defendant's due process liberty interest in both fair and unprejudiced decisionmaking and in being treated with respect and dignity is thus protected.

Furthermore, "[I]n determining applicable due process safeguards, it must be remembered that 'due process is flexible and calls for such procedural protections as the particular situation demands.'" (*People v. Ramirez* (1979) 25 Cal.3d 260, 268 [158 Cal. Rptr. 316, 599 P.2d 622].) The mixed motive approach provides the flexibility and procedural protections needed to safeguard a defendant's constitutional rights. If the prosecutor meets his burden of establishing [***42] that the same decision would have resulted even had the impermissible purpose not been considered, the defendant can "no longer [*1186] fairly ... attribute the injury complained of [here, striking the two openly gay jurors] to [an] improper ... discriminatory purpose. In such circumstances, there would be no justification for judicial interference with the challenged decision." (*Arlington Heights, supra*, 429 U.S. at p. 271, fn. 21.)

Finally, overturning a conviction by an unbiased jury simply because a prosecutor was partially motivated to strike a prospective juror for an impermissible reason when the prosecutor would have legally and justifiably stricken the juror regardless of the improper motivation not only erodes public confidence in the adjudicative process, but also threatens the finality of judgments. If a defendant has received a fair trial, there is an institutional interest in protecting the finality of the court's judgment. Theoretical imperfections ought not be treated more seriously than real deficiencies, for such skewed values would undermine confidence in the

administration of justice. While I am sensitive to the appearance of perceived discriminatory bias described by the majority, I am not persuaded that a per se rule is required to [**324] address [***43] this concern or to protect the fairness—actual or perceived—of judicial proceedings.

The majority justifies its decision under the broad rubric of fairness and equality, but there may not have been, in the final analysis, anything unfair or unequal in defendant's trial. The neutral reasons for striking the openly gay jurors may well have been valid. Reversing the unbiased jury's convictions for a very serious crime under such circumstances—without first determining the motivation and import of what in fact motivated the prosecutor to strike the openly gay jurors—denigrates rather than protects the equality and fairness of our criminal justice system.

While the majority's quest for social perfection in our criminal justice system is, I am sure, well meaning, its decision in this instance is misguided. Importantly, that decision comes with a significant societal cost; the automatic reversal of a conviction for serious crimes of violence that may, in fact, have been fairly tried and entered untainted by constitutional error.

Footnotes

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1 We previously dismissed codefendant Sharpe's separate appeal for failure to file a brief. (*People v. Sharpe* (Feb. 7, 2013, C071639) [order of dismissal].)

2 We granted the applications of Equality California, Lambda Legal, and the National Center for Lesbian Rights' (collectively Equality California), and of the Los Angeles County Public Defender's Office (LA Public Defender) to appear as amici curiae.

3 Although the parties referred only to *Wheeler*, a *Wheeler* objection preserves a *Batson* claim. (See *People v. Lenix* (2008) 44 Cal.4th 602, 610, fn. 5 [80 Cal. Rptr. 3d 98, 187 P.3d 946] (*Lenix*).)

4 The practical holding of *In re Marriage Cases*, that same-sex marriage was legal in California, was subject to a long series of events not necessary to describe here; what is important for our purposes is the state equal protection holding, which was left intact.

5 ***HN7*** Normally a successful *Wheeler* motion requires dismissal of the panel and restarting jury selection, but if the movant consents, a trial court may implement lesser remedies, such as sanctioning the offending attorney or seating the improperly challenged juror(s). (See *People v. Mata* (2013) 57 Cal.4th 178, 182–186 [158 Cal. Rptr. 3d 655, 302 P.3d 1039]; *People v. Singh* (2015) 234 Cal.App.4th 1319, 1327–1328 [184 Cal. Rptr. 3d 790].)

[65] We use the term "prosecutorial error" rather than the at times misleading term "prosecutorial misconduct," because we are not concerned with the prosecutor's culpable mental state, but with the lawfulness of the reasons given for exercising the peremptory challenges. (Cf., e.g., *People v. Centeno* (2014) 60 Cal.4th 659, 666–667 [180 Cal. Rptr. 3d 649, 338 P.3d 938].)

Content Type: Cases

Terms: "People v. Douglas" w/100 Wheeler

Narrow By: Court: California

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People v. Smith, 4 Cal. 5th 1134

Supreme Court of California

May 21, 2018, Filed

S065233

Reporter

4 Cal. 5th 1134 * | 417 P.3d 662 ** | 233 Cal. Rptr. 3d 1 *** | 2018 Cal. LEXIS 3523 **** | 2018 WL 2294404

THE PEOPLE, Plaintiff and Respondent, v. FLOYD DANIEL SMITH, Defendant and Appellant.

Subsequent History: Reported at People v. Smith, 2018 Cal. LEXIS 3998 (Cal., May 21, 2018)
Time for Granting or Denying Rehearing Extended People v. Smith, 2018 Cal. LEXIS 4343 (Cal., June 7, 2018)
Rehearing denied by People v. Smith, 2018 Cal. LEXIS 5277 (Cal., July 18, 2018)

Prior History: [****1] Superior Court of San Bernardino County, No. FWV08607, John W. Kennedy, Judge.
People v. Smith, 2018 Cal. LEXIS 907 (Cal., Jan. 31, 2018)

Core Terms

death penalty, jurors, trial court, murder, instructions, reasons, special circumstance, apartment, killed, questionnaire, challenges, answers, prospective juror, defendant argues, convicted, credibility, questions, shooting, feelings, juvenile, penalty phase, circumstances,

phase, sentence, factors, defense counsel, kidnappers, argues, views, deliberately

Case Summary

Overview

HOLDINGS: [1]-The state supreme court accorded deference to a trial court's credibility finding as to a prosecutor's stated reasons for striking four Black prospective jurors, as the trial court considered the statement of reasons as a whole, and its evaluation of the reasons was sincere and reasoned; [2]-Substantial evidence supported the trial court's finding that the prospective jurors were challenged for reasons other than race; [3]-The trial court was right not to instruct on second-degree murder or voluntary manslaughter as lesser included offenses, as the evidence would not have supported a jury finding that defendant was guilty of one of those crimes but not first-degree murder; [4]-Defendant's motion to represent himself during penalty phase closing argument was properly denied, given the quality of his counsel's representation and the disruption granting the motion would cause.

Outcome

Judgment affirmed.

▼ LexisNexis® Headnotes

Constitutional Law > Equal Protection > National Origin & Race

Criminal Law & Procedure > ... > Challenges to Jury Venire > Equal Protection Challenges > Burdens of Proof

Constitutional Law > ... > Fundamental Rights > Criminal Process > Right to Jury Trial

Criminal Law & Procedure > ... > Challenges to Jury Venire > Equal Protection Challenges > Equal Protection Rule

Criminal Law & Procedure > Juries & Jurors > Peremptory Challenges > Proving Discriminatory Use

HN1 Equal Protection, National Origin & Race
A party may exercise a peremptory challenge for any permissible reason or no reason at all but exercising peremptory challenges solely on the basis of race offends the Fourteenth Amendment's guaranty of the equal protection of the laws. Such conduct also violates the right to trial by a jury drawn from a representative cross-section of the community under Cal. Const., art. I, § 16. A three-step procedure applies at trial when a defendant alleges discriminatory use of peremptory challenges. First, the defendant must make a prima facie showing that the prosecution exercised a challenge based on impermissible criteria. Second, if the trial court finds a prima facie case, then the prosecution must offer nondiscriminatory reasons for the challenge. Third, the trial court must determine whether the prosecution's offered justification is credible and whether, in light of all relevant circumstances, the defendant has shown purposeful race discrimination. The ultimate burden of persuasion regarding discriminatory motivation rests with, and never shifts from, the defendant. More like this Headnote

Shepardize - Narrow by this Headnote

Criminal Law & Procedure > ... > Challenges to Jury Venire > Equal Protection Challenges > Appellate Review

Criminal Law & Procedure > Juries & Jurors > Peremptory Challenges > Proving Discriminatory Use

Criminal Law & Procedure > ... > Challenges to Jury Venire > Equal Protection Challenges > Tests for Equal Protection Violations

Criminal Law & Procedure > ... > Challenges to Jury Venire > Equal Protection Challenges > Race-Neutral Strikes

Criminal Law & Procedure > Juries & Jurors > Peremptory Challenges > Race-Neutral Strikes

HN2 Equal Protection Challenges, Appellate Review
When a trial court has found a defendant satisfied the first of the Batson steps by making a prima facie showing of group bias and has evaluated the prosecutor's reasons for the challenges, the adequacy of the prima facie showing becomes moot, and a reviewing court skips to the third stage to determine whether the trial court properly credited the prosecutor's reasons for challenging the prospective jurors in question. While still relevant, the statistical showing that motivated the finding of a prima facie case is not dispositive at this third stage of Batson. Rather, the critical question is the persuasiveness of the prosecutor's justification for the peremptory strike. Usually, the issue comes down to whether the trial court finds the prosecutor's race-neutral explanations to be credible. Credibility can be measured by, among other factors, the prosecutor's demeanor; how reasonable, or how improbable, the explanations are; and whether the proffered rationale has some basis in accepted trial strategy. Evaluation of the prosecutor's state of mind based on demeanor and credibility lies peculiarly within a trial judge's province. Thus, in reviewing a trial court's reasoned determination that a prosecutor's reasons for striking a juror are sincere, an appellate court typically defers to the trial court and considers only whether substantial evidence supports its conclusions. More like this Headnote

Shepardize - Narrow by this Headnote

Criminal Law & Procedure > ... > Challenges to Jury Venire
> Equal Protection Challenges > Appellate Review

Criminal Law & Procedure > ... > Challenges to Jury Venire
> Equal Protection Challenges > Tests for Equal Protection Violations

HN3 **Equal Protection Challenges, Appellate Review**
One form of circumstantial evidence that is relevant, but not necessarily dispositive, on the issue of intentional discrimination is a comparison of the treatment of an excused juror with other similarly situated jurors. Evidence of comparative juror analysis must be considered even for the first time on appeal if relied upon by the defendant if the record is adequate to permit the urged comparisons. But when a defendant waits until appeal to argue comparative juror analysis, appellate review is necessarily circumscribed, and an appellate court need not consider responses by stricken panelists or seated jurors other than those identified by the defendant. The appellate court reviews the trial court's ruling on the question of purposeful racial discrimination under a deferential substantial evidence standard, so long as the trial court has made a sincere and reasoned attempt to evaluate each nondiscriminatory justification offered. More like this Headnote

Shepardize - Narrow by this Headnote

Criminal Law & Procedure > ... > Challenges to Jury Venire
> Equal Protection Challenges > Race-Neutral Strikes

Criminal Law & Procedure > ... > Challenges to Jury Venire
> Equal Protection Challenges > Tests for Equal Protection Violations

HN4 **Equal Protection Challenges, Race-Neutral Strikes**
An attorney's failure to meaningfully examine a prospective juror about a subject about which the attorney claims to be concerned can constitute evidence of pretext. More like this Headnote

Shepardize - Narrow by this Headnote

Criminal Law & Procedure > ... > Challenges to Jury Venire
> Equal Protection Challenges > Race-Neutral Strikes

Criminal Law & Procedure > Juries & Jurors > Peremptory Challenges
> Race-Neutral Strikes

HN5 **Equal Protection Challenges, Race-Neutral Strikes**
Casual dress is a facially race-neutral reason for exercising a strike, and courts have noted that prosecutors may regard a juror's dress as some indication of how seriously he or she takes the responsibility of serving as a juror. More like this Headnote

Shepardize - Narrow by this Headnote

Criminal Law & Procedure > Juries & Jurors > Peremptory Challenges > Proving Discriminatory Use

Criminal Law & Procedure > ... > Challenges to Jury Venire > Equal Protection Challenges > Race-Neutral Strikes

Criminal Law & Procedure > ... > Challenges to Jury Venire > Equal Protection Challenges > Tests for Equal Protection Violations

Criminal Law & Procedure > Juries & Jurors > Peremptory Challenges > Race-Neutral Strikes

HN6 **Peremptory Challenges, Proving Discriminatory Use**
A prosecutor's positing of multiple reasons, some of which, upon examination, prove implausible or unsupported by the facts, can in some circumstances fatally impair the prosecutor's credibility. In assessing credibility at the third stage of a Batson/Wheeler decision, trial courts should attempt to evaluate the attorney's statement of reasons as a whole rather than focus exclusively on one or two of the reasons offered. More like this Headnote

Shepardize - Narrow by this Headnote

Criminal Law & Procedure > ... > Challenges to Jury Venire > Equal Protection Challenges > Procedural Matters

Criminal Law & Procedure > Juries & Jurors > Peremptory Challenges > Proving Discriminatory Use

HN7 **Equal Protection Challenges, Procedural Matters**
A sincere and reasoned evaluation of the prosecutor's stated reasons for exercising a peremptory challenge does not, in every circumstance, require the court to make detailed comments on every such reason. But the court should determine whether the challenge was based on group bias by considering the reasons as a whole, without focusing on a single stated reason to the exclusion of others. More like this Headnote

Shepardize - Narrow by this Headnote

Criminal Law & Procedure > ... > Jury Instructions > Particular Instructions > Lesser Included Offenses

HN8 **Particular Instructions, Lesser Included Offenses**
As a general rule, a trial court errs if it fails to instruct, sua sponte, on all theories of a lesser included offense which find substantial support in the evidence. But a court must instruct on such theories only when the record contains substantial evidence from which a

rational jury could conclude that the defendant committed the lesser offense, and that the defendant is not guilty of the greater offense. More like this Headnote

Shepardize - Narrow by this Headnote

Criminal Law & Procedure > ... > Standards of Review > Harmless & Invited Error > Jury Instructions

Criminal Law & Procedure > ... > Jury Instructions > Particular Instructions > Lesser Included Offenses

HN9 **Harmless & Invited Error, Jury Instructions**
A defendant may not invoke a trial court's failure to instruct on a lesser included offense as a basis on which to reverse a conviction when, for tactical reasons, the defendant persuades a trial court not to instruct on a lesser included offense supported by the evidence. More like this Headnote

Shepardize - Narrow by this Headnote

Criminal Law & Procedure > ... > Murder > Definitions > Deliberation & Premeditation

Criminal Law & Procedure > ... > Murder > First-Degree Murder > Elements

HN10 **Definitions, Deliberation & Premeditation**
In the context of first-degree murder, "premeditated" means considered beforehand, and "deliberate" means formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action. The process of premeditation and deliberation does not require any extended period of time. The true test is not the duration of time as much as it is the extent of the reflection. More like this Headnote

Shepardize - Narrow by this Headnote

Criminal Law & Procedure > ... > Murder > Definitions > Malice

HN11 **Definitions, Malice**
Malice is implied when the killing is proximately caused by an act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his or her conduct endangers the life of another and who acts with conscious disregard for life. More like this Headnote

Shepardize - Narrow by this Headnote

Criminal Law & Procedure > ... > Homicide, Manslaughter & Murder > Murder > Felony Murder

CA(24) **(24) Criminal Law § 87—Rights of Accused—Self-representation—Untimely Request.**

In exercising its discretion over an untimely request for self-representation, the court must consider whether any disruption that would be caused by granting the request is likely to be aggravated, mitigated, or justified by the surrounding circumstances, including the quality of counsel's representation to that point, the reasons the defendant gives for the request, and the defendant's proclivity for substituting counsel.

Counsel: Michael J. Hersek and Mary K. McComb, State Public Defenders, under appointments by the Supreme Court, Barry P. Helft, Chief Deputy State Public Defender, Joseph E. Chabot, Jamilla Moore and Elias Batchelder, Deputy State Public Defenders, for Defendant and Appellant.

Edmund G. Brown, Jr., and Xavier Becerra, Attorneys General, Dane R. Gillette and Gerald A. Engler, Chief Assistant Attorneys General, Gary W. Schons and Julie L. Garland, Assistant Attorneys General, Annie Featherman Fraser, Gil Gonzalez, Holly D. Wilkens, Kimberley A. Donohue and Allison V. Acosta, Deputy Attorneys General, for Plaintiff and Respondent.

Judges: Opinion by Kruger, J., with Cantil-Sakauye, C. J., Chin, Corrigan, Liu, Cuéllar, and Benke, JJ., *, concurring.

Opinion by: Kruger

Opinion

[***10] [**670] **KRUGER, J.**—A jury convicted defendant Floyd Daniel Smith of one count of first degree murder (Pen. Code, § 187), and found true an alleged special circumstance that he committed [***11] the murder while lying in wait (*id.*, § 190.2, subd. (a)(15)). The jury also convicted defendant of two counts of attempted voluntary manslaughter (*id.*, §§ 664, 192, subd. (a)), two counts of first degree burglary (*id.*, § 459), and one count each of assault with a firearm [****2] (*id.*, § 245, subd. (a)(2)), false imprisonment (*id.*, § 236), and possession of a firearm by a convicted felon (*id.*, former § 12021, subd. (a)(1)). As to all but the last charge, the jury found firearm use enhancement allegations to be true (*id.*, § 12022.5). At the special circumstance phase, the jury found true a second special circumstance—that defendant had a prior murder conviction (*id.*, § 190.2, subd. (a)(2)).

[*1142]

At the penalty phase, the jury returned a verdict of death. This appeal is automatic. (Pen. Code, § 1239, subd. (b).) We affirm the judgment in its entirety.

CA(19) (19) Criminal Law § 523—Penalty Trial of Capital Prosecution—Instructions—Sua Sponte—General Principles of Law.

At the penalty phase, the trial court must instruct sua sponte on the general principles of law relevant to the evidence. If the court instructs the jury at penalty phase to disregard previously given instructions, it must later provide the jury with those instructions applicable to the penalty phase.

CA(20) (20) Criminal Law § 523—Penalty Trial of Capital Prosecution—Instructions—General Principles of Law—Prejudice.

The trial court's failure to reinstruct on general principles at the penalty phase is not necessarily prejudicial, even if the jury has been told to disregard its earlier instructions.

CA(21) (21) Criminal Law § 245.6—Trial—Instructions—Eyewitness Identification.

The trial court need not give CALJIC No. 2.92 unless requested to do so by the defense.

CA(22) (22) Criminal Law § 244—Trial—Instructions—Witness Credibility.

Trial courts must instruct on factors affecting witness credibility in every case.

CA(23) (23) Criminal Law § 87—Rights of Accused—Self-representation—Requests—After Commencement of Trial—Factors.

In order to invoke the constitutionally mandated unconditional right of self-representation, a defendant in a criminal trial should make an unequivocal assertion of that right within a reasonable time prior to the commencement of trial. Once a defendant has chosen to proceed to trial represented by counsel, demands by such defendant that the defendant be permitted to discharge his or her attorney and assume the defense himself or herself shall be addressed to the sound discretion of the court. Among other factors to be considered by the court in assessing such requests made after the commencement of trial are the quality of counsel's representation of the defendant, the defendant's prior proclivity to substitute counsel, the reasons for the request, the length and stage of the proceedings, and the [*1141] disruption or delay that might reasonably be expected to follow the granting of such a motion.

I. FACTS

A. *Guilt Phase Evidence*

Defendant was convicted of the murder of Joshua Rexford. The prosecution argued that defendant committed the murder in retaliation for the murder of defendant's close friend, Manuel Farias.

1. *Prosecution's case*

On November 23, 1994, Linda Farias attended the funeral of her brother Manuel. After the funeral, she overheard defendant conversing with three other men. Although Linda could not remember who said what, defendant did most of the talking. In the conversation, the men said that "Brian" killed Farias, that "Josh" was Brian's cousin, and that "they were going to get through him to find Brian." Within a day or two of the funeral, defendant had a conversation with Troy Holloway. Defendant [****3] questioned Holloway about Joshua Rexford, who, like Holloway, played on the football team at A.B. Miller High School in Fontana. Defendant asked how Rexford was, what he was like, where he lived, and where he hung out, explaining that he wanted to talk to Rexford.

On the morning of November 27, four days after the funeral, Michael Honess saw defendant and a Hispanic man sitting on a wall in the back of Honess's apartment complex in Rancho Cucamonga. Later that morning, Honess again saw defendant, now alone, sitting on the stairs adjacent to Honess's third floor apartment. Defendant asked if he could use [**671] the telephone in Honess's apartment to call his mother. Honess allowed him to do so, but instead of calling his mother, defendant called a directory service and requested the number of the Church of God in Christ. He called the number he received from the directory service but did not appear to speak to anyone. He then left Honess's apartment.

Ten minutes later, defendant knocked on Honess's door. Honess opened the door and walked back into his apartment, assuming that defendant wanted to make another call. As Honess walked away, defendant, holding a dark gray or black automatic pistol, [****4] grabbed him and pushed him onto his hands and knees. Two other men then entered the apartment: the Hispanic man Honess had previously seen with defendant and a White man whom defendant called "Jay," who was carrying a sawed-off shotgun. Defendant told Jay to look **[*1143]** through the blinds out the window and to search for telephones in the apartment. He wiped off Honess's telephone with a paper towel and cut the telephone wire. The Hispanic man took some of Honess's money, but defendant told him to put it back.

After 15 to 20 minutes, the three men left Honess's apartment; defendant told Jay to wait in the car. Before leaving, defendant told Honess that "'someone has done something bad'" and that when Honess [***12] spoke to the police he should "tell the truth."

Defendant then went downstairs to the apartment of Maikolo ("Walter") Pupua, who was seated in the living room with Ndibu ("Freddie") Badibanga and Joshua Rexford. He knocked on the door and Badibanga told him to enter. He opened the door and immediately opened fire with what appeared to be a nine-millimeter pistol. Pupua dove behind a speaker in the corner of the room, while Badibanga crawled to the bedroom and jumped out a window. Badibanga [****5] saw a second man accompanying defendant; Pupua saw only defendant, but inferred that there was a second gunman from the large number of shots ("at least about 15 or 16") that were fired.

Rexford, who was struck five times, died as a result of gunshot wounds in his chest and abdomen. "[L]arge caliber bullets ... approximately nine millimeters in diameter" were recovered from his body. Seven cartridge cases were recovered from the scene of the shooting, six of which had been fired and belonged to nine-millimeter cartridges. One cartridge, a ".25 caliber auto," was unfired.

That evening, defendant and two men came to the home of Troy Holloway. Defendant gave Holloway a nine-millimeter pistol, which was unchambered but loaded with four bullets. He did not charge Holloway for the gun, but told him that "a real man never shows anybody what he got." About three or four days later defendant called Patrick Wiley and asked him to retrieve the gun from Holloway. Wiley did so, returning the gun to defendant.

2. *Defense case*

The defense conceded that defendant was present at the scene of the murder, but claimed he was not there of his own free will. Testifying on his own behalf, defendant claimed that the [****6] night before the murder, three men kidnapped him and held him in his apartment overnight. The next day, they took him to an apartment complex, where they "loaf[ed] around ... for a long time." Defendant spoke to Honess and used his telephone to call his church. As Honess was starting to leave the apartment, defendant saw two of his kidnappers, a Hispanic male and a White male, approaching Honess's [#1144] doorway. Fearing that the White male was going to start shooting because defendant was not sitting on the stairs, as his kidnappers had instructed him, defendant grabbed Honess's arm and pulled him to safety.

According to defendant, he and his kidnappers then waited in Honess's apartment. Defendant eventually left with the Hispanic kidnapper, while the White kidnapper went down a different flight of stairs. The Hispanic kidnapper took defendant to Pupua's apartment. When they entered the apartment, the Hispanic kidnapper began shooting. Defendant claimed he tried to run away but got stuck between the door and a wall. Eventually he exited the apartment and ran to the apartment's parking lot, with the Hispanic [**672] kidnapper behind him. Defendant and the three kidnappers then got into defendant's car and [****7] drove some distance before they parked. A white truck approached. The kidnappers exited defendant's car and told defendant he could leave. They departed in the truck.

Defendant denied giving a gun to Troy Holloway. He also denied making the statements attributed to him by Linda Farias at the funeral of her brother Manuel.

3. *Jury verdict*

The jury convicted defendant of murdering Rexford and found a lying-in-wait special circumstance to be true. With respect to the attempted murder charge, the jury [***13] convicted defendant of the lesser included offense of attempted voluntary manslaughter. The jury also convicted defendant of burglarizing Honess's apartment and falsely imprisoning him, of burglarizing Pupua's apartment, and of possession of a firearm by a convicted felon, and it found firearm use enhancements to be true as to all but the last offense. The jury acquitted defendant of a charge that he dissuaded a witness.

B. *Special Circumstance Phase Evidence*

The prosecution presented a fingerprint card, a Riverside County Superior Court minute order, and California Youth Authority records showing that on July 13, 1984, defendant pleaded guilty to first degree murder, for which he was incarcerated [****8] in the Youth Authority. Defendant was 16 years old when he committed the murder.

C. *Penalty Phase Evidence*

The prosecution presented evidence that on January 27, 1984, when defendant was 16 years old, he accosted Felton M. at gunpoint, forcing him to take defendant to his house and to engage in sexual acts. Defendant then **[*1145]** took Felton to a field, forced him to remove his clothes, and left with his wallet, warning that defendant would kill him if he said anything.

The next day, defendant shot and killed Virgil Fowler. In a statement to the police after the shooting, defendant said he was with Orlando Hunt and Calvin Wade when Hunt told him to rob Fowler, who was walking towards them. Defendant drew his gun, told Fowler to lie on the ground, and told Hunt to look through Fowler's pockets. When Fowler got up and began to run, defendant fatally shot him.

Joshua Rexford's mother testified that after the jury left the courtroom at the end of the guilt phase, defendant simulated a pistol with his fingers and pointed the "finger-pistol" in her direction. She told him, "'you're so disrespectful!'"; defendant replied that she was a "'fucking bitch.'"

The defense presented evidence that defendant's [****9] mother was a sex worker who used drugs and alcohol and smoked cigarettes while pregnant with defendant. During that time she was prescribed antipsychotic and antidepressant medication and suffered a severe dystonic reaction during the sixth or seventh month of pregnancy, causing her to fall and suffer physical trauma to her uterus. Forensic Psychiatrist David Glaser testified that these chemical and physical traumas could have adversely affected the development of defendant's brain.

According to defense witnesses, defendant had no relationship with his father and his mother was neglectful and physically abusive. Defendant was severely abused, physically and sexually, by his older brother George, who forced defendant to orally copulate him on repeated occasions over a period of years and who burned defendant's genitals with a hot iron when he was a young child.

When defendant was 13 years old, he was made a ward of the state. He thereafter had only brief negative interactions with his mother and was placed in six or seven foster homes between the ages of 13 and 17. Dr. Glaser testified that defendant's history of neglect, abandonment, and abuse changed him from a passive, chronic victim [****10] into "a chronic, active perpetrator." Dr. Glaser opined that the abuse and abandonment caused defendant to suffer from displaced rage and extreme narcissism.

The defense presented evidence that defendant worked on behalf of New Life Ministries [**673] for "a few months" to help establish [***14] a community-based, youth-oriented church by engaging in recruitment and acting as a driver. Defendant's four-year-old son testified that he enjoyed visits with his father.

[*1146]

II. Discussion

A. *Pretrial Issues*

1. *Trial court's denial of defendant's* Batson/Wheeler *motions*

Defendant, who is Black, argues that he was deprived of his constitutional rights to equal protection and a representative jury because the prosecutor exercised peremptory challenges to exclude Black prospective jurors. (See *Batson v. Kentucky* (1986) 476 U.S. 79 [90 L. Ed. 2d 69, 106 S. Ct. 1712] (*Batson*); *People v. Wheeler* (1978) 22 Cal.3d 258 [148 Cal. Rptr. 890, 583 P.2d 748] (*Wheeler*).) During jury selection, after the prosecutor used three of his first five peremptory challenges to excuse Prospective Jurors Sandra D., Reginia S., [1] and Huey D., all of whom are Black, defendant made a *Batson/Wheeler* motion. The trial court found that the defense had made a prima facie showing that the challenges were based on group bias, but it denied the motion after the prosecutor gave his reasons for [****11] the challenges. The prosecutor thereafter struck five non-Black jurors and on three occasions accepted the panel. But when the defense passed the challenge for the first time, the prosecutor asked to approach

the bench and announced that he intended to strike the sole remaining Black juror, Elizabeth K., whereupon the defense made a second *Batson/Wheeler* motion. The court again found that the defense had made a prima facie showing, and again denied the motion after the prosecutor explained the challenge.

Apart from the four jurors challenged by the prosecution, there were at least three and possibly five Black prospective jurors remaining in the venire when the parties began to exercise their peremptory challenges. One of these was later excused because of a hearing problem, and the others were never called. As a result, the panel that tried defendant's case included no Black jurors. Defendant now contends that the trial court erred when it denied his *Batson/Wheeler* motions.

HN1 ***CA(1)*** **(1)** "[A] party may exercise a peremptory challenge for any permissible reason or no reason at all." (*People v. Huggins* (2006) 38 Cal.4th 175, 227 [41 Cal. Rptr. 3d 593, 131 P.3d 995]) but "exercising peremptory challenges solely on the basis of race offends the Fourteenth Amendment's guaranty of the equal protection of [****12] the laws" (*Id.* at p. 226; see generally *Batson, supra*, 476 U.S. 79). Such conduct also "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." (*Wheeler, supra*, 22 Cal.3d at pp. 276–277.)

[*1147]

"A three-step procedure applies at trial when a defendant alleges discriminatory use of peremptory challenges. First, the defendant must make a prima facie showing that the prosecution exercised a challenge based on impermissible criteria. Second, if the trial court finds a prima facie case, then the prosecution must offer nondiscriminatory reasons for the challenge. Third, the trial court must determine whether the prosecution's offered justification is credible and whether, in light of all relevant circumstances, the [***15] defendant has shown purposeful race discrimination. [Citation.] 'The ultimate burden of persuasion regarding [discriminatory] motivation rests with, and never shifts from, the [defendant].'" (*People v. Manibusan* (2013) 58 Cal.4th 40, 75 [165 Cal. Rptr. 3d 1, 314 P.3d 1].)

HN2 ***CA(2)*** **(2)** Here, the trial court found that defendant had satisfied the first of these steps by making a prima facie showing of group bias, and it evaluated the prosecutor's reasons for the challenges. When this occurs, the adequacy of the prima facie showing becomes moot (*Hernandez v. New York* (1991) 500 U.S. 352, 359 [114 L. Ed. 2d 395, 111 S. Ct. 1859]; *People v. Elliott* (2012) 53 Cal.4th 535, 560–561 [137 [**674] Cal. Rptr. 3d 59, 269 P.3d 494]), and the reviewing court skips to the third stage to determine [****13] whether the trial court properly credited the prosecutor's reasons for challenging the prospective jurors in question (*Elliott, supra*, at p. 561; *People v. Riccardi* (2012) 54 Cal.4th 758, 786–787 [144 Cal. Rptr. 3d 84, 281 P.3d 1]).

While still relevant, the statistical showing that motivated the finding of a prima facie case is not dispositive at this third stage. Rather, "[a]t the third stage of *Batson*, the 'critical question ... is the persuasiveness of the prosecutor's justification for his peremptory strike.' (*Miller-El v. Cockrell* (2003) 537 U.S. 322, 338–339 [154 L. Ed. 2d 931, 123 S. Ct. 1029].) Usually, 'the issue comes down to whether the trial court finds the prosecutor's race-neutral explanations to be credible. Credibility can be measured by, among other factors, 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.' (*Id.* at p. 339.) '"As with the state of mind of a juror, evaluation of the prosecutor's state of mind based on demeanor and credibility lies 'peculiarly within a trial judge's province.'"' (*Ibid.*) Thus, in reviewing a trial court's reasoned determination that a prosecutor's reasons for striking a juror are sincere, we typically defer to the trial court and consider only 'whether substantial evidence supports the trial court's conclusions.' [****14] (*People v. Lenix* (2008) 44 Cal.4th 602, 627 [80 Cal. Rptr. 3d 98, 187 P.3d 946] (*Lenix*).)" (*People v. Banks* (2014) 59 Cal.4th 1113, 1146 [176 Cal. Rptr. 3d 185, 331 P.3d 1206].)

HN3 ***CA(3)*** **(3)** "[O]ne form of circumstantial evidence that is relevant, but not necessarily dispositive, on the issue of intentional discrimination" is a **[*1148]** comparison of the treatment of an excused juror with other similarly situated jurors. (*People v. Lenix, supra*, 44 Cal.4th at p. 622.) "[E]vidence of comparative juror analysis must be considered ... even for the first time on appeal if relied upon by the defendant [if] the record is adequate to permit the urged comparisons." (*Ibid.*) But when, as here, a defendant "wait[s] until appeal to argue comparative juror analysis," our "review is necessarily circumscribed," and we "need not

consider responses by stricken panelists or seated jurors other than those identified by the defendant." (*Id.* at p. 624.) We review the trial court's ruling on the question of purposeful racial discrimination under a deferential substantial evidence standard, so long as "'the trial court has made a sincere and reasoned attempt'" to evaluate each nondiscriminatory justification offered. (*People v. McDermott* (2002) 28 Cal.4th 946, 971 [123 Cal. Rptr. 2d 654, 51 P.3d 874]; see *People v. Hamilton* (2009) 45 Cal.4th 863, 900–901 [89 Cal. Rptr. 3d 286, 200 P.3d 898] (*Hamilton*); *People v. Avila* (2006) 38 Cal.4th 491, 541 [43 Cal. Rptr. 3d 1, 133 P.3d 1076].)

[***16] a. *Prospective Juror Sandra D.*

When initially questioned about his reasons for challenging Sandra D., the prosecutor first referred to her opinions about the then-recent not guilty verdict in the high-profile murder prosecution [****15] of O.J. Simpson, as well as her views on the death penalty: "[M]y main concern was her feelings about the O[.]J[.] Simpson case, which I felt was undefined. I thought [she] was sympathetic to Mr. Simpson and I felt that her opinions concerning the death penalty were extremely scrambled in terms of either pro or anti-death. So my main concern on her was her weak opinions concerning the death penalty or undefined opinions concerning the death penalty." After the court gave him a chance to look at his notes, the prosecutor added: "[S]he's the person who said that she would have a very hard time judging the person in the death penalty case. Does not want the responsibility of making that decision. She's divorced. She's not married. She lives in the Bloomington area, and she's only lived there for five months. She's also lived in another street in Bloomington, Riverside, and Rialto, [as a result of] which I ... have some difficulty concerning her stability in the community. [¶] And her educational concerns ... consisted of sometime at RCC, less than a year, evidently, and perhaps as much as a year ... at Valley College."

[**675] The trial court then recessed until after lunch to give the prosecutor [****16] a chance to refresh his recollection of the questionnaires, each 42 pages long, filled out by each of the challenged prospective jurors. When the court reconvened (outside the jury's presence), the prosecutor reiterated his concerns about Sandra D.'s ability to impose the death penalty. He also noted that he "did not see the type of community leadership that [he] would hope for in a leader of group dynamics of the thing."

[*1149]

The trial court found the prosecutor's explanation credible, stating that "there was no problem with the non-racial basis for exercising the peremptory." It contrasted Sandra D. with Reginia S. and Hugy D., the other two Black jurors who, at the time of its ruling, had been challenged by the prosecutor, explaining that there was a "much closer question" as to the latter two.

Sandra D.'s answers on her juror questionnaire support the prosecutor's concern that she would be reluctant to vote for death. When asked whether her feelings on the death penalty were such that she would "never be able to vote for the penalty of death of a defendant," she did not check either "yes" or "no," but instead wrote: "I wouldn't want to vote for anyone to die. But if they killed someone [****17] then I think they deserve to die." When asked whether her feelings were such that she would "always be able to vote for the penalty of death," she again did not check "yes" or "no," but wrote: "I think it would depend on how it happen [*sic*]. I wouldn't want to have to vote for the penalty of death. I just don't want to be the reason why someone died." In response to a question asking whether she could see herself, "in the appropriate case, rejecting life imprisonment without the possibility of parole and choosing the death penalty," she checked "no," and wrote: "I don't want to have to make that decision on anyone." And when asked whether she could consider imposing the death penalty "as a realistic and practical possibility," she checked "no," and explained: "I would feel like I killed them. It would bother me. But if he did it he deserves the Death Penalty." Sandra D. also checked a box indicating that she was not upset by the O.J. Simpson verdict, explaining: "I really don't know if he did it or not."

[***17] Sandra D. reiterated her reluctance to impose the death penalty during the *Hovey* voir dire. 2 She testified: "I just feel like I don't want to be the one to say someone gets the

death [****18] penalty. It's like I'm killing someone." When asked whether, if she determined after hearing the evidence and the law that death was the appropriate penalty, she would be able to come back with that decision, she replied: "Probably." She explained: "If ... I really felt that [the murder] was done, I think I would vote—I mean if it came down to it, I wouldn't want to—but I would do it." Sandra's answers might arguably have justified a challenge for cause, though the prosecutor did not make such a challenge.

Defendant points out that Jurors Nos. 46, 119, and 370, all of whom were members of the jury panel, expressed some hesitance about the death penalty, but the prosecutor did not challenge them. He also notes that Alternate Jurors Nos. 389 and 91 indicated some hesitance to vote in favor of death. But each of these jurors also indicated in other questionnaire responses that they would **[*1150]** be able to vote in favor of the death penalty if circumstances warranted. None answered, as did Sandra D., that they simply did not "want to have to make that decision on anyone."

As defendant notes, some of Sandra D.'s questionnaire answers were favorable to the prosecution. For example, she repeatedly [****19] said she supported the death penalty, explaining "I feel if you kill someone you don't have the right to live." She agreed with the saying "'[a]n eye for an eye,'" and she had two sisters who were correctional officers. Defendant also disputes the validity of the concerns expressed by the prosecutor about Sandra D.'s stability in the community, pointing out that she had been employed at Kaiser Permanente for more than seven years; she had lived in the same home for five years, then lived in two others for a total of five years; she was a Girl Scout leader; and she planned to open a home daycare center. And [**676] while the prosecutor mentioned in passing that Sandra was divorced, defendant points out that he did not strike Juror No. 392, who also was divorced. Nor is it clear exactly how divorce would affect the desirability of a prospective juror from the prosecution point of view in this case.

Nevertheless, the record amply supports what the prosecutor described as his primary concern—that despite Sandra D.'s belief in the death penalty in the abstract, she would have great difficulty in actually voting to impose it. She expressed this concern repeatedly, both in her written answers to the [****20] jury questionnaire and in her testimony during the *Hovey* voir dire, and she was never able to say with certainty that she would be able to vote for death, initially stating that she would be unable to do so and later stating only that she could "probably" do so. Substantial evidence supports the trial court's ruling that the prosecutor did not challenge Sandra D. because of her race.

b. Prospective Juror Reginia S.

When asked to state his reasons for challenging Reginia S., the prosecutor initially mentioned that her brother was a juvenile delinquent, that she came to court casually dressed (in a T-shirt, sandals, and sweatpants), that she had no children or family in the area, that she had limited college education, and that she did not appear to be "a stable person in the community, based upon her housing history, and job history." After reviewing his notes, he added that she had indicated a belief that race plays a part in the criminal justice [***18] system, and that she had four different addresses as an adult. He acknowledged making a mistake with respect to her college education—he had noticed that she had attended community college, but he had not realized that she thereafter graduated [****21] from Pepperdine University.

[*1151]

After reviewing Reginia S.'s jury questionnaire, the prosecutor began by reiterating his concern about her manner of dress, noting that it was "completely different from the attire of all the other jurors that we presently have in the box." He then pointed to her belief that the system is not always fair and that race sometimes plays a role, expressed concern about her views on the O.J. Simpson case, and noted that while she believed in the death penalty, she said the prosecution "must absolutely prove guilt" and that she would only impose the death penalty "if it is proven 'without a doubt that the crime was committed.'" Finally, he again noted that her brother had been in "the juvenile system."

Defense counsel questioned the prosecutor's reliance on the fact that Reginia S.'s brother was a juvenile delinquent, pointing out that the prosecutor did not know what crimes the brother had committed. With respect to Reginia S.'s attire, counsel argued: "I don't know how it would relate ... to her ability to understanding issues, to sit ... as a fair and impartial juror, or to consider and follow the Court's instructions on evidence." Counsel challenged the prosecutor's [****22] assertion that Reginia was unstable, pointing out that she had been married for 11 years and had good jobs. And counsel pointed out that Reginia wrote on her questionnaire that she was for the death penalty, would vote to keep it, and could vote for it in an appropriate case.

The trial court discussed the prosecutor's challenges to Reginia S. and to Huey D. together, ruling that they were not based on group bias. The court said it would "accept the truth of [the prosecutor's] statement that he was concerned about [the] statements [of Reginia S. and Huey D.] about their sense of the degree of proof required that exceeds proof beyond a reasonable doubt" and found "that is a truthful comment and that that is his ... motivation." With regard to other reasons mentioned by the prosecutor for challenging Reginia S., the court noted that it "would not have shared" all the prosecutor's concerns about Reginia S. and Huey D., but acknowledged, "I'm not the lawyer trying this lawsuit." The court later added: "That's not to say that I would have exercised the peremptories the same as you, but it's your case not mine. And I think the ultimate question whether there's purposeful discrimination, [****23] I don't at this point find that there has been. I don't believe that your motivation has been a racial motivation."

[**677] The trial court's ruling emphasized the prosecutor's stated concern that Reginia S. would not vote to impose a death sentence unless defendant's guilt was proved to a standard greater than proof beyond a reasonable doubt. The concern is both plausible and supported by the record. When asked to describe her general feelings about the death penalty, Reginia wrote: "I'm for it, but we must absolutely prove guilt." And when asked whether she had "negative or positive feelings about the death penalty," she wrote: "Neither. I **[*1152]** just think if we impose death we need to be sure they did the crime." Although these answers would not justify a challenge for cause, the prosecutor could reasonably conclude that Reginia S. would be sympathetic to an argument that lingering doubt about defendant's guilt ought to guide the jury's determination of the appropriate penalty—an argument that [***19] would be entirely legitimate, but unfavorable to the prosecution.

CA(4) **(4)** Defendant argues the prosecutor's failure to voir dire Reginia S. on her view of the standard of proof she would require before returning [****24] a death verdict indicates the prosecutor's stated reason was pretextual. Defendant is correct that ***HN4*** an attorney's failure to meaningfully examine a prospective juror about a subject about which the attorney claims to be concerned can constitute evidence of pretext. (*Miller-El v. Dretke* (2005) 545 U.S. 231, 246 [162 L. Ed. 2d 196, 125 S. Ct. 2317].) But here, unlike in *Miller-El*, for example, the prosecutor's stated concerns arose from a pair of questionnaire responses that spoke for themselves; no additional clarification was needed to ascertain Reginia S.'s meaning. (Cf. *id.* at p. 244 [in light of prospective juror's "outspoken support for the death penalty," prosecutor "would have cleared up" a misunderstanding concerning the juror's attitude toward rehabilitation as a factor in penalty decision had the prosecutor truly been concerned with the matter]; *id.* at p. 246 [noting that, after the prospective juror indicated that he did not know much about his brother's prior conviction, "the prosecution asked nothing further about the influence his brother's history might have had on [the juror], as it probably would have done if the family history had actually mattered"].) Whatever inference may arise from the prosecutor's lack of questioning is not so strong as to undermine the trial court's [****25] determination that Reginia S.'s views on the standard of proof did, in fact, matter to the prosecutor.

Defendant further points out that the prosecutor did not challenge Juror No. 46, who wrote that the death penalty should not be considered unless the sentencer is "absolutely sure of guilt." But Juror No. 46 also wrote that she could set aside her feelings about when to impose the death penalty, explaining: "Would choose appropriate penalty based on evidence presented—not my opinion about punishment." In response to that same question, by contrast, Reginia S. wrote that she could see herself voting for death "if it can be proven without a doubt ... [that] the crime was committed." Defendant also points out that the prosecutor did not challenge Juror No. 119 and Alternate Jurors Nos. 389 and 91, each of whom expressed some reluctance to impose the death penalty. But unlike Reginia S., these jurors did not say that they would not impose death unless guilt was proved to an absolute certainty.

CA(5) (5) As noted above, the prosecutor gave several other reasons for challenging Reginia S. Some of these additional reasons find support in the [*1153] record. Regarding the prosecutor's assertion Reginia S. [****26], was more casually dressed than the other prospective jurors, defense counsel agreed she was wearing a T-shirt and sweatpants but questioned the import of this observation. *HN5* Casual dress is a facially race-neutral reason for exercising a strike, and courts have noted that prosecutors may regard a juror's dress as some indication of how seriously he or she takes the responsibility of serving as a juror. (See, e.g., *People v. Elliott, supra*, 53 Cal.4th at pp. 569–570; *U.S. v. Thompson* (9th Cir. 1987) 827 F.2d 1254, 1260.) The record also lends some support to the prosecutor's stated concern about Reginia S.'s views regarding the evidence presented in the O.J. Simpson case; asked on the questionnaire for her feelings about the case, she responded that "[I]f they couldn't prove he murdered Nicole, then the verdict [**678] was fair." Similarly, the prosecutor's concern about Reginia S.'s belief that, as she wrote, "the system is not always fair, [and] sometimes race seems to play a part" also finds support in the record. [***20] We have previously upheld challenges based on similar reasons. (See, e.g., *People v. Mills* (2010) 48 Cal.4th 158, 184 [106 Cal. Rptr. 3d 153, 226 P.3d 276] [upholding as race-neutral the prosecutor's stated concern about a prospective juror's belief that the prosecution in the O.J. Simpson murder trial had not proved Simpson's guilt]; *People v. Winbush* (2017) 2 Cal.5th 402, 439 [213 Cal. Rptr. 3d 1, 387 P.3d 1187] ["Skepticism about the fairness [****27] of the criminal justice system to indigents and racial minorities has also been recognized as a valid race-neutral ground for excusing a juror."].) 3

But other reasons given for challenging Reginia S. either lack record support or do not withstand comparison to the prosecutor's treatment of other jurors. The prosecutor asserted that he challenged Reginia S. in part because her brother had been found guilty of several minor theft offenses when he was younger. But as defendant points out, Reginia S. wrote in her questionnaire that she felt her brother had been treated fairly, and the prosecutor later declined to challenge two alternate jurors who had close relatives who were convicted of various crimes. The record suggests that the prosecutor's concern with prospective jurors' stability was a general one, not limited to members of any racial group. But the prosecutor's stated concern about Reginia S.'s stability is questionable in light of her questionnaire responses [*1154] showing that, at age 38, she had been married for 11 years and had had only two employers (for one of whom she had worked 11 years). Finally, despite acknowledging at one point he had failed to notice Reginia had a bachelor's [****28] degree from Pepperdine University, the prosecutor later referred to her education as "limited"—an inapt characterization, particularly considering that, as the trial court remarked, only 12 percent of San Bernardino County residents had college degrees.

The prosecutor's reasons for striking the next challenged juror, Huey D., raise much the same difficulty: While some of the reasons were supported in the record, others were not. We will review the record concerning the challenge of Huey D. before addressing the trial court's rulings as to both prospective jurors.

c. *Prospective Juror Huey D.*

In explaining his decision to strike Huey D., the prosecutor first mentioned that Huey D. was 70 years old, that his opinions were "extremely confused," and that his opinions were "extremely weak" with respect to "the death penalty and ... the status of crime in the community," and "he put great emphasis on the fact that he felt the standard of proof on the death penalty should be no doubt." After looking at his notes, the prosecutor added that Huey D. had given answers to questions about the O.J. Simpson case that were "pro O[.]J[.] and anti prosecution." He also expressed concern about Huey's [****29] views on individual responsibility and why people commit [***21] crimes, and reiterated his concern over Huey D.'s views on the death penalty. After a recess, the prosecutor observed that Huey D. made "various statements ending with, I also feel that care should be used in sentencing someone to death. There should be no doubt." The prosecutor also noted that Huey D. did not answer a question asking whether his feelings about death were such that he would never be able to vote for death, instead explaining that he had problems [**679] about how the question was asked. He also expressed concern that Huey D. had written that he had no opinion about recent crimes covered in the news (which included the Simpson case) and that he could not think of ways to improve the criminal justice

system. In the prosecutor's view, these views were surprising for a person who, like Huey D., was an educator with a master's degree. Regarding the Simpson case in particular, the prosecutor stated, Huey had answered that the verdict did not upset him because he felt there was doubt.

During the ensuing discussion, the prosecutor explained he was attempting to pick a "well working, cohesive group" of jurors and was concerned [****30] with whether prospective jurors "have any experiences working with leaders and as followers or working as a group." When the trial court noted that Huey D. **[*1155]** had been a high school principal, the prosecutor replied: "I went through his particular questions. It is not difficult to see why he is no longer in this group. He is not a person involved in the community. He is not involved in any community activity. He is completely devoid of opinions concerning some of the hot issues in the community today. He is a person who showed confusion by defense counsel's own admittance, that he was not too aware of what was going on. I don't know if that was as a result of his age, which is 70 years old, and I don't know. Again, why take that risk when there are other people whom I've evaluated who are a better fit within the total group?" In response, defense counsel asserted that Huey D. was currently "a member of several organizations that are community-based. The South Area Bay Club [*sic* Boys Club], the Parent Teachers Association, and the Omega Psi Phi Fraternity." The prosecutor asked whether Huey was currently a member of these organizations, an apparent reference to Huey's questionnaire, which [****31] states that, except for the fraternity, he had not been a member of these organizations for several years.

As previously noted, the trial court concluded that the prosecutor challenged Huey D. because he feared that, like Reginia S., Huey D. would not vote to impose the death penalty unless the evidence of guilt was more compelling than proof beyond a reasonable doubt. Huey D.'s questionnaire answers and testimony provide substantial evidence supporting this conclusion. When asked to describe his general feelings about the death penalty, Huey wrote: "I feel that the death penalty does have a place in the system. It may or may not deter crime but I feel that without it, crime could be worse. I also feel that care should be used in sentencing someone to death. Their [*sic*] should be no doubt." When asked whether he had positive or negative feelings about the death penalty, Huey reiterated the point: "I feel that the death penalty should be used in extreme cases where their [*sic*] is no doubt." When asked whether he would be reluctant to personally vote for a sentence of death, he answered yes.

On voir dire, Huey D. stated his view that the death penalty "has its place" and he would support [****32] it "if the proof is conclusive that this is what is necessary." And he thereafter agreed with the prosecutor that on the "part of this case that may deal [***22] with the death penalty" he "would want absolute proof." When the prosecutor informed him that the prosecution need only present proof beyond a reasonable doubt, not absolute proof, and asked whether he could accept this standard, Huey D. said he could. Nevertheless, it is not surprising that the prosecutor believed that Huey D.'s views on the degree of proof required to impose a death sentence made him a less than ideal juror for the prosecution. As with Sandra D. and Reginia S., defendant argues that the prosecutor declined to challenge several jurors and alternates whose views on the death penalty were similar to those of Huey D. But as previously noted, none of the jurors or alternates repeatedly expressed the **[*1156]** view that they would require "absolute proof" of the defendant's guilt. The trial court did not err in crediting the explanation.

Some of the other reasons the prosecutor gave for challenging Huey D. also find support in the record. As the prosecutor noted, Huey had indicated in his questionnaire that he was not troubled by [****33] the decision in the O.J. Simpson case, writing: "I felt [**680] that their [*sic*] was doubt." Huey also declined to answer a number of questions seeking information about his attitudes toward the death penalty. For example, when asked whether his feelings about the death penalty were such that he would never be able to vote for the death penalty, he did not answer, instead writing: "I really have problems as to how this question is asked." He answered other sentencing-related questions "I really do not know," "Have no opinion now," or "No clear opinion."

Reasonable minds might not share the prosecutor's view that Huey D.'s lack of an opinion about whether the death penalty was used frequently enough and his inability to think of ways to improve the criminal justice system were causes for concern. But the record provides no adequate basis for us to conclude that the prosecutor's reasons were a pretext for discrimination. Defendant points to other jurors who were not challenged on similar grounds. Although some of these jurors declined to give substantive responses to one or two questions,

only one—Juror No. 87—declined to answer multiple questions probing attitudes toward the death penalty. Juror [****34] No. 87's views were, however, nevertheless clear: Among other things, Juror No. 87 indicated that she believed that "violent crime murder" should "[a]lways receive the death penalty"; that the state should impose the death penalty on anyone who kills another human being for any reason; and that she "[s]trongly favor[ed] the death penalty" and had actively supported the 1978 Briggs Initiative reinstating capital punishment in California. As previously noted, Huey D.'s questionnaire and voir dire responses did not paint a comparably clear picture about his views on the death penalty. [4]

On the other hand, the prosecutor's claim that Huey D. would not be a good member of a cohesive jury because he "is not a person involved in the community" rings false in light of the facts that Huey, a 70-year-old retired teacher, principal and school administrator, was still involved in a fraternity promoting scholarship and leadership, had been in a parent- [****23] teacher association for almost 40 years (ending seven years before trial), had supervised a **[*1157]** Sunday school and at earlier periods of his life was active in other youth-support organizations—all experiences that likely involved both leadership and working in groups. Again, the [****35] record suggests that the prosecutor's interest in community involvement was not limited to members of any racial group, but it is unclear why Huey D.'s questionnaire responses would have raised particular concerns. The prosecutor's complaint that Huey wrote he had a problem with the way one of the death penalty questions was asked is undermined by the fact that jurors and alternates, whom the prosecutor did not peremptorily challenge, also questioned or criticized aspects of the lengthy, somewhat repetitive juror questionnaire. [5] And the prosecutor's assertion that Huey's answers regarding the reasons for crime and how it should be handled showed a bias against law enforcement are not borne out by the record; Huey's responses on these questions—that crime had increased due to "lack of jobs and proper supervision for youth" and that, to alleviate crime, communities should receive more resources for resolving these problems—appear to reflect his commitment to educating and supporting young people rather than any negative attitude toward police or prosecutors.

[**681] ***CA(6)*** **(6)** As to each of the three prospective jurors who were subjects of the first *Batson/Wheeler* challenge, the prosecutor, when asked [****36] for his reasons, identified a relatively long list of questionnaire responses and other factors to justify the challenge. In each case, the trial court identified what it regarded as a central nonracial reason for the challenge—Sandra D.'s deep reluctance to impose the death penalty and Huey D. and Reginia S.'s insistence on a heightened standard of proof before imposing the penalty—and found the prosecutor sincere in offering that reason for the challenge. [6] This "laundry list" approach (*Foster v. Chatman* (2016) 578 U.S. ___, ___ [195 L. Ed. 2d 1, 136 S. Ct. 1737, 1748]) carries a significant danger: that the trial court will take a shortcut in its determination of the prosecutor's credibility, picking one plausible item from the list and summarily accepting it without considering whether the prosecutor's explanation as a whole, including offered reasons that are implausible or unsupported by the prospective juror's questionnaire and voir dire, indicates a pretextual justification. ***HN6*** A prosecutor's positing of multiple reasons, some of which, upon examination, prove implausible or unsupported by the facts, can in some circumstances fatally impair the **[*1158]** prosecutor's credibility. (See *U.S. v. Chinchilla* (9th Cir. 1989) 874 F.2d 695, 699 [where two bases for the challenges were acceptable and two were not, appellate court [****37] holds motion under *Batson* should have been granted: "the fact that two of the four proffered reasons do not hold up under [***24] judicial scrutiny militates against [the supported reasons'] sufficiency"].) In assessing credibility at the third stage of a *Batson/Wheeler* decision, trial courts should attempt to evaluate the attorney's statement of reasons as a whole rather than focus exclusively on one or two of the reasons offered.

In this case, however, the record contains no indication that the trial court took any shortcut in evaluating the prosecutor's credibility. Rather, the trial judge expressed substantial concerns about the prosecutor's challenges, which had eliminated all the Black jurors in a case involving a Black defendant and defense counsel. The court engaged actively in the third stage analysis, questioning counsel closely on certain points. True, after hearing the prosecutor's presentation and defense counsel's rebuttal, the trial court focused on Reginia S.'s and Huey D.'s statements about a heightened standard of proof, accepting that as the prosecutor's motivation for those challenges. At the same time, however, the court expressly allowed further discussion on the propriety [****38] of the strikes, and further discussion indeed ensued. The court expressed skepticism as to the prosecutor's assertion that Reginia S. and Huey D. possessed insufficient education, community involvement, or leadership ability to function as part of a "well working, cohesive group," noting that Reginia S. was better educated than many residents of the county

and Huey D. had been a high school principal. After further argument from both parties, the court in conclusion stated that while it might not have exercised peremptory challenges in the same manner, it continued to find the prosecutor had not exercised them with a racially discriminatory motivation. Despite its skepticism as to certain of the offered reasons, the court's overall assessment of the prosecutor's credibility remained unchanged.

CA(7) **(7)** That the trial court did not address in detail each of the numerous reasons the prosecutor gave for excusing Reginia S. and Huey D. does not mean it failed to make a sincere and reasoned evaluation of the prosecutor's reasons overall. *HN7* A sincere and reasoned evaluation of the prosecutor's stated reasons does not, in every circumstance, require the court to make detailed comments on every such reason. [****39] (*Hamilton, supra*, 45 Cal.4th at p. 901.) But the court should determine whether the challenge was based on group bias by considering the reasons as a whole, without focusing on a single stated reason to the exclusion of others. The record indicates the trial court here properly considered the prosecutor's statement of reasons as a whole, [**682] and we therefore give the lower court's credibility finding the deference due a sincere and reasoned evaluation.

[*1159]

d. *Prospective Juror Elizabeth K.*

The prosecutor gave a lengthy explanation for his challenge to Elizabeth K., occupying fully 10 pages of transcript. The prosecutor said that because Elizabeth K. had "considerable experience as a leader" and "a tremendous amount of group ability," she was likely to be the jury foreperson (the defense having assertedly "knock[ed] out [his] leaders"), but her questionnaire answers indicated that she was likely to vote for life imprisonment without possibility of parole and to persuade other jurors to do the same. He explained that he had a system by which he rated the prospective jurors, that he had rated Elizabeth K. a "C minus" because of her views on the death penalty, and she was the only C minus juror remaining on the panel. He said he had asked a [****40] supervising deputy district attorney who had tried death penalty cases, and [***25] who used a similar grading system, to read her answers pertaining to the death penalty, and he gave her the same grade.

The prosecutor explained that certain of Elizabeth K.'s answers seemed disingenuous. He noted that when asked what the criminal justice system's biggest problems were and how they could be improved, Elizabeth K. said she had not thought about it and had not had much interaction with the criminal justice system. He had difficulty crediting this answer because Elizabeth had been on the board of directors of a spousal abuse home. Elizabeth also wrote that she had not followed the O.J. Simpson case, which the prosecutor found difficult to believe both because of her involvement in spousal abuse issues and because Elizabeth's husband had been a professional football player who knew Simpson. When asked whether her feelings about the death penalty had changed in the last 10 years, Elizabeth said she had "'never taken a position on it one way or the other.'" The prosecutor found it unlikely that a person with her experiences and education would have no opinion on the issue.

The prosecutor was troubled [****41] that, when asked to describe her feelings about the death penalty, Elizabeth K. wrote: "'In general, I do not believe people should decide who gets to live and who has to die. However, I do believe there are times that this difficult choice has to be made. It should not be taken lightly.'" And when the questionnaire asked whether she believed in "an eye for an eye," Elizabeth said she did not, commenting that "[t]wo wrongs don't make a right." The prosecutor interpreted that comment as expressing the view "that anything that had the possible taint of revenge or the use of the death penalty because some crime deserved it was not appropriate." When asked whether she had positive or negative feelings about the death penalty, Elizabeth said she viewed it "as a part of our society's system that we unfortunately have to deal with periodically." The prosecutor acknowledged that this answer was not "completely negative," but he found it **[*1160]** "very weak, and certainly the weakest on the present panel." The prosecutor was also disturbed that, when asked for her general thoughts about the benefit of imposing a death sentence on a person convicted of special circumstances murder, she wrote: "'I don't [****42] see a benefit in sentencing anyone to death. I just don't think of it in those terms.'" In the prosecutor's view, this answer was "the ultimate capper in placing her in the negative side of the death penalty issue." Finally, when Elizabeth K. was asked whether she could show mercy to a person guilty of intentional murder, she wrote: "'If by "mercy," ... you mean grant a less harsh sentence, I could, if there were

circumstances to warrant it." The prosecutor viewed this answer as "pure game playing," explaining "I think she is equivocating, trying to conceal her true feelings."

The prosecutor concluded: "My interpretation of her true feelings were that she is likely to vote for life imprisonment without the possibility of parole, except in very extreme cases, and only if there are other jurors who could interact with her to lead her to that approach. ... [W]ith the present group on the panel ... I simply do not feel that that's possible. I think that she would, in fact, lead at least four of the other jurors, to her present position."

[**683] The trial court found that the prosecutor excused Elizabeth K. because of "her stand on death penalty issues." The court agreed with the prosecutor that [****43] Elizabeth K. was likely to be the jury foreperson, describing her as "extremely qualified." And after reviewing Elizabeth's answers, the court found that the prosecutor "could [***26] reasonably believe ... that she was extremely reluctant ... to [impose] the death penalty." In the court's view, the prosecutor reasonably believed that Elizabeth was intelligent and openminded, and could be talked out of her opinions by other persuasive jurors, but "if you put her on a jury in the absence of other leadership, ... I think I'm hearing him say that ... her reluctance to impose the death penalty wouldn't be disputed by anybody, and I think he could rationally conclude that she's reluctant to impose the death penalty ... ." The court reasoned that the prosecutor's decision to pass the challenge several times with Elizabeth on the panel was consistent with this view. Summing up, the court explained: "[T]he question is, as I sit here, do I believe what [the prosecutor] says or do I think that he is doing things for racial purposes? And I think if he was doing it just for racial purposes he would have done it much sooner. ... [I]t really does suggest to me ... [t]hat he saw her as being resistant to the death [****44] penalty, probably would go along with it ... . [¶] But now she is going to be the leader ... and he feels that that's a risk he can't take. I believe [the prosecutor] on that."

Defendant argues that the prosecutor deliberately waited to challenge Elizabeth K. until the defense had passed the challenge, which signaled to the prosecutor that this was his last chance to strike her and thereby to ensure [*1161] that the jury contained no Black jurors. But as the trial court noted in rejecting the same argument, this scenario is improbable: From the prosecutor's point of view, it was entirely possible that the defense could have passed after any of the three times that the prosecutor passed the challenge. If that had happened, Elizabeth K. would have remained on the jury. The timing of the challenge supports the trial court's conclusion that the strike was not motivated by Elizabeth K.'s race, but instead by the prosecutor's evaluation of the dynamics of the jury following a series of defense strikes.

Defendant also argues that the prosecutor's stated concerns about juror dynamics were pretextual. He points out that the prosecutor did not challenge Jurors Nos. 46, 119, and 370 and Alternate Jurors [****45] Nos. 389 and 91, each of whom, as previously discussed in connection with the other Black jurors challenged by the prosecutor, expressed some reluctance to vote for death. But the trial court found that the prosecutor's concern was not only that Elizabeth K. had somewhat mixed feelings about the death penalty, but that she was likely to assume a leadership role in the absence of other leaders. The trial court agreed with the prosecutor that Elizabeth K., a regional personnel director for a major corporation who had a bachelor's degree in management and whose children were in college, would have been "the probable foreperson." Although the other jurors to whom defendant points all revealed some degree of hesitation about imposing the death penalty, none had the kind of background or leadership experience that Elizabeth K. had; and the prosecutor may have believed that they would have less influence on the jury's deliberations.

It is by no means clear that Elizabeth K. would have persuaded other jurors not to return a death verdict. None of her answers reflected an explicit opposition to the death penalty or a strong reluctance to impose it; some of the answers cited by the prosecutor [****46] appear innocuous from the prosecution perspective. Although the prosecutor viewed some of her answers as disingenuous and found other answers suggestive of an antideath bias, others might infer from those same answers that she was openminded and would review the [***27] evidence fairly and evenhandedly. But the trial judge, who was present in the courtroom, credited the prosecutor's explanation. The judge noted that, when he was trying death penalty cases some decades before, answers like Elizabeth K.'s would have been considered "clear over on the right end of the political spectrum," but "now I think it's not unreasonable for the prosecution to assume that somebody with answers like this is certainly left of center" [**684] on the death penalty. Our task is not to determine whether we would have shared the prosecutor's concerns; the only question before us is whether substantial evidence supports the court's ruling that the prosecutor described legitimate reasons for the challenge and that he

challenged Elizabeth K. for those reasons, not because of her race. Here, **[*1162]** substantial evidence supports the trial court's conclusion that the prosecutor challenged Elizabeth K. for reasons other than her [****47] race.

2. People v. Gutierrez

Defendant maintains that as in *People v. Gutierrez* (2017) 2 Cal.5th 1150 [218 Cal. Rptr. 3d 289, 395 P.3d 186], the trial court here failed to sufficiently scrutinize the prosecutor's proffered reasons. In *Gutierrez*, we held the deference due a trial court that has made a "'sincere and reasoned'" evaluation of the prosecutor's reasons at the third stage of a *Batson* motion (*Gutierrez*, at p. 1159) was not applicable when the grounds for the strike offered by the prosecutor and accepted by the court were not self-evident and were not explained at the hearing. We explained: "Some neutral reasons for a challenge are sufficiently self-evident, if honestly held, such that they require little additional explication. ... Yet when it is not self-evident why an advocate would harbor a concern, the question of whether a neutral explanation is genuine and made in good faith becomes more pressing." (*Id.* at p. 1171.) The trial court in *Gutierrez* had accepted "the 'Wasco issue'"—the prospective juror lived in Wasco but claimed to be unaware of gang activity there—as the prosecutor's reason, but "never clarified why it accepted the Wasco reason as an honest one." (*Ibid.*) "The court may have made a *sincere* attempt to assess the Wasco rationale, but it never [****48] explained why it decided this justification was not a pretext for a discriminatory purpose. Because the prosecutor's reason for this strike was not self-evident and the record is void of any explication from the court, we cannot find under these circumstances that the court made a *reasoned* attempt to determine whether the justification was a credible one." (*Id.* at p. 1172.)

Gutierrez's reasoning is inapplicable here; the reasons accepted by the court for striking each prospective juror were either self-explanatory or were explained at the hearing. For reasons already explained, we conclude that the trial court's evaluation of the prosecutor's justifications was sincere and reasoned, and we thus accord deference to its credibility ruling. 7

[*1163]

[***28] B. *Guilt Phase Issues*

1. *Trial court's failure to instruct on lesser included offenses of second degree murder and voluntary manslaughter*

Defendant argues that the trial court erred by not instructing the jury sua sponte on second degree murder and voluntary manslaughter, which are lesser offenses necessarily included within the charged crime of first degree murder. He asserts that its failure to do so violated his rights to a fair trial, to due process [****49] of law, and to reliable guilt and special circumstance verdicts as guaranteed by the federal and state Constitutions.

HN8 ***CA(8)*** **(8)** As a general rule, "a trial court errs if it fails to instruct, sua sponte, on all theories [**685] of a lesser included offense which find substantial support in the evidence." (*People v. Breverman* (1998) 19 Cal.4th 142, 162 [77 Cal. Rptr. 2d 870, 960 P.2d 1094].) But a court must instruct on such theories only when the record contains "'substantial evidence' from which a rational jury could conclude that the defendant committed the lesser offense, and that he is not guilty of the greater offense.'" (*People v. Whalen* (2013) 56 Cal.4th 1, 68 [152 Cal. Rptr. 3d 673, 294 P.3d 915] (*Whalen*).)

CA(9) **(9)** Here, defendant's claim that the trial court should have instructed on second degree murder fails at the outset because defendant himself asked the court not to give the instruction at trial. ***HN9*** "[A] defendant may not invoke a trial court's failure to instruct on a lesser included offense as a basis on which to reverse a conviction when, for tactical reasons, the defendant persuades a trial court not to instruct on a lesser included offense supported by

the evidence." (*People v. Barton* (1995) 12 Cal.4th 186, 198 [47 Cal. Rptr. 2d 569, 906 P.2d 531].) Defense counsel in this case asked the court not to instruct on second degree murder; he said he had discussed the matter with defendant, and defendant personally joined in the request [****50] on the record. Defendant thereby invited the alleged error of which he now complains.

By contrast, defense counsel never asked the court not to instruct the jury on voluntary manslaughter, although counsel did agree with the court's observation that the evidence did not warrant it. Defense counsel was correct on this point. As explained below, regardless of whether defendant adequately preserved the issue for appeal, the court was right not to instruct on either second degree murder or voluntary manslaughter, because the evidence at trial would not have supported a jury finding that he was guilty of one of those crimes but not first degree murder.

[*1164]

CA(10) **(10)** Defendant argues that the jury could have found that he killed Rexford with express malice (i.e., with the intent to kill), but that he lacked premeditation and deliberation, and that the killing therefore was second degree murder. ***HN10*** "In the context of first degree murder, '"premeditated" means "considered beforehand," and "deliberate" means "formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action"'" [***29] (*People v. Lee* (2011) 51 Cal.4th 620, 636 [122 Cal. Rptr. 3d 117, 248 P.3d 651]). "The process of premeditation and deliberation does [****51] not require any extended period of time. 'The true test is not the duration of time as much as it is the extent of the reflection.'" (*People v. Mayfield* (1997) 14 Cal.4th 668, 767 [60 Cal. Rptr. 2d 1, 928 P.2d 485] (*Mayfield*).)

Defendant points out that there was evidence that he wanted to talk to a person named "Josh," who, he asserts, might not have been Josh Rexford. He notes that Linda Farias testified that, several days before the murder, she overheard defendant conversing with three other men, during which they said that "Brian" killed Farias, that "Josh" was Brian's cousin, and that "they were going to get through [Josh] to find" Brian, but she heard no last names mentioned. A reasonable juror, he argues, "could easily have concluded that [defendant] sought out a 'Josh' to get information from him, not to kill him," and thus that the killing was unpremeditated. But the jury could have believed that defendant was looking for a "Josh" with an unknown last name only if it rejected Troy Holloway's testimony that defendant questioned him about Josh Rexford within a day or two of the conversation overheard by Farias.

And more significantly, the evidence of the manner of killing cannot be reconciled with defendant's theory that the jury could reasonably have concluded [****52] that he was merely seeking information. According to prosecution witnesses, defendant staked out the apartment complex and, just before the shooting, secreted himself in an apartment above Pupua's. He then went downstairs, entered Pupua's apartment, and began shooting immediately, without saying a word. The defense, in turn, relied on defendant's testimony that his kidnappers brought him against his will to Pupua's apartment and staked out the apartment prior to the shooting, and that defendant then entered the apartment with his Hispanic male kidnapper, who immediately started shooting. These are, [**686] of course, two very different versions of events, but neither version would have supported a jury finding that defendant committed the murder with express malice but without premeditation. There is nothing in the record that could have led a reasonable juror to believe that defendant planned to converse with the victims or that he actually conversed with them before or after the shooting. In short, "the entire course of conduct clearly revealed by the evidence, taken as a whole, is inconsistent with any suggestion that," if defendant committed the shooting with express malice, **[*1165]** "the killing [****53] [was] not willful, premeditated, and deliberate." (*People v. Carter* (2005) 36 Cal.4th 1114, 1184–1185 [32 Cal. Rptr. 3d 759, 117 P.3d 476].)

CA(11) **(11)** Defendant argues that the jury could have convicted him of second degree murder by finding that he killed Rexford without premeditation or express malice, but with implied malice. ***HN11*** "Malice is implied when the killing is proximately caused by '"an act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life."'" (*People v. Knoller* (2007) 41 Cal.4th 139, 152 [59 Cal. Rptr. 3d 157, 158 P.3d 731].) Here, defendant maintains, the jury could have found that he "knew that his act [ions] endangered the lives of the apartment occupants" but merely "intended to frighten the

*Associate Justice of the Court of Appeal, Fourth Appellate District, Division One, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

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1 The record contains references to both "Reginia S." and "Regina S." For the sake of consistency, we use the first spelling.

2 *Hovey v. Superior Court* (1980) 28 Cal.3d 1 [168 Cal. Rptr. 128, 616 P.2d 1301].

3 Defendant points out that the prosecutor did not challenge Jurors Nos. 317 and 353, who expressed somewhat similar views. But these jurors' questionnaire responses differed from Reginia S.'s in ways the prosecutor could well have regarded as significant. Like Reginia S., Jurors Nos. 317 and 353 checked "No" in response to the question whether Blacks were treated as fairly by the judicial system as other persons. But of the three, only Reginia S. responded to an open-ended question about problems with the criminal justice system by spontaneously raising questions about the system's fairness and the role race plays in it. In response to the question asking whether they were upset by the O.J. Simpson verdict, both Jurors Nos. 317 and 353 checked "Yes" and explained the jury had not deliberated long enough. Reginia S., by contrast, checked "No" and explained, as discussed earlier, that the verdict was fair if Simpson's guilt was not proven.

4 Defendant argues the prosecutor's focus on Huey D.'s age (70) suggests pretext because Huey had no health problems that would interfere with his service as a juror. But the prosecutor mentioned the prospective juror's age as possibly explaining his omitted and vague answers on the questionnaire, not in reference to potential physical limitations. As explained above, the record provides sufficient support for the prosecutor's concern regarding Huey's questionnaire responses.

5 In colloquy with one prospective juror who found the questionnaire's death penalty section hard to follow because of its repetitiveness, the prosecutor remarked that it was "purposely" written "[t]o see if we can confuse people." He was no doubt joking, but the remark nonetheless undercuts his claimed concern with Huey D.'s statement that he had a problem with the wording of one question. (This prospective juror was excused for

cause, without defense opposition, because of his categorical inability to impose the death penalty.)

6 The prosecutor's approach here may have resulted from a degree of miscommunication between court and counsel. During discussion on defendant's motion, the court asked the prosecutor to "[c]over everything that you think is important," an invitation the prosecutor took as calling for "every single detail" about the disputed challenges.

7 Defendant maintains that "the prosecutor arguably scattered a couple of ostensibly valid race-neutral grounds for excusing the Black prospective jurors amongst his litany of pretextual race-neutral grounds." He argues that the trial court therefore should have applied a mixed motives analysis borrowed from other legal contexts. (See, e.g., *Hunter v. Underwood* (1985) 471 U.S. 222, 228 [85 L. Ed. 2d 222, 105 S. Ct. 1916]; *Arlington Heights v. Metropolitan Housing Corp.* (1977) 429 U.S. 252, 270–271 & fn. 21 [50 L. Ed. 2d 450, 97 S. Ct. 555]; *Howard v. Senkowski* (2d Cir. 1993) 986 F.2d 24, 30.) But the trial court did not find that the prosecutor's strikes were motivated by a combination of race-based and race-neutral considerations; it instead found that the strikes were based on considerations other than race. Because we uphold that finding, we have no occasion to consider what result would obtain if the prosecutor's challenges were based in part on race-neutral reasons and based in part on group bias. We therefore need not decide here whether mixed motives analysis applies in a *Batson/Wheeler* case. (See generally *Hamilton*, *supra*, 45 Cal.4th at p. 909, fn. 14; *People v. Schmeck* (2005) 37 Cal.4th 240, 275–277 [33 Cal. Rptr. 3d 397, 118 P.3d 451].)

8 At the first trial, the prosecution attempted to introduce evidence that it had discovered after the trial had begun, as well as evidence described in an earlier police report that had not been provided to the defense. The trial court granted the defense's motion for a mistrial.

9 Franks told Holloway he believed Holloway was afraid of being killed; later Holloway admitted his fear and asked how Franks knew. Holloway went on to say that defendant "is a man that would come kill your ass. Why do you think I been holding off so long?" Franks appealed to Holloway to stand up for the victim, his friend. Eventually, Holloway said that though he was "[p]etrified that this man was going to kill me," he "could not sleep with this shit on my conscious any more." Near the interview's end, Holloway asked for "protective custody" and Franks promised to "take care of you."

People v. Hardy, 5 Cal. 5th 56

Supreme Court of California

May 31, 2018, Filed

S113421

Reporter

5 Cal. 5th 56 * | 418 P.3d 309 ** | 233 Cal. Rptr. 3d 378 *** | 2018 Cal. LEXIS 3969 **** | 2018 WL 2437532

THE PEOPLE, Plaintiff and Respondent, v. WARREN JUSTIN HARDY, Defendant and Appellant.

Subsequent History: Reported at People v. Hardy, 2018 Cal. LEXIS 4090 (Cal., May 31, 2018)
Time for Granting or Denying Rehearing Extended People v. Hardy, 2018 Cal. LEXIS 4585 (Cal., June 13, 2018)
Rehearing denied by People v. Hardy, 2018 Cal. LEXIS 5291 (Cal., July 18, 2018)

Prior History: [****1] Superior Court of Los Angeles County, No. NA039436-02, John D. Lord, Judge.
People v. Hardy, 2018 Cal. LEXIS 1131 (Cal., Feb. 13, 2018)

Core Terms

juror, rape, reasons, trial court, murder, death penalty, questions, alternate, instructions, robbery, prospective juror, questionnaire, excused, kidnapping, felony, defense counsel, foreign object, circumstances, torture, sexual penetration, contends, peremptory challenge, arrested,

special circumstance, first degree murder, challenges, argues, killing, wooden, struck

Case Summary

Overview

HOLDINGS: [1]-In a capital murder case under Pen. Code, § 187, an African American prospective juror's close ties with lawyers, and false arrest supported a finding that a peremptory excusal was not discriminatory, even though the juror was the only African American available for the main panel and there were racial overtones, as the case involve an African-American defendant who was accused of aiding and abetting the murder of a white woman, who had allegedly yelled a racial slur at him and his cohorts, triggering the incident; [2]-It was proper to excuse for cause a juror who stated that the death penalty was abhorrent to him and the he could impose death only if the law compelled him to do so, even when the attorneys and the court repeatedly explained to him that the law would never require a verdict of death.

Outcome

Judgment affirmed.

LexisNexis® Headnotes

Criminal Law & Procedure > ... > Challenges for Cause > Bias & Impartiality > Capital Cases

HN1 **Bias & Impartiality, Capital Cases**

A prospective juror in a capital case may be excluded for cause if his or her views on capital punishment would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath. Prospective jurors may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings. Accordingly, deference must be paid to the trial judge who sees and hears the juror and must determine whether the prospective juror would be unable to faithfully and impartially apply the law. The court applies this standard to determine whether excusing a prospective juror in a capital case for cause based on the prospective juror's views on capital punishment violates the defendant's right to an impartial jury under Cal. Const., art. I, § 16. More like this Headnote

Shepardize - Narrow by this Headnote

Criminal Law & Procedure > ... > Challenges for Cause > Appellate Review > Standards of Review

HN2 **Appellate Review, Standards of Review**
On appeal, the court will uphold the trial court's ruling as to whether a prospective juror in a capital case may be excluded for cause if his or her views on capital punishment if it is fairly supported by the record, accepting as binding the trial court's determination as to the prospective juror's true state of mind when the prospective juror has made statements that are conflicting or ambiguous. In many cases, a prospective juror's responses to questions on voir dire will be halting, equivocal, or even conflicting. Given the juror's probable unfamiliarity with the complexity of the law, coupled with the stress and anxiety of being a prospective juror in a capital case, such equivocation should be expected. Under such circumstances, the reviewing court defers to the trial court's evaluation of a prospective juror's state of mind, and such evaluation is binding on appellate courts. More like this Headnote

Shepardize - Narrow by this Headnote

Criminal Law & Procedure > Juries & Jurors > Peremptory Challenges > Proving Discriminatory Use

HN3 **Peremptory Challenges, Proving Discriminatory Use**
The United States and California Constitutions prohibit exercising peremptory challenges based on race. When a defendant alleges discriminatory use of peremptory challenges, the defendant must first make a prima facie showing of impermissible challenges. If the trial court finds a prima facie case, the prosecutor must then state nondiscriminatory reasons for the challenges. At that point, the trial court must determine whether the reasons are credible and whether the defendant has shown purposeful discrimination under all of the relevant circumstances. The defendant has the ultimate burden of persuasion. The Constitution forbids striking even a single prospective juror for a discriminatory purpose. At the third step of the Batson/Wheeler analysis, 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. More like this Headnote

Shepardize - Narrow by this Headnote

Criminal Law & Procedure > Juries & Jurors > Peremptory Challenges > Appellate Review

HN4 **Peremptory Challenges, Appellate Review**
When the trial court has found no prima facie case of impermissible peremptory challenges, but only after the prosecutor has stated reasons for the challenges, the reviewing court infers an implied prima facie finding of discrimination and proceeds directly to review of the ultimate question of purposeful discrimination. More like this Headnote

Shepardize - Narrow by this Headnote

Criminal Law & Procedure > Juries & Jurors > Peremptory Challenges > Appellate Review

Criminal Law & Procedure > Juries & Jurors > Peremptory Challenges > Race-Neutral Strikes

HN5 **Peremptory Challenges, Appellate Review**
The prosecutor's justification for a peremptory challenge does not have to support a challenge for cause, and even a trivial reason, if genuine and race neutral, is sufficient. The inquiry is focused on whether the proffered neutral reasons are subjectively genuine, not on how objectively reasonable they are. The reasons need only be sincere and nondiscriminatory. More like this Headnote

Shepardize - Narrow by this Headnote

Criminal Law & Procedure > Juries & Jurors > Peremptory Challenges > Appellate Review

HN6 **Peremptory Challenges, Appellate Review**
The court reviews the trial court's determination with restraint, presumes the prosecutor has exercised the challenges in a constitutional manner, and defers to the trial court's ability to distinguish genuine reasons from sham excuses. Reviewing the trial court's determination with restraint does not, however, mean abdication. Although the court generally accords great deference to the trial court's ruling that a particular reason for a peremptory strike is genuine, the court does so only when the trial court has made a sincere and reasoned attempt to evaluate each stated reason as applied to each challenged juror. 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. However, a trial court is not required 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. More like this Headnote

Shepardize - Narrow by this Headnote

Criminal Law & Procedure > Juries & Jurors > Peremptory Challenges > Race-Neutral Strikes

HN7 **Peremptory Challenges, Race-Neutral Strikes**
Some neutral reasons for a peremptory challenge are sufficiently self-evident, if honestly held, such that they require little additional explication. Moreover, a peremptory challenge may be based on a broad range of factors indicative of juror partiality, even those which are apparently trivial or highly speculative. Yet when it is not self-evident why an advocate would harbor a concern, the question of whether a neutral explanation is genuine and made in good faith becomes more pressing. That is particularly so when an advocate uses a considerable number of challenges to exclude a large proportion of members of a cognizable group. At this stage, a defendant may engage in comparative juror analysis; that is, may compare the responses of the challenged jurors with those of similar unchallenged jurors who were not members of the challenged jurors racial group. Such analysis is not necessarily dispositive, but it is one form of relevant circumstantial evidence. More like this Headnote

Shepardize - Narrow by this Headnote

Criminal Law & Procedure > Juries & Jurors > Peremptory Challenges > Appellate Review

Criminal Law & Procedure > Juries & Jurors > Peremptory Challenges > Proving Discriminatory Use

HN8 **Peremptory Challenges, Appellate Review**
When comparative juror arguments regarding peremptory challenges are made for the first time on appeal, the prosecutor was not asked to explain, and therefore generally did not explain, the reasons for not challenging other jurors. In that situation, the reviewing court must keep in mind that exploring the question at trial might have shown that the jurors were not really comparable. Accordingly, the court considers such evidence in light of the deference due to the trial court's ultimate finding of no discriminatory purpose. The individuals compared need not be identical in every respect aside from ethnicity: But they must be materially similar in the respects significant to the prosecutor's stated basis for the challenge. More like this Headnote

Shepardize - Narrow by this Headnote

Criminal Law & Procedure > Juries & Jurors > Peremptory Challenges > Proving Discriminatory Use

HN9 **Peremptory Challenges, Proving Discriminatory Use**
A prosecutor, like any party, may exercise a peremptory challenge against anyone, including members of cognizable groups. All that is prohibited is challenging a person because the person is a member of that group. The fact the prosecutor excused all possible African-Americans is a probative circumstance. More like this Headnote

Shepardize - Narrow by this Headnote

Criminal Law & Procedure > Juries & Jurors > Peremptory Challenges > Race-Neutral Strikes

HN10 **Peremptory Challenges, Race-Neutral Strikes**
Although an isolated mistake or misstatement that the trial court recognizes as such is generally insufficient to demonstrate discriminatory intent in the exercise of peremptory challenges, it is another matter altogether when 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. More like this Headnote

Shepardize - Narrow by this Headnote

Criminal Law & Procedure > Juries & Jurors > Peremptory Challenges > Race-Neutral Strikes

HN11 **Peremptory Challenges, Race-Neutral Strikes**
The defendant has the ultimate burden of persuasion regarding the prosecutor's motivation for peremptory challenges. More like this Headnote

Shepardize - Narrow by this Headnote

Criminal Law & Procedure > Juries & Jurors > Peremptory Challenges > Race-Neutral Strikes

HN12 **Peremptory Challenges, Race-Neutral Strikes**
A juror who distrusts both sides of a case may well be more likely to have a reasonable doubt and thus be problematic for the prosecution. The fact that the juror distrusted all attorneys involved in the criminal justice system, and not just prosecutors, does not invalidate this reason. A prospective juror's distrust of the criminal justice system is a race-neutral basis for his excusal. More like this Headnote

Shepardize - Narrow by this Headnote

Criminal Law & Procedure > Juries & Jurors > Peremptory Challenges > Race-Neutral Strikes

HN13 **Peremptory Challenges, Race-Neutral Strikes**
A close and pervasive connection to lawyers and the judicial system is a legitimate and recognized reason for a prosecutor to exercise a peremptory challenge. More like this Headnote

Shepardize - Narrow by this Headnote

Criminal Law & Procedure > Juries & Jurors > Peremptory Challenges > Race-Neutral Strikes

HN14 **Peremptory Challenges, Race-Neutral Strikes**
A negative experience with law enforcement is a valid basis for a peremptory challenge.
More like this Headnote

Shepardize - Narrow by this Headnote

Criminal Law & Procedure > Juries & Jurors > Peremptory Challenges > Race-Neutral Strikes

HN15 **Peremptory Challenges, Race-Neutral Strikes**
The prosecutor's demeanor observations, even if not explicitly confirmed by the record,

are a permissible race-neutral ground for peremptory excusal, especially when they were not disputed in the trial court. More like this Headnote

Shepardize - Narrow by this Headnote

Criminal Law & Procedure > Juries & Jurors > Peremptory Challenges > Prohibitions

HN16 **Peremptory Challenges, Prohibitions**
A party is not required to examine a prospective juror about every aspect that might cause concern before it may exercise a peremptory challenge. More like this Headnote

Shepardize - Narrow by this Headnote

Criminal Law & Procedure > Juries & Jurors > Peremptory Challenges > Proving Discriminatory Use

HN17 **Peremptory Challenges, Proving Discriminatory Use**
The question on a claim of discriminatory use of peremptory challenges is not whether a prosecutor should or should not have excused a prospective juror. It is whether this prosecutor excused him or her for an improper reason. More like this Headnote

Shepardize - Narrow by this Headnote

Evidence > Relevance > Exclusion of Relevant Evidence > Confusion, Prejudice & Waste of Time

Evidence > Relevance > Relevant Evidence

HN18 **Exclusion of Relevant Evidence, Confusion, Prejudice & Waste of Time**
No evidence is admissible except relevant evidence. Evid. Code, § 350. Relevant evidence is evidence having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action. Evid. Code, § 210. The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. Evid. Code, § 352. In general, the trial court is vested with wide discretion in determining relevance and in weighing the prejudicial effect of proffered evidence against its probative value. Its rulings will not be overturned on appeal absent an abuse of that discretion. More like this Headnote

Shepardize - Narrow by this Headnote

Criminal Law & Procedure > ... > Standards of Review > Substantial Evidence > Sufficiency of Evidence

HN19 **Substantial Evidence, Sufficiency of Evidence**
To determine whether sufficient evidence supports a jury verdict, a reviewing court

reviews the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable jury could find the defendant guilty beyond a reasonable doubt. This standard of review applies when the evidence is largely circumstantial and to review of special circumstance findings. More like this Headnote

Shepardize - Narrow by this Headnote

Criminal Law & Procedure > ... > Murder > Capital Murder > Elements

HN20 Capital Murder, Elements
In 1998, the robbery special circumstance did not apply when a defendant's intent was not to steal but to kill and the robbery was merely incidental to the murder because its sole object was to facilitate or conceal the primary crime. The special circumstance required an independent felonious purpose to commit one of the listed felonies. In other words, a kidnapping could not be merely incidental to the murder, with the murder being the defendant's primary purpose. The court has, however, found sufficient evidence to support a special circumstance so long as there was a concurrent purpose to commit both the murder and one of the listed felonies. The question is whether the defendant had a purpose for the underlying apart from murder. It is only when the underlying felony is merely incidental to the murder that the felony-murder special circumstance does not apply. More like this Headnote

Shepardize - Narrow by this Headnote

Criminal Law & Procedure > ... > Murder > Capital Murder > Elements

HN21 Capital Murder, Elements
Even if a defendant harbored the intent to kill at the outset, a concurrent intent to commit an eligible felony will support the special circumstance allegation. More like this Headnote

Shepardize - Narrow by this Headnote

Criminal Law & Procedure > Criminal Offenses > Crimes Against Persons > Robbery

HN22 Crimes Against Persons, Robbery
Robbery is the felonious taking of personal property in the possession of another and against the person's will, accomplished by means of force or fear. Pen. Code, § 211. If a defendant does not harbor the intent to take another's property at the time the force or fear is applied, the taking is a theft, not a robbery. More like this Headnote

Shepardize - Narrow by this Headnote

Criminal Law & Procedure > ... > Murder > Capital Murder > Elements

Criminal Law & Procedure > Criminal Offenses > Crimes Against Persons > Robbery

that the defendant did not have an independent felonious purpose for committing the felony.

CA(18) **(18) Witnesses § 35—Cross-examination—Exclusion of Evidence—Offer of Proof—Scope of Direct.**

Normally, a reviewing court may not consider a claim that the trial court erroneously excluded evidence unless the substance, purpose, and relevance of the excluded evidence was made known to the court by the questions asked, an offer of proof, or by any other means (Evid. Code, § 354, subd. (a)). However, the rule does not apply when the evidence was sought by questions asked during cross-examination or recross-examination (§ 354, subd. (c)). Normally, if the trial court excludes evidence on cross-examination, no offer of proof is necessary to preserve the issue for consideration on appeal. This exception applies only to questions within the scope of the direct examination. If the evidence the defendant seeks to elicit on cross-examination is not within the scope of the direct examination, an offer of proof is required to preserve the issue. To the extent *People v. Capistrano* and *People v. Vines* suggest that a party must make an offer of proof to challenge on appeal a court's ruling limiting cross-examination, they are inconsistent with Evid. Code, § 354, subd. (c), and the court overrules them. [Overruling to the extent inconsistent: *People v. Capistrano* (2014) 59 Cal.4th 830 [176 Cal.Rptr.3d 27, 331 P.3d 201]; *People v. Vines* (2011) 51 Cal.4th 830 [124 Cal.Rptr.3d 830, 251 P.3d 943].]

Counsel: Susan K. Shaler, under appointment by the Supreme Court, for Defendant and Appellant.

Kamala D. Harris and Xavier Becerra, Attorneys General, Dane R. Gillette and Gerald A. Engler, Chief Assistant Attorneys General, Lance E. Winters, **[*63]** Assistant Attorney General, Keith H. Borjon, Joseph P. Lee and Michael J. Wise, Deputy Attorneys General, for Plaintiff and Respondent.

Judges: Opinion by Chin, J., with Cantil-Sakauye, C. J., Corrigan, Cuéllar, Kruger, and Baker, JJ., *, concurring. Dissenting opinion by Liu, J.

Opinion by: Chin

Opinion

[***389] [**318] **CHIN, J.**—A jury convicted defendant, Warren Justin Hardy, of the first degree murder of Penny Sigler with the special circumstances of murder committed during the commission of robbery, kidnapping for rape, rape, sexual penetration by a foreign object, and the infliction of torture. (Pen. Code, §§ 187, 189, 190.2, subd. (a)(17), (18).) 1 The jury also found that defendant was an aider and abettor and either had the intent to kill or was a major participant who acted with reckless indifference [***390] to human life, but it did not find that he was the actual killer. In addition, the jury convicted defendant of robbery, kidnapping for rape, rape, rape in concert, [****2] sexual penetration by a foreign object, sexual penetration

The jury must render a general verdict, except that in a felony case, when they are in doubt as to the legal effect of the facts proved, they may find a special verdict (Pen. Code, § 1150). A special verdict is that by which the jury find the facts only, leaving the judgment to the court. It must present the conclusions of fact as established by the evidence, and not the evidence to prove them, and these conclusions of fact must be so presented as that nothing remains to the court but to draw conclusions of law upon them (Pen. Code, § 1152). Special verdicts are permissible so long as they do not interfere with the jury's deliberative process.

CA(14) (14) Criminal Law § 9—Mental State—Specific Intent—Aiding and Abetting—Torture.

Aiding and abetting liability and torture both require a specific intent. Torture requires the intent to cause cruel or extreme pain and suffering for the purpose of revenge, extortion, persuasion, or for any sadistic purpose (Pen. Code, § 206). Aiding and abetting liability requires the intent or purpose of committing, encouraging, or facilitating the commission of the offense. Torture in violation of Pen. Code, § 206 was not added to the list in Pen. Code, § 189, of predicate felonies for first degree murder until 1999.

CA(15) (15) Criminal Law § 250—Trial—Instructions—Lesser Included Offenses.

A trial court has an independent obligation to instruct the jury on all lesser included offenses the evidence warrants, even against the defense's wishes. Such instructions are required when, but only when, a jury could reasonably conclude that the defendant committed the lesser offense but not the greater one.

CA(16) (16) Kidnapping § 15—Asportation.

The rule for aggravated kidnapping is that the movement must not be merely incidental to the commission of the robbery, and must substantially increase the risk of harm over and above that necessarily present in the crime of robbery itself. This rule applies to other forms of aggravated kidnapping, including kidnapping for rape. By contrast, asportation for purposes of simple kidnapping used to be exclusively based on distance.

[*62] *CA(17)* (17) Homicide § 101.4—Death Penalty—Special Circumstances—Felony Murder—Instructions.

The independent felonious purpose rule is not an element of the felony-murder special circumstance, on which a court must instruct in every case in which the special circumstance has been alleged. The rule merely clarifies the scope of the requirement that the murder must have taken place during the commission of a felony. A trial court has no duty to instruct on the independent felonious purpose rule unless the evidence supports an inference that the defendant might have intended to murder the victim without having an independent intent to commit the specified felony. Put in affirmative terms, a court has a duty to instruct the jury, on its own motion, that the felony cannot have been merely incidental to the murder when there is evidence from which the jury could have inferred

by a foreign object in concert, and torture of Sigler. (§§ 206, 209, subd. (b)(1), 211, 261, subd. (a)(2), 264.1, 289, subd. (a)(1).) In connection with the rape and sexual penetration convictions, the jury found true that defendant kidnapped and tortured Sigler. (§ 667.61, subds. (a), (d).) The jury found not true or did not reach a verdict on allegations that he personally used a deadly and dangerous weapon in connection with the charges. Defendant admitted a prior robbery conviction.

After a penalty trial, the jury returned a verdict of death. The trial court denied the automatic motion to modify the verdict and imposed a judgment of death. This appeal is automatic.

We affirm the judgment.

I. THE FACTS

The evidence showed that defendant and two other men, Jamelle Armstrong (defendant's half brother) and Kevin Pearson, killed Penny Sigler during a robbery and sexual assault. The crimes took place on the night of December 28–29, 1998, by a freeway embankment in Long Beach.

A. *Guilt Phase*

Sometime after 10:00 p.m., December 28, 1998, Sigler left her Long Beach home with six dollars' worth of food stamps her roommate gave her to buy **[*64]** soda and candy. Sigler's nude body was discovered the next day on an embankment of Interstate [****3] 405 near the intersection of Long Beach Boulevard and Wardlow Road, less than a mile from her [**319] home. Her body was near the bottom of the embankment, separated from the streets by a drainage ditch, and, above the ditch, a nylon mesh fence supported by wooden stakes. Near Sigler's body was a shoe, a broken stake, and other debris, and blood was in the surrounding area.

Sigler suffered extensive injuries. The medical examiner counted 114 injuries, including at least 10 skull fractures that appeared to have been inflicted before death. Other injuries included blunt force injuries to her face, neck, back, chest, abdomen, arms, and thighs, a partially torn right ear, bruising and bleeding of the neck, broken neck bones, a broken rib, a chipped tooth, and bite marks on her breast and knee. Sigler also had bruising and lacerations on her internal and external genitalia, perineum, and anus. Some of the injuries, such as the chipped tooth and the lacerations and bruises to Sigler's genitalia and anus, were consistent with having been caused by a wooden stake. A wood splinter was recovered from her vagina. Deoxyribonucleic acid (DNA) from one of the bite marks matched defendant. The medical examiner [****4] concluded that blunt force trauma was the major cause of death, but he also found signs of asphyxiation.

Police recovered the cover of a food stamp booklet near Sigler's body. Through the booklet's serial number, detectives traced the food stamps to a nearby grocery store. The store's manager recognized defendant as a regular customer, and remembered that around the time of the murder defendant had purchased food using [***391] food stamps. Detectives executed a search warrant of defendant's home, recovering a pair of shoes with a sole pattern consistent with marks found at the scene, a leather jacket with blood stains, and other articles of clothing. DNA on the jacket and other clothes in defendant's home matched that of Sigler.

Detectives interviewed defendant the day of the search. He made three unrecorded statements and one recorded statement based on his third unrecorded statement. In his first two statements, defendant denied being involved in Sigler's death. After being told that Armstrong was also in custody, defendant became visibly upset and related a third version of events. Portions of the transcript and recording of this statement were provided to the jury.

According to this statement, [****5] as supplemented by later statements to the detectives, defendant was at a friend's home the night of Sigler's death where he, Armstrong, Pearson, and others were drinking. Defendant, Armstrong, Pearson, and two others left around 11:00 p.m. The two others took the "Metro" southbound, while defendant, Armstrong, and Pearson took it northbound to Long Beach. As the three were walking to a bus station along Long [*65] Beach Boulevard, they noticed Sigler across the street and, unprovoked, heard her yell at them, "Fuck you, niggers." The three crossed the street to confront Sigler; for defendant, something "clicked" when he heard the slur.

Once they reached Sigler, everyone began yelling at one another. In the process, Sigler grabbed at defendant, and he bit her on her breast in self-defense. Sigler then slapped him in the face. Pearson told defendant and Armstrong to bring Sigler over the fence that ran along the freeway embankment; defendant could not recall how they managed to do so. Pearson then ordered Sigler to lie down, and ordered defendant to remove her shoes. Defendant left to throw away Sigler's shoes as Pearson removed Sigler's pants, but in the process tripped and dropped one of [****6] the shoes. When he returned, defendant saw Pearson on top of Sigler, and then Pearson ordered Sigler to orally copulate him. Still angry from earlier, defendant punched Sigler in the jaw twice. Sigler reached out her hand to him and asked for his help, but he did nothing. Armstrong then appeared carrying a wooden stick, which he gave to Pearson. Pearson hit Sigler in the face with the stick, then stomped on her with his boots.

Defendant gathered the clothing and one shoe into a plastic bag he found nearby and climbed back over the fence with Armstrong and Pearson. Looking back at Sigler's body, he saw a stick protruding from Sigler's vagina. He returned to Sigler's body to remove the stick. Defendant gave inconsistent statements as to what happened to the stick: in one version, he threw it into the parking lot; in another, he threw it into a dumpster; and [**320] in a third, he gave it to Armstrong, who put it in a dumpster.

The three boarded a bus, transferred to another bus, and went to defendant's home. Somewhere along the way, Pearson discarded the bag with Sigler's clothes. All three left their clothing at defendant's home. Defendant claimed Pearson threatened to kill him if he talked.

[****7] The defense cross-examined prosecution witnesses but did not present any witnesses of its own. Defendant stipulated that he had a prior attempted robbery conviction.

B. *Penalty Phase*

1. *Prosecution evidence*

Cory Garro testified regarding the facts behind the prior attempted robbery conviction. [***392] One night in December 1996, as Garro and his wife were walking to their hotel in Long Beach, three men accosted them. One of the men (not defendant) pressed a gun to Garro's chest. The men demanded Garro hand [*66] over his wallet; while one man removed Garro's wallet, another tried to take his wife's purse. She screamed, causing the men to flee. Defendant later told police that he and two other men had attempted to rob Garro and his wife. One of the other men held the gun.

On April 11, 1996, police responded to a call from defendant's residence in Long Beach. There, they found defendant's young son bleeding from a two-inch puncture wound on the back of his leg. Defendant repeatedly told his son to say that the injury had been an accident. Defendant gave conflicting accounts of what had happened, but ultimately he told a police detective that he had a knife in his front pocket with the blade pointing upward. [****8] When defendant went to say goodbye to his son, he lifted him up and set him on his lap, causing the knife to stab him. He had forgotten about the knife. Police found a bloodstained knife with a five-inch blade in a kitchen drawer.

Monty Gmur, whose house defendant had visited before Sigler's death, testified that defendant, Armstrong, Pearson and another man had been working in Gmur's music studio the evening of the murder. At some point, defendant left and returned with alcohol, which he drank with the other men. Defendant and the others were at Gmur's house for three to four hours; Gmur was

in another part of the house much of this time. Gmur believed that defendant and the others had been drinking, as they showed signs of intoxication and the alcohol bottles were empty.

Teddy Keptra, Sigler's son, testified about the impact of her murder on him. He had been 16 years old when his mother died, and subsequently dropped out of high school and had difficulty holding a job. He missed his mother and thought of her daily.

2. *Defense evidence*

Friends, relatives, and mental health experts testified regarding defendant's childhood, upbringing, and character.

Defendant's mother, Pamela Armstrong, [****9] testified that she and defendant's father had been together for three years until Pamela discovered that the father was having a baby with another woman. She gave birth to defendant in an attempt to get his father back, but the father abandoned her and defendant. Defendant was born with numerous birthmarks, as well as with an eye that turned to the side. Defendant had corrective surgery for the eye as a child. His vision problems caused him to be clumsy and have difficulties at school, problems that the surgery alleviated but did not eliminate.

[*67]

Pamela married Armstrong's father when defendant was one year old, and gave birth to Armstrong when defendant was four or five years old. Armstrong's father was abusive toward Pamela. Although he initially treated defendant well, he increasingly favored Armstrong over defendant as they grew older. Both Pamela and Armstrong's father drank and used drugs, and the physical abuse worsened. On occasion, the teenaged defendant would try to intervene by hitting Armstrong's father and telling him not to hurt his mother. Between his learning disabilities and his deteriorating relationship with his stepfather, defendant's grades worsened, and he eventually [****10] dropped out of [**321] school. Instead, he spent his time with gang members.

Defendant's family pastor, Albert Scales, testified that defendant had been a well- [***393] behaved child at church, and that he had never seen him act in a mean-spirited manner. Scales counselled defendant's mother and stepfather, and was aware that there were drinking problems in the home, that defendant was not well cared for, and that his stepfather was violent towards his mother.

Dr. Carl Osborn, a forensic psychologist, opined that defendant had never fit in at home or school. Defendant's stepfather was a heavy drinker and drug user who was abusive towards defendant's mother, who also drank heavily. Defendant became his mother's caretaker, yet his mother generally sided with his stepfather, leaving defendant feeling unwanted. His home environment was surrounded by violence; his mother and stepfather were violent, his stepfather was involved in gangs, his aunt had been raped and had been involved in a knife fight with his mother, and the neighborhood was the site of several shootings. Once, a man was gunned down in front of defendant's house while defendant was watching. At school, defendant was small and had a birth defect [****11] that caused severe learning disabilities that were never identified or corrected. Other students consequently picked on him, and his academic performance was poor. In Dr. Osborn's view, defendant desperately sought support, a role model, and a place to fit in.

By age 13, the two bright spots in defendant's life were that he showed some athletic talent and was involved in choir at church. But when he was 13, he had to choose between football and choir. Pastor Millard Jackson told him that if he chose choir, he could go to Disneyland. Because he hated spending time at home, he spent several nights with Jackson. Defendant claimed that Jackson molested him, specifically, that Jackson fondled defendant while he ejaculated. Defendant began a downward spiral after this, hiding behind alcohol and with his only sense of self-worth coming from his gang involvement.

Dr. Osborn opined that defendant's alcoholism stemmed from a dysthymic disorder—defendant was initially unable to recall a time when he had been **[*68]** happy. Defendant continued to

drink even while in jail, and the combination of dysthymia and alcohol led to explosive disinhibition, causing violent and impulsive tendencies to manifest themselves. [****12] Those tendencies were occasionally directed against defendant himself. His mother testified that at age 16, defendant ran away from home and reported having suicidal thoughts. Tiyarie Felix, the mother of defendant's children, testified that defendant demonstrated suicidal tendencies three times, once pulling a cord tight around his neck, once putting a gun to his head, and once throwing himself in front of a car. These tendencies, in Dr. Osborn's opinion, were consistent with defendant's dysthymia and alcoholism.

Felix also testified about defendant's problems with alcohol. The two met when they were 18 years old, at which time Felix had two sons from a prior relationship. Felix then had two more sons with defendant. Defendant loved all four of her sons equally, and treated them well. But defendant could be abusive towards Felix when he drank. Despite recognizing that his violence was linked to his drinking, defendant continued to drink. Eventually, Felix asked him to move out. Felix also testified about the incident in which defendant's son was cut in the back of his leg. Immediately after the incident, her son told her it was an accident.

Witnesses also testified that defendant was [****13] a follower, not a leader. James Johnson ran a community training program that defendant completed. Johnson testified that defendant lacked initiative, but was willing to learn and seemingly wanted [***394] a job to support his children. Following the program, defendant worked for Johnson for about a year installing toilets until Johnson's company went out of business. During that time, defendant worked well, but he still tended to be more of a follower than a leader. Felix and Scales supported this view. Dr. Osborn determined that defendant had an I.Q. of 83, putting him in the 13th percentile of the general population. Based on his intellectual abilities and background, Osborn believed that defendant [***322] lacked the "horsepower" to lead on the streets.

Based on his sessions with defendant and review of the records, Dr. Osborn came to three conclusions regarding Sigler's death: The crimes would have been out of character for defendant had he been sober; defendant actively participated but was dominated by Pearson and Armstrong; and they were crimes of passion due to defendant's intoxication, because drinking caused defendant to become violent or suicidal.

Dr. Gordon Plotkin, a medical doctor, testified [****14] that Sigler's autopsy toxicology report showed that she had ingested methamphetamines and alcohol before her death. Other records showed that she had been diagnosed with depression. Methamphetamines, alcohol, and depression in combination [*69] could cause a person to have poor impulsivity and suffer loss of judgment, and could cause that person to have increased aggression and possibly act violently.

Dr. Plotkin also testified that defendant's reported alcohol abuse and drinking on the night of Sigler's death could have meant that he was so intoxicated that he did not remember what happened. His intoxication could have aggravated any violent tendencies and reduced impulse control. Because defendant remembered some details about the night, including mundane ones, Dr. Plotkin did not think defendant had blacked out.

Robert Grace, a Los Angeles County Deputy District Attorney, testified regarding defendant's cooperation during a murder prosecution in 1997. Defendant had witnessed a shooting between rival Crips and Bloods gang members. He cooperated with the prosecution to identify suspects and did not recant or change his testimony. His testimony, which put his life in danger, was necessary [****15] to obtain convictions for conspiracy to commit murder against Crips gang members. Defendant himself was a member of the Bloods.

3. Prosecution rebuttal

Monty Gmur testified that at one point during the evening defendant and Pearson asked to use his music studio to "jump in" or initiate someone into a gang, but Gmur refused.

The prosecution presented evidence about an incident on a bus the night of Sigler's death. The bus driver testified he picked up three young African-American men, whom he could not identify, near Wardlow Road and Long Beach Boulevard after midnight. One of them argued

over the fare, and the three argued among themselves and a fourth African-American man about gangs. Defendant later told a detective he was involved and the dispute was over Crips, Bloods, and gang colors.

Pastor Jackson, the pastor defendant claimed molested him, testified that, after Sigler's death, he spoke to defendant and defendant's mother about the allegation. Jackson had counselled defendant as a young teenager, and defendant had occasionally stayed at Jackson's house in the spare bedroom. Jackson denied molesting defendant.

Sergeant Steve Newman of the Los Angeles County Sheriff's Department testified [****16] [***395] regarding gangs. He explained that "jumping in" was an initiation process in which a new gang member would be beaten for one to three minutes. Newman testified that a tattoo defendant bore indicated that he was **[*70]** a member of the Bloods. Although the Bloods might frown on a member testifying against the Crips, as defendant had done, it might be tolerated.

II. Jury Selection Issues

A. *Excusal for Cause of Two Prospective Jurors*

Defendant contends the trial court improperly excused two prospective jurors for cause due to their views on the death penalty in violation of his Fifth, Sixth, Eighth and Fourteenth Amendment rights.

CA(1) (1) "*HN1* A prospective juror in a capital case may be excluded for cause if his or her views on capital punishment 'would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath."' (*Wainwright v. Witt* (1985) 469 U.S. 412, 424 [83 L. Ed. 2d 841, 105 S. Ct. 844].) Prospective jurors 'may not know how they will react when faced with [**323] imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings.' (*Id.* at p. 425.) Accordingly, 'deference must be paid to the trial judge who sees and hears the juror' and must determine whether the 'prospective juror would be unable to faithfully and impartially apply the [****17] law.' (*Id.* at p. 426.) We apply this standard to determine whether excusing a prospective juror in a capital case for cause based on the prospective juror's views on capital punishment violates the defendant's right to an impartial jury under article I, section 16 of the California Constitution. [Citations.]

HN2 ""On appeal, we will uphold the trial court's ruling if it is fairly supported by the record, accepting as binding the trial court's determination as to the prospective juror's true state of mind when the prospective juror has made statements that are conflicting or ambiguous."' [Citation.] '"In many cases, a prospective juror's responses to questions on voir dire will be halting, equivocal, or even conflicting. Given the juror's probable unfamiliarity with the complexity of the law, coupled with the stress and anxiety of being a prospective juror in a capital case, such equivocation should be expected. Under such circumstances, we defer to the trial court's evaluation of a prospective juror's state of mind, and such evaluation is binding on appellate courts."'" (*People v. Souza* (2012) 54 Cal.4th 90, 122–123 [141 Cal. Rptr. 3d 419, 277 P.3d 118].)

Defendant first argues the test established in *Wainwright v. Witt, supra*, 469 U.S. 412, should be modified. However, the United States Supreme Court established that test. If it is to be modified, it is up to that court [****18] to do so, not this court. (*People v. Rices* (2017) 4 Cal.5th 49, 79–80 [226 Cal. Rptr. 3d 118, 406 P.3d 788].)

[*71]

Defendant also argues the trial court erred under the *Witt* standard. We disagree. We discuss the two prospective jurors in question.

1. *The First Prospective Juror at Issue*

David D. wrote on the jury questionnaire that he "would initially be leaning towards the defense, I have developed a mistrust of prosecutors." He "abhorre[d]" the death penalty. He was "strongly against it" and viewed it as "cruel and unusual." He stated that the "death penalty is out of step in a modern society as ours," and that it was for the purpose of "revenge" or "political" reasons. He also [***396] felt that "the killing of any human being diminishes us all and goes against the laws of nature and man," and that "only the most barbaric countries on earth still impose it."

In response to the question whether he could vote for the death penalty, he responded "no." In response to the question whether he could vote for life in prison, he responded "yes." He wrote, "I'm not sure," to the question whether he would "automatically vote for life without the possibility of parole, in every case regardless of the evidence presented to you?" In response to the question whether he would "always vote against death, [****19] no matter what the evidence might be presented or argument made during a penalty trial," he answered "no."

During voir dire, David D.'s responses were somewhat equivocal. The court asked him whether he could keep an open mind in the penalty phase; he answered, "I believe I can." When the prosecutor asked him whether he could impose the death penalty, he responded, "I'm not sure. I think I have to sit in that jury room and make that decision at the time of the deliberations." Then he expressed the opinion that the death penalty is barbaric, but he believed he could impose it "if it was necessary to follow the law, and the law said this was the only answer to this case." He could impose it only "if it was clear-cut that the law—the law made it very clear that the death penalty had to be imposed. I don't feel that I'm above the law. However, I hold these convictions very strongly. I think if I sat in the jury room and it became very clear there was only one answer, I believe I could impose the death penalty. . . ."

The trial court explained that "the law doesn't say that you have to impose the death penalty. I won't be telling you. You will be telling me. Basically, the court will be asking [****20] what is the appropriate penalty." The [**324] prosecutor added, "The court is not going to tell you it's a clear-cut in this circumstance. You vote for death in this circumstance [or] you vote for life. It is subjective. Do you believe that you can impose death?" David D. responded, "I believe—I believe I could. It would be very difficult for me. I would have to [*72] have almost everyone on the jury trying to convince me that it would be essential or necessary to impose death."

Defendant's attorney explained to David D. that neither the court nor the law would ever require a death sentence and asked whether he could vote for the death penalty. The juror responded, "I'm trying to figure out. This is a huge question. Can I have a couple days to think about it?" He was told no. Later, he said, "If the law states one thing I would feel compelled to follow the law." When the court reiterated that the law will never compel a death verdict, he said he could vote for the death penalty "if the other jurors were able to convince me to vote for the death penalty, I would do it, yes."

Later, when defense counsel asked whether he could "come to a conclusion, after hearing the evidence in the penalty phases, that [****21] this was a case which called for the death penalty," David D. responded, "I could, yes."

The prosecutor challenged David D. for cause. The court granted the challenge: "I sort of have a two-fold problem with this juror. One is based on his answers. At least initially, it certainly appeared that his views would prevent or substantially impair his performance as a juror, in accordance with the law. So it would seem at the outset, that he probably could not impose the death penalty no matter the circumstances. The second problem that I have, if he was a juror and the jury did impose death, I'm not sure that that verdict [***397] would be worth much because he told us repeatedly if it comes back with the death verdict that means 11 people voted for death and so did he. So I don't think he will be helpful or useful to us in this case. So I'm going to grant the People's challenge for cause."

The record supports this ruling. The court reasonably found that the juror's views in opposition of the death penalty would "prevent or substantially impair" his performance as a juror in defendant's case.

Defendant argues that David D. stated numerous times that he could follow the law and vote for death. But he [****22] also made clear that he could impose the death penalty only if the law compelled him to do so, even when the attorneys and the court repeatedly explained to him that the law would never require a verdict of death. (See *People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, 402 [178 Cal. Rptr. 3d 185, 334 P.3d 573] [trial court properly dismissed a potential juror based partially on her statement that she would vote for the death penalty only if the law required her to do so].) Yet when the juror seemed to understand the law correctly, he was unsure if he could impose the death penalty, stating, "I believe—I believe I could. It would be very difficult for me."

In addition, David D. stated several times that he would only vote for death if the other jurors were able to convince him that death was the appropriate **[*73]** outcome. When the court stated that a death verdict would not be "worth much," it appeared to mean that had David D. been on the jury, a death verdict would not have reflected a unanimous decision to impose death, but rather an 11 to 1 vote if David D. voted for death only because he felt pressured to do so.

The record supports the court's ruling excusing this juror due to his views on the death penalty.

2. *The Second Prospective Juror at Issue*

With respect to the death penalty, Kirk F. [****23] stated on the questionnaire that it was a "tough moral decision." He stated that while when he was "younger [he] was for the death penalty, as [he] grew older [he was] more unsure." He went on to state that he felt the death penalty is used "too seldom." Nevertheless, he stated that while he supported the death penalty, he "may not be able to make the final decision for the penalty." He wrote that "taking of another person's life, based on judgment, is difficult from my religious experiences and social awareness." He also indicated that he could not set aside his religious beliefs, explaining that he [**325] would "try to set aside beliefs but [he could not] say for certain [he would] be able to."

When asked if he could, in the appropriate case, "reject[] life in prison without the possibility of parole and vot[e] for the death penalty," he said "no," but explained that he "would need to see the details and the level of involvement as compared to the others." He also indicated that he would not automatically vote for either the death penalty or life without the possibility of parole.

During voir dire, Kirk F. initially stated that he would "try to" keep an open mind and decide between the two penalties. [****24] He explained: "Of what I've seen of the case so far, I feel strongly more about the death penalty ... ." Nevertheless, when the court asked whether he would be able to keep an open mind because he "hadn't firmly fixed in [his] mind what the penalties would be ... because [he] hadn't heard ... the evidence," he replied that yes, he would be able to do so.

His answers to questions the attorneys posed were more equivocal. When defendant's [***398] attorney asked whether he could vote for death if this was the appropriate case in which to do so, he replied, "Right." But later he indicated that his religious upbringing might interfere with his ability to do so. "I don't know what will happen when I actually try to make the decision, whether I'll just look at what is there or my personal beliefs will—." When defense counsel interrupted to ask what those beliefs were, he mentioned his Lutheran **[*74]** upbringing and said, "I guess it's kind of uncertain for me. I don't know, exactly, where I stand." He said he had beliefs about "taking someone else's life or making that decision to take another person's life."

When Kirk F. indicated that his hesitancy to vote for the death penalty would be due to lingering [****25] doubt about defendant's guilt, defendant's attorney told him that "this case isn't like that. ... There is going to be physical evidence, DNA evidence, confessions ... coming out of the mouth of my client as to what he did, and about his involvement. This is not going to be that kind of case where you go, oh, maybe the witness was lying and maybe really he wasn't there, or that kind of thing. ... So try to think of it in removing any doubt about the actual guilt, now we're just talking strictly about the penalty. With that removed and just thinking about the

penalty, would you be able to make a decision considering death or life?" Kirk F. replied, "Yes. If I was comfortable with that, yes."

On questioning by the prosecutor, Kirk F. said the Lutheran faith is against imposing the death penalty. He could not say for certain that he could set aside his personal beliefs.

The court excused Kirk F., stating, "It would appear to me that the juror's views on capital punishment would prevent or substantially impair the performance of his duties if he was a juror, in accordance with the law. So we'll excuse that juror."

This record also supports this ruling. While his negative views toward [****26] the death penalty were less clear than those of David D., he was unable or unwilling to state unequivocally that he would be able to set aside his personal beliefs and vote for the death penalty in an appropriate case. He gave conflicting answers with respect to his feelings about the death penalty. While he believed it was not imposed enough, he could never say whether he personally could vote for death. He stated he was not religious, but also that he felt he could not set aside his Lutheran faith, which he believed was against the death penalty. All of this supported the court's finding of substantial impairment.

B. *Prosecutor's Use of Peremptory Challenges*

Defendant, who is African-American, contends the prosecutor improperly used peremptory challenges to excuse African-Americans due to their race in violation of *Batson v. Kentucky* (1986) 476 U.S. 79 [90 L. Ed. 2d 69, 106 S. Ct. 1712] and *People v. Wheeler* (1978) 22 Cal.3d 258 [148 Cal. Rptr. 890, 583 P.2d 748].

[*75]

1. *Procedural Background*

The prosecutor exercised five peremptory challenges during selection of the original 12 jurors, one to excuse Frank G., the only [**326] African-American who was available during that part of jury selection. She exercised all four of her peremptory challenges while picking alternates, two to excuse Darin B. and Marion H., the first two African-Americans [****27] who became available during that part of jury selection. The prosecutor twice passed with Marion H. in the box, then challenged her after the defense exercised two additional challenges. After both sides exhausted their [***399] peremptory challenges for alternates, an African-American was seated as the fourth and final alternate.

After the alternates were selected, defendant objected that the prosecutor had exercised her challenges against African-Americans for reasons of group bias. He noted that the prosecutor had challenged all three African-Americans that she could have challenged. The prosecutor argued that defendant had not established a prima facie case, but before the court ruled on the matter, she volunteered to give her reasons for the challenges. After she gave her reasons as to all three jurors, the court asked defense counsel, "Did you want to respond?" Defense counsel answered, "No."

The court then denied the motion. "The court doesn't believe that there is sufficient showing to meet the prima facie finding. Even if the court had reached that point, the prosecution has explained race neutral reasons for excusing the jurors. And, naturally, the explanation doesn't have to be one [****28] that the court would do, if the court was still a lawyer. But the only one that was kind of out of the ordinary for the court, was as to the alternate, and I'm not even sure if there has ever been a case that addresses how *Wheeler* would apply to alternates. It's unlikely that we'll use any of the alternates in this case, and even more unlikely that we'll get to alternate No. 3. But, nonetheless, just because of the fact when I was a lawyer, just because I might not have done that, doesn't mean that the reason is not sufficient pursuant to *Wheeler*. So the *Wheeler* motion is denied."

2. *Applicable Legal Principles*

CA(2)↑ **(2)** "*HN3*↑ The United States and California Constitutions prohibit exercising peremptory challenges based on race. When a defendant alleges discriminatory use of peremptory challenges, the defendant must first make a prima facie showing of impermissible challenges. If the trial court finds a prima facie case, the prosecutor must then state nondiscriminatory reasons for the challenges. At that point, the trial court must determine whether the reasons are credible and whether the defendant has shown purposeful discrimination under all of the relevant circumstances. The defendant has the ultimate [****29] **[*76]** burden of persuasion." (*People v. Melendez* (2016) 2 Cal.5th 1, 14 [211 Cal. Rptr. 3d 49, 384 P.3d 1202].) "The 'Constitution forbids striking even a single prospective juror for a discriminatory purpose.'" (*Foster v. Chatman* (2016) 578 U.S. ___, ___ [195 L. Ed. 2d 1, 136 S. Ct. 1737, 1747], quoting *Snyder v. Louisiana* (2008) 552 U.S. 472, 478 [170 L. Ed. 2d 175, 128 S. Ct. 1203].)

"At the third step of the *Batson/Wheeler* analysis, 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."' [Citation.]" (*People v. Gutierrez* (2017) 2 Cal.5th 1150, 1168 [218 Cal. Rptr. 3d 289, 395 P.3d 186].)

HN4↑ Here, the court found no prima facie case, but only after the prosecutor had stated her reasons for the challenges. In this situation, "we infer an 'implied prima facie finding' of discrimination and proceed directly to review of the ultimate question of purposeful discrimination." (*People v. Scott* (2015) 61 Cal.4th 363, 387, fn. 1 [188 Cal. Rptr. 3d 328, 349 P.3d 1028], quoting *People v. Arias* (1996) 13 Cal.4th 92, 135 [51 Cal. Rptr. 2d 770, 913 P.2d 980].) Accordingly, "we must determine whether the trial court correctly ruled that the defense did not demonstrate discriminatory [***400] purpose at the third stage. *HN5*↑ The prosecutor's justification does not have to support a challenge for cause, and even a trivial reason, if genuine and race neutral, is sufficient. The inquiry is focused [**327] on whether the proffered neutral reasons [****30] are subjectively *genuine*, not on how objectively reasonable they are. The reasons need only be sincere and nondiscriminatory. *HN6*↑ We review the trial court's determination with restraint, presume the prosecutor has exercised the challenges in a constitutional manner, and defer to the trial court's ability to distinguish genuine reasons from sham excuses." (*People v. Melendez*, *supra*, 2 Cal.5th at pp. 14–15.)

Reviewing the trial court's determination with restraint does not, however, mean abdication. "'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.' [Citation.] '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.' [Citation.] However, we also have stated that a trial court is not required 'to make explicit and **[*77]** detailed [****31] 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.'" (*People v. Williams* (2013) 56 Cal.4th 630, 653 [156 Cal. Rptr. 3d 214, 299 P.3d 1185].)

CA(3)↑ **(3)** *HN7*↑ "Some neutral reasons for a challenge are sufficiently self-evident, if honestly held, such that they require little additional explication. ... Moreover, a peremptory challenge may be based on a broad range of factors indicative of juror partiality, even those which are '"apparently trivial"' or '"highly speculative."' [Citation.] Yet when it is not self-evident why an advocate would harbor a concern, the question of whether a neutral explanation is genuine and made in good faith becomes more pressing. That is particularly so when, as here, an advocate uses a considerable number of challenges to exclude a large proportion of members of a cognizable group." (*People v. Gutierrez*, *supra*, 2 Cal.5th at p. 1171.)

"At this stage, a defendant may engage in 'comparative juror analysis'; that is, may compare the responses of the challenged jurors with those of similar unchallenged jurors who were not members of the challenged jurors' racial group. Such analysis is not necessarily dispositive, but it is one form of relevant circumstantial evidence. *HN8*↑ When comparative juror arguments [****32] are made for the first time on appeal, ... the prosecutor was not asked to explain, and therefore generally did not explain, the reasons for not challenging other jurors. In that situation, the reviewing court must keep in mind that exploring the question at trial might have shown that the jurors were not really comparable. Accordingly, we consider such evidence in light of the deference due to the trial court's ultimate finding of no discriminatory purpose." (*People v. Melendez*, *supra*, 2 Cal.5th at p. 15.) "The individuals compared need not be identical in every respect aside from ethnicity; 'A *per se* rule that a defendant cannot win a *Batson* claim unless there is an exactly identical white juror would leave *Batson* inoperable; potential jurors are not products of a set of cookie [***401] cutters.'" (*People v. Gutierrez*, *supra*, 2 Cal.5th at p. 1173, quoting *Miller-El v. Dretke* (2005) 545 U.S. 231, 247, fn. 6 [162 L. Ed. 2d 196, 125 S. Ct. 2317].) "[B]ut they must be materially similar in the respects significant to the prosecutor's stated basis for the challenge." (*People v. DeHoyos* (2013) 57 Cal.4th 79, 107 [158 Cal. Rptr. 3d 297, 303 P.3d 1].)

In this case, two of the three prospective jurors at issue could only have been selected as alternates. The trial court stated that it would call the alternates onto the main panel, if needed, in the order they were seated. During the trial, only one alternate was called to serve on the main panel. Neither of [****33] the prospective jurors at issue would have been in the first seat, and thus neither would have served as an actual juror. Accordingly, any error as to those two jurors [**328] would have been harmless. (*People v. Mills* (2010) 48 **[*78]** Cal.4th 158, 182 [106 Cal. Rptr. 3d 153, 226 P.3d 276].) But that does not mean the prosecutor's reasons for challenging them are irrelevant. Those reasons, if unsupported, weak, or implausible, may "be considered part of an overall and deliberate plan to remove all African-Americans from the jury in violation of [the defendant's] constitutional rights." (*Ibid.*)

For this reason, although we will focus on the validity of the prosecutor's excusal of Frank G., we will also examine the prosecutor's excusal of the two other jurors for whatever light it may shed on the validity of her reasons for excusing Frank G.

3. *Application to This Case*

For two reasons, the prosecutor's use of peremptory challenges warrants close scrutiny. First, although the numbers are small, she excused every African-American prospective juror she could have excused—one while selecting the main panel and two while selecting the alternates. An African-American was ultimately selected as an alternate, but that occurred only after both parties had exhausted their peremptory challenges. [****34] Second, this case had definite racial overtones. Defendant is African-American; the victim was White. Defendant told the police that she had yelled a racial slur at him and his cohorts, triggering the incident.

CA(4)↑ **(4)** These circumstances are not dispositive. *HN9*↑ "[A] prosecutor, like any party, may exercise a peremptory challenge against anyone, including members of cognizable groups. All that is prohibited is challenging a person *because* the person is a member of that group." (*People v. Cleveland* (2004) 32 Cal.4th 704, 733 [11 Cal. Rptr. 3d 236, 86 P.3d 302].) But the circumstances are troubling. The fact the prosecutor excused all possible African-Americans is a "probative circumstance[], although [it is] not dispositive, especially considering the small numbers involved." (*People v. Jones* (2011) 51 Cal.4th 346, 362 [121 Cal. Rptr. 3d 1, 247 P.3d 82]; see *People v. Gutierrez*, *supra*, 2 Cal.5th at p. 1171.) The racial overtones, although again alone not dispositive, "raise[] heightened concerns about whether the prosecutor's challenge was racially motivated." (*People v. O'Malley* (2016) 62 Cal.4th 944, 980 [199 Cal. Rptr. 3d 1, 365 P.3d 790].)

We will examine the prosecutor's excusal of the prospective jurors at issue with these and all other relevant circumstances in mind.

Defendant and the dissent (dis. opn., *post*, at pp. 111–1126) argue that we should not defer to the trial court's finding because the court did not make "'a sincere and reasoned attempt to evaluate'" the [***402] prosecutor's [****35] reasons. (*People v. Williams*, *supra*, 56 Cal.4th

at p. 653.) The court essentially made a **[*79]** "'global finding'" that the reasons were sufficient. (*Ibid.*) But, as we will discuss, the reasons were generally supported by the record, inherently plausible, and self-evident. Some, at least, were strong and have a firm basis in accepted trial strategy. When the trial court invited defense counsel to comment, counsel declined, thus offering nothing to challenge the credibility of the prosecutor's reasons. "Under the circumstances, the court was not required to do more than what it did." (*People v. Jones*, *supra*, 51 Cal.4th at p. 361.) Moreover, as we explain, even if we did not review the trial court's ruling deferentially, no reason appears for this court to doubt the genuineness of the prosecutor's stated reasons.

a. *Frank G.*

The prosecutor stated six reasons for excusing Frank G.: (1) "He indicated on question no. 42, 'Police are not always truthful and tend to exaggerate' "; (2) "He speaks to attorneys daily, and knows 50 to 60 civil or criminal lawyers"; (3) "He did not want to sit on this case"; (4) "He was arrested in 1992 by the Los Angeles Sheriff's Department"; (5) During questioning, "he refused to smile at me, although he smiled for the defense"; and (6) "He also indicated [****36] that LWOP [life without the possibility of parole] was worse for a defendant." She said that, "In combination," these were the reasons she "kicked him."

With one discrepancy, the record supports each of these reasons except, of course, the [**329] record does not record the juror's demeanor. Collectively, these reasons are inherently plausible and reasonable and have a basis in accepted trial strategy. Considered in combination, they provide ample race-neutral grounds for the challenge. We discuss each reason in the order the prosecutor gave.

Regarding the juror's answer to question No. 42 on the jury questionnaire, there is a discrepancy. The juror in fact wrote, "I believe prosecutors are not always truthful and tend to exaggerate." Thus, the prosecutor erroneously said this belief concerned "police" rather than "prosecutors." Because the discrepancy was not raised at trial, we do not know whether the prosecutor simply misspoke—saying police when she meant prosecutors—or misremembered—police and prosecutors are closely connected in this context. (Eleven days had elapsed between the individual questioning of this juror and the prosecutor's explanation, and the attorneys had many long questionnaires [****37] to review.) But no reason exists to doubt the prosecutor's sincerity or suspect she simply made it up. She correctly quoted the rest of the juror's answer, and it provides a strong reason for excusing the juror. There is "no *Batson* violation when the **[*80]** prosecutor excused a prospective juror for a factually erroneous but race-neutral reason." (*People v. O'Malley*, *supra*, 62 Cal.4th at p. 980 [mistaken recollection that a juror had spoken of prejudice did not establish discriminatory intent].)

CA(5) **(5)** In *People v. Silva* (2001) 25 Cal.4th 345 [106 Cal. Rptr. 2d 93, 21 P.3d 769], the prosecutor made completely unsupported statements that a juror "would be reluctant to return a death verdict or that he was 'an extremely aggressive person.'" (*Id.* at p. 385.) We found this circumstance critical and reversed the trial court's denial of the defendant's motion. ***HN10*** "Although an isolated mistake or misstatement that the trial court recognizes as such is generally insufficient to demonstrate discriminatory intent [citation], [***403] 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]." (*Id.* at p. 385.) The slight discrepancy here is like the prosecutor's error in *People v. O'Malley*, *supra*, 62 Cal.4th 944, not the one in *Silva [****38]*.

It is true that the trial court did not comment on this one-word mistake. Neither did defense counsel. It is unrealistic to expect the trial court to discover the mistake under trial conditions when it was not brought to the court's attention. Many jurors were examined over several days, and hundreds of prospective jurors filled out the 52-page questionnaire containing 237 questions.

When the trial court invited defense counsel to respond to the prosecutor's statement of reasons, counsel declined. This failure to respond is significant. In *Uttecht v. Brown* (2007) 551 U.S. 1 [167 L. Ed. 2d 1014, 127 S. Ct. 2218], the high court reviewed a claim that the trial court erred in excusing a juror for cause. The defendant had not objected to the excusal.

Although the failure to object did not forfeit the claim, the court found it significant to its review of the court's ruling. It noted that "diligent judges often must [rely] upon both parties' counsel to explain why" the juror was not subject to challenge for cause. (*Id.* at p. 18.) "By failing to object, the defense did not just deny the conscientious trial judge an opportunity to explain his judgment or correct any error. It also deprived reviewing courts of further factual findings that would have helped to explain the [****39] trial court's decision." (*Ibid.*; see *People v. McKinnon* (2011) 52 Cal.4th 610, 644 [130 Cal. Rptr. 3d 590, 259 P.3d 1186].)

This concern applies here. By failing to respond when given the chance, counsel deprived the trial court of the opportunity to consider arguments in an adversarial context. Judges necessarily rely on the arguments of counsel. (*Uttecht v. Brown, supra*, 551 U.S. at p. 18.) The failure also denied the prosecutor the opportunity to defend herself against defendant's claims that **[*81]** her reasons were pretextual, thus further denying this court the opportunity to consider any such defense. If defense counsel had noted that the juror had referred to prosecutors [**330] rather than police, the prosecutor could have explained herself, and the court could have made a reasoned ruling that we could review.***HN11*** The defendant has the ultimate burden of persuasion regarding the prosecutor's motivation. (*People v. O'Malley, supra*, 62 Cal.4th at p. 974.) Under the circumstances, we find defendant did not meet that burden.

Moreover, the one-word discrepancy was minor. Indeed, a precisely accurate statement would, if anything, have provided an even stronger reason for the excusal. The fact that the juror distrusted prosecutors, and not just some of the witnesses, might reasonably be of even greater concern to a prosecutor. As defendant notes, the juror said the same [****40] thing about criminal defense attorneys. But this circumstance does not significantly reduce the strength of this reason. Prosecutors, especially, are expected, even required, to be truthful and to seek justice, not a conviction at any cost. (E.g., *Berger v. United States* (1935) 295 U.S. 78, 88 [79 L.Ed. 1314, 55 S. Ct. 629].) Moreover, they have the burden of proof beyond a reasonable doubt, unlike defense attorneys, who merely need to raise a reasonable doubt. ***HN12*** A juror who distrusts both sides of a case may well be more likely to have a reasonable [***404] doubt and thus be problematic for the prosecution. The fact that the juror distrusted *all* attorneys involved in the criminal justice system, and not just prosecutors, does not invalidate this reason. "A prospective juror's distrust of the criminal justice system is a race-neutral basis for his excusal." (*People v. Clark* (2011) 52 Cal.4th 856, 907 [131 Cal. Rptr. 3d 225, 261 P.3d 243].)

The record fully supports the prosecutor's second reason. The juror wrote on the questionnaire, "In my occupation I speak with lawyers on a daily basis regarding civil litigation and know about 50-60 civil and criminal defense attorneys." During voir dire, he explained that he supervised civil litigation for Hertz Corporation, that he was currently supervising a case in Santa Monica in which he was a possible defense [****41] witness and had "signed all of the discovery and verification responses." Such ***HN13*** a close and pervasive connection to lawyers and the judicial system is a legitimate and recognized reason for a prosecutor to exercise a peremptory challenge. (*People v. Clark, supra*, 52 Cal.4th at p. 907.) Moreover, the prosecutor might reasonably have found the juror's cynicism about prosecutors and defense attorneys even more troubling in light of his frequent professional contact with lawyers.

The record also supports the third reason. The juror stated on the questionnaire, "I would not like to sit on this jury due to the nature of the alleged crimes." When the prosecutor asked him why he did not want to be a juror in the case, he responded, "Other than it's a big decision, it's probably maybe the length of the trial." He was concerned serving as a juror might interfere **[*82]** with trial in the case he was involved with in Santa Monica. The prosecutor and court explained to him that this trial would probably end before his other trial would begin. Additionally, the court told the juror it had "a great deal of influence with that Santa Monica court." The reassurance seemed to satisfy the juror. Nevertheless, that the juror did not want to sit in the case [****42] was a legitimate race-neutral reason. In isolation, especially given the concerns we have expressed, it was also a rather weak reason. Many prospective jurors do not want to sit on a jury in a death penalty case, including some in this case the prosecutor did not challenge. Standing alone, this reason might present a situation where the "question of whether a neutral explanation is genuine and made in good faith becomes more pressing." (*People v. Gutierrez, supra*, 2 Cal.5th at p. 1171.) But it does not stand alone. It is a legitimate reason to add to the others.

The record also supports the fourth reason. The juror stated on the questionnaire that he had been arrested in 1992 by "LASD" (presumably Los Angeles Sheriff's Department) due to a "computer error by rental agency." He went to court, but the charge was dismissed. He wrote,

"I was falsely accused of stealing a rental auto because of a computer/human mistake." *HN14* A 'negative experience with law enforcement' is [**331] a valid basis for a peremptory challenge." (*People v. Melendez, supra*, 2 Cal.5th at p. 18.) As defendant notes, the juror checked boxes stating that he had been treated fairly by police and justice had been served. But he also said he felt "ambivalent" about the result; in another part of the questionnaire, he wrote [****43] that "wrongful accusations" are a major problem with the criminal justice system. Under these circumstances, it was reasonable for the prosecutor to be concerned about a prospective juror who had been falsely arrested regardless of how understanding [***405] and forgiving that juror might appear to be.

The fifth reason was based on demeanor—the juror did not smile at the prosecutor although he smiled at the defense. Obviously, the record does not reflect demeanor, and the trial court did not specifically comment on it. But defense counsel did not dispute this reason. *HN15* "[T]he prosecutor's demeanor observations, even if not explicitly confirmed by the record, are a permissible race-neutral ground for peremptory excusal, especially when they were not disputed in the trial court." (*People v. Mai* (2013) 57 Cal.4th 986, 1052 [161 Cal. Rptr. 3d 1, 305 P.3d 1175].)

Finally, as the prosecutor correctly stated, the juror said he believed life without the possibility of parole to be a worse punishment than death. He reiterated that view when the prosecutor asked him about it on voir dire. This is another legitimate race-neutral reason to exercise a peremptory challenge. (*People v. Davis* (2009) 46 Cal.4th 539, 584 [94 Cal. Rptr. 3d 322, 208 P.3d **[*83]** 78].) Standing alone, it might also be considered a weak reason, especially given the concerns we have expressed. But, [****44] in combination with the other reasons, it is legitimate.

CA(6) **(6)** Although some of the reasons, in isolation, might not be very convincing, as a whole they support the trial court's ruling. Three are especially strong: the juror's distrust of police (if the prosecutor misremembered) or prosecutors (if the prosecutor misspoke), the juror's close and daily professional relationship with lawyers and the court system, and the juror's false arrest.

CA(7) **(7)** Defendant and the dissent argue the prosecutor did not ask the juror about some of her concerns. This factor is relevant but not particularly probative. *HN16* "A party is not required to examine a prospective juror about every aspect that might cause concern before it may exercise a peremptory challenge." (*People v. Jones, supra*, 51 Cal.4th at p. 363.) The prosecutor did question the juror about some, although not all, of her concerns. Moreover, she had a lengthy and detailed questionnaire to review, and she heard questioning during voir dire by the court and defense counsel. "Under these circumstances, we place little weight on the prosecutor's failure to individually or more thoroughly question a prospective juror before exercising a peremptory challenge." (*People v. Dement* (2011) 53 Cal.4th 1, 21 [133 Cal. Rptr. 3d 496, 264 P.3d 292]; accord, *People v. Melendez, supra*, 2 Cal.5th at p. 19.)

Defendant also engages in comparative [****45] juror analysis regarding this juror. The analysis does not aid him. Some unexcused jurors shared some of the traits the prosecutor cited regarding Frank G., including not wishing to sit on the jury and believing life without the possibility of parole is worse than death. But parties with limited peremptory challenges generally cannot excuse every potential juror who has any trait that is at all problematic. They must instead excuse those they believe will be most problematic under all the circumstances. There will always be some similarities between excused jurors and nonexcused jurors. Defendant cites no unexcused juror who exhibited the cynicism about prosecutors that this juror showed, or who had been mistakenly arrested for a crime and remained ambivalent about it, or who had such close and continual professional contacts with attorneys and the court system that this juror had. Unlike jurors defendant cites, this juror did not simply have casual or occasional contact with attorneys. Although not a lawyer, he *supervised* civil litigation [***406] for a large corporation. Contrary to the views expressed in the dissent, all of these circumstances sharply distinguish this juror from others the [****46] dissent and defendant cite as supposedly similar. [**332] (Dis. opn., *post*, at pp. 113–114.)

[*84]

CA(8) **(8)** As defendant and the dissent note, in some respects, Frank G. appeared to be a fine juror for the prosecution. He was a stable family man with a responsible job, had served in the Air Force, and favored the death penalty. But *HN17* the question is not whether a prosecutor should or should not have excused a prospective juror. It is whether this prosecutor

excused him for an improper reason. The record provides no sufficient reason to so conclude or for this court to overturn the trial court's ruling regarding Frank G.

b. *Selecting the Alternate Jurors*

The prosecutor stated five reasons for challenging Darin B.: (1) "He is currently on probation for driving under the influence. ... [T]he fact that he is currently on probation, I think it's highly unusual that a prosecutor would keep somebody that's currently on probation for a criminal offense on a jury, let alone a death case"; (2) "He was also roughed up by the police, for no reason at all, according to his questionnaire"; (3) "He also feels that mental defects may alter intent, thus making death unwarranted and LWOP would suffice. That's question 219"; (4) "He [****47] also had great concerns about whether or not it was fair to make those with little money, while they were on death row, and later found not guilty--I think we talked about that with him ..."; and (5) "He's an attorney, and I don't normally keep attorneys on my panel. I think they have too many problems in the jury."

The record supports each of these reasons, they are plausible, and, collectively at least, are strong. Lawyers and those currently on probation are often excused peremptorily. The prosecutor questioned the juror about most of these concerns, although not all.

Defendant engages in comparative juror analysis, but it does not aid him. He identifies no unexcused juror who was currently on probation, a point the prosecutor stressed, or was a lawyer. Defendant cites primarily one actual juror as supposedly similar to Darin B. That juror stated on the questionnaire that he had never been a defendant in a court proceeding and left blank the question of whether he had ever been arrested. But on the question of whether he had ever visited or been inside a jail, he said "yes," and designated "self" as the person he visited and the charge as "drunk driving." From this, defendant infers [****48] the juror must have been convicted of drunk driving, and he compares the prosecutor's failure to challenge that juror with the challenge of Darin B. The questionnaire was unclear. The actual juror said he had never been a defendant and did not mention a drunk driving charge under his arrest history. But even if we assume he had once been convicted of drunk driving, there is no indication that he was currently on probation.

[*885]

The prosecutor stated three reasons for challenging Marion H.: (1) The "juror watches CSI, Crime Scene Investigation, all the time; she underlined that on her jury questionnaire. This case, as we have indicated to the court, does involve DNA, a substantial amount of DNA"; (2) "Some of the questions that I asked her just a few minutes ago concerning being a jailer, she indicated that it was dark and she didn't want to be involved with these type of people. I feel that she has some special knowledge with regards to what it would be like to be in jail, and that may play a part in her decision making process. [***407] I did not want someone ... with that frame of mind, i.e., that it's dark to be in jail, to be on this particular panel"; and (3) "She indicated that she finds [****49] it difficult to judge another," and "that she did not want to be on this panel, it would be extremely hard for her to put someone to death, and it is a sad case, on question number 231."

The record supports each of these reasons. For example, on the questionnaire, the juror indicated that her religion was very important to her; and on voir dire, in response to a question by the prosecutor, she agreed that her difficulty in judging another person was "based on religious or philosophical or moral reasons." The prosecutor also questioned this juror about some of these concerns, although, again, not all. These reasons are also plausible, although collectively probably not as strong as the reasons for the other two challenges [**333] at issue. In particular, a prosecutor can legitimately be concerned about a person whose religion is very important to her, and who finds it difficult to judge another due to religious, philosophical, or moral reasons. Defendant also engages in comparative juror analysis but, again, fails to identify any nonexcused juror who was at all similar.

Additionally, the prosecutor twice passed the alternates with Marion H. still sitting. Although this circumstance, like others, [****50] is not dispositive, it strongly suggests that her later challenge of this juror was not based on race. (*People v. Gutierrez, supra*, 2 Cal.5th at p. 1170.)

In a point not briefed by either party, the dissent finds pernicious that, in deciding how to exercise her final peremptory challenge while selecting the alternate jurors, the prosecutor questioned an African-American juror extensively, while she questioned a White juror only briefly. (Dis. opn., *post*, at pp. 121–122.) But the African-American juror, who became the fourth alternate, happened to be a particularly interesting juror for reasons entirely unrelated to her race. Among other things, she stated on the questionnaire that her husband was a "ret. Judge atty," and that she had worked in her husband's law office. She also disclosed that her "husband's cousin's wife shot & killed him." Obviously, and reasonably, interested in these answers, the prosecutor asked her a series of questions about them.

[*86]

It is true that the prosecutor questioned the White juror only briefly, mainly about her brother's past conviction. But that juror's questionnaire answers indicated little that would raise questions for a prosecutor. She had no connection to the legal profession. The dissent suggests [****51] the prosecutor should have questioned the juror about her spouse's conviction in addition to asking her about her brother's, and about a car theft. (Dis. opn., *post*, at p. 86.) But that is micromanaging. The juror said her brother's conviction would not affect her decisionmaking. Given the rest of the juror's rather unremarkable questionnaire, the prosecutor might reasonably have been satisfied with that answer. The two jurors were very different. We see nothing invidious in the different ways the prosecutor questioned them.

The prosecutor's exercise of peremptory challenges while selecting the alternates provides no reason to be skeptical of the genuineness of her reasons for excusing Frank G. The record supports the trial court's denial of defendant's *Batson/Wheeler* motion. We see no error.

III. Guilt Phase Issues

A. *Exclusion of Victim's Toxicology Report*

Defendant contends the trial court erred by excluding Sigler's postmortem [***408] toxicology report during the guilt phase. He argues that it was disputed whether Sigler had called him and his cohorts "niggers," thereby provoking them to attack her, and that the toxicology report would tend to explain why Sigler might have used a racial slur. [****52] We see no abuse of discretion.

1. *Background*

Defense counsel sought to admit Sigler's toxicology report at the guilt phase. According to the autopsy, Sigler's blood contained 0.73 micrograms of methamphetamine per milliliter and 0.22 micrograms of alcohol per milliliter. He sought to introduce the report to help make credible defendant's statement that Sigler yelled a racial slur that led to the subsequent events. Specifically, he argued the report would help explain why a small White woman would have shouted a racial slur at three African-American men late at night. Counsel also argued that the report helped to corroborate defendant's confession, including portions of the confession favorable to the defense. The prosecutor objected to the report as irrelevant on the question of guilt.

The trial court excluded the report during the guilt phase. It found that whether "she appeared to be under the influence of drugs, or alcohol, or both ... adds so little to the bolstering or corroborating of his confession, compared to the amount of time that we will spend even right here out of the **[*87]** presence of the jury, haggling over whether it should [**334] come in at the guilt phase, it's not relevant at [****53] the guilt phase, and there's just too much of a problem with having the jury consider it for guilt, which it's not relevant for us to introduce it."

Evidence regarding the level of methamphetamine and alcohol in the victim's blood was admitted by stipulation during the penalty phase, and the expert witness testified about the meaning of the numbers.

2. *Analysis*

CA(9)↑ **(9)** "*HN18*↑ No evidence is admissible except relevant evidence." (Evid. Code, § 350.) "Relevant evidence is evidence 'having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.'" (*People v. Scott* (2011) 52 Cal.4th 452, 490 [129 Cal. Rptr. 3d 91, 257 P.3d 703], quoting Evid. Code, § 210.) "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352.) "In general, the trial court is vested with wide discretion in determining relevance and in weighing the prejudicial effect of proffered evidence against its probative value. Its rulings will not be overturned on appeal absent an abuse of that discretion." (*People v. Edwards* (1991) 54 Cal.3d 787, 817 [1 Cal. Rptr. 2d 696, 819 P.2d 436].)

Here, the prosecution never argued that Sigler did [****54] not yell a racial slur; indeed, she said during her opening statement that the jury would "hear testimony or evidence that [Sigler] made some racial remarks, and that the defendant and his companions approached her as a result of these." This left defense counsel free to argue that the attack was provoked by the racial epithets—as, in fact, he did. Even assuming the report had some relevance at the guilt phase, the trial court acted within its discretion in excluding it. Under the circumstances, the court could reasonably conclude that whether Sigler used a racial slur had little probative value regarding guilt and risked sidetracking the trial. The evidence was more relevant regarding penalty. [***409] It was admitted at the penalty phase. We see no abuse of discretion in the court's admitting the evidence at the penalty phase but not the guilt phase.

B. *Medical Examiner's Testimony*

Defendant contends the trial court erred when it allowed Dr. Raffi Djabourian, a deputy medical examiner, to testify about aspects of Sigler's autopsy that he did not himself perform. He argues that this testimony was inadmissible hearsay, and violated his Sixth Amendment right to confront witnesses **[*88]** under *Crawford v. Washington* (2004) 541 U.S. 36 [158 L. Ed. 2d 177, 124 S. Ct. 1354] (*Crawford*) and subsequent [****55] cases. We see no error.

Dr. Djabourian testified that during the autopsy he removed a "splinter-type" object that was "well imbedded" in Sigler's vaginal tissue. That splinter was marked as exhibit 8. Also included in exhibit 8 was another, larger splinter, but the witness could not say where that splinter was found or whether he recovered it himself. When asked if due to the "location of the splinters, way inside the vaginal area, would that have been painful?" Djabourian replied, "Yes." He also testified that, in his opinion, the injuries to her vagina occurred before the fatal injuries to her head.

Preliminarily, the Attorney General urges us to find defendant's claim forfeited for failure to object at trial. "But because defendant's trial occurred before the decision in *Crawford*, he has not forfeited his *Crawford* challenge." (*People v. Clark* (2016) 63 Cal.4th 522, 563 [203 Cal. Rptr. 3d 407, 372 P.3d 811].) We thus proceed to the merits.

We have explained that, under *Crawford, supra*, 541 U.S. 36, "[t]he prosecution may not use '[t]estimonial statements' of a witness who does not appear at trial, unless the witness is unavailable to testify and the defendant had a prior opportunity for cross-examination." (*People v. Dungo* (2012) 55 Cal.4th 608, 616 [147 Cal. Rptr. 3d 527, 286 P.3d 442].)

We need not decide whether anything in exhibit 8 was testimonial because Dr. Djabourian never gave [****56] any specific testimony [*335] concerning the second splinter. He testified

are not required.'" (*Sánchez*, at p. 487.) "Intercase proportionality review is not required." (*Id.* at p. 488.) ***HN44*** "California's use of the death penalty does not violate international law." (*Ibid.*) The court need not instruct the jury that the prosecutor has the burden of persuasion regarding the existence of aggravating factors, the weight of aggravating versus mitigating factors, and the appropriateness of a death judgment. (*People v. Mendoza* (2016) 62 Cal.4th 856, 916 [198 Cal. Rptr. 3d 445, 365 P.3d 297].) There is no presumption of life. (*People v. Parker* (2017) 2 Cal.5th 1184, 1233 [218 Cal. Rptr. 3d 315, 395 P.3d 208].)

"Finally, the cumulative impact of these [****95] purported deficiencies in California's death penalty scheme does not render the penalty unconstitutional. We have rejected each of [defendant's] challenges to the death penalty statute, and these challenges are no more persuasive when considered together." (*People v. Simon* (2016) 1 Cal.5th 98, 150 [204 Cal. Rptr. 3d 380, 375 P.3d 1].) "California's capital sentencing scheme as a whole provides adequate safeguards against the imposition of arbitrary or unreliable death judgments." (*People v. Williams* (2008) 43 Cal.4th 584, 648 [75 Cal. Rptr. 3d 691, 181 P.3d 1035]; accord, *People v. Johnson* (2016) 62 Cal.4th 600, 658 [197 Cal. Rptr. 3d 461, 364 P.3d 359].)

V. CONCLUSION

We affirm the judgment.

Cantil-Sakauye, C. J., Corrigan, J., Cuéllar, J., Kruger, J., and Baker, J., [*] concurred.

Dissent by: Liu

Dissent

LIU, J., Dissenting.—Defendant Warren Justin Hardy, a black man, was convicted and sentenced to death for raping and murdering Penny Sigler, a white woman. During jury selection, the prosecutor used peremptory strikes to remove every black juror she could have removed. She struck the only black prospective juror from the main panel, Frank G. (Juror No. G-2041), **[*108]** and the first two black prospective jurors from the alternate panel, Darin B. (Juror No. B-3747) and Marion H. (Juror No. H-4826). One black juror, Juror No. S-6169, was eventually seated as the fourth and final alternate after both parties had exhausted their peremptory strikes. (I refer to prospective jurors [****96] by name after initially identifying their juror number. I refer to seated jurors by number only; their names are under seal in the record.)

[**348] After jury selection, Hardy brought a motion under *Batson v. Kentucky* (1986) 476 U.S. 79 [90 L. Ed. 2d 69, 106 S. Ct. 1712] (*Batson*) and *People v. Wheeler* (1978) 22 Cal.3d 258 [148 Cal. Rptr. 890, 583 P.2d 748] (*Wheeler*). [***425] The prosecutor gave six reasons for striking Frank G.; the trial court accepted the reasons without elaboration. Today's opinion affirms the trial court's ruling, finding three reasons "especially strong" and three reasons "weak" or "not ... very convincing" but "legitimate" when considered "in combination with the other reasons." (Maj. opn., *ante*, at pp. 82–83.)

I respectfully disagree. In light of all of the relevant circumstances—including the answers given by Frank G. and other jurors on their questionnaires and during voir dire, the fact that the prosecutor did not question Frank G. about several concerns she identified as reasons for striking him, and her apparent lack of concern about nonblack jurors with similar traits—I cannot affirm the trial court's ruling, which is devoid of any reasoned evaluation of the prosecutor's reasons for the strike. "'[T]he Constitution forbids striking even a single prospective juror for a discriminatory purpose.'" (*Snyder v. Louisiana* (2008) 552 U.S. 472, 478 [170 L. Ed. 2d 175, 128 S. Ct. 1203] (*Snyder*).) The standard is whether [****97] it is "more likely than not that the challenge was improperly motivated." (*Johnson v. California* (2005) 545

U.S. 162, 170 [162 L. Ed. 2d 129, 125 S. Ct. 2410]; see *People v. Gutierrez* (2017) 2 Cal.5th 1150, 1158 [218 Cal. Rptr. 3d 289, 395 P.3d 186] (*Gutierrez*).) That standard has been met here, and because the error undermines the fairness of the trial, the judgment must be reversed.

I.

Today's opinion acknowledges two reasons why "the prosecutor's use of peremptory challenges warrants close scrutiny. First, although the numbers are small, she excused every African-American prospective juror she could have excused—one while selecting the main panel and two while selecting the alternates. ... Second, this case had definite racial overtones. Defendant is African-American; the victim was White. Defendant told the police that she had yelled a racial slur at him and his cohorts, triggering the incident." (Maj. opn., *ante*, at p. 78.) These circumstances are indeed "troubling" and "raise[] heightened concerns." (*Ibid.*)

[*109]

I would add three further observations as context for evaluating the *Batson* issue here. First, there is reason to believe Frank G. "should have been an ideal juror in the eyes of a prosecutor seeking a death sentence." (*Miller-El v. Dretke* (2005) 545 U.S. 231, 247 [162 L. Ed. 2d 196, 125 S. Ct. 2317] (*Miller-El*).) At the time of Hardy's trial, Frank G. was a 68-year-old married homeowner in South Central Los Angeles with [****98] five grown children and four grandchildren. He previously served 10 years in Air Force intelligence, achieving the rank of staff sergeant. He held a supervisory position at the Hertz car rental company, evaluating liability claims and assisting in civil litigation. On his juror questionnaire, he wrote that he "enjoy[s] his present position and take[s] pleasure in resolving difficult cases."

Frank G. indicated on the questionnaire that he "favor[ed]" the death penalty—a view that he said had not changed over time—and he felt it was used "too seldom." He believed California should have the death penalty because "certain crimes deserve" such punishment. He did not report any "social, philosophical, or religious convictions" that would prevent him from voting to impose the death penalty, and he was not a member of any organization that opposed capital punishment. He wrote that he could see himself personally voting for [***426] death for "heinous crimes" and that he was "not likely" to take a defendant's background or childhood experiences into consideration when doing so. When defense counsel asked Frank G. to expand on this answer, he said it would be "difficult" for him to consider defendant's background because [****99] "everybody has their own choices in life," but he ultimately said he could consider such evidence.

The year before Hardy's trial, Frank G. had been the victim of a home burglary. Although the person responsible was never [**349] identified or arrested, he said he was "satisfied" with the police's conduct in that case. Ten years before Hardy's trial, he had been falsely arrested for car theft due to a "computer error by [the] rental agency." The case was dismissed, and he wrote on the questionnaire that he had been "treated fairly by police" and that "justice [was] served." Asked his views on what should be done about crime, Frank G. wrote, "Hire more law enforcement" and "Enforce, strongly, current laws." In his view, the major crime problem in Los Angeles was "gang activity" that led to "too many innocent persons [being] harmed." When asked for his "thoughts about how childhood experiences affect a person's development in relationship to committing criminal acts," he wrote, "I don't believe in too many mitigating factors. People have choices." He checked "no" when asked whether he believed "a person's upbringing may relieve that individual from responsibility for committing violent or criminal [****100] acts." Overall, he thought the criminal justice system was "slow but in most cases fair." He also wrote, "I sincerely respect judges."

[*110]

When asked about prejudice and biases, Frank G. wrote, "I experienced racial prejudice while in the Air Force stationed in San Antonio, Texas in 1952," and "I am biased against drug & alcohol abusers and gang activity." He checked "yes" when asked if he "believe[d] that a white/caucasian person can be the victim of a hate crime." When asked if there were "any

reasons [he] might be biased or prejudiced either for, or against, Black Americans," he wrote, "No."

Frank G. had never served on a jury before. He wrote that "[I]f selected, [he] will serve," that "[I]t is my duty as [a] citizen to serve," and that he expected to be "fair, impartial & listen to evidence" as a juror. When asked "[w]hat is it about yourself that makes you feel you can be an impartial juror," he wrote, "I am a good listener and observer." When asked "whether your attitudes on our criminal justice system are such that you would be leaning towards the prosecution or the defense stance before hearing both sides," he wrote, "I would not lean one way or the other until all evidence is heard."

The prosecutor asked [****101] very few questions of Frank G. during voir dire. In addition to the topics discussed further below, the prosecutor asked him "what [his five kids] do for a living." Consistent with his questionnaire, Frank G. said they worked as a cement mason, a construction foreman, a human resource director, an owner of a maintenance business, and an accounting director, respectively.

Second, the prosecutor gave six reasons for striking Frank G. We recently said that when confronted with this "'laundry list' approach (*Foster v. Chatman* (2016) 578 U.S. ___, ___ [195 L. Ed. 2d 1, 136 S. Ct. 1737, 1748])," courts must be cognizant that "[a] prosecutor's positing of multiple reasons, some of which, upon examination, prove implausible or unsupported by the facts, can in some circumstances fatally impair the prosecutor's credibility. (See *U.S. v. Chinchilla* (9th Cir. 1989) 874 F.2d 695, 699 [where two bases for the challenges were acceptable and two were [***427] not, appellate court holds motion under *Batson* should have been granted: 'the fact that two of the four proffered reasons do not hold up under judicial scrutiny militates against [the supported reasons'] sufficiency'].)" (***People v. Smith* (2018) 4 Cal.5th 1134, 1157–1158 [233 Cal.Rptr.3d 1, 417 P.3d 662]** (*Smith*).) The level of suspicion here is further heightened by the fact that the prosecutor did not ask Frank G. [****102] or various seated jurors about any of the concerns that today's opinion finds especially strong. (See *Miller-El*, *supra*, 545 U.S. at p. 246 ["[T]he prosecution asked nothing further about the [purported reason], as it probably would have done if the [reason] had actually mattered."]; *id.* at p. 250, fn. 8 ["the failure to ask undermines the persuasiveness of the claimed concern"]; *Gutierrez*, *supra*, 2 Cal.5th at p. 1170 [lack of inquiry by the **[*111]** prosecutor "raises a question as to how interested he was in meaningfully examining" the issue proffered as a reason for a contested strike].)

Third, in ruling on Hardy's *Batson* motion, the trial court made a "'"global finding"'" with no reasoned analysis of any of the prosecutor's [**350] stated concerns. (Maj. opn., *ante*, at p. 79.) "A trial court's conclusions are entitled to deference only when the court made a 'sincere and reasoned effort to evaluate the nondiscriminatory justifications offered.'" (*Gutierrez*, *supra*, 2 Cal.5th at p. 1159.) In *Gutierrez*, we concluded that "[b]ecause the prosecutor's reason for [a contested] strike was not self-evident and the record is void of any explication from the court, we cannot find under these circumstances that the court made a *reasoned* attempt to determine whether the justification was a credible one." (*Id.* at p. 1172.) Here, the stated reasons are also not self-evident; [****103] by the court's own admission, at least two of the reasons are "weak," and the demeanor-based reason finds no support in the record. (Maj. opn., *ante*, at pp. 82–83.) Further, the fact that the trial court did not comment on the discrepancy between the prosecutor's first reason and Frank G.'s answer on the questionnaire (*id.* at p. 79) suggests that the trial court had not carefully examined the stated reasons when it ruled. We cannot apply a deferential standard of review in this case. (See *Gutierrez*, at pp. 1171–1172; *People v. Silva* (2001) 25 Cal.4th 345, 385–386 [106 Cal. Rptr. 2d 93, 21 P.3d 769]; *People v. Fuentes* (1991) 54 Cal.3d 707, 716–717, fn. 5, 717 [286 Cal. Rptr. 792, 818 P.2d 75]; **cf. *Smith*, *supra*, 4 Cal.5th at p. 1158** [deferring to trial court's ruling on multiple reasons stated by the prosecutor where "[t]he court engaged actively in the third[-]stage analysis, questioning counsel closely on certain points"].) We must undertake our own independent review of the record.

II.