APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHARLES STEVENS, *Petitioner-Appellant*, v. RONALD DAVIS, Warden, San Quentin State Prison, *Respondent-Appellee.*	No. 19-99004 D.C. No. 3:09-cv-00137-WHA OPINION

Appeal from the United States District Court
for the Northern District of California
William Alsup, District Judge, Presiding

Argued and Submitted July 19, 2021
Pasadena, California

Filed February 14, 2022

Before: Sandra S. Ikuta, Paul J. Watford, and Daniel P. Collins, Circuit Judges.

Opinion by Judge Ikuta

OPINION

IKUTA, Circuit Judge:

A California jury convicted Charles Stevens of four murders and six attempted murders and sentenced him to death. Stevens claims that the prosecutor's decision to strike black prospective jurors constituted purposeful discrimination on the basis of race, in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986). The California Supreme Court rejected these claims on direct appeal. *People v. Stevens*, 41 Cal. 4th 182 (2007). Reviewing the California Supreme Court's determination under 28 U.S.C. § 2254, we affirm the judgment of the district court denying Stevens's habeas claims.

I

A

In the four months between April and July 1989, Stevens randomly shot at people on or near Interstate 580 in Oakland. This shooting spree left four people dead and six people injured. *Stevens*, 41 Cal. 4th at 187.[1]

His final attacks took place in the early morning hours of July 27, 1989. At that time, Rodney Stokes was driving home from work on Interstate 580. *Id.* Stevens pulled up alongside his vehicle, and Stokes lowered his passenger window to see

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[1] During his shooting spree, Stevens killed Leslie Ann Noyer, Lori Anne Rochon, Laquann Sloan, and Raymond August, and attempted to kill Karen Alice Anderson, Janell Lee, Julia Peters, Paul Fenn, Upendra de Silva, and Rodney Stokes. *Stevens*, 41 Cal. 4th at 187.

if he knew the driver. Stevens motioned to get Stokes's attention, smiled at him, and then shot at him. *Id*. at 187 88. As Stokes struggled to regain control of his car, Stevens shot at Stokes twice more. *Id.* at 188. Stevens then pulled away. *Id.*

Trailing Stevens, Stokes saw Stevens pull alongside Raymond August's car and slow down. *Id.* Stokes saw both cars' brake lights come on and heard "at least two gunshots." *Id.* August's car crashed into a pillar under an overpass, and he died at the scene. *Id.* Stevens exited the freeway and reentered the freeway going in the opposite direction before stopping near the scene. *Id.* Stokes called 911. *Id.* When police arrived, they found Stevens, still parked, watching the scene of August's murder. *Id.* Stevens attempted to flee, and when an officer grabbed him, "a heavy metallic object hit the ground." *Id.* The object was a loaded .357 magnum Desert Eagle semiautomatic pistol which was later proven to be "either a match to or consistent with the gun used" in all but one of the crimes. *Id.* Stevens was also carrying a loaded magazine and a loose bullet. *Id.*

A subsequent search of Stevens's apartment revealed a box and a manual for the pistol, a gun case, gun cleaning equipment, a cartridge, a pistol magazine, bullets, and practice targets. *Id.* at 189. The search also discovered "a collection of Oakland newspapers containing articles about the shootings" and "an envelope with handwritten references to what appeared to be various Penal and Vehicle Code sections including those regarding murder, assault, vehicle theft, and weapons offenses." *Id.*

Stevens was charged with multiple first degree murders with special circumstances. Richard Clark stood trial with

Stevens as a co-defendant for one murder the shooting of Leslie Noyer. *Id.* at 187. Clark told the police that "he had shot Noyer under duress because [Stevens] threatened to shoot him," but at trial "denied being present at the murder scene." *Id.* at 189.

During voir dire and jury selection in December 1992 and January 1993, Stevens's counsel brought or joined four motions under *People v. Wheeler*, 22 Cal. 3d 258 (1978).[2] These motions asserted that the prosecutor purposefully discriminated when he used peremptory challenges to excuse black prospective jurors. *See Stevens*, 41 Cal. 4th at 192. The trial court denied all four motions, and the empaneled jury included one black juror and one black alternate. *Id.*[3]

Clark, Stevens's co-defendant, brought the first *Wheeler* motion after the prosecutor used his twelfth peremptory challenge to excuse prospective juror Walter Simpson. Stevens joined that motion. Defense counsel argued that the prosecutor had impermissibly struck four black prospective jurors: Henry Hill, Larry Foster, Jean Clemons, and Simpson. The trial court found that defense counsel established a prima

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[2] *Wheeler* is California's procedural equivalent to an objection under *Batson v. Kentucky*, 476 U.S. 79 (1986), and serves as an implicit objection under *Batson*. *Sifuentes v. Brazelton*, 825 F.3d 506, 514 n.1 (9th Cir. 2016).

[3] Prospective jurors used different terms to identify themselves on their juror questionnaires, such as "BLACK," "BLK," "African American," and "Afro-American." Following *Miller El v. Dretke* (*Miller El II*), 545 U.S. 231, 242 (2005), we use the word "black" to describe these prospective jurors, and refer to prospective jurors who are not black as "nonblack."

facie case of discrimination under *Wheeler* and asked the prosecutor to state his justifications for the strikes.

In response, the prosecutor stated that the four prospective jurors "indicated in one way or another at the very least an ambivalence and the lack of commitment, at least in my mind, of their willingness to impose the death penalty." The prosecutor offered more specific reasons for striking each prospective juror, which we discuss in more detail below.

The trial court recessed briefly to review its notes. After "an analysis of the proffered reasons and the court's own observations," the trial court denied the *Wheeler* motion and found that the prosecution "met its burden to rebut the inference of group bias" as to the four black prospective jurors. Jury selection resumed.

The prosecutor then used peremptory challenges to excuse three other black prospective jurors, Patricia King, Sarah McCall, and Joyce Gray. After each strike, defense counsel made a *Wheeler* motion. As explained in more detail below, the prosecutor indicated his decision in each case was based on the prospective juror's ambivalence and the prosecutor's uncertainty about the juror's ability to impose the death penalty. The trial court considered "the arguments of counsel and also my own observations and recollection[s] of this juror" in each case, and concluded that the prosecutor met his burden to rebut the inference of discrimination under *Wheeler*.

In March 1993, the jury convicted Stevens. The jury found the special circumstances that Stevens killed his final victim while lying in wait and that Stevens committed multiple murders. *Id.* The court declared a mistrial for Clark.

Stevens, 41 Cal. 4th at 187. At the penalty phase, the jury voted in favor of the death penalty, and the trial court sentenced Stevens to death. *Id.*

B

In his direct appeal to the California Supreme Court, Stevens argued that the trial court erred in denying his *Wheeler* motions. *Stevens*, 41 Cal. 4th at 187. Stevens's brief focused on the strikes of Hill, Foster, and Clemons. Although Stevens mentioned the strikes of four other prospective jurors in his brief,[4] the California Supreme Court concluded that Stevens challenged "only the ruling on the first motion" (relating to the strikes of Hill, Foster, Clemons, and Simpson) on direct appeal. *Id.* at 192. Considering only the strikes against Hill, Foster and Clemons (Stevens did not provide separate arguments about Simpson), the California Supreme Court determined that nothing in the record indicated "that pretext is evident" in the prosecutor's stated justifications for striking the three prospective jurors. *Id.* at 196 198. Deferring to the trial court's credibility determination, the California Supreme Court concluded that Stevens "failed to demonstrate purposeful racial discrimination against prospective jurors." *Id.* at 198. Stevens sought review from the United States Supreme Court, which denied Stevens's petition for writ of certiorari. *Stevens v. California*, 552 U.S. 1118 (2008).

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[4] Stevens's brief to the California Supreme Court includes a section titled "Factual Background," which identified four separate *Wheeler* motions: the first motion related to the strikes of Hill, Foster, Clemons and Simpson, and the three subsequent motions relating to the strikes of King, McCall and Gray. In the sections setting out his legal arguments, Stevens specifically addressed only the strikes of Hill, Foster, and Clemons.

While Stevens's direct appeal was pending, he filed a petition for habeas relief with the California Supreme Court. Among other claims, Stevens alleged ineffective assistance of trial counsel in failing to perform a comparative juror analysis in the trial court to support his *Wheeler* claim. The California Supreme Court denied the habeas petition largely on the merits, including ineffective assistance of trial counsel.

C

Stevens sought federal habeas relief in district court. The May 2014 amended petition is the operative petition here. In his petition, Stevens challenged (among other things) the California Supreme Court's rejection of his claim that the prosecutor's use of seven peremptory challenges against black prospective jurors was an unreasonable application of *Batson v. Kentucky*, 476 U.S. 79 (1986). In January 2019, the district court denied all of Stevens's claims, but granted a certificate of appealability on his *Batson* claims.

Stevens timely appealed, and the district court entered a stay of execution pending appeal.

II

On appeal, Stevens raises three main arguments. First, he claims that the California Supreme Court made an unreasonable determination of the facts in upholding the trial court's conclusion that the prosecutor did not purposefully discriminate in striking Foster, Clemons and Hill. Second, Stevens claims that the California Supreme Court erred in failing to address his claims that the prosecutor violated *Batson* in striking Simpson, King, McCall, and Gray, and urges us to review these claims de novo. Finally, Stevens

argues that the California Supreme Court's rejection of his *Batson* claims was contrary to or an unreasonable application of *Batson* and other Supreme Court precedent. We have jurisdiction under 28 U.S.C. §§ 1291 and 2253(a). We review de novo the district court's denial of a habeas petition under 28 U.S.C. § 2254.

A

Our review of Stevens's arguments requires an understanding of both our framework for adjudicating *Batson* claims and the doubly deferential standard applied in reviewing a habeas petition raising a *Batson* challenge under § 2254(d)(2).

Under *Batson*, "the State's privilege to strike individual jurors through peremptory challenges . . . is subject to the commands of the Equal Protection Clause," which "forbids the prosecutor to challenge potential jurors solely on account of their race." 476 U.S. at 89. "[A]s in any case alleging a violation of the Equal Protection Clause," a criminal defendant bears the "burden of proving purposeful discrimination on the part of the State." *Id.* at 90.

We employ a three-step burden-shifting framework regarding the claimed equal protection violation on a strike-by-strike basis. 476 U.S. at 90, 93 94, 96 n.18 & 97 98. First, the defendant must make "a prima facie showing that the prosecutor exercised a peremptory challenge on the basis of race." *Rice v. Collins*, 546 U.S. 333, 338 (2006). If the defendant makes such a showing, then "the burden shifts to the prosecutor to present a race-neutral explanation for striking the juror in question." *Id.* Third, the trial court must evaluate "'the persuasiveness of the justification' proffered

by the prosecutor" and "determine whether the defendant has carried his burden of proving purposeful discrimination." *Id.* (quoting *Purkett v. Elem*, 514 U.S. 765, 768 (1995)).

The trial court's determination as to whether the prosecutor purposefully discriminated "turns on evaluation of credibility." *Sifuentes v. Brazelton*, 825 F.3d 506, 515 (9th Cir. 2016) (quoting *Batson*, 476 U.S. at 98 n.21) (alteration adopted). Such a credibility determination is a "pure issue of fact." *Id.* (quoting *Hernandez v. New York*, 500 U.S. 352, 364 65 (1991)). The trial court evaluates "the prosecutor's state of mind based on demeanor and credibility." *Id.* (quoting *Hernandez*, 500 U.S. at 365). In evaluating the prosecutor's rationale for striking a prospective juror, the trial court may also take into account its own observations of the prospective juror. *See Snyder v. Louisiana*, 552 U.S. 472, 477 (2008) (explaining importance of "trial court's firsthand observations" in resolving *Batson* claims). The trial court's assessments "are often based on subtle impressions and intangible factors," *Davis v. Ayala*, 576 U.S. 257, 285 (2015), including a prospective juror's "tone, demeanor, facial expression, emphasis all those factors that make the words uttered by the prospective juror convincing or not," *Sifuentes*, 825 F.3d at 516 (quoting *Burks v. Borg*, 27 F.3d 1424, 1429 (9th Cir. 1994)).

In considering a prosecutor's credibility, the trial court "must undertake 'a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.'" *Batson*, 476 U.S. at 93 (quoting *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977)). Different types of evidence may raise an inference that the prosecutor's race-neutral explanation for striking a juror was pretextual. For example, a prosecutor's "implausible or fantastic"

justifications of strikes that are not supported by the record may raise an inference of pretext. *Sifuentes*, 825 F.3d at 516 (citing *Purkett*, 514 U.S. at 768). Additionally, a prosecutor's mischaracterization of a prospective juror's testimony "in a manner completely contrary to the juror's stated beliefs" on the record may raise such an inference. *Id.* (quoting *Aleman v. Uribe*, 723 F.3d 976, 982 (9th Cir. 2013)).

Courts may also infer pretext where a prosecutor "gives a race-neutral reason for striking a proposed juror, but has allowed jurors with similar characteristics to be empaneled." *Id.* (citing *Miller-El v. Dretke* (*Miller-El II*), 545 U.S. 231, 241 (2005)). In considering this evidence of pretext, a court may engage in a comparative juror analysis, which involves "side-by-side comparisons of some black venire panelists who were struck and white panelists allowed to serve." *Miller-El II*, 545 U.S. at 241. "If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson*'s third step." *Id.* But there is no "bright line rule" that a particular strike must be deemed purposefully discriminatory "when 'prospective jurors of different races provide similar responses and one is excused while the other is not,'" *Sifuentes*, 825 F.3d at 516 (quoting *Burks*, 27 F.3d at 1429). In capital cases, the Supreme Court has acknowledged that the prosecutor's "fine judgment calls about which jurors are more or less willing to vote for the ultimate punishment" requires a "comparison of responses that differ in only nuanced respects, as well as a sensitive assessment of jurors' demeanor." *Ayala*, 576 U.S. at 273.

In considering whether a prosecutor purposefully discriminated on the basis of race when striking a juror,

courts also consider "evidence of a prosecutor's disparate questioning and investigation of black and white prospective jurors in the case." *Ervin v. Davis*, 12 F.4th 1102, 1106 (9th Cir. 2021) (citing *Flowers v. Mississippi*, 139 S. Ct. 2228, 2243 (2019)). As explained in *Miller-El v. Cockrell* (*Miller-El I*), "if the use of disparate questioning is determined by race at the outset, it is likely [that] a justification for a strike based on the resulting divergent views would be pretextual. In this context the differences in the questions posed by the prosecutors are some evidence of purposeful discrimination." 537 U.S. 322, 344 (2003).

Finally, courts may also consider statistical evidence showing the use of peremptory challenges bears more heavily on one race than others, "evidence of a prosecutor's disparate questioning and investigation" of black and white prospective jurors, and the "relevant history of the State's peremptory strikes in past cases." *Flowers*, 139 S. Ct. at 2243.

Overall, trial courts are "best situated" to resolve questions of credibility, and the Supreme Court has recognized that such issues "lie peculiarly within a trial judge's province." *Ayala*, 576 U.S. at 273 74 (quoting *Snyder*, 552 U.S. at 477); *see also Flowers*, 139 S. Ct. at 2243 ("[T]he job of enforcing *Batson* rests first and foremost with trial judges."). For these reasons, reviewing courts must give "great weight" to the credibility findings of trial courts. *Ayala*, 576 U.S. at 285 86. On direct review, "in the absence of exceptional circumstances," appellate courts "defer to the trial court" because "[a]ppellate judges cannot on the basis of a cold record easily second-guess a trial judge's decision about likely motivation." *Id.* at 274. We therefore uphold *Batson* rulings absent clear error. *Snyder*, 552 U.S. at 477.

The Supreme Court has indicated that appellate courts must be cautious in capital cases not to "second-guess a trial judge's decision" on the basis of a "cold record." *See Ayala*, 576 U.S. at 273 74 (cleaned up). As the Supreme Court has explained, "[i]n a capital case, it is not surprising for prospective jurors to express varying degrees of hesitancy about voting for a death verdict." *Id.* at 273. This is because "[f]ew are likely to have experienced a need to make a comparable decision at any prior time in their lives." *Id*. In exercising peremptory strikes against such jurors, "both the prosecution and the defense may be required to make fine judgment calls about which jurors are more or less willing to vote for the ultimate punishment." *Id.* "These judgment calls may involve a comparison of responses that differ in only nuanced respects" and may involve "a sensitive assessment of jurors' demeanor." *Id.*

B

In this case, we are not directly reviewing the California Supreme Court's decision but instead reviewing it through the deferential lens of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2254(d).[5] Where

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[5] 28 U.S.C. § 2254(d) provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly

AEDPA's "highly deferential standard" applies, it "demands that state-court decisions be given the benefit of the doubt." *Felkner v. Jackson*, 562 U.S. 594, 598 (2011) (per curiam) (quoting *Renico v. Lett*, 559 U.S. 766, 773 (2010)). Our role on federal habeas review is "to guard against extreme malfunctions in the state criminal justice systems, not to apply *de novo* review of factual findings and to substitute [our] own opinions for the determination made on the scene by the trial judge." *Ayala*, 576 U.S. at 276 (cleaned up).

Under § 2254(d)(1), we must determine whether the California Supreme Court's adjudication of Steven's claims "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law" according to Supreme Court precedent. A state court's decision is "contrary to" Supreme Court precedent if the state reviewing court "arrives at a conclusion opposite to that reached by" the Supreme Court "on a question of law or if the state court decides a case differently than the Supreme Court "on a set of materially indistinguishable facts." *Williams v. Taylor*, 529 U.S. 362, 412 13 (2000). A state court's decision is an "unreasonable application of" Supreme Court precedent if the state court "identifies the correct governing legal principle from [the Supreme Court's] decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 413; *see also Hooper v. Shinn*, 985 F.3d 594, 614 (9th Cir. 2021) (same). We review the

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established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

state reviewing court's decision only in light of law clearly established by the Supreme Court at the time of the last reasoned state court's decision. *See Hooper*, 985 F.3d at 614.

In considering whether a state court's decision is "contrary to" or "an unreasonable application of" *Batson* under § 2254(d)(1), we have recognized that *Batson* clearly establishes the requirement that courts perform a "sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Murray v. Schriro*, 745 F.3d 984, 1004 (2014) (quoting *Batson*, 476 U.S. at 93). State courts disobey this clearly established requirement if they "'rubberstamp' a prosecutor's proffered race-neutral explanation for exercising a disputed peremptory strike," or "misstate[] the test," or "impermissibly rel[y] on an erroneous factor." *Id.* at 1005. But *Batson* does not "specify the *form* of the trial court's inquiry into the prosecutor's motive." *Id.* at 1004. Thus, *Murray* explained that "[n]either *Batson* nor the Supreme Court cases following it clearly establish that trial courts must conduct a formal comparative analysis." *Id.*

Under § 2254(d)(2), we must determine whether the California Supreme Court's adjudication of Steven's claims was an "unreasonable determination of the facts." The factual determination primarily at issue is whether the prosecutor engaged in purposeful discrimination when striking a black juror. *See Sifuentes*, 825 F.3d at 517. In considering whether a state court's decision was based on an unreasonable determination of the facts, "a federal court may not second-guess a state court's fact-finding process unless, after review of the state-court record, it determines that the state court was not merely wrong, but actually unreasonable." *Id.* (quoting *Taylor v. Maddox*, 366 F.3d 992, 999 (9th Cir. 2004), *overruled on other grounds*, *Murray*, 745 F.3d

at 999 1000). This standard is met when the record "compel[s] the conclusion that the trial court had no permissible alternative but to reject the prosecutor's race-neutral justifications" and find a *Batson* violation. *Collins*, 546 U.S. at 341. Any factual findings underlying the trial court's determination regarding a prosecutor's credibility are presumed correct, and the petitioner has the burden of rebutting that presumption by clear and convincing evidence.[6] *See* 28 U.S.C. § 2254(e)(1); *see also Ayala*, 576 U.S. at 271.

When the highly deferential AEDPA standard combines with the already deferential standard used to review *Batson* claims on direct review, "we end up with a standard of review that is 'doubly deferential.'" *Sifuentes*, 825 F.3d at 518 (quoting *Briggs v. Grounds*, 682 F.3d 1165, 1170 (9th Cir. 2012)); *see Jamerson v. Runnels*, 713 F.3d 1218, 1225 (9th Cir. 2013).

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[6] Under 28 U.S.C. § 2254(e)(1), "a determination of a factual issue made by a State court shall be presumed to be correct" in a federal habeas proceeding, and the defendant "shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." By its terms, § 2254(e)(1) applies to the question whether the prosecutor purposefully discriminated when striking jurors, which is a "pure issue of fact," *Hernandez*, 500 U.S. at 364. Nevertheless, the Supreme Court has left open the question of how § 2254(e)(1) interacts with § 2254(d)(2), *see Brumfield v. Cain*, 576 U.S. 305, 322 (2015) ("We have not yet defined the precise relationship between § 2254(d)(2) and § 2254(e)(1)."). Rather than resolve this issue in the *Batson* context, we have previously, in an "abundance of caution," applied § 2254(d)(2)'s standard to state court adjudications of *Batson* purposeful discrimination claims. *See Sifuentes*, 825 F.3d at 517 n.3. We do the same here. We also apply § 2254(e)(1)'s clear and convincing evidence standard to the additional *Batson* challenges that the California Supreme Court did not review on the merits, although we decline to resolve the question whether § 2254(d)(2) applies to such claims. *See infra* at 45–46.

Under this doubly deferential standard, we ask whether the state appellate court unreasonably determined, as an issue of fact, that the trial court did not clearly err in its credibility determination. In evaluating whether the state appellate court's deference to the trial court was objectively unreasonable, we recognize the deference owed "to the trial court's determination of the prosecutor's credibility," *Sifuentes*, 825 F.3d at 518, but "use ordinary analytic tools to evaluate the prosecutor's race-neutral explanations," *id.*, and "conduct a comparative juror analysis in the first instance if the state reviewing court has not done so," *id.* at 518 n.4; *see also Jamerson*, 713 F.3d at 1225. But "[e]ven if we would have reached a different conclusion regarding the prosecutor's credibility, we must give the state appellate court the benefit of the doubt and may not grant the habeas petition unless the state court's decision was 'not merely wrong, but actually unreasonable.'" *Sifuentes*, 825 F.3d at 518 (quoting *Taylor*, 366 F.3d at 999) (citation omitted). In sum, under AEDPA, "unless the state appellate court was objectively unreasonable in concluding that a trial court's credibility determination was supported by substantial evidence, we must uphold it." *Sifuentes*, 825 F.3d at 518 (quoting *Briggs*, 682 F.3d at 1170).

III

We now turn to Stevens's arguments on appeal. Stevens first argues that the California Supreme Court's rejection of his *Batson* claims was an objectively unreasonable determination of the facts. *See* 28 U.S.C. § 2254(d)(2). As required by *Batson*, we consider these claims on a strike-by-strike basis, in light of "all of the relevant facts and circumstances." *Flowers*, 139 S. Ct. at 2243. We first consider the prosecutor's strikes of Foster, Hill, and Clemons

under the doubly deferential standard of § 2254(d)(2). We then review the strikes of the remaining prospective jurors not expressly addressed by the California Supreme Court.

A

We begin with Stevens's challenge to the prosecutor's strike of Foster. Stevens argues that the prosecutor's nondiscriminatory reasons for challenging Foster were not supported by the record, because the prosecutor mischaracterized Foster's responses, and because the prosecutor's nondiscriminatory reason for striking Foster applied just as well to other members of the venire accepted by the prosecutor. We conclude that Stevens fails to show that the California Supreme Court reached an objectively unreasonable factual determination on this claim.

In responding to the *Wheeler* challenge regarding Foster, Clemons, Hill and Simpson, the prosecutor stated generally that these individuals indicated "at the very least an ambivalence and the lack of commitment, at least in my mind, of their willingness to impose the death penalty." Specifically as to Foster, the prosecutor stated:

> [H]e too reflected an ambivalence in his ability to carry forthwith the death penalty, while in the questionnaire, he indicated he was moderately for it. When it came down to whether or not he would vote for it if the issue were on the ballot, he said, "I honestly don't know." And in talking with him, he said, "Well, I'll follow the law with regard to whatever the judge tells me."

> And when you put it in terms that, well, the law doesn't mandate that you have to impose the death penalty, that's something that's up to you. He indicated, again, just an ambivalence in his ability and showed a lack of commitment in the ability to impose the death penalty.

In other words, the prosecutor's stated justification was Foster's "ambivalence in his ability to carry forthwith the death penalty" and "a lack of commitment in the ability to impose the death penalty."

The trial court did not give a separate explanation for rejecting each of Stevens's claims as to the strikes of the four black prospective jurors, but stated generally that after "an analysis of the proffered reasons and the court's own observations," it determined that the prosecution "met its burden to rebut the inference of group bias."

On review, the California Supreme Court concluded that the record supported the prosecutor's characterization of the record and that Foster's ambivalent responses did "not undermine the prosecutor's stated reason." *Stevens*, 41 Cal. 4th at 194. The California Supreme Court considered Stevens's arguments based on comparisons between prospective jurors struck by the prosecutor (Foster, Hill, and Clemons) and seated nonblack jurors identified by Stevens, and explained that the seated jurors did not "demonstrate such a striking similarity in ambivalence regarding the death

penalty that a finding of pretext is warranted." *Id.* at 196.[7] As explained below, we conclude that the California Supreme Court's determination regarding Foster was not objectively unreasonable.

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We first consider Stevens's argument that the prosecutor mischaracterized Foster's testimony as being ambivalent toward the death penalty. A review of the record shows that the California Supreme Court reasonably determined that the prosecutor did not do so.

Foster stated in his questionnaire that he was "moderately in favor" of the death penalty as a matter of philosophical opinion. In answer to a question on the jury questionnaire about how he would vote if the death penalty was on the ballot, he marked "[n]ot sure" and added, "I honestly don't know." During voir dire, when asked if he would vote for the death penalty on the ballot, Foster stated "Yes . . . I believe it's a deterrent." When the prosecutor drew a comparison between abstract support for the death penalty when people "read about the crimes in the newspaper" and the difficulty posed when people must look at a "real person" to sentence

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[7] The California Supreme Court used first and last initials to compare "Prospective Jurors H.H., L.F., and J.C." with "seated Jurors D.M., J.C., M.F., and V.W." *Stevens*, 41 Cal. 4th at 196. These initials correspond respectively to Henry Hill, Larry Foster, Jean Clemons, Dana Mercie, James Collondrez, Marlene Favareille, and Virginia Watkins. Stevens argues that the California Supreme Court's analysis was "so wanting that the opinion confusingly identified both seated jurors Collondrez and Clemons as 'J.C.'" No such confusion exists. The California Supreme Court expressly referred to Jean Clemons as "*Prospective* Juror J.C." and James Collondrez as "*Juror* J.C." *See* 41 Cal. 4th at 198.

to death, Foster acknowledged the difficulty of such a scenario:

> Well, you're right. At one time I thought that way, I really don't I didn't like the death penalty. But I find I can follow if the law says that's what it is, I can follow the law. I'd do what the law says and if it if if the law says this man gets the death penalty, this man doesn't, I could do that.

It was not objectively unreasonable for the California Supreme Court to conclude that these varying responses reflect ambivalence.

Stevens also claims that the prosecutor misquoted Foster's statement that he would "do what the law says" because the prosecutor paraphrased Foster as saying "Well, I'll follow the law with regard to whatever the judge tells me." We reject this argument. While the prosecutor did not give a direct quote, the prosecutor's paraphrase was materially the same, and to the extent the quotation was inaccurate, it did "nothing to change the basis for the strike," *Jamerson*, 713 F.3d at 1232 n.7.

Given the evidence supporting the prosecutor's explanation for striking Foster, the California Supreme Court's determination that the prosecutor had not mischaracterized Foster's testimony "in a manner completely contrary to the juror's stated beliefs," *Sifuentes*, 825 F.3d at 516 (quoting *Aleman*, 723 F.3d at 982), was not an unreasonable determination of the facts.

We next consider Stevens's argument that the prosecutor purposefully discriminated here because his nondiscriminatory reason for striking Foster applied just as well to other members of the venire whom the prosecutor did not strike. In raising this argument to the California Supreme Court, Stevens compared Foster to four nonblack prospective jurors: Mercie, Collondrez, Favareille, and Watkins.

The California Supreme Court concluded that Stevens had not demonstrated that those four jurors had "such a striking similarity in ambivalence regarding the death penalty that a finding of pretext is warranted." *Stevens*, 41 Cal. 4th at 196 98. Supporting this conclusion, the California Supreme Court stated that, according to the juror questionnaire, Watkins agreed with the decision to remove Chief Justice Bird from the California Supreme Court,[8] voted for the death penalty, and was moderately in favor of the death penalty. *Id.* at 196. Mercie gave responses that "indicate[d] an appreciation that voting for a death verdict is a grave decision, not ambivalence regarding the death

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[8] Chief Justice Bird was the object of a "strenuous and well publicized campaign" in 1986 to unseat her in a retention election. The successful campaign focused on "the high percentage of death penalty reversals and the claim that, led by the Chief Justice, [the California Supreme Court] was intentionally evading the law in refusing to affirm more of those decisions and allow executions to recommence. Regardless of their political interest or inclination, few citizens of the state could have been unaware of the situation or the circumstances prompting these efforts." *People v. Cox*, 53 Cal. 3d 618, 696 (1991). A prospective juror's support for Chief Justice Bird's removal could therefore be viewed as raising the reasonable inference that the prospective juror also supports the death penalty.

penalty." *Id.* at 197. Collondrez stated that the death penalty "is needed," even though he would want to read more on the issue first before voting for it on the ballot, and he could cast a twelfth vote for death. *Id.* at 197 98. Favareille was neutral on the death penalty and advocated for a "case-by-case" approach, but said she could cast a twelfth vote for death. *Id.* at 198. The California Supreme Court therefore rejected Stevens's argument.

The California Supreme Court's ruling is not an objectively unreasonable determination of the facts. Although each of these nonblack prospective jurors at times expressed some degree of ambivalence toward imposing the death penalty, their overall expressions were not so similar to Foster's that we can say that the California Supreme Court was objectively unreasonable in upholding the trial court's factual finding. Stevens points out that Foster made discrete statements that were similar to statements made by these named nonblack jurors. But in a comparative juror analysis, a court does not compare only specific statements; instead it must look to "the overall tenor" of a prospective juror's responses in evaluating the prosecutor's justification, *see Mayes v. Premo*, 766 F.3d 949, 961 n.16 (9th Cir. 2014). This focus takes on particular importance when the justification offered is one so broad as ambivalence toward the death penalty and the ability to vote for death, which may be exhibited through demeanor and subtly different responses. *See Ayala*, 576 U.S. at 273 74.

For the first time on collateral review, Stevens also compares Foster to a number of additional prospective jurors. Although Stevens refers briefly to a long list of prospective jurors as evidence of pretext, he focuses on Edward Newbegin, Armond Jordan, Edward Prodger, and Mary

Domenichelli.[9] The California Supreme Court did not undertake a comparative juror analysis as to these prospective jurors. We have not previously addressed the question whether we must consider additional prospective jurors raised for the first time on collateral review when the state court has already undertaken a comparative juror analysis for some prospective jurors. *Cf. Sifuentes*, 825 F.3d at 518 n.4 (holding that, where the state court undertakes no comparative juror analysis at all, we must do so "in the first instance"); *see also Jamerson*, 713 F.3d at 1225. We need not resolve that question here. Even if we consider these additional jurors in the first instance, we see no basis for habeas relief.

Each of these prospective jurors expressed some ambivalence regarding imposing the death penalty, but the comparisons do not provide sufficient evidence of pretext to render the California Supreme Court's ultimate factual determination objectively unreasonable. Newbegin stated in his questionnaire that he was "[m]oderately in favor" of the death penalty philosophically. In response to subsequent questions on voir dire, he indicated that his abstract support for the death penalty would translate into a vote to sentence Stevens to death if the evidence warranted it.[10] Jordan, who

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[9] Stevens briefly mentions Catherine Riehl, Almeta Persons, Sheri Banks, Leigh Irwin, Rodolfo Salazar, and Wallace Gobin. We conclude that the responses from these panelists are substantially different from Foster's responses, and therefore do not merit significant discussion.

[10] Specifically, when asked during voir dire about the difficulty of translating abstract support for the death penalty into a vote to sentence Stevens to death, Newbegin responded that his "objectivity doesn't suffer as to whether it's a philosophical or a real question" and that he didn't "see any difference."

was struck by Clark, stated during voir dire that he would vote yes on the ballot for the death penalty, and he explained that "certain crimes, you should have a death penalty for." Jordan also had a brother-in-law in a "high ranking position" at the district attorney's office and a brother-in-law who was a deputy sheriff involved in Stevens's case. Prodger stated in his questionnaire that he would vote for the death penalty on the ballot because he felt "it would be helpful, *if* the laws weren't so complicated." Asked about this answer during voir dire, Prodger expressed impatience with the delays on death row. And Prodger expressed the belief that he was beginning to think the defendants were guilty simply because of voir dire's focus on penalty issues. The responses from these prospective jurors evince significantly less ambivalence toward the death penalty than did Foster's.

The record shows that the third alternate juror, Mary Domenichelli, evinced an ambivalence toward the death penalty and a conditional willingness to vote for that penalty which were fairly similar to Foster's. Domenichelli described her general feelings on the death penalty by explaining that, "[g]rowing up Catholic," she "was probably opposed" but was "no longer a practicing Catholic" and so she "believe[d] there are cases where death penalty is appropriate." She was philosophically "[n]eutral" on the death penalty but added that she had "become more tolerant of death penalty in recent years." Like Foster on his questionnaire, she was not sure how to vote on the ballot for the death penalty. During voir dire, Domenichelli acknowledged that she was "nervous" about "having that kind of, not authority, if you will, but the kind of possibility, judgment" to vote for death. She added that she was "very uneasy about it" and "would rather not have to be in a position to make that kind of a judgment."

Asked by the court whether she could vote for death, Domenichelli responded, "I think I could."

Reasonable minds could disagree as to whether Foster expressed greater ambivalence regarding the death penalty than Domenichelli. But we are not making de novo determinations here; rather, we must evaluate whether the California Supreme Court's deference to the trial court's conclusion that the prosecutor was credible was an objectively unreasonable determination of the facts. We conclude it was not. First, it was proper for the California Supreme Court to refrain from second guessing a trial judge's decision in a close case, given the Supreme Court's determination that the trial court was best positioned to determine the prosecutor's credibility. *See Ayala*, 576 U.S. at 274; *see also Sifuentes*, 825 F.3d at 515 16. Second, as the Supreme Court has explained, the prosecutor and the trial court both had to make "fine judgment calls" about ambivalence that were based on "a comparison of responses that differ[ed] in only nuanced respects" and a "sensitive assessment of jurors' demeanor." *Ayala*, 576 U.S. at 273. Unlike cases where the prosecutor's reason for striking a prospective juror is fairly specific such as whether a prospective juror had competing work obligations, *Flowers*, 139 S. Ct. at 2249 50, knew people who were involved in the crime, *Foster v. Chatman*, 136 S. Ct. 1737, 1750 (2016), or was divorced, *see, e.g.*, *Snyder*, 552 U.S. at 484 the California Supreme Court had to evaluate the prosecutor's assessment of relative degrees of ambivalence, a much more difficult task.

Therefore, given our standard of review, we conclude that the California Supreme Court's determination that the prosecutor's reasons for striking Foster were not pretextual

was not an objectively unreasonable determination of the facts in the record. 28 U.S.C. § 2254(d)(2). We therefore reject Stevens's argument that the prosecutor was not credible because he accepted other prospective jurors who expressed ambivalence similar to that expressed by Foster.

3

For the first time on appeal, Stevens now points to other evidence in the record to support his argument that the California Supreme Court's decision to uphold the trial court's credibility determination regarding Foster was an unreasonable determination of the facts.[11]

First, Stevens points to record evidence that the prosecutor used peremptory strikes to remove 78 percent of the eligible black prospective jurors that he had a chance to strike.[12] Evidence that a prosecutor struck a

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[11] For purposes of our analysis, we assume that under § 2254(d)(2), we may consider the entire record before the state court in deciding Stevens's claim, *see Miller El II*, 545 U.S. at 240–41 & n.2, even though Stevens did not rely on this evidence in his habeas petition to the California Supreme Court.

[12] The parties dispute how to calculate the prosecutor's strike rate. Stevens maintains that it should be calculated as seven strikes against the nine black prospective jurors that the prosecutor had the chance to strike (78 percent), which would exclude Kenrick Lee, who was struck by Clark's counsel before the prosecutor had a chance to strike him. The government argues instead that it should be calculated as seven strikes against the eleven black prospective jurors in the entire venire (63 percent). We follow the Supreme Court's lead in using the number of black prospective jurors that a prosecutor could have struck or accepted as the denominator. *See, e.g.*, *Flowers*, 139 S. Ct. at 2235, 2245. This method of calculation removes Kenrick Lee from consideration of the

disproportionately high percentage of black prospective jurors compared to nonblack prospective jurors can support a prisoner's habeas challenge to a state court decision and may, in some cases, constitute a "critical fact[]" regarding discrimination. *See Flowers*, 139 S. Ct. at 2235, 2243. *Flowers* involved a "blatant pattern of striking black prospective jurors" in four trials of the same defendant, where the prosecutor attempted "to strike every single black prospective juror that it could have struck." *Id.* at 2245. On direct review, the Supreme Court has found purposeful discrimination where a prosecutor struck 83 percent of eligible black prospective jurors compared to 5 percent of nonblack prospective jurors. *See Flowers*, 139 S. Ct. at 2245. Nevertheless, neither the Supreme Court nor we have developed any bright line rule. *Compare Jamerson*, 713 F.3d at 1235 (rejecting *Batson* claim under § 2254(d)(2) with strikes against ten of twelve black prospective jurors); *Cook v. LaMarque*, 593 F.3d 810, 825 26 (9th Cir. 2010) (rejecting *Batson* claim under § 2254(d)(2) with strikes against seven of ten black prospective jurors); *Sifuentes*, 825 F.3d at 514 (rejecting *Batson* claim under § 2254(d)(2) with strikes against nine of twelve black prospective jurors), *with Kesser v. Cambra*, 465 F.3d 351, 357 (9th Cir. 2006) (en banc) (granting habeas relief with strikes against four of four minority prospective jurors); *Ali v. Hickman*, 584 F.3d 1174, 1176 (9th Cir. 2009) (granting relief with strikes against two of two black prospective jurors).

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strike rate because Clark struck Lee before the prosecutor had a chance to strike Lee. We reject Stevens's attempt to excise Sheri Banks, an alternate juror not physically present during jury selection but accepted by the prosecutor, because Stevens merely speculates that the prosecutor either forgot Banks was black or "was likely unconcerned with alternates at all."

Here, the prosecutor struck 7 of 9 (78 percent) of the black prospective jurors that he had a chance to strike, while striking 13 of 49 (26.5 percent) nonblack prospective jurors called to the jury box. Three black prospective jurors were not struck by the prosecutor: seated juror Almeta Persons, alternate juror Sheri Banks, and Kenrick Lee, who was struck by Clark. While this record shows that the strikes of black prospective jurors were disproportional to the strikes of nonblack prospective jurors, the disproportionality is not as stark as in cases where the Supreme Court found purposeful discrimination. *See, e.g.*, *Miller-El II*, 545 U.S. at 241 (finding discriminatory intent in a case where the prosecutor struck 91 percent of eligible black prospective jurors compared to 13 percent of nonblack prospective jurors); *Flowers*, 139 S. Ct. at 2245 (finding discriminatory intent in a case where the prosecutor struck 83 percent of eligible black prospective jurors compared to 5 percent of nonblack prospective jurors). Therefore, while the disproportionate strike rate supports Stevens's argument that the prosecutor had a discriminatory intent, taken in the context of the record as a whole, it does not show that the California Supreme Court's affirmance of the trial court's credibility finding was an unreasonable determination of the facts.

Second, Stevens argues that there is evidence that the Alameda County District Attorney's office historically maintained a pattern or practice of purposeful discrimination. In support, Stevens points to a state court opinion, *In re Freeman*, 38 Cal. 4th 630 (2006), and two federal district court cases, *Mitcham v. Davis*, 103 F. Supp. 3d 1091 (N.D. Cal. 2015) and *Stanley v. Ayers*, No. 07-cv-04727-EMC, 2018 WL 4488298 (N.D. Cal. Sept. 17, 2018).

This argument is meritless for two reasons. First, in determining whether the California Supreme Court's decision "was based on an unreasonable determination of the facts," we are limited to "the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). Stevens did not present any evidence supporting his pattern or practice claim to the California Supreme Court.[13]

Second, the legal opinions cited in Stevens's brief do not support Stevens's claim. In *Freeman*, the California Supreme Court concluded that an Alameda County prosecutor's claim that the District Attorney's office had a practice of discriminating against black and Jewish prospective jurors was not credible. 38 Cal. 4th at 644 45. Likewise, the federal district court decisions cited by Stevens do not hold that the Alameda County District Attorney's office engaged in such practices. In *Stanley*, the court granted a petitioner's motion for preservation of voir dire notes to support the

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[13] After oral argument, Stevens submitted citations to several Ninth Circuit and district court opinions (all of which were issued after the California Supreme Court resolved Stevens's appeal) that refer to jury selection conducted by assistant district attorneys from Alameda County. In the majority of these cases, the court either did not reach the *Batson* issue or concluded that no *Batson* violation occurred. Stevens appears to offer the facts from these cases, as recited in the opinions' respective fact sections, as evidence supporting his argument that the Alameda County District Attorney's Office engaged in a practice of discrimination. Because we are limited to considering whether the state court's decision "was based on an unreasonable determination of the facts in light of the evidence *presented in the State court proceeding*," § 2254(d)(2) (emphasis added), and this evidence was not part of the record before the California Supreme Court, we may not consider it here. Stevens's reliance on *Ervin* is misplaced because *Ervin* does not (and could not) suggest that a district court considering a habeas petition under § 2254(d)(2) can consider evidence beyond that presented in state court. *See* 12 F.4th at 1107.

petitioner's claim that a prosecutor from the Alameda County District Attorney's Office had a pattern and practice of discrimination against black prospective jurors. *See* 2018 WL 4488298 at *1. In *Mitcham*, the court ruled that the petitioner had shown ineffective assistance of counsel, because his attorney had failed to raise a *Batson* challenge despite evidence that a prosecutor from the Alameda County District Attorney's office was purposefully striking black prospective jurors on the basis of their race. *See* 103 F. Supp. 3d at 1097. Neither opinion supports Stevens's claim that a different prosecutor in this case was operating under a general policy of discriminating against black prospective jurors.

Finally, Stevens asserts that the prosecutor's credibility is undermined due to the prosecutor's purposeful discrimination against Jewish prospective jurors. According to Stevens, the prosecutor was "literally whitewashing his strikes of African-American prospective jurors by comparing their strikes to white prospective jurors who were improperly being struck because they were Jewish." While Stevens's theory is not entirely clear, we understand him to be making the argument that a court should discount comparative evidence that the prosecutor struck nonblack prospective jurors on the same basis as black prospective jurors, if the nonblack prospective jurors were Jewish.[14] We reject this argument. First, Stevens has not established that the prosecutor purposefully discriminated against the six prospective jurors whom Stevens claims are Jewish. Indeed, limiting our analysis to

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[14] In his reply brief, Stevens clarifies that he is not asserting a free-standing *Batson* claim based on the striking of Jewish jurors.

the record,[15] there is no evidence that the prosecutor even knew that two of the six jurors were Jewish, given that they did not identify as such in their questionnaires or in voir dire. Second, even if the prosecutor did purposefully discriminate against Jewish prospective jurors, Stevens does not explain how that would make the California Supreme Court's conclusion that the prosecutor did not purposefully discriminate against prospective black jurors an unreasonable determination of the facts.

B

We next turn to Stevens's argument that the California Supreme Court made an unreasonable determination of the facts in rejecting his claim that the prosecutor engaged in purposeful discrimination when he struck Jean Clemons.[16]

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[15] Stevens relies in part on a declaration filed in an unrelated California Supreme Court case that provided a review of peremptory challenges exercised against Jewish prospective jurors by the Alameda County District Attorney's Office. Stevens also relies on a page "from the 1930 Census" to show that one venireperson, Arthur Wilner, who did not identify as Jewish was actually Jewish because his mother spoke Yiddish. Stevens did not present the census page or the declaration to the California Supreme Court. Accordingly, we reject this evidence because our analysis is limited to evidence presented in the state court proceedings. *See* 28 U.S.C. § 2254(d)(2).

[16] We limit our review to arguments raised in the opening and reply briefs filed by Stevens on appeal. We do not consider additional arguments that Stevens raised before the district court, because his mere reference to those arguments in his opening brief on appeal does not incorporate them for our review. *See* Ninth Circuit Rule 28-1(b) ("Parties must not . . . incorporate by reference briefs submitted to the district court . . . or refer this Court to such briefs for the arguments on the merits of the appeal.").

The prosecutor used his eleventh peremptory challenge to remove Clemons from the jury. The prosecutor justified the strike against Clemons, along with the strikes against Foster, Hill, and Simpson, by explaining that these jurors "indicated in one way or another at the very least an ambivalence and the lack of commitment, at least in my mind, of their willingness to impose the death penalty." According to the prosecutor, "there was a vacillation that they reflected and a situation that I felt I could not take the chance of them hanging this should we get to the point of a death penalty, a penalty phase."

Referring to Clemons in particular, the prosecutor stated that her responses were "indicating, 'I think I could do it,' but reflecting, again a lack of conviction in her ability to do it, which gave me a great deal of concern as to whether I could afford to take the chance." In response to defense counsel's arguments, the prosecutor continued to justify his strike against Clemons:

> Miss Clemons, in the question that we asked as to how they feel, a range of emotion about the death penalty in general, she reflects a neutral feeling and she's not sure whether she would vote for it if it were on the ballot. And again, it does come down to a lack of certainty and conviction that is promulgated from what she has to say or the prospective juror has to say as well as how they say it and relying upon my experience in judging and evaluating people.

As with Foster, the trial court denied the first *Wheeler* motion "[a]fter an analysis of the proffered reasons and the court's own observations."

The California Supreme Court reasonably determined that "the record supports the prosecutor's statement that Prospective Juror J.C. [Jean Clemons] was ambivalent." *See Stevens*, 41 Cal. 4th at 195 96. In concluding that the prosecutor's race-neutral rationale for striking Clemons was credible, the trial court stated it relied on its "own observations." The California Supreme Court deferred to the trial court's credibility determination, *Stevens*, 41 Cal. 4th at 198.

The record supports the California Supreme Court's determination that Clemons's responses were ambivalent. Clemons stated on her questionnaire that she was not sure how she would vote on the ballot for the death penalty and had "not made up [her] mind on the death penalty." She stated during voir dire, "I think I would vote for [the death penalty]," but then added that it "depends on the crime," and she "would have to wait until it actually happened before I make up my mind finally." She elsewhere expressed ambivalence about voting for the death of a "real person." When asked about her ability to vote to impose the death penalty, Clemons framed her answers by saying "I think I could" or "I really believe I could," but recognized that it would be "kind of hard" to be in the position to vote for death.

Stevens claims that the California Supreme Court's determination was unreasonable. According to Stevens, the prosecutor mischaracterized Clemons's responses when he said she was ambivalent, because her questionnaire responses

were more ambivalent than her voir dire responses. We disagree. As with many other jurors, the responses made publicly in voir dire were more nuanced than the responses made on the questionnaire, but both Clemons's questionnaire responses and her public voir dire responses reflected a lack of certainty and ambivalence. Based on Clemons's answers, the California Supreme Court could reasonably conclude that the "overall tenor" of Clemons's responses supported the prosecutor's stated justification of ambivalence. *Stevens*, 41 Cal. 4th at 197 98.

Stevens next argues that a comparative juror analysis establishes that the prosecutor's justifications for striking Clemons were pretextual. These arguments are similar to those Stevens made with respect to Foster, and fail for the same reason. *See* Part III.A *supra*. Although the seated jurors Mercie, Collondrez, Favareille, and Watkins expressed ambivalence toward imposing the death penalty, their views were not so similar to Clemons that the California Supreme Court was objectively unreasonable in upholding the trial court's factual finding that the prosecutor had a nondiscriminatory basis for striking Clemons. Indeed, the California Supreme Court described Clemons's responses as "[u]nlike" those offered by Collondrez. *Mayes*, 766 F.3d at 197 98.

Stevens asks us to compare Clemons to additional prospective jurors who were not part of his argument to the California Supreme Court. First, he claims that Clemons "was certainly less ambivalent than both Prodger and Jordan," and also adds in a comparison to Sydney Santos, who was accepted by the prosecutor before being struck by Stevens. As before, we reject the comparison of Clemons to Prodger and Jordan. Prodger and Jordan expressed pro death

penalty views, and Jordan, who was struck by Clark, had a family connection to law enforcement. *Supra* Part III.A. We also reject the comparison of Clemons to Santos, who stated she was "[s]trongly in favor" of the death penalty, had "came to favor it" as she grew older, and would have voted for the death penalty on the ballot because, "[i]f one of my family was murdered I would want the murder[er] to receive the death penalty." In light of this record evidence regarding the views of Prodger, Jordan and Santos regarding the death penalty, the California Supreme Court's determination that the prosecutor's strike of Clemons was not pretextual is not objectively unreasonable. Further, we reject Stevens's arguments that Domenichelli was more ambivalent than Clemons. While reasonable minds could disagree on that point, such disagreement is not itself sufficient for us to conclude that the California Supreme Court was objectively unreasonable in deferring to the trial court's factual determination that the prosecutor struck Clemons for her ambivalence. *See Sifuentes*, 825 F.3d at 516 (citing *Burks*, 27 F.3d at 1429).

Stevens makes the additional point that the prosecutor struck Clemons even though she said she was neutral as to the death penalty, while seven other prospective jurors (Collondrez, Favareille, Jordan, Riehl, Persons, Domenichelli, and Banks) who stated they were neutral were accepted by the prosecutor. He argues that this comparison supports the inference that the prosecutor's strike of Clemons was pretextual. We reject this argument. A reviewing court is not limited to comparing single statements by prospective jurors in isolation, but may consider all the evidence in the record shedding light on their views, including recognizing that the trial court and prosecutor were exposed to demeanor evidence for each juror. *Ayala*, 576 U.S. at 273. Although

Collondrez, Favareille, and Jordan stated they were neutral on the death penalty, as we have discussed, their testimony otherwise was less ambivalent than Clemons's testimony. *Supra* Part III.A.3. Catherine Riehl also stated she was neutral on the death penalty, but stated that she supported Chief Justice Bird's removal, would vote for the death penalty on the ballot, and offered little, if any, equivocation or ambivalence in any of her voir dire answers. As for Domenichelli, while reasonable minds could disagree on whether she was more or less ambivalent than Clemons, that is insufficient to find that the California Supreme Court's decision was objectively unreasonable. *See Sifuentes*, 825 F.3d at 516 (citing *Burks*, 27 F.3d at 1429). Finally, Stevens notes that black juror Almeta Person and black alternate juror Sheri Banks stated they were neutral on the death penalty, but the prosecutor's acceptance of these black prospective jurors does not tend to prove discrimination. *See Miller-El II*, 545 U.S. at 241.

Stevens again raises the additional evidence he identified in his argument regarding Foster, including statistical evidence, the district attorney's office's alleged pattern and practice of discrimination, and the prosecutor's alleged discrimination against Jewish prospective jurors. For the reasons explained above, this additional evidence fails to alter our conclusion that the California Supreme Court was not objectively unreasonable in declining to disturb the trial court's factual determination.

C

Stevens's argument that the California Supreme Court made an unreasonable determination of the facts in rejecting

his claim that the prosecutor acted with discriminatory intent in striking Henry Hill also fails.

The prosecutor used his first peremptory strike to remove Hill from the jury. As with the other jurors, the prosecutor justified his strike against Hill on the ground that he had expressed "ambivalence and the lack of commitment" in his "willingness to impose the death penalty." According to the prosecutor, Hill "kept on bouncing around" and answering that he would "need all the information" before making a decision, and this repeated answer reflected "more of an ambivalence." Further, the prosecutor added, "As I was talking with him, I could smell a very strong odor of alcohol on him, and he admits in his questionnaire that he is an alcoholic and that alcohol has gotten him into trouble."

The California Supreme Court reasonably determined that "the record supports the prosecutor's stated reasons" for striking Hill. *Stevens*, 41 Cal. 4th at 195. On his questionnaire, Hill stated that the death penalty was "ineffective due to [the] fact th[at] it can be delayed any number of times by anyone convicted" and that the death penalty "has not shown to be a deter[r]en[t] for anyone com[m]itting crimes." While Hill stated that he would vote for the death penalty on the ballot because it "might cause criminals to think twice" if the penalty was "implemented and enforced to the maximum," when he was questioned during voir dire about his ability to be open-minded and consider all the evidence, Hill gave lengthy, sometimes rambling answers, insisting that he could not pass judgment until he had "all the facts" and that he was an "information junkie" who did not "like to leave gaps" in information. Hill ultimately said that he was "pretty sure I could live with" imposing the death penalty but only "[i]f all indications pointed to that particular

situation [of voting for death]," Given Hill's concerns, the California Supreme Court was not objectively unreasonable in concluding that the prosecutor's stated justification regarding Hill's ambivalence and his "falling back" on needing evidence was supported by the record and did not misrepresent Hill's answers. *See Stevens*, 41 Cal. 4th at 194.

The prosecutor also based his decision to strike Hill on the ground that he had "a very strong odor of alcohol on him," and "he admits in his questionnaire that he is an alcoholic and that alcohol has gotten him into trouble." The prosecutor explained that he was "always concerned about someone who's drinking in the middle of the day . . . and who admits that he's got an alcohol problem and he's still drinking." This rationale is also supported by the record. Asked on the questionnaire whether alcohol abuse had touched his life, Hill said "Yes" and explained, "I am an alcoholic." Hill also disclosed on his questionnaire that he had been convicted for driving while intoxicated and was punished with house arrest and a fine. During voir dire, Hill stated that this conviction occurred only "[a] year and a half ago."

Stevens does not contest the conviction or Hill's self-identification as an alcoholic, but argues that there is no evidence supporting the prosecutor's statement that Hill smelled of alcohol in the courtroom. Relying on *Snyder*, Stevens argues that the lack of evidence confirming that Hill smelled of alcohol raises the inference that this justification is pretextual. This argument is based on a misreading of *Snyder*. In *Snyder*, a prosecutor justified his strike of a black prospective juror based on two race-neutral reasons, first, that the prospective juror "looked very nervous," and second, that he was a student teacher who did not want to miss class, and

might be inclined to reach a quick decision on a lesser verdict. 552 U.S. at 478 79. The trial court allowed the strike. On direct review, the Supreme Court held that the second race-neutral reason was belied by the record, which gave rise to an inference of discriminatory intent. *Id.* at 485. Because the record did not show that the trial judge credited the prosecutor's claim that the prospective juror was nervous, while other evidence in the record supported an adverse inference, the Supreme Court concluded that the prosecutor could not justify his preemptory challenge based on the nervousness alone. *Id.* In this case, by contrast, the record supported the prosecutor's rationales for striking Hill, who showed ambivalence to the death penalty and was self-identified as alcoholic, and the trial court's failure to confirm that Hill smelled of alcohol was therefore irrelevant.

A comparative juror analysis and other circumstantial evidence for the strike against Hill does not support Stevens's arguments. We therefore conclude that Stevens has failed to show that the California Supreme Court made an objectively unreasonable determination of the facts in upholding the trial court's finding that the prosecutor did not purposefully discriminate in striking Hill.

D

The California Supreme Court did not address the remaining four black prospective jurors (Simpson, King, McCall, and Gray) struck by the prosecutor. The district court concluded that Stevens had failed to exhaust his claims relating to the strikes of Simpson, King, McCall, and Gray because in his brief to the California Supreme Court, he mentioned these jurors only in the section titled "Factual Background" and did not advance specific legal arguments.

On appeal, Stevens argues that the district court erred in reaching this conclusion, or alternatively, in failing to stay the case and hold it in abeyance to permit exhaustion.

We need not reach this issue because, regardless of whether Stevens properly exhausted these claims, we can address the claims on the merits. *See* 28 U.S.C. § 2254(b)(2) ("An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State."). In addressing the merits, we need not decide whether a claim "adjudicated on the merits" by a state trial court is subject to AEDPA deference under § 2254(d) if the habeas petitioner failed to exhaust the claim fully in the state courts. Rather, we may "engag[e] in de novo review when it is unclear whether AEDPA deference applies, because a habeas petitioner will not be entitled to a writ of habeas corpus if his or her claim is rejected on de novo review." *Berghuis v. Thompkins*, 560 U.S. 370, 390 (2010).

However, even under a de novo review, "we still defer to a state court's factual findings under § 2254(e)." *Crittenden v. Chappell*, 804 F.3d 998, 1011 (9th Cir. 2015). Specifically, the state court's factual findings are presumed correct, and that presumption can be overcome only by clear and convincing evidence. 28 U.S.C. § 2254(e)(1). A state court's factual findings include the ultimate issue underlying a *Batson* claim: whether the prosecutor's strikes were driven by purposeful discrimination. *See Hernandez*, 500 U.S. at 364 (describing "*Batson*'s treatment of intent to discriminate" as "pure issue of fact"); *Miller-El I*, 537 U.S. at 348 (noting that where 28 U.S.C. § 2254(e)(1) applies, habeas petitioners "must demonstrate that a state court's finding of the absence of purposeful discrimination was

incorrect by clear and convincing evidence"); *Sifuentes*, 825 F.3d at 515 (explaining that a "trial court's determination whether the prosecutor has intentionally discriminated turn[s] on evaluation of credibility . . . [which] is a pure issue of fact") (cleaned up).

Accordingly, to prevail on his *Batson* claims relating to the strikes of Simpson, King, McCall, and Gray, Stevens must establish, with clear and convincing evidence, that the trial court's finding of the absence of purposeful discrimination was incorrect. *See Miller-El I*, 537 U.S. at 348. Stevens has not done so.

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Simpson was one of the four prospective jurors identified in Stevens's first *Wheeler* motion. As with Foster, Clemons, and Hill, the prosecutor struck Simpson based on his ambivalence and "the lack of commitment" in the "willingness to impose the death penalty." More specifically, the prosecutor referred to Simpson as "one of the most evasive people that we saw on this jury" and stated that Simpson "had the verbal skills to be evasive." The prosecutor stated that Simpson's evasive responses gave him "some concerns whether he would be willing to subordinate his beliefs to the law." The trial court determined that the prosecutor was credible.

The record supports the prosecutor's justifications. In response to the questionnaire's inquiry whether his personal beliefs would interfere with his ability to convict someone of murder, Simpson marked "yes," and wrote: "Depends on the issue and its severity." Asked on the questionnaire his opinion about the criminal justice system and Chief Justice

Bird's removal, Simpson answered both questions by writing: "Ambiguous." In response to the question "What are your GENERAL FEELINGS regarding the death penalty?" Simpson answered with a question: "Does the penalty fit the crime, when decided in this way?"

During voir dire, Simpson's answers were equally ambiguous. Simpson did not respond directly to questions, and could not tell either the prosecutor or defense counsel that he would follow the law instead of his own personal beliefs if they conflicted with the law.[17] Simpson finally agreed that he "would follow the law as it exists" but only after the prosecutor challenged Simpson for cause and Simpson engaged in a lengthy colloquy on the issue with the court and counsel.

Stevens asks us to compare Simpson with other jurors who stated on their questionnaires that they were philosophically neutral on the death penalty, or were not sure whether they would vote for the death penalty if it was on the ballot, or who made, in Stevens's view, similarly evasive responses. Again, we do not compare discrete statements, but rather look at the totality of the record for each juror. *See Miller-El II*, 545 U.S. at 242; *Mayes*, 766 F.3d at 961 n.16; *see also supra* Part III.A. Based on our review of the record,

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[17] The prosecutor asked, "[W]ill you follow the law, or would you rely upon your own beliefs if it conflicts with what the law is?" Simpson responded, "I can not give you those assurances." Defense counsel attempted to clarify by asking "Are you open to both penalties, that is to say, the death penalty or life without the possibility of parole, or have you, by that time, decided on what penalty or another for whatever, you know, your own inner reasons are?" Simpson answered, "That's an interesting and intimidating question. The response continues to be that I could not give you those assurances."

no other juror accepted by the prosecution made a similar overall expression of ambivalent and evasive answers.

In explaining the reasons for his strike, the prosecutor also described Simpson as "a very strong willed individual" who was "much like" Arthur Wilner, a prospective nonblack juror also struck by the prosecutor. Stevens argues that the prosecutor was motivated by discrimination against Jewish prospective jurors and struck Wilner for being Jewish, and therefore the court should discount the prosecutor's statement that Simpson was a "strong-willed individual" like Wilner. This argument fails for several reasons. First, nothing in the record establishes that the prosecutor perceived Wilner as being Jewish.[18] Second, the prosecutor's comparison of Simpson to Wilner does not raise an inference that the prosecutor struck Simpson on the basis of race. Finally, the prosecutor's statement that Simpson and Wilner were strong-willed is supported by the record. Simpson's inability to provide assurances that he would follow the law instead of his personal beliefs is reasonably similar to Wilner's skepticism of the death penalty as an appropriate punishment for crimes other than treason. In any event, the comparison does not raise an inference that the prosecutor's reason for striking Simpson was pretextual.

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[18] Wilner did not state a religion in his questionnaire or in voir dire. Stevens argues that Wilner's surname is Jewish and he had at least one parent who was Jewish, pointing to a 1930 census document which he claims shows that Wilner's mother spoke Yiddish. Even assuming we can judicially notice the census document, there is no evidence indicating that the prosecutor knew about this information at the time of jury selection. Nor does Stevens support his claim that the majority of individuals named Wilner are Jewish.

Considering Stevens's argument that the prosecutor's race-neutral reason for striking Simpson was pretextual, as well as the additional cumulative evidence identified by Stevens, *see* Part III.A.3, we conclude that Stevens has not carried his burden of showing, by clear and convincing evidence, that the prosecutor engaged in purposeful discrimination when he struck Simpson. *See Miller-El I*, 537 U.S. at 348.

2

The prosecutor used his fourteenth peremptory challenge to remove Patricia King. The prosecutor relied on King's "ambivalence," her "extremely equivocal" responses, and her "tremendous amount of difficulty in exuding confidence in her ability" to impose the death penalty. The trial court denied the *Wheeler* motion after considering "the arguments of counsel" and the court's "own observations and recollection of this juror."

The record clearly supports the prosecutor's justification. King explained that the death penalty "it is not a penalty that is pleasing to me" and that it "is necessary if there is absolutely no doubt of the guilt of the defendant." King admitted that, "to be very honest, I don't know if I could or couldn't" vote to impose death. Asked if she could vote for death knowing the execution procedure, King said three times that it would be "very difficult." Asked more directly by the prosecutor whether this was "a case that perhaps you should pass on because of how you feel," King acknowledged as much: "I think it's something I should probably pass on . . . ." Pressed more by the court, King concluded, "All I can say is I would try. That's all I can say." This repeated hesitance

and lack of confidence strongly supports the prosecutor's stated justification for striking King.

3

The prosecutor used his seventeenth peremptory challenge to remove Sarah McCall from the jury. The prosecutor justified his strike by explaining that McCall "wouldn't tell me whether or not she was for or against the death penalty," because she declined to say during voir dire how she would vote for the death penalty on the ballot. The prosecutor claimed that McCall "danced around in her answers" and was "very vague on the issue as to whether or not she could actually impose the death penalty." The prosecutor stated that "[h]er responses were similar to a number of other jurors that I had excused and the same vein as far as whether or not they could do it." The trial court denied the *Wheeler* motion based on the record and "the court's own observations."

The record supports this justification. In her responses to the jury questionnaire, McCall stated that she was moderately in favor of the death penalty, but was not sure how she would vote if it were on the ballot. During voir dire, she reiterated that she was "not prepared to answer [the ballot question] at this time." Asked twice about whether she could vote to end Stevens's life, she gave an unresponsive answer: "I've thought about it" but declined to elaborate. The prosecutor's stated justification that McCall declined to give responsive answers is borne out by the record.

The prosecutor used his eighteenth peremptory challenge to remove Gray from the jury. The prosecutor had originally challenged Gray for cause, having concluded "there was no way she was going to impose the death penalty." The trial court denied the *Wheeler* motion, after noting that it had Gray's answers in mind because of the for cause challenge.

In her jury questionnaire, Gray stated that she was moderately against the death penalty. Although she was "becoming a little closer to being in favor" after herself becoming the victim of a crime, she stated she had "not made up my mind yet." During voir dire, Gray admitted that she had been "against the death penalty" for most of her life but only recently "questioned the strength of that belief." Asked directly whether voting for the death penalty was a "real option" for Gray in Stevens's case, Gray said, "No." Asked again whether Gray could vote for death knowing the execution procedure, Gray responded, "It would be extremely difficult for me to do. It's a question that I just couldn't answer. It would be very hard for me. If I had to know the choice and had to give you an answer, one or the other, just this second, I would say no." Gray also stated that she was perhaps not fit to serve on the jury. Although Gray later said the death penalty could be appropriate and that she was "not saying that [she] couldn't" vote for death, the record supports the prosecutor's stated justification that Gray expressed an inability and strong reluctance to vote for death.

Based on our de novo review, we conclude that the prosecutor's race-neutral justifications for striking Simpson, King, McCall and Gray are supported by the record and not belied by any comparative juror analysis. Stevens fails to

demonstrate, by clear and convincing evidence, that the trial court erred in finding the prosecutor had not purposefully discriminated on the basis of race. *See Miller-El*, 537 U.S. at 348. Thus, we affirm the district court's judgment denying Stevens's habeas claims for King, McCall, and Gray.

IV

We now turn to Stevens's arguments under 28 U.S.C. § 2254(d)(1) that the California Supreme Court's decision was an unreasonable application of *Batson*, *Snyder* and *Miller-El I* and *II*, and was contrary to *Miller-El I* and *II* and *Flowers.*

First, Stevens claims that the California Supreme Court unreasonably applied *Batson* by failing to consider sua sponte all of the struck prospective black jurors and compare them with all of the prospective nonblack jurors who were not struck, regardless whether Stevens had asked the court to consider them.[19]

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[19] Stevens also claims that a concurring opinion in *People v. Harris*, 57 Cal. 4th 804, 865–66 (2013) (Liu, J., concurring), shows that the California Supreme Court unreasonably applied Supreme Court precedent. In the *Harris* concurrence, a state court justice expressed "serious doubts" that the California Supreme Court has "held true to *Batson*'s mandate," or "maintained the proper level of vigilance" over trial courts and prosecutors. 57 Cal. 4th 804, 865–66 (2013) (Liu, J., concurring). The concerns expressed by one justice about the jurisprudence of his colleagues does not show that the California Supreme Court was objectively unreasonable in its application of Supreme Court precedent. Rather, AEDPA "demands that state-court decisions be given the benefit of the doubt," *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002).

We disagree. Neither *Batson*, *Miller-El II*, nor *Snyder* clearly establish such a rule. A basic principle of our adversarial system is "the principle of party presentation." *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020). "[W]e rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present." *Id.* (quoting *Greenlaw v. United States*, 554 U.S. 237, 243 (2008)). *Batson* did not alter this fundamental principle. To the contrary, "*Batson* did not dictate the formal steps the trial court must take to evaluate the prosecutor's credibility, it only established that the trial court must do so." *Murray*, 745 F.3d at 1005. And "*Batson* and the cases that follow it do not require trial courts to conduct a comparative juror analysis" at all. *Id.* Although *federal* courts must perform a comparative juror analysis advanced by a state prisoner, even if the state reviewing court has not done so, *see Sifuentes*, 825 F.3d at 518 n.4; *Jamerson*, 713 F.3d at 1224, the Supreme Court has not established that state reviewing courts have such an obligation. Here, the California Supreme Court's decision to evaluate only Stevens's specific arguments was not contrary to Supreme Court precedent.[20]

Second, Stevens argues that the California Supreme Court's decision was contrary to *Miller-El I* and *Miller-El II* because the facts here are materially indistinguishable from the facts in those cases. This argument also fails, because the California Supreme Court could have made a principled

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[20] We do not address the question whether the California Supreme Court unreasonably applied Supreme Court precedent in failing to address the jurors that Stevens included in the section entitled "Factual Background" because we evaluated Stevens's habeas claims related to those jurors on the merits. *See* Part III, section D.

distinction between those cases and the case before it. In *Miller-El I* and *II*, the Supreme Court considered a disproportionate strike rate against black prospective jurors, *Miller-El I*, 537 U.S. at 331; *Miller-El II*, 545 U.S. at 240 41, together with a comparative juror analysis revealing clear pretext and material mischaracterizations of responses from prospective jurors, *see Miller-El II*, 545 U.S. at 242 46. Based on this evidence, the Supreme Court concluded the prosecutor's rationales were clearly pretextual. *See Miller-El II*, 545 U.S. at 242 46. Here, by contrast, the comparative juror analyses do not show clear evidence of pretext, the prosecutor did not materially mischaracterize prospective jurors' responses, and the strike rate was not as disproportionate. "[W]hen a state court may draw a principled distinction between the case before it and Supreme Court caselaw, the law is not clearly established for the state-court case." *Murdoch v. Castro*, 609 F.3d 983, 991 (9th Cir. 2010).

Stevens's comparison to *Flowers* also fails. Because *Flowers* was decided more than a decade after the California Supreme Court's decision here, it was not clearly established precedent "as of the time the state court renders its decision." *Cullen v. Pinholster*, 563 U.S. 170, 182 (2011) (cleaned up). Even if we consider *Flowers*, however, there is a principled distinction between *Flowers* and this case. In *Flowers*, a defendant was "tried six separate times" by the same prosecutor and each trial was marked by a near 100 percent strike rate against black prospective jurors. *See Flowers*, 139 S. Ct. at 2234 35. Further, the prosecutor engaged in "dramatically disparate questioning" of prospective jurors, and made a "series of factually inaccurate explanations for striking black prospective jurors." *Id.* at 2235, 2250. Based on this evidence, the Supreme Court concluded that "all of

the relevant facts and circumstances taken together establish that the trial court" at the defendant's last trial "committed clear error in concluding that the State's peremptory strike of" one prospective black juror did not constitute purposeful discrimination. *Id.* at 2252. No such "extraordinary facts" exist here.

Finally, Stevens argues that the California Supreme Court applied an erroneous legal standard. In conducting its comparative juror analysis, the California Supreme Court stated that the seated jurors identified by Stevens (Collondrez, Favareille, and Watkins) did not show a "striking similarity" in ambivalence to struck prospective jurors. *Stevens*, 41 Cal. 4th at 196, 198. Stevens argues that the California Supreme Court erred in using this terminology, because it should have considered whether the seated nonblack jurors were "similarly situated" to the black prospective jurors the prosecutor struck. *Miller-El II*, 545 U.S. at 247.

We reject this argument. In context, the California Supreme Court used the phrase "striking similarity" to mean that the congruence between the ambivalence expressed by the seated jurors and that expressed by the struck prospective jurors was not *so significant* that it raised an inference contrary to the trial court's observations that the prosecutor was not credible. This is confirmed by the language used by the California Supreme Court, which stated that the seated jurors did not demonstrate "*such a* striking similarity" or "*such* striking similarity" to warrant a finding of pretext. *Stevens*, 41 Cal. 4th at 196, 198 (emphasis added). The California Supreme Court could reasonably conclude that, absent such significant congruence, the credibility findings of the trial court should remain undisturbed. The California Supreme Court's approach on this issue is not contrary to or

an unreasonable application of any Supreme Court case. *See Ayala*, 576 U.S. at 274 (explaining courts should defer to trial court's credibility finding absent "exceptional circumstances").

Therefore, we determine that the California Supreme Court did not reach a decision "that was contrary to, or involved an unreasonable application of, clearly established federal law." 28 U.S.C. § 2254(d)(1).

V

As a federal court reviewing a state court's decision and the trial court's findings of fact, our role is limited to guarding against "extreme malfunctions in the state criminal justice systems." *Ayala*, 576 U.S. at 276 (cleaned up). With no such malfunction here, we decline to substitute our own judgments for the factual credibility determinations made almost three decades ago by the state trial court. Therefore, we affirm the district court's judgment denying Stevens federal habeas relief.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

CHARLES STEVENS,

Petitioner,

v.

RON DAVIS, Warden,
San Quentin State Prison,

Respondent.
/

No. C 09-00137 WHA

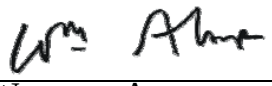
DEATH PENALTY CASE

JUDGMENT

For the reasons stated in the accompanying order denying claims and granting motion to file response under seal, **FINAL JUDGMENT IS HEREBY ENTERED** in favor of respondent Ron Davis and against petitioner Charles Stevens. The Clerk shall close the file.

IT IS SO ORDERED.

Dated: January 17, 2019.



WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

CHARLES STEVENS,

Petitioner,

v.

RON DAVIS, Warden,
San Quentin State Prison,

Respondent.
_____/

No. C 09-00137 WHA

DEATH PENALTY CASE

ORDER DENYING CLAIMS AND GRANTING MOTION TO FILE RESPONSE UNDER SEAL

Re: Dkt. Nos. 162, 172

INTRODUCTION

A jury convicted petitioner, Charles Stevens, in 1981 of, inter alia, four counts of murder and six counts of attempted murder (Cal. Penal Code 187(a)), accompanied by a lying-in-wait special circumstance (Section 190.2 (a)(15)) as to one murder and a multiple-murder special circumstance (Section 190.2(a)(3)). Through counsel, petitioner filed a petition for writ of habeas corpus under Section 2254 raising twenty-eight claims for relief. He subsequently dismissed eight of those claims. An additional round of claims, four of the subclaims within Claim 5 and all of Claim 23, were dismissed on procedural default grounds. Subsequently, nine claims were denied and an additional claim was dismissed as procedurally defaulted. The parties have now briefed the remaining claims in the petition. Claims 1, 11, 12, 15, 16, 21, 24, 25 and 28 are **DENIED** for the following reasons. Additionally, petitioner's counsel's motion to file under seal their response to the order requesting a response on petitioner's pro se letters is **GRANTED**.

STATEMENT

Petitioner is a condemned inmate at San Quentin State Prison. Between April 3 and July 27, 1989, petitioner shot at victims on or near Interstate 580 in Oakland. All of them, save for one, were inside a car at the time of the attack. Petitioner killed four people: Leslie Ann Noyer, Lori Anne Rochon, Laquann Sloan, and Raymond August. He attempted to murder an additional six people: Karen Alice Anderson, Janelle Lee, Julia Peters, Paul Fenn, Upendra de Silva, and Rodney Stokes. Prosecutors charged petitioner as to all the offenses and charged a co-defendant, Richard Clark, as to Noyer's murder. Clark testified in his own defense. The jury deadlocked on the murder charge against Clark and the trial court declared a mistrial. It convicted petitioner of all charges and sentenced him to death. The facts adduced at trial follow.

Ballistics evidence connected petitioner's Desert Eagle firearm as either a direct match or consistent with the weapon used in all of the shootings except for the attempted murder of Stokes.

In the early morning of April 3, 1989, police responded to a call regarding gunshots and found Leslie Noyer lying on the ground in front of a Mazda RX7 with its doors open and the engine running. Noyer had been shot in the head. Police found shell casings and an unexpended copper-jacket bullet near the vehicle. A palm print retrieved from the door below the passenger side window matched petitioner and two other prints matched co-defendant Clark. The found casings matched petitioner's gun, when it was eventually recovered.

On June 7, a little after 2:00 a.m., Karen Anderson drove herself and her friend Janelle Lee home. As Anderson turned a corner on the way home, Lee saw a man with his arms raised and pointing at them, though she did not see anything in his hands. The man shot at them, shattering the passenger window. He did not hit either of them. When Anderson had the window repaired, the repair person found shell casings, which he gave to her. Those casings also eventually matched petitioner's Desert Eagle.

Laquann Sloan was shot in the head around 11:45 p.m. on June 8. Police found three shell casings that matched petitioner's gun.

On July 6, Highway Patrol officers found Lori Rochon slumped over her seat on the side of Interstate 580 near the Grand Avenue exit in Oakland. She had been shot one time. A police search of the area did not yield any casings. The police criminalist who examined the casings from all of the crimes said that the one found inside Rochon was consistent with a Desert Eagle. He noted that the slug contained polygonal rifling, which the other casings from the other crimes did as well. No other casings the Oakland Police Department had found in the past five years had such rifling.

Around 3:00 a.m. on July 16, Paul Fenn drove his friends Julie Peters and John Cutler eastbound on Interstate 580 near the Harrison Street exit. He intended to move into the right-hand lane and had noticed the headlights of another car there. When he looked to see if he was clear to move over, the headlights had disappeared and he could not see them anywhere. A pop sounded immediately to the right of the car and the right panel of the front windshield exploded. Other windows then shattered. The other car, a small, white sedan, waited about three seconds and then took off at high speed. Ten months later, Fenn found slugs and a copper bullet jacket in the van. They were consistent with a .38 or .357 Desert Eagle.

Later on July 16, Dr. Upendra De Silva was driving on Oakland Avenue after having exited Interstate 580. As he approached the top of the hill, he heard and felt the glass in his car shattering. He ducked down after recognizing the sound of gunfire. When he resurfaced several seconds later, he saw the taillights of a car in the right lane about 25–50 yards ahead. He got out, walked to a nearby apartment building, and asked someone to call the police. De Silva sustained injuries from the shattered glass and was shot in his right elbow. Police did not recover any casings there. The next day, however, police investigated a similar shooting one block away from where De Silva had been shot and one mile away from the Rochon murder. A casing found there matched petitioner's gun, when it was eventually recovered.

Police apprehended petitioner across the highway from the scene of the final murder. On July 27, at 1:15 a.m., petitioner, driving a white Mazda, pulled alongside Rodney Stokes, who was driving home from work on Interstate 580. Petitioner drove at approximately forty-five miles per hour. Both vehicles slowed. Stokes tried to discern if he knew the other

driver. Co-workers often motioned to Stokes on the freeway and chatted with him. Petitioner motioned to get Stokes' attention and then smiled at him. Stokes realized he did not know petitioner but tried to see if petitioner might have a passenger that Stokes did know. Petitioner then shot at him.

Stokes tried to avoid petitioner's attention by turning off his headlights, laying down on the seat, and slowing to about thirty miles per hour. He lost control of the car, but regained control shortly thereafter. When he looked up, he saw petitioner coasting in front of him, seemingly waiting. Petitioner fired two more shots. Petitioner then pulled away from Stokes, who began flashing his headlights to attract police attention. He sped up to try to stay with petitioner. They were approximately three-quarters of a mile away from the 35th Avenue overpass in Oakland.

Stokes saw petitioner slow down and pull alongside another car, one driven by Raymond August. Petitioner got August's attention and both sets of brake lights came on. As the cars rounded a bend, Stokes lost sight of the cars briefly. When he again spotted them, he heard at least two gunshots. Petitioner exited the freeway at the 35th Avenue off-ramp, drove over the freeway, and then took the onramp heading the opposite direction on Interstate 580. Petitioner parked on the shoulder.

August's car crashed into a pillar under the 35th Avenue overpass. Stokes pulled up behind August's car. He checked on August, who was covered in "[a]n awful lot of blood," and then saw petitioner's Mazda parked on the other side of the freeway. Stokes called 911. The police arrived and Stokes pointed out where petitioner was still parked. An officer drove over and ordered petitioner out of the car. Petitioner initially appeared startled and began to drive away. He got out of the car with his hands in the air, walked backwards, then fled on foot toward a retaining wall. The officer grabbed petitioner at the wall and heard a heavy metallic object hit the ground. The officer then retrieved petitioner's loaded .357 magnum Desert Eagle semiautomatic pistol, which petitioner later told police he'd obtained three or four months earlier in "[a]bout . . . March. A search of petitioner yielded a loaded magazine and a loose bullet. This seizure allowed the police to connect the firearm to the prior murders.

Stokes identified petitioner at the scene. The ammunition fragment recovered from Stokes' car was insufficient to make any comparison.

Police searched petitioner's room and found "an operator's manual for the weapon, a canvas gun case, gun cleaning equipment, a .357 magnum cartridge and magazine, trays of bullets, and practice targets." Additionally, they found a collection of articles about the shootings and "an envelope with handwritten references to what appeared to be various Penal and Vehicle Code sections including those regarding murder, assault, vehicle theft, and weapons offenses." Petitioner's palm print was found on Noyer's car.

The police interviewed petitioner. They asked him how a person who committed the crimes would get caught and petitioner replied, "The guy would get caught if somebody told on him or if he pulled over like I did."

During the guilt phase of trial, petitioner only presented evidence as to the Sloan murder. The victim, a 16-year-old, had been shot in the head. The three witnesses who testified did not see the actual shooting, though they had been present either right before or right after. Co-defendant Clark testified as to the Noyer and Rochon murders. Clark had made multiple statements to the police regarding the Noyer murder. His story changed with each version. In his last statement, he said that he had shot Noyer because petitioner had threatened to shoot him if he did not. At trial, Clark once again changed his story, this time saying he was not present at the Noyer murder scene. Clark explained the variances in his accounts by saying he was afraid of petitioner and made up his statements using details from the police.

Clark also testified as to the Rochon murder. He said that early on the morning of July 6, while driving a stolen car with Clark as the passenger, petitioner started rocking back and forth, and said, "'Man, I got to shoot somebody.'" Petitioner then pulled alongside a car. Clark asked why he was going to shoot this person and petitioner said, "Okay. I'm not going to shoot this guy. I'll shoot somebody white." Petitioner then pulled alongside Lori Rochon's car, rolled down his side window, and shot at her. He told Clark he thought Rochon was a "white dude," and fired at her.

Clark's sister also testified. She said that in July 1989, Clark asked her to tell him when the news came on because petitioner had shot someone on the freeway. The news covered the shooting, identifying the victim as "Lori" and noting that she was shot on Interstate 580. Clark said that when he saw a July 18 article about the assaults on Fenn, Peters, and de Silva, he called petitioner and asked if petitioner had shot them. Petitioner said, "Man, don't say that over the phone."

At the penalty phase, the parties stipulated that petitioner incurred a conviction in 1989 for three counts of felony auto theft.

Randall Shumpert testified to an incident in June 1987, wherein petitioner drove by a BART station where Shumpert stood at 10:00 p.m. The passenger in petitioner's car yelled at Shumpert and an angry exchange took place. Petitioner drove away, then returned a few minutes later with his headlights off, and shot at Shumpert through the car window. Petitioner then left.

The trial court received testimony regarding a 1988 incident wherein petitioner threw a carton of milk at a correctional officer in the county jail and encouraged other inmates to do so. In another incident, a sheriff's deputy overheard a threat that petitioner made against co-defendant Clark during transit to the courthouse in March 1993. Petitioner said he would kill Clark for snitching.

Eight witnesses provided victim impact testimony regarding the accomplishments of their loved ones, and the effect of the murders on their own lives.

Petitioner's expert, psychiatrist Harry Kormos, testified about the conditions of petitioner's childhood and the results of psychological testing petitioner underwent. After ten meetings, each of which lasted for three hours, over a period of four to five months, Dr. Kormos concluded that petitioner had an unspecified personality disorder with schizoid and borderline personality traits. Dr. Kormos could not recall any of the several dozen people had diagnosed with the same disorder as having committed murder.

Dr. Kormos stated that petitioner did not have a mental illness and that all of the testing revealed no organic brain damage, illness, tumors, or malformations. He concluded that

petitioner did not suffer from fetal alcohol syndrome because petitioner's mother had stopped drinking five years before she had petitioner. Petitioner's intelligence quotient of eighty to ninety indicated below-average intelligence and he did have to repeat the ninth grade due for academic reasons; however, Dr. Kormos did not believe petitioner had an intellectual disability. During childhood, petitioner suffered several seizures. A childhood EEG showed an abnormality. Another EEG in 1993 showed no abnormalities.

Dr. Kormos also testified to the difficulty petitioner's mixed racial heritage could cause. Petitioner's mother was Native American, and his father Caucasian and Black. Petitioner had reported a good early childhood to Dr. Kormos. He said that he had been cared for by his parents in Oakland until he was about twelve years old. His mother devoutly practiced her faith as a Jehovah's Witness and he attended church with her. When he was twelve, though, that changed following a move with his mother and older sister to a reservation on the Nevada border.

Petitioner's mother resumed drinking. She stopped church and became verbally and physically violent. Police arrested her for child abuse for beating petitioner's older sister. Petitioner reported that he attempted suicide twice in a few days to get his mother's attention. He provided no medical records regarding the attempts and bore no scars, although he said he cut his wrists in the second attempt.

Petitioner's family returned to Oakland approximately a year later. Petitioner's mother obtained several arrests for drunk driving and spent a year in jail. She later threatened to throw petitioner out of a window and kill his sister. She was committed to Highland Hospital. She continued heavily drinking until her alcoholism resulted her death in March 1986 in front of petitioner.

Petitioner's brother, who was seventeen years older than petitioner, was convicted of murder in 1978. Dr. Kormos did not believe this to be emotionally relevant to petitioner because of the age difference and petitioner had not reported a close relationship with his brother.

Petitioner received two suspensions in middle school for disruptive behavior. He said he did not use drugs, though he tried marijuana when he was twelve and sold cocaine in high school to get money for clothes and jewelry. Petitioner stole a gun from a pawnshop where he worked and was fired for it.

Dr. Kormos said that petitioner could act altruistically and noted petitioner's care for his father as an example. In his youth, petitioner did attain some achievement when he won several trophies for bike racing.

Dr. Kormos said he could not "come up with a clear diagnosis as to why" petitioner murdered four people and attempted to kill six others. Petitioner never denied having committed the shootings, though he said he could not remember having done most of them. He did have "a patchy recollection of the August killing." Dr. Kormos thought that petitioner must have wanted, at least on some level, to be caught. He did not believe petitioner derived pleasure or satisfaction from the killings.

Jerry Enomoto, a former Director of the Department of Corrections, testified that petitioner, at most, would pose a nuisance in prison and would not be a danger to other inmates or staff. Three deputy sheriffs testified regarding petitioner's good behavior in jail, although one noted that petitioner had lost a job assignment for misconduct. *See People v. Stevens*, 41 Cal.4th 182, 187–192 (2007).

* * *

The California Supreme Court affirmed petitioner's conviction and sentence on direct appeal on June 4, 2007. *Stevens*, 41 Ca1.4th at 1168. On January 7, 2008, the United States Supreme Court denied a petition for certiorari. *Stevens v. California*, 552 U.S. 1118 (2008).

On December 1, 2008, petitioner initiated the present habeas corpus action. That document was received on January 12, 2009. Counsel for petitioner, Robert Bryan and Mark Eibert, were appointed three years later. Through those appointed counsel, petitioner filed his Amended Petition for Writ of Habeas Corpus on May 21, 2014, asserting 28 claims. After a round of briefing and careful review and consideration, the Court granted petitioner's motion to withdraw eight of those claims from his petition (Dkt. No. 109).

Respondent filed a motion to dismiss a portion of Claim 5 and all of Claim 6 and Claim 23 on procedural default grounds (Dkt. No. 107). Petitioner failed to show cause and prejudice justice to excuse the default or that imposition of the procedural bar would result in a fundamental miscarriage. The four challenged subclaims of Claim 5 and Claim 23 were dismissed (Dkt. No. 126).

Lead counsel Robert Bryan moved to be removed from the case and that motion was granted (Dkt. No. 132). Attorneys Brian Pomerantz and Richard Tamor took over the case (Dkt No. 134). Petitioner previously briefed two rounds of merits claims, which were denied, except for Claims 1 and 12, which were deferred. Petitioner now has briefed all remaining claims in the petition.

ANALYSIS

Following enactment of the Antiterrorist and Effective Death Penalty Act of 1996 (AEDPA), a district court may not grant a petition challenging a state conviction or sentence on the basis of a claim that was reviewed on the merits in state court unless the state court's adjudication of the claim: "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). The first prong applies both to questions of law and to mixed questions of law and fact, *Williams v. Taylor*, 529 U.S. 362, 407-09 (2000), while the second prong applies to decisions based on factual determinations, *Miller-El v. Cockrell* ("*Miller-El I*"), 537 U.S. 322, 340 (2003).

A state court decision is "contrary to" Supreme Court authority, that is, falls under the first clause of Section 2254(d)(1), only if "the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts." *Williams*, 529 U.S. at 412-13. A state court decision unreasonably applies Supreme Court authority as articulated in the second clause of Section 2254(d)(1) if it correctly identifies the

governing legal principle from the Supreme Court's decisions but "unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 413. A federal court on habeas review may not issue the writ "simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly." *Id.* at 411. Rather, the application must be "objectively unreasonable" to support granting the writ. *Id.* at 409.

A state court's determination that a claim lacks merit precludes federal habeas relief so long as "fairminded jurists could disagree" on the correctness of the state court's decision. *Harrington v. Richter*, 562 U.S. 86, 101 (2011) (citing *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). "As a condition for obtaining habeas corpus [relief] from a federal court, a state prisoner must show that the state court's ruling on the claim . . . was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Id.* at 102.

A state court decision "based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state-court proceeding." *Miller-El I*, 537 U.S. at 340.

A district court must limit its review to the record that was before the state court that adjudicated the claim on the merits unless a petitioner can show the state court's decision to be unreasonable under 2254 Section (d)(1) or (d)(2). *Cullen v. Pinholster*, 563 U.S. 170, 180–81 (2011).

1. CLAIMS 1 AND 12.

Claim 1 argues that the prosecutor impermissibly dismissed venire members based on racial bias. Claim 1A focuses on the dismissal of potential African American jurors and claim 1B addresses the dismissal of potential Jewish jurors. Claim 12 argues that trial counsel rendered ineffective assistance by failing to submit a comparative juror analysis to the trial court. These errors, petitioner argues, violated his rights to the effective assistance of counsel; to a fair trial and an impartial jury; to a reliable special circumstance determination; to reasonable access to the courts; to confrontation; to present a defense; to freedom from cruel

and/or unusual punishment; to a reliable penalty determination; to a reliable, accurate, non-arbitrary guilt and penalty determination; and to equal protection of the law and due process of law, as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments (Sec. Am. Pet. at 35, 155).

A. Exclusion of African American Jurors.

This claim challenges the prosecution's dismissal of seven out of eight African American venire members. Petitioner argues that these dismissals violated the strictures against the elimination of jury venire members on the basis of racial bias as set out in *Batson v. Kentucky*, 476 U.S. 79 (1986). The California Supreme Court denied this claim on direct appeal.

(i) Background.

During voir dire, the defense attorneys for both petitioner and co-defendant Clark made a collective four motions challenging the prosecution's dismissal of seven African American venire members pursuant to *People v. Wheeler*, 22 Cal.3d 258 (1978), the California analog to *Batson*. The first motion challenged the dismissal of potential jurors Henry Hill, Larry Foster, Jean Clemons, and Walter Simpson (14 RT 2864). The second motion concerned the dismissal of Patricia King (14 RT 2882). The third addressed the dismissal of Alice McCall (14 RT 2888) and the final motion covered the dismissal of Joyce Gray (14 RT 2895). For all of the challenges, the trial court either expressly or impliedly found that the defense had established a prima facie case of discrimination and asked the prosecutor to explain his reasons for using the peremptory challenges. Each time, the trial court seemed satisfied with the prosecutor's assertions and found that the petitioner and Clark had not proven purposeful discrimination and allowed jury selection to continue (*see*, *e.g.*, 14 RT 2877, 2885, 2893–94, 2896).

(ii) Petitioner Failed to Plead Properly the Entirety of His Claim in the State Court.

The California Supreme Court denied this claim on direct appeal. It found that petitioner's appellate brief only challenged the denial of the first *Wheeler* motion. It framed petitioner's argument on appeal as, "[D]efendant asserts the prosecutor's reasons for challenging Prospective Jurors L.F., H.H., and J.C., all of whom were involved in the first

Wheeler motion, were not supported by the record, and that the trial court erred in failing to question the prosecutor about these discrepancies." *Stevens*, 41 Cal.4th at 193. The California Supreme Court then engaged in a comparative juror analysis as to dismissed venire members Hill, Foster, and Clemons. It made no mention of dismissed venire member Simpson, who was also covered by the first motion. The California Supreme Court determined that petitioner had not shown entitlement to relief because the comparative juror analysis did not reveal "such [a] striking similarity [between dismissed venire members and seated jurors] that pretext is evident." *Id.* at 198. The court noted that it deferred to the trial court's credibility determinations and that the trial court stated it relied, in part, on its own "observations" in finding no purposeful discrimination. *Ibid.*

A federal habeas court may grant the writ if it concludes that the state courts adjudication of the claim "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). The relevant question under Section 2254(d)(2) is whether an appellate panel, applying the normal standards of appellate review, could reasonably conclude that the state court findings are supported by the record. *Lambert v. Blodgett*, 393 F.3d 943, 978 (9th Cir. 2004). Petitioner argues that the record does not support the state court's findings in two ways: (1) the California Supreme Court stated that petitioner's claim only addressed the first *Wheeler* motion made in the trial court, and (2) in the analysis of that first motion, the California Supreme Court failed to analyze the prosecution's dismissal of Walter Simpson.

The proper question is not whether the California Supreme Court overlooked the other claims, but whether petitioner properly pleaded them. His appellate brief included a lengthy factual background detailing all four *Wheeler* motions and some of the answers the dismissed venire members provided (AG022830–42). However, his argument section only includes arguments as to Foster, Hill, and Clemons (AG022843–51). By not making specific argument as to Simpson and the remaining jurors, petitioner failed to present properly those claims to the California Supreme Court. Because petitioner did not do so, he failed to exhaust the claims as to Simpson and the second, third, and fourth *Wheeler* motions. *See Gulbrandson v. Ryan*,

738 F.3d 976, 993 (9th Cir. 2013), citing *Koerner v. Grigas*, 328 F.3d 1039, 1046-48 (9th Cir. 2003) (a petitioner does not exhaust all possible claims stemming from a common set of facts merely by raising one specific claim). Under Section 2254(b)(1)(A), a district court may not grant the writ unless state court remedies are exhausted. Thus, only the claims properly raised on appeal may be considered.

(iii) The California Supreme Court Denial Was Reasonable.

A party establishes a prima facie equal protection violation based on race by showing that: (1) the defendant is a member of a cognizable racial group, (2) the group's members have been excluded from the jury, and (3) the circumstances of the case raise an inference that the exclusion was based on race. *Batson*, 476 U.S. at 96. When a defendant raises a plausible *Batson* claim, a court must analyze the context in which the contested peremptory strike arose. *Boyd v. Newland*, 467 F.3d 1139, 1146–47 (9th Cir. 2006) (citing *Johnson* v. *California*, 545 U.S. 162, 173 (2005)). An appellate court should conduct a comparative juror analysis to assist in determining whether the totality of the circumstances gives rise to an inference of discrimination. *Boyd*, 467 F.3d at 1148–49.

Here, the California Supreme Court conducted the required comparative juror analysis, contrasting responses the excused venire members gave on their questionnaires and during voir dire with those of seated jurors. *See Stevens*, 41 Cal.4th at 193–198. Our court of appeals recently clarified the review process for such claims:

> When we apply th[e] deferential AEDPA standard in the *Batson* context, we end up with a standard of review that is "doubly deferential," *Briggs* [*v. Grounds*], 682 F.3d [1165,] 1170 [(9th Cir. 2012)], because the federal court defers to the state reviewing court's determination of the facts, and the reviewing court defers to the trial court's determination of the prosecutor's credibility. This doubly deferential standard means that "unless the state appellate court was objectively unreasonable in concluding that a trial court's credibility determination was supported by substantial evidence, we must uphold it." *Id.* at 1170.
>
> We apply this doubly deferential standard in two steps. *Jamerson v. Runnels*, 713 F.3d 1218, 1225 (9th Cir. 2013). First, because § 2254(d)(2) ultimately requires us to determine whether the state court's decision was "based on an unreasonable determination of the facts in light of the evidence" in the record, we must review the relevant portions of the record and use ordinary analytic tools to evaluate the prosecutor's race-neutral explanations. *Mitleider v.*

> *Hall*, 391 F.3d 1039, 1046–47 (9th Cir. 2004). We consider whether a prosecutor's justifications are contrary to the evidence in the record, such as being "implausible or fantastic," *Purkett* [*v. Elem*], 514 U.S. [765,] 768 [(1995)], based on mischaracterizations of a prospective juror's testimony, [*Miller-El v. Dretke* ("*Miller–El II*")], 545 U.S. [231], 244 [(2005)], or belied by a comparative juror analysis. Conversely, we consider whether evidence in the record shows that at least some of the prosecutor's reasons were "permissible and plausible." [*Rice v.*] *Collins*, 546 U.S. [333], 341 [(2006)].
>
> Second, having reviewed the prosecutor's explanations in light of the evidence in the record, we turn to the state appellate court's decision. The pertinent question is not whether the prosecutor was credible, or even whether the trial court's conclusion to that effect was clearly erroneous. Rather, the pertinent question is whether the state appellate court was objectively unreasonable in upholding the trial court's determination. Even if we would have reached a different conclusion regarding the prosecutor's credibility, we must give the state appellate court the benefit of the doubt, *Felkner* [*v. Jackson*], 562 U.S. [594,] 598 [(2011)], and may not grant the habeas petition unless the state court's decision was "not merely wrong, but actually unreasonable." *Taylor* [*v. Maddox*], 366 F.3d [992], 999 [(9th Cir. 2004), *overruled on other grounds by Murray v. Schriro*, 745 F.3d 984, 999–1000 (9th Cir. 2014)].

Sifuentes v. Brazelton, 825 F.3d 506, 518 (9th Cir. 2016) (reversing district court grant of habeas corpus relief for *Batson* claim).

(a) Larry Foster.

The first step of the analysis does not show the prosecutor's reasons for excusing venire member Foster to hold up. During the *Wheeler* motion hearing, the prosecutor stated Foster "reflected an ambivalence" in his ability to carry out the death penalty and Foster stated he did not know if California should have a death penalty. Foster's answers on voir dire indicate a potential juror both in favor of the death penalty and committed to rendering the verdict most supported by the law.

When the prosecutor asked Foster how he would vote on a ballot initiative regarding whether California should have the death penalty, Foster stated that he would vote in favor because he believed the death penalty served as a deterrent (10 RT 1835). The prosecutor then asked Foster whether he could in fact render a death verdict when actually faced with it. Foster noted that he had previously opposed the death penalty, which he had stated on his questionnaire, but "[i]f the law says [death is] what it is, I can follow the law. . . . If the law says

this man gets the death penalty, this man doesn't, I could do that" (10 RT 1836). The prosecutor continued questioning by asking Foster if he was the sort of person who could never vote for the death penalty knowing that life without the possibility of parole served as an alternative. Foster said, "I believe that if the evidence and whatever was presented to me says that he should have had the death penalty, I can determine and I can give what I think . . . is necessary" (10 RT 1837). Positing a hypothetical, the prosecutor asked Foster if he could cast the twelfth and final vote for the death penalty and Foster responded, "I could if it was called for, I could do that" (10 RT 1838). The prosecutor concluded by asking if Foster would have an open mind when going in to the penalty phase if he had voted to convict on the charges and Foster said, "My mind would be open until I heard all the evidence, both the penalty and the guilt phase" (10 RT 1840).

Foster remained consistent when questioned by petitioner's trial attorney. When asked if he would be open to considering a sentence of life without the possibility of parole, Foster said, "Yes, after I heard all the evidence, I could make my decision" (10 RT 1844). Finally, when asked if he could be the one vote against the death penalty if all other jurors voted for it, Foster said, "I could if I felt strongly enough" (10 RT 1844).

The record belies the prosecutor's statement that Foster "didn't know" how he would vote on a ballot initiative regarding whether California should have a death penalty. Additionally, all of Foster's answers on voir dire confirmed his belief in the purpose of the death penalty and that he would render the verdict compelled by the relevant law and application of evidence to that law. Contrary to the prosecutor's assertions, Foster did not express an ambivalence about returning a death verdict.

That, however, does not conclude the analysis.

The second prong of the evaluation compels a denial of federal habeas relief on this claim. "[T]he pertinent question is whether the state appellate court was objectively unreasonable in upholding the trial court's determination. Even if we would have reached a different conclusion regarding the prosecutor's credibility, we must give the state appellate court the benefit of the doubt." *Sifuentes*, 825 F.3d at 518. The "objectively unreasonable" standard is

not a clear error standard. *Lockyer*, 538 U. S. at 75–76. "[A] strong case for relief does not mean the state court's contrary conclusion was unreasonable." *Richter*, 562 U.S. at 102.

The California Supreme Court noted in its denial of this claim that the trial court not only relied on the prosecutor's proffered reasons for excusing the jurors, but also its own "the court's own observations." *Stevens*, 41 Cal.4th at 198. It cannot be said that its deference to the trial court's credibility determinations "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Richter*, 562 U.S. at 101–102. Thus, petitioner has not met his burden as to Foster.

(b) Jean Clemons.

When asked to state his reason for dismissing venire member Jean Clemons, the prosecutor stated that, while Clemons said she "thought she could" render a death verdict, she "expressed a lack of conviction in her ability to do it" (10 RT 2867). This lack of conviction, the prosecutor said, gave him considerable concern about whether he could "take the risk" on seating her on the panel (*ibid.*). A review of the record shows the prosecutor's stated reason to not be "implausible or fantastic." *Purkett*, 514 U.S. at 768.

Clemons gave one definitive answer to the prosecutor. At the end of his voir dire questioning, he asked whether she could keep an open mind as to the penalty if the petitioner had been convicted and the case proceeded to a second phase. Clemons said, "Yes. Yes, sir, I can" (7 RT 1367). She hedged in all of her other answers to his questions.

When the prosecutor asked her how she would vote on a ballot initiative for California to retain the death penalty, Clemons said that based on where she was now on the issue, she thought she would vote for it, but added, "I would have to wait until it actually happened before I make up my mind finally" (7 RT 1360–61). When asked whether she could impose the death penalty if the evidence called for it, she said, "I think I could. I do think I could depending on what I heard throughout the trial, the evidence, and everything I had to go on" (7 RT 1362). The prosecutor asked the question again after giving a visual depiction of what the death penalty would involve for petitioner, and Clemons said, "Well, I admit that would be a tough situation to

be in. But I would have to believe beyond a reasonable doubt that this person did commit whatever, you know, the crimes. I would then decide at that time. I can't say exactly what I would do until I hear all the circumstances" (7 RT 1363). Finally, when the prosecutor asked if she could render the twelfth vote for the death penalty, Clemons said, "Since you put it like that, it's kind of hard" (7 RT 1365). She followed up by saying, "I really believe I could do it. I believe I could do it" (*ibid.*).

These answers do not reflect a firm conviction in either the death penalty itself or in Clemons's ability to impose it should the law support such a verdict. *See Collins*, 546 U.S. at 341 (requiring consideration at to whether evidence in the record shows that at least some of the prosecutor's reasons were "permissible and plausible"). As such, petitioner has not met his burden under the first step of the evaluation. Nor, based on this analysis, can it be said that the California Supreme Court's denial as it pertained to Clemons constituted an objectively unreasonable determination. Thus he has not met his burden at the second step either.

(c) Henry Hill.

Venire member Hill presents a slightly easier analysis. In addition to citing Hill's ambivalence to impose the death penalty, the prosecutor noted both that Hill identified himself as an alcoholic in his questionnaire and smelled of alcohol during questioning (10 RT 2867). Defense counsel for petitioner and Clark both stated that should have been raised as a dismissal for cause and that they did not smell alcohol on him (10 RT 2870). The trial court, however, accepted this rationale, as well as the prosecutor's statements about Hill's physical demeanor and evasive nature during voir dire. The trial court was in the best position to judge the credibility of those statements. Accordingly, petitioner has not shown that he met his burden for either step in the analysis.

For all of the foregoing reasons, this claim is **DENIED**.

B. Exclusion of Jewish Jurors.

This claim challenges the prosecutor's exclusion of four venire persons who "identified themselves as Jewish, or referenced membership in a Jewish organization" (First Rd. Merits Br.

at 70). It also cites the dismissal of an additional two jurors who, while not identifying as Jewish, had Jewish surnames.

Respondent argues that the claim cannot be considered for several reasons: (1) the claim is not included in the petition, (2) it rests improperly on documents outside the state record, (3) it is barred by the statute of limitations, and (4) petitioner failed to exhaust the claim in state court (First Rd. Opp. at 4[1]). Petitioner argues that the Jewish jurors component of the *Batson* claim need not be viewed as a new claim (First Rd. Reply at 1). He also notes that counsel have "grave concerns" about the Second Amended Petition and ask that if the claim be determined to be independent and in need of exhaustion, that he be allowed to file a Third Amended Complaint and return to the state court to exhaust it (*id.* at 1–2).

Petitioner argues that this does not constitute a new claim because "there is already a claim in the petition that the prosecution was striking potential jurors based on group bias" and the exclusion of Jewish jurors component "is just further evidence, contained within the record, that such bias existed and was motivating the prosecution's strike pattern in a constitutionally impermissible way" (First Rd. Merits Br. at 102). Habeas corpus petitions must meet heightened pleading requirements. *McFarland v. Scott*, 512 U.S. 849, 856 (1994). An application for a federal writ of habeas corpus filed by a prisoner who is in state custody pursuant to a judgment of a state court must "specify all the grounds for relief which are available to the petitioner . . . and shall set forth in summary form the facts supporting each of the grounds thus specified." Rule 2(c) of the Rules Governing § 2254 Cases, 28 U.S.C. foll. § 2254 (emphasis added). "'[N]otice' pleading is not sufficient, for the petition is expected to state facts that point to a 'real possibility of constitutional error.'" Rule 4 Advisory Committee Notes (quoting *Aubut v. Maine*, 431 F.2d 688, 689 (1st Cir. 1970). Nowhere does the petition mention the prosecution's improper striking of Jewish jurors. Moreover, much of petitioner's argument pertains to evidence outside the trial record, such as statistics regarding the Alameda County District Attorney's rate of striking Jewish jurors at the time of petitioner's trial. The petition includes no

[1] This order primarily resolves claims from the third round of merits briefing. However, it also ddresses claims 1 and 12 from the first round and addresses issues pertaining to claims 7–10 from the second ound. Thus, prior rounds of briefing are denoted as such.

mention of an office-wide and repeated exclusionary practice. It is, thus, a new ground for relief not contained within the petition.

Petitioner requests the opportunity to file a Third Amended Petition. Such a request surfaced for the first time in the reply on the first round of merits briefing. "It is improper for a moving party to introduce new facts or different legal arguments in the reply brief than those presented in the moving papers." *United States ex rel. Giles v. Sardie*, 191 F.Supp.2d 1117, 1127 (C.D. Cal. 2000); *see also State of Nev. v. Watkins*, 914 F.2d 1545, 1560 (9th Cir. 1990) ("[Parties] cannot raise a new issue for the first time in their reply briefs." (citations omitted)). Petitioner indicated in the opening brief that he intended to "stay on task" in that brief and would not address the applicability of procedural default cases to his unexhausted claim unless respondent raised the exhaustion issue (First Rd. Merits Br. at 102). Nowhere, however, did he discuss a Third Amended Petition.

Moreover, as noted by respondent, the statute of limitations in this case has expired. 28 U.S.C. § 2244(d)(1). Petitioner cannot file an amended petition with new claims without first filing a motion to do so. *See Mayle v. Felix*, 545 U.S. 644, 645 (2005) ("Amendments made after the statute of limitations has run relate back to the date of the original pleading if the original and amended pleadings 'ar[i]se out of the conduct, transaction, or occurrence.' Rule 15(c)(2)"). Petitioner must show that "the original and amended petitions state claims that are tied to a common core of operative facts." *Id.* at 664. Petitioner initially filed this brief in June 2017. He has had eighteen months in which to file a proper motion to amend and he has failed to do so.

As it stands, the claim is not contained within the petition, is time-barred, and is unexhausted. Thus, it will not be considered.

C. Claim 12.

Claim 12 argues that trial counsel rendered ineffective assistance by failing to submit a comparative juror analysis to the trial court at the time defense counsel made the Wheeler motions (First Rd. Merits Br. at 129). Had counsel done this, petitioner argues, counsel would have made an appropriate record and the California Supreme Court would not have deferred to

the trial court's "nonexistent credibility findings" (*id.* at 130). The California Supreme Court denied this claim without comment on state habeas.

As petitioner acknowledges in his petition, at the time of petitioner's trial, the California Supreme Court had disavowed comparative juror analyses. *See People v. Johnson*, 47 Cal.3d 1194, 1220 (1989). To show that his ineffective assistance of counsel claim warrants relief, petitioner must establish that counsel's performance was deficient, *i.e.*, that it fell below an "objective standard of reasonableness" under prevailing professional norms. *Strickland v. Washington*, 466 U.S. 686, 687–88 (1984). He also must establish that he was prejudiced by counsel's deficient performance, *i.e.*, that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. The reasonableness of counsel's decisions must be measured against the prevailing legal norms at the time counsel represented the defendant. *Compare Bobby v. Van Hook*, 558 U.S. 4, 8–9 (2009) (criticizing the appellate court's reliance on the 2003 American Bar Association Standards as commands rather than guidelines when evaluating defense counsel's performance in a 1985 trial) with *Rompilla v. Beard*, 545 U.S. 374, 387 (2005) (citing American Bar Association Standards for Criminal Justice in circulation at time of defendant's trial). Petitioner's trial counsel cannot be deemed to have rendered deficient performance because they failed to present evidence they knew the trial court would not accept.

Petitioner argues that federal law permitted the submission of comparative juror analyses for proving a *Batson* violation (First Rd. Merits Br. at 130). Petitioner supports his supposition by relying on the Supreme Court's decision in *Miller-El II*, *supra*. *Miller-El II* postdates petitioner's criminal trial by more than twenty years. While *Miller-El II* may not have announced a new rule of criminal procedure as it pertained to the submission of comparative juror analyses, the Supreme Court had not previously indicated that such a tool could be useful in proving a *Batson* claim. *See Boyd*, 467 F.3d at 1145 ("*Miller–El II* made clear that comparative juror analysis is an important tool that courts should utilize in assessing *Batson* claims.").

Petitioner cannot show that trial counsel rendered deficient performance according to the prevailing norms in California trial courts at the time of his trial. Thus, he has failed to show that the California Supreme Court denial of this claim constituted an unreasonable application of clearly established federal law or an unreasonable application of the facts to that law. Accordingly, this claim is **DENIED**.

2. CLAIM 11.

Claim 11 argues that trial counsel rendered ineffective assistance in numerous ways regarding the handling of ballistics during the trial. Petitioner cites as specific shortcomings counsel's failure to hire a ballistics expert and failure to "challenge, minimize, or exclude damaging prosecution ballistics evidence." He also argues that trial counsel erred in failing to request testing of the gunshot residue samples taken upon his arrest (Merits Br. at 2).

Respondent argues that petitioner has failed to show that the California Supreme Court's denial of these claims was unreasonable. Respondent also asserts that petitioner's claim regarding counsel's failure to hire an expert to perform gunshot residue tests on the samples taken from petitioner at the time of his arrest is unexhausted and not properly a part of the petition (Opposition at 1). Petitioner offers no meaningful reply (Reply at 1).

A. Gunshot Residue Test.

This claim argues that trial counsel rendered ineffective assistance by failing to submit for testing to a ballistics expert the gunshot residue samples police took from petitioner's hands upon arrest (Merits Br. at 3). As noted by respondent, petitioner failed to exhaust this claim before the California Supreme Court and the claim was not included in the petition. Regardless, petitioner has failed to show that he would be entitled to relief on it.

Testimony at trial established petitioner as the shooter in the Stokes attempted murder and the August murder. Stokes testified that petitioner did not have a passenger in the car (18 RT 4003). When police approached petitioner at the scene, he sat in the driver's seat of the car and appeared to be alone. Upon seeing the police, petitioner fled his vehicle on foot. The Desert Eagle fell out of his pocket (15 RT 3198–3207). Police retrieved the gun and a criminalist later connected it to the August murder.

Once apprehended and questioned, petitioner indicated that he thought his friend Mario Woods had been with him (16 RT 3319–21). Petitioner's statement is the only evidence to indicate someone else may have been involved. No other evidence exists to suggest that petitioner did not commit the two shootings. His equivocal invocation of a third party not present at the scene, without more, cannot establish a reasonable probability that another person committed the shooting and evaded detection by the police and Stokes.

Given the remote possibility that the gunshot residue test would have come up clear on petitioner, he cannot show that trial counsel rendered deficient performance by failing to request a gunshot residue test or that such a failure prejudiced him. *See Strickland*, 466 U.S. at 687–88, 694. Accordingly, the claim is **DENIED**.

B. Motion in Limine.

This claim challenges as ineffective assistance trial counsel's failure to file a motion in limine to limit Criminalist Lansing Lee's "testimony regarding the basis and methods of comparison" of the ballistics evidence on the ground that such comparison is unreliable (Merits Br. at 7). Petitioner argues that "no generally accepted objective criterion upon which an expert may ground his identification" exists and "no objective guideline" governs an expert's opinion as to what constitutes a match (*id.* at 10). Additionally, he notes that there is no error rate for firearm and toolmark comparison. Thus, he argues that the trial court should have granted a motion to exclude Lee's testimony under *People v. Kelly*, 17 Cal.3d 24 (1976), and *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), which governed the admissibility of scientific evidence at the time of petitioner's trial.

Respondent argues that the California Supreme Court reasonably denied this claim because petitioner failed to present the state court with a declaration stating that ballistics no longer met the standard set out in *Kelly* (Opp. at 7). Moreover, respondent notes that nothing required counsel to file a motion that would have been rejected. The California Supreme Court denied this claim on habeas without comment.

Petitioner's arguments focus on the wrong question. Federal habeas review does not require (or even permit) answering the question of whether a firearms comparison could have

been performed reliably and objectively when petitioner went to trial. Instead, the underlying question presented is whether petitioner's attorney reasonably determined that such evidence was clearly admissible under *Kelly*, such that he could reasonably determine that a challenge to such evidence would be futile. The ultimate question that must answered is whether the California Supreme Court's decision on the underlying question of futility was reasonable.

To prevail on a claim for ineffective assistance of counsel for failure to file a motion, petitioner must show "that (1) had his counsel filed the motion, it is reasonable that the trial court would have granted it as meritorious, and (2) had the motion been granted, it is reasonable that there would have been an outcome more favorable to him." *Wilson v. Henry*, 185 F.3d 986, 990 (9th Cir. 1999), citing *Kimmelman v. Morrison*, 477 U.S. 365, 373–74 (1986). As noted by respondent, all of the concerns in legal literature that petitioner presents postdate his trial. At the time of petitioner's trial, expert evidence on toolmark and firearm identification evidence was universally admissible. 4 David Faigman et al., Modern Scientific Evidence, The Law and Science of Expert Testimony § 35:1, pages 613–14 (Thomason Reuters/West 2010). Petitioner has not identified any case in which a California trial court excluded firearms identification evidence or other ballistics comparisons on the bases he cites in his motion, and certainly none that existed at the time of his trial. Petitioner, thus, has not shown the viability of a motion in limine to exclude Lee's testimony.

The California Supreme Court reasonably could have concluded that petitioner had not shown an entitlement to relief because he failed to present evidence demonstrating that a motion to exclude the testimony or any other evidentiary challenge would have been successful. Thus, this claim is **DENIED**.

C. Failure to Hire Defense Ballistics Expert.

This claim asserts trial counsel rendered deficient performance by failing to hire a ballistics expert to help counsel prepare for cross-examination of the prosecution's expert by challenging the expert's credibility and diminishing the negative impacts of his testimony (Merits Br. at 7). Petitioner argues that trial counsel consulted with ballistics expert Charles

Morton, but then failed to follow up with him or secure his assistance for trial. The California Supreme Court denied this claim on habeas without comment.

As noted above, the concerns the legal community has come to develop regarding ballistics and firearm identification evolved after petitioner's trial. Thus, it is unclear if any expert would have advised trial counsel at the time to cross-examine Lee based on those issues. Moreover, such concerns do not share universal acceptance, nor do they prevent such evidence from being accepted in trial courts.

In light of the generally accepted nature of firearms identification evidence and the dearth of evidence to show that trial counsel could have challenged it successfully, petitioner has not shown that trial counsel rendered ineffective assistance by failing to secure his own ballistics expert to challenge Lee's testimony. Notably, petitioner's only evidence that trial counsel did not consult reasonably with such an expert is Morton's declaration that counsel did not follow up with him and the absence of such an expert testifying at trial. Trial counsel could have decided not to consult further with Morton and, instead, consult another expert.

Trial counsel did garner a concession from Lee that Desert Eagle guns could be purchased in any gun store and the weapon was not, in fact, "rare" (18 RT 3974–75). He also got Lee to confirm that none of the casings or slugs in the Rochon murder affirmatively matched petitioner's Desert Eagle (18 RT 3976–77), or that any slugs from any scene affirmatively matched petitioner's gun (18 RT 3981). Clark's attorney then asked about the level of judgment that comes in to making identification, asking, "Some other examiner might look at that and draw a different conclusion, right?" (18 RT 3985). He followed up by asking Lee who makes a determination about whether test casings match those found at the scene, to which Lee replied, "I do" (18 RT 3988). These questions all address petitioner's major points and do not show an unprepared trial attorney. That Clark's attorney asked two questions does not prejudice petitioner because the questions were asked and answered before the jury.

Petitioner failed to provide the state court with a declaration from any expert stating specific objections that could have been made to Lee's testimony or particular ways in which trial counsel could have curtailed that testimony. Nor does he present a declaration from any

expert stating how he or she could have countered Lee's findings if called to the stand. Petitioner's contentions, on their own, are insufficient to demonstrate prejudice. *See Allen*, 395 F.3d at 1002 n. 2; *Grisby*, 130 F.3d at 373.

Petitioner's counsel chose to pursue a defense that petitioner's Desert Eagle floated between people and that the removable bolt that had made the definitive markings also could have floated between guns (*see, e.g.*, RT 3978–3979, 5701–03, 5710). A reasoned tactical decision to chose one defense over the other does not constitute ineffective assistance of counsel. *See United States v. Stern*, 519 F.2d 521, 525 (9th Cir. 1975). For all of these reasons, petitioner has not shown to be unreasonable the California Supreme Court denial of his claim. Accordingly, it is **DENIED**.

3. CLAIM 15.

Claim 15 alleges that trial counsel rendered ineffective assistance during closing argument in the guilt phase by conceding petitioner's guilt and assassinating his character. Specifically, petitioner argues that counsel told the jury that there was "nothing likeable" about petitioner; that there was "no explanation" as to why petitioner committed the crimes; that the case was not an easy one to argue, in part because of the amount of evidence introduced against petitioner; and counsel agreed that every killing constituted a murder and every shooting an attempted murder (Merits Br. at 15–17). According to petitioner, these concessions amounted to a denial of counsel at a critical stage of the proceeding in violation of petitioner's constitutional rights as outlined in *United States v. Cronic*, 466 U.S. 648, 658 (1984).

Respondent argues that *Cronic* does not apply because "[c]laimed failures at 'specific points' are evaluated under *Strickland*" (Opp. at 9). He asserts that counsel raised a classic reasonable doubt defense regarding who committed the murders, the degree to be assigned to the murders, and challenging the prosecution's narrative around the gun, which ballistics tied to each count. Accordingly, he states that the California Supreme Court denial of this claim cannot be deemed unreasonable (*id.* at 11).

On state habeas, the California Supreme Court denied this claim without comment.

A. Legal Standard.

Petitioner misstates the legal standard. Courts presume prejudice and ineffective assistance in the rare cases where counsel "entirely fail[ed] to subject the prosecution's case to meaningful adversarial testing." *Cronic*, 466 U.S. at 658-62. *See*, *e.g.*, *United States v. Swanson*, 943 F.2d 1070, 1074 (9th Cir. 1991) (prejudice presumed where counsel conceded in argument to jury that there was no reasonable doubt regarding factual issue in dispute). In such a case, a petitioner need not show that there is a reasonable probability that the outcome would have been different. *Id.* at 659.

For *Cronic's* presumption of prejudice to apply, the attorney's failure must be "complete." *Bell v. Cone*, 535 U.S. 635, 696–97 (2002). The court must consider the proceeding as a whole; that counsel failed to subject the prosecution's case to meaningful adversarial testing at specific points does not trigger presumption of prejudice. *Id.* at 696-97. *But cf. Musladin v. Lamarque*, 555 F.3d 830, 837-38 (9th Cir. 2009) (disagreeing with party's assertion that reviewing court should focus on the pervasiveness of the error in place of *Cronic's* bright-line rule that deprivation of counsel at a critical stage is automatically reversible error). *Cronic* provides a general standard applicable to claims regarding the denial of counsel at a "critical stage" of the proceedings. *Musladin*, 555 F.3d at 836, 839. The phrase "critical stage" denotes "'a step of a criminal proceeding, such as arraignment, that held significant consequences for the accused.'" *Id.* (quoting *Bell*, 535 U.S. at 695–96).

Petitioner argues that his trial attorney's concessions during closing argument constituted a failure to subject the prosecution's case to "meaningful adversarial testing" (Merits Br. at 17, citing *Cronic*, 466 U.S. at 659). However, a review of his attorney's closing argument shows that the concessions of guilt and the "assassination" of petitioner's character were not as complete as petitioner asserts. Moreover, the complexities of capital case litigation require a different analysis that recognizes the two-phase nature of the proceedings and the importance of avoiding a capital sentence. *See Florida v. Nixon*, 543 U.S. 175, 189–92 (2004) (reversing Florida Supreme Court decision that held that trial counsel committed *Cronic* error by admitting

the defendant had committed the murder in question and holding that the case should have been analyzed under *Strickland*).

In *Nixon*, the state had amassed a significant amount of evidence against the defendant. In response, his trial attorney chose to admit Nixon's guilt in the closing argument in the guilt phase, to preserve credibility at the penalty phase, where he hoped to convince jurors to save Nixon's life by arguing the mitigating evidence. *Nixon*, 543 U.S. at 183–84. Nixon argued to the Florida Supreme Court that counsel's failure to obtain his consent to an admission of crime at a critical stage of the proceedings constituted a complete deprivation of the assistance of counsel. The Florida Supreme Court applied *Cronic* and found that Nixon had been denied his right to the effective assistance of counsel at a critical stage of the proceeding.

The Supreme Court reversed. As an initial matter, it held that the Florida Supreme Court committed error when it applied *Cronic*, a decision the state court based on an inapt analogy of a guilt concession by counsel to entry of a guilty plea. It then found that on the record before it, it could not find that counsel's concession ranked as a "'fail[ure] to function in any meaningful sense as the Government's adversary.'" *Id.* at 190, quoting *Cronic*, 466 U.S. at 666.

Capital cases, it said, posed "daunting challenges" to attorneys in "developing trial strategies, not least because the defendant's guilt is often clear." *Id.* at 191. It noted that an attorney's best strategy might be avoidance of execution, leading them often to focus on the penalty phase. "In this light, counsel cannot be deemed ineffective for attempting to impress the jury with his candor and his unwillingness to engage in 'a useless charade.'" *Id.* at 192, quoting *Cronic*, 466 U.S. at 656–57, n.19.

In situations where an attorney has consulted with a client and advised that a concession of guilt is in the client's best interest, then *Strickland v. Washington*, 466 U.S. 668 (1984), applies.[2]

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[2] The Supreme Court recently held that an attorney who concedes guilt over a defendant's express objection commits structural error. *McCoy v. Louisiana*, __ U.S. __, 138 S.Ct. 1500, 1511 (2018). Petitioner has not asserted that counsel failed to advise him of the strategy of conceding guilt to one second-degree murder and one attempted murder. Accordingly, *Strickland* applies.

B. Merits of Claim.

The trial attorney in *Nixon* actually admitted the defendant's guilt in the opening statement and advised the jury to focus on the penalty phase. *Id.* at 182. Nonetheless, the trial attorney objected to the admission of prejudicial evidence, cross-examined prosecution witnesses, and made a number of objections regarding proposed jury instructions. He re-emphasized Nixon's guilt in his closing argument and urged the jury to remain open to sparing Nixon's life during the penalty phase. The Supreme Court found that Nixon's attorney did not render deficient performance. The Court stated, "[I]f counsel's strategy, given the evidence bearing on the defendant's guilt, satisfies the *Strickland* standard, that is the end of the matter." *Id.* at 192.

Here, the trial attorney's closing argument concessions clearly constituted a deliberate strategy to retain some level of credibility and minimize the possibility petitioner would receive a capital sentence. Petitioner's counsel's closing argument, which addressed charges for four murders, six attempted murders, and two separate special circumstances, totaled ninety-eight pages. Early on in his statement, counsel said, "I will be as honest as I possibly can in terms of looking at the evidence. The reason for that is very simple. Because if I am not honest with you, you're going to disregard me" (26 RT 5664). His primary concern was that the jury would look at all of the cases collectively instead of reviewing each on its own merits (26 RT 5663). Thus, he started by conceding that the prosecution had proven its case on the August murder and Stokes attempted murder beyond a reasonable doubt (26 RT 5664–65). He did not, however, concede that the prosecutor had proven that petitioner committed first-degree murder with respect to August (26 RT 5676). Later, he argued in depth that the prosecution had failed to meet its burden as to first-degree murder in the August case (26 RT 5696–5700).

Defense counsel then addressed the Sloan murder, which he argued the prosecutor had supported with the least amount of evidence (26 RT 5677). He noted that the witnesses had described an assailant who appeared to be black (*ibid.*). Witnesses never identified petitioner as appearing black, despite his being mixed race. He also distinguished Sloan from the other murders for which the state tried petitioner on the ground that it appeared to be an assassination

and nothing about it fit with the other crimes (26 RT 5707–08). He explained that if the prosecution intended to use a similar modus operandi as a continuous thread, it broke with the Sloan case (26 RT 5708).

Counsel turned to the Noyer and Rochon murders and explained his theory that co-defendant Clark's statements could only be credited up until the point he realized he had become a suspect and would need to pin the murders on someone else (26 RT 5704). He also challenged the prosecution theory that petitioner had maintained control over the gun at all times or was even present at the murders (26 RT 5709–12). He then contrasted the evidentiary holes in these murders with the strong case the prosecution had presented for the August murder (26 RT 5713). Counsel concluded the discussion of the Noyer murder by explaining how the prosecution had failed to show that petitioner both knew and supported Clark's intent to murder Noyer and, therefore, could not be found guilty under an aider and abettor theory (26 RT 5720–22). In concluding his discussion of the Rochon murder, counsel returned to his message that Clark could not be trusted and no evidence supported his statement (26 RT 5726–29).

In wrapping up his discussion of the murders, counsel returned to the issue of degree. While he had stated previously that the Sloan killing was first-degree because of the assassination nature of it (26 RT 5707), he stressed toward the end of his argument that if the jury believed that petitioner was present at all of the murders and participated in them, he had not shown the sort of behavior of someone who had premeditated and deliberated (26 RT 5732). As an example of this, counsel cited Clark's statement that petitioner stated, "I've got to kill someone," while driving and then started rocking back and forth before killing Ms. Rochon (*ibid.*). Counsel stated that if petitioner had acted as relayed by Clark, petitioner was then a "sick person" who could not engage the sort of careful premeditation and deliberation required for first-degree murder (26 RT 5733). He then applied this logic to the Stokes murder as well (*ibid*.)

Turning to the attempted murder of Janelle Lee, counsel stressed that the victim identified a live line-up in which petitioner participated and she selected someone else (26 5735–36). For the other attempted murders, he argued that the only connection to petitioner

was the gun, though he did acknowledge a lack of evidence contradicting the prosecution's case for those particular charges (26 RT 5737). He then discussed the gun, challenging the prosecution's narrative that it was a unique weapon and that petitioner viewed the gun almost as an extension of himself, such that he would be reluctant to give the gun to anyone else (26 RT 5738–42).

In conclusion, counsel argued that the jury could not convict petitioner of the lying-in-wait special circumstance because he did not have the requisite waiting and deliberation period (26 RT 5749–50). He also differentiated the specific finding the jury would have to make for a lying-in-wait special circumstance for the Noyer murder based on the prosecution's aiding and abetting theory (26 RT 5751–52). He ended by challenging some of the circumstantial evidence the prosecution had introduced, namely the envelope on which someone had written what the prosecution theorized were California Penal Code sections and the collection of newspaper articles about the shootings, both found in petitioner's apartment (26 RT 5756–58).

Petitioner argues that his trial attorney advised the jury they had only one issue to deliberate: whether the prosecution had demonstrated deliberation beyond a reasonable doubt (Merits Br. at 15). Not so. Trial counsel conceded one murder and arguably conceded the attempted murders (*see* 26 RT 5758). This appeared to be part of a deliberate strategy to give his client the "best chance" (*ibid.*). As discussed, counsel challenged the prosecution's case in depth regarding three of the murders, the lying-in-wait special circumstance, and the prosecution's narrative around modus operandi and the gun. This representation does not constitute an entire failure "to subject the prosecution's case to meaningful adversarial testing." *Cronic*, 466 U.S. at 658–62. Rather, this approach falls under that contemplated by *Nixon* wherein an attorney faced with a significant amount of evidence against his client must present the best case possible to save his client's life.

Petitioner's citation to *United States v. Swanson*, 943 F.2d 1070, 1074 (9th Cir. 1991), does not command an alternate determination (*see* Reply at 2). In addition to not being "clearly established federal law," it also is inapposite. There, the petitioner faced one count of bank robbery and sentencing as a career criminal, which his counsel conceded the prosecution had

proven beyond a reasonable doubt. *Swanson* concerned one count, not a combined ten charges plus two special circumstances. And while Swanson faced the rest of his life in prison if convicted, he did not face execution. Similarly, *Yarborough v. Gentry*, 540 U.S. 1 (2003), does not provide relief. The defendant there had been convicted of assault with a deadly weapon. The choices his defense attorney had to make did not concern minimizing damage to preserve his client's life.

Petitioner has failed to show that his counsel rendered deficient performance in conceding one murder and the attempted murders in an attempt to procure a not-guilty finding on the other murders, or in the worst case, secure only second-degree murder convictions. A difference of opinion as to trial tactics does not constitute denial of effective assistance, *see United States v. Mayo*, 646 F.2d 369, 375 (9th Cir. 1981), and tactical decisions are not ineffective assistance simply because in retrospect better tactics are known to have been available. *See Bashor v. Risley*, 730 F.2d 1228, 1241 (9th Cir. 1984), cert. denied, 469 U.S. 838 (1984); *see, e.g., Bell*, 535 U.S. at 701–02 (not unreasonable for state court to hold decision to waive closing argument in penalty portion of capital case was competent tactical decision, when waiver prevented "very persuasive" prosecutor from arguing).

Petitioner also argues that defense counsel rendered deficient performance by assassinating his character (Merits Br. at 17). At one point, counsel did say, "[T]here may be nothing likeable about Mr. Stevens" (26 RT 5678). However, he did so within the context of explaining that whether the jury liked petitioner was irrelevant. "By candidly acknowledging his client's shortcomings, counsel might have built credibility with the jury and persuaded it to focus on the relevant issues in the case." *Swanson*, 540 U.S. at 9.

The petitioner has failed to show that the California Supreme Court denial of this claim constituted an unreasonable application of clearly established federal law or an unreasonable application of the facts to that law. Accordingly, it is **DENIED**.

4. CLAIM 16.

Claim 16 argues that trial counsel rendered ineffective assistance by failing to control defense witness Dr. Kormos's production of documents to the prosecution. Specifically,

petitioner challenges the production of notes authored by Dr. White, which he says should not have been passed on because Dr. Kormos did not testify as to them, rendering them irrelevant and the information within prejudicial. This failure, petitioner argues, deprived him of the right to be free from self-incrimination, due process, equal protection, a fair trial, the effective assistance of counsel, the right to present a defense, and the right to be free of cruel and unusual punishment pursuant to the Fifth, Sixth, Eighth, and Fourteenth Amendments (Merits Br. at 18–19).

Respondent argues that petitioner has provided no clearly established federal law to show an entitlement to relief on this claim. In particular, he argues, petitioner did not show that any law required counsel to monitor the transfer of documents from Dr. Kormos to the prosecution and petitioner failed to provide a declaration from Dr. Kormos saying that he did not read Dr. White's notes or rely on them (Opp. at 12). On state habeas, he California Supreme Court denied this claim without comment.

Petitioner's argument relies upon the premise that Dr. Kormos gave no indication that he read that Dr. White's notes or that he relied upon them in forming his opinion as to petitioner's mental status (Merits Br. at 27–28). The record belies this assertion.

During cross-examination, the prosecutor asked Dr. Kormos where he had learned that petitioner watched the movie *Extreme Prejudice* multiple times, a movie which the psychiatrist found to be an important piece of information in forming a psychiatric portrait of petitioner (29 RT 6636; *see also* 29 RT 6473). Dr. Kormos stated, "It was in Dr. White's notes, and I asked him about it . . . ." That statement clearly indicates that the defense expert read Dr. White's notes. Moreover, during redirect, defense counsel asked Dr. Kormos about where he had read an independent report that petitioner had made suicidal gestures as a child and he identified an interview Dr. White conducted with petitioner's father that indicated the father knew of this (30 RT 6722–23; *see also* 29 RT 6518 ("I didn't find out about [the suicide attempts] from Charles, I found out from the records that this had happened, and then I got him to explain the incident to me")). Dr. Kormos, therefore, relied on Dr. White's notes at a minimum to support his determination that petitioner had set up suicide attempts to shock his

mother when he was twelve years old, that his father knew of the gestures, and that petitioner was being sincere when discussing those attempts. The fact that petitioner had identified the information to Dr. White, but not to Dr. Kormos and did not try to play up his attempts in an effort to impress the psychiatrist made Dr. Kormos find petitioner credible (29 RT 6519). Thus, Dr. Whites' notes formed a part of Dr. Kormos's evaluation of petitioner.

Petitioner notes that Dr. Kormos did not call Dr. White to discuss her notes (Merits Br. at 19). Dr. Kormos explained that he chose not to call her because her notes seemed "pretty self explanatory" and that he did not believe she could add to what the notes contained because she had not seen petitioner in several years (30 RT 6722).

Contrary to petitioner's premise, the record indicates that Dr. Kormos did read and rely on Dr. White's notes to at least some extent in his evaluation of petitioner. Thus, as acknowledged by petitioner, the district attorney had a right to cross-examine Dr. Kormos about the notes (Merits Br. at 20, citing *People v. Coleman*, 48 Cal.3d 112, 151–52 (1989)).

Because Dr. Kormos acted properly in turning over Dr. White's report, trial counsel did not render ineffective assistance. As such, petitioner has failed to show that the state court denial of this claim constituted an unreasonable application of clearly established federal law or an unreasonable application of the law to the facts. This claim is **DENIED**.

5. CLAIM 21.

Claim 21 argues that the cumulative impact of all errors in both phases of trial resulting from trial counsel's ineffective assistance deprived petitioner of his constitutional rights (Merits Br. at 22). The California Supreme Court denied this claim without comment on state habeas.

Counsel attempt to use the catch-all of cumulative error to litigate claims previously dismissed by petitioner.[3] They argue that because petitioner did not seek to withdraw claim 21 or the petition exhibits associated with the claims he successfully sought to dismiss, he necessarily assented to the consideration of any cumulative error impact resulting from the dismissed claims (Merits Br. at 35). Claims 13, 14, 15, 16, 17, 19, and 20 were removed from

[3] To the extent counsel attempt to challenge the March 13, 2015 order denying the motion for a psychiatric evaluation, such a challenge properly is brought in a motion for reconsideration or a renewed motion or psychiatric evaluation based on relevant authorities. The Court declines to relitigate that issue here.

the petition. No law allows the grant of relief for errors arising from claims not part of the petition, whether individually or cumulatively. Counsel have presented no authority to the contrary. It is also noted that there is no indication petitioner agrees to pursuing a cumulative error claim based on possible errors contained within the claims he worked so hard to dismiss.

Petitioner next challenges the denial of claims 7, 8, 9, and 10. Instead of arguing the cumulative impact of trial counsel's errors, he argues that this Court erred in denying the claims, saying, "The question that the Court must consider is how the jury would have perceived the Sloan and August murders without the Rochon and Noyer murders included" (Merits Br. at 95). Not only is this an untimely and improper motion for reconsideration, as with claim 11B, it focuses on the wrong question. Petitioner can only obtain federal habeas relief if he can show the California Supreme Court's denial of claims 7, 8, 9, and 10 "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). A state court's determination that a claim lacks merit precludes federal habeas relief so long as "fairminded jurists could disagree" on the correctness of the state court's decision. *Richter*, 562 U.S. at 101. Moreover, he can only obtain relief on the instant claim if he makes the same showing.

Petitioner argues for claim 7 that trial counsel rendered ineffective assistance for failing to research properly and file a motion to sever petitioner's trial from that of co-defendant Clark's on the ground of antagonistic defenses. Within his argument, petitioner acknowledges that counsel filed a motion to sever (Sec. Rd. Merits Br. at 14). Counsel based the severance motion on the "*Bruton-Aranda*" rule, which prevents the introduction of inculpating statements by one co-defendant from inculpating another (4 CT 1032–1033, citing *Bruton v. United States*, 391 U.S. 123 (1986) and *People v. Aranda*, 63 Cal.2d 518 (1965). After a period of negotiation regarding proper redaction of Clark's statement, petitioner's trial attorney assented the revised version and withdrew the motion to sever (1 RT 90). Petitioner argues that counsel's decision constituted ineffective assistance.

As noted, a difference of opinion as to trial tactics does not constitute denial of effective assistance, *Mayo*, 646 F.2d at 375, and tactical decisions are not ineffective assistance simply because in retrospect better tactics are known to have been available, *Bashor*, 730 F.2d at 1241. Tactical decisions of trial counsel deserve deference when: (1) counsel in fact bases trial conduct on strategic considerations; (2) counsel makes an informed decision based upon investigation; and (3) the decision appears reasonable under the circumstances. *Sanders v. Ratelle,* 21 F.3d 1446, 1456 (9th Cir. 1994). Petitioner has not shown counsel's failure to request severance following the negotiation of Clark's redacted statement to not be a strategic trial decision. Nor has he shown that the motion to sever based on antagonistic defenses would have been granted. *Wilson*, 185 F.3d at 990.

California holds a statutory preference for joint trials of jointly charged defendants. Cal. Pen. Code § 1098 ("When two or more defendants are jointly charged with any public offense, whether felony or misdemeanor, they must be tried jointly, unless the court orders separate trials."). Trial courts retain the discretion to grant a motion for severance. *People v. Keenan*, 46 Cal.3d 478, 499–500 (1988). Severance may be granted where a defendant faces an incriminating confession by a co-defendant, prejudicial association with co-defendants, likely confusion resulting from evidence on multiple counts, conflicting defenses, or the possibility that at a separate trial a co-defendant could give exonerating testimony. *Ibid.*; *see* also *People v. Hardy*, 2 Cal.4th 86, 167 (1992). Conflicting defenses does not necessitate severance. *Hardy*, 2 Cal.4th at 168. "If the fact of conflicting or antagonistic defenses alone required separate trials, it would negate the legislative preference for joint trials and separate trials 'would appear to be mandatory in almost every case.'" *Ibid.*

To obtain severance on the ground of antagonistic defenses, a criminal defendant must "demonstrate that the conflict is so prejudicial that [the] defenses are irreconcilable, and the jury will unjustifiably infer that this conflict alone demonstrates that both are guilty.'" *Ibid.*, citing (*United States v. Davis*, 623 F.2d 188, 194–195 (1st Cir. 1980). "Stated another way, 'mutual antagonism' only exists where the acceptance of one party's defense will preclude the acquittal of the other." *Ibid.* "If 'there exists sufficient independent evidence against the moving

defendant, it is not the conflict alone that demonstrates his or her guilt, and antagonistic defenses do not compel severance.'" *People v. Letner and Tobin*, 50 Cal.4th 99, 150 (2010) (citation omitted). In the present case, independent evidence implicated petitioner in Leslie Noyer's murder.

Petitioner's hand print was on the stolen car found at the scene of Noyer's murder. The bullet jacket found at the scene had polygonal rifling consistent with a Desert Eagle gun. Noyer's murder occurred in petitioner's neighborhood. Two of the newspaper clippings found at petitioner's apartment covered the Noyer murder.

Moreover, the decision not to sever the two defendants appears to be a tactical one. The question of the admissibility of the totality of Clark's confession in a separate trial for petitioner remained open (1 RT 23, 53). However, as petitioner's trial attorney noted, once Clark took the stand in his own defense, "all [his] statements bec[a]me impeaching material" (1 RT 96). And petitioner's attorney made the most of those inconsistent statements during his closing, attempting to paint the Noyer murder as an event perpetrated solely by Clark (26 RT 5702–5705).

Trial counsel engaged in protracted negotiations to get in Clark's statements in a way that provided the least prejudice to petitioner as possible with the most inculpating evidence of Clark. Given California's preference for joint trials and the trial court's insistence that the parties negotiate on the statement, petitioner has not shown that the trial court would have granted a motion to sever based on antagonistic defenses. Moreover, he has not shown that the failure to sever prejudiced him. While Clark did say a number of damaging things about petitioner when he took the stand, there is no guarantee that the prosecutor would not have called Clark as a witness in a separate trial against petitioner. Thus, petitioner has not shown prejudicial error or that the California Supreme Court's denial of this claim was unreasonable.

Claim 8 argues that trial counsel rendered ineffective assistance by failing to move to exclude Clark's extrajudicial statements (Sec. Rd. Merits Br. at 19). Petitioner argues that the statements were unreliable. Petitioner has failed to show that such a motion would have been granted. Moreover, as noted, trial counsel used the inconsistencies within those statements to

cast Clark as a liar who sought to pin the blame on anyone following his realization of the consequences of having confessed.

Petitioner argues that Clark's prejudiced petitioner because Clark said that petitioner "was a car thief (20 RT 4462–63), shot at cars (24 RT 5168), killed other people (20 RT 4524–25), carried a gun (21 RT 4576), talked about robbing people (21 RT 4665), said he needed 'to shoot somebody' (21 RT 4646), made hollow point bullets (21 RT 4657), [and] was prejudiced against 'fags' (21 RT 4731)" (Sec. Rd. Merits Br. at 20). Considering that police arrested petitioner when he fled from a stolen car, that substantial evidence supported petitioner having shot at several cars and killing multiple people, and petitioner dropped his gun when running from the police, little of this would be new information to the jury. Clark's reference to killing "someone," not "other people," pertains to the Rochon murder, not to uncharged criminal activity. Criminalist Lee testified to viewing hollow point bullets collected from one of the crime scenes (20 RT 4257).

Regarding the statement that petitioner hated "fags," Clark sandwiched it between testimony that he lied to police and that, when given questions with two answers, Clark answered the way he thought Sergeant Roth wanted him to (20 RT 4730–33). Specifically, he admitted that he made up a female companion for Noyer on a "lark" (20 RT 4730). Clark testified that he had no idea about Noyer's sexual preference (21 RT 4731). And while he stated that he did not believe that his response about petitioner's feelings regarding homosexuals came up during the discussion of Noyer's murder, Clark's testimony preceding and following the statement concerned facts he fabricated during his police interviews (*ibid.*). Within the context of that portion of Clark's testimony, his statement about petitioner reads like another fact he manufactured because he thought that's what the police wanted him to say. Moreover, the original statement to police appears on a tape that was admitted into evidence. Thus, the jury had access to it anyway. In light of this context, petitioner cannot show that trial counsel rendered deficient performance for failing to object, nor that such an objection to any of the comments would have been sustained. Accordingly, he has not shown the California Supreme Court acted unreasonably when denying the claim.

Claim 9 challenges trial counsel's decision to withdraw a request for accomplice instructions for Clark's testimony because evidence established Clark as an accomplice, if not a principal, for the Noyer murder and a likely accomplice to the Rochon murder (Sec. Rd. Merits Br. at 23). Petitioner asserts that had the instructions been given, the jury likely would not have convicted him of the Rochon murder (*id.* at 25).

Following an off-the-record, in-chambers discussion about proposed jury instructions, the trial court announced on the record, "I would note for the record that in the course of our conference relative to instructions, the following instructions or initially preliminarily proposed instructions were withdrawn. Those are . . . 3.10 to through and including 3.18 [instructions relating to accomplice testimony] that were preliminarily requested by the defendant Stevens" (25 RT 5496). The record provides no further explanation and petitioner has not provided a declaration from prior counsel explaining what happened during the conference and why the request for those instructions was withdrawn. It was quite possible the court indicated a predisposition to deny the request for the instructions. Clark could not have been found to be an accomplice as to the Rochon murder because the evidence did not support it.

The prosecutor explained clearly in his closing argument why Clark did not amount to an accomplice for the Rochon murder, even though Clark testified that he rode in the car with petitioner and did not report the murder afterward. The prosecutor said, "There was no evidence [Clark] had knowledge of what was going on, or if he did have knowledge, that he did something with the intent to or purpose of encouraging, facilitating or permitting to promote the act itself (sic) . . . . But Clark under the evidence that we have here, is not guilty of the killing of Lori Rochon because he wasn't doing anything, because there isn't any evidence of that" (25 RT 5565–66). Despite petitioner's attestations otherwise, evidence aside from Clark's statement does connect him with the Rochon murder.

Criminalist Lee testified that the slug recovered from Rochon's body came from a Desert Eagle (RT 3976–77). He just could not say definitively that it came from petitioner's. And while the Desert Eagle could be purchased in a wide variety of regional gun shops, Lee testified that only three Desert Eagles had come in to the crime lab in the previous five years

(RT 3974) and no bullets or casings had come into the crime lab with polygonal rifling until the Noyer murder (RT 3990). Additionally, Rochon was murdered when someone drove up alongside her car and shot through the window, the same modus operandi that matches the August murder, where petitioner was apprehended at the scene. Jurors did not need to believe Clark to convict petitioner of Rochon's murder. Finally, the trial court did instruct the jury extensively in how to determine credibility, including, "A witness who is wilfully false in one material part of his or her testimony, is to be distrusted in others" (27 RT 5954, *see also* 27 RT 5952–5955). Petitioner has not shown that the California Supreme Court denial of this claim was unreasonable because he has not prejudicial deficient performance.

Claim 10 argues that trial counsel rendered deficient performance by failing to object "when investigating officer Arthur Roth improperly opined that of all the different versions given by co-defendant Clark regarding Leslie Noyer's killing, the version regarding Mr. Stevens shooting Ms. Noyer while Mr. Clark held her 'rang true.' (24 RT 5193)." (Sec. Rd. Merits Br. at 25). Petitioner states that this constituted improper lay testimony as to Clark's credibility.

The full exchange occurred thus:

> Prosecutor: Now, why did you want to talk with [Clark] the following morning?
>
> Sergeant Roth: Well, at the conclusion of our fourth taped statement, I was of the Opinion, based upon information that I had, and also by his demeanor that he was not being truthful. That although he was giving us his — a fourth taped statement, or a continuing version of what took place at that murder and many others, there were many unresolved questions. I believe that this statement of him holding this woman while [petitioner] shot her rang true.

(24 RT 5193). Petitioner's trial counsel did not object.

Petitioner has not shown that such an objection would have been sustained, nor has he provided any information from counsel indicating why they chose not to object. All of the cases he cites involve situations where a witness indicates that another witness was either telling the truth or not. He does not cite a comparable situation wherein a witness indicates both that another witness was lying and possibly telling the truth. Moreover, Clark himself later

disavowed this version of events. As noted by petitioner in other claims, the jury hung on the murder charge as it applied to Clark, so it does not appear that Sergeant Roth's statement bolstered the credibility of this version of Clark's account sufficient to result in the return of guilty verdicts. Petitioner, thus, has not shown the California Supreme Court was unreasonable in finding no prejudicial error.

Petitioner next argues that the errors contained within claims 7, 8, 9, and 10 must be considered in combination with other errors, specifically trial counsel's purported failure to retain a ballistics expert, to effectively cross-examine the prosecution's ballistics expert, conceding guilt and other errors during the guilt phase closing argument, and failing to supervise the distribution of documents from Dr. Kormos to the prosecution (Merits Br. at 96). Petitioner has failed to show a single error by counsel, as discussed in the orders resolving his ineffective assistance of counsel claims. Where there is no single constitutional error existing, nothing can accumulate to the level of a constitutional violation. *See Hayes v. Ayers*, 632 F.3d 500, 524 (9th Cir. 2011). Most importantly, he has not shown the California Supreme Court's denial of the claim constituted an unreasonable application of clearly established federal law or an unreasonable application of the facts to that law. Accordingly, this claim is **DENIED**.

6. CLAIM 24.

Claim 24 argues that the lying-in-wait special circumstance as presented to the jurors violated petitioner's constitutional rights because the jury instruction contained unclear language. It also asserts that the special circumstance itself fails to distinguish between all first-degree murders and those eligible for the death penalty.

The California Supreme Court denied this claim on direct appeal. The court distinguished between the lying-in-wait special circumstance and lying-in-wait first-degree murder by noting that "the lying-in-wait special circumstance requires a physical concealment or concealment of purpose and a surprise attack on an unsuspecting victim from a position of advantage." *Stevens*, 41 Cal.4th at 203. It also noted that the special circumstance required the intent to kill, whereas lying-in-wait murder did not. *Id.* at 204. The court determined that the instruction adequately defined the temporal component of the special circumstance. *Ibid.*

A. Constitutionality of Lying-in-Wait Special Circumstance.

This claim argues that the lying-in-wait special circumstance violates the Constitution because it fails to "'genuinely narrow' those persons eligible for the death penalty, "reasonably justify" the imposition of the death penalty on the defendant compared to other murderers, and "provide a meaningful basis" to distinguish death penalty cases from those that are not (Merits Br. at 100, quoting *Romano v. Oklahoma*, 512 U.S. 1, 7 (2004) and *Godfrey v. Georgia*, 446 U.S. 420, 427 (1980)). Petitioner provides no clearly established federal law that would entitle him to relief on this claim. As noted by respondent, our court of appeals has found the lying-in-wait special circumstance to pass constitutional muster. *See Morales v. Woodford*, 388 F.3d 1159, 1173–1178 (9th Cir. 2004). Petitioner provides nothing to the contrary. Accordingly, this claim is **DENIED**.

B. Jury Instruction Subclaim.

Petitioner also asserts that the jury instruction on the lying-in-wait special circumstance likely confused jurors because "the jury was instructed that 'mere concealment of purpose' is not sufficient;" they also must find "the 'substantial period of watching and waiting for an opportune time to act'" (Merits Br. at 101).

The instruction provided to the jury read:

> To find that the special circumstance, referred to in these instructions as murder while lying in wait, is true, each of the following facts must be proved:
>
> 1. The defendant intentionally killed the victim, and
>
> 2. The murder was committed while the defendant was lying in wait.
>
> The term "while lying in wait" within the meaning of the law of special circumstances is defined as a waiting and watching for an opportune time to act, together with a concealment by ambush or by some other secret design to take the other person by surprise even though the victim is aware of the murderer's presence. The lying in wait need not continue for any particular period of time provided that its duration is such as to show a state of mind equivalent to premeditation or deliberation.
>
> Thus, for a killing to be perpetrated while lying in wait, both the concealment and watchful waiting as well as the killing must occur during the same time period, or in an uninterrupted attack commencing no later than the moment concealment ends.

> If there is a clear interruption separating the period of lying in wait from the period during which the killing takes place, so that there is neither an immediate killing nor a continuous flow of the uninterrupted lethal events, the special circumstance is not proved.
>
> A mere concealment of purpose is not sufficient to meet the requirement of concealment set forth in this special circumstance. However, when a defendant intentionally murders another person, under circumstances which include (1) a concealment of purpose, (2) a substantial period of watching and waiting for an opportune time to act, and (3) immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage, the special circumstance of murder while lying in wait has been established

(27 RT 5965–66).

Petitioner argues that the instruction was "convoluted and impossible to understand" because "[w]hile the instructions provide that 'mere concealment of purpose' is not enough and must be accompanied by 'a substantial period of watching and waiting' and a 'surprise attack,' it also dispenses with the 'substantial period of watching and waiting' requirement by allowing it to be satisfied by the temporal element already pre-existing in all first degree murders that reach the lying-in-wait instruction" (Merits Br. at 98). Petitioner goes on to argue that the instruction given to the jury "fails to provide a basis for distinguishing between murders that warrant the death penalty from those that do not" (Merits Br. at 101). Petitioner conflates his jury instruction claim with his argument that the California Supreme Court's analysis of that claim rendered the special circumstance unconstitutional.

In denying this claim on direct appeal, the California Supreme Court held that

> any overlap between the premeditation element of first degree murder and the durational element of the lying in wait special circumstance does not undermine the narrowing function of the special circumstance. (Citation omitted.) Moreover, . . . concealment of purpose inhibits detection, defeats self-defense, and may betray at least some level of trust, making it more blameworthy than premeditated murder that does not involve surprise.
>
> A similar narrowing distinction is discernible between the lying-in-wait special circumstance and lying-in-wait murder because the former requires an intent to kill, while the latter does not. (Citations omitted.) [A]ny overlap between the elements of lying in wait in both contexts does not undermine the narrowing function of the special circumstance. (Citations omitted.)
>
> Defendant further contends that "[i]f the temporal element is . . . equivalent to that of first degree murder," the "requirement of a

> 'substantial period of watching and waiting' is a confusing, contradictory and unnecessary addition to the instruction," making the instruction "incorrect on a material point," and results in the concept of lying in wait being defined in the instruction in materially different ways. We disagree with these assertions, and conclude the instruction is internally consistent. The instruction requires a period of time long enough to show a "state of mind equivalent to premeditation or deliberation." (Citations omitted.) This formulation describes the durational requirement of the special circumstance, which is demonstrated by a substantial period of watching and waiting during which the defendant is physically concealed or conceals his purpose.

Stevens, 41 Cal.4th at 204. A state court's interpretation of state law, including one announced on direct appeal of the challenged conviction, binds a federal court on habeas review. *See Bradshaw v. Richey*, 546 U.S. 74, 76 (2005).

To prevail on a claim that a vague or ambiguous jury instruction violated his constitutional rights, petitioner must show there is a "reasonable likelihood" that the jury has applied the challenged instruction in a way that violates the Constitution. *See Estelle v. McGuire*, 502 U.S. 62, 72 & n.4 (1991). Petitioner's argument, however, focuses not on how the jury could have misapplied the instruction, but rather how the California Supreme Court's analysis conflates elements that the jury was required to find. He, thus, has failed to show a constitutional violation as to the lying-in-wait instruction given to the jury. The California Supreme Court's denial of this claim did not constitute an unreasonable application of clearly established federal law or an unreasonable application of the facts to that law. The claim is, therefore, **DENIED**.

7. CLAIM 25.

Petitioner withdrew Claim 25 in his merits brief (Merits Br. at 103).

8. CLAIM 28.

Claim 28 argues that petitioner's conviction and capital sentence violate various instruments of international law because the death penalty is imposed in a racially discriminatory manner (Sec. Am. Pet. at 277). This claim is not cognizable on federal habeas. Petitioner has failed to cite any clearly established federal law that applies to or would entitle him to relief on this claim. Thus, it is **DENIED**.

9. CALIFORNIA SUPREME COURT'S REFUSAL TO ISSUE AN ORDER TO SHOW CAUSE.

In his first merits brief, petitioner challenged the California Supreme Court's refusal to issue an order to show cause on his state habeas petition and failure to hold an evidentiary hearing, noting that the failure to do so rendered the state court's decision unreasonable (First Rd. Merits Br. at 14–15, citing *Nunes v. Mueller*, 350 F.3d 1045, 1055 (9th Cir. 2003)). This argument would apply only to petitioner's ineffective assistance of counsel claims and the cumulative error claim. Petitioner presented all other claims to the state court on direct appeal.

Respondent argues that petitioner's challenges to the California Supreme Court's adherence to its own processes is not cognizable on federal habeas (First Rd. Opp. at 2). Additionally, he adds that the Supreme Court has indicated clearly that silent denials constitute merits-based denials and that federal courts must give deference to them (*ibid.*, citing *Richter*, 562 U.S. at 98–99).

Nunes does not legally or factually compel the result for which petitioner argues. The holding of *Nunes* does not require a state court to offer an evidentiary hearing in every case in order for the state court decision to be considered "reasonable." Nor are the factual findings made by the state court in *Nunes* comparable to this case.

Nunes was charged with one count of murder and three counts of assault with a firearm for the shooting of a man he found sleeping in his estranged wife's bedroom. The first two of Nunes' trials ended in hung juries. The third trial ended with a conviction, which was reversed on appeal. Before Nunes' fourth trial, the prosecutor made a plea offer to Nunes' counsel. Nunes claimed that his attorney informed him incorrectly of the terms of the offer; that his counsel told the prosecutor that Nunes had rejected the plea bargain; and that by the time Nunes finally could reach his counsel to clarify the offer after the start of his trial, the offer had already expired. Nunes' fourth trial ended in a conviction. *Nunes*, 350 F.3d at 1049–50.

Nunes challenged his conviction on direct appeal and also by way of a state court petition for a writ of certiorari. Nunes claimed that his counsel had provided ineffective assistance by failing to inform Nunes fully of the terms of a plea offer. The California court of appeal

rejected Nunes' claim, finding it unnecessary to hold an evidentiary hearing because Nunes had not established a prima facie case for prejudice—"that but for counsel's deficient performance, the defendant would have accepted the plea bargain." *Ibid.*

Nunes filed a Section 2254 petition in the federal district court in the Northern District of California. The magistrate judge assigned to the case held a two-day evidentiary hearing on Nunes' ineffective assistance claim, after which the magistrate judge recommended that Nunes' petition be granted, concluding that the state court ruling was (1) erroneous and (2) contrary to federal law as clearly established in *Strickland v. Washington*, 466 U.S. 668, 690–93 (1984). The district court adopted the recommendation, and the respondent appealed.

Our court of appeals found that the California Court of Appeal had acted unreasonably by rejecting Nunes' habeas petition. The Ninth Circuit focused on the state court's findings that:

> (1) the materials Nunes had included in the record were "of dubious relevance" and (2) that the state court of appeal had rejected as "simply not credible" Nunes' claim that he could not reach his attorney to clarify the plea offer. The state court had also found on the record that Nunes failed to demonstrate that he would have accepted the state's plea offer had his attorney communicated it to him accurately. The Ninth Circuit took the state court to task for having "eschewed an evidentiary hearing on the basis that it was accepting Nunes' version of the facts" when the state court had clearly discredited Nunes' credibility and rejected his assertions.

Id. at 1055, n. 7.

While *Nunes* found that the state court had acted unreasonably in not holding an evidentiary hearing, that case and the subsequently issued *Lambert v. Blodgett*, 393 F.3d 943, (9th Cir. 2004), make clear that holding an evidentiary hearing is not a per se requirement for a state court to reasonably determine that a petitioner's allegations are not credible or do not justify relief. *Nunes*, 350 F.3d at 1055; *Lambert v. Blodgett*, 393 F.3d at 969 (specifically "declin[ing] to accept Lambert's proposal to inject an 'evidentiary hearing' requirement as a pre-requisite to AEDPA deference").

Lambert reiterated that district courts must extend deference to state court decisions, and further explained the level of review for questions of fact, questions of law, and mixed questions of law and fact:

> We summarize the layers of review mandated by AEDPA as follows: First, challenges to purely factual questions resolved by the state court are reviewed under § 2254(d)(2)7; the question on review is whether an appellate panel, applying the normal standards of appellate review, could reasonably conclude that the finding is supported by the record . . . challenges to mixed questions of law and fact receive similarly mixed review; the state court's ultimate conclusion is reviewed under § 2254(d)(1), but its underlying factual findings supporting that conclusion are clothed with all of the deferential protection ordinarily afforded factual findings under §§ 2254(d)(2) and (e)(1).

Lambert v. Blodgett, 393 F.3d 943, 978 (9th Cir.2004).

In petitioner's case, the reasonableness of the California Supreme Court's habeas denial not as petitioner has suggested, simply a question of whether or not the court held an evidentiary hearing. Rather, the issue is whether or not the California Supreme Court's view of the record absent an evidentiary hearing was objectively reasonable in its finding of no prejudice. *Williams*, 529 U.S. at 409–11. Any other conclusion, as noted by respondent, would vitiate the deference that *Richter* requires for silent denials. The reasonableness of the state court's finding of no prejudice has been addressed above and in the prior order on the merits (*see* Feb. 21, 2018, Order, Dkt. No. 157).

10. MOTION TO SEAL RESPONSE.

On November 7, petitioner's counsel were ordered to file a response to two letters sent by petitioner raising concerns about a potential conflict. Counsel move to file their response under seal because it addresses issues related to the attorney-client relationship (Administrative Motion to File Under Seal, Dkt. No. 172).

"Historically, courts have recognized a 'general right to inspect and copy public records and documents, including judicial records and documents.'" *Kamakana v. City & Cnty. of Honolulu*, 447 F.3d 1172, 1178 (9th Cir. 2006) (quoting *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597 & n.7 (1978)). Accordingly, when considering a sealing request, "a strong presumption in favor of access is the starting point." *Ibid.* (internal quotation marks omitted).

Courts have accepted attorney–client privilege as sufficient justifications for sealing. *See In re Hewlett-Packard Co. S'holder Derivative Litig.*, No. 15-16688, 2017 WL 5712130, at *4 (9th Cir. Nov. 28, 2017) (affirming sealing decision where "[t]he special master found that HP provided compelling reasons to justify its sealing motion, including that the documents at issue included . . . material protected by the attorney–client privilege and the work product doctrine"). Thus, good cause exists to seal counsel's response to the November 7 order and the motion to seal is **GRANTED**.

CONCLUSION

For the foregoing reasons, Claims 1, 11, 12, 15, 16, 21, 24, and 28 are **DENIED**. Claim 25 was withdrawn.

The Court **GRANTS** a certificate of appealability as to Claim 1.

The motion to seal counsel's response to the November 7 order is **GRANTED**.

IT IS SO ORDERED.

Dated: January 17, 2019.

WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE

APPENDIX D

SUPREME COURT
FILED
AUG 26 2009
Frederick K. Ohlrich Clerk
Deputy

S119354

IN THE SUPREME COURT OF CALIFORNIA

En Banc

In re CHARLES STEVENS on Habeas Corpus

The Petition for Writ of Habeas Corpus filed September 29, 2003, is denied. All claims except Claim 17 are denied on the merits.

Claim 16 is also denied on the ground it was raised and rejected on appeal. (*In re Harris* (1993) 5 Cal.4th 813, 825; *In re Waltreus* (1965) 62 Cal.2d 218, 225.)

Claims 2 and 10 are also denied on the ground that they could have been, but were not, raised on appeal. (*In re Harris* (1993) 5 Cal.4th 813, 825, fn. 3, 829; *In re Dixon* (1953) 41 Cal.2d 756, 759.)

Claim 17 is denied as premature and without prejudice to petitioner's filing of a renewed petition after an execution date is set.

DOCKETED
SAN FRANCISCO
AUG 27 2009
By H. BIS...
No. SF2003XH0007

GEORGE
Chief Justice

SUPREME COURT
FILED
JUN 04 2007
Frederick K. Ohlrich Clerk
Deputy

APPENDIX E

IN THE SUPREME COURT OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

CHARLES STEVENS,

Defendant and Appellant.

S034704

Alameda County
Super. Ct. No. 102962

A jury convicted Charles Stevens of four first degree murders and six attempted murders.[1] A lying-in-wait special circumstance was found true as to one murder.[2] A special circumstance allegation of multiple murder, and personal firearm use allegations as to all counts, were also found true.[3] The jury set the punishment at death.

The case is before us on defendant's automatic appeal.[4] For the reasons that follow, we affirm the judgment.

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[1] Penal Code sections 187, subdivision (a), former section 189, former section 664. All further undesignated statutory references are to the Penal Code.

[2] Section 190.2, former subdivision (a)(15), as enacted by initiative, November 7, 1978.

[3] Section 190.2, subdivision (a)(3); former sections 1203.06, 12022.5.

[4] California Constitution, article VI, section 11, section 1239, subdivision (b).

SEE CONCURRING AND
CONCURRING AND DISSENTING OPINIONS

I. FACTUAL BACKGROUND

A. Guilt Phase

1. Prosecution Evidence

Defendant challenges the sufficiency of proof only as to one murder, one attempted murder, and the lying-in-wait special circumstance. Thus, we discuss the facts in summary, except as necessary. Between April 3 and July 27, 1989, defendant engaged in a series of random attacks, by shooting at people on or near Interstate 580 in Oakland. All but one of the victims were in cars when attacked. Defendant succeeded in killing Leslie Ann Noyer, Lori Anne Rochon, Laquann Sloan, and Raymond August. He attempted to kill Karen Alice Anderson, Janell Lee, Julia Peters, Paul Fenn, Upendra de Silva, and Rodney Stokes. Defendant was charged alone as to all the offenses, except Noyer's murder. As to this murder, Richard Clark was tried as a codefendant. The jury deadlocked on the murder charge against Clark, and the trial court declared a mistrial.

Defendant was apprehended near the scene of his final murder. On July 27, at 1:15 a.m., Rodney Stokes was driving home from work at 45 miles per hour on Interstate 580. Defendant, driving a white Mazda, pulled up alongside him and both vehicles slowed down. Stokes lowered his passenger window, and looked over to see if he knew the driver. Defendant motioned as though trying to get Stokes's attention, and smiled at him. Stokes had never seen defendant before, but thought perhaps he had a passenger who "was a friend from work getting a ride and trying to slow me down for whatever reasons." Stokes had often seen coworkers on the freeway. Just as Stokes realized there was no passenger, defendant shot at him.

Stokes lay down on the seat and turned off his headlights, losing control of the vehicle briefly. At this point he was traveling approximately 30 miles per hour. When Stokes regained control and looked up, the Mazda was in front of

him. Defendant "was sitting there waiting, basically, still coasting in front of me and then [defendant] fired" twice more. Stokes was approximately three-quarters of a mile away from the 35th Avenue overpass. Defendant pulled away, and Stokes began flicking his lights on and off to attract police attention. He also sped up to catch defendant.

As he drove, Stokes saw defendant slow down and pull alongside Raymond August's car. They were the only two vehicles in front of him on the road. Stokes testified defendant "g[o]t the attention of the other driver" because both sets of brake lights came on. Stokes lost sight of the cars for a brief moment, which he characterized as "the snap of a finger." After rounding a slight turn, Stokes saw the cars again, and heard at least two gunshots. Defendant rapidly drove to the 35th Avenue off-ramp, left the freeway, and drove onto another on-ramp that entered the freeway going the opposite direction.

Stokes drove to August's car, which had crashed into a pillar under the 35th Avenue overpass. He saw August and "[a]n awful lot of blood." He looked across the freeway, saw the Mazda parked on the shoulder of the on-ramp, and called 911.

When the first police officer arrived, defendant was still parked on the on-ramp, looking "at the scene underneath the freeway." When the officer ordered him out of the vehicle, defendant appeared startled, and began to drive away. He then got out of the car with his hands in the air, walked backwards, and fled on foot toward a retaining wall. The officer grabbed defendant at the wall. As he did so, the officer heard a heavy metallic object hit the ground; it was a loaded .357 magnum Desert Eagle semiautomatic pistol. Defendant was carrying a loaded magazine and a loose bullet. Stokes subsequently arrived and identified defendant.

Defendant told police he had possessed the weapon for the last three to four months, since "[a]bout . . . March." Ballistics evidence indicated defendant's weapon was either a match to or consistent with the gun used in all of the crimes except for the attempted murder of Stokes. The piece of lead slug recovered from Stokes' vehicle was insufficient to make any comparison.

A search of defendant's room revealed a box and an operator's manual for the weapon, a canvas gun case, gun cleaning equipment, a .357 magnum cartridge and magazine, trays of bullets, and practice targets. He also had a collection of Oakland newspapers containing articles about the shootings, and an envelope with handwritten references to what appeared to be various Penal and Vehicle Code sections including those regarding murder, assault, vehicle theft, and weapons offenses.[5] Defendant's palm print was found on victim Noyer's vehicle.

During an unrecorded interview, police asked defendant what type of person would commit random shootings on a freeway. He replied the "only reason would be mental, or loneliness, some lonely mother fucker." When asked how such a person would be caught, he said, "The guy would get caught if somebody told on him or if he pulled over like I did."

2. Defense Evidence

Defendant presented evidence only as to the murder of 16-year-old Laquann Sloan, a conviction not challenged on appeal. Sloan was shot in the head as he walked down the street. Three witnesses testified about events before and after the shooting, but none witnessed the shooting itself.

---

[5] The references included: "245(A, 2)-10+" (punishment for assault with a firearm); "12020-20+" (prohibited weapons); "187-4" (murder) and "10851-32+" (vehicle theft).

Codefendant Clark testified regarding the Noyer and Rochon murders. Clark had given police various accounts of the Noyer murder. In his last statement, he claimed he had shot Noyer under duress because defendant threatened to shoot him. At trial, Clark denied being present at the murder scene, and said he made up the story using details from the police.

As to the Rochon murder, Clark testified that early on the morning of July 6, he and defendant were in a stolen car. As defendant drove, he started rocking back and forth, and said in an urgent tone, " 'Man, I got to shoot somebody.' " Defendant pulled alongside a car, but Clark asked why he was going to shoot this person. Defendant said, "Okay. I'm not going to shoot this guy. I'll shoot somebody white." Defendant subsequently pulled next to Lori Rochon's car, and rolled down his side window, telling Clark he thought Rochon was a "white dude," and fired at her. Clark's sister testified that in July 1989, Clark asked her to tell him when the news came on because defendant had shot someone on the freeway. The news report stated that the woman's name was "Lori," and she was shot on Interstate 580. When Clark saw a July 18 article about the assaults on Fenn, Peters, and de Silva, he called defendant and asked if he had done the shooting. Defendant said, " 'Man, don't say that over the phone.' "

B. Penalty Phase

1. Prosecution evidence

The parties stipulated that defendant was convicted in 1989 of three counts of felony auto theft. (Former Veh. Code, § 10851.)

Randall Shumpert described an incident in June 1987. At 10:00 p.m., defendant and a passenger drove by the BART station where Shumpert was standing. The passenger yelled something at Shumpert, and angry words were exchanged. Defendant drove off, but returned a few minutes later with his

headlights off. Defendant leaned from the car window, shot at Shumpert, and drove away.

On November 30, 1988, Sheriff's Deputy William Borland and Sergeant Steve Wilson responded to a disturbance in the county jail mess hall. Defendant threw a carton of milk at Wilson, swore, and urged other inmates to throw objects at the officers. Defendant picked up his metal tray as though to throw that, but complied when ordered to put it down.

On March 18, 1993 Sherriff's Deputy Timothy Durbin was transporting defendant from jail to court during the guilt phase of this case. He heard defendant tell another inmate in hushed tones, "You know that fuckin' Clark is fucking me over. He snitched me off five times now. If I get the chance, I'm going to do him . . . . I'm going to kill that mother fucker, even if I did make him do some of that shit, he's trying to fuck me over."

Eight witnesses provided victim impact testimony regarding the accomplishments of their loved ones, and the effect of the murders on their own lives.

2. Defense evidence

Psychiatrist Harry Kormos testified about defendant's childhood and the results of psychological testing. Dr. Kormos met with defendant approximately 10 times for three hours each over a period of four to five months. He concluded defendant had an unspecified personality disorder with schizoid and borderline personality traits. Dr. Kormos had diagnosed several dozen people with such a disorder, but could not recall any of them committing murder. Although defendant manifested this disorder, he suffered from no mental illness. Physical and psychological testing revealed no organic brain illness, tumors, or malformations. Defendant's mother stopped drinking about five years before

defendant was born, and defendant did not have fetal alcohol syndrome. Defendant's intelligence quotient of 80 to 90 revealed below-average intelligence, but he was not mentally retarded. Defendant was of mixed racial heritage: his mother was Native American, and his father Caucasian and Black. While defendant said "that he never had any difficulty" along these lines, Dr. Kormos nevertheless opined that "[t]his kind of racial confusion makes it even harder than it is already in our society to deal with racial issues."

Defendant was well cared for by his parents in Oakland until he was 11 or 12 years old. Defendant's mother was a devout Jehovah's Witness, and defendant was active in the church. About age 12, defendant moved with his mother and older sister to an Indian reservation. Defendant suffered several seizures, and an EEG showed abnormality. In a 1993 EEG, however, there were no abnormalities. His mother resumed drinking, stopped practicing her religion, and became both verbally and physically violent. She was charged with child abuse for beating defendant's older sister. Defendant reported that in two incidents a few days apart, he attempted suicide to get his mother's attention. There were no medical reports about the suicides, and he bore no scars, although he said he cut his wrists in the second attempt.

When defendant was 13, the family was reunited in Oakland. Defendant's mother was arrested on several occasions for drunk driving, and spent a year in jail. At one point she was committed to Highland Hospital for threatening to throw defendant out a window and kill his sister. She drank until her death in March 1986.

Defendant's brother was convicted of murder in 1978. Dr. Kormos said the brother, 17 years older than defendant, was only a distant figure to defendant, and he discerned no relevant "emotional" material in these factors.

Defendant was twice suspended for disruptive behavior in middle school. He had to repeat the ninth grade for academic reasons, but won several trophies in bike racing. He tried marijuana when he was 12, but did not use drugs. He did, however, sell cocaine in high school to get money for clothes and jewelry. He was fired from a pawnshop job for stealing a gun. He cared for his father, who was working full-time, which Dr. Kormos opined demonstrated defendant was capable of altruistic action.

Dr. Kormos was not "able to come up with a clear diagnosis as to why" defendant murdered four people and attempted to kill six others. Defendant never denied committing the capital crimes, but reported he could not remember committing most of them. He did have a patchy recollection of the August killing. Dr. Kormos opined that at some level defendant wanted to be caught. He found no indication that defendant derived pleasure or satisfaction from the killings.

Jerry Enomoto, a former Director of the Department of Corrections, testified defendant would be no more than a nuisance inmate in prison. Three deputy sheriffs testified regarding defendant's good conduct while in jail, although one noted defendant had lost a job assignment for misconduct.

II. DISCUSSION

A. Pretrial

Alleged Wheeler Error

Defendant brought four *Wheeler* motions asserting the prosecutor was improperly exercising his peremptory challenges to excuse African-Americans. (*People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*).) All four motions were denied. Here, defendant challenges only the ruling on the first motion. The trial court expressly found a prima facie case of discrimination in connection with this motion, and asked the prosecutor to state reasons for his challenges. The jury as sworn contained one Black juror and one Black alternate.

In *Wheeler*, *supra*, 22 Cal.3d 258, we held " 'that the use of peremptory challenges by a prosecutor to strike prospective jurors on the basis of group membership violates the right of a criminal defendant to trial by a jury drawn from a representative cross-section of the community under article I, section 16, of the California Constitution. Subsequently, in *Batson* v. *Kentucky* (1986) 476 U.S. 79, 84-89 [*Batson*] . . . the United States Supreme Court held that such a practice violates, inter alia, the defendant's right to equal protection of the laws under the Fourteenth Amendment to the United States Constitution.' " (*People v. Catlin* (2001) 26 Cal.4th 81, 116 (*Catlin*).) "[T]he ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike." (*Purkett v. Elem* (1995) 514 U.S. 765, 768; *Batson*, at p. 93.)

Relying on *People v. Silva* (2001) 25 Cal.4th 345, defendant asserts the prosecutor's reasons for challenging Prospective Jurors L.F., H.H., and J.C., all of whom were involved in the first *Wheeler* motion, were not supported by the record, and that the trial court erred in failing to question the prosecutor about these discrepancies. In *Silva*, we observed that a trial judge is required to make a "sincere and reasoned attempt to evaluate each stated reason as applied to each challenged juror. [Citations.] When the prosecutor's stated reasons are both inherently plausible and supported by the record, the trial court need not question the prosecutor or make detailed findings. But when the prosecutor's stated reasons are either unsupported by the record, inherently implausible, or both, more is required of the trial court than a global finding that the reasons appear sufficient." (*Silva*, at p. 386.)

The record reveals that defendant's claim lacks merit. Regarding all three prospective jurors, the prosecutor stated, "The basis for the challenges are the same as for all of the people that I have challenged, and that is on the basis that the People didn't feel they would get a fair trial with those jurors . . . . [W]ith regard

to all [three] of the jurors, I indicated in one way or another at the very least an ambivalence and the lack of commitment, at least in my mind, of their willingness to impose the death penalty. That there was a vacillation that they reflected and a situation that I felt I could not take the chance of them hanging this should we get to the point of . . . a penalty phase. . . . [I]t was not just merely the words that they spoke or what they had written on the questionnaire, but also the manner in which they responded to my questions, and specifically, their ability to carry it out, and reading not only what they said, but also how they responded physically to the question itself."

The prosecutor also noted "the bulk of the victims in my case are in fact of Afro-American [descent], and I would like to have that represented on the jury. It is, just in my view and my experience, that I didn't feel that these people had the personal fortitude to in fact impose a death penalty verdict, if it should get there . . . I would also like to have that point of view reflected on this jury but, unfortunately, these jurors, I don't believe, have the ability, the internal fortitude to say to Mr. Stevens 'death' if we should get there."

As to Prospective Juror L.F. specifically, the prosecutor stated he "reflected an ambivalence" regarding the death penalty, while in his questionnaire "he indicated he was moderately for it. When it came down to whether or not he would vote for it if the issue were on the ballot, he said, 'I honestly don't know.' And in talking with him, he said, 'Well, I'll follow the law with regard to whatever the Judge tells me.' And when you put it in terms that, well, the law doesn't mandate that you have to impose the death penalty, that's something that's up to you. He indicated, again, just an ambivalence in his ability and showed a lack of commitment in the ability to impose the death penalty."

Defendant asserts that Prospective Juror L.F. did not say he honestly did not know when asked if he would vote for the death penalty if an advisory measure

were on the ballot. During voir dire, L.F. said he would vote "Yes," because the penalty was a "deterrent," and on his juror questionnaire, L.F. said he was "[m]oderately in favor" of the death penalty. However, when asked on the questionnaire, "If the issue of whether California should have a death penalty law was to be on the ballot in this coming election, how would you vote," he checked, "[n]ot sure," and wrote, "I honestly do not know." The record supports the prosecutor's stated reason.

Defendant also points out that L.F. said he could supply the twelfth vote to make a death verdict unanimous "if it was called for." L.F. also said, "At one time I thought that way, I really . . . didn't like the death penalty. But I find I can follow—if the law says that's what it is, I can follow the law. I'd do what the law says and if it—if—if the law says this man gets the death penalty, this man doesn't, I could do that." These various responses do not undermine the prosecutor's stated reason.

As to Prospective Juror H.H., the prosecutor stated, "he kept on bouncing around, at least in terms of a certain amount of ambivalence that he reflected, always falling back, 'Can you do it?' And the answer is, 'Well, I'll take a look at all the information. I need all the information before I could make a decision.' At one level that may be understandable. At another level . . . ., it appeared to be more of an ambivalence." The prosecutor also noted, "As I was talking with him, I could smell a very strong odor of alcohol on him, and he admits in his questionnaire that he is an alcoholic and that alcohol has gotten him into trouble. And I'm always concerned about someone who's drinking in the middle of the day . . . and who admits that he's got an alcohol problem and he's still drinking." H.H. admitted a conviction for driving under the influence a year and a half earlier.

Defendant asserts that the prosecutor "misrepresented" Prospective Juror H.H. "as falling back on needing all the evidence, [when he] in fact said that only in the context of affirming that he could and would vote for death if the evidence led him there."

On his questionnaire, Prospective Juror H.H. stated he was "neutral" regarding the penalty, and noted, "I feel that it is ineffective due to [the] fact . . . it can be delayed any number of times by any one convicted. Also it has not shown to be a [deterrent] for anyone committing crimes." On voir dire, he repeatedly asserted he would not make a decision without "all" the "information," "facts," or "evidence." In response to the court's question regarding whether he would be open to imposing either penalty, he said, "I'm the type of person, you know, that I cannot pass whatever type of judgment, whatever, or anything without having all the facts. I prefer to have all the facts before I make any kind of judgment on anything. If you don't have the facts, you tend to make mistakes, and I'm one who tends to try to have all the facts before me before I make any kind of decision." In response to the prosecutor's question as to whether he had thought about whether he could vote for a death penalty verdict, H.H. said, "Not really because, you know, like as I stated before, you have to take into consideration all of the information that's going to be presented, I mean, you know, you just cannot preformulate any kind of idea of what's going to happen without the information being available and being presented. I mean, you know, I'll put it like this, I'm an information junkie, that's one thing I live for is information. . . . I don't tend to pass any kind of judgment or anything like this without taking into consideration all of the information that's pertaining to what I'm trying to find out . . . ." In sum, the record supports the prosecutor's stated reasons.

Regarding Prospective Juror J.C., the prosecutor said she "was in a like situation of indicating, 'I think I could do it,' but reflecting, again, a lack of

conviction in her ability to do it, which gave me a great deal of concern as to whether I could afford to take the chance." Defendant contends "this ignored her many answers affirmatively supporting her ability and willingness to impose the death penalty."

On her questionnaire, Prospective Juror J.C. stated she was "neutral" on the death penalty, and said, "I have not made up my mind on the death penalty[.] It would depend upon the extent of the crime[.] I cannot answer [until] I had all the facts." She was "[n]ot sure" how she would vote "[i]f the issue of whether California should have a death penalty law was to be on the ballot in this coming election," because "[n]ot all crime deserve[s] [the] death penalty."

On voir dire, when asked how she would vote if the death penalty were on the ballot, J.C. said, "I think I would vote for it. . . . I say it depends on the crime and—it depends. The penalty should fit the crime, depending on the circumstances of what happened. I think at this time the way I feel right now I think I would vote for it. But I would have to wait until it actually happened before I make up my mind finally." When the prosecutor described how defendant would be executed, and then asked, "Now, could you cast that vote and sign that jury verdict form," Prospective Juror J.C. responded, "Since you put it like that, it's kind of hard. . . . It's hard, yeah." Thus, while J.C. made other statements that indicated she could vote for the death penalty, the record supports the prosecutor's statement that Prospective Juror J.C. was ambivalent.

Defendant further asserts that the prosecutor's pretext is demonstrated by comparing the voir dire answers of Prospective Jurors H.H., L.F., and J.C. with those of seated Jurors D.M., J.C., M.F., and V.W. Defendant did not perform a comparative juror analysis in the trial court, and acknowledges that we have disapproved of such comparative analysis for the first time on appeal. (*People v. Johnson* (1989) 47 Cal.3d 1194, 1220-1221.) To the extent *Johnson* may have

been called into question by *Miller-El v. Dretke* (2005) 545 U.S. 231, we perform a comparative juror analysis to facilitate this review. (Compare with *People v. Bell* (2007) 40 Cal.4th 582, 600-601 [*Miller-El* does not require comparative juror review in a first stage *Wheeler* case, or when no prima facie case is found].) We do not hereby express an opinion that such a comparison is compelled. The record fails to demonstrate purposeful discrimination.

In comparison to Prospective Juror H.H., seated Jurors J.C., M.F., and V.W. had not suffered any prior convictions. Juror D.M. had suffered a conviction for driving under the influence approximately eight years earlier. However, H.H. had a substantially more recent conviction, and smelled of alcohol during voir dire.

Nor do these seated jurors demonstrate such a striking similarity in ambivalence regarding the death penalty that a finding of pretext is warranted. (See *People v. Schmeck* (2005) 37 Cal.4th 240, 271, 273 (*Schmeck*).) On her questionnaire, Juror V.W. "[a]greed with the decision" to remove Chief Justice Bird. She voted for, and was moderately in favor of, the death penalty. If the issue of whether California should have a death penalty was on the ballot, she would vote for it since, "[s]ome crimes really seem to justify the penalty."

On voir dire, when asked whether she could be in the situation of ending another person's life, V.W. answered, "You know, at this point, I guess so. I really don't know." However, when in his next question the prosecutor described the execution process and asked her if she could cast the twelfth vote for a death penalty verdict, Juror V.W. said, "Yes."

On her questionnaire, Juror D.M. stated, "I believe the death penalty is justified in certain cases." She was moderately in favor of the death penalty. She would vote for it if it were on the ballot because, "I think there are some crimes [heinous] enough to warrant the death penalty."

On voir dire, when asked by the prosecutor whether she could envision herself voting for the death penalty in this type of case, D.M. said in part, "to me, murder is a heinous crime so that is about the only way I can answer that for you. I would think, depending on the circumstances and depending on the instructions that we've been given as to what would make that penalty phase come into effect, that I am—I would be prepared to make that vote . . . if the aggravating . . . circumstances, warranted that the death penalty be in this case, then I could vote for it if I felt that way." In response to the prosecutor's question about casting the twelfth vote for a death penalty verdict, D.M. said, "If I felt it were appropriate based on what I said before, I would have to." When asked if she would give serious consideration to defendant's mitigating evidence and the penalty of life imprisonment without the possibility of parole, she said, "I think I would have to be so convinced that . . . the death penalty was the only thing that I could vote for before I voted for it. In other words, I think I would try to give every possibility to not asking for the death penalty, unless I just could not, in my own mind, think that anything less would be appropriate. . . . I would weigh every possibility of the death penalty not being the verdict, unless I felt very convinced that that was the only appropriate verdict that I would have to vote for it, so yes, I think I would keep an open mind to anything that might sway [me] in that direction." In response to defense counsel questioning, she said, "I believe that there are certain cases for which the death penalty is appropriate. I am not so sure I can say without hearing evidence that this case falls into that category." These responses indicate an appreciation that voting for a death verdict is a grave decision, not ambivalence regarding the death penalty.

Juror J.C. stated on his questionnaire, "I believe that the death penalty is needed because it gives criminals (persons) something to think about when they commit the crimes and kill somebody either by firearms or bodily harm." He was

neutral on the death penalty, and not sure if he would vote for it on the ballot. "I would read the issue first and come to a conclusion before I voted on this issue. I want to [find] out the good and bad points of this issue."

On voir dire, the court asked, "could you cast a vote as a juror for either of . . . these penalties if you felt it was the appropriate penalty . . .?" Juror J.C. answered "Yes, sir." In response to the prosecution question regarding "[s]hould we have a death penalty in the state of California," Juror J.C. said "Yes, we should if . . . the crime is serious enough." Unlike *Prospective* Juror J.C., when the prosecutor described the execution process and asked, "Knowing those consequences, could you cast that twelfth vote," *Juror* J.C. answered, "I would—I believe that if in my truthful mind that everything points to the death penalty, that's the way I would go."

Juror M.F. wrote on her questionnaire, "I feel that the death penalty should be looked at on a case-by-case basis." She was neutral on the death penalty. She was not sure if she would vote for it on the ballot because "I am not entirely convinced that the death penalty deters criminals."

On voir dire, when the court asked if she could cast a vote for either penalty, M.F. said "Yes." In response to the prosecutor's question regarding casting the twelfth vote for a death penalty verdict, she said, "Yes, sir, I could."

In sum, nothing in these jurors' questionnaire or voir dire answers indicates such striking similarity to the challenged prospective jurors' responses that pretext is evident. Moreover, as with any situation involving alleged bias, we defer to the trial court's credibility determination. (*Batson*, *supra*, 476 U.S. at p. 98, fn. 21; *Schmeck*, *supra*, 37 Cal.4th at p. 275.) The best evidence of whether a race-neutral reason should be believed is often "the demeanor of the attorney who exercises the challenge," and "evaluation of the prosecutor's state of mind based on demeanor and credibility lies 'peculiarly within a trial judge's province.' "

(*Hernandez v. New York* (1991) 500 U.S. 352, 365.) In addition, the prosecutor expressly stated he was basing his challenges not only on the prospective jurors' words, but their nonverbal behavior as well. The trial court could evaluate the nonverbal conduct on which the prosecutor relied. We cannot. Indeed, in denying the *Wheeler* motion, the trial court noted it was relying not only on "an analysis of the proferred reasons," but also "the court's own observations." Defendant has failed to demonstrate purposeful racial discrimination against prospective jurors.

B. Guilt Phase

1. Alleged Crawford Error

Codefendant Clark's statement to police was redacted to delete any reference to another person. Defendant contends that admission of the statement was erroneous under *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*). In *Crawford,* at pages 53-54, 68, and *Davis v. Washington* (2006) ___ U.S. __ [126 S.Ct. 2266, 2276], the high court held that admission of testimonial hearsay statements against a defendant violates the Sixth Amendment confrontation clause when the declarant is not, and has not previously been, subject to cross-examination.

This claim is waived. Defendant's counsel expressly stated his satisfaction with the redacted statement because there was "no reference to [defendant] directly or indirectly." He withdrew his *Aranda/Bruton*[6] objection and motion to sever based on the redacted statement.

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[6] In *People v. Aranda* (1965) 63 Cal.2d 518, this court "adopted 'judicially declared rules of practice' for all cases in which the prosecution proposed to introduce in evidence an extrajudicial statement of one defendant that implicated a codefendant." (*People v. Fletcher* (1996) 13 Cal.4th 451, 460, see also p. 465.) In *Bruton*, the high court held that "because jurors cannot be expected to ignore one defendant's confession that is 'powerfully incriminating' as to a second defendant

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Moreover, the claim lacks merit. *Crawford* addressed the introduction of testimonial hearsay statements against a defendant. Clark's redacted statement contained no evidence against defendant. (*Crawford, supra*, 541 U.S. at pp. 39-40, 68.) Thus, it cannot implicate the confrontation clause. (*Richardson v. Marsh* (1987) 481 U.S. 200, 211; *People v. Mitcham* (1992) 1 Cal.4th 1027, 1046-1047.) The same redaction that "prevents *Bruton* error also serves to prevent *Crawford* error." (*United States v. Chen* (2d Cir. 2004) 393 F.3d 139, 150.)

Defendant further asserts that because Clark's redacted statement was admitted, Clark testified at trial. Had Clark not testified, defendant argues, the jury would not have heard incriminating evidence about defendant's involvement in the Noyer and Rochon murders, and there would have been no modus operandi regarding freeway murders. The Sixth Amendment confrontation clause does not bar hearsay statements of a witness who testifies at trial and is subject to cross-examination. (*Crawford, supra*, 541 U.S. at p. 59, fn. 9.) Here, defendant received what the confrontation clause requires: a full opportunity to confront and cross-examine Clark.

2. Challenge to Denial of Section 1118.1 Motion

Defendant contends the trial court erroneously denied his motion to dismiss the counts regarding the murder of Lori Rochon, and the attempted murder of Paul Fenn.[7] (§ 1118.1.)[8] As for Rochon's murder, defendant argues that when the

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when determining the latter's guilt, admission of such a confession at a joint trial generally violates the confrontation rights of the nondeclarant. (*Bruton* v. *United States* (1968) 391 U.S. 123, 126–137.)" (*Fletcher*, at p. 455.)

[7] Defendant does not challenge the sufficiency of the evidence supporting his conviction for the attempted murder of Julia Peters, who was in the van with Fenn.

motion was argued, Clark had not testified. Hence, the evidence was insufficient as to the perpetrator's identity.

"The standard applied by a trial court in ruling upon a motion for judgment of acquittal pursuant to section 1118.1 is the same as the standard applied by an appellate court in reviewing the sufficiency of the evidence to support a conviction, that is, 'whether from the evidence, including all reasonable inferences to be drawn therefrom, there is any substantial evidence of the existence of each element of the offense charged.' " (*People v. Crittenden* (1994) 9 Cal.4th 83, 139, fn. 13.) "The purpose of a motion under section 1118.1 is to weed out as soon as possible those few instances in which the prosecution fails to make even a prima facie case." (*People v. Shirley* (1982) 31 Cal.3d 18, 70; *People v. Ainsworth* (1988) 45 Cal.3d 984, 1022.) The question "is simply whether the prosecution has presented sufficient evidence to present the matter to the jury for its determination." (*Ainsworth*, at p. 1024.) The sufficiency of the evidence is tested at the point the motion is made. (§ 1118.1; *Shirley*, at pp. 70-71; see *People v. Cole* (2004) 33 Cal.4th 1158, 1213.) The question is one of law, subject to independent review. (*Cole*, at p. 1213.)

The prosecution's evidence showed Rochon was shot while driving on Interstate 580 on July 6, 1989. Between April 3 and July 16, eight people, including Rochon and Fenn, were shot at within a few miles of each other on or

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[8] Section 1118.1 provides in relevant part: "In a case tried before a jury, the court on motion of the defendant or on its own motion, at the close of the evidence on either side and before the case is submitted to the jury for decision, shall order the entry of a judgment of acquittal of one or more of the offenses charged in the accusatory pleading if the evidence then before the court is insufficient to sustain a conviction of such offense or offenses on appeal."

near that freeway. Rochon was also shot during the early morning; all of the nine other assaults in this case occurred between approximately midnight and 3:00 a.m. The bullet removed from Rochon's body had polygonal markings and was fired from a Desert Eagle pistol, a fairly unusual weapon. The Desert Eagle is the only .357 magnum pistol with polygonal rifling. Before the Noyer murder on April 3, Lansing Lee, an Oakland Police Department criminalist and firearms identification expert, had never seen a .357 magnum slug with polygonal rifling. After August's murder on July 27, Lee never again saw another such slug. Defendant was arrested in possession of a Desert Eagle, and admitted having it in his possession for several months. Defendant's Desert Eagle was used to kill Noyer, Sloan, and August, and to shoot at Anderson, Lee, and de Silva. A newspaper article regarding the Rochon murder was found in defendant's bedroom. This evidence supports a prima facie case that defendant was the perpetrator.

Defendant further contends that whether considered at the time of the motion to dismiss or following the defense case, there is insufficient evidence connecting him to the attempted murder of Paul Fenn. Not so. Fenn was shot at while driving on Interstate 580 early on the morning of July 16. Copper bullet jackets found in his van were from a Desert Eagle. Minutes after the assault on Fenn, and only several hundred yards away, de Silva was wounded by a shot from defendant's Desert Eagle. When Clark saw a newspaper article about the assaults on Fenn and de Silva, he called defendant and asked if he had done the shooting. Defendant said, " 'Man, don't say that over the phone.' " An article about the Fenn and de Silva assaults was found in defendant's bedroom. The evidence was sufficient regarding defendant's identity as Fenn's attempted murderer.

3. Sufficiency of Evidence of Lying-in-wait Special Circumstance

Defendant contends there was insufficient evidence of an adequate period of watching and waiting to support the lying-in-wait special-circumstance finding for Raymond August's murder.[9] We conclude the evidence was sufficient.

A sufficiency of evidence challenge to a special circumstance finding is reviewed under the same test applied to a conviction. (*People v. Mayfield* (1997) 14 Cal.4th 668, 790.) Reviewed in the light most favorable to the judgment, the record must contain reasonable and credible evidence of solid value, "such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578.)

The prosecution relied solely on a theory of premeditation for the underlying murder of August. The jury convicted defendant of first degree murder, and he does not challenge that conclusion. Evidence of lying in wait was provided primarily by Rodney Stokes, at whom defendant shot just before murdering August. (See *ante*, pp. 2-3.)

At the time of the capital crimes, the elements of the lying-in-wait special circumstance required an intentional killing, committed under circumstances that included a physical concealment or concealment of purpose; a substantial period of watching and waiting for an opportune time to act; and, immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage.[10]

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[9] The jury found not true the lying-in-wait special-circumstance allegation regarding Noyer's murder.

[10] Here, the jury was instructed that in order to find the special circumstance true, defendant must have intentionally killed the victim and done so while lying in wait. Lying in wait was defined as "waiting and watching for an opportune time to act, together with a concealment by ambush or by some other secret design to take the other person by surprise even though the victim is aware of the murderer's presence. The lying in wait need not continue for any particular period of time provided that its duration is such as to show a state of mind

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(Section 190.2, former subd. (a)(15); *People v. Morales* (1989) 48 Cal.3d 527, 554-555, 557 (*Morales*).) The purpose of the watching and waiting element is to distinguish those cases in which a defendant acts insidiously from those in which he acts out of rash impulse. (See *People v. Moon* (2005) 37 Cal.4th 1, 24 (*Moon*).) This period need not continue for any particular length " 'of time provided that its duration is such as to show a state of mind equivalent to premeditation or deliberation.' "[11] (*Sims*, *supra*, 5 Cal.4th at p. 433-434.) " ' "The element of

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equivalent to premeditation or deliberation. Thus, for a killing to be perpetrated while lying in wait, both the concealment and watchful waiting as well as the killing must occur during the same time period, or in an uninterrupted attack commencing no later than the moment concealment ends. If there is a clear interruption separating the period of lying in wait from the period during which the killing takes place, so that there is neither an immediate killing nor a continuous flow of the uninterrupted lethal events, the special circumstance is not proved. A mere concealment of purpose is not sufficient to meet the requirement of concealment set forth in this special circumstance. However, when a defendant intentionally murders another person, under circumstances which include (1) a concealment of purpose, (2) a substantial period of watching and waiting for an opportune time to act, and (3) immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage, the special circumstance of murder while lying in wait has been established."

[11] Contrary to Justice Kennard's concurring and dissenting opinion, nothing in the language of section 190.2, former subdivision (a)(15), which provides that "[t]he defendant intentionally killed the victim while lying in wait," indicates that the durational element of "lying-in-wait" is defined differently for the special circumstance than it is for first degree murder. (Conc. & dis. opn. of Kennard, J., *post*, at p. 2.) Nor does anything we said in *Morales*, *supra*, 48 Cal.3d 527, indicate we were so interpreting the special circumstance. (Conc. & dis. opn. of Kennard, J., *post*, at p. 2.) At the time of the capital crimes, the only differences between lying in wait murder and the special circumstance did not touch on the durational element of lying in wait. Rather, first degree murder by lying in wait does not require an intent to kill while the special circumstance based on that theory does. (*People v. Webster* (1991) 54 Cal.3d 411, 448 (*Webster*); *People v. Ceja* (1993) 4 Cal.4th 1134, 1140, fn. 2 (*Ceja*).) In addition, the first

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concealment is satisfied by a showing that a defendant's true intent and purpose were concealed by his actions or conduct. It is not required that he be literally concealed from view before he attacks the victim." ' " ' " (*People v. Hillhouse* (2002) 27 Cal.4th 469, 500 (*Hillhouse*).) The factors of concealing murderous intent, and striking from a position of advantage and surprise, "are the hallmark of a murder by lying in wait." (*People v. Hardy* (1992) 2 Cal.4th 86, 164.)

Defendant here was convicted of August's premeditated murder. In order to convict him of first degree murder, the jury was instructed it had to find beyond a reasonable doubt that defendant's intentional killing was willful, deliberate and premeditated.

The facts of this case and the jury's conclusion that defendant acted with deliberation and premeditation dispel any inference that he killed as a result of rash impulse. Even a short period of watching and waiting can negate such an inference. (*Moon, supra*, 37 Cal.4th at p. 24.) The facts here are more than sufficient to establish that after the assault on Stokes, defendant turned his attention to a new target. He selected August, the driver of the only other nearby car on the road ahead of him, as his next victim. He approached and concealed his deadly purpose by pulling up alongside of August and induced him to slow down. August did so, just as Stokes had. This process may not have taken an extended

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degree murder formulation refers to "by means of" lying in wait and the special circumstance referred to "while" lying in wait. Neither difference changes the principle that for a murder conviction and for a special circumstance finding the lying in wait need not continue for any particular period of time provided that its duration is such as to show a state of mind equivalent to premeditation or deliberation. (*Ceja*, at p. 1139; *People v. Sims* (1993) 5 Cal.4th 405, 433-434 (*Sims*).)

period, because defendant did not have to wait long until his next target became available. But there is no indication of rash impulse. To the contrary, it was reasonable for the jury to conclude that defendant acted to implement his plan of luring a victim of opportunity into a vulnerable position by creating or exploiting a false sense of security. The jury could also reasonably conclude that August was taken by surprise. He did not flee, but slowed down and drove side-by-side with defendant, just as Stokes had done. Once the intended victim slowed down, the time to act became opportune. Defendant stopped watching and started shooting. Such behavior is completely consistent with, and provides substantial evidence for, the watching and waiting element of the lying-in-wait special circumstance.

4. Alleged Unconstitutionality of Lying-in-wait Special-circumstance Instruction

Defendant contends the lying-in-wait special-circumstance instruction was confusing and constitutionally flawed in violation of the Sixth and Fourteenth Amendments, and California Constitution article I, section 16.[12] In particular, he contends that "[i]f the temporal element is . . . equivalent to that of first-degree murder, then the statute loses all claim to performing a rational narrowing function." It is not clear whether he means first degree murder on a theory of premeditation and deliberation, or lying in wait, but in either case the claim fails. In distinction with premeditated first degree murder, the lying-in-wait special circumstance requires a physical concealment or concealment of purpose and a surprise attack on an unsuspecting victim from a position of advantage. (Section 190.2, former subd. (a)(15); *Morales*, *supra*, 48 Cal.3d at pp. 554-555, 557.) Thus, any overlap between the premeditation element of first degree murder

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[12] While defendant states he is challenging the instructions "as applied in this case," the entire challenge is to the language of the instruction.

and the durational element of the lying in wait special circumstance does not undermine the narrowing function of the special circumstance. (*Sims*, *supra*, 5 Cal.4th at p. 434.) Moreover, contrary to Justice Moreno's concurring and dissenting opinion, concealment of purpose inhibits detection, defeats self-defense, and may betray at least some level of trust, making it more blameworthy than premeditated murder that does not involve surprise. (See *Catlin*, *supra*, 26 Cal.4th at p. 159 [poison murder]; conc. & dis. opn. of Moreno, J, *post*, at p. 13.)

A similar narrowing distinction is discernible between the lying-in-wait special circumstance and lying-in-wait murder because the former requires an intent to kill, while the latter does not. (*Ceja, supra,* 4 Cal.4th at p. 1140, fn. 2; *Webster*, *supra,* 54 Cal.3d at p. 448.) Thus, any overlap between the elements of lying in wait in both contexts does not undermine the narrowing function of the special circumstance. (See *Sims*, *supra*, 5 Cal.4th at p. 434; see also *Catlin*, *supra*, 26 Cal.4th at pp. 158-159.)

Defendant further contends that "[i]f the temporal element is . . . equivalent to that of first degree murder," the "requirement of a 'substantial period of watching and waiting' is a confusing, contradictory and unnecessary addition to the instruction," making the instruction "incorrect on a material point," and results in the concept of lying in wait being defined in the instruction in materially different ways. We disagree with these assertions, and conclude the instruction is internally consistent. The instruction requires a period of time long enough to show a "state of mind equivalent to premeditation or deliberation." (See *ante*, p. 21, fn. 10.) This formulation describes the durational requirement of the special circumstance, which is demonstrated by a substantial period of watching and waiting during which the defendant is physically concealed or conceals his purpose.

5. Alleged prosecutorial misconduct

Defendant alleges the prosecutor committed misconduct when he tried to prevent the jury from returning second degree murder convictions. During voir dire, the trial court explained that the jury would only reach a penalty phase if it found that defendant was guilty of first degree murder and that a special circumstance was true. Prospective jurors were also told that while deliberating in the guilt phase, they could not consider or discuss the subject of punishment in any way.

In his rebuttal argument, the prosecutor addressed defense counsel's contention that the August murder was no more than second degree. After discussing the relevant legal principles, and the evidence showing that defendant premeditated and deliberated, the prosecutor said, "Now, why go through all of this? The court is going to instruct you you're not to consider penalty in this phase of the trial. I mean, in the back of your heads you all know if we do certain things, we might be talking about whether he should live or die, and you're not supposed to consider that in deciding whether he's guilty of any of these crimes. In any of the special circumstance clauses, you're supposed to separate that and you all said you could do it. And while you're not supposed to consider penalty and punishment, [defense counsel] and [defendant] certainly are thinking about it. And what happens when you say these are all murders? No doubt about it. All of the attempted murders, they're all attempted murders, no doubt about it. Yeah, but they're only second degree murders. What happens if they're second degree murders? You can never find him guilty of the special circumstance. And they save his life or at least save --"

Following defense counsel's objection, the trial court said, "Ladies and gentlemen, as I've indicated to you previously, the statements of the attorneys and argument are not evidence as you know with regard to the law. At the conclusion

of the arguments I will be instructing you as to the law that is applicable to this case. With regard to the last comment, I will direct you to disregard it." The jury was subsequently instructed not to consider penalty or punishment in its deliberations.

There is no reasonable likelihood the remark misled the jury as to whether it could consider punishment in its guilt deliberations. (*People v. Samayoa* (1997) 15 Cal.4th 795, 842-843 (*Samayoa*).) As the high court has stated, "arguments of counsel generally carry less weight with a jury than do instructions from the court. The former are usually billed in advance to the jury as matters of argument, not evidence [citation], and are likely viewed as the statements of advocates; the latter, we have often recognized, are viewed as definitive and binding statements of the law." (*Boyde v. California* (1990) 494 U.S. 370, 384 (*Boyde*).)

Moreover, while defendant relies on *People v. Holt* (1984) 37 Cal.3d 436 (*Holt*), to assert the reference to punishment was prejudicial, *Holt* is distinguishable. There, the trial court did not immediately admonish the jury following the prosecutor's remark that accepting defendant's theory would guarantee Holt a parole date. (*Id.* at pp. 457-458.) Rather than disapproving the argument, it said, " 'I wouldn't talk any more about that.' " (*Id.* at p. 458.) Here, in addition to the court's immediate intervention and disapproval, the jury had already been properly informed that a penalty phase would follow only if defendant was convicted of first degree murder and a special circumstance was found true. Nothing in *Holt* indicates that the jury there had been similarly informed. Moreover, the *Holt* court did not find prejudice based solely on the prosecutor's argument. Rather, it reversed for cumulative prejudice based on several errors including the objectionable argument. (*Id.* at pp. 458-459.)

In addition to these factors which distinguish this case from *Holt*, after argument the jury here was instructed, as was the jury in *Holt*, "In your

deliberations the subject of penalty or punishment is not to be discussed or considered by you. That is a matter which must not in any way affect your verdict or affect your finding as to the special circumstance[s] charged in this case." (*Holt*, *supra*, 37 Cal.3d at p. 458, fn. 16.) We presume the jury followed that instruction. (See, e.g., *People v. Ledesma* (2006) 39 Cal.4th 641, 684.)

C. Penalty Phase

1. Alleged Prosecutorial Misconduct

Defendant also alleges numerous instances of prosecutorial misconduct at the penalty phase. There was no prejudicial misconduct either as to individual claims or collectively.

First, defendant contends the prosecutor ignored the trial court's ruling on the scope of victim impact evidence. The trial court directed that August's girlfriend, Linda Leach, not mention "feelings of personal guilt."

Defendant objects to Leach's testimony in response to the prosecutor's question "When did you last see him?" Leach said she and August saw each other every day. She had a company function on the night August was murdered, and he had not felt comfortable leaving without knowing Linda arrived home safely. These statements do not violate the trial court's order, and certainly the prosecutor's question would not be expected to elicit inappropriate testimony.

The trial court sustained objections to and struck Leach's volunteered testimony that "I still feel a lot of guilt about the fact that he was leaving my house" and "we should have followed the news stories. We should have known that he should not have been on the road." We need not consider the correctness of the trial court's ruling regarding reference to feelings of personal guilt. Neither of Leach's statements were elicited by the prosecutor, and the jury was told to disregard them.

Defendant asserts without elaboration that "[a] similar pattern occurred with Laquann Sloan's mother," and defense counsel was "forced to object repeatedly . . ., as he was again with Lori Rochon's sister, Karen Adams . . . ." We have examined the questioning of these witnesses, and see no misconduct.

Next, defendant asserts prosecutorial misconduct when Leslie Noyer's mother picked up and kissed a photograph of her daughter as she left the witness stand. Defendant moved for a mistrial. The prosecutor said that the incident "was totally, from my perspective, spontaneous. It was something that I did not anticipate occurring at all. . . . [T]he act of the kissing of the photograph was something that took us all by surprise." Defense counsel said, "He knows or didn't know. I would assume he didn't know it was going to happen. . . . I don't think that's an issue . . . I'm not alleging any kind of misconduct."

The court denied the motion. It found that counsel had acted in good faith. It noted that the photograph "was in a position that was out of the line of sight of the witness as she was being examined by [the prosecutor], and it's a location in the structure of this courtroom where exhibits throughout the course of this trial over the many weeks have been placed when they have not been utilized by a particular witness."

By expressly asserting below he was not alleging "any kind of misconduct," defendant clearly has waived any challenge on appeal. Moreover, no misconduct is demonstrated. Nor, to the extent defendant asserts the claim, did the trial court err in denying the mistrial motion. The case law is clear that victim-impact testimony is relevant and admissible. When family and friends of murder victims are asked to come into court to testify about their bereavement, the situation is an emotionally charged one. The mother's grief at losing her daughter was a normal human emotion the jury would assume she experienced. Kissing her daughter's photograph, while not appropriate, gave the jury no new or impermissible

information, and was not so inflammatory it would "divert the jury's attention from its proper role" or invite a purely irrational response. (*People v. Taylor* (2001) 26 Cal.4th 1155, 1172.)

Next, defendant contends the prosecutor tried to undermine the trial court's ruling regarding what the prosecution asserted was defendant's "scorecard." The court admitted an envelope with handwritten references apparently to Penal and Vehicle Code sections, with numbers next to these sections. (See *ante*, p. 4.) The court excluded a notation on the envelope to "190 Ø." The prosecution's theory was that this was a reference to section 190, delineating punishment for murder, and in his view indicated a plan to kill a police officer.

During his cross-examination of Dr. Kormos regarding the envelope, the prosecutor said, "Let's assume if there is another element on that score card . . . that indicated an intent to murder a police officer—" The court sustained defense counsel's objection, and subsequently stated, "There's been no answer to the question. The question is to go out. The jury is to disregard it."

Even assuming the prosecutor's question was improper, there is no reasonable likelihood it misled the jury as to evidence of defendant's intent to murder a police officer. (*Samayoa*, *supra*, 15 Cal.4th at pp. 842-843.) No evidence of such a plan or attempt was introduced. Indeed, the prosecutor never finished the question, so the jury had no idea what point he was trying to make. In addition, the jury was promptly reminded the question had not been answered, and they were to disregard it. For these reasons, and to the extent defendant raises the claim, the trial court did not err in denying his subsequent motion for mistrial based on this aborted and stricken question.

Next, defendant contends the prosecutor engaged in several instances of misconduct during closing argument. The prosecutor said, "The difficulty in this case is not whether the death penalty is justified and warranted here. The

difficulty is whether all 12 of you have the internal fortitude to impose the death penalty on that man over there. It's not easy. It's not easy. And as [defense counsel] in his opening statement alluded to, all it takes is one, one of you to block a death verdict in this jury. And that's what he wants, just one of you, because we have to have a unanimous verdict for a death verdict. All 12 of you have to agree on that. And if you don't and you hang, we do it again with another jury." Defense counsel objected, and the jury was told to disregard "the last comment."

While defendant notes he objected to and brought an unsuccessful mistrial motion regarding the last comment, he challenges on appeal only the "internal fortitude" aspect of the prosecutor's statement. This claim is forfeited because defendant did not object on this ground at trial. It is also meritless.

Relying on *United States v. Young* (1985) 470 U.S. 1, 18, defendant contends that statements regarding the jury's "internal fortitude" were improper. *Young* involved the guilt, not penalty, phase of a criminal trial. (*Id.* at pp. 3-6.) Moreover, the high court found that, in context, the prosecutor's comment that the jury " 'do its job,' " while misconduct, did not influence the jury "to stray from its responsibility to be fair and unbiased." (*Id.* at p. 18, fn. omitted.) Here, the prosecutor's argument merely acknowledged the inherent difficulty in sentencing to death a person sitting in front of the jury. The argument was proper. (*People v. Jones* (1997) 15 Cal.4th 119, 185.)

Without further elaboration, defendant next contends the prosecutor "went too far" when he said, "When we talk about this personality disorder, what is the one thing we know we can say for sure? Just the testimony and the work of Dr. Kormos tallies up to $14,250. And what do you get for your money? Nothing. Nothing. Not one ounce of it explains why he's where he is today. Not one piece of it gives you anything about his character or his background that causes you any sympathy, to lend out any compassion to give a grant of mercy and spare his life.

$14,250, and that's just Dr. Kormos. What have the other doctors cost? Gretchen White? We know that she saw him a number of times. Dr. Kaufman and Shonkoff, they saw him in April of 1991, saw him three times. What do they cost?" Defense counsel objected, and the court told the jury it would be instructing it as to the law at the conclusion of argument.

Shortly after the challenged comment, the prosecutor said without objection, "the significance of the amount of money involved here illustrates that when the man's life is on the line, we are not going to be stingy, we'll give them those resources. See if you can find something. We'll give them to you. You need some bucks, $14,000 for Dr. Kormos? Fine, go ahead. You need some tests done? Fine, go ahead. We are not going to deny somebody a test that might provide something that might cause sympathy, compassion for him. But when all is said and done, it still comes up to a big zero." In context, the comment simply reflects permissible argument that, despite being given significant resources, defendant's psychiatric consultants were unable to marshal any credible reason to explain or mitigate defendant's murderous behavior. Moreover, the trial court's later instructions made clear what factors the jury could consider.

Defendant contends the prosecutor committed misconduct when he said, "Now, who haven't you heard from? Who are some people that you would have expected to have heard from that you haven't heard from? [Defense counsel], in his opening statement to you, said the defendant doesn't have any family. He's an orphan. He doesn't have anyone to speak for him. Well, that's not correct. We know that his father died last summer. We know that. But you know, . . . there are ways of preserving the testimony of witnesses who are ill, and who are elderly. You videotape their testimony and present it here. The defendant's father could have spoken to you." Defense counsel objected, stating in part, "Counsel knows I made a motion trying to do that and he was not in any condition to do that." The

prosecutor responded, "Well, I disagree with that. And counsel says he doesn't like to speak, but that's a total lie." The trial court instructed the jury to disregard the prosecutor's last comment, and said, "I've told you repeatedly that with regard to the arguments of counsel, the arguments of counsel are not evidence in this case."

Defendant concedes the reasons why the examination of defendant's father "was apparently not done are not readily discernible from the record." The fact that he did not appear, and was an obvious witness to rebut the People's or corroborate defendant's penalty case, was fair comment on the evidence by the prosecutor. (*People v. Lewis* (2001) 25 Cal.4th 610, 670 (*Lewis*).)

Relying on *People v. Coddington* (2000) 23 Cal.4th 529, defendant also asserts that the prosecutor's argument was a violation of the work product privilege. *Coddington* held that a "party's decision that an expert who has been consulted should not be called to testify is within the privilege." (*Id.* at p. 606.) Whatever the continuing efficacy of *Coddington* in the context of expert witnesses (see *People v. Gray* (2005) 37 Cal.4th 168, 238 (conc. opn. of Baxter, J.); *id.* at p. 238 (conc. opn. of Chin, J.), it has long been established that a prosecutor may comment on the absence of logical witnesses to rebut the People's or corroborate defendant's case. (*People v. Chatman* (2006) 38 Cal.4th 344, 403; *Lewis*, *supra*, 25 Cal.4th at p. 670; *People v. Szeto* (1981) 29 Cal.3d 20, 34; *People v. Vargas* (1973) 9 Cal.3d 470, 475; see *People v. Bolden* (2002) 29 Cal.4th 515, 552-553.) Nor, as defendant contends, was he "sentenced to death 'on the basis of information which he had no opportunity to explain or deny.' " Indeed, defense counsel gave an explanation in his objection to the prosecutor's argument.

Defendant next objects to the prosecutor's related comment regarding defendant's sister and half sister, "And why weren't Gina and Sylvia called? Two logical inferences. One, they didn't want to testify to why—" The trial court

sustained defense counsel's objection "as to the beginning of that last part." The prosecutor continued, "If they had anything positive, constructive to say to wring from you compassion and show you a basis of having sympathy and a basis for mercy to be given to this man, you would have heard it." The trial court overruled defense counsel's ensuing objection.

As to the first comment, the record does not reflect what the comment would have been. Even assuming it was inappropriate, the objection operated precisely as it was supposed to, and the jury never heard the comment. We reject defendant's assertion the second comment was misconduct for the same reasons it was not misconduct to comment on the absence of defendant's father.

Defendant asserts misconduct in the prosecutor's statement, "You know, I wonder if Dr. Kormos had the misfortune of having a loved one who violated the law—" Defense counsel objected, and the trial court said, "All right. Move into another argument . . . ." This claim is forfeited for failure to seek an admonition. It is also meritless. Other than quoting the statement, defendant provides no reason why it was improper or how he was prejudiced. It is not even clear what the prosecutor was attempting to say. No misconduct is apparent.

Finally, defendant challenges the prosecutor's comment, "[T]his is my last chance to talk to you. And I was wondering what Leslie, Lori, Laquann, and Raymond would say to you if they had the chance to tell you what happened to them. And maybe I've been in this case too long, but I felt last night that I did have a conversation with them. And in that conversation, Leslie said to me, 'You know, his attorney --' " The trial court sustained defense counsel's objection.

The claim is waived on appeal by the failure to request an admonition. Moreover, the line of questioning was ended by defense objection, and defendant makes no attempt to explain how the partial statement was improper or prejudicial.

2. Constitutionality of Death Penalty Statute

Defendant makes numerous claims that the death statute violates the United States Constitution. We conclude they are not individually, or cumulatively, meritorious.

Section 190.2 is not impermissibly broad in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. In particular here, the multiple-murder and lying-in-wait special circumstances adequately narrow the class of murderers subject to the death penalty. (*People v. Jurado* (2006) 38 Cal.4th 72, 127; *People v. Box* (2000) 23 Cal.4th 1153, 1217 (*Box*).)

Section 190.3, factor (a), which allows the jury to consider "[t]he circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true pursuant to Section 190.1," does not violate due process and the Eighth Amendment because those circumstances differ from case to case. (*Tuilaepa v. California* (1994) 512 U.S. 967, 975-976; *Schmeck*, *supra*, 37 Cal.4th at p. 304.)

The death statute does not allow for arbitrary and capricious sentencing, or deprive a defendant of the right to a jury trial on each element of a capital crime, in violation of the Sixth, Eighth, and Fourteenth Amendments. In particular, these constitutional provisions are not violated when a jury is not required to find beyond a reasonable doubt that aggravating factors outweigh mitigating factors, that death is the appropriate sentence, or that an aggravating factor (except for other crimes) is true. (*People v. Cox* (2003) 30 Cal.4th 916, 971-972 (*Cox*).)

Nor is there merit to defendant's alternative claim that a preponderance of the evidence standard of proof is compelled for the findings that an aggravating factor exists, that the aggravating factors outweigh the mitigating factors, and that death is the appropriate sentence. The jury was instructed that "[t]o return a judgment of death, each of you must be persuaded that the aggravating circumstances are so

substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." That instruction is sufficient. (*Tuilaepa v. California*, *supra*, 512 U.S. at p. 979; *Box*, *supra*, 23 Cal.4th at p. 1216.) "Unlike the guilt determination, 'the sentencing function is inherently moral and normative, not factual' [citation] and, hence, not susceptible to a burden-of-proof quantification." (*People v. Hawthorne* (1992) 4 Cal.4th 43, 79.)

The Constitution does not require that a jury make written findings regarding aggravating factors, or reach unanimity as to which aggravating evidence is true. Nothing in *Cunningham v. California* (2007) __ U.S. __ [127 S. Ct. 856], *Apprendi v. New Jersey* (2000) 530 U.S. 466, or *Ring v. Arizona* (2002) 536 U.S. 584, affects our conclusions in this regard. (*People v. Prince* [S036105, Apr. 30, 2007] __ Cal.4th __ [at pp. 156-157]; *Cox, supra*, 30 Cal.4th at pp. 971-972; *People v. Prieto* (2003) 30 Cal.4th 226, 263, 275.)

The death statute does not violate defendant's right to due process or his state or federal right to equal protection. "[C]apital and noncapital defendants are not similarly situated and therefore may be treated differently without violating constitutional guarantees of equal protection of the laws or due process of law." (*People v. Manriquez* (2005) 37 Cal.4th 547, 590 (*Manriquez*).)

The failure to require intercase proportionality does not guarantee "arbitrary, discriminatory, or disproportionate impositions of the death penalty," or violate the Fifth, Sixth, Eighth, and Fourteenth Amendments. (*Pulley v. Harris* (1984) 465 U.S. 37, 50-51; *Cox*, *supra*, 30 Cal.4th at p. 970.) Contrary to defendant's claim, "use of unadjudicated criminal activity during the penalty phase is permissible," and does not violate the Fifth, Sixth, Eighth, and Fourteenth Amendments. (*Box*, *supra*, 23 Cal.4th at p. 1217.) The trial court is not required to delineate which factors are mitigating or aggravating. (*Manriquez*, *supra*, 37 Cal.4th at p. 590.)

The use of the words "extreme" in section 190.3, factors (d) and (g), and "substantial" in factor (g), does not render these factors unconstitutionally vague, arbitrary, or capricious, act as a barrier to the consideration of mitigating evidence, or violate the Fifth, Sixth, Eighth, and Fourteenth Amendments. Factor (k), as expanded in the instructions here pursuant to *People v. Easley* (1983) 34 Cal.3d 858, allowed consideration of "any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime and any sympathetic or other aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death, whether or not related to the offense for which he is on trial." (*Id.* at p. 878, fn. 10; *Schmeck*, *supra*, 37 Cal.4th at p. 305; see *Ayers v. Belmontes* (2006) __ U.S. __ [127 S.Ct. 469, 475]; *Boyde*, *supra*, 494 U.S. at pp. 381-382.)

We reject defendant's argument that the death penalty statute is contrary to international norms of humanity and decency, and therefore violates the Eighth and Fourteenth Amendments. Defendant points to no authority that "prohibit[s] a sentence of death rendered in accordance with state and federal constitutional and statutory requirements." (*Hillhouse*, *supra*, 27 Cal.4th at p. 511.)

III. DISPOSITION

The judgment is affirmed.

CORRIGAN, J.

WE CONCUR:

GEORGE, C. J.
BAXTER, J.
WERDEGAR, J.
CHIN, J.

CONCURRING OPINION BY WERDEGAR, J.

Like Justice Moreno, who dissents from affirmance of the lying-in-wait special-circumstance finding (conc. & dis. opn. of Moreno, J., *post*), I am concerned at the potential breadth of that special circumstance. In light of our holdings that the special circumstance (set out in Pen. Code, § 190.2, subd. (a)(15)) does not require physical concealment but only "concealment of purpose, coupled with a surprise attack from a position of advantage" (*People v. Morales* (1989) 48 Cal.3d 527, 556), and that the period of watchful waiting involved need be only so long " 'as to show a state of mind equivalent to premeditation or deliberation' " (*People v. Sims* (1993) 5 Cal.4th 405, 433-434), the concept of lying in wait threatens to become so expansive as to eliminate any meaningful distinction between defendants rendered eligible for the death penalty by the special circumstance and those who have "merely" committed first degree premeditated murder.

I do not believe, however, the special circumstance must or should be construed so broadly as to pose a constitutional problem. In order to find the evidence of lying in wait sufficient in this case, particularly, we need not understand concealment of purpose to mean simply that defendant did not announce his intent before killing the victim. This case, like *Morales*, involves active *deceit* as to purpose—a misrepresentation or ruse that lulls the victim into a false sense of security. In *Morales*, one of the murderers lured the victim into his

car on the pretext of a shopping trip. (*People v. Morales*, *supra*, 48 Cal.3d at p. 554; see also *People v. Sims*, *supra*, 5 Cal.4th at p. 433 [sufficient evidence to support lying-in-wait special circumstance where murderers lured pizza delivery man to motel room by pretext of ordering pizza].) In the case at bench, defendant similarly employed a ruse—gesturing and smiling as he pulled alongside the victim, Raymond August—to induce August to slow his vehicle so that defendant could shoot him. (Or so the jury could infer from the testimony of eyewitness Rodney Stokes.) Defendant's conduct was distinct from ordinary premeditated murder not merely because he did not warn the victim of his murderous intent, but because he actively concealed it by his deceitful behavior.

In my view, this is a meaningful distinction, one on which the voters could have reasonably relied in approving the special circumstance law. Those who conceal from the victim their intent to kill by deceit or ruse could reasonably be regarded as more culpable than those who do not do so; deceitful behavior is traditionally and rationally condemned. Perhaps more to the point, an aspiring murderer who lures his victim into a vulnerable position and then launches a surprise attack is particularly likely to succeed, and hence is particularly dangerous. As the penal law is meant to deter, the special circumstance is not irrational in selecting especially dangerous behavior for special punishment.

Considering defendant's employment of a ruse, moreover, sufficient evidence supports the finding that he watched and waited for his opportunity to kill August for a *substantial* period. Though he took only a few seconds to prepare to shoot August, defendant used that time, as the majority explains, "to implement his plan of luring a victim of opportunity into a vulnerable position by creating . . . a false sense of security." (Maj. opn., *ante*, at p. 23.) Brief though it was, the period of watching and waiting here was substantial in that it allowed defendant to implement a critical step in his plan of attack.

Wary as I am of affirming a finding on an overbroad lying-in-wait special circumstance, therefore, I conclude that here, without adopting an unconstitutional construction, the majority properly holds the finding supported by substantial evidence.

WERDEGAR, J.

CONCURRING AND DISSENTING OPINION BY KENNARD, J.

The concurring and dissenting opinion by Justice Moreno concludes that the lying-in-wait special circumstance, as this court has construed it, does not perform the narrowing function required by the federal Constitution's Eighth Amendment to distinguish from other murders those killings that are so heinous as to warrant the death penalty. At one time I expressed similar concerns. (*People v. Ceja* (1993) 4 Cal.4th 1134, 1146-1147 (conc. opn. of Kennard, J.).) Since then, however, I have come to the conclusion that the lying-in-wait special circumstance does not violate the federal Constitution. (*People v. Jurado* (2006) 38 Cal.4th 72, 145-147 (conc. opn. of Kennard, J.).) On this point, therefore, I disagree with Justice Moreno. But I share his view that the trial court in this case erred in instructing the jury that to find true the special circumstance allegation of lying in wait, it need only find that the lying in wait continued for the length of time necessary "to show a state of mind equivalent to premeditation or deliberation." Because that error was prejudicial, this court should vacate the lying-in-wait special circumstance found by the jury in this case.

Under California's death penalty law, murder intentionally committed by lying in wait is a special circumstance warranting the death penalty, but those who commit premeditated and deliberate murder are not subject to the death penalty unless there is also a special circumstance finding. This distinction suggests that when the voters in 1978, through the power of initiative, enacted California's

death penalty law, they regarded murder by lying in wait as more heinous than premeditated murder, and they intended to define murder by lying in wait in a manner that differed significantly from premeditated murder. To give effect to that distinction, this court in *People v. Morales* (1989) 48 Cal.3d 527, held that the lying-in-wait special circumstance requires "a *substantial* period of watching and waiting for an opportune time to act." (*Id.* at p. 557, italics added.) A murder committed after a substantial period of watchful waiting demonstrates a degree of callousness and coldbloodedness exceeding that of an "ordinary" premeditated killing, where the murderer's requisite reflection and consideration of consequences may occur in a very short time. (See *People v. Lenart* (2004) 32 Cal.4th 1107, 1127 ["Premeditation and deliberation do not require much time [citation], for ' "[t]houghts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly." ' "].)

Thereafter, in *People v. Sims* (1993) 5 Cal.4th 405, this court upheld a jury instruction stating that the waiting period required for the lying-in-wait special circumstance "need not continue for any particular period of time provided that its duration is such as to show a state of mind equivalent to premeditation or deliberation." (*Id.* at pp. 433-434.) As Justice Moreno's concurring and dissenting opinion in this case points out, *Sims* undercuts this court's earlier requirement in *People v. Morales, supra*, 48 Cal.3d at page 557, that the period of watchful waiting be "substantial." (Conc. & dis. opn. of Moreno, J., *post*, at p. 6.)

In *Sims*, I wrote separately, disagreeing with the majority's discussion of three issues unrelated to lying in wait, a topic that my separate opinion in *Sims* did not address. (*People v. Sims*, *supra*, 5 Cal.4th at pp. 467-471.) On reflection, I now conclude that the *Sims* majority was also wrong in departing from this court's earlier holding in *People v. Morales*, *supra*, 48 Cal.3d at page 557, that the lying-in-wait special circumstance requires a "substantial" period of watchful waiting. I

therefore agree with Justice Moreno (conc. & dis. opn. of Moreno, J., *post*, at pp. 13-14) that the trial court here erred by giving the same jury instruction that this court upheld in *Sims*: that to find the lying-in-wait special circumstance true, the jury need only find that the defendant waited for a period of time sufficient to show "a state of mind equivalent to premeditation or deliberation." I hasten to add that the giving of that jury instruction in this case was understandable in light of its express approval by the majority in *Sims*. For the reasons given by Justice Moreno (conc. & dis. opn. of Moreno, J., *post*, at pp. 14-15), the error requires reversal of the jury's special circumstance finding of lying in wait, but it does not require reversal of the judgment of death because the jury found the existence of another special circumstance.

KENNARD, J.

CONCURRING AND DISSENTING OPINION BY MORENO, J.

I agree that defendant Charles Stevens's death judgment should be affirmed. I would, however, reverse the lying-in-wait special circumstance because the imposition on defendant of that circumstance, as interpreted by this court and applied in this case, violates the Eighth Amendment to the United States Constitution. Unfortunately, the meaning and significance of this circumstance has not been interpreted with sufficient intellectual rigor, notwithstanding the fact that its application in a given case may mean the difference between life and death.

I.

The jury found true the lying-in-wait special circumstance in connection with the Raymond August murder. As recounted in the majority opinion, defendant, driving a white Mazda on Interstate 580 in Oakland, first pulled alongside Rodney Stokes, prompting Stokes to slow down and lower his window to see if he knew the driver. Defendant motioned as though trying to get Stokes's attention, and smiled at him. Defendant then shot at Stokes several times, but missed him. After that, Stokes saw defendant catch up to another car on the freeway and appear to essentially repeat the same modus operandi: "Stokes testified defendant 'g[o]t the attention of the other driver' because both sets of brake lights came on. Stokes lost sight of the cars for a brief moment, which he characterized as 'the snap of a finger.' After rounding a slight turn, Stokes saw the cars again, and heard at least

two gunshots. Defendant rapidly drove to the 35th Avenue off-ramp, left the freeway, and drove onto another on-ramp that entered the freeway going the opposite direction." (Maj. opn., *ante*, at p. 3.)

In denying defendant's claim that there was insufficient evidence of the lying-in-wait special circumstance, the majority first clarified its conception of the requirement for proving such a crime. "At the time of the capital crimes, the elements of the lying-in-wait special circumstance required an intentional murder; committed under circumstances that included a concealment of purpose; a substantial period of watching and waiting for an opportune time to act; and, immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage. (Former Pen. Code, § 190.2, subd. (a)(15);[1] *People v. Morales* (1989) 48 Cal.3d 527, 557.) The purpose of the watching and waiting element is to distinguish those cases in which a defendant acts insidiously from those in which he acts out of rash impulse. (See *People v. Moon* (2005) 37 Cal.4th 1, 24 (*Moon*).)" (Maj. opn., *ante*, at pp. 21-22, fn. omitted.)

Applying this definition of the lying-in-wait special circumstance to the present case, the majority states: "The facts of this case and the jury's conclusion that defendant acted with deliberation and premeditation dispel any inference that he killed as a result of rash impulse. Even a short period of watching and waiting can negate such an inference. (*Moon*, *supra*, 37 Cal.4th at p. 24.) The facts here are more than sufficient to establish that after the assault on Stokes, defendant turned his attention to a new target. He selected August, the driver of the only other nearby car on the road ahead of him, as his next victim. He approached and concealed his deadly purpose by pulling up along side of August and induced him

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1 All statutory references are to the Penal Code unless otherwise indicated.

to slow down. August did so, just as Stokes had. This process may not have taken an extended period, because defendant did not have to wait long until his next target became available. But there is no indication of rash impulse. To the contrary, it was reasonable for the jury to conclude that defendant acted to implement his plan of luring a victim of opportunity into a vulnerable position by creating or exploiting a false sense of security. The jury could also reasonably conclude that August was taken by surprise. He did not flee, but slowed down and drove side-by-side with defendant, just as Stokes had done. Once the intended victim slowed down, the time to act became opportune. Defendant stopped watching and started shooting. Such behavior is completely consistent with, and provides substantial evidence for, the watching and waiting element of the lying-in-wait special circumstance." (Maj. opn., *ante*, at pp. 23-24.)

II.

Lying in wait, as a principle in criminal law, began as a 14th century statute denying to the Crown the right to pardon any person who killed "while lying in wait" for his victim. This statute apparently arose as a reaction by the Norman conquerors of England against the subjugated Anglo-Saxons' practice of killing the Normans by ambush. (Note, *Criminal Law: Homicide: Murder Committed by Lying in Wait* (1954) 42 Cal. L.Rev. 337.) It evolved into a form of first degree murder, incorporated into Penal Code section 189, and, as explained below, was used as an alternative means of proving that the defendant premeditated or deliberated before the murder. (Note, *supra*, at pp. 340-341; see *People v. Thomas* (1953) 41 Cal.2d 470, 481 (conc. opn. of Traynor, J.).)

Lying in wait took on a different use when it was incorporated as a special circumstance into the 1978 death penalty statute together with other forms of first degree murder in existence at the time, such as murder by torture or by a destructive device. This death penalty statute provided that a defendant must be

sentenced to death or life imprisonment without possibility of parole if the "defendant intentionally killed the victim while lying in wait." (§ 190.2, subd. (a)(15), as added by Prop. 7, approved by voters, Gen. Elec. (Nov. 7, 1978).) "In this setting, lying in wait is not a means of proving premeditation in order to show the murder is one of the first degree. To the contrary, the murder must already have been found to be first degree before the jury reaches the question of special circumstance. [¶] Instead, the special circumstance of lying in wait serves — and to be constitutional, must serve — a different purpose: it must provide a ' " 'meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not.' " ' (*Godfrey v. Georgia* (1980) 446 U.S. 420, 427.)" (*People v. Webster* (1991) 54 Cal.3d 411, 465 (conc. & dis. opn. of Broussard, J.).)

This court has failed to interpret the lying-in-wait special circumstance to serve that narrowing function. In *People v. Morales*, *supra*, 48 Cal.3d 527, 555 (*Morales*), we made clear that lying in wait within the meaning of the special circumstance statute did not require actual physical concealment, but only concealment of purpose. At the same time, the *Morales* court rejected a constitutional challenge to this interpretation of the lying-in-wait special-circumstance statute. "[W]e do not mean to suggest that a mere concealment of purpose is sufficient to establish lying in wait — many 'routine' murders are accomplished by such means, and the constitutional considerations raised by defendant might well prevent treating the commission of such murders as a special circumstance justifying the death penalty. But we believe that an intentional murder, committed under circumstances which include (1) a concealment of purpose, (2) a substantial period of watching and waiting for an opportune time to act, and (3) immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage, presents a factual matrix sufficiently distinct from

'ordinary' premeditated murder to justify treating it as a special circumstance." (*Morales*, *supra*, 48 Cal.3d at p. 557.)

Although the court acknowledged that concealment of purpose alone would not distinguish lying-in-wait murder from ordinary murder, it quickly became clear that the second requirement of the lying-in-wait special circumstance, the substantial period of watching and waiting, also did not distinguish it from "ordinary" premeditated murder. We subsequently approved the lying-in-wait special-circumstance instruction that included the following, taken from the lying-in-wait murder instruction: " 'The lying in wait need not continue for any particular period of time provided that its duration is such as to show a state of mind equivalent to premeditation or deliberation . . . ." (*People v. Sims* (1993) 5 Cal.4th 405, 433-434.) As the majority affirms in the present case, "[t]he purpose of the watching and waiting element is to distinguish those cases in which a defendant acts insidiously from those in which he acts out of rash impulse." (Maj. opn., *ante*, at p. 22.)

This dictum that the lying-in-wait period be equivalent to premeditation and deliberation apparently entered the jury instruction on lying-in-wait murder via Justice Traynor's concurring opinion in *People v. Thomas*, *supra*, 41 Cal.2d 470, 475.) Justice Traynor viewed as erroneous the then current lying-in-wait murder instruction, which stated that " 'Where the killing is by "lying in wait," and the act causing death was intentional, it is murder of the first degree, whether the killing was intentional or unintentional, as in such case it is not necessary that there exist in the mind of the perpetrator an intent to kill.' " (*Id.*, at p. 476.) His concern was that a jury receiving the above instruction could convict someone who had unintentionally killed a person after a period of lying in wait, even though the person's actions would not rise to the level of murder, as in the case of the person who lies in wait merely intending to surprise a person who then has a heart attack.

(*Thomas*, *supra*, 41 Cal.2d at pp. 478-479.) Because section 189 provides that first degree murder will be found for murder perpetuated by various means, including lying in wait " 'or any *other* kind of willful, deliberate and premeditated killing' " (41 Cal.2d at p. 477), Justice Traynor concluded: "There must . . . be substantial evidence of a long enough period of waiting and watching in concealment to show a state of mind equivalent to premeditation and deliberation before the court can properly give an instruction on lying in wait. . . . . Otherwise a killing that was the result of a rash impulse would be converted into first degree murder." (*Id.* at p. 481 (conc. opn. of Traynor, J.).)

Thus, the language in the lying-in-wait special-circumstance jury instruction equating the period of lying in wait with a period of premeditation and deliberation was designed to ensure that the person lying in wait was guilty of murder. *Morales*'s dictum that there must be a "substantial period of watching and waiting" was intended to differentiate lying-in-wait special-circumstance murder from " 'ordinary' " premeditated murder. (*Morales*, *supra*, 48 Cal.3d at p. 557.) The two instructions thus pull in different directions, with the former modifying and cancelling out the latter, so that the "substantial period of watching and waiting" as interpreted in *Morales* has become no more than the watching and waiting needed to establish the premeditation and deliberation required in "ordinary" premeditated murder.[2]

What then is left of lying in wait if neither *Morales*'s factor (1), concealment of purpose, nor factor (2), a substantial period of watching and waiting, actually distinguishes lying in wait from ordinary first degree murder?

---

2 I note that the jury was instructed in the present case that "[t]he lying in wait need not continue for any particular period of time provided that its duration is such as to show a state of mind equivalent to premeditation or deliberation."

The third factor is to initiate, immediately after the watching and waiting, "a surprise attack on an unsuspecting victim from a position of advantage." (*Morales*, *supra*, 48 Cal.3d at p. 557.) But concealing murderous intent and launching a surprise attack from a position of advantage are not two distinct factors distinguishing lying-in-wait murder, but one circumstance — almost invariably, one conceals a murderous intent in order to gain advantage over the victim. According to this court's jurisprudence, then, the lying-in-wait special circumstance, which requires neither lying nor waiting, is nothing more than *murder by surprise*, and I will refer to it as such for the duration of the discussion.

Is murder by surprise a constitutionally valid special circumstance? Since *Morales*, this court has routinely rejected the notion that the lying-in-wait special circumstance is unconstitutional, relying on cases that ultimately can be traced back to *Morales* (see, e.g., *Moon*, *supra*, 37 Cal.4th at p. 44), not acknowledging that *Morales*'s constitutional justification for that special circumstance is built on sand. The single most comprehensive judicial effort to constitutionally defend the lying-in-wait special circumstance is to be found in *Morales v. Woodford* (9th Cir. 2004) 388 F.3d 1159. In that case, the Ninth Circuit panel, over a vigorous dissent, upheld a facial challenge to the special circumstance. The majority opinion in that case proceeded with the following syllogism. Its major premise was that "a circumstance that makes one eligible for the death penalty must meet two requirements to satisfy the Eighth Amendment" (*id.* at p. 1174) and then quoted the United States Supreme Court in *Tuilaepa v. California* (1994) 512 U.S. 967, 972 (*Tuilaepa*): " 'First, the circumstance may not apply to every defendant convicted of a murder; it must apply only to a sub-class of defendants convicted of murder. Second, the aggravating circumstance may not be unconstitutionally vague.' "

Next, in establishing its minor premise, the Ninth Circuit majority reasoned that lying in wait applies only to a subclass of defendants convicted of murder and that it is not unconstitutionally vague. As to the former point, it stated: "To illustrate a non-lying-in-wait murder: a sadistic person who wants the victim to know what is coming, and who has no doubt of his ability to accomplish the crime, may confront the victim face to face, say 'I'm going to kill you,' and do so. Or a person intending to kill another may threaten the victim, travel armed, and when he spots his intended victim by chance, approach him and shoot him face to face. Or, not uncommonly, the loser of a bar fight may say 'I'm going to kill you,' go to his car or his home and get a gun, come back to the bar, confront the victim saying 'now I'm going to kill you,' and do so. Even under the California Supreme Court's liberal interpretations of lying in wait, these hypothetical first-degree murders would not merit the special circumstance." (*Morales v. Woodford*, *supra*, 388 F.3d at p. 1175.) Moreover, relying on a previous case, *Houston v. Roe* (9th Cir. 1999) 177 F.3d 901, 907-908, the court held that the special circumstance was not unconstitutionally vague because it " 'created a thin but meaningfully distinguishable line between first degree murder lying in wait and special circumstances lying in wait.' " (*Morales v. Woodford*, *supra*, 388 F.3d at p. 1174.)

Having thus proceeded from major premise to minor premise, the Ninth Circuit concluded that the lying-in-wait circumstance does not violate the Eighth Amendment. (*Morales v. Woodford*, *supra*, 388 F.3d at p. 1176.)

I disagree with the Ninth Circuit's major premise that, in order to establish the constitutionality of a special circumstance, one need only determine that the special circumstance applies to a subclass of first degree murderers and is not unconstitutionally vague. Although the Ninth Circuit relies on *Tuilaepa*, *supra*, 512 U.S. 967, for this proposition, I do not understand *Tuilaepa* to have repudiated

the basic tenets of the United States Supreme Court's modern Eighth Amendment jurisprudence that, as the court reiterated in the same term and the same month as *Tuilaepa*, " 'to pass constitutional muster, a capital sentencing scheme must "genuinely narrow the class of persons eligible for the death penalty and must *reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.*" ' " (*Romano v. Oklahoma* (1994) 512 U.S. 1, 7, italics added.) Nor was it repudiating its often quoted formulation in *Godfrey v. Georgia*, *supra*, 446 U.S. at page 427, that death penalty eligibility criteria must provide "a meaningful basis for distinguishing the few cases in which the penalty is imposed from the many cases in which it is not."

Moreover, *Tuilaepa* did not consider the validity of any special circumstance, but rather addressed the constitutionality of California's penalty phase provisions under section 190.3. To support its dictum that an aggravating circumstance that would make a defendant eligible for death "must apply only to a sub-class of defendants convicted of murder," the *Tuilaepa* court cited *Arave v. Creech* (1993) 507 U.S. 463. *Arave* concerned a challenge to an Idaho death penalty statute that had as one of its aggravating or special circumstances that "[b]y the murder, or circumstances surrounding its commission, defendant exhibited utter disregard for human life." (*Id.* at p. 465.) The court stated: "When the purpose of a statutory aggravating circumstance is to enable the sentencer to distinguish those who deserve capital punishment from those who do not, the circumstance must provide a *principled* basis for doing so." (*Id.* at p. 474, italics added.) In considering the case at hand, the court noted that the Idaho Supreme Court had given the circumstance at issue a limiting construction, referring to a " 'cold-blooded, pitiless slayer.' " (*Id.* at p. 469.) The court concluded that the circumstance as so construed genuinely narrowed the class of first degree murderers "because some within the broad class of first-degree murderers do

exhibit feeling. Some, for example, kill with anger, jealousy, revenge, or a variety of other emotions. In *Walton* [*v. Arizona* (1990) 497 U.S. 639] we held that Arizona could treat capital defendants who take pleasure in killing as more deserving of the death penalty than those who do not. Idaho similarly has identified the subclass of defendants who kill without feeling or sympathy as more deserving of death. By doing so, it has narrowed in a *meaningful* way the category of defendants upon whom capital punishment may be imposed." (*Arave v. Creech*, *supra*, 507 U.S. at p. 476, italics omitted and added.)

It is a truism therefore, that to be consistent with the Eighth Amendment, a special circumstance that makes a defendant eligible for the death penalty must not only narrow the class of murderers, but must do so in a principled and meaningful way to " ' "reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder" ' " (*Romano v. Oklahoma*, *supra*, 512 U.S. at p. 7), and to identify a subclass of defendants "as more deserving of death." (*Arave v. Creech*, *supra*, 507 U.S. at p. 476.) Special circumstances based on moral trivialities would therefore not pass constitutional muster. A "foul language" special circumstance, for example — using foul language while committing the murder — would not survive an Eighth Amendment challenge.

Most of California's many special circumstances fulfill the function of identifying the subclass of murderers more deserving of death. When someone not only commits first degree murder, but tortures the victim (§ 190.2, subd. (a)(18)), or murders by an especially destructive device that is a danger to the general public (*id.*, subd. (a)(4)), or kills a peace officer (*id.*, subd. (a)(7)), the moral justification for the greater penalty is clear. Not so with murder by surprise. The lying-in-wait special circumstance as interpreted by this court declares in effect: "The defendant deserves a greater punishment than the ordinary first

degree murderer because not only did he commit first degree murder, but he failed to let the person know he was going to murder him before he did." How can we make sense of this kind of special circumstance? Not only is surprise a common feature of murder — since murderers usually want their killings to succeed, and victims usually don't want to be murdered — but it is not at all obvious that a murderer who does not conceal his purpose before murdering the victim is less culpable than one who does. One of the examples of murder without the lying-in-wait special circumstance furnished by the Ninth Circuit, is "a sadistic person who wants the victim to know what is coming, and who has no doubt of his ability to accomplish the crime, [and who] confront[s] the victim face to face, say[ing] 'I'm going to kill you' " (*Morales v. Woodford*, *supra*, 388 F.3d at p. 1175). How is this murderer less culpable and less deserving of the death penalty, by any conventional standard of morality, than someone who conceals his purpose before murdering? To put it another way, because a murderer must gain an advantage over his victim, why is it at all morally significant that he gained the advantage through surprise rather than through overpowering, or that he murders right after the surprise rather than sadistically toying with the victim? And how is the murderer who announces his intention to murder just before carrying it out against a defenseless person less culpable than one who maintains surprise?

The closest this court has come to a principled defense of lying in wait as a special circumstance is the comment in *People v. Edelbacher* (1989) 47 Cal.3d 983, 1023, that "[m]urder committed by lying in wait has been 'anciently regarded . . . as a particularly heinous and repugnant crime.' (Note, *Murder Committed by Lying in Wait* (1954) 42 Cal. L.Rev. 337.)" The cited article, as noted above (*ante*, at p. 3), in fact explains that English law regarded lying in wait as particularly heinous because in the period following the Norman conquest in the 11th century, Anglo-Saxons would lie in wait to assassinate their Norman

conquerors. Whether we still share with the medieval Normans that special repugnance for lying-in-wait murder as originally conceived — an ambush assassination that involves physical concealment and a substantial period of watching and waiting — there is nothing to indicate that ordinary murder by surprise, the lying-in-wait special circumstance as construed by this court, has been historically, or is regarded currently, as an especially heinous form of murder.[3]

In defense of the lying-in-wait special circumstance, the majority states: "The special circumstance requires an intent to kill, which lying-in-wait murder does not. [Citation.][4] This difference alone means that any overlap between the

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3 Other justifications for the lying-in-wait special circumstance were considered and rejected by Justice Broussard in his cogent concurring and dissenting opinion in *People v. Webster*, *supra*, 54 Cal.3d 411, 467: "*In Richards v. Superior Court* [(1983)] 146 Cal.App.3d 306, 314, footnote 5, the court speculated that '[o]ne supposes that [lying in wait] is perceived as a particularly cowardly form of murder — hence the opprobrium heaped on the western villain who killed from ambush. And in earlier, more religious times, special scorn was reserved for those who murdered victims in a fashion intended to deprive them of the opportunity for reflection and contrition. Thus, the piteous complaint of Hamlet's father that he was murdered "in the blossoms of my sin/ Unhousel'd, disappointed, unanel'd/ No reckoning made, but sent to my account/ With all my imperfections on my head . . . ." (Hamlet, act I, scene v., line 66ff.)' [¶] I do not believe the drafters and voters in 1978 included the lying-in-wait special circumstance because of a 400-year-old notion that an honorable killer allows the victim time to confess his sins, or even a 100-year-old notion that an honorable killer waits until the victim has a chance to draw first. In any case, the lying-in-wait special circumstance, as construed in *Morales*, embodied neither notion. To the contrary, *Morales* specifically rejected the contention that the special circumstance only applies if the killer ambushes the victim." I agree.

4 Lying-in-wait murder requires " 'an intentional infliction upon the person killed of bodily harm involving a high degree of probability that it will result in death and which shows a wanton disregard for human life.' " (*People v. Ruiz* (1988) 44 Cal.3d 589, 614, fn. 3.)

premeditation element of first degree murder and the duration element of lying in wait does not undermine the narrowing function of the special circumstance." (Maj. opn., *ante*, at p. 24.) But intent to kill is required in ordinary first degree premeditated murder. (See *Moon*, *supra*, 37 Cal.4th at p. 29.) The majority fails to explain how premeditated murder by surprise is more deserving of the death penalty or life without possibility of parole than premeditated murder that does not involve surprise.

Because, as discussed above, lying in wait was originally conceived as a type of first degree murder and not a special circumstance, it was not particularly designed to do what the Eighth Amendment requires — provide a principled basis for determining which murderers are especially culpable and therefore eligible for the death penalty. I do not assert that the court cannot give the special circumstance a reasonable limiting construction that would survive an Eighth Amendment challenge. But it has failed to do so.

III.

In the present case, as noted, the jury was instructed on a definition of the lying-in-wait special circumstance that " '[t]he lying in wait need not continue for any particular period of time provided that its duration is such as to show a state of mind equivalent to premeditation or deliberation.' " (Maj. opn., *ante*, at p. 22, fn. 10.) Although the jury was also instructed that the lying in wait must constitute "a substantial period of watching and waiting for an opportune time to act," the instruction regarding the duration of the lying in wait makes it reasonable for the jury to interpret the word "substantial" to simply mean that time necessary for deliberation, as this court has done. (See maj. opn., *ante*, at p. 22, fn. 10; see also *People v. Edwards* (1991) 54 Cal.3d 787, 823.) Because the lying-in-wait special circumstance, as set forth by this instruction, does not provide a principled basis for dividing first degree murderers eligible for the death penalty from those

who are not, and is therefore not consistent with the Eighth Amendment, I would hold that the instruction is in error.

For purposes of assessing the prejudicial effect of this instructional error, I will assume that the above erroneous jury instruction could have been cured by omitting the words "The lying in wait need not continue for any particular period of time provided that its duration is such as to show a state of mind equivalent to premeditation or deliberation." With this omission, the jury is at least left with the unalloyed instruction that the lying-in-wait special circumstance requires a *substantial* watching and waiting period; it would not necessarily have to equate watching and waiting with the time required to premeditate and deliberate, but the term "substantial" would connote something closer to the classic ambush situation, in which the murderer not only deliberates but, while watching and waiting, holds fast to a concealed, murderous purpose for a sustained period. The evidence does not establish beyond a reasonable doubt that the jury would have found a substantial period in the present case. (See *People v. Flood* (1998) 18 Cal.4th 470, 503-504 [instructional error not reversible when the evidence at trial establishes the error harmless beyond a reasonable doubt].) The evidence showed that defendant became aware of August, and pursued him, for only a few moments, and it is not clear beyond a reasonable doubt that a properly instructed jury would have found this to be a substantial period of watching and waiting. Indeed, there is insufficient evidence in the record that defendant engaged in a substantial period of watching and waiting before murdering August.[5]

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[5] Justice Werdegar proposes that the lying-in-wait special circumstance be interpeted to require not simply concealment of purpose but "active deceit . . . — a misrepresentation or ruse that lulls the victim into a false sense of security" (conc. opn. of Werdegar, J., *ante*, at p. 1), and that such limiting construction would insulate that special circumstance from a constitutional challenge. Assuming she

(footnote continued on next page)

I do not deny that defendant's murder of August alone — a random, callous act of killing — could under some theory be viewed as a particularly heinous murder making defendant eligible for the death penalty. But lying in wait is not what made that murder heinous. I would therefore reverse the lying-in-wait special circumstance as to the August murder, but would otherwise uphold defendant's capital sentence based on the multiple-murder special circumstance and the fact that the jury could still properly consider the aggravated circumstances of the August murder at the penalty phase of the trial. (See *Brown v. Sanders* (2006) 546 U.S. 212, __ [126 S.Ct. 884, 893-894].)

MORENO, J.

(footnote continued from previous page)
is correct, such construction would not save the lying-in-wait finding in the present case. The jury was not instructed on active deceit, and although some parts of the instruction could lead jurors to believe that active deceit was required, the part of the instruction incorporating *Morales* makes clear that concealment of purpose alone, together with the two other factors discussed above, would suffice to find lying in wait. (See *Morales*, *supra*, 48 Cal.3d at p. 555.) Nor is it clear beyond a reasonable doubt that the jury would have found active deceit in the present case had it been instructed in that requirement. Defendant's act of pulling up alongside Stokes, and briefly motioning at and smiling at him, is hardly evidence beyond a reasonable doubt of an active deceit that is distinguishable from mere concealment of purpose. (Cf. *People v. Sims*, *supra*, 5 Cal.4th at p. 433 [lying-in-wait special circumstance found where murderers lured pizza delivery man to motel room by ordering pizza].)

See next page for addresses and telephone numbers for counsel who argued in Supreme Court.

Name of Opinion People v. Stevens

Unpublished Opinion
Original Appeal XXX
Original Proceeding
Review Granted
Rehearing Granted

Opinion No. S034704
Date Filed: June 4, 2007

Court: Superior
County: Alameda
Judge: William R. McGuiness

Attorneys for Appellant:

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APPENDIX F

FILED

APR 22 2022

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CHARLES STEVENS, Petitioner-Appellant, v. RONALD DAVIS, Warden, San Quentin State Prison, Respondent-Appellee.	No. 19-99004 D.C. No. 3:09-cv-00137-WHA Northern District of California, San Francisco ORDER

Before: IKUTA, WATFORD, and COLLINS, Circuit Judges.

The panel has unanimously voted to deny appellant's petition for rehearing en banc (Dkt. 49). The petition for rehearing en banc was circulated to the judges of the court, and no judge requested a vote for en banc consideration.

The petition for rehearing en banc is DENIED.

APPENDIX G

QUESTIONNAIRE

BACKGROUND INFORMATION **[PLEASE PRINT]**

Full Name: VIRGINIA I WATKINS

Date of Birth: 1/11/26

Any other names you have used: MAIDEN NAME BALLARD - DOYAL - LANGLANDS

City/Area of Residence: HAYWARD

Place of Birth: SAN LEANDRO

Racial or ethnic group: WHITE

Marital Status:

Single	_____
Married	X
Divorced	_____
Widowed	_____
Re-Married	_____

EMPLOYMENT

1. If you are employed outside the home:

   a. Name and location of your job:

   Bobs National Tires

   b. What is your present job?

   Semi - Retired - Owner

   c. Any previous positions with the same employer:

   d. How long have you been with this employer? 35 yrs

   e. Duties and responsibilities of your present job:

   f. Do you supervise other employees? Yes_____ No X

g. Do you have occasion to fire or discipline other employees?

Yes_____ No X

2. If you are now retired or are disabled, please list your former occupation:

_____

_____

a. Do you have a hearing or physical problem which would make it difficult to hear the testimony or sit for long periods?

Yes_____ No X

If yes, please describe.

_____

_____

_____

3. If you are presently a student:

School	Grade	Full or Part-Time
_____	_____	_____
_____	_____	_____

4. Will you be paid your regular salary for jury service?

Yes X No_____

5. What is the amount of time that your employer will pay your salary while you are a juror in a case of this length?

6. Please list any prior jobs or occupations:

Job title	Years	Name/Location of Employer
Prod. Worker	22 yrs	Frieden - Singer - San Leandro

7. What is/was your father's occupation?

Oakland Diving Plunge - OWNER - NOW DECEASED

What is/was your mother's occupation?

HOUSEWIFE - DECEASED

8. If you are divorced or widowed:

   a. What type of occupation did your former spouse have:

   TRUCK DRIVER & DELIVERY - DECEASED

   b. Place of employment:

   CARNATION CREAMERY

   c. Length of employment:

   16 YRS

9. Is there any reason that you are not available to participate as a juror, if selected, during the trial of this case?

   Yes_____ No X

   If yes, please explain in detail.

RESIDENCE

1. How long have you lived in Alameda County? 66 YRS

2. Other places you have lived at and length of time:

3. How long have you lived at your current residence?

30 YRS

4. Are you purchasing or renting your current residence?

OWN

5. Who else lives at your residence?

Name	Relationship
ROBERT D WATKINS	HUSBAND
ROBERT R D. Bar	GRANDSON
MISCHELLE A. BECKER	GRANDAUGHTER

6. For each of your children, if any, please give the following information:

Sex	Age	Occupation/Grade in School	Lives at Home
M	49	ENGINEER SJ STATE GRAD.	No - N Car.
M	46	EXECUIVE @ BARBARAS - 2YR CHABOT	NO PETALUMA
F	45	DISPATCHER	No RENO
M	44	DATA PROCESSOR	No
F	42	DISABLED	No
M	40	DISABLED	No

a. Name the school(s) they attend:

LIVERMORE HIGH - TENNYSON HIGH
MISSION SAN JOSE

7. Please give the occupation of the spouses of your married children:

(1) HOUSEWIFE · 5 NOT MARRIED

8. If you are living with another adult(s) [including your spouse], please state their occupation. If they are not presently employed, please state if they are: a) homemaker; b) unemployed: c) retired; d) disabled; e) student.

Relationship	Age	Occupational Status
HUSBAND	62	RETIRED
GRANDSON	22	WAREHOUSE
GRANDAUGHTER	19	UNEMPLOYED

9. If the person(s) described in No. 8 above is employed, please state for each person:

Who and Location of Job	Job Title and Duties	Previous Jobs
GRANDSON PLEASANTON	WAREHOUSE	TINTED GLASS
SAN RAMON	CLERK @ LUCKY STORE	

10. What do you like to do in your spare time (i.e., hobbies, sports, interests, etc.)?

READ - COOKING - TRAVEL - BASEBALL - FOOTBALL - BASKETBALL

11. What newspapers, magazines, or periodicals do you subscribe to or regularly read?

DAILEY REVUE - CHRONICLE - SUNSET - TIME - GOOD HOUSE KEEPING
CONSUMER REPORTS READERS DIGEST

12. Do you frequently follow news reports concerning current events?

Yes X No_____

If yes, please describe your primary sources of information.

NEWSPAPER - TV - TIME

13. What television and radio programs do you frequently watch or listen to?

CH 2 & 5 NEWS & SITCOMS
KGO - 810 - 560 - 610 RADIO

EDUCATION/MILITARY

1. What is the highest level of education that you have completed?

HIGH SCHOOL

a. If high school:

1. What high school did you attend: OAKLAND

2. Did you graduate: Yes____ No X

3. What year did you graduate or last attend? 1942

b. If college:

1. What colleges did you attend?

2. What was your major or area of special interest?

3. Degree(s) and date(s) received:

c. Graduate work:

1. Where did you do your graduate work?

2. Area(s) of study:

3. Degree(s), if any, and date received:

d. Any special professional or vocational training received:

1. Where: HAYWARD ADULT SCHOOL

2. Nature of training:

HIGH SCHOOL DIPLOMA

3. When? 1975 - 76

e. Have you ever studied or received any training or had any experience in:

1. Law? Yes X No_____ If yes, please explain:
ADULT SCHOOL SECRATARIAL

2. Criminology? Yes_____ No X If yes, please explain.

3. Science, medicine, or psychology? Yes____ No X

If yes, please explain:_____

2. Have you ever served in the armed forces? Yes_____ No X

If yes:

a. What branch?_____

b. Rank achieved?_____

c. Duties: _____

d. Did you serve with the military police or were you involved with the military justice system?

Yes_____ No_X_.If yes, please explain(i.e., a court martial or a board of inquiry).

_____

_____

3. If any members of your family served in the armed forces, for each member please list the following:

Relationship	Branch	Rank Achieved	Duties
SON	N. GAURD	?	
SON	NAVY	?	FEULED AIR PLANES
SON	ARMY	SPEC.	VIETNAM - CALVARY

_____

POLITICAL, RELIGIOUS, AND OTHER ORGANIZATIONAL AFFILIATIONS

1. Are you registered to vote? Yes X No____

2. Are you involved with a church and with church activities?

   Yes_____ No X

3. Would any of your religious beliefs, moral feelings or philosophical principles interfere with your ability to sit in judgment of another person and convict him of a crime such as murder?

   Yes_____ No X If yes, please explain:

   _____

   _____

   _____

4. Please list any civic, political, or social charitable organizations you belong to:

   NONE

   _____

   _____

   a. Are you an active member in any of these groups?

      Yes_____ No X

      If yes, please explain your activities with each group:

      _____

5. Do you or any members of your immediate family or household belong to any special interest groups (i.e., Mothers Against Drunk Driving, National Rifle Association, ACLU, etc.)?

Yes_____ No__X__

If yes, are you an active member? Yes_____No_____

If yes, please explain your activities:

_____

_____

_____

6. Do you have any bumper stickers or personalized license plates or holders on your car(s)?

Yes_____ No__X__ If yes, please describe them.

_____

_____

7. Have you, any member of your immediate family, household, or friends ever belonged to any organization that advocates victims' rights?

Yes_____ No__X__ If yes, please explain.

_____

_____

CRIMINAL JUSTICE SYSTEM

1. Do you have any previous experience as a juror?

Yes X No_____

If yes, for each occasion, please state:

When	Where	Civil or Criminal	Nature of Case (i.e. personal injury, burglary, etc.)
1974	OAKLAND	BOTH - CRIMINAL	ATTEMPTED MURDER
		CIVIL	SALES DISPUTE BY CO.

Did you deliberate? Was there a verdict? Were you the foreperson?

1. Yes X No___ Yes X No___ Yes___ No X
2. Yes X No___ Yes___ No X Yes___ No X
3. Yes___ No___ Yes___ No___ Yes___ No___

2. Do you know any of the other prospective jurors in this case?

Yes___ No X If yes, please state his/her name:

_____

_____

_____

3. Have you ever served on a grand jury? Yes_____ No X

4. Have you ever been arrested, accused of, or convicted for any crime, including driving while under the influence of alcohol or drugs?

Yes_____ No X

If yes, please explain. Please include type of charge, where and how the matter(s) was resolved:

_____

_____

_____

5. Have any members of your family or household or friends ever been arrested, accused or charged with a crime?

Yes X No_____ If yes, please explain.

Son D.U.I.

_____

_____

6. Have you ever known anyone who was investigated for or charged with a crime?

Yes_____ No X If yes, please explain:

_____

_____

_____

7. Have you ever been the victim of a crime? Yes X No___

If yes, please explain and include where, when, the nature of the crime, and any injuries or losses you suffered:

BUSINESS BROKEN INTO A COUPLE OF TIMES - NO INJURIES - TIRES TAKEN

8. Have any members of your family or household or friends ever been the victim of a crime?

Yes X No_____ If yes, please explain.

CAR RADIO STOLEN FROM SON'S CAR

9. Are there any particular types of crimes that are especially upsetting to you?

DRUGS - DRUNKEN DRIVING

10. Do you have an organized anti-crime neighborhood watch in your neighborhood?

Yes X No_____ If yes, please explain your involvement:

HAVE A PROBLEM WITH DRUG DEALERS IN THE NEIGHBORHOOD

11. Have you ever been a witness to a crime? Yes_____No X

If yes:

a. Did you report the crime to the police? Yes___No___

If no, why not?

_____

_____

_____

b. Did you give a statement to the police? Yes_____No X

c. Did you have to make any type of identification of the suspect (i.e., view pictures of suspects or attend a lineup, etc.)? Yes_____No X If yes, please explain:

_____

_____

_____

d. Did you ever have to testify at a hearing or trial?

Yes_____ No X

12. Have any members of your immediate family, household, or close friends ever witnessed a crime?

Yes_____ No X If yes, please explain:

_____

_____

_____

13. Have you or any member of your family or any of your close friends ever been employed by or sought employment with:

a. any city, county, federal or state prosecutorial agency (District Attorney's Office or Attorney General's Office)?

Yes_____ No_X_____

b. any city, county, federal or state law enforcement agency (police department, sheriff's department, highway patrol, F.B.I., etc).?

Yes_____ No_X_____

c. any city, county, federal or state correctional institution?

Yes_____ No_X_____

d. any criminal defense office (e.g., criminal defense law firm, Public Defender's Office, etc.)?

Yes_____ No_X_____

e. the judiciary (e.g., U.S. courts, state courts, etc.)?

Yes_____ No_X_____

f. Any other agency or organization connected with the criminal justice system (e.g. ACLU, Citizens for Law and Order, etc.)?

If you answered yes to any of the above questions, please give details. Who? When? What agency and in what capacity?

_____

_____

_____

14. Are any members of your immediate family, household, or close friends employed by or in any way involved with:

No the Alameda County District Attorney's Office

No members of any other district attorney's office

No members of any Public Defender's office

No any criminal defense attorneys

No any judges, court commissioners, or referees

No any court personnel (i.e., court reporters, clerks, etc.)

No any other type of attorneys or paralegals

No any parole or probation officers

No any person connected with the criminal justice system in any capacity

If your answer to any of these is yes, please explain, including where the person works, how long they have been in the legal system, whether you discuss their jobs with them:

_____

_____

_____

_____

15. Other than your immediate family, household, and close friends, do you know or have any regular contact with:

a. members of any law enforcement agency?

Yes___ No X

b. members of the legal system in any capacity?

Yes___ No X

If yes, please explain:

16. What are your feelings about the effectiveness of our criminal justice system?

Still the best there is

17. Have you or any close friend or relative ever visited any jail, prison, or juvenile detention or been incarcerated in a facility? If yes, please explain [include who, when, where, why].

Visited son in various county jails
Oakland - 5th St. Martinez

18. Do you recall movement to remove Rose Bird as Chief Justice of the California Supreme Court?

Yes X No _____

If yes, how do you feel about her removal?

AGREED WITH THE DECISION

ATTITUDES REGARDING FIREARMS

1. Have you ever used a firearm for any purpose?

   If yes, when and for what purpose? Yes____ No X

   _____

   _____

   _____

   _____

2. Do you belong to any organization or are you in agreement with any organization that has as its primary goal advocacy of **the right to own and possess** firearms.

   Yes_____ No X

   If so, please state.

   _____

   _____

   _____

   _____

3. Do you belong to any organization or are you in agreement with any organization that has as its primary goal the **elimination** of the right to possess or own firearms?

   Yes_____ No X

   If so, please state.

   _____

4. Have you or do you now own any firearms?

Yes X No_____

A. What guns have you owned or do you own?

SHOTGUN

B. Do you own them now?

Yes X No_____

C. For what purpose do/did you own guns?

ATTITUDES REGARDING ALCOHOL ABUSE

1. What are your **GENERAL FEELINGS** regarding alcohol abuse?

SAD

2. Has alcohol abuse touched your life or the life of anyone close to you in any way?

YES X NO___

If YES, please explain: My Mother was an alcoholic

Our one son "was" an alcoholic

ATTITUDES REGARDING DRUG USE

1. What are your **GENERAL FEELINGS** regarding drug users?

Disaproval

2. Have drugs touched your life or the life of anyone close to you?

YES X NO ___

If YES, please explain: Son also used drugs of awhile

3. Do you feel that drug users are more likely to be guilty of the charges because they are drug users?

YES ___ NO X

If YES, please explain: ___

4. Do you feel that drug users should be punished just because they are drug users?

YES ___ NO X

If YES, please explain: _____

_____

_____

_____

_____

5. Do you have any strong personal or philosophical views about narcotics laws that might impair your ability to be an appropriate juror for this case?

YES ___ NO X

If YES, please explain: _____

_____

_____

_____

_____

ATTITUDES REGARDING PSYCHIATRIC AND PSYCHOLOGICAL TESTIMONY

1. Have you ever studied or had training or work experience in psychology, psychiatry, psychotherapy, counseling, or any related subjects?

   YES ___ NO X

   If YES, please explain: _____

2. Have you or any family member or friend ever been involved with the mental health field or professions in any manner (including employment, volunteer work, etc)?

   YES ___ NO X

   If YES, please explain: _____

3. Do you have an opinion about the value and validity of psychiatric and/or psychological testimony in legal matters?

YES ___ NO X

If YES, please explain: _____

_____

_____

_____

_____

_____

_____

PUBLICITY

This case involves a number of shooting incidents which occurred on the I-580 Freeway in Oakland between the months of March and August 1989. Some of the incidents resulted in the deaths of persons on or near that freeway.

1. Do you think you may have you seen, heard or read anything about this case in the media (TV, radio, newspapers, etc.) or from other sources?

YES X NO ___

If YES, please explain:

YOUR SOURCE(S): HAVE HEARD OF HIGHWAY SHOOTINGS.

DON'T KNOW IF THIS IS RELATED.

WHEN you received the information: DON'T REALLY RECALL ANY

SPECIFIC TIME

WHAT INFORMATION you received: _____

If you think you have heard or read or know anything about this case **YOU ARE ORDERED NOT TO DISCUSS YOUR RECOLLECTIONS WITH ANY OF YOUR FELLOW JURORS.**

POTENTIAL WITNESSES

The following is a list of the **potential witnesses** who may or may not be called to testify in this matter. While every attempt is made to be all inclusive, additional witnesses may be discovered as the testimony develops during the course of the trial and/or through on-going investigation. The mere fact that a person is listed as a potential witness does not mean that they will in fact testify in this matter. This list is designed to place potential jurors on notice as to the individuals who may **possibly be called to testify** in this matter.

Please **circle the name of any person** you know, think you may know, have met, or you think you might have heard of:

Grace Taube
Robert Noyer
Vincent Diguicepi
Helen McEboy
Chi Yeung
Illinois Clark
Kimberly Clark
Mrs. Richard Boykin
Kimberly Michele Cooper
Angelo Dechae Rivers
Marion Taylor
Garland Arnell Horton
Sally Bruno
Nancy R. Monroe

Janell Lee
Karen Anderson

Martha Sloan
Jennifer Vaughn
Mary Alice Cross
Maritta Cross
Anthony Green
Charles Green
Ann Killensworth
Maggie Christine Zeigler
John W Cuthbertson

Paul Rochon
Louise Rochon
Karen Adams
Lloyd Rochon
Karen Amerine-Oren

Paul Fenn
Julie Peters
John Cutler

Upendra DeSilva
Leo Critchlow
Anna Oprrevaux
Ken Young

William August
Geraldine August
Terrie Dowling
Constance Patterson
Rodney Stokes
Shelton Matthews
Fred Mohr
Mickels Reti
Georgina Iris Stevens
John Murphy
Mario Steven Woods
Jarrad Hameditoloui
Doris Hameditoloui
Oleander Harrison
Treya Robinson
Pamela Joyce Simpson
Robert Goldstone
Randall Shumpert

Paul Herrmann, M.D.
Sharon Van Meter, M.D.
Thomas Rogers, M.D.
Dr. Chieu, M.D.

The following were employed by Allied Ambulance:
Patricial Welke
Ken McCury
K. Binder
D. Wheaton

C. Dominguez

Curtis Sato - Oakland Police Department Crime Lab
Lansing Lee - Oakland Police Department Crime Lab

The following are members of the Oakland Police Department:
Robert Chenault
Art Roth

John McKenna
Ramon Peniagua
Mike Sitterud
Brian Thiem

K. Wiley
P. Mahanay
Daniel Hutchinson
Hallinan
Pete Pruitt
Larry Ballusa
B. Williams
J. Hayter
D. Downum
M. Bonds
D. Struntz

Kevin Wiley
Thomas Viglienzonie
Paul Berlin
A. Freitas
M. Hoyle
J. Meeks
J. Hassan
T. Shaver
T. Shade
Edward Smith
Lawrence Riggs
Debbie Rivers
Bruce Brock
Collin Wong
Greg Alberigi
S. Thurston
P. Dunbar
J. Ferguson

The following are Reserve Officers with the Oakland Police
D. Mace
T. Liston
D. Miller
W. Hodgkin
T. Dubsky

The following Deputies of the Alameda County Sheriff's Dept.:
Dep. Wilson
Dep. Borland
Dep. N. Palmer

Ofc. Delaney - Berkeley Police Department

Inspector Peck - San Francisco Police Department

Michael Anderson - California Highway Patrol

The following memebers of the Oakland Fire Department:
Capt. W Sauters
R. June
H. Harrell
R. White
Capt R. Gatchalian
L. Salsberry
T. Stinson
L. Townsend

The following are members of the District Attorney's Office:
Jerry Koehne
Larry Ballusa

Is there any matter that **has not** been covered by this questionnaire that you feel that you should mention at this time that might affect your ability to be a fair and impartial juror in this case?

Yes_____ No X If yes, please explain:

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

ATTITUDES REGARDING THE DEATH PENALTY

The Court is asking these questions regarding your **feelings** about the death penalty because one of the **possible** sentences for a person convicted of the murder charges the prosecution has filed against the defendant Stevens is the death penalty. Therefore, the Court must know whether you could be fair to both the prosecution and the defendant Stevens on the issue of punishment, **if you reach that issue**. By asking these questions, the Court is **not** suggesting that you will ever need to decide this question. The Court has **no way** of knowing what the evidence in this case will be or whether or not you will find the defendant guilty of anything at all.

1. What are your **GENERAL FEELINGS** regarding the death penalty?

I VOTED FOR THE DEATH PENALTY

2. Which would you say most accurately states your **philosophical opinion** regarding the death penalty?

_____Strongly in favor

__X__Moderately in favor

_____Neutral

_____Moderately against

_____Strongly against

3. Have your views about the death penalty ever **changed** substantially in either **intensity or nature**?

Yes_____ No__X_____

Please explain:

_____

_____

_____

_____

4. Do you hold to any **religious, moral feelings or philosophical principle** that would affect your ability to vote for the death penalty as a judgment in this case?

Yes_____ No__X__

Please explain:

_____

_____

_____

5. Do you belong to any organization that advocates **in favor** of the death penalty.

Yes_____ No__X__

If yes, what organization?_____

_____

_____

6. Do you belong to any organization that advocates the **abolition** of the death penalty?

Yes_____ No__X__

If yes, what organization?

_____

_____

_____

7. If the issue of whether California should have a death penalty law was to be on the ballot in this coming election, how would you vote:

For__X__ Against_____ Not sure_____

Why?

SOME CRIMES REALLY SEEM TO JUSTIFY THE PENALTY

_____

_____

_____

8. Is there any matter that **has not** been covered by this questionnaire concerning the death penalty or your feelings and attitudes about the death penalty that you feel that you should mention at this time that might affect your ability to be a fair and impartial juror in this case?

Yes_____ No__X__ If yes, please explain:

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

ADDITIONAL AREA FOR EXPLANATION OF ANSWERS

I declare under penalty of perjury under the laws of the State of California, that the above answers are true and correct.

Dec 3, 1992
(DATE)

Virginia I Watkins
(Signature)

APPENDIX H

QUESTIONNAIRE

BACKGROUND INFORMATION **[PLEASE PRINT]**

Full Name: Mary Louise Domenichelli

Date of Birth: 2/15/37

Any other names you have used: Mary Lou. Myles (Husband's name)

City/Area of Residence: Berkeley, CA

Place of Birth: Sonoma County - Healdsburg, CA

Racial or ethnic group: White

Marital Status:

Single _____

Married X

Divorced _____

Widowed _____

Re-Married _____

EMPLOYMENT

1. If you are employed outside the home:

   a. Name and location of your job:

   Kaiser Aluminum & Chemical Corp.
   300 Lakeside Drive, Oakland, CA.

   b. What is your present job?

   Industrial Relations Aide

   c. Any previous positions with the same employer:

   no

   d. How long have you been with this employer? 23 Years.

   e. Duties and responsibilities of your present job:

   Support Staff to a V.P. - Industrial Relations, Labor Lawyer & Industrial Pediatric Consultant

   f. Do you supervise other employees? Yes____ No Y

g. Do you have occasion to fire or discipline other employees?

Yes_____ No__X__

2. If you are now retired or are disabled, please list your former occupation:

_____

_____

a. Do you have a hearing or physical problem which would make it difficult to hear the testimony or sit for long periods?

Yes_____ No__X__

If yes, please describe.

_____

_____

_____

3. If you are presently a student: N/A

School	Grade	Full or Part-Time
_____	_____	_____
_____	_____	_____

4. Will you be paid your regular salary for jury service?

Yes X No_____

5. What is the amount of time that your employer will pay your salary while you are a juror in a case of this length?

As long as it takes

6. Please list any prior jobs or occupations:

Job title	Years	Name/Location of Employer
Insurance Aide	9	University of California Berkeley CA.

7. What is/was your father's occupation?

Rancher (grapes, prunes) now retired.

What is/was your mother's occupation?

House wife

8. If you are divorced or widowed:

   a. What type of occupation did your former spouse have:

   _____

   _____

   b. Place of employment:

   _____

   _____

   c. Length of employment:

   _____

   _____

9. Is there any reason that you are not available to participate as a juror, if selected, during the trial of this case?

   Yes_____ No__X__

   If yes, please explain in detail.

   _____

   _____

   _____

   _____

   _____

RESIDENCE

1. How long have you lived in Alameda County? 38 years

2. Other places you have lived at and length of time:

Geyserville, CA 1937 - 1954

3. How long have you lived at your current residence?

17 years

4. Are you purchasing or renting your current residence?

Renting

5. Who else lives at your residence?

Name	Relationship
Glenn Myles	Husband

6. For each of your children, if any, please give the following information: N/A

Sex	Age	Occupation/Grade in School	Lives at Home

a. Name the school(s) they attend:

_____

_____

7. Please give the occupation of the spouses of your married children:

_____

_____

_____

student.

Age

58 DESIG

9. If the person(s) described in No. 8 above is employed, please state for each person:

Who and Location of Job | Job Title and Duties | Previous Jobs

Self-Employed - Berkeley
Asst Professor of Ethnic Art Studies - California College of Arts & Crafts

10. What do you like to do in your spare time (i.e., hobbies, sports, interests, etc.)?

Cooking - Hiking -

11. What newspapers, magazines, or periodicals do you subscribe to or regularly read?

New York Times, S.F. Chronicle, Elle Gourmet, Wine Spectator, Bon Appetit.

12. Do you frequently follow news reports concerning current events?

Yes X No _____

If yes, please describe your primary sources of information.

Newspapers - CNN television. Local television.

13. What television and radio programs do you frequently watch or listen to?

CNN News
Channel 9
KRAC - Foreign Movies.

EDUCATION/MILITARY

1. What is the highest level of education that you have completed?

B of Arts - 4 years college.

a. If high school:

1. What high school did you attend:_____

2. Did you graduate: Yes____ No_____

3. What year did you graduate or last attend?_____

b. If college:

1. What colleges did you attend?

University of California

2. What was your major or area of special interest?

Spanish literatures

3. Degree(s) and date(s) received:

Bachelor of Arts - 1958

c. Graduate work: N/A

1. Where did you do your graduate work?

_____

_____

_____

2. Area(s) of study:

_____

_____

_____

3. Degree(s), if any, and date received:

_____

_____

_____

d. Any special professional or vocational training received:

1. Where: _____

2. Nature of training:

_____

_____

_____

3. When? _____

e. Have you ever studied or received any training or had any experience in:

1. Law? Yes_____No_____If yes, please explain:

_____

_____

_____

2. Criminology? Yes____No___If yes, please explain.

_____

_____

_____

3. Science, medicine, or psychology? Yes___No___

If yes, please explain:_____

_____

_____

2. Have you ever served in the armed forces? Yes____No____

If yes:

a. What branch?_____

b. Rank achieved?_____

c. Duties: _____

d. Did you serve with the military police or were you involved with the military justice system?

Yes_____ No_____.If yes, please explain(i.e., a court martial or a board of inquiry).

_____

_____

3. If any members of your family served in the armed forces, for each member please list the following:

Relationship	Branch	Rank Achieved	Duties
Husband	Navy	?	?

POLITICAL, RELIGIOUS, AND OTHER ORGANIZATIONAL AFFILIATIONS

1. Are you registered to vote? Yes_____ No_____

2. Are you involved with a church and with church activities?

   Yes_____ No_____

3. Would any of your religious beliefs, moral feelings or philosophical principles interfere with your ability to sit in judgment of another person and convict him of a crime such as murder?

   Yes_____ No_____ If yes, please explain:

   _____

   _____

   _____

4. Please list any civic, political, or social charitable organizations you belong to:

   _____

   _____

   _____

   a. Are you an active member in any of these groups?

      Yes_____ No_____

      If yes, please explain your activities with each group:

      _____

5. Do you or any members of your immediate family or household belong to any special interest groups (i.e., Mothers Against Drunk Driving, National Rifle Association, ACLU, etc.)?

Yes_____ No_____

If yes, are you an active member? Yes_____ No_____

If yes, please explain your activities:

_____

_____

_____

6. Do you have any bumper stickers or personalized license plates or holders on your car(s)?

Yes_____ No_____ If yes, please describe them.

_____

_____

7. Have you, any member of your immediate family, household, or friends ever belonged to any organization that advocates victims' rights?

Yes_____ No_____ If yes, please explain.

_____

_____

CRIMINAL JUSTICE SYSTEM

1. Do you have any previous experience as a juror?

Yes_____ No_X_

If yes, for each occasion, please state:

When	Where	Civil or Criminal	Nature of Case (i.e. personal injury, burglary, etc.)

Did you deliberate? Was there a verdict? Were you the foreperson?

1. Yes___ No____ Yes_____ No_____ Yes____ No_____
2. Yes___ No_____ Yes_____ No_____ Yes____ No_____
3. Yes___ No_____ Yes_____ No_____ Yes____ No_____

2. Do you know any of the other prospective jurors in this case?

Yes____ No_X_ If yes, please state his/her name:

3. Have you ever served on a grand jury? Yes_____No_X_

4. Have you ever been arrested, accused of, or convicted for any crime, including driving while under the influence of alcohol or drugs?

Yes_____ No_X_____

If yes, please explain. Please include type of charge, where and how the matter(s) was resolved:

_____

_____

_____

5. Have any members of your family or household or friends ever been arrested, accused or charged with a crime?

Yes_____ No_X_____ If yes, please explain.

_____

_____

_____

6. Have you ever known anyone who was investigated for or charged with a crime?

Yes_____ No_X_____ If yes, please explain:

_____

_____

_____

7. Have you ever been the victim of a crime? Yes____ No X

If yes, please explain and include where, when, the nature of the crime, and any injuries or losses you suffered:

8. Have any members of your family or household or friends ever been the victim of a crime?

Yes_____ No X If yes, please explain.

9. Are there any particular types of crimes that are especially upsetting to you?

Rape

10. Do you have an organized anti-crime neighborhood watch in your neighborhood?

Yes_____ No X If yes, please explain your involvement:

11. Have you ever been a witness to a crime? Yes_____No_X_

If yes:

a. Did you report the crime to the police? Yes___No___

If no, why not?

_____

_____

_____

b. Did you give a statement to the police? Yes____No___

c. Did you have to make any type of identification of the suspect (i.e., view pictures of suspects or attend a lineup, etc.)? Yes_____No_____ If yes, please explain:

_____

_____

_____

d. Did you ever have to testify at a hearing or trial?

Yes_____ No_____

12. Have any members of your immediate family, household, or close friends ever witnessed a crime?

Yes_____ No_X_____ If yes, please explain:

_____

_____

_____

13. Have you or any member of your family or any of your close friends ever been employed by or sought employment with:

a. any city, county, federal or state prosecutorial agency (District Attorney's Office or Attorney General's Office)?

Yes_____ No__X__

b. any city, county, federal or state law enforcement agency (police department, sheriff's department, highway patrol, F.B.I., etc).?

Yes_____ No__X__

c. any city, county, federal or state correctional institution?

Yes_____ No__X__

d. any criminal defense office (e.g., criminal defense law firm, Public Defender's Office, etc.)?

Yes_____ No__X__

e. the judiciary (e.g., U.S. courts, state courts, etc.)?

Yes_____ No__X__

f. Any other agency or organization connected with the criminal justice system (e.g. ACLU, Citizens for Law and Order, etc.)?

If you answered yes to any of the above questions, please give details. Who? When? What agency and in what capacity?

_____

_____

_____

14. Are any members of your immediate family, household, or close friends employed by or in any way involved with:

_____ the Alameda County District Attorney's Office

_____ members of any other district attorney's office

_____ members of any Public Defender's office

_____ any criminal defense attorneys

_____ any judges, court commissioners, or referees

_____ any court personnel (i.e., court reporters, clerks, etc.)

__X__ any other type of attorneys or paralegals

_____ any parole or probation officers

_____ any person connected with the criminal justice system in any capacity

If your answer to any of these is yes, please explain, including where the person works, how long they have been in the legal system, whether you discuss their jobs with them:

I work for a Labor Lawyer who is also Director of Labor Relations at Kaiser Permanente - I'm assuming about 25 years. No we don't discuss outside happenings - only arbitrations that are work - related

15. Other than your immediate family, household, and close friends, do you know or have any regular contact with:

a. members of any law enforcement agency?

Yes___ No X

b. members of the legal system in any capacity?

Yes λ No___

If yes, please explain:

I work for a Labor lawyer at Kaiser Aluminum.

16. What are your feelings about the effectiveness of our criminal justice system?

Fair - but object to Political influences in Appointments to U.S. Supreme Court.

17. Have you or any close friend or relative ever visited any jail, prison, or juvenile detention or been incarcerated in a facility? If yes, please explain [include who, when, where, why]. N/A

18. **Do you recall movement to remove Rose Bird as Chief Justice of the California Supreme Court?**

Yes X **No** _____

If yes, how do you feel about her removal?

I do not believe she should have been removed.

ATTITUDES REGARDING FIREARMS

1. Have you ever used a firearm for any purpose?

   If yes, when and for what purpose? Yes____ No__X__

   _____

   _____

   _____

   _____

2. Do you belong to any organization or are you in agreement with any organization that has as its primary goal advocacy of **the right to own and possess** firearms.

   Yes_____ No__X__

   If so, please state.

   _____

   _____

   _____

   _____

3. Do you belong to any organization or are you in agreement with any organization that has as its primary goal the **elimination** of the right to possess or own firearms?

   Yes_____ No__X__

   If so, please state.

   _____

_____

_____

_____

4. Have you or do you now own any firearms?

Yes_____ No__X__

A. What guns have you owned or do you own?

_____

_____

B. Do you own them now?

Yes_____ No_____

C. For what purpose do/did you own guns?

_____

_____

ATTITUDES REGARDING ALCOHOL ABUSE

1. What are your **GENERAL FEELINGS** regarding alcohol abuse?

there should be more counseling available to those with problems

2. Has alcohol abuse touched your life or the life of anyone close to you in any way?

YES X NO ___

If YES, please explain: an uncle (father's brother) who died at age 39 of the disease.

ATTITUDES REGARDING DRUG USE

1. What are your **GENERAL FEELINGS** regarding drug users?

not. Friendly at all - although marijuana smokers don't bother me.

2. Have drugs touched your life or the life of anyone close to you?

YES ___ NO X

If YES, please explain: _____

3. Do you feel that drug users are more likely to be guilty of the charges because they are drug users?

YES X NO ___

If YES, please explain: Because. intelligence / mental factors are conditioned.

4. Do you feel that drug users should be punished just because they are drug users?

YES ___ NO X

If YES, please explain: _____

_____

_____

_____

_____

5. Do you have any strong personal or philosophical views about narcotics laws that might impair your ability to be an appropriate juror for this case?

YES ___ NO X

If YES, please explain: _____

_____

_____

_____

_____

ATTITUDES REGARDING PSYCHIATRIC AND PSYCHOLOGICAL TESTIMONY

1. Have you ever studied or had training or work experience in psychology, psychiatry, psychotherapy, counseling, or any related subjects?

   YES ___ NO X

   If YES, please explain: _____

2. Have you or any family member or friend ever been involved with the mental health field or professions in any manner (including employment, volunteer work, etc)?

   YES ___ NO X

   If YES, please explain: _____

3. Do you have an opinion about the value and validity of psychiatric and/or psychological testimony in legal matters?

YES ___ NO X

If YES, please explain: _____

_____

_____

_____

_____

_____

_____

PUBLICITY

This case involves a number of shooting incidents which occurred on the I-580 Freeway in Oakland between the months of March and August 1989. Some of the incidents resulted in the deaths of persons on or near that freeway.

1. Do you think you may have you seen, heard or read anything about this case in the media (TV, radio, newspapers, etc.) or from other sources?

YES X NO ___

If YES, please explain:

YOUR SOURCE(S): But it's vague.

WHEN you received the information: Newspaper

WHAT INFORMATION you received: only that it occurred

If you think you have heard or read or know anything about this case **YOU ARE ORDERED NOT TO DISCUSS YOUR RECOLLECTIONS WITH ANY OF YOUR FELLOW JURORS.**

POTENTIAL WITNESSES

The following is a list of the **potential witnesses** who may or may not be called to testify in this matter. While every attempt is made to be all inclusive, additional witnesses may be discovered as the testimony develops during the course of the trial and/or through on-going investigation. The mere fact that a person is listed as a potential witness does not mean that they will in fact testify in this matter. This list is designed to place potential jurors on notice as to the individuals who may **possibly be called to testify** in this matter.

Please circle the name of any person you know, think you may know, have met, or you think you might have heard of:

Grace Taube
Robert Noyer
Vincent Diguicepi
Helen McEboy
Chi Yeung
Illinois Clark
Kimberly Clark
Mrs. Richard Boykin
Kimberly Michele Cooper
Angelo Dechae Rivers
Marion Taylor
Garland Arnell Horton
Sally Bruno
Nancy R. Monroe

Janell Lee
Karen Anderson

Martha Sloan
Jennifer Vaughn
Mary Alice Cross
Maritta Cross
Anthony Green
Charles Green
Ann Killensworth
Maggie Christine Zeigler
John W Cuthbertson

Paul Rochon
Louise Rochon
Karen Adams
Lloyd Rochon
Karen Amerine-Oren

Paul Fenn
Julie Peters
John Cutler

Upendra DeSilva
Leo Critchlow
Anna Oprrevaux
Ken Young

William August
Geraldine August
Terrie Dowling
Constance Patterson
Rodney Stokes
Shelton Matthews
Fred Mohr
Mickels Reti
Georgina Iris Stevens
John Murphy
Mario Steven Woods
Jarrad Hameditoloui
Doris Hameditoloui
Oleander Harrison
Treya Robinson
Pamela Joyce Simpson
Robert Goldstone
Randall Shumpert

Paul Herrmann, M.D.
Sharon Van Meter, M.D.
Thomas Rogers, M.D.
Dr. Chieu, M.D.

The following were employed by Allied Ambulance:
Patricial Welke
Ken McCury
K. Binder
D. Wheaton

C. Dominguez

Curtis Sato - Oakland Police Department Crime Lab
Lansing Lee - Oakland Police Department Crime Lab

The following are members of the Oakland Police Department:
Robert Chenault
Art Roth

John McKenna
Ramon Peniagua
Mike Sitterud
Brian Thiem

K. Wiley
P. Mahanay
Daniel Hutchinson
Hallinan
Pete Pruitt
Larry Ballusa
B. Williams
J. Hayter
D. Downum
M. Bonds
D. Struntz

Kevin Wiley
Thomas Viglienzonie
Paul Berlin
A. Freitas
M. Hoyle
J. Meeks
J. Hassan
T. Shaver
T. Shade
Edward Smith
Lawrence Riggs
Debbie Rivers
Bruce Brock
Collin Wong
Greg Alberigi
S. Thurston
P. Dunbar
J. Ferguson

The following are Reserve Officers with the Oakland Police
D. Mace
T. Liston
D. Miller
W. Hodgkin
T. Dubsky

The following Deputies of the Alameda County Sheriff's Dept.
Dep. Wilson
Dep. Borland
Dep. N. Palmer

Ofc. Delaney - Berkeley Police Department

Inspector Peck - San Francisco Police Department

Michael Anderson - California Highway Patrol

The following memebers of the Oakland Fire Department:
Capt. W Sauters
R. June
H. Harrell
R. White
Capt R. Gatchalian
L. Salsberry
T. Stinson
L. Townsend

The following are members of the District Attorney's Office:
Jerry Koehne
Larry Ballusa

Is there any matter that **has not** been covered by this questionnaire that you feel that you should mention at this time that might affect your ability to be a fair and impartial juror in this case?

Yes_____ No__X__ If yes, please explain:

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

ATTITUDES REGARDING THE DEATH PENALTY

The Court is asking these questions regarding your feelings about the death penalty because one of the possible sentences for a person convicted of the murder charges the prosecution has filed against the defendant Stevens is the death penalty. Therefore, the Court must know whether you could be fair to both the prosecution and the defendant Stevens on the issue of punishment, if you reach that issue. By asking these questions, the Court is not suggesting that you will ever need to decide this question. The Court has no way of knowing what the evidence in this case will be or whether or not you will find the defendant guilty of anything at all.

1. **What are your GENERAL FEELINGS regarding the death penalty?**

Growing up Catholic, I was probably opposed. But since I am no longer a practicing Catholic, my views points have altered & do believe there are cases where death penalty is Appropriate.

2. Which would you say most accurately states your **philosophical opinion** regarding the death penalty?

_____Strongly in favor

_____Moderately in favor

__X__Neutral

_____Moderately against

_____Strongly against

3. Have your views about the death penalty ever **changed** substantially in either **intensity or nature?**

Yes__X__ No_____

Please explain:

I've become more tolerant of death penalty in recent years.

4. Do you hold to any **religious, moral feelings or philosophical principle** that would affect your ability to vote for the death penalty as a judgment in this case?

Yes_____ No__X__

Please explain:

5. Do you belong to any organization that advocates **in favor** of the death penalty.

Yes_____ No_X_____

If yes, what organization?_____

_____

_____

6. Do you belong to any organization that advocates the **abolition** of the death penalty?

Yes_____ No_X_____

If yes, what organization?

_____

_____

_____

7. If the issue of whether California should have a death penalty law was to be on the ballot in this coming election, how would you vote:

For_____ Against_____ Not sure_X_____

Why?

Explained above

_____

_____

_____

8. Is there any matter that **has not** been covered by this questionnaire concerning the death penalty or your feelings and attitudes about the death penalty that you feel that you should mention at this time that might affect your ability to be a fair and impartial juror in this case?

Yes_____ No__X__ If yes, please explain:

ADDITIONAL AREA FOR EXPLANATION OF ANSWERS

I declare under penalty of perjury under the laws of the State of California, that the above answers are true and correct.

December 14, 1992
(DATE)

Mary Lou Domenichelli
(Signature)

APPENDIX I

QUESTIONNAIRE

BACKGROUND INFORMATION **[PLEASE PRINT]**

Full Name: Larry Wendell Foster

Date of Birth: 11/13/37

Any other names you have used: No

City/Area of Residence: Fremont Irvington

Place of Birth: Washington C.H. Ohio

Racial or ethnic group: Black

Marital Status:

Single	X
Married	
Divorced	X
Widowed	
Re-Married	

EMPLOYMENT

1. If you are employed outside the home:

   a. Name and location of your job:

   A/C Engine Mech. United Airlines
   S.F. Airport

   b. What is your present job?

   Jet Engine Mechanic

   c. Any previous positions with the same employer:

   ~~No~~ Clerical

   d. How long have you been with this employer? 32 yr.

   e. Duties and responsibilities of your present job:

   Repair Jet Engines and
   maintain Service

   f. Do you supervise other employees? Yes____ No X

g. Do you have occasion to fire or discipline other employees?

Yes_____ No_X_

2. If you are now retired or are disabled, please list your former occupation:

_____

_____

a. Do you have a hearing or physical problem which would make it difficult to hear the testimony or sit for long periods?

Yes_____ No_X_

If yes, please describe.

_____

_____

_____

3. If you are presently a student:

School	Grade	Full or Part-Time
_____	_____	_____
_____	_____	_____

4. Will you be paid your regular salary for jury service?

Yes X No_____

5. What is the amount of time that your employer will pay your salary while you are a juror in a case of this length?

Full 100%

6. Please list any prior jobs or occupations:

Job title	Years	Name/Location of Employer

7. What is/was your father's occupation?

Government Employee

What is/was your mother's occupation?

Housewife & Mother of 10

8. If you are divorced or widowed:

a. What type of occupation did your former spouse have:

Sales Rep for Pacific Telephone

b. Place of employment:

San Francisco

c. Length of employment:

20yr +

9. Is there any reason that you are not available to participate as a juror, if selected, during the trial of this case?

Yes_____ No +

If yes, please explain in detail.

RESIDENCE

1. How long have you lived in Alameda County? 36 yr.

2. Other places you have lived at and length of time:

Ohio

3. How long have you lived at your current residence?

6 yrs

4. Are you purchasing or renting your current residence?

Yes

5. Who else lives at your residence?

Name	Relationship
None	

6. For each of your children, if any, please give the following information:

Sex	Age	Occupation/Grade in School	Lives at Home
~~M~~	~~30~~	~~Larry W. Foster Jr.~~	~~No~~
~~F~~	~~32~~	~~Chapter~~ House wife	No
M	30	Bill Collector	N
F	28		N

a. Name the school(s) they attend:

_____

_____

7. Please give the occupation of the spouses of your married children:

_____

_____

_____

8. If you are living with another adult(s) [including your spouse], please state their occupation. If they are not presently employed, please state if they are: a) homemaker; b) unemployed: c) retired; d) disabled; e) student.

Relationship	Age	Occupational Status

9. If the person(s) described in No. 8 above is employed, please state for each person:

Who and Location of Job	Job Title and Duties	Previous Jobs

10. What do you like to do in your spare time (i.e., hobbies, sports, interests, etc.)?

Bowling, Photograph & Collecting + Travel

11. What newspapers, magazines, or periodicals do you subscribe to or regularly read?

Oakland Tribune

12. Do you frequently follow news reports concerning current events?

Yes X No ____

If yes, please describe your primary sources of information.

Newspaper T.V Radio

13. What television and radio programs do you frequently watch or listen to?

Talk Shows news sports

EDUCATION/MILITARY

1. What is the highest level of education that you have completed?

High School

a. If high school:

1. What high school did you attend: Washington H.S.

2. Did you graduate: Yes X No_____

3. What year did you graduate or last attend? 1956

b. If college:

1. What colleges did you attend?

_____

_____

2. What was your major or area of special interest?

_____

_____

_____

3. Degree(s) and date(s) received:

_____

_____

_____

c. Graduate work:

1. Where did you do your graduate work?

_____

_____

_____

2. Area(s) of study:

_____

_____

_____

3. Degree(s), if any, and date received:

_____

_____

_____

d. Any special professional or vocational training received:

1. Where:_____

2. Nature of training:

_____

_____

_____

3. When?_____

e. Have you ever studied or received any training or had any experience in:

1. Law? Yes_____No X If yes, please explain:

_____

_____

_____

2. Criminology? Yes____No X If yes, please explain.

_____

_____

_____

3. Science, medicine, or psychology? Yes___No X

If yes, please explain:_____

_____

_____

2. Have you ever served in the armed forces? Yes X No____

If yes:

a. What branch? Navy

b. Rank achieved? 3rd Class petty Off.

c. Duties: A/c Loadmast.

d. Did you serve with the military police or were you involved with the military justice system?

Yes____ No X .If yes, please explain(i.e., a court martial or a board of inquiry).

3. If any members of your family served in the armed forces, for each member please list the following:

Relationship	Branch	Rank Achieved	Duties
Bro	Navy	E9	Soar
"	Airforce	E7	Line Main
"	Navy		
"	Navy		
"	Navy		
"	Navy		
"	Navy		
"	Navy		
~~"~~	"		

POLITICAL, RELIGIOUS, AND OTHER ORGANIZATIONAL AFFILIATIONS

1. Are you registered to vote? Yes X No____

2. Are you involved with a church and with church activities?

   Yes X No_____

3. Would any of your religious beliefs, moral feelings or philosophical principles interfere with your ability to sit in judgment of another person and convict him of a crime such as murder?

   Yes_____ No X If yes, please explain:

   _____

   _____

   _____

4. Please list any civic, political, or social charitable organizations you belong to:

   _____

   _____

   _____

   a. Are you an active member in any of these groups?

      Yes_____ No_____

      If yes, please explain your activities with each group:

      _____

5. Do you or any members of your immediate family or household belong to any special interest groups (i.e., Mothers Against Drunk Driving, National Rifle Association, ACLU, etc.)?

Yes_____ No__X__

If yes, are you an active member? Yes_____No_____

If yes, please explain your activities:

_____

_____

_____

6. Do you have any bumper stickers or personalized license plates or holders on your car(s)?

Yes_____ No__X__ If yes, please describe them.

_____

_____

7. Have you, any member of your immediate family, household, or friends ever belonged to any organization that advocates victims' rights?

Yes_____ No__X__ If yes, please explain.

_____

_____

CRIMINAL JUSTICE SYSTEM

1. Do you have any previous experience as a juror?

Yes X No_____

If yes, for each occasion, please state:

When	Where	Civil or Criminal	Nature of Case (i.e. personal injury, burglary, etc.)
89	Oakland	Criminal	Child Molestation

Did you deliberate? Was there a verdict? Were you the foreperson?

1. Yes X No___ Yes X No____ Yes____ No X
2. Yes___ No____ Yes____ No____ Yes____ No____
3. Yes___ No____ Yes____ No____ Yes____ No____

2. Do you know any of the other prospective jurors in this case?

Yes____ No X If yes, please state his/her name:

3. Have you ever served on a grand jury? Yes_____ No X

4. Have you ever been arrested, accused of, or convicted for any crime, including driving while under the influence of alcohol or drugs?

Yes_____ No_X_

If yes, please explain. Please include type of charge, where and how the matter(s) was resolved:

_____

_____

_____

5. Have any members of your family or household or friends ever been arrested, accused or charged with a crime?

Yes_____ No_X_ If yes, please explain.

_____

_____

_____

6. Have you ever known anyone who was investigated for or charged with a crime?

Yes_____ No_X_____ If yes, please explain:

_____

_____

_____

7. Have you ever been the victim of a crime? Yes____No X

If yes, please explain and include where, when, the nature of the crime, and any injuries or losses you suffered:

_____

_____

8. Have any members of your family or household or friends ever been the victim of a crime?

Yes_____ No X If yes, please explain.

_____

_____

_____

9. Are there any particular types of crimes that are especially upsetting to you?

No

_____

_____

_____

10. Do you have an organized anti-crime neighborhood watch in your neighborhood?

Yes_____ No X If yes, please explain your involvement:

_____

_____

_____

11. Have you ever been a witness to a crime? Yes_____No_X_

If yes:

a. Did you report the crime to the police? Yes____No____

If no, why not?

_____

_____

_____

b. Did you give a statement to the police? Yes_____No___

c. Did you have to make any type of identification of the suspect (i.e., view pictures of suspects or attend a lineup, etc.)? Yes_____No_____ If yes, please explain:

_____

_____

_____

d. Did you ever have to testify at a hearing or trial?

Yes_____ No_____

12. Have any members of your immediate family, household, or close friends ever witnessed a crime?

Yes_____ No_^_____ If yes, please explain:

_____

_____

_____

13. Have you or any member of your family or any of your close friends ever been employed by or sought employment with:

a. any city, county, federal or state prosecutorial agency (District Attorney's Office or Attorney General's Office)?

Yes_____ No X

b. any city, county, federal or state law enforcement agency (police department, sheriff's department, highway patrol, F.B.I., etc).?

Yes_____ No X

c. any city, county, federal or state correctional institution?

Yes_____ No X

d. any criminal defense office (e.g., criminal defense law firm, Public Defender's Office, etc.)?

Yes_____ No X

e. the judiciary (e.g., U.S. courts, state courts, etc.)?

Yes_____ No X

f. Any other agency or organization connected with the criminal justice system (e.g. ACLU, Citizens for Law and Order, etc.)?

If you answered yes to any of the above questions, please give details. Who? When? What agency and in what capacity?

_____

_____

_____

14. Are any members of your immediate family, household, or close friends employed by or in any way involved with:

No the Alameda County District Attorney's Office

No members of any other district attorney's office

No members of any Public Defender's office

No any criminal defense attorneys

No any judges, court commissioners, or referees

No any court personnel (i.e., court reporters, clerks, etc.)

No any other type of attorneys or paralegals

No any parole or probation officers

No any person connected with the criminal justice system in any capacity

If your answer to any of these is yes, please explain, including where the person works, how long they have been in the legal system, whether you discuss their jobs with them:

_____

_____

_____

_____

15. Other than your immediate family, household, and close friends, do you know or have any regular contact with:

a. members of any law enforcement agency?

Yes___ No X

b. members of the legal system in any capacity?

Yes___ No X

If yes, please explain:

16. What are your feelings about the effectiveness of our criminal justice system?

Indifferent

17. Have you or any close friend or relative ever visited any jail, prison, or juvenile detention or been incarcerated in a facility? If yes, please explain [include who, when, where, why].

(Me) County Jail Contempt of Court 1973

18. Do you recall movement to remove Rose Bird as Chief Justice of the California Supreme Court?

Yes X No _____

If yes, how do you feel about her removal?

_____

_____

_____

_____

ATTITUDES REGARDING FIREARMS

1. Have you ever used a firearm for any purpose?

   If yes, when and for what purpose? Yes____ No_X__

   _____

   _____

   _____

   _____

2. Do you belong to any organization or are you in agreement with any organization that has as its primary goal advocacy of **the right to own and possess** firearms.

   Yes_____ No_X___

   If so, please state.

   _____

   _____

   _____

   _____

3. Do you belong to any organization or are you in agreement with any organization that has as its primary goal the **elimination** of the right to possess or own firearms?

   Yes_____ No_X___

   If so, please state.

   _____

_____

_____

_____

4. Have you or do you now own any firearms?

Yes_____ No X

A. What guns have you owned or do you own?

_____

_____

B. Do you own them now?

Yes_____ No_____

C. For what purpose do/did you own guns?

_____

_____

ATTITUDES REGARDING ALCOHOL ABUSE

1. What are your **GENERAL FEELINGS** regarding alcohol abuse?

I believe if you abuse the use of Alcohol Break the law justice must be served.

2. Has alcohol abuse touched your life or the life of anyone close to you in any way?

YES ✓ NO ___

If YES, please explain: I have to brothers that are alcoholics

ATTITUDES REGARDING DRUG USE

1. What are your **GENERAL FEELINGS** regarding drug users?

Using drugs is wrong and the user as well as the pusher should be punished

2. Have drugs touched your life or the life of anyone close to you?

YES ___ NO X

If YES, please explain: _____

3. Do you feel that drug users are more likely to be guilty of the charges because they are drug users?

YES ___ NO X

If YES, please explain: _____

4. Do you feel that drug users should be punished just because they are drug users?

YES X NO ___

If YES, please explain: I think it should be against the Law to use drugs

5. Do you have any strong personal or philosophical views about narcotics laws that might impair your ability to be an appropriate juror for this case?

YES ___ NO X

If YES, please explain: ___

ATTITUDES REGARDING PSYCHIATRIC AND PSYCHOLOGICAL TESTIMONY

1. Have you ever studied or had training or work experience in psychology, psychiatry, psychotherapy, counseling, or any related subjects?

   YES X NO ___

   If YES, please explain: I had some courses in psychology in college

2. Have you or any family member or friend ever been involved with the mental health field or professions in any manner (including employment, volunteer work, etc)?

   YES ___ NO X

   If YES, please explain: _____

3. Do you have an opinion about the value and validity of psychiatric and/or psychological testimony in legal matters?

YES ___ NO X___

If YES, please explain: _____

_____

_____

_____

_____

_____

_____

PUBLICITY

This case involves a number of shooting incidents which occurred on the I-580 Freeway in Oakland between the months of March and August 1989. Some of the incidents resulted in the deaths of persons on or near that freeway.

1. Do you think you may have you seen, heard or read anything about this case in the media (TV, radio, newspapers, etc.) or from other sources?

YES ___ NO X

If YES, please explain:

YOUR SOURCE(S): _____

_____

WHEN you received the information: _____

_____

WHAT INFORMATION you received: _____

If you think you have heard or read or know anything about this case **YOU ARE ORDERED NOT TO DISCUSS YOUR RECOLLECTIONS WITH ANY OF YOUR FELLOW JURORS.**

POTENTIAL WITNESSES

The following is a list of the **potential witnesses** who may or may not be called to testify in this matter. While every attempt is made to be all inclusive, additional witnesses may be discovered as the testimony develops during the course of the trial and/or through on-going investigation. The mere fact that a person is listed as a potential witness does not mean that they will in fact testify in this matter. This list is designed to place potential jurors on notice as to the individuals who may **possibly be called to testify** in this matter.

Please **circle the name of any person** you know, think you may know, have met, or you think you might have heard of:

Grace Taube
Robert Noyer
Vincent Diguicepi
Helen McEboy
Chi Yeung
Illinois Clark
Kimberly Clark
Mrs. Richard Boykin
Kimberly Michele Cooper
Angelo Dechae Rivers
Marion Taylor
Garland Arnell Horton
Sally Bruno
Nancy R. Monroe

Janell Lee
Karen Anderson

Martha Sloan
Jennifer Vaughn
Mary Alice Cross
Maritta Cross
Anthony Green
Charles Green
Ann Killensworth
Maggie Christine Zeigler
John W Cuthbertson

Paul Rochon
Louise Rochon
Karen Adams
Lloyd Rochon
Karen Amerine-Oren

Paul Fenn
Julie Peters
John Cutler

Upendra DeSilva
Leo Critchlow
Anna Oprrevaux
Ken Young

William August
Geraldine August
Terrie Dowling
Constance Patterson
Rodney Stokes
Shelton Matthews
Fred Mohr
Mickels Reti
Georgina Iris Stevens
John Murphy
Mario Steven Woods
Jarrad Hameditoloui
Doris Hameditoloui
Oleander Harrison
Treya Robinson
Pamela Joyce Simpson
Robert Goldstone
Randall Shumpert

Paul Herrmann, M.D.
Sharon Van Meter, M.D.
Thomas Rogers, M.D.
Dr. Chieu, M.D.

The following were employed by Allied Ambulance:
Patricial Welke
Ken McCury
K. Binder
D. Wheaton

C. Dominguez

Curtis Sato - Oakland Police Department Crime Lab
Lansing Lee - Oakland Police Department Crime Lab

The following are members of the Oakland Police Department:
Robert Chenault
Art Roth

John McKenna
Ramon Peniagua
Mike Sitterud
Brian Thiem

K. Wiley
P. Mahanay
Daniel Hutchinson
Hallinan
Pete Pruitt
Larry Ballusa
B. Williams
J. Hayter
D. Downum
M. Bonds
D. Struntz

Kevin Wiley
Thomas Viglienzonie
Paul Berlin
A. Freitas
M. Hoyle
J. Meeks
J. Hassan
T. Shaver
T. Shade
Edward Smith
Lawrence Riggs
Debbie Rivers
Bruce Brock
Collin Wong
Greg Alberigi
S. Thurston
P. Dunbar
J. Ferguson

The following are Reserve Officers with the Oakland Police
D. Mace
T. Liston

W. Hodgkin
T. Dubsky

The following Deputies of the Alameda County Sheriff's Dept.:
Dep. Wilson
Dep. Borland
Dep. N. Palmer

Ofc. Delaney - Berkeley Police Department

Inspector Peck - San Francisco Police Department

Michael Anderson - California Highway Patrol

The following memebers of the Oakland Fire Department:
Capt. W Sauters
R. June
H. Harrell
R. White
Capt R. Gatchalian
L. Salsberry
T. Stinson
L. Townsend

The following are members of the District Attorney's Office:
Jerry Koehne
Larry Ballusa

Is there any matter that **has not** been covered by this questionnaire that you feel that you should mention at this time that might affect your ability to be a fair and impartial juror in this case?

Yes_____ No_X_____ If yes, please explain:

ATTITUDES REGARDING THE DEATH PENALTY

The Court is asking these questions regarding your **feelings** about the death penalty because one of the **possible** sentences for a person convicted of the murder charges the prosecution has filed against the defendant Stevens is the death penalty. Therefore, the Court must know whether you could be fair to both the prosecution and the defendant Stevens on the issue of punishment, **if you reach that issue**. By asking these questions, the Court is **not** suggesting that you will ever need to decide this question. The Court has **no way** of knowing what the evidence in this case will be or whether or not you will find the defendant guilty of anything at all.

1. What are your **GENERAL FEELINGS** regarding the death penalty?

I have a mind set of feeling about the death penalty but I will and I am able to abide the law and if the crime calls for the death penalty give it.

2. Which would you say most accurately states your **philosophical opinion** regarding the death penalty?

_____Strongly in favor

X____Moderately in favor

_____Neutral

_____Moderately against

_____Strongly against

3. Have your views about the death penalty ever **changed** substantially in either **intensity or nature**?

Yes_____ No X_____

Please explain:

_____

_____

_____

_____

4. Do you hold to any **religious, moral feelings or philosophical principle** that would affect your ability to vote for the death penalty as a judgment in this case?

Yes_____ No X____

Please explain:

_____

_____

_____

5. Do you belong to any organization that advocates **in favor** of the death penalty.

Yes_____ No_X_____

If yes, what organization?_____

_____

_____

6. Do you belong to any organization that advocates the **abolition** of the death penalty?

Yes_____ No_X_____

If yes, what organization?

_____

_____

_____

7. If the issue of whether California should have a death penalty law was to be on the ballot in this coming election, how would you vote:

For_____ Against_____ Not sure_T_____

Why?

I honestly don't know

_____

_____

_____

8. Is there any matter that **has not** been covered by this questionnaire concerning the death penalty or your feelings and attitudes about the death penalty that you feel that you should mention at this time that might affect your ability to be a fair and impartial juror in this case?

Yes_____ No X If yes, please explain:

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

ADDITIONAL AREA FOR EXPLANATION OF ANSWERS

I declare under penalty of perjury under the laws of the State of California, that the above answers are true and correct.

12/3/92
(DATE)

Timothy W. Foster
(Signature)

APPENDIX J

THE CLERK: THE NEXT PROSPECTIVE JUROR IS EDWARD PRODGER.

EDWARD PRODGER

VOIR DIRE EXAMINATION

BY THE COURT:

Q. GOOD MORNING, MR. PRODGER.

A. GOOD MORNING.

Q. THANK YOU FOR BEING HERE, SIR. AND ALSO I WANT TO THANK YOU FOR WAITING. I KNOW IT'S CERTAINLY NOT A PARTICULARLY PLEASANT EXERCISE, AND I APPRECIATE YOUR COURTESY IN THIS REGARD.

WE DO HAVE SOME QUESTIONS FOR YOU. I'M GOING TO BEGIN THE QUESTIONING PROCESS WITH YOU. BEFORE I DO THAT I WANT TO FOLLOW UP ON JUST AN ANSWER OR TWO THAT YOU GAVE US IN THAT QUESTIONNAIRE THAT YOU WERE GOOD ENOUGH TO FILL OUT FOR US.

AND I NOTE YOU ARE EMPLOYED BY A COMPANY KNOWN AS HARVARD UNIVERSAL, INC. YOU TOLD ME THAT YOU KNEW THAT YOU WOULD BE PAID TO SOME EXTENT FOR YOUR JURY SERVICE OR PAID YOUR REGULAR SALARY DURING JURY SERVICE, YOU DIDN'T KNOW WHAT THE ARRANGEMENTS WERE AS TO THE LENGTH OF THAT.

DID YOU CHECK ON THAT, SIR?

A. YES.

Q. AND WHAT IS THE COMPANY'S POLICY?

A. IT'S UNLIMITED.

Q. UNLIMITED. OKAY. THAT'S FINE.

YOU ALSO INDICATED IN THE QUESTIONNAIRE THAT YOU FELT THAT YOU MIGHT HAVE SOME RECOLLECTION OF HAVING READ,

HEARD OR SEEN SOMETHING ABOUT THIS CASE A COUPLE OF YEARS AGO, AS YOU REFERRED TO IT, "AT THE TIME OF THE INCIDENT," AND YOU DID NOT STATE ANY PARTICULAR DETAILS THAT YOU MIGHT RECALL.

DO YOU RECALL ANY SPECIFICS? AND I DON'T WANT TO KNOW PARTICULARLY WHAT THEY WERE, BUT DO YOU RECALL ANY SPECIFICS ABOUT WHAT YOU READ OR HEARD?

A. NOT REALLY, NO.

Q. WHAT IS IT THAT YOU DO RECALL?

A. JUST POSSIBLY THAT THERE WAS A POSSIBLE SHOOTING AT THE FREEWAY FOR SOME REASON, I DON'T KNOW WHAT. THAT'S ALL.

Q. I CALL THAT TO YOUR ATTENTION SIMPLY FOR THIS REASON, I WOULD BE DIRECTING ANY JUROR IN THIS CASE, AND INDEED, ANY JUROR IN ANY CASE, THAT IF THEY ARE SELECTED AND TO SERVE AS JURORS FOR THE PURPOSES OF THE TRIAL, AND I'M SURE THIS WOULDN'T COME AS ANY SURPRISE TO YOU, THAT WE DIRECT OUR JURORS CLEARLY TO MAKE ANY DECISION THAT THEY MIGHT REACH BASED ON THE EVIDENCE AND THE TESTIMONY THAT THEY HEAR DURING THE TRIAL IN THE COURTROOM AND NOT ON ANY INFORMATION THEY MIGHT HAVE FROM SOME OTHER SOURCE. AND OF COURSE THAT WOULD ENCOMPASS ANYTHING THAT YOU MIGHT RECALL FROM ANY MEDIA SOURCE.

I'M SURE YOU CAN APPRECIATE THAT WE NEED TO HAVE 12 JURORS MAKING A DECISION ON THE SAME INFORMATION OR EVIDENCE AND NOT HAVE ONE OR TWO OR THREE JURORS FACTORING IN SOMETHING THEY MAY HAVE HEARD FROM SOMEWHERE ELSE AND HAVING THAT ENTER INTO THEIR DECISION MAKING PROCESS.

I DON'T THINK THAT WOULD BE ANY PROBLEM WITH REGARD TO YOUR SITUATION, BECAUSE YOU DON'T HAVE ANY RECOLLECTION OF SPECIFIC DETAILS.

A. NO.

Q. OBVIOUSLY WE WOULD ASK YOU TO PUT THAT ASIDE AND MAKE YOUR DECISION ON WHAT YOU SEE AND HEAR HERE; OKAY?

FAIR ENOUGH?

A. YES.

Q. ALL RIGHT. I TAKE IT, THEN, FROM MY REVIEW OF YOUR QUESTIONNAIRE THAT RECOGNIZING THERE'S CERTAINLY A LEVEL OF INCONVENIENCE IF WE DO ASK YOU TO SERVE ON THIS JURY, IT WOULD BE CERTAINLY INCONVENIENT TO SOME EXTENT FOR ALMOST EVERYBODY, AND ALSO RECOGNIZING THAT IF YOU HAD A CHOICE AND IT WERE A PERFECT WORLD, YOU MIGHT CHOOSE TO BE SOMEWHERE ELSE DURING FEBRUARY AND MARCH, HAVING THAT IN MIND, HOWEVER, IT APPEARS THAT NONETHELESS YOU'RE AVAILABLE TO SERVE IF YOU ARE SELECTED FOR THE LENGTH OF TRIAL; IS THAT CORRECT?

A. YES.

Q. WHEN I INTRODUCED YOU TO THE DEFENDANTS AND THE ATTORNEYS A FEW WEEKS AGO, DID YOU KNOW ANY OF THEM BEFORE THAT DAY?

A. NO.

Q. I MENTIONED TO YOU WHEN YOU WERE IN HERE EARLIER WITH THE OTHER MEMBERS OF THE GROUP THAT YOU'VE BEEN WITH THIS MORNING, THAT WE DO HAVE SOME QUESTIONS FOR YOU, WHICH WILL BE DIRECTED, IN PART, TOWARD THE IDEA OF

PUNISHMENT OR PENALTY, THAT SUBJECT, AND MORE PARTICULARLY TOWARD THE CONCEPT OF THE POSSIBILITY, AS I'VE EXPLAINED, AND IT'S A POSSIBILITY ONLY, BECAUSE OF THE NATURE OF THE CHARGES, OF A SECOND PART TO THIS CASE, WHAT I DESCRIBE AS THE PENALTY PHASE. AND I WANT TO ASK YOU SOME QUESTIONS ABOUT THAT. AND IN ORDER TO GET US TO A POINT AND MAKE THE BEST USE OF YOUR TIME WHERE I CAN HAVE A MEANINGFUL CONVERSATION WITH YOU ON THAT SUBJECT, I'M GOING TO ASK YOU, AS I HAVE EVERYBODY ELSE, TO MAKE A COUPLE OF ASSUMPTIONS FOR ME JUST FOR THE PURPOSES OF THESE QUESTIONS.

I'M GOING TO ASK YOU TO ASSUME, FIRST OF ALL, THAT THE JURY SELECTION PROCESS HERE IS OVER, WHICH YOU KNOW IT ISN'T, BUT JUST ASSUME THAT IT IS AND YOU'VE BEEN SELECTED AS ONE OF THE JURORS. ASSUME FOR ME ALSO THAT THE CASE HAS STARTED AND THAT ALL THE EVIDENCE IN THE FIRST PART OF THE CASE, WHAT I REFERRED TO AS THE GUILT PHASE, AT THE CONCLUSION OF WHICH THE JURY WOULD BE ASKED TO MAKE A DECISION ABOUT THE GUILT OR INNOCENCE OF BOTH THE DEFENDANTS, ASSUME FOR ME THAT WE'VE HAD THAT PHASE AND THAT'S OVER, AND YOU'VE CONSIDERED ALL THE EVIDENCE, YOU'VE CONSIDERED THE INSTRUCTIONS AS TO THE LAW THAT I WOULD GIVE YOU AT THAT POINT, AND YOU'VE HAD DISCUSSIONS WITH YOUR FELLOW JURORS, AND ALL 12 OF YOU HAVE DECIDED IN A HYPOTHETICAL VERDICT THAT THE DEFENDANT CHARLES STEVENS IS GUILTY OF FIRST DEGREE MURDER AND THAT ONE OF WHAT I DESCRIBED AS SPECIAL CIRCUMSTANCES IS TRUE. IF YOU JUST ASSUME THAT FOR ME, THEN WE'LL MOVE FORWARD INTO MY

QUESTIONS; OKAY?

NOW, THE -- YOU KNOW, FROM WHAT I TOLD YOU PROCEDURALLY THAT IF THE JURY ARRIVED AT A VERDICT SUCH AS IN MY HYPOTHETICAL, THAT THE CASE WOULD AUTOMATICALLY PROCEED INTO THAT SECOND PART, AT THE CONCLUSION OF WHICH THE JURY WOULD BE DECIDE -- WOULD BE ASKED TO DECIDE WHAT THE APPROPRIATE PUNISHMENT WOULD BE FOR THAT DEFENDANT. AND THERE WERE ONLY TWO POSSIBILITIES AT THAT POINT, AS I'VE INDICATED TO YOU, DEATH OR LIFE IN PRISON WITHOUT THE POSSIBILITY OF PAROLE.

AT THAT SECOND PHASE, AS I'VE EXPLAINED, THE JURY WOULD HEAR ADDITIONAL INFORMATION, INFORMATION AND EVIDENCE UNRELATED TO THE EVIDENCE ABOUT THE CRIMES WHICH THEY WOULD HAVE ALREADY HEARD, AND THAT INFORMATION WOULD BE DESIGNED TO HELP THEM CHOOSE WHAT, INDEED, WOULD BE THE APPROPRIATE PUNISHMENT FOR THAT DEFENDANT.

NOW, IN VIEW OF THE HYPOTHETICAL THAT WE ARE CONSTRUCTING FOR OUR DISCUSSION THIS MORNING, YOU KNOW, FROM MY ADDITIONAL EXPLANATION AS TO PROCEDURES, THAT BEFORE WE GET TO THE SECOND PART OF THE CASE AND BEFORE YOU HEAR ANY ADDITIONAL EVIDENCE ABOUT THE DEFENDANT'S BACKGROUND OR ANYTHING ELSE THAT MIGHT BE PRESENTED BY EITHER SIDE TO HELP YOU CHOOSE THE APPROPRIATE PUNISHMENT, YOU KNOW, FROM THE PROCEDURE THAT I'VE EXPLAINED, THAT THE JURY WOULD HAVE ALREADY MADE CERTAIN DECISIONS, BY VIRTUE OF WHICH IF THEY HAD NOT, THEN WE WOULDN'T EVEN GET TO THE SECOND PHASE. IN TERMS OF THIS CASE, FROM A FACTUAL STANDPOINT, THE JURY WOULD HAVE ALREADY DECIDED BEYOND A

REASONABLE DOUBT THAT THE DEFENDANT CHARLES STEVENS WAS GUILTY OF AT LEAST ONE FIRST DEGREE MURDER, THAT IS, ONE PREMEDITATED, INTENTIONAL MURDER, AND THAT AT LEAST ONE OF THOSE SPECIAL CIRCUMSTANCES, LYING IN WAIT OR MULTIPLE MURDER WAS TRUE. AND THE JURY MIGHT HAVE ALSO DECIDED BEFORE WE START THE SECOND PART THAT HE IS GUILTY OF ONE OR MORE OR ALL SIX OF THE ATTEMPTED MURDERS THAT HE'S CHARGED WITH; OKAY?

NOW, YOU HEARD ME DISCUSS WITH YOU, OBVIOUSLY, BEFORE THAT AT THAT POINT AS WE GOT TO THE END OF THE SECOND PHASE, IT WOULD BE UP TO THE JURY TO DECIDE THE PUNISHMENT, BUT THEY'RE NOT SUPPOSED TO MAKE UP THEIR MINDS ABOUT WHAT PUNISHMENT WOULD BE APPROPRIATE BASED SOLELY OR HAVING HEARD ONLY THE EVIDENCE ABOUT THE CRIMES, BUT RATHER, THEY'RE SUPPOSED TO WAIT AND PROCEED THROUGH THAT SECOND PART OF THE CASE WHERE OTHER EVIDENCE WOULD BE PRESENTED TO THEM; AS I SAY, EVIDENCE DESIGNED TO HELP THEM CHOOSE THE APPROPRIATE PUNISHMENT, AND NOT MAKE UP THEIR MIND -- AND TO SERIOUSLY CONSIDER THAT BEFORE MAKING UP THEIR MIND AS TO THE APPROPRIATE PUNISHMENT.

NOW, SOME PEOPLE MIGHT SAY TO ME BASED ON THE TYPE OF CRIMES THAT I'VE OUTLINED HERE AND THE NATURE OF THE CHARGES HERE, OR THE NUMBER OF THE CHARGES, THAT IN A CASE LIKE THIS, THEY WOULD ALWAYS VOTE FOR THE DEATH PENALTY, REGARDLESS OF WHAT ADDITIONAL EVIDENCE MIGHT BE PRESENTED TO THEM IN THE SECOND PART OF THE TRIAL.

OTHER PEOPLE MIGHT SAY TO ME THAT THEY WOULD NEVER VOTE FOR THE DEATH PENALTY IN A CASE LIKE THIS, BUT AGAIN,

REGARDLESS OF WHAT CIRCUMSTANCES MIGHT BE PRESENTED TO THEM IN THE SECOND PART OF THE TRIAL.

THE POINT IS, AND WE GET BACK TO WHAT I'VE MENTIONED TO YOU PREVIOUSLY, THAT PEOPLE SUCH AS THAT WOULD MAKE UP THEIR -- -- WOULD MAKE UP THEIR MIND BASED ON THE EVIDENCE ABOUT THE CRIMES ONLY AND WOULD NOT SERIOUSLY CONSIDER OTHER INFORMATION AS THE LAW WOULD REQUEST THAT YOU DO.

SO I WANT TO FIND OUT WHAT YOUR THOUGHTS ARE IN THIS SUBJECT, AND AS I DO SO, PLEASE BEAR IN MIND I'M NOT ASKING YOU HOW YOU WOULD VOTE IN THIS CASE, OBVIOUSLY WE WOULDN'T AND COULDN'T DO THAT, YOU HAVEN'T HEARD ANY EVIDENCE. BUT LET ME KNOW THIS, AS YOU SIT THERE NOW, BASED ON MY DISCUSSIONS WITH YOU AND WHAT I'VE TOLD YOU ABOUT THE TYPE OF CASE THIS IS, AND BASED ON THE HYPOTHETICAL I'VE SHARED WITH YOU, IF YOU ARE SELECTED AS A JUROR HERE, WOULD YOU HAVE AN OPEN MIND IN STARTING THAT SECOND PHASE OF THE CASE, IF WE HAD ONE, AS TO BOTH SENTENCE POSSIBILITIES OR CHOICES, AND WOULD YOU SERIOUSLY CONSIDER BOTH SENTENCE CHOICES AFTER HAVING HEARD ALL THE EVIDENCE PRESENTED TO YOU, NOT ONLY IN THE FIRST PART OF THE CASE, THE EVIDENCE ABOUT THE CRIMES, BUT WHATEVER MIGHT BE PRESENTED ADDITIONALLY TO YOU IN THE SECOND PART OF THE CASE? WOULD YOU DO THAT?

A. WELL, I THINK IT WOULD DEPEND ON, LIKE YOU SAY, CIRCUMSTANCES, AND YOU KNOW, WHAT THE LAW PERSCRIBES AS FAR AS YOU, YOURSELF, AS JUDGE WOULD SAY WHAT IS LEGAL OR WHAT IS -- SHOULD BE DONE BY LAW, YOU KNOW, AND --

Q. WELL, I WOULD GIVE YOU CERTAIN INSTRUCTIONS --

A. INSTRUCTIONS.

Q. -- GENERAL GUIDELINES --

A. YES.

Q. -- AS TO HOW THE EVIDENCE WOULD BE CONSIDERED.

A. RIGHT.

Q. BUT THE DECISION --

A. YES.

Q. -- AS TO THE APPROPRIATE PUNISHMENT WOULD BE UP TO THE JURY.

A. YES.

Q. AND THAT'S THE POINT I WANT TO GET TO.

SO WHAT I'M TRYING TO FIND OUT IS IN TERMS OF YOUR STATE OF MIND, AND THAT'S WHAT WE ARE TRYING TO GAUGE HERE, IN TERMS OF AS WE TALK TO THE JURORS, IS BASED ON WHAT I'VE TOLD YOU ABOUT THE CASE SO FAR, AND BASED ON THE TYPE OF CRIMES THAT ARE CHARGED HERE, WHETHER YOU WOULD HAVE MADE UP YOUR MIND AS TO THE APPROPRIATE PUNISHMENT BEFORE HEARING THE SECOND PART OF THE CASE AND THE INFORMATION DESIGNED TO HELP YOU CHOOSE PUNISHMENT, OR WOULD YOU WOULD HAVE AN OPEN MIND GOING INTO THAT PART OF IT? THAT'S WHAT I NEED TO FIND OUT.

A. NO, I WOULD HAVE AN OPEN MIND.

YES, YOU WOULD HAVE TO HAVE AN OPEN MIND.

Q. WELL, SOME PEOPLE MIGHT NOT, AND THAT'S WHAT WE HAVE TO FIND OUT.

A. WELL, YOU HAVE TO, YES. YES.

Q. LET ME APPROACH IT FROM ANOTHER DIRECTION.

I TAKE IT, NOW, AS I HAVE CLARIFIED IT, AND BELIEVE ME, THESE ARE DIFFICULT AREAS WHEN WE TRY AND COMPRESS IT, AS I'VE CLARIFIED MY INQUIRY NOW.

I TAKE IT FROM YOUR RESPONSE TO ME RELATIVE TO MY QUESTIONING ABOUT HAVING AN OPEN MIND, THAT AS YOU SIT THERE NOW, AND BASED ON WHAT YOU'VE HEARD ABOUT SO FAR, YOU HAVE NOT ELIMINATED OR EXCLUDED THE POSSIBILITY OF EITHER OF THOSE TWO PENALTIES; AM I RIGHT ABOUT THAT?

A. THAT'S CORRECT.

Q. ALL RIGHT. SO THAT YOU WOULD HAVE AN OPEN MIND STARTING THAT PHASE OF THE CASE IF WE HAVE ONE, AND SERIOUSLY CONSIDER WHATEVER IS PRESENTED TO YOU BEFORE YOU MADE UP YOUR MIND AS TO WHICH PUNISHMENT WOULD BE APPROPRIATE; IS THAT A FAIR STATEMENT?

A. YES.

Q. AND, AGAIN, GETTING BACK A LITTLE BIT TO WHAT YOU SAID TO ME, THE DECISION MAKING PROCESS THAT WE'RE TALKING ABOUT, IN THE SECOND PHASE OF A CASE LIKE THIS, IF WE ACTUALLY HAVE A SECOND PHASE, IS NOT AS I SAID -- FIRST OF ALL, THE DECISION WOULD BE UP TO THE JURY, THE PROCESS IS NOT A MECHANICAL, IT'S NOT A MATHEMATICAL TYPE OF A PROCESS. IT'S NOT A QUESTION OF SIMPLY ADDING UP THE NUMBER OF AGGRAVATING FACTORS OR MITIGATING FACTORS, BUT IT'S NOT A QUESTION OF ADDING UP A CERTAIN NUMBER FACTORS ON ONE SIDE OR THE OTHER OF A HYPOTHETICAL SCALE. IT IS A VERY SUBJECTIVE DECISION, IT'S A VERY PERSONALIZED

PROCESS.

NOW, IN REGARD TO THAT PROCESS, YOU WOULD BE INSTRUCTED, I MENTIONED IN TERMS OF THE INSTRUCTIONS OF THE COURT, YOU WOULD BE INSTRUCTED, IN PART, THAT TO RETURN A JUDGMENT OF DEATH, YOU PERSONALLY WOULD HAVE TO BE PERSUADED THAT THE CIRCUMSTANCES IN AGGRAVATION ARE SO SUBSTANTIAL IN COMPARISON TO THE EVIDENCE IN MITIGATION THAT IT WARRANTS DEATH INSTEAD OF LIFE IN PRISON WITHOUT PAROLE.

NOW, HAVING HAD THIS DISCUSSION AS WE'VE HAD IN THESE LAST SEVERAL MINUTES, IS IT YOUR HONEST BELIEF AS YOU SIT THERE NOW, AND BASED ON WHAT YOU KNOW ABOUT THIS CASE SO FAR, AND BASED ON OUR HYPOTHETICAL THAT I'VE SHARED WITH YOU, THAT YOU WOULD HAVE AN OPEN MIND IN GOING FORWARD INTO -- YOU WOULD HAVE AN OPEN MIND AS TO THE POSSIBILITY OF IMPOSING EITHER PENALTY THAT I'VE DESCRIBED, THAT YOU WOULD BE ABLE TO FOLLOW THE COURT'S INSTRUCTIONS IN THAT REGARD, AND THAT YOU WOULD SERIOUSLY CONSIDER BOTH PENALTIES, BOTH POSSIBLE PENALTIES IN THIS CASE ONLY AFTER HEARING ALL EVIDENCE THAT'S PRESENTED TO YOU NOT ONLY IN THE FIRST PART OF THE CASE WHERE YOU HEAR THE EVIDENCE ABOUT THE CRIMES, BUT IN THE SECOND PART OF THE CASE AS WELL?

A. YES.

Q. NOW, HERE'S MY LAST QUESTION FOR YOU. COULD YOU AS AN INDIVIDUAL, AND ULTIMATELY AS A JUROR IF YOU'RE SELECTED, AFTER HAVING HEARD EVERYTHING IN BOTH PARTS OF THE CASE IF WE GET THAT FAR, COULD YOU VOTE TO IMPOSE

EITHER OF THOSE TWO PENALTIES IF YOU FELT IT WAS THE APPROPRIATE PENALTY, COULD YOU CAST THAT VOTE?

A. I WOULD HAVE -- IT HAS TO BE ONE WAY OR THE OTHER, YES.

Q. WELL, AS I'VE EXPLAINED --

A. YEAH.

Q. -- THERE'S ONLY TWO POSSIBILITIES.

A. RIGHT.

Q. BUT WHAT I WANT TO GET TO IS --

A. YEAH.

Q. -- THAT AFTER YOU'VE HEARD EVERYTHING --

A. YES.

Q. -- DO YOU, AS AN INDIVIDUAL, AS YOU KNOW YOURSELF, AND NOBODY IS SUGGESTING THAT ANY OF THIS IS AN EASY PROCESS.

A. RIGHT.

Q. IT IS NOT.

BUT DO YOU HAVE THE CAPACITY AS AN INDIVIDUAL TO CAST A VOTE FOR EITHER OF THOSE TWO PENALTIES, DEATH OR LIFE IN PRISON WITHOUT POSSIBILITY OF PAROLE?

THOSE BEING THE ONLY TWO POSSIBILITIES AT THAT STAGE, COULD YOU CAST A VOTE AFTER HAVING HEARD EVERYTHING AND AFTER HAVING MADE A DETERMINATION IN YOUR MIND THAT THAT WAS THE APPROPRIATE PENALTY, COULD YOU DO THAT?

A. I PROBABLY COULD, YES.

Q. AS FAR AS YOU KNOW?

A. AS FAR AS I KNOW, YES.

Q. BUT OBVIOUSLY YOU'VE NOT BEEN CALLED UPON TO

DO IT BEFORE?

A. YES, RIGHT.

Q. BUT BASED ON, AS I SAY, AND ONLY YOU CAN ANSWER THIS QUESTION, AS YOU KNOW YOURSELF, IF YOU FELT IT WAS THE APPROPRIATE PENALTY, COULD YOU VOTE FOR THAT AS ONE OF THE 12 JURORS?

A. I THINK SO.

THE COURT: ALL RIGHT. MR. BURR.

MR. BURR: THANK YOU.

VOIR DIRE EXAMINATION

BY MR. BURR:

Q. LET ME REACQUAINT YOU, TO A CERTAIN DEGREE, WITH WHO'S WHO AND WHAT THEY'RE CHARGED WITH.

WHEN YOU HEARD OUR COURT CLERK HERE READ THE CHARGES THERE WERE TEN CHARGES THAT WERE READ.

THE DEFENDANT THAT'S CLOSEST TO YOU HERE, MR. CLARK, HE'S CHARGED WITH ONLY ONE OF THOSE CRIMES. IT'S A VERY SERIOUS ONE. HE'S CHARGED WITH MURDER. WE ARE NOT SEEKING THE DEATH PENALTY AS TO HIM.

THE DEFENDANT HERE AT THE END OF THE TABLE WITH THE GLASSES ON, HE IS CHARGED WITH ALL TEN OF THOSE CRIMES, FOUR MURDERS, AND -- AND HE'S ALSO CHARGED WITH ATTEMPTING TO MURDER SIX OTHER PEOPLE. AND WE ARE SEEKING THE DEATH PENALTY WITH REGARD TO HIM.

NOW, A LOT OF PEOPLE COME IN HERE AND OCCUPY THESE CHAIRS, AND THEY DON'T REALLY THINK ABOUT WHETHER OR NOT THEY COULD ACTUALLY VOTE TO EXTINGUISH THE LIFE OF ANOTHER HUMAN BEING UNTIL THEY OCCUPY ONE OF THESE CHAIRS. AND

THAT SORT OF MAKE SENSE. THERE'S NO REASON TO GO AROUND THINKING ABOUT THIS SORT OF STUFF. BUT IT IS SOMETHING PEOPLE HAVE TO THINK ABOUT BECAUSE, AS THE JUDGE SAYS, IT'S NOT EASY, AND IT SHOULDN'T BE EASY. IT'S A VERY DIFFICULT THING.

WE HAVE HAD A NUMBER OF PEOPLE TELL US THAT ARE -- THEY'RE STRONG PROPONENTS OF THE DEATH PENALTY, THEY THINK IT'S AN APPROPRIATE PENALTY FOR US TO HAVE. AND IF IT WERE -- THIS CASE WERE SOMETHING THAT THEY'D READ ABOUT IN THE NEWSPAPERS, THEY WOULD SAY, "YEP, IF HE DID ALL THOSE THINGS, HE SHOULD BE GIVEN THE DEATH PENALTY." BUT WHEN THEY OCCUPY A CHAIR LIKE YOU'RE IN AND THERE'S A REAL PERSON NOT 40 FEET AWAY, WE'RE NO LONGER TALKING ABOUT HYPOTHETICALS, WE ARE TALKING ABOUT REAL PEOPLE.

A. NO, THAT'S RIGHT.

Q. AND WHEN THEY ARE FACED WITH THAT TYPE OF SITUATION, SOME PEOPLE, BECAUSE OF RELIGIOUS BELIEFS THAT THEY HADN'T THOUGHT ABOUT UNTIL THEY OCCUPY THE CHAIR AND THEY WERE CONFRONTED WITH THIS, OR THEIR OWN ETHICAL VALUES, EVEN THOUGH THEY ARE -- THEY SUPPORT THE DEATH PENALTY, THIS IS SOMETHING THEY CAN'T DO. MAYBE IT'S BECAUSE OF WHAT'S GOING ON IN THEIR LIFE, OR THEIR OWN DIFFICULTY WITH MAKING DECISIONS THAT AFFECT THEIR OWN LIFE LET ALONE ANOTHER PERSON'S LIFE.

BUT THE BOTTOM LINE IS THEY CAN SUPPORT THE DEATH PENALTY, BUT WHEN THEY ARE ASKED IS THIS SOMETHING THEY CAN DO, THEY SAY, "NO. I'M GETTING IN OVER MY HEAD. I CAN'T DO THAT. I DON'T HAVE IT WITHIN ME TO DO THAT."

AND THAT'S OKAY. THAT'S WHY WE GO THROUGH THIS PROCESS. WE NEED PEOPLE WHO CAN DECIDE AND LOOK INSIDE AND SAY, "CAN I DO THIS?"

AND SO I ASK THE QUESTION, CAN YOU DO THIS?

A. IT'S -- THAT'S A DIFFICULT ANSWER BECAUSE IT'S HARD TO SAY RIGHT NOW, YOU'RE RIGHT. I'D HAVE TO WEIGH ALL THE EVIDENCE AND --

THE COURT: WELL, SIR, THAT'S WHY WE TRY AND FOCUS IT IN THIS WAY --

PROSPECTIVE JUROR PRODGER: YES.

THE COURT: -- AND HYPOTHETICALLY GET TO THE POINT, FOR PURPOSES OF THE QUESTIONS, THAT YOU HAVE DONE THAT, YOU'VE WEIGHED ALL THE EVIDENCE.

PROSPECTIVE JUROR PRODGER: YEAH.

THE COURT: YOU'VE CONSIDERED EVERYTHING, AND YOU'VE MADE A DETERMINATION THAT ONE PENALTY OR THE OTHER IS THE APPROPRIATE PENALTY BASED ON EVERYTHING THAT YOU'VE HEARD.

AND WHAT MR. BURR IS TRYING TO FIND OUT, WHAT WE ARE ALL TRYING TO FIND OUT, IS HAVING GONE THAT FAR WITH IT, WHETHER -- AND AGAIN WE ARE NOT ASKING YOU HOW YOU WOULD VOTE.

PROSPECTIVE JUROR PRODGER: RIGHT.

THE COURT: BECAUSE YOU DON'T KNOW THAT, YOU HAVEN'T HEARD ANYTHING YET.

WE ARE ASKING YOU WHETHER YOU COULD VOTE, HAVING HEARD EVERYTHING AND HAVING MADE A DETERMINATION IN YOUR OWN MIND THAT THE APPROPRIATE PENALTY WAS ONE OR THE

OTHER, COULD YOU VOTE FOR IT?

THAT'S WHAT WE NEED TO KNOW; COULD YOU DO THAT?

PROSPECTIVE JUROR PRODGER: I PROBABLY COULD, I'LL PUT IT THAT WAY.

MR. BURR: Q. WELL, AS A LAWYER, WE EARN OUR LIVING WITH WORDS. AND WHEN PEOPLE SAY, "YEAH, I PROBABLY COULD," SOMETIMES THAT'S A FIGURE OF SPEECH. SOMETIMES, ON THE OTHER HAND, THAT INDICATES INDECISION.

A. RIGHT.

Q. AND WHAT WE NEED TO KNOW IS CAN YOU DO IT? AND IT'S HARD BECAUSE --

A. YES.

Q. -- AS WE SAY, YOU KNOW, WE CAN'T TRY THE CASE TO EVERYBODY AND SAY, "ALL RIGHT. CAN WE SEE A SHOW OF HANDS OF PEOPLE WHO COULD IMPOSE THE DEATH PENALTY IN THIS KIND OF CASE."

AND I'M NOT ASKING YOU WHETHER IT'S THE FINAL DECISION YOU'RE GOING TO MAKE. WHAT I'M ASKING YOU IS CAN YOU DO THIS? BECAUSE IT'S NOT FAIR TO YOU, AND I'M WASTING MY TIME --

A. UHM-HUM.

Q. -- IF WHEN PUSH COMES TO SHOVE YOU GET TO THE END OF THE ROAD AND YOU SAY, "HEY, I CAN'T DO THIS. AND THE ONLY THING THAT I COULD DO IS GIVE HIM LIFE WITHOUT PAROLE, BECAUSE NOW THAT I THINK ABOUT IT, I CAN'T VOTE TO HAVE ANOTHER PERSON DIE AND CARRY THAT AROUND WITH ME. I CAN'T DO THAT."

AND WE GO THROUGH THIS SIFTING PROCESS NOW FOR

PEOPLE TO EXAMINE THEMSELVES AND TELL US THAT. BECAUSE, YOU KNOW, WE DON'T WANT TO WAIT EIGHT WEEKS LATER AND IT'S A WASTE OF EVERYBODY'S TIME -- OR AT LEAST IT'S A WASTE OF MY TIME.

A. SURE.

Q. SO LET ME PHRASE IT THIS WAY:

LET'S SAY YOU'RE ON THE JURY AND WE'RE IN THE PENALTY PHASE, AND IN THE PENALTY PHASE, YOU REALIZE THAT AS YOU'RE DELIBERATING, BECAUSE NOW YOU'VE HEARD ALL THE EVIDENCE, AND YOU'RE UP THERE TALKING ABOUT WHAT -- WHAT PENALTY HE SHOULD PAY FOR HIS CRIMES, AND AS YOU'RE TALKING WITH THE FOLKS, IT BECOMES CLEAR TO YOU THAT THEY BELIEVE THE PROPER PENALTY FOR THE MAN DOWN THERE AT THE END OF THE TABLE IS DEATH, AND YOU HAVEN'T MADE UP YOUR MIND YET. YOU TALK WITH THEM SOME MORE, AND YOU PLAY THE EVIDENCE OVER IN YOUR HEAD A LITTLE BIT, AND YOU REALIZE, YOU SAY, "YEAH, I, TOO, THINK THE PROPER PENALTY IS DEATH." AND WITH YOUR VOTE, WE NOW HAVE 12. WE NOW HAVE A UNANIMOUS VERDICT. WE HAVE A VERDICT.

AND YOU COME BACK DOWN HERE AND THE VERDICT IS GIVEN TO THE COURT CLERK AND SHE READS IT, "WE THE JURY IN THE ABOVE ENTITLED ACTION FIX THE PENALTY AT DEATH." AND WITH THAT, THE JURY IS POLLED. AND WHAT THAT BASICALLY MEANS IS EACH JUROR IS ASKED, "IS THIS YOUR TRUE AND INDIVIDUAL VERDICT, THAT YOU BELIEVE HE SHOULD DIE FOR HIS CRIMES?" BECAUSE YOU'VE GOT TO HAVE EVERYBODY SAY, "YES," ONE MORE TIME BEFORE THERE IS THIS VERDICT.

AND LET'S SAY YOU'RE OCCUPYING THE LAST CHAIR, AND

WE COME TO YOU, "IS THIS YOUR TRUE AND INDIVIDUAL VERDICT, HE SHOULD DIE FOR WHAT HE'S DONE?" AND YOU REALIZE THAT BY YOUR SAYING, "YES," THAT'S THE FIRST STEP THAT WILL TAKE HIM FROM THIS COURTROOM, ACROSS THE BAY TO SAN QUENTIN, WHERE SOMEWHERE DOWN THE ROAD HE'LL BE BROUGHT INTO A DEATH ROOM, IT'S HIS CHOICE WHICH OF THE TWO ROOMS HE GOES INTO. IN ONE, HE'LL BE PLACED ON A GURNEY, STRAPPED ON THAT GURNEY, AND A NEEDLE WILL BE STUCK IN HIS ARM, AND HE'LL BE FED POISON THROUGH A NEEDLE UNTIL HE'S DEAD. THE OTHER ONE IS THE GAS CHAMBER WHERE HE'LL BE BROUGHT INTO THAT GREEN GAS CHAMBER, STRAPPED IN THAT CHAIR AND FORCED TO BREATHE LETHAL GAS UNTIL HE'S DEAD.

NOW, KNOWING THAT, CAN YOU SIT THERE WITH HIM OVER THERE AND SAY, "YES"?

A. THAT'S VERY HARD TO ANSWER.

THE COURT: WELL, SIR, WE RECOGNIZE THAT.

PROSPECTIVE JUROR PRODGER: YES.

THE COURT: AND I KNOW YOU'RE TRYING TO DO THE BEST YOU CAN, AND SO ARE WE.

BEAR IN MIND, NOW, EVERYTHING THAT'S BEEN SAID TO YOU IN TERMS OF AT WHAT STAGE YOU WOULD BE AT THAT POINT. COULD YOU VERIFY THAT VERDICT? COULD YOU SAY, "YES," IF YOU FELT IT WAS THE APPROPRIATE VERDICT IN YOUR MIND, BASED ON EVERYTHING YOU'VE HEARD AND CONSIDERED?

PROSPECTIVE JUROR PRODGER: I WOULD SAY YES. YES.

MR. BURR: Q. SOMETIMES PEOPLE FEEL CHALLENGED.

A. UHM-HUM.

Q. AND FEEL THAT THERE'S A RIGHT OR WRONG ANSWER. AND THERE ISN'T ANY RIGHT OR WRONG ANSWER EXCEPT THE TRUTH AND HOW PEOPLE FEEL.

A. THAT'S RIGHT.

Q. AND SO LET ME ASK IT ONE LAST TIME SO THAT THERE IS NO DOUBT IN YOUR MIND AND THERE'S NO DOUBT IN MY MIND.

COULD YOU VOTE TO HAVE THE MAN DOWN THERE AT THE END OF THE TABLE EXECUTED?

A. YES.

Q. THE OTHER SIDE OF THIS IS THE IDEA OF A REAL TRIAL FOR PENALTY. AND WHAT THAT MEANS IS THAT THE JURORS NOT MAKE UP THEIR MINDS TILL AFTER THEY'VE HEARD ALL THE EVIDENCE WITH REGARD TO PENALTY. BUT IN ORDER TO GET TO THE PENALTY, YOU'VE HAD TO HAVE CONVICTED HIM OF SOME VERY SERIOUS CHARGES. AND YOU ALSO HAVE GOT TO -- WHEN YOU'VE GOTTEN TO THE PENALTY PHASE, YOU HAVE HEARD MOST OF WHAT WE CALL THE AGGRAVATING EVIDENCE, OR EVIDENCE THAT YOU CAN CONSIDER AGAINST THE DEFENDANT FOR PURPOSES OF VOTING FOR THE DEATH PENALTY. SORT OF WALKING IN THERE KNOWING HALF THE INFORMATION.

AND LET'S ASSUME THE WORST FOR THE DEFENDANT DOWN THERE. LET'S SAY THAT YOU AND THE OTHER 11 JURORS HAVE CONVICTED HIM OF FOUR FIRST DEGREE MURDERS. HE PUT FOUR PEOPLE IN THE GROUND. AND, I MEAN, THIS IS PREMEDITATED, IT WAS DELIBERATE, IT WAS INTENTIONAL. AND YOU FOUND THAT HE LIED IN WAIT IN ORDER TO COMMIT THOSE CRIMES. AND

LET'S ASSUME FURTHER THAT YOU FOUND THAT HE ATTEMPTED TO MURDER SIX OTHER PEOPLE. AND ALL THESE THINGS HAPPENED BASICALLY OVER EIGHT -- SEVEN OR EIGHT DIFFERENT DATES AND INCIDENTS, NOW, IT WASN'T JUST A ONE TIME FLING, WE'RE TALKING ABOUT GOING OUT SEVEN OR EIGHT TIMES AND DOING THESE THINGS.

WELL IF YOU'VE CONVICTED HIM OF DOING ALL THAT, YOU KNOW, A LOT OF FOLKS ARE GOING TO SAY, "YOU KNOW, I'M INCLINED TO VOTE FOR THE DEATH PENALTY. I MEAN, SOMEONE WHO DOES ALL THAT, THAT'S HORRIBLE." AND THAT'S OKAY, BECAUSE THAT EVIDENCE, AS I INDICATED, IS PART OF THE PENALTY EVIDENCE, IT'S JUST THAT YOU HAD TO HEAR IT IN THE GUILT PHASE IN ORDER TO GET TO THE PENALTY PHASE.

BUT AS I ALSO SAID, THAT'S ONLY PART OF THE EVIDENCE WITH REGARD TO PENALTY, BECAUSE YOU'VE GOT TO GIVE HIS ATTORNEYS AN OPPORTUNITY, AND THE DEFENDANT AN OPPORTUNITY, TO PRESENT WHAT WE CALL MITIGATING EVIDENCE, GOOD STUFF ABOUT HIM, THAT FOR YOU TO CONSIDER AND WEIGH AND DECIDE WHETHER OR NOT YOU SHOULD SPARE HIS LIFE.

NOW, SOME PEOPLE, IF THEY'VE CONVICTED HIM OF ALL THOSE CRIMES, THEY SAY, "HEY, HE'S DONE ALL OF THAT, THAT'S -- THAT'S IT FOR ME. DEATH." AND SOME OTHER PEOPLE WHO SAY, "I'M INCLINED TO VOTE FOR DEATH, I FEEL PRETTY STRONGLY ABOUT IT, BUT I'VE ONLY HEARD PART OF THE EVIDENCE AND I CAN KEEP AN OPEN MIND AND GIVE SERIOUS CONSIDERATION TO ALL THE OTHER EVIDENCE THAT MAY BE PRESENTED BY HIS LAWYERS BEFORE I FINALLY MAKE THE DECISION AS TO WHETHER HE SHOULD DIE OR WHETHER HE SHOULD

GET LIFE WITHOUT PAROLE."

WHICH WOULD YOU BE?

A. WELL, I WOULD HAVE TO HEAR BOTH SIDES, YES.

Q. OKAY. SO YOU'D KEEP AN OPEN MIND?

A. OH, YES.

Q. AND WAIT?

A. RIGHT. RIGHT.

MR. BURR: THANK YOU?

THE COURT: DO YOU HAVE QUESTIONS, MR. BERGER?

MR. BERGER: I JUST HAD A FEW, YOUR HONOR.

VOIR DIRE EXAMINATION

BY MR. BERGER:

Q. HELLO, MR. PRODGER.

A. HI.

Q. MY NAME IS MICHAEL BERGER I'M ONE OF MR. STEVENS' LAWYERS. AND THE OTHER LAWYER IS MR. SELVIN WHO'S REPRESENTING MR. STEVENS.

DO YOU UNDERSTAND THAT THE JUDGE IS NEVER GOING TO TELL YOU WHAT PENALTY IS APPROPRIATE; THAT'S ALWAYS GOING TO BE UP TO THE JURY.

THE JUDGE WILL GIVE INSTRUCTIONS ABOUT WHAT THE LAW SAYS AND HOW IT APPLIES TO THIS CASE, BUT IT'S ALWAYS GOING TO BE UP TO YOU TO DECIDE WHAT'S APPROPRIATE.

IS THAT CLEAR --

A. YES.

Q. -- ABOUT HOW IT WORKS?

AND LOOKING AT THE QUESTIONNAIRE YOU FILLED OUT

SEVERAL WEEKS AGO, WHEN WE ASKED YOU WHAT YOUR GENERAL FEELINGS ABOUT THE DEATH PENALTY ARE, WHAT YOU SAID IS THAT, "I THINK THAT IF IT IS IN THE LAW BOOKS, THEN IT SHOULD BE UPHELD IF THE DEFENDANT IS FOUND GUILTY?

A. CORRECT.

Q. OKAY.

IS IT CLEAR IN YOUR MIND THAT IF YOU EVER GET TO THE STAGE OF DECIDING WHAT THE PROPER PENALTY IS, MR. STEVENS WILL HAVE BEEN FOUND GUILTY; OKAY?

WE DON'T EVEN TALK ABOUT THE DEATH PENALTY UNLESS YOU GET TO THE POINT WHERE MR. STEVENS IS FOUND GUILTY OF AT LEAST ONE, AND MAYBE AS MANY AS FOUR INTENTIONAL, PREMEDITATED, THOUGHT OUT, SENSELESS FIRST DEGREE MURDERS; OKAY?

A. YES.

Q. AND THESE ARE NOT ARGUMENTS, THESE ARE NOT SELF-DEFENSE SITUATIONS. THESE ARE SEVEN OR EIGHT TIMES THAT MR. STEVENS, ASSUMING -- YOU KNOW, ASSUMING THE WORST, NOW, ASSUMING WE GET TO THAT POINT. AND MR. STEVENS HAS GONE OUT, TAKEN A GUN, AND SHOT INNOCENT PEOPLE, KILLED FOUR, LEFT SIX FOR DEAD, LAID IN WAIT; OKAY?

SO WE ARE AT THAT STAGE. SO THE ISSUE IS NOT WHETHER HE'S GUILTY OR NOT. HE'S BEEN FOUND GUILTY.

AT THAT POINT, DO YOU DEAL FEEL THAT THE DEATH PENALTY IS THE APPROPRIATE PENALTY?

MR. BURR: WELL, OBJECTION. HE'S ONLY HEARD THE AGGRAVATING EVIDENCE. THERE ISN'T ANYTHING TO COUNTER

THAT.

MR. BERGER: WELL, I'M JUST SIMPLY FOLLOWING UP AND TRACKING THE LANGUAGE OF MR. PRODGER'S ANSWER TO THE QUESTION.

THE COURT: I UNDERSTAND WHAT YOU'RE DOING.

WOULD YOU FEEL THAT THE DEATH PENALTY WAS THE ONLY APPROPRIATE PENALTY, SIR OR WOULD YOU CONSIDER THE POSSIBILITY OF TWO PENALTIES, DEATH OR LIFE IN PRISON WITHOUT THE PROBABILITY OF PAROLE?

PROSPECTIVE JUROR PRODGER: NO, I WOULD CONSIDER THE TWO.

THE COURT: LET'S MOVE FORWARD.

MR. BERGER: Q. YOU'VE ALSO TOLD US IN THIS YOUR QUESTIONNAIRE THAT YOU WOULD VOTE FOR THE DEATH PENALTY BECAUSE YOU THINK IF WOULD BE HELPFUL IF THE LAWS WEREN'T SO COMPLICATED?

A. CORRECT.

Q. WHAT DID YOU MEAN BY THAT?

A. IT JUST SEEMS LIKE A LOT OF CASES GET DRAGGED OUT SO LONG. I KNOW THERE ARE CERTAIN LAWS AND CERTAIN PROCEDURES THAT HAVE TO BE GONE THROUGH, AND YOU HEAR SO MUCH OF THE PERSONS THAT ARE ON DEATH ROW, THAT THEY ARE THERE FOR YEARS AND YEARS AND NOTHING HAPPENS.

Q. OKAY.

A. AND -- AND THEN YOU HEAR THE OTHER SIDE, TOO, THAT WHY ISN'T SOMETHING DONE?

WELL, IT'S -- THERE IS SO MUCH BUREAUCRACY, IT SEEMS LIKE AND -- YOU KNOW, TRUE, PEOPLE ARE INNOCENT

UNTIL PROVEN GUILTY, BUT THE PART OF PROVING THEM GUILTY DOES TAKE A LONG TIME. I GUESS THAT'S WHAT I'M GETTING AT.

Q. LET ME TELL YOU, AND THE JUDGE WILL TELL YOU ALSO, THAT IF YOU'RE A JUROR IN THIS CASE, YOU ARE THE LAST WORD FOR ALL INTENTS AND PURPOSES. BY THAT, I MEAN, IF YOU DECIDE THAT THE DEATH PENALTY SHOULD BE IMPOSED, YOU HAVE TO ASSUME THAT MR. STEVENS WILL BE EXECUTED JUST AS MR. BURR TOLD YOU.

AND ON THE OTHER HAND, IF YOU DECIDE THAT MR. STEVENS SHOULD BE IMPRISONED FOR THE REST OF HIS LIFE, HE WILL BE IMPRISONED FOR THE REST OF HIS LIFE. WHEN WE SAY LIFE WITHOUT POSSIBILITY OF PAROLE, IT MEANS EXACTLY THAT, THERE'S NO CHANCE THAT HE'LL BE BACK ON THE STREETS.

DO YOU ACCEPT THAT?

A. YES.

Q. OKAY. AND THE REASON I ASK YOU IS BECAUSE SOME PEOPLE ARE SKEPTICAL AND THEY THINK THAT THERE ARE LOOPHOLES AND TECHNICALITIES, THE LAW DOESN'T REALLY MEAN WHAT THIS SAYS. BUT IF YOU ARE CHOSEN AS A JUROR, YOU MUST BELIEVE THAT WHAT YOU SAY WILL GO.

CAN YOU DO THAT?

A. YES, BUT WHAT YOU SAY, TOO, IS THERE ARE A LOT OF THEM OF THAT LIFE IN PRISONMENT WITHOUT PAROLE, BUT THEN HOW DO THEY GET ON PAROLE?

THAT COMES UP, DOESN'T IT?

THE COURT: WELL, SIR, BASED ON THE CURRENT STATE OF THE LAW, IF YOU'RE A JUROR HERE --

PROSPECTIVE JUROR PRODGER: YEAH.

THE COURT: YOU MUST ACCEPT, AND YOU HAVE TO ASSUME THAT ANY -- ANY VERDICT THAT YOU VOTE TO IMPOSE, ANY PUNISHMENT WILL BE CARRIED OUT, AND THAT LIFE IN PRISON WITHOUT THE POSSIBILITY OF PAROLE MEANS EXACTLY THAT, AS I MENTIONED ONCE BEFORE SEVERAL WEEKS AGO, AND THE INDIVIDUAL WOULD NOT BE CONSIDERED FOR PAROLE AND HE WOULD NOT BE PAROLED.

CAN YOU ACCEPT THAT FOR PURPOSES OF THIS TRIAL?

PROSPECTIVE JUROR PRODGER: OH, YES, YES.

MR. BERGER: ALL RIGHT. THANK YOU VERY MUCH, SIR.

I DON'T HAVE ANY OTHER QUESTIONS.

THE COURT: OKAY.

MR. ZIMMER, ON OTHER AREAS?

MR. ZIMMER: THANK YOU.

VOIR DIRE EXAMINATION

BY MR. ZIMMER:

Q. GOOD MORNING.

MY NAME IS RICHARD ZIMMER. MR. CLARK IS MY CLIENT SEATED TO MY LEFT.

A. GOOD MORNING.

Q. IF YOU WERE LIKE THE OTHER JURORS IN THIS CASE, YOU MAY HAVE BEEN CONFUSED WHEN THE INFORMATION WAS READ AS TO THE NUMBER OF CHARGES AGAINST MR. CLARK AND TO WHETHER OR NOT THE PROSECUTION WAS SEEKING THE DEATH PENALTY AGAINST HIM. I DON'T KNOW IF YOU SHARED THAT CONFUSION OR NOT. BUT I ASSUME THAT AT THIS POINT, AT

APPENDIX K

THE POSSIBILITIES NOW. AND THAT'S THE ONLY REASON THAT WE'RE GOING TO BE DISCUSSING THESE TOPICS AT THIS TIME; OKAY?

SO WITH THAT, NOW, LET ME TELL YOU, AND I SAY THIS EVERY MORNING AND EVERY AFTERNOON, THERE'S SIX OF YOU. WE CAN ONLY TALK TO YOU ONE AT A TIME BECAUSE THAT'S THE PROCEEDURE THAT WE'VE ADOPTED. OBVIOUSLY THAT MEANS SOMEBODY'S GOING TO GO FIRST AND SOMEBODY'S GOING TO BE NUMBER 6. I WANT YOU TO KNOW THAT, I DISCLAIM THIS, I HAVE NO CONTROL OVER THIS. IT'S ENTIRELY RANDOM. AND I WOULD TELL YOU FIRST, AS I LOOK AT THE LIST HERE, IS MR. LARRY FOSTER.

PROSPECTIVE JUROR FOSTER: YES.

THE COURT: MR. FOSTER HAPPENS TO BE THE FIRST PROSPECTIVE JUROR THAT WE'LL TALK TO THIS MORNING.

THE OTHERS OF YOU, I'M GOING TO ASK TO RETURN OUT TO THE WITNESS ROOM. AND, AS I SAY, I THANK YOU IN ADVANCE NOT ONLY FOR BEING HERE, I THANK YOU FOR YOUR PATIENCE BECAUSE FOR SOME OF YOU IT WILL TAKE A LITTLE BIT LONGER THAN FOR OTHERS SIMPLY BECAUSE OF WHERE YOU ARE IN THE SCHEMATIC OF TIME.

AND WITH THAT, I'LL SEE YOU ALL A LITTLE BIT LATER. AND WE'LL TALK TO MR. FOSTER.

LARRY FOSTER

VOIR DIRE EXAMINATION

BY THE COURT:

Q. GOOD MORNING, SIR.

A. GOOD MORNING.

Q. LET ME SAY, AS I'VE INDICATED, THAT WE APPRECIATE VERY MUCH YOU BEING HERE.

WE'VE REVIEWED YOUR QUESTIONNAIRE, AND I APPRECIATE YOU FILLING THAT OUT. AND BELIEVE ME, IT HAS BEEN OF USE TO ALL OF US. AND, AS I SAY, IT WILL SAVE TIME AS WE GO FORWARD IN THIS PROCESS.

MY REVIEW OF YOUR QUESTIONNAIRE INDICATES, AND LET ME MAKE THIS STATEMENT WITH A PREFACE, RECOGNIZING THAT IF -- IF YOU HAD A PREFERENCE, YOU MIGHT WELL PREFER TO BE SOMEPLACE ELSE IN FEBRUARY AND MARCH OTHER THAN ON JURY DUTY, AND RECOGNIZING A CERTAIN LEVEL OF INCONVENIENCE IS VISITED UPON ANYONE WHO'S SERVING ON A JURY AND HAVING THEIR PERSONAL LIFE DISRUPTED TO A CERTAIN EXTENT, BUT WITH THAT UNDERSTANDING, HOWEVER, IT APPEARS FROM YOUR QUESTIONNAIRE THAT IF YOU ARE SELECTED TO SERVE HERE YOU ARE AVAILABLE TO SERVE FOR THE LENGTH OF THE TRIAL; IS THAT CORRECT?

A. YES.

Q. OKAY.

SIR, THE OTHER DAY WHEN YOU WERE HERE, I SAY THE OTHER DAY, THE OTHER WEEK WOULD BE MORE ACCURATE, WHEN YOU WERE HERE, I INTRODUCED THE PARTIES AND THE ATTORNEYS, AND THEY ALL STOOD UP AND WERE INTRODUCED.

WHEN THEY DID THAT, DID YOU KNOW ANY OF THEM?

A. I DID NOT.

Q. ALL RIGHT. NOW, AS I'VE MENTIONED TO YOU JUST A MINUTE AGO, THERE WERE SEVERAL SUBJECTS RELATED TO THE CONCEPT OF PENALTY OR PUNISHMENT, AND ALSO TO THE

POSSIBILITY, AS I'VE EXPLAINED TO SOME LENGTH, OF A SECOND PART OF THIS CASE THAT I WANTED TO TALK TO YOU ABOUT. AND IN ORDER MAKE THE BEST USE OF YOUR TIME AND TO GET TO A PLACE WHERE WE CAN HAVE A DISCUSSION ABOUT THAT SUBJECT, I'M GOING TO ASK YOU TO MAKE MAKE A COUPLE OF ASSUMPTIONS FOR ME THIS MORNING, SIMPLY FOR THE PURPOSE OF THESE QUESTIONS; OKAY?

I'M GOING TO ASK YOU TO ASSUME IN YOUR MIND AS WE GO FORWARD, ASSUME FOR ME THAT THE JURY IN THIS CASE HAS BEEN SELECTED; OKAY? THAT THIS PROCESS WHICH OBVIOUSLY IS NOT COMPLETED, JUST ASSUME THE JURY HAS BEEN SELECTED, AND ASSUME FOR ME ALSO THAT YOU ARE A MEMBER OF THE JURY.

ASSUME FOR ME FURTHER THAT THE CASE HAS GOTTEN UNDERWAY, AND WE'VE GONE THROUGH THE FIRST PHASE OF THE CASE, WHICH I'VE DESCRIBED TO YOU AND CALLED THE GUILT PHASE, THAT PART OF THE CASE WHERE EVIDENCE IS PRESENTED TO YOU RELEVANT TO THE CHARGES. AND LET'S ASSUME THAT PART'S OVER. AND YOU'VE HEARD AND YOU'VE CONSIDERED, THE JURY HAS DELIBERATED, YOU'VE CONSIDERED ALL THE EVIDENCE, YOU'VE CONSIDERED THE LAW THAT I WILL INSTRUCT YOU ABOUT, YOU'VE HAD YOUR DELIBERATIONS AND YOUR DISCUSSIONS, AND ALL 12 JURORS HAVE ARRIVED AT A VERDICT, AND THEY HAVE FOUND THAT THE DEFENDANT STEVENS IS GUILTY OF AT LEAST ONE FIRST DEGREE MURDER AND THAT ONE OF THOSE SPECIAL CIRCUMSTANCES THAT I'VE DISCUSSED WITH YOU IS TRUE; OKAY? SO THAT IS OUR ASSUMPTION, THAT'S A HYPOTHETICAL VERDICT THAT I JUST WANT YOU TO ASSUME AS WE GO FORWARD.

THE REASON I ASK YOU TO DO THAT IS THAT YOU KNOW

FROM MY DISCUSSION WITH YOU ABOUT PROCEDURE, THAT IF THE JURY REACHED A VERDICT SUCH AS THAT, THE CASE WOULD GO AUTOMATICALLY, PROCEDURALLY INTO A SECOND PART AS IT RELATES TO THAT DEFENDANT.

AND AT THE SECOND PART, AS I'VE EXPLAINED, ADDITIONAL EVIDENCE, EVIDENCE UNRELATED TO THE CRIMES WOULD BE PRESENTED TO YOU WHICH IS DESIGNED TO HELP YOU CHOOSE THE APPROPRIATE PUNISHMENT. AND AT THE CONCLUSION OF THAT PHASE, THE JURY WOULD BE WOULD, INDEED, BE ASKED TO DETERMINE THE APPROPRIATE PUNISHMENT.

NOW, BY WAY OF THAT SAME HYPOTHETICAL VERDICT THAT I'VE JUST DISCUSSED WITH YOU, IN SUPPORT OF THAT VERDICT, THE JURY WOULD HAVE MADE CERTAIN FACTUAL DECISIONS, THERE WOULD HAVE BEEN FINDINGS AND DECISIONS MADE BY THE JURY BEFORE WE START THE SECOND PHASE, OBVIOUSLY, BECAUSE IF THEY HADN'T REACHED THOSE FINDINGS, THERE WOULDN'T BE A SECOND PHASE. IN TERMS OF THIS CASE, THE JURY WOULD HAVE DETERMINED BEYOND A REASONABLE DOUBT THAT WITH RESPECT TO CERTAIN INCIDENTS THAT TOOK PLACE ON OR ABOUT THE 580 FREEWAY HERE IN OAKLAND, WHICH WE MENTIONED TO YOU IN THE QUESTIONNAIRE YOU MAY RECALL, THAT THE DEFENDANT CHARLES STEVENS IS GUILTY OF AT LEAST ONE FIRST DEGREE MURDER, THAT IS, ONE INTENTIONAL, PREMEDITATED MURDER, AND THAT AT LEAST ONE OF THOSE SPECIAL CIRCUMSTANCES, LYING IN WAIT OR MULTIPLE MURDER, HAS BEEN FOUND TO BE TRUE. THE JURY WOULD HAVE MADE THOSE DECISIONS BEFORE THE SECOND PART OF THE TRIAL STARTED. THE JURY MIGHT ALSO HAVE DECIDED THAT SAME DEFENDANT IS GUILTY OF ONE, OR MORE, OR ALL OF THE

SIX ATTEMPTED MURDERS THAT HE IS CHARGED WITH.

SO IF YOU'RE WITH ME ON THIS, THE JURY WOULD HAVE MADE THAT DECISION OR THOSE DECISIONS BEFORE THE SECOND PART OF THE CASE, THE CASE DESIGNED TO TAKE UP THE ISSUE OF PUNISHMENT OR PENALTY, BEFORE THAT EVEN STARTED.

NOW, YOU MAY RECALL, FROM MY DISCUSSION WITH YOU A FEW MINUTES AGO, THAT I TOLD YOU THAT AT THE CONCLUSION OF THAT SECOND PHASE, IF WE HAVE ONE, THE JURY WILL BE ASKED TO MAKE A DETERMINATION AS TO THE APPROPRIATE PUNISHMENT, THERE ARE ONLY TWO AS I MENTIONED TO YOU, BUT I ALSO TOLD YOU THAT THE JURORS ARE NOT SUPPOSED TO MAKE UP THEIR MINDS AS TO THE APPROPRIATE PUNISHMENT HAVING HEARD ONLY THE EVIDENCE ABOUT THE CRIMES. THE EVIDENCE ABOUT THE CRIMES CLEARLY IS EVIDENCE THEY CAN CONSIDER ULTIMATELY IN DECIDING THE PENALTY, BUT THEY'RE SUPPOSED TO WAIT, GO THROUGH THE ENTIRETY OF THAT SECOND PHASE, LISTEN TO AND CAREFULLY CONSIDER ALL THE ADDITIONAL INFORMATION ABOUT THE DEFENDANT'S BACKGROUND OR WHATEVER IT MIGHT BE THAT'S PRESENTED TO THEM IN THAT SECOND PART BEFORE THEY MAKE UP THEIR MIND AS TO THE APPROPRIATE PENALTY.

NOW, SOME PEOPLE MIGHT SAY TO ME BASED ON THE TYPE AND NATURE AND NUMBER OF CRIMES THAT I'VE JUST OUTLINED FOR YOU IN OUR HYPOTHETICAL, THAT IN A CASE LIKE THIS, THEY WOULD ALWAYS VOTE FOR THE DEATH PENALTY, REGARDLESS OF WHAT ADDITIONAL EVIDENCE OR CIRCUMSTANCES OR INFORMATION WERE PROVIDED TO THEM IN THAT SECOND PART OF THE CASE.

OTHER PEOPLE MIGHT JUST AS WELL SAY TO ME THAT IN A

CASE SUCH AS THIS, THEY WOULD NEVER VOTE FOR THE DEATH PENALTY. BUT THE POINT IS THEY WOULD SAY THAT REGARDLESS OF WHATEVER INFORMATION OR EVIDENCE WAS PRESENTED TO THEM IN THE SECOND PART OF THE CASE.

IN OTHER WORDS, WE ARE GETTING BACK TO THE IDEA WHICH I JUST DISCUSSED WITH YOU, THESE ARE PEOPLE WHO WOULD MAKE UP THEIR MIND HAVING HEARD ONLY THE EVIDENCE ABOUT THE CRIMES, AND WOULD NOT HAVE AN OPEN MIND TO CONSIDER ADDITIONAL INFORMATION SPECIFICALLY DESIGNED TO HELP THEM DETERMINE THE PUNISHMENT; OKAY?

ARE YOU WITH ME?

A. (NODS HEAD UP AND DOWN.)

Q. ALL RIGHT. NOW, LET ME FOCUS THIS NOW A LITTLE BIT MORE ON YOU.

IN TERMS OF THE TYPE OF CRIMES THAT I'VE DESCRIBED, IF YOU ARE SELECTED AS A JUROR HERE, AND IF WE GET TO A SECOND PHASE WHERE A PENALTY DETERMINATION WOULD BE MADE BY THE JURY, WOULD YOU, AS A JUROR, HAVE AN OPEN MIND AS TO BOTH POSSIBLE SENTENCE CHOICES, AND WOULD YOU CAREFULLY CONSIDER BOTH POSSIBLE SENTENCE CHOICES AFTER HAVING HEARD ALL THE EVIDENCE THAT IS PRESENTED TO YOU, NOT ONLY IN THE FIRST PART OF THE CASE ABOUT THE CRIMES, BUT IN THE SECOND PART OF THE CASE AS WELL, WOULD YOU HAVE SUCH AN OPEN MIND?

A. I WOULD.

Q. ALL RIGHT. NOW, LET ME COME AROUND AND ASK IT ANOTHER WAY, SAME QUESTION IN ANOTHER DIRECTION.

I TAKE IT FROM THAT ANSWER THAT AS YOU SIT THERE,

AND IN TERMS OF EVERYTHING THAT I'VE TALKED TO YOU ABOUT SO FAR THIS MORNING, IN YOUR MIND -- NOW, I'M NOT ASKING YOU HOW YOU WOULD VOTE IN THIS CASE, NOBODY IS GOING TO DO THAT IN THE CASE, YOU HAVEN'T HEARD ANY EVIDENCE, BUT WHAT I AM ASKING YOU IS FROM YOUR ANSWER I TAKE IT YOU HAVE NOT, IN YOUR MIND, EXCLUDED OR ELIMINATED EITHER ONE OF THOSE TWO PUNISHMENTS?

A. YOU'RE RIGHT.

Q. I'M RIGHT. OKAY.

NOW, THE DECISION MAKING PROCESS THAT I'M TALKING TO YOU ABOUT, IF THERE'S A SECOND PART OF THE CASE, IF THERE'S A PENALTY PHASE, WHEN WE TALK ABOUT DETERMINING THE APPROPRIATE PUNISHMENT, AND WE TALK ABOUT AGGRAVATION FACTORS, MITIGATING FACTORS, THOSE KIND OF THINGS THAT I MENTIONED TO YOU BEFORE, THAT PROCESS, THAT DECISION MAKING PROCESS IS OBVIOUSLY NOT A MECHANICAL OR SCIENTIFIC OR MATHEMATICAL PROCESS OF SIMPLY CALCULATING FACTORS ON ONE SIDE OR THE OTHER OF AN IMAGINARY SCALE, ADDING THOSE UP AND REACHING A DECISION IT'S NOT LIKE THAT; OBVIOUSLY IT'S A VERY SUBJECTIVE PROCESS.

NOW, AS I TOLD YOU, I WOULD GIVE THE JURY CERTAIN GUIDELINES AT THE END OF THAT PHASE AS TO HOW TO CONSIDER THE EVIDENCE AND YOU WOULD BE INSTRUCTED BY ME IN PART THAT TO RETURN A VERDICT -- A JUDGMENT OF DEATH, YOU PERSONALLY WOULD HAVE TO BE PERSUADED THAT THE EVIDENCE IN AGGRAVATION IS SO SUBSTANTIAL IN COMPARISON TO THE EVIDENCE IN MITIGATION THAT IT WARRANTS DEATH INSTEAD OF LIFE WITHOUT PAROLE.

NOW, SUMMARIZING, HAVING HEARD ALL OF THIS THIS MORNING, IS IT YOUR HONEST BELIEF NOW, AS YOU SIT THERE, THAT YOU COULD FOLLOW THE COURT'S INSTRUCTIONS AND THAT YOU WOULD BE OPEN TO THE POSSIBILITY OF IMPOSING EITHER PENALTY IN THIS CASE DEPENDING UPON ALL THE EVIDENCE THAT IS PRESENTED IN BOTH PHASES OF THE CASE?

A. I WOULD.

Q. ALL RIGHT. NOW, HERE'S MY LAST QUESTION TO YOU.

COULD YOU, AS A PERSON, AS AN INDIVIDUAL, AND ULTIMATELY AS AN INDIVIDUAL WHO MAY BE CALLED UPON TO SERVE ON THIS JURY, COULD YOU CAST A VOTE TO IMPOSE EITHER OF THOSE PENALTIES IF, AFTER HAVING HEARD EVERYTHING IN BOTH PHASES, YOU FELT IT WAS THE APPROPRIATE PENALTY, COULD YOU AS A JUROR CAST THAT VOTE?

A. I COULD.

THE COURT: ALL RIGHT. SIR, THANK YOU.

MR. BURR.

MR. BURR: THANK YOU, YOUR HONOR.

VOIR DIRE EXAMINATION

BY MR. BURR:

Q. MR. FOSTER, GOOD MORNING.

A. GOOD MORNING.

Q. LET'S ASSUME TOMORROW IS ELECTION DAY, AND ON THE BALLOT, THE STATE LEGISLATORS AND THE GOVERNOR PUT ON WHAT THEY CALL A PLEBISCITE WHICH BASICALLY ASKS FOR THE INPUT FROM THE CITIZENS, AND THE QUESTION THEY HAVE AND THEY WANT INPUT FROM OR THE QUESTION THEY PUT DOWN THERE

IS, "SHOULD THE STATE OF CALIFORNIA HAVE A DEATH PENALTY?" THAT'S ALL IT SAYS.

HOW WOULD YOU VOTE?

A. YES.

Q. AND WHY?

A. I BELIEVE IT'S A DETERRENT.

Q. NOW, I GUESS IT WAS ABOUT FIVE OR SIX WEEKS AGO WHEN YOU WERE LAST HERE AND OUR CLERK READ TO YOU THE CHARGING DOCUMENT, THERE ARE TEN CRIMES THAT WERE READ TO YOU, LET ME HELP YOU OUT AS TO MAKING SURE YOU KNOW WHO'S WHO.

THE DEFENDANT CLOSEST TO YOU HERE IS MR. CLARK. HE'S CHARGED WITH ONE OF THOSE TEN CRIMES; IT'S VERY SERIOUS. HE'S CHARGED WITH MURDER. AND WE ARE NOT SEEKING THE DEATH PENALTY AS TO HIM.

THE DEFENDANT AT THE END OF THE TABLE HERE WITH THE GLASSES BETWEEN HIS TWO ATTORNEYS, THIS IS MR. STEVENS. HE'S CHARGED WITH ALL TEN OF THOSE CRIMES, FOUR MURDERS, ALONG WITH THE SPECIAL CIRCUMSTANCE OF LYING IN WAIT. HE'S ALSO CHARGED WITH THE ATTEMPTING TO MURDER SIX OTHER PEOPLE. AND WITH REGARD TO HIM, WE ARE SEEKING THE DEATH PENALTY.

NOW, A LOT OF PEOPLE WILL TELL ME THAT IF THEY HAD READ ABOUT THE CRIMES IN THE NEWSPAPER AND TALKING TO SOMEONE OVER MORNING COFFEE, THEY READ SOMETHING LIKE THAT ABOUT SOMEBODY, THEY'D SAY, "YOU KNOW, IF HE DID THAT STUFF, HE SHOULD BE EXECUTED. WE DON'T NEED PEOPLE LIKE THAT. WE CAN'T AFFORD TO HAVE PEOPLE LIKE THAT."

HOWEVER, WHEN THEY FIND THEMSELVES IN THIS TYPE OF SETTING AS A POSSIBLE JUROR, AND THERE'S A REAL PERSON NOT 40 FEET AWAY FROM THEM, SUDDENLY IT'S DIFFERENT. IT'S A LOT DIFFERENT, BECAUSE NOW WE'RE TALKING ABOUT A REAL PERSON. A REAL PERSON'S LIFE.

AND WE FREQUENTLY HEAR PEOPLE SAY EVEN THOUGH THEY MIGHT BE SUPPORTERS OF THE DEATH PENALTY, FOR WHATEVER REASON THEY SAY, "THIS IS SOMETHING I CAN'T DO. I'M GETTING IN OVER MY HEAD." AND THAT'S OKAY. WE JUST NEED TO KNOW THAT NOW BECAUSE IT'S NOT FAIR TO THEM, IT'S NOT FAIR TO US, IF THEY FIND THEMSELVES IN A SITUATION WHERE THEY SAY, "THERE IS NO WAY, I DON'T CARE WHAT THE EVIDENCE IS, THERE'S NO WAY I COULD VOTE TO HAVE ANOTHER HUMAN BEING EXECUTED NOW THAT I'M ACTUALLY FACED WITH IT."

WHAT ARE YOUR THOUGHTS ABOUT IT?

A. WELL, YOU'RE RIGHT. AT ONE TIME I THOUGHT THAT WAY, I REALLY DON'T -- I DIDN'T LIKE THE DEATH PENALTY. BUT I FIND I CAN FOLLOW -- IF THE LAW SAYS THAT'S WHAT IT IS, I CAN FOLLOW THE LAW. I'D DO WHAT THE LAW SAYS AND IF IT -- IF -- IF THE LAW SAYS THIS MAN GETS THE DEATH PENALTY, THIS MAN DOESN'T, I COULD DO THAT.

Q. WHAT THE LAW BASICALLY SAYS IS THERE HAS TO BE, FIRST, A DETERMINATION AS TO WHETHER HE'S GUILTY OF CERTAIN CRIMES WHICH QUALIFY HIM TO BE FACING THE DEATH PENALTY. AND TO A GREAT EXTENT WHETHER THE EVIDENCE WARRANTS HIS DEATH IS REALLY LEFT UP TO YOU.

A. THAT'S TRUE.

Q. AND THERE ARE SOME PEOPLE WHO SAY, "WELL, IF

THAT'S THE SITUATION, SINCE I'M NOT SPECIFICALLY ORDERED TO VOTE FOR DEATH, I REALLY COULD NEVER VOTE FOR DEATH BECAUSE OF HOW I FEEL, BECAUSE WITH THE IDEA THAT THE OPTION OF LIFE WITHOUT PAROLE BEING THERE, THAT'S WHAT I'D ALWAYS VOTE FOR."

WHAT ARE YOUR THOUGHTS ABOUT THAT?

A. I BELIEVE THAT IF THE EVIDENCE AND WHATEVER WAS PRESENTED TO ME SAYS THAT HE SHOULD HAVE THE DEATH PENALTY, I CAN DETERMINE AND I CAN GIVE WHAT I THINK IT IS THAT'S NECESSARY.

Q. OKAY.

I ASK THIS QUESTION OF EVERYBODY BECAUSE THIS IS SOMETHING I WANT TO MAKE SURE PEOPLE ARE CERTAIN WITHIN THEMSELVES IF THIS IS SOMETHING THEY CAN DO. AND OBVIOUSLY I NEED TO MAKE SURE THAT PEOPLE CAN DO IT, BECAUSE OTHERWISE I'D BE WASTING MY TIME. BECAUSE IF WE GET INTO THE PENALTY PHASE, I'M GOING TO STAND UP HERE AND I'M GOING TO ASK, MAYBE EVEN DEMAND, THAT THE JURY IMPOSE THE DEATH PENALTY ON THE GUY IN THE GLASSES DOWN THERE. AND IF THEY CAN'T DO THAT, OR IF SOMEBODY DOES NOT HAVE THAT INTERNAL FORTITUDE TO DO THAT SORT OF THING, WE NEED TO KNOW THAT NOW.

SO LET ME ASK ASK YOU THIS QUESTION:

LET'S ASSUME YOU'RE ON THE JURY AND YOU'VE HEARD ALL THE EVIDENCE. I MEAN, HE IS GUILTY OF THE CRIMES THAT GET US INTO THE PENALTY PHASE. AND YOU'VE HEARD ALL THE PENALTY EVIDENCE THAT IS PRESENTED, AND YOU'RE UPSTAIRS IN THE JURY ROOM AND YOU'RE TALKING WITH THE OTHER JURORS

TRYING TO FIGURE OUT WHAT SHOULD THE PENALTY BE, LIFE OR DEATH. AND AS YOU SIT THERE, AND TALK WITH, AND HEAR THE OTHER 11 JURORS, IT BECOMES CLEAR TO YOU THAT THE OTHER 11 PEOPLE HAVE FINALLY ARRIVED IN THEIR OWN MINDS THAT THE PROPER PENALTY HE SHOULD FACE FOR HIS CRIMES IS DEATH. AND YOU HAVEN'T QUITE MADE UP YOUR MIND YET, BUT THE OTHERS HAVE. AND YOU THINK ABOUT IT SOME MORE AND YOU TALK WITH THE FOLKS A LITTLE BIT MORE. AND YOU FINALLY DECIDE, "YEAH, THAT IS THE RIGHT CRIME, HE SHOULD DIE FOR WHAT HE'S DONE. HE SHOULD GET THE DEATH PENALTY." AND BY CASTING YOUR VOTE, THAT MAKES IT 12 FOR DEATH, THAT MAKES IT UNANIMOUS, AND THAT MAKES IT A VERDICT OF DEATH.

NOW, REALIZING THAT BY CASTING YOUR LAST VOTE THAT MAKES IT UNANIMOUS, THAT'S THE FIRST STEP THAT'S GOING TO CARRY THE GUY DOWN THERE IN THE GLASSES FROM THIS COURTROOM, ACROSS THE BAY TO SAN QUENTIN WHERE SOMEWHERE DOWN THE ROAD HE'LL BE BROUGHT INTO A DEATH ROOM, ONE OF TWO DEATH ROOMS. IT'S HIS CHOICE WHICH OF THE TWO HE GOES INTO. IN ONE, HE'LL BE STRAPPED ONTO A GURNEY, AND A NEEDLE WILL BE STUCK INTO HIS BODY, AND POISON WILL FLOW INTO HIS BODY UNTIL HE'S DEAD. THE OTHER ONE IS THE GREEN GAS CHAMBER WHERE HE'LL BE STRAPPED INTO A CHAIR AND FORCED TO BREATHE LETHAL GAS UNTIL HE'S DEAD.

KNOWING THAT THAT'S WHAT'S GOING TO HAPPEN, COULD YOU STILL GIVE THAT TWELFTH VOTE?

A. I COULD IF IT WAS CALLED FOR, I COULD DO THAT.

Q. NOW, AS THE JUDGE HAS TOLD YOU, WHEN WE TALK

ABOUT PENALTY IN THE PENALTY PHASE, YOU'VE ALREADY FOUND HIM GUILTY OF AT LEAST ONE MURDER WITH A SPECIAL CIRCUMSTANCE OF LYING IN WAIT. SO HE'S GUILTY, AND WE MOVE INTO THE PENALTY PHASE. AND THE PENALTY PHASE REQUIRES 12 PEOPLE WHO WILL MAKE THEIR DECISION ON ALL THE EVIDENCE THAT IS PRESENTED.

NOW, LET'S ASSUME THE WORST PICTURE FOR THE DEFENDANT DOWN THERE. LET'S ASSUME THAT YOU FIND HIM GUILTY OF THE FOUR MURDERS, THAT HE INTENTIONALLY, AND HE PREMEDITATED, AND DELIBERATED, AND KILLED FOUR PEOPLE. AND THAT YOU FIND THE SPECIAL CIRCUMSTANCE TO BE TRUE WHERE THAT'S APPLIED, THAT IS, THAT HE SNUCK UP ON PEOPLE ON THE FREEWAY, TOOK THEM BY SURPRISE WHEN HE TRIED TO KILL THEM AND DID KILL THEM. AND LET'S ASSUME FURTHER THAT NOT ONLY DID HE PUT FOUR PEOPLE IN THE GROUND, BUT HE TRIED TO KILL SIX OTHER PEOPLE. AND THESE OCCURRED BASICALLY OVER A COURSE OF ABOUT THREE MONTHS INVOLVING SEVEN OR EIGHT DIFFERENT TRANSACTIONS.

NOW, YOU FIND SOMEBODY GUILTY OF ALL THAT STUFF, YOU KNOW, IT'S VERY REASONABLE TO SAY, "HEY, YOU KNOW, I'M INCLINED TO VOTE FOR DEATH IF I'M SATISFIED THAT HE'S DONE ALL THAT STUFF." AND THAT'S OKAY. BECAUSE THAT EVIDENCE OF THOSE CRIMES, AND THE CIRCUMSTANCES OF THOSE CRIMES IS ACTUALLY PART OF THE AGGRAVATING EVIDENCE THAT YOU'RE SUPPOSED TO CONSIDER IN DECIDING WHAT PENALTY TO IMPOSE. IT'S OKAY TO BE INCLINED, BECAUSE IN FACT YOU'VE HEARD PART OF THAT EVIDENCE THAT YOU'RE SUPPOSED TO USE, IF NOT PRIMARILY, THE BULK OF THE EVIDENCE WITH REGARD TO

AGGRAVATION BEFORE YOU EVEN GET TO THE PENALTY PHASE, BECAUSE WE GET THERE THROUGH THE GUILT PHASE.

NOW, SOME PEOPLE, WHEN THEY GET TO THIS PHASE, TAKE THE POSITION THAT, "HEY, IF I FOUND HIM GUILTY OF ALL THAT STUFF, THAT'S IT. THERE'S NOTHING MORE -- I'VE ALREADY MADE UP MY MIND. HE SHOULD DIE. IT'S DEATH."

OTHER PEOPLE TAKE THE POSITION, "WELL, EVEN IF HE'S GUILTY OF ALL THAT STUFF, THAT'S STILL NOT ENOUGH FOR ME IN THE SENSE THAT THERE'S NO WAY THAT I COULD EVER IMPOSE THE DEATH PENALTY. I MEAN, IT'S GOT TO BE MORE SERIOUS IN THE SENSE OF MAYBE KILLING BABIES."

AND THEN THERE'S THE THIRD GROUP OF PEOPLE WHO SAY "YEAH, I'M INCLINED TO THINK HE SHOULD DIE FOR HIS CRIMES, BUT I CAN KEEP AN OPEN MIND AND I WILL LISTEN TO THE REST OF THE EVIDENCE, BECAUSE I'VE ONLY HEARD PART OF THE EVIDENCE AND I WANT TO HEAR BOTH SIDES. AND I'LL KEEP AN OPEN MIND AND LISTEN TO THE ADDITIONAL EVIDENCE THAT WILL BE OFFERED IN THIS PENALTY PHASE AND GIVE SERIOUS CONSIDERATION TO WHATEVER MITIGATING EVIDENCE HIS ATTORNEYS MIGHT OFFER TO TRY AND CONVINCE ME TO SPARE HIS LIFE. AND I'LL ONLY MAKE UP MY MIND AS TO WHICH PENALTY HE SHOULD GET AFTER I'VE HEARD ALL THE EVIDENCE."

AND WHICH OF THOSE THREE GROUPS WOULD YOU FALL INTO?

A. MY MIND WOULD BE OPEN TILL I HEARD ALL THE EVIDENCE, BOTH THE PENALTY AND THE GUILT PHASE.

I COULD MAKE A DECISION AFTER I HEARD IT ALL.

(INTERRUPTION BY THE REPORTER.)

THE COURT: I COULD MAKE A DECISION AFTER I HEARD IT ALL.

MR. BURR: THANK YOU.

THE COURT: MR. SELVIN.

MR. SELVIN: YES.

VOIR DIRE EXAMINATION

BY MR. SELVIN:

Q. GOOD MORNING, MR. FOSTER.

A. GOOD MORNING.

Q. MY NAME IS ALEXANDER SELVIN. MY ASSOCIATE, CO-COUNSEL IS MR. MICHAEL BERGER, AND OUR CLIENT CHARLES STEVENS.

MR. FOSTER, YOU UNDERSTAND THAT BY TALKING ABOUT THE DEATH PENALTY, WE SORT OF PUT THE CART BEFORE THE HORSE?

A. I DO.

Q. BUT WE HAVE TO DO IT BECAUSE AS, THE JUDGE EXPLAINED TO YOU, THAT'S TO FIND OUT WHAT YOUR ATTITUDE IS WITH REGARD TO THE DEATH PENALTY IN THE EVENT THAT WE GET THERE.

BUT BEFORE WE GET THERE, YOU STILL HAVE TO ASCERTAIN WHETHER OUR CLIENT IS GUILTY OF ONE MURDER, TWO, THREE, FOUR OR THE OTHER ATTEMPTED MURDERS.

DO YOU UNDERSTAND THAT?

A. I DO.

Q. AND YOU'VE GOT TO LOOK AT THE EVIDENCE THAT WILL BE PRESENTED BY THE PROSECUTION AND WHATEVER OTHER EVIDENCE MAY BE PRESENTED CAREFULLY AND SEE THAT, IN FACT,

THEY'VE PROVEN BEYOND A REASONABLE DOUBT TO A MORAL CERTAINTY EACH ONE OF THE CRIMES; YOU UNDERSTAND THAT?

A. I DO.

Q. BECAUSE ONE OF THE THINGS WE HAVE TO BE CAREFUL ABOUT IS THAT SOMEONE DOES NOT GET CAUGHT BY THE MOMENTUM OF IF YOU FIND HIM GUILTY OF ONE CRIME OR TWO CRIMES, THEN MUST BE GUILTY OF THE REST.

DO YOU UNDERSTAND THAT?

A. YES, I DO.

Q. NOW, AS FAR AS THE DEATH PENALTY, YOU'VE STATED THAT AT ONE POINT OF IN YOUR LIFE YOU WEREN'T MUCH IN FAVOR OF THE DEATH PENALTY BUT YOU CHANGED?

A. YES, THAT'S TRUE.

Q. YOU UNDERSTAND THAT UNDER THE LAW, AND THE JUDGE WILL GIVE INSTRUCTIONS OF HOW TO APPROACH YOUR DECISION MAKING WITH RESPECT TO THE DEATH PENALTY, WHAT YOU WOULD CONSIDER, AND YOU WILL LISTEN VERY CAREFULLY TO HIS INSTRUCTIONS, AND THEN THE LAWYERS GET A CHANCE TO ARGUE, YOU KNOW, THE -- WHAT THE EVIDENCE IS THAT WAS PRESENTED AND HOW YOU SHOULD INTERPRET THE INSTRUCTIONS AND THEN YOU WILL REACH A DECISION; YOU UNDERSTAND THAT?

A. I UNDERSTAND.

Q. OKAY.

AND UNDER THE INSTRUCTIONS, YOU WILL BE TOLD THAT THERE ARE TWO POSSIBLE PUNISHMENTS, ONE, THE DEATH PENALTY, AND THE OTHER ONE IS LIFE WITHOUT POSSIBILITY OF PAROLE.

MR. BURR, OF COURSE, WILL COME IN AND WANT THE

DEATH PENALTY. THAT'S HIS FUNCTION, AND THAT'S HOW THEY'VE CHARGED THE CASE, AND THAT'S WHAT THEY'RE GOING TO BE ASKING.

CONVERSELY, MR. BERGER AND I WILL BE ASKING YOU FOR LIFE WITHOUT POSSIBILITY OF PAROLE; YOU UNDERSTAND THAT?

A. I UNDERSTAND.

Q. AND YOU CAN APPRECIATE THAT LIFE WITHOUT POSSIBILITY OF PAROLE MEANS JUST THAT, LIFE WITHOUT POSSIBILITY OF PAROLE.

A. (NODS HEAD UP AND DOWN.)

Q. IT'S NOT LIKE THE OLD DAYS -- THE OLD DAYS, WHATEVER THE OLD DAYS WERE -- TEN YEARS AGO BEFORE LIFE -- THERE WAS NO SUCH THING, THERE WAS NO SUCH ANIMAL, NOW THERE IS SUCH AN ANIMAL, LIFE WITHOUT POSSIBILITY OF PAROLE, AND IF THAT'S WHAT YOU CHOOSE, THAT'S WHAT'S GOING TO HAPPEN. MR. STEVENS WILL BE IN PRISON THE REST OF HIS LIFE WITHOUT PAROLE; DO YOU UNDERSTAND THAT?

A. I UNDERSTAND.

Q. AND CAN YOU TELL ME, AND ONLY YOU CAN TELL ME, I COULD STAND HERE THE NEXT TEN HOURS AND ASK YOU THE QUESTIONS, I'LL NEVER REALLY KNOW, BUT ONLY YOU CAN TELL ME THIS:

CAN YOU ACCEPT THE FACT THAT UNDER THE NATURE OF THIS PARTICULAR CASE, YOU KNOW, WHEN THERE IS THE KIND -- THE KIND OF MURDERS WE ARE TALKING ABOUT, THEY'RE INTENTIONAL MURDERS, PREMEDITATED MURDERS, SENSELESS MURDERS, YOU KNOW, SIX -- FOUR PEOPLE WERE KILLED, ANOTHER SIX ATTEMPTED TO BE KILLED, YOU FOUND HIM GUILTY, MY

CLIENT, OF THAT, ASSUME YOU'VE REACHED THAT PARTICULAR STATE. WOULD YOU BE OPEN TO CONSIDER THE PENALTY OF LIFE WITHOUT POSSIBILITY OF PAROLE?

A. YES, AFTER I HEARD ALL THE EVIDENCE, I COULD MAKE MY DECISION.

Q. WE CAN'T ASK YOU TO PREJUDGE, YOU HAVEN'T HEARD, YOU DON'T KNOW WHAT -- YOU KNOW, YOU DON'T KNOW WHAT IT IS, YOU DON'T KNOW WHAT THAT PROBLEM IS.

BUT WHAT WE HAVE WANT TO KNOW AND THE ONLY THING WE CAN EXPECT FROM A JUROR IS THAT AS YOU'RE SITTING THERE, YOU'RE OPEN TILL THE END. AND THE END BEING AFTER ALL THE EVIDENCE IS PRESENTED, YOU'VE TALKED TO THE OTHER PEOPLE, YOU KNOW, IN THE JURY, AND THEN YOU'VE REACHED THE DECISION.

AND ONE MORE THING I WANT TO KNOW, LET'S ASSUME, JUST FOR HYPOTHETICAL, MAKE MY DAY, START OUT MY DAY RIGHT; OKAY? YOU HAVE DECIDED LIFE WITHOUT POSSIBILITY OF PAROLE IS THE PROPER PENALTY, THE OTHER 11 SAY, "NO, THE DEATH PENALTY."

IF YOU FEEL STRONGLY ENOUGH, WOULD YOU BE ABLE TO SAY, "OKAY." TALK TO THEM AND SO FORTH, "BUT THIS IS WHAT I FEEL," AND STICK WITH YOUR DECISION?

A. I COULD IF I FELT STRONGLY ENOUGH.

MR. SELVIN: OKAY. THAT'S FINE.

OKAY. THANK YOU VERY MUCH.

I APPRECIATE IT.

THE COURT: MR. ZIMMER, ON OTHER MATTERS.

MR. ZIMMER: THANK YOU.

//

VOIR DIRE EXAMINATION

BY MR. ZIMMER:

Q. GOOD MORNING. MY NAME IS RICHARD ZIMMER. MY CLIENT IS RICHARD CLARK WHO'S SITTING DIRECTLY TO MY LEFT.

I DON'T KNOW WHETHER YOU SHARED THE CONFUSION THAT SOME OF THE OTHER JURORS HAD COMING INTO HERE TODAY ABOUT WHICH CLIENT, OR WHICH OF THE TWO PEOPLE WAS CHARGED WITH WHAT CRIMES.

WHETHER YOU DID OR NOT, I WOULD -- WOULD GATHER FROM WHAT MR. BURR HAS TOLD YOU, YOU UNDERSTAND NOW, AT LEAST, THAT MR. CLARK IS NOT CHARGED WITH THE DEATH PENALTY, THAT IS, WITH RESPECT TO HIM, THERE'S ONLY GOING TO BE ONE PROCEEDING AND THAT'S A NORMAL JURY TRIAL WHEN ONE DETERMINES GUILT OR INNOCENCE; OKAY?

A. OKAY.

Q. SO I'M NOT GOING TO ASK YOU ANYTHING ABOUT YOUR DEATH PENALTY VIEWS, BECAUSE THAT REALLY DOESN'T PERTAIN TO MY CLIENT.

I DO HAVE SOME QUESTIONS, HOWEVER, ON AREAS THAT WOULD PERTAIN TO THE FIRST TRIAL, THAT IS THE GUILT OR INNOCENCE TRIAL IN THIS CASE, BECAUSE CERTAINLY I'M GOING TO BE ARGUING VERY STRONGLY THAT MR. CLARK IS NOT GUILTY OF THESE CRIMES. SO I'M CONCERNED ABOUT THAT PORTION OF THE PROCEEDINGS RATHER THAN THE PENALTY PORTION.

I NOTICE THAT YOU HAVE SERVED ON A PRIOR JURY; IS THAT RIGHT?

A. THAT'S RIGHT.

Q. AND I TAKE IT THAT WAS HERE IN THIS COURTHOUSE?

A. TWICE.

Q. TWICE IN THIS COURTHOUSE.

ONE OF THEM WAS A CHILD MOLESTATION CASE?

A. CORRECT.

Q. AND I'M SORRY, BUT I DID NOT PICK UP, YOU PROBABLY TOLD US ON THE QUESTIONNAIRE, BUT WHAT WAS THE NATURE OF THE OTHER CASE?

A. I DON'T REMEMBER WHAT THE OTHER ONE WAS. IT WAS A LONG TIME AGO, IT WAS A GUY WHO WAS, I GUESS, RESISTING ARREST.

Q. RESISTING ARREST CASE?

A. YES.

Q. AND THAT WAS IN THIS COURTHOUSE, OR WAS THAT IN THE MUNICIPAL COURT?

A. I DON'T REMEMBER. IT WAS LONG TIME AGO, 10, 15 YEARS AGO.

Q. OH, REALLY.

I KNOW THE ONE THAT YOU PUT DOWN, I THINK IT WAS IN 1989.

A. THAT'S CORRECT.

Q. WAS THERE ANYTHING ABOUT -- BACK UP A MINUTE, THE JURY DID RETURN A VERDICT IN THIS CASE; CORRECT?

A. CORRECT.

Q. DID YOU HAVE AN OPPORTUNITY TO TALK WITH THE ATTORNEYS OR DID THE ATTORNEYS ON EITHER SIDE TALK WITH YOU ABOUT THE CASE?

A. NO.

Q. WAS THERE ANYTHING AT ALL ABOUT THE PROCEEDINGS THAT YOU WENT THROUGH, THE DELIBERATIONS PROCESS, THAT WOULD CARRY OVER TO THIS JURY SERVICE OR IN ANY WAY MAKE IT DIFFICULT FOR YOU TO SIT ON ANOTHER JURY?

A. NO.

Q. I ALSO NOTICE THAT YOU INDICATED YOU HAD SOME GENERAL PSYCHOLOGY COURSES IN COLLEGE; IS THAT RIGHT?

A. THAT'S CORRECT.

Q. I FAILED TO NOTE THAT YOU HAD -- I KNOW THAT YOU GRADUATED FROM HIGH SCHOOL. WHEN WAS IT THAT YOU WENT TO COLLEGE?

A. 197- -- '69, '70, '71, I DIDN'T GRADUATE.

Q. YOU DIDN'T COMPLETE YOUR COLLEGE EDUCATION?

A. NO, I DID NOT.

Q. WERE YOU AT A FOUR-YEAR SCHOOL OR IN A JUNIOR COLLEGE AT THAT TIME.

A. JUNIOR COLLEGE.

Q. AND WHAT WAS YOUR GENERAL AREA OF STUDY?

A. PSYCHOLOGY.

Q. ALL RIGHT. ONE OF THE QUESTIONS THAT WE ASKED YOU IN THE QUESTIONNAIRE WAS TO TRY AND FIND OUT IF YOU HAD ANY FEELINGS ABOUT PSYCHIATRIC OR PSYCHOLOGICAL TESTIMONY IN CRIMINAL TRIALS, THAT SOMETIMES IS A MATTER OF SOME DEBATE.

WHAT FEELINGS, IF ANY, DO YOU HAVE ABOUT PSYCHOLOGISTS OR PSYCHIATRISTS TESTIFYING IN CRIMINAL TRIALS?

A. WHATEVER IT IS -- I TOOK PSYCHOLOGY BECAUSE I WANTED IT FOR MYSELF, NOT TO USE ON ANYBODY ELSE.

Q. ALL RIGHT. ONE OF THE THINGS THAT WE MAY HAVE TESTIMONY ABOUT IN THIS CASE IS TESTIMONY FROM A PSYCHOLOGIST DEALING WITH THE QUESTIONS OF WHY CERTAIN ACTIONS HAPPENED OR WHAT MOTIVATED CERTAIN ACTIONS ON SOMEBODY'S PART.

DO YOU FEEL TESTIMONY OR THE KIND OF THEORIES THAT PSYCHOLOGISTS HAVE ABOUT WHAT MOTIVATES THE BEHAVIOR OR WHY PEOPLE MAY DO WHAT THEY DID?

DO YOU THINK THERE'S ANY VALIDITY TO THOSE THEORIES?

A. I NEVER THOUGHT ABOUT IT THAT WAY.

I REALLY CAN'T ANSWER THAT QUESTION.

MR. ZIMMER: ALL RIGHT. THANK YOU.

I THINK THAT PRETTY MUCH TAKES CARE OF MY CONCERNS.

THE COURT: THANK YOU, SIR.

MR. BURR, ANYTHING FURTHER?

MR. BURR: YES, YOUR HONOR.

VOIR DIRE EXAMINATION

BY MR. BURR:

Q. MR. FOSTER, I NOTICE THAT IT'S BEEN ABOUT 20 YEARS AGO, THERE WAS SOME, YOU -- YOU WERE IN A JAIL OR SOMETHING FOR CONTEMPT OF COURT?

A. CONTEMPT OF COURT CASE.

Q. DID THAT HAVE SOMETHING TO DO WITH FAMILY LAW?

A. YES, CHILD -- I WAS -- UNEMPLOYED, YOU KNOW,

ON DISABILITY AND I WASN'T WORKING AND I DIDN'T PAY CHILD SUPPORT, THAT'S WHAT IT WAS.

Q. IS THERE ANYTHING ABOUT THAT THAT YOU THINK MIGHT HAVE SOME IMPACT ON THIS CASE?

A. I DON'T THINK SO.

MR. BURR: THANK YOU VERY MUCH.

THE COURT: MR. BERGER.

MR. BERGER: I DON'T HAVE ANY QUESTIONS.

THE COURT: THANK YOU.

ALL RIGHT. MR. FOSTER, WE WANT TO THANK YOU FOR BEING HERE THIS MORNING, AS I MENTIONED, SIR, THIS COMPLETES THE QUESTIONING AS IT RELATES TO YOU. I'M GOING TO BE EXCUSING YOU THIS MORNING. I'M GOING TO ASK YOU TO RETURN TO THIS COURTROOM ON JANUARY 25TH AT 2:00 IN THE AFTERNOON. WE WON'T HAVE ANY FURTHER QUESTIONS FOR YOU AT THAT TIME, IT'S SIMPLY THE NEXT PART, OR PHASE, OF THE JURY SELECTION PROCESS. THE BAILIFF'S GOING TO GIVE YOU A SLIP OF PAPER THAT HAS THAT DATE AND TIME ON IT.

AND LET ME REMIND YOU, PLEASE KEEP IN MIND, HAVE NO DISCUSSION ABOUT THIS CASE, OR ANYTHING YOU'VE LEARNED ABOUT THE CASE SO FAR, AND DON'T LET ANYBODY TALK TO YOU ABOUT IT BETWEEN NOW AND THEN.

AND WE WILL SEE YOU ON JANUARY 25TH AT 2:00 O'CLOCK.

PROSPECTIVE JUROR FOSTER: THANK YOU.

THE COURT: THANK YOU.

(PAUSE IN PROCEEDINGS.)

THE CLERK: THE NEXT PROSPECTIVE JUROR IS

APPENDIX L

VIRGINIA WATKINS.

VIRGINIA WATKINS

VOIR DIRE EXAMINATION

BY THE COURT:

Q. GOOD MORNING, MS. WATKINS.

A. GOOD MORNING.

Q. AS I'VE INDICATED, WE APPRECIATE YOU BEING HERE, AND THANK YOU FOR WAITING FOR US AS WE GO FORWARD THIS MORNING.

I HAVE REVIEWED YOUR QUESTIONNAIRE. WE ARE GOING TO HAVE SOME QUESTIONS FOR YOU, AS I'VE INDICATED, THIS MORNING.

WITH RESPECT TO THE QUESTIONNAIRE, THE ONLY FOLLOW UP I WANTED TO TOUCH UPON WITH YOU IS UNDER THE PART OF THE QUESTIONNAIRE WHERE WE TALKED ABOUT PUBLICITY IN THE CASE, YOU INDICATED THAT YOU THOUGHT YOU MIGHT HAVE HEARD SOMETHING ABOUT THESE INCIDENTS, WHETHER IT BE ON THE TELEVISION OR THE NEWSPAPER, BUT YOU DIDN'T RECALL ANY SPECIFIC -- ANY SPECIFICS, AS I UNDERSTOOD IT; AM I RIGHT ABOUT THAT?

A. YES, IT'S ONLY -- ACTUALLY IT'S SPECIFICS, I DIDN'T FOLLOW UP ALL THE WAY THROUGH. THERE WAS ONE WHERE A GENTLEMAN --

Q. PARDON?

A. THERE WAS ONE CASE WHERE A GENTLEMAN AND HIS WIFE WERE COMING HOME FROM DINNER IN SAN FRANCISCO.

Q. YEAH. I THINK I KNOW THE INCIDENT TO WHICH YOU'RE REFERRING. THAT'S UNRELATED TO THIS MATTER.

A. AND THE OTHER ONE WAS A YOUNG LADY GOING TO WORK IN THE SMALL HOURS OF THE MORNING.

Q. I DIDN'T HEAR?

A. A YOUNG LADY GOING TO WORK IN THE SMALL HOURS OF THE MORNING.

Q. ALL RIGHT. NOW, LET ME SAY THIS TO YOU:

IF YOU ARE SELECTED ON THE JURY HERE, IT WILL COME AS NO SURPRISE TO YOU, I'M SURE, THAT YOU WILL BE DIRECTED, AS WILL ALL THE JURORS, TO MAKE ANY DECISION THAT YOU MIGHT MAKE IN THE CASE BASED SOLELY ON THE TESTIMONY AND THE EVIDENCE THAT YOU HEAR IN THE TRIAL AND IN THIS COURTROOM, AND NOT ON INFORMATION THAT MAY -- THAT YOU MAY HAVE RECEIVED FROM SOME OTHER SOURCE, FOR EXAMPLE, FROM A NEWSPAPER, WHATEVER IT MIGHT BE. I'M SURE YOU CAN UNDERSTAND WHY IT NEEDS TO BE THAT WAY. WE HAVE TO HAVE ALL 12 JURORS MAKING A DECISION ON THE SAME INFORMATION AND NOT HAVING ONE, OR TWO, OR THREE JURORS FACTORING SOMETHING IN THAT THEY KNOW ABOUT THAT THE OTHERS KNOW NOTHING ABOUT.

SO I MENTION THAT TO YOU. WE WOULD ASK YOU TO PUT ASIDE ANY INFORMATION, AND YOU APPARENTLY HAVE SOME GENERAL RECOLLECTION OF SOMETHING THAT MAY RELATE TO THE INCIDENT, BUT WE WOULD ASK YOU TO PUT THAT ASIDE AND NOT LET IT INFLUENCE OR IMPACT ANY DECISION YOU MIGHT REACH.

WILL YOU DO THAT FOR US?

A. SURE.

Q. NOW, FROM MY REVIEW OF YOUR QUESTIONNAIRE, RECOGNIZING, CERTAINLY, THAT JURY SERVICE IN ANY TRIAL AND

PERHAPS IN A TRIAL OF THIS ANTICIPATED LENGTH CERTAINLY VISITS INCONVENIENCE ON PEOPLE IN THEIR NORMAL ROUTINE, AND I'M SURE IF GIVEN A PREFERENCE, YOU WOULD PREFER TO BE SOMEWHERE ELSE DURING THE MONTHS OF FEBRUARY AND MARCH. NONETHELESS, IT APPEARS TO ME IF YOU ARE SELECTED TO BE A JUROR HERE YOU ARE AVAILABLE TO PARTICIPATE FOR THE LENGTH OF TRIAL; IS THAT RIGHT?

A. YES, SIR.

Q. OKAY.

AND AGAIN, I'M GOING ASK YOU, I KNOW IT'S ASKING YOU TO DO SOMETHING THAT YOU DON'T NORMALLY DO, TRY AND SPEAK INTO THAT MICROPHONE BECAUSE THE REPORTER HAS TO GET EVERYTHING YOU SAY; OKAY?

NOW, WHEN I INTRODUCED THE ATTORNEYS AND THE DEFENDANTS TO YOU THE OTHER DAY, DID YOU KNOW ANY OF THEM WHEN THEY STOOD UP?

A. NO.

Q. AS I MENTIONED TO YOU EARLIER THIS MORNING, I DO WANT TO TALK TO YOU A LITTLE BIT ABOUT THE IDEA OF PUNISHMENT OR PENALTY. AND I ALSO WANT TO TALK TO YOU A LITTLE BIT ABOUT THE POSSIBILITY, AS I'VE EXPLAINED, OF A SECOND PART, OR A SECOND PHASE, TO THIS CASE.

IN ORDER TO GET US, YOU AND I, TO A POINT IN OUR DISCUSSION WHERE WE CAN HAVE SOME MEANINGFUL QUESTIONS AND ANSWERS ABOUT THOSE SUBJECTS, AND IN ORDER TO MAKE THE BEST USE OF YOUR TIME, I'M GOING TO ASK YOU TO MAKE A COUPLE OF ASSUMPTIONS FOR ME. THEY'RE ASSUMPTIONS ONLY, AND THEY'RE STRICTLY FOR THE PURPOSE OF THESE QUESTIONS;

OKAY?

A. ALL RIGHT.

Q. ASSUME FOR ME THAT THE JURY SELECTION PROCESS IN THIS CASE IS OVER AND YOU HAVE BEEN SELECTED AS ONE OF THE TWELVE JURORS.

ASSUME FOR ME FURTHER THAT WE HAVE GONE THROUGH WHAT I CALL THE GUILT PHASE OF THE CASE, THAT IS THE PHASE OF THE CASE, IN WHICH EVIDENCE IS PRESENTED RELATIVE TO THE CHARGES. AND LET'S ASSUME FURTHER THAT YOU -- THAT THAT'S OVER WITH AND YOU AND THE OTHER JURORS HAVE DELIBERATED AND DISCUSSED THE EVIDENCE AND THE LAW THAT I WOULD GIVE YOU IN THAT REGARD. AND YOU, ALL 12 OF YOU, HAVE DECIDED IN A HYPOTHETICAL VERDICT THAT THE DEFENDANT CHARLES STEVENS IS GUILTY OF AT LEAST ONE FIRST DEGREE MURDER AND THAT AT LEAST ONE OF THOSE SPECIAL CIRCUMSTANCES THAT WE TALKED TO YOU ABOUT IS TRUE; OKAY?

WOULD YOU MAKE THESE ASSUMPTIONS FOR ME?

A. ALL RIGHT.

Q. NOW HAVING MADE THOSE ASSUMPTIONS YOU KNOW, FROM WHAT I EXPLAINED TO YOU, PROCEDURALLY BEFORE THAT THAT IF THERE WAS A RESULT LIKE THAT AFTER THE FIRST PHASE, THE CASE WOULD AUTOMATICALLY MOVE INTO A SECOND PHASE, AND IN THAT SECOND PHASE, THERE WOULD BE ADDITIONAL EVIDENCE, EVIDENCE UNRELATED TO THE EVIDENCE ABOUT THE CRIMES THAT WOULD BE PRESENTED TO THE JURORS DESIGNED TO HELP THEM CHOOSE THE APPROPRIATE PENALTY, AND THERE ONLY BEING TWO PENALTIES WHICH I'VE EXPLAINED TO YOU.

NOW, BY WAY OF THAT HYPOTHETICAL VERDICT, YOU KNOW

THAT THE JURY WOULD HAVE MADE SOME DECISIONS, OBVIOUSLY, BEFORE WE WOULD START THE SECOND PART OF THE CASE. AND IN THAT PARTICULAR CASE, THEY WOULD HAVE DECIDED BEYOND A REASONABLE DOUBT THAT WITH REGARD TO CERTAIN INCIDENTS THAT TOOK PLACE ON OR ABOUT THE 580 FREEWAY IN OAKLAND IN 1989, THAT THE DEFENDANT CHARLES STEVENS WAS GUILTY OF AT LEAST ONE FIRST DEGREE MURDER, THAT IS, AN INTENTIONAL PREMEDITATED MURDER, AND THAT AT LEAST ONE OF THOSE SPECIAL CIRCUMSTANCES, LYING IN WAIT OR MULTIPLE MURDER WAS TRUE.

IN ADDITION BEFORE WE START THE SECOND PART OF THE CASE, THEY MIGHT ALSO HAVE DECIDED THAT HE WAS GUILTY OF ONE, OR MORE, OR ALL OF THE SIX ATTEMPTED MURDERS THAT HE IS CHARGED WITH.

ARE YOU WITH ME SO FAR?

A. YES.

Q. NOW, FROM WHAT I'VE EXPLAINED TO YOU INITIALLY, YOU KNOW THAT IF WE GET TO THAT POINT, THE JURY'S GOING TO BE ASKED, EACH JUROR AND THE JURY GENERALLY WILL BE ASKED, TO DECIDE WHAT THE APPROPRIATE PUNISHMENT IS. BUT I ALSO TOLD YOU, AS YOU MAY REMEMBER, THAT THE JURORS ARE NOT TO MAKE UP THEIR MINDS AS TO THE APPROPRIATE PUNISHMENT HAVING HEARD ONLY THE EVIDENCE ABOUT THE CRIMES, WHICH IS THE ONLY EVIDENCE THAT THEY HAVE THAT THEY WOULD HAVE HEARD ABOUT IN THE FIRST PART OF THE CASE, BUT RATHER THEY ARE SUPPOSED TO WAIT, PROCEED THROUGH THE SECOND PHASE OF THE CASE, THE PENALTY PHASE, LISTEN TO AND CAREFULLY CONSIDER WHATEVER ADDITIONAL

EVIDENCE, WHETHER IT BE ABOUT THE DEFENDANT'S BACKGROUND OR WHATEVER ELSE IT MIGHT BE, WHICH WOULD BE OFFERED TO THEM AND DESIGNED TO HELP THEM CHOOSE THE APPROPRIATE PUNISHMENT; OKAY?

A. OKAY.

Q. NOW, SOME PEOPLE MIGHT SAY TO ME BASED ON THE TYPE OF CRIMES THAT I'VE OUTLINED HERE, THE NATURE OF THOSE CRIMES, OR THE NUMBER OF THOSE CRIMES, OR THE COMBINATION OF ALL OF THAT, THAT IN A CASE LIKE THIS, THEY WOULD ALWAYS VOTE FOR THE DEATH PENALTY. OTHER PEOPLE MIGHT JUST AS WELL SAY TO ME BASED ON THE SAME SCENARIO THAT IN A CASE LIKE THIS, THEY WOULD NEVER VOTE FOR THE DEATH PENALTY, BUT REGARDLESS OF WHAT INFORMATION, OR EVIDENCE, OR CIRCUMSTANCES MIGHT BE PRESENTED TO THEM IN THE SECOND PART OF THE CASE.

SO, IF YOU FOLLOW ME, I'M GETTING BACK TO THE POINT I MADE TO YOU EARLIER. THOSE TYPE OF PEOPLE WOULD HAVE MADE UP THEIR MIND HAVING HEARD ONLY THE EVIDENCE ABOUT THE CRIMES AND WOULD NOT MAINTAIN AN OPEN MIND TO CONSIDER WHATEVER ELSE MIGHT BE PRESENTED TO THEM DESIGNED TO HELP THEM CHOOSE THE PUNISHMENT.

NOW, AFTER ALL THAT, I'M GOING TO COME TO YOU. WITH REGARD TO YOUR OWN STATE OF MIND AS YOU SIT THERE, IF YOU ARE SELECTED AS A JUROR, AND I'M NOT ASKING YOU, DON'T MISUNDERSTAND, NOBODY WILL ASK YOU HOW YOU WOULD VOTE, WE COULDN'T POSSIBLY ASK YOU, YOU DON'T KNOW, YOU HAVEN'T HEARD ANY EVIDENCE, BUT WHAT WE'RE TRYING TO PROBE HERE IS ATTITUDES AND STATE OF MIND, AND OBVIOUSLY YOUR OWN STATE

OF MIND AND YOUR ATTITUDE.

BASED ON WHAT I TOLD YOU SO FAR IF YOU WERE A JUROR ON THIS CASE AND WE GOT TO THE SECOND PART OF THE CASE WOULD YOU, AS A JUROR, HAVE AN OPEN MIND IN STARTING THAT SECOND PART OF THE CASE, AND WOULD YOU LISTEN TO AND SERIOUSLY CONSIDER BOTH POSSIBLE SENTENCE CHOICES ONLY AFTER HAVING HEARD ALL THE EVIDENCE THAT'S PRESENTED TO YOU IN BOTH PARTS OF THE CASE? WOULD YOU HAVE SUCH AN OPEN MIND?

A. YES, I BELIEVE SO.

Q. ALL RIGHT. LET ME COME AROUND AND ASK YOU ALMOST THE SAME QUESTION IN ANOTHER WAY.

I TAKE IT FROM THAT ANSWER, AND I KNOW THAT YOU'VE LISTENED CAREFULLY TO WHAT I'VE SAID THIS MORNING, YOU'VE DONE SOME THINKING, NO DOUBT, DURING THE PERIOD THAT YOU'VE BEEN ON THIS JURY PANEL.

I TAKE IT FROM THAT ANSWER THAT IN YOUR MIND, BASED ON EVERYTHING THAT I'VE TOLD YOU ABOUT, YOU HAVE NOT ELIMINATED OR EXCLUDED EITHER OF THOSE TWO POSSIBLE PENALTY CHOICES; AM I RIGHT ABOUT THAT?

A. THAT'S RIGHT.

Q. NOW, THIS DECISION MAKING PROCESS THAT I AM ALLUDING TO WITH YOU AND WHAT I'M REFERRING TO NOW, THE DECISION MAKE PROCESS IN THE SECOND PART OF THE CASE, IF WE GET THERE, IN WHICH THE JURY WOULD BE ASKED TO DECIDE ABOUT THE PUNISHMENT, I THINK YOU CAN WELL APPRECIATE THAT THAT IS NOT A MECHANICAL OR A SCIENTIFIC PROCESS. IT'S NOT A QUESTION OF ADDING UP ALL THE FACTORS ON ONE SIDE OR

THE OTHER OF AN IMAGINARY SCALE. YOU'VE HEARD ME TALK ABOUT AGGRAVATING FACTORS AND MITIGATING FACTORS AND THINGS OF THAT SORT, BUT IT'S NOT A PROCESS IN WHICH ONE WOULD ADD UP FACTORS ON ONE SIDE OR THE OTHER ON AN IMAGINARY SCALE AND REACH A DECISION. IT'S NOT THAT KIND OF PROCESS, IT'S A VERY SUBJECTIVE PROCESS.

NOW, I TOLD YOU THAT AT THE CONCLUSION OF THAT PHASE OF THE CASE, IF WE HAVE THAT PHASE OF THE CASE, I WOULD INSTRUCT YOU AND GIVE CERTAIN GUIDELINES AS TO HOW TO CONSIDER THE EVIDENCE, AND YOU WOULD BE INSTRUCTED, IN PART, THAT TO RETURN A JUDGMENT OF DEATH, YOU PERSONALLY WOULD HAVE TO BE PERSUADED THAT THE EVIDENCE IN AGGRAVATION WAS SO SUBSTANTIAL IN COMPARISON TO THE EVIDENCE IN MITIGATION THAT IT WARRANTED DEATH RATHER THAN LIFE IN PRISON WITHOUT PAROLE.

NOW, BY WAY OF SUMMARY, HAVING ALL OF THAT IN MIND AS YOU SIT THERE, IF YOU ARE SELECTED AS A JUROR HERE, DO YOU THINK THAT YOU COULD FOLLOW THE INSTRUCTIONS OF THE COURT AND THAT YOU COULD BE OPEN TO THE POSSIBILITY OF IMPOSING EITHER PENALTY AS I HAVE DESCRIBED THEM AFTER HAVING HEARD ALL THE EVIDENCE AND ALL THE CIRCUMSTANCES THAT WOULD BE PRESENTED TO YOU NOT JUST IN THE FIRST PART OF THE CASE, BUT IN THE SECOND PART AS WELL, WOULD YOU HAVE SUCH AN OPEN MIND?

A. I BELIEVE I WOULD.

Q. ALL RIGHT.

A. I DON'T REALLY WANT TO.

Q. WELL, I CAN CERTAINLY APPRECIATE THAT, AND I

KNOW THAT YOU CAN APPRECIATE THAT THERE PROBABLY ARE NOT VERY MANY PEOPLE WHO COME FORWARD AS PROSPECTIVE JURORS THAT WOULD PREFER TO BE ASKED TO MAKE THAT DECISION.

LET ME ASK YOU THIS, THOUGH, THAT REACTION CERTAINLY NOT UNIQUE TO YOU, BUT LET ME ASK YOU THIS:

COULD YOU AS A PERSON, IF ASKED, IF ASKED TO SERVE HERE, COULD YOU AS A PERSON, AS AN INDIVIDUAL, AND ULTIMATELY AS AN INDIVIDUAL ON THIS JURY, AT THE CONCLUSION OF -- OF BOTH PHASES OF THE CASE, IF WE HAD TWO PHASES, AND IF YOU'RE ASKED TO DETERMINE PUNISHMENT HERE, COULD YOU CAST A VOTE TO IMPOSE EITHER PUNISHMENT AFTER HAVING HEARD EVERYTHING AND HAVING DISCUSSED IT WITH THE OTHER JURORS, IF YOU DETERMINED IN YOUR MIND THAT WAS THE APPROPRIATE PUNISHMENT, COULD YOU CAST A VOTE FOR THAT PUNISHMENT?

A. YES.

THE COURT: THANK YOU. MR. BURR.

MR. BURR: THANK YOU, YOUR HONOR.

VOIR DIRE EXAMINATION

BY MR. BURR:

Q. MS. WATKINS, I KNOW IT'S BEEN ABOUT FIVE OR SIX WEEKS SINCE YOU WERE LAST HERE, SO LET ME MAKE SURE YOU KNOW WHO'S WHO AND WHAT THEY'RE CHARGED WITH.

WHEN OUR CLERK READ THE INFORMATION LAST MONTH, SHE READ OFF TEN CRIMES. AND WITH REGARD TO THOSE TEN CRIMES, THE DEFENDANT CLOSEST TO YOU HERE IS MR. CLARK. HE'S CHARGED WITH ONE OF THOSE CRIMES, A VERY SERIOUS CRIME, MURDER. WE ARE NOT SEEKING THE DEATH PENALTY AS TO HIM.

THE MAN HERE AT THE END OF THE TABLE WITH THE GLASSEES BETWEEN HIS TWO LAWYERS IN THE SWEATER, THIS IS MR. STEVENS. HE IS CHARGED WITH ALL TEN OF THOSE CRIMES, FOUR MURDERS AND THE ATTEMPT TO MURDER SIX OTHER PEOPLE. AND WITH REGARD TO HIM, WE ARE SEEKING THE DEATH PENALTY.

NOW, A LOT OF PEOPLE HEARING -- OR READING ABOUT THESE TYPES OF OFFENSES AND ONE CHARGED WITH DOING ALL THAT STUFF OVER THE MORNING PAPER MIGHT SAY, "YOU KNOW, IF THAT'S TRUE, THAT PERSON SHOULD BE EXECUTED. I SUPPORT THE DEATH PENALTY, AND THIS IS THE TYPE OF PERSON IT'S DESIGNED FOR." WHEN THEY COME INTO THE COURTROOM AND THEY OCCUPY ONE OF THESE CHAIRS AND THERE'S A REAL PERSON DOWN THERE, IT'S DIFFERENT, AS IT SHOULD BE. BECAUSE WE'RE NO LONGER TALKING ABOUT SOMETHING IN THE ABSTRACT, WE ARE TALKING ABOUT A REAL LIFE.

HAVE YOU THOUGHT ABOUT BEING PLACED IN A SITUATION OF BEING ASKED TO END ANOTHER HUMAN BEING'S LIFE?

A. I CAN'T SAY I'VE GIVEN A LOT OF THOUGHT IF IT'S SOMETHING THAT I REALLY WANT TO THINK ABOUT.

AS AN INDIVIDUAL, AND AS I MENTIONED, I SEE THINGS IN THE PAPER, IT'S VERY EASY TO MAKE AN ASSUMPTION.

NO I HAVEN'T GIVEN A LOT OF THOUGHT TO HAVING TO DO IT MYSELF.

Q. WELL, YOU'RE NOT ALONE, BECAUSE MOST FOLKS DON'T GO AROUND THINKING ABOUT SOMETHING LIKE THAT. AND IT'S NOT TILL THEY FIND THEMSELVES IN THIS TYPE OF SITUATION THAT THEY ACTUALLY START CONFRONTING IT. AND THAT'S WHY WE GO THROUGH THIS PROCESS, BECAUSE IT'S NOT

FAIR TO THEM, IT'S NOT FAIR TO US IF THIS IS NOT THE TYPE OF CASE THAT THEY CAN SIT ON. AND THAT'S WHAT WE ARE TRYING TO FIND OUT HERE.

AND WE FIND THAT A NUMBER OF PEOPLE, WHEN THEY ARE CONFRONTED WITH THE REALITY, SAY THAT EVEN THOUGH THEY SUPPORT THE DEATH PENALTY, CAMPAIGNED FOR IT, YOU KNOW, 15 OR SO YEARS AGO, FOR WHATEVER REASON, EVEN THOUGH THEY MIGHT BE PHILOSOPHICALLY IN AGREEMENT WITH IT, THEY SAY, "THIS IS SOMETHING I CAN'T DO." NOT THAT -- AND THAT'S DIFFERENT FROM SAYING, "I PREFER NOT TO DO IT." EITHER BECAUSE OF MAYBE REFLECTING ON PRIOR RELIGIOUS TEACHINGS THAT THEY HADN'T REALLY THOUGHT OF BEFORE IN THE PAST OR BECAUSE OF THEIR OWN EMOTIONAL MAKEUP, OR BECAUSE OF JUST WHAT'S GOING ON IN THE STRESS OF THEIR LIFE RIGHT NOW.

AND SOME PEOPLE SAY, "YOU KNOW, I HAVE A DIFFICULT TIME MAKING UP MY OWN MIND BE ABOUT MY OWN LIFE, LET ALONE SOMEBODY ELSE'S LIFE." AND THEY FIND THEMSELVES IN THE SITUATION OF NOT, "I PREFER NOT TO DO THIS," BUT, "I CAN'T DO THIS."

SO I ASK EVERYBODY, IS THIS SOMETHING YOU CAN DO?

A. YOU KNOW, AT THIS POINT, I GUESS SO.

I REALLY DON'T KNOW.

Q. ALL RIGHT. LET ME ASK IT IN THIS FASHION, BECAUSE AGAIN, THIS IS A QUESTION I ASK EVERYBODY, TO HAVE THEM LOOK INSIDE THEMSELVES. BECAUSE IF WE GET TO THE PENALTY PHASE, I'M GOING TO STAND RIGHT HERE AND I'M GOING TO DEMAND THAT THE JURY IMPOSE THE DEATH PENALTY ON THE MAN IN THE SWEATER DOWN THERE AT THE END OF THE TABLE.

AND I JUST WANT TO MAKE SURE THAT PEOPLE ARE CAPABLE OF DOING THAT, BECAUSE IT'S -- AS I SAY, IT'S NOT FAIR TO PLACE THEM THERE IF THAT'S SOMETHING THEY JUST CAN'T DO.

SO LET'S ASSUME YOU'RE ON THE JURY. LET'S ASSUME THAT YOU'VE HEARD ALL THE EVIDENCE IN THE PENALTY PHASE AND YOU'RE UP IN THE JURY DELIBERATION ROOM, AND YOU'RE TALKING WITH THE OTHER 11 JURORS ABOUT WHAT PENALTY SHOULD BE IMPOSED. AND AS YOU LISTEN TO EVERYBODY AND TALK WITH THEM, IT BECOMES CLEAR IN YOUR OWN MIND THAT THE OTHER 11 PEOPLE HAVE FINALLY REACHED THE POSITION THAT HE SHOULD DIE FOR HIS CRIMES. AND YOU THINK A LITTLE BIT MORE ABOUT IT AND YOU TALK WITH THEM A LITTLE BIT MORE, AND THEN FINALLY YOU GET TO THAT SAME POSITION. YOU SAY, "YES, THE PROPER PENALTY FOR WHAT HE'S DONE IS DEATH." AND YOU REALIZE THAT WITH YOUR VOTE, THAT NOW MAKES IT UNANIMOUS, WHICH IS WHAT IS REQUIRED FOR A VERDICT. AND WITH YOUR VOTE, THAT'S THE FIRST STEP THAT WILL TAKE HIM FROM THIS COURTROOM, ACROSS THE BAY TO SAN QUENTIN, WHERE SOME DAY IN THE FUTURE HE'LL BE BROUGHT INTO ONE OF TWO DEATH ROOMS, IT'S HIS CHOICE WHICH ONE HE GOES INTO. IN ONE HE'LL BE STRAPPED DOWN ONTO A GURNEY, AND A NEEDLE WILL BE STUCK INTO HIM, AND POISON WILL FLOW INTO HIS BODY UNTIL HE'S DEAD. THE OTHER ONE IS THAT GREEN GAS CHAMBER WHERE HE'LL BE STRAPPED INTO THAT CHAIR IN THERE AND FORCED TO BREATHE LETHAL GAS UNTIL HE'S DEAD.

KNOWING THAT, COULD YOU CAST THAT TWELFTH VOTE?

A. YES.

Q. NOW, AS THE JUDGE HAS ALSO INDICATED, IT'S

GOT TO BE A REAL PENALTY TRIAL, BY THAT, I MEAN NO ONE'S ALREADY MADE UP THEIR MIND, AND THE JURY HAS TO MAKE THEIR DECISION BASED UPON ALL THE EVIDENCE.

NOW, LET'S ASSUME YOU FIND HIM GUILTY OF EVERYTHING. THAT'S THE WORST POSSIBLE PICTURE. LET'S ASSUME THAT YOU FIND HIM GUILTY OF MURDERING FOUR PEOPLE. IT'S PREMEDITATED, IT'S INTENTIONAL, IT'S DELIBERATE. YOU FIND THE SPECIAL CIRCUMSTANCE THAT HE LIED IN WAIT, BASICALLY THAT HE CREEPED UP ALONG SIDE PEOPLE ON THE FREEWAY THERE, CAUGHT THEM BY SUPRISE AS HE SHOT THEM, THAT HE ATTEMPTED TO MURDER SIX OTHER PEOPLE, FORTUNATELY FOR THEM THEY WERE ABLE TO WALK AWAY WITH MINOR INJURIES, BUT HE DIDN'T KNOW. HE TRIED TO MURDER THEM.

WELL ANYBODY WHO HAS CONVICTED SOMEBODY OF ALL OF THAT, THEY'RE GOING TO SAY, "YOU KNOW, I'M INCLINED TO VOTE FOR THE DEATH PENALTY HERE. I'M NOT -- I'M REALLY LEANING THERE," AND THAT'S OKAY. IT DOESN'T MATTER WHETHER YOU SUPPORT THE DEATH PENALTY OR NOT. THE FACT OF THE MATTER IS THAT THAT'S ALL RIGHT, BECAUSE WHAT YOU HAVE CONVICTED HIM OF IS, IN ESSENCE, PART OF THE EVIDENCE THAT YOU CAN CONSIDER IN DECIDING WHICH PENALTY TO IMPOSE ON HIM.

IT'S JUST THAT WHEN YOU WALK INTO THE PENALTY PHASE, YOU'VE HEARD PART OF THE EVIDENCE OR PART OF THE STORY. AND SO THE FACT THAT AT THAT POINT YOU'RE LEANING, FAVORING ONE PENALTY, THAT'S ALL RIGHT. BECAUSE THAT PROBABLY IS A LARGE BULK OF THE AGGRAVATING EVIDENCE.

THE ISSUE IS WHETHER OR NOT YOU CAN HAVE AND KEEP

AN OPEN MIND. BECAUSE SOME PEOPLE WHEN THEY GET TO THIS POSITION SAY, "HEY, I'VE ALREADY MADE UP MY MIND AND THAT'S IT. IT'S CLOSED. I DON'T CARE IF I'VE ONLY HEARD PART OF THE EVIDENCE. I'VE ALREADY MADE UP MY MIND."

BUT WHAT THE COURT REQUIRES IS SOMEONE WHO CAN SAY, "I'M LEANING, BUT I CAN KEEP AN OPEN MIND BECAUSE I'VE ONLY HEARD PART OF THE EVIDENCE. I WANT TO HEAR IT ALL BEFORE I MAKE UP MY MIND," AND LISTEN WITH AN OPEN MIND TO THE REST OF THE EVIDENCE AND ANY MITIGATING EVIDENCE THAT HIS ATTORNEYS MIGHT INTRODUCE, GOOD STUFF ABOUT HIM TO TRY AND CONVINCE YOU TO SPARE HIS LIFE. AND IN THAT REGARD, GIVE ALL THAT EVIDENCE SERIOUS CONSIDERATION AND MAKE YOUR FINAL DECISION AS TO WHAT THE PENALTY IS AFTER YOU'VE HEARD ALL THE EVIDENCE.

CAN YOU DO THAT?

A. YES, I -- ASSUMING ALSO THAT THE JUDGE TELLS US WHERE THE LAW LIES AND WHICH WAY TO GO AS FAR AS THE LAW IS CONCERNED.

MR. BURR: OKAY.

THANK YOU VERY MUCH.

THE COURT: JUST ON THAT LAST POINT.

AS I INDICATED TO YOU, AT THE CONCLUSION OF THAT PHASE OF THE CASE, IF THERE IS ONE, THE COURT WOULD BE INSTRUCTING YOU AS TO SOME GENERAL GUIDELINES AS TO HOW TO CONSIDER THE EVIDENCE, BUT THE DECISION AS TO THE APPROPRIATE PUNISHMENT WILL BE WITH THE JURY.

DO YOU UNDERSTAND?

PROSPECTIVE JUROR WATKINS: YES. THAT'S WHAT

I WAS REFERRING TO.

THE COURT: MR. BERGER.

VOIR DIRE EXAMINATION

BY MR. BERGER:

Q. GOOD MORNING. MY NAME IS MICHAEL BERGER. MY CLIENT IS MR. STEVENS. MR. SELVIN IS HIS OTHER ATTORNEY.

I HOPE YOU'LL FORGIVE ME FOR QUESTIONING YOU ON THE SAME AREAS, BUT I'VE GOT TO COME AT IT FROM OUR OWN PERSPECTIVE.

A. I UNDERSTAND.

Q. YOU'VE TOLD US IN THE QUESTIONNAIRE THAT YOU ARE FOR THE DEATH PENALTY, YOU VOTED FOR IT WHEN IT WAS ON THE BALLOT, AND YOU SAID, "I'VE ALWAYS BEEN FOR THE DEATH PENALTY." YOUR VIEWS HAVE NOT CHANGED OVER YOUR LIFETIME AND YOU'VE SAID THAT IF IT WERE ON THE BALLOT, YOU WOULD VOTE FOR IT BECAUSE YOU SAY, "SOME CRIMES REALLY SEEM TO JUSTIFY IT."

I WAS WONDERING, WHEN YOU WROTE THAT, WHAT CRIMES DID YOU HAVE IN MIND? CAN YOU EXPAND ON THAT?

A. I WAS PROBABLY THINKING ABOUT DAHMER, I THINK.

Q. THE DAHMER THING?

A. YEAH.

Q. IN A WAY THE JUDGE AND THE PROSECUTOR HAVE PUT YOU ON THE SPOT BY ASKING YOU IF YOU CAN KEEP AN OPEN MIND, BECAUSE I DON'T THINK ANYBODY AROUND HERE LIKES TO ADMIT THAT HE OR SHE CAN'T KEEP AN OPEN MIND. BUT THE QUESTION REALLY ISN'T THAT.

THE QUESTION IS ARE YOUR VIEWS ON THE DEATH PENALTY SUCH THAT YOU REALLY SHOULD NOT BE CALLED ON TO MAKE A DECISION IN THIS PARTICULAR CASE ABOUT THAT PARTICULAR ISSUE?

MR. BURR: WELL, OBJECTION.

PROSPECTIVE JUROR WATKINS: I REALLY DON'T KNOW WHAT THE --

MR. BURR: EXCUSE ME, MA'AM.

THAT IS NOT THE LAW.

THE COURT: WHY DON'T YOU RESTATE THE QUESTION, SIR.

MR. BERGER: Q. THE QUESTION IS, THE QUESTION WE ARE ALL TRYING TO GET AT IN OUR OWN WAY IS WHETHER YOUR ATTITUDES TOWARD THE DEATH PENALTY ARE SUCH THAT YOU CAN GIVE OUR CLIENT A REAL TRIAL.

YOU'VE BEEN TOLD SEVERAL TIMES NOW THAT AT THE WORST, ASSUMING THE WORST, MR. STEVENS WILL HAVE BEEN FOUND GUILTY OF NOT ONE, OR TWO, OR THREE, BUT FOUR SEPARATE FIRST DEGREE MURDERS. AND FIRST DEGREE MEANS THAT THEY'RE PREMEDITATED, HE THOUGHT ABOUT THEM IN ADVANCE, HE GOT A GUN. AND THAT IS THIS IS NOT ONE OCCASION, BUT THERE ARE SEVEN OR EIGHT DIFFERENT TIMES THAT HE WENT OUT WITH A FIREARM AND GUNNED DOWN INNOCENT, UNSUSPECTING PEOPLE AT RANDOM. NOT PEOPLE HE KNEW, NOT PEOPLE HE HAD AN ARGUMENT WITH, NO ISSUES OF SELF-DEFENSE HERE. JUST OUT OF THE BLUE, RANDOM SHOOTINGS.

AND FURTHER PRETENDING THAT YOU HAVE FOUND THE WORST CASE TO BE TRUE BEYOND ANY DOUBT, ANY REASONABLE

DOUBT, THERE WOULD BE NO QUESTION OF WHO DID IT, IT'S NOT A WHODUNIT. YOU WILL HAVE FOUND THAT HE LAY IN WAIT FOR THESE PEOPLE FOR, AT LEAST IN TWO -- ONE OR TWO OF THE INSTANCES.

PEOPLE HAVE SAT IN YOUR CHAIR AND TOLD US VERY CANDIDLY THAT IF THAT WERE SO, THAT'S THE KIND OF CASE WHERE THE DEATH PENALTY, TO THEIR MIND, IS THE ONLY APPROPRIATE PUNISHMENT.

AND WE DO THIS IN PRIVATE, WE CALL YOU IN ONE AT A TIME SO THAT YOU DON'T HAVE TO GRANDSTAND, YOU HAVE NOTHING TO PROVE TO ANYBODY, AND THE ONLY RIGHT ANSWERS ARE REALLY HONEST ANSWERS. AND I KNOW YOU'VE BEEN GIVING US THOUGHTFUL ANSWER. YOU OBVIOUSLY ARE NOT TELLING US WHAT YOU THINK WE OUGHT TO HEAR.

AND SO WHAT I ASK YOU IS, KNOWING WHAT I'VE TOLD YOU ABOUT THE WORST CASE, IN THAT SITUATION DO YOU THINK THAT THE DEATH PENALTY WOULD BE THE ONLY APPROPRIATE PENALTY?

A. I DON'T THINK I COULD ANSWER THAT WITHOUT KNOWING THE -- WHAT OTHER CIRCUMSTANCES WERE INVOLVED. I DON'T THINK ANYONE CAN COME OUT AND JUST SAY THAT'S THE WHOLE THING IF THEY HAVEN'T HEARD THE REST OF THE EVIDENCE AND I HAVEN'T HEARD THE REST.

Q. OKAY. AND BY THE REST OF THE EVIDENCE, WHAT ARE YOU TALKING ABOUT?

A. I'M TALKING ABOUT THE SECOND PHASE --

Q. OKAY.

A. -- WHERE THERE'S OTHER EVIDENCE BROUGHT IN

THE CASE.

Q. OKAY.

YOU KNOW THAT IF WE GET THAT TO THAT SECOND PHASE, THERE WILL ONLY BE TWO POSSIBLE PUNISHMENTS. YOU UNDERSTAND THAT IF YOU VOTE, IF YOU AS A JURY UNANIMOUSLY VOTE FOR THE DEATH PENALTY, MR. STEVENS WILL BE EXECUTED AS MR. BURR TOLD YOU. ON THE OTHER HAND, IF YOU AS A JURY VOTE FOR LIFE WITHOUT THE POSSIBILITY OF PAROLE, IT MEANS LITERALLY AND EXACTLY THAT, THAT HE WILL NOT BE PAROLED, HE WILL NOT BE FREE, HE WILL NOT BE RELEASED FROM PRISON.

DO YOU ACCEPT THAT?

A. SURE.

Q. OKAY. AND THE REASON I SAY THAT IS BECAUSE A LOT OF PEOPLE HAVE HEARD ABOUT PREVIOUS LAWS OR OTHER STATES OR OTHER SITUATIONS WHICH SIMPLY DON'T APPLY HERE. THE LAW IS STRICT AND LITERAL IN THIS CASE.

DO YOU ACCEPT THAT AS A PROPOSITION?

A. YES.

MR. BERGER: OKAY. THANK YOU VERY MUCH.

THE COURT: MR. ZIMMER, OTHER SUBJECTS?

MR. ZIMMER: THANK YOU.

VOIR DIRE EXAMINATION

BY MR. ZIMMER:

Q. GOOD MORNING.

A. GOOD MORNING.

Q. MY NAME IS RICHARD ZIMMER AND THIS IS MY CLIENT RICHARD CLARK DIRECTLY TO MY LEFT.

I NOTE THAT YOU HAD SERVED PREVIOUSLY ON A CRIMINAL

JURY, AND I THINK THAT WAS AN ATTEMPTED MURDER CASE; IS THAT RIGHT?

A. YES.

Q. YOU OBVIOUSLY HAVE GONE THROUGH A JURY SELECTION PROCESS BEFORE, BUT I ASSUME IT WAS NOTHING LIKE THIS PROCESSES, WAS IT?

A. (SHAKES HEAD FROM SIDE TO SIDE.)

Q. NOW, BECAUSE THE PROSECUTION IS NOT SEEKING THE DEATH PENALTY AGAINST MR. CLARK, I'M NOT GOING TO ASK YOU ANYTHING MORE ABOUT YOUR DEATH PENALTY VIEWS.

I'M MORE CONCERNED, OBVIOUSLY, WITH THE GUILT PHASE OF THIS CASE, BECAUSE WITH RESPECT TO MR. CLARK, AT LEAST, I'M GOING TO BE ARGUING VERY STRENUOUSLY THAT HE'S NOT GULITY OF THIS CRIME.

AND THERE ARE SOME THINGS THAT YOU MENTION IN THE JURY QUESTIONNAIRE THAT I WANT TO ASK YOU A FEW QUESTIONS ABOUT, IF YOU DON'T MIND.

I WAS TRYING TO PIECE TOGETHER FROM THE ANSWER TO YOUR QUESTIONS YOUR OCCUPATIONAL BACKGROUND. AND I GATHER, AND TELL ME IF I'M WRONG BECAUSE I'VE TRIED TO PIECE MYSELF THROUGH, YOU WERE MARRIED ONCE AND THEN YOUR -- YOUR FIRST HUSBAND IS DECEASED; IS THAT CORRECT?

A. NO. MY FIRST HUSBAND IS STILL LIVING.

MY SECOND HUSBAND IS DECEASED.

Q. OH, YOUR SECOND HUSBAND IS DECEASED. ALL RIGHT.

AND THAT -- IT'S WITH YOUR SECOND HUSBAND THAT YOU BECAME INVOLVED WITH BOB'S TIRES. I NOTICE HIS FIRST NAME

IS ROBERT.

A. NO.

Q. WRONG?

A. THAT WAS MY THIRD HUSBAND.

Q. THAT WAS YOUR THIRD HUSBAND HUSBAND; OKAY.

I'M SORRY.

BECAUSE YOU DID SEEM TO HAVE A -- YOU WORKED FOR A WHILE AS A PRODUCTION WORKER IN ONE OF THE BUSINESSES IN HAYWARD; IS THAT RIGHT?

A. I'VE WORKED SINCE I WAS 16 AND I NEVER LEFT THE BAY AREA. SO AS FAR AS WORKING, I COULD GIVE YOU A STRING OF JOBS RIGHT UP TO THE POINT WHERE WE -- SINGER FREMONT AND CLOSED I WORKED THERE 22 YEARS WHEN THEY FOLDED.

IN THE MEANTIME, MY HUSBAND AND I STARTED A TIRE BUSINESS, AND WE WERE JUST -- IT WAS KIND OF A PART-TIME THING AND IT GREW, AND IT BECAME OUR MAIN SOURCE OF INCOME. AND THAT -- IT STILL IS.

Q. ALL RIGHT. AND THAT BUSINESS IS STILL -- IS IT STILL IN EXISTANCE?

A. YES, WE TRIED TO RETIRE A FEW MONTHS AGO, ABOUT SIX MONTHS AGO, AND WE HAVE HAD SO MANY OLD CUSTOMERS THAT DIDN'T REALIZE WE WERE CLOSING THAT WE KIND OF KEPT IT OPEN FOR PEOPLE THAT NEEDED HELP RIGHT NOW, AND THEN THEY GO SOMEWHERE ELSE NEXT TIME.

Q. OKAY. FAIR ENOUGH.

I THINK I'M BEGINNING TO UNDERSTAND IT NOW.

IN TERMS OF YOUR -- LET ME BACK UP.

YOU HAVE BEEN BURGLARIZED IN YOUR BUSINESS; IS THAT RIGHT?

A. SEVERAL TIMES.

Q. AND I ASSUME YOU'VE MADE POLICE REPORTS WITH RESPECT TO THAT?

A. YES.

Q. WAS ANYBODY EVER CAUGHT OR DID YOU EVER HAVE TO TESTIFY IN TRIAL OR ANYTHING OF THAT NATURE?

A. NO. NO.

Q. AND I ALSO NOTICED THAT IT LOOKS LIKE YOU HAVE SOME CRIMINAL PROBLEMS IN YOUR NEIGHBORHOOD AS WELL; IS THAT RIGHT?

A. YES.

Q. YOU MENTIONED DRUG DEALING IS A PROBLEM WHERE YOU'RE LIVING NOW?

A. YES.

Q. IS THAT A RELATIVELY RECENT PROBLEM?

A. YEAH, PRETTY MUCH.

WE HAVE SOME PEOPLE LIVING IN A HOUSE IN FRONT OF US THAT SEEM TO BE HAVING TROUBLE WITH ONE SON. IN FACT, HE WAS JUST RELEASED FROM JAIL NOT TOO LONG AGO.

Q. AND HAVE THE POLICE BECOME INVOLVED IN THAT OR --

A. TO A DEGREE.

Q. AND IS THAT BEING TAKEN CARE OF, OR IS IT --

A. NO. I DIDN'T REALLY FOLLOW THROUGH ON JUST WHAT HAPPENED TO HIM.

HE DID GO TO JAIL AND HE'S BEEN RELEASED, I ASSUME

ON PROBATION.

AND WE HAD PROBLEMS WITH THE NEIGHBORS MORE OR LESS BLAMING US FOR -- ACTUALLY WE OWN THAT HOME, THEY'RE RENTING FROM US. AND THEY HAVE A VERY NICE MOTHER AND FATHER BUT THEY'RE HAVING PROBLEMS WITH THE CHILDREN.

Q. IS THERE ANYTHING ABOUT THE UNFORTUNATE STATUS THAT YOU'VE BEEN IN WITH REGARDS TO CRIME AND CRIMINALS, I MEAN, YOU'VE BEEN VICTIMIZED IN YOUR -- IN YOUR BUSINESS AND BASICALLY VICTIMIZED IN YOUR HOME SETTING AS WELL. IS THERE ANYTHING ABOUT THAT, DO YOU THINK, THAT YOU WOULD CARRY INTO THIS TRIAL?

A. NO.

Q. YOU CAN SET THAT ASIDE AND RECOGNIZE THAT THE GUILT OR INNOCENCE OF MR. CLARK IS AN ENTIRELY SEPARATE ISSUE?

A. YES.

MR. ZIMMER: OKAY.

THANK YOU VERY MUCH.

THE COURT: MR. BURR.

VOIR DIRE EXAMINATION

BY MR. BURR:

Q. I NOTICE THAT THE TWO JURIES THAT YOU SERVED ON, YOU TOLD US ONE WAS AN ATTEMPTED MURDER, AND YOU DIDN'T -- I DON'T RECALL WHAT THE OTHER ONE WAS, BUT ONE OF THEM, THE JURY WAS UNABLE TO REACH A VERDICT; IS THAT CORRECT?

A. YES.

Q. WAS THAT THE ATTEMPTED MURDER CHARGE OR

THE --

A. THE ATTEMPTED MURDER CHARGE WAS THE ONE WE COULDN'T REACH A VERDICT ON.

THAT WAS A -- REALLY IT'S BEEN SO LONG AGO, THAT THERE WAS ONE LADY ON THE -- I DON'T SUPPOSE I SHOULD SAY THIS.

Q. THAT'S OKAY. I DON'T NEED TO KNOW ANYTHING FURTHER.

A. OKAY.

Q. BUT THE OTHER JURY, WAS THAT A CIVIL CASE OR ALSO A CRIMINAL CASE?

A. THE CIVIL CASE WAS SETTLED OUT OF COURT BEFORE WE CAME TO A DECISION.

MR. BURR: THANK YOU.

THE COURT: MR. SELVIN.

MR. SELVIN: I'M SORRY. YES. YES.

VOIR DIRE EXAMINATION

BY MR. SELVIN:

Q. GOOD MORNING, MS. WATKINS.

A. GOOD MORNING.

Q. MY NAME IS ALEXANDER SELVIN. THIS IS MR. BERGER. THIS IS OUR CLIENT CHARLES STEVENS.

OKAY.

YOU SERVED ON A PRIOR JURY BEFORE; IS THAT CORRECT?

A. (NODS HEAD UP AND DOWN.)

Q. ANYTHING ABOUT THAT EXPERIENCE THAT MAY AFFECT YOUR ABILITY -- I SHOULDN'T SAY ABILITY -- YOUR DESIRE TO SERVE ON A JURY -- AS A JUROR IN THIS PARTICULAR

CASE?

A. YES. I WOULD RATHER NOT SERVE IF THAT'S WHAT YOU'RE ASKING ME.

Q. YEAH, I GET THAT SENSE.

YOU KNOW, I'M NOT JUST LISTENING TO THE ANSWER, I GET A SENSE THAT YOU, TO ME AT LEAST IT APPEARED MORE SO THAN ANY OF THE JURORS THAT WE'VE HAD, JUST REALLY DON'T WANT TO BE ON THIS PARTICULAR JURY, OR ON A JURY; AM I CORRECT?

A. THAT'S RIGHT.

Q. OKAY.

COULD YOU GIVE ME AN HONEST ANSWER.

I KNOW YOU HAVE YOU'VE BEEN THROUGH THE PROCESS BEFORE SO YOU KNOW WHAT THIS PROCESS ENTAILS, AND YOU'LL BE MAKING A DECISION LIKE THE OTHER PROCESS.

MY QUESTION IS DO YOU THINK THAT BECAUSE YOU FEEL YOU DON'T WANT TO BE HERE FOR WHATEVER THE REASONS, WE WON'T GET INTO THEM RIGHT NOW, BUT WHATEVER THE REASONS, DO YOU THINK THAT ULTIMATELY YOU CAN BE OPEN TO MAKING THE OF KIND DECISIONS, IN TERMS OF VERDICTS, THAT ARE REQUIRED IN A CASE SUCH AS THIS?

A. YES, I DO.

Q. YOU DO? NOTWITHSTANDING YOUR FEELINGS?

A. (NODS HEAD UP AND DOWN.)

Q. YOU'RE NOT -- WELL, I SHOULD SAY YOU'RE NOT UNCOMFORTABLE WITH IT, YOU'D JUST RATHER NOT BE HERE?

A. NO. IF I CAN EXPLAIN A LITTLE BIT.

Q. PLEASE DO.

A. IT'S NOT EASY SITTING ON A JURY WHEN YOU KNOW YOU HAVE SOMEBODY ELSE'S LIFE IN YOUR HANDS.

Q. NO QUESTION.

A. AND I DIDN'T FIND IT EASY TO WALK AWAY FROM THIS.

IT'S SOMETHING THAT YOU DON'T REALLY, REALLY FORGET, AND IT'S NOT SOMETHING I REALLY RELISH DOING. THAT'S WHY I TOLD YOU I JUST WOULD LIKE TO PASS.

BUT IN ALL HONESTY, YOU DO WHAT YOU'RE SUPPOSED TO DO. THAT'S WHAT THE JURY SYSTEM IS ALL ABOUT.

Q. YEAH.

A. THAT'S THE REASON, I GUESS, I'M HERE.

I THINK THAT'S THE MAIN EXCUSE OF WHY I DON'T WANT TO BE HERE.

Q. NO, I CAN UNDERSTAND AND I CAN APPRECIATE PROBLEM.

MY CONCERN, OF COURSE, IS WHETHER SOMEHOW OR ANOTHER BECAUSE OF THAT FEELING, YOU WILL BE LEANING IN TERMS OF A CERTAIN DIRECTION. AND I DON'T KNOW WHICH DIRECTION OR WHAT -- YOU KNOW, I WISH I COULD LOOK INTO YOUR MIND, I WISH I COULD, YOU KNOW, UNDERSTAND WHAT'S GOING ON, BUT I CAN'T. I CAN'T. I HAVE TO JUST DEPEND UPON YOUR ANSWER SAYING, "OKAY. I'VE BEEN THROUGH THE PROCESS BEFORE. FOR WHATEVER REASONS, I KNOW WHAT I HAVE TO DO, I JUST DON'T WANT TO DO IT AND I THINK BECAUSE OF THESE CONFLICTS THAT I HAVE, I REALLY SHOULDN'T BE SITTING, I REALLY CAN'T -- YOU KNOW, I CAN'T BE THE KIND OF JUROR THAT WE SHOULD HAVE, MR. SELVIN."

THAT'S WHAT I WANT TO KNOW.

A. I DON'T THINK IT PROBABLY WOULD MAKE ANY DIFFERENCE. I FEEL THE RESPONSIBILITY VERY STRONGLY.

Q. NO QUESTION. NO QUESTION. OKAY.

THE OTHER QUESTION THAT I HAVE WHICH IS -- AND MY LAST QUESTION, WHICH IS A LITTLE DIFFERENT, PERHAPS, TO LIGHTEN UP THINGS A LITTLE BIT.

YOU KNOW YOU'RE UNDER OATH HERE.

WHAT'S THE BEST TIRE MADE?

A. PARDON?

Q. WHAT'S THE BEST TIRE MADE?

A. WITH OUR COMPANY, I WOULD SAY -- NOW YOU'RE SAYING "MADE."

Q. RIGHT.

A. THERE ARE SEVERAL THAT ARE VERY GOOD.

Q. YOU NOTICE EVERYONE IS LISTENING VERY CLOSE.

MR. ZIMMER: I'M TAKING NOTES AGAIN.

PROSPECTIVE JUROR WATKINS: DEPENDING ON THE TIRE AND WHAT HOW YOU'RE GOING TO USE IT, I WOULD SAY DAYTON, NITO, AND BRIDGESTONE.

MR. SELVIN: Q. WHAT WAS THE ONE IN THE --

A. NITTO.

Q. NITTO?

A. IT'S A VERY GOOD HANDLING TIRE, WEARS WELL AND GOOD PERFORMANCE, ESPECIALLY IF YOU'RE A HOT RODDER.

Q. OKAY. THANK YOU.

A. GOOD MILEAGE.

MR. SELVIN: OKAY. THANK YOU.

THE COURT: ALL RIGHT. MS. WATKINS, AS YOU HAVE MIGHT EXPECTED, BASED ON THAT LAST QUESTION, THIS COMPLETES THE QUESTIONING PROCESS AS IT RELATES TO YOU.

I WANT TO THANK YOU FOR BEING HERE AND FOR YOUR CANDOR IN ANSWERING THE QUESTIONS.

I'M GOING TO BE EXCUSING YOU THIS MORNING. I AM GOING TO BE ASKING YOU TO TO RETURN ON JANUARY 25TH AT 2:00 O'CLOCK.

I CAN ASSURE THAT YOU WE WOULDN'T BE ASKING YOU FURTHER QUESTIONS ON THAT DATE, IT'S SIMPLY THE NEXT PHASE OF THE JURY SELECTION PROCESS.

I WOULD REMIND YOU, PLEASE, DO NOT HAVE ANY CONVERSATION WITH ANYBODY ABOUT THE CASE OR YOUR POSSIBLE SERVICE AS A JUROR ON THE CASE.

AND THE BAILIFF WILL HAVE A PIECE OF PAPER FOR YOUR THAT HAS THAT DATE AND TIME FOR YOUR RECORDS.

THANKS A LOT FOR BEING HERE.

PROSPECTIVE JUROR WATKINS: ALL RIGHT.

(PAUSE IN PROCEEDINGS.)

THE CLERK: THE NEXT PROSPECTIVE JUROR IS STANLEY SLATER.

STANLEY SLATER

VOIR DIRE EXAMINATION

BY THE COURT:

Q. GOOD MORNING, MR. SALTER.

A. GOOD MORNING.

Q. THANKS NOT ONLY FOR BEING HERE, SIR, BUT AS I THANKED YOU IN ADVANCE, I THANK YOU FOR YOUR PATIENCE IN

APPENDIX M

AND SO, WITH THAT, WE'LL BEGIN WITH OUR INDIVIDUAL QUESTIONING. I WOULD INDICATE THAT MISS DOMENICHELLI WILL BE, AND HAPPENS TO BE APPROPRIATELY SITTING IN THE FIRST CHAIR, AND SO THAT'S ONLY HAPPENSTANCE. I ASSURE YOU THIS IS A PURELY RANDOM EXERCISE IN TERMS OF HOW WE ARRIVE AT THIS, AND SO WE'LL START WITH HER, AND I'LL ASK THE OTHER FIVE OF YOU TO BE GOOD ENOUGH TO WAIT OUTSIDE IN THE WITNESS ROOM AND THE BAILIFF WILL CALL YOU AS WE COME TO YOUR TIME.

THANK YOU VERY MUCH.

MARY DOMENICHELLI

VOIR DIRE EXAMINATION

BY THE COURT:

Q. OKAY. GOOD AFTERNOON.

A. HELLO.

Q. AS I'VE INDICATED, IT SO HAPPENS WE'LL BE TALKING TO YOU FIRST, AND I'M GOING TO BEGIN THAT QUESTIONING PROCESS.

THE FIRST MATTER I WANTED TO TAKE UP WITH YOU JUST VERY GENERALLY IS IN THE PUBLICITY SECTION OF THE QUESTIONNAIRE THAT YOU WERE NICE ENOUGH TO FILL OUT FOR US WHEN YOU WERE HERE PREVIOUSLY. YOU INDICATED YOU THOUGHT YOU MIGHT HAVE SOME VAGUE, USING YOUR WORDS, VAGUE RECOLLECTION OF HAVING READ SOMETHING ABOUT THIS CASE IN THE NEWSPAPER, AND THE ONLY THING YOU RECALL IS THAT SOMETHING OCCURRED.

AND I JUST WANTED TO MENTION TO YOU, IF YOU ARE SELECTED ON THIS JURY, OBVIOUSLY WE WOULD BE DIRECTING

YOU, AS WELL AS ALL THE OTHER JURORS, TO REACH ANY DECISION THAT YOU MIGHT REACH BASED SOLELY ON THE EVIDENCE AND THE TESTIMONY THAT'S PRESENTED HERE IN THE COURTROOM DURING THE TRIAL AND NOT ON INFORMATION YOU MIGHT RECEIVE FROM ANOTHER SOURCE, AND I'M SURE YOU CAN UNDERSTAND WHY IT NEEDS TO BE THAT WAY. I DON'T THINK THAT'S GOING TO BE A DIFFICULTY FOR YOU IF YOU ARE SELECTED BECAUSE YOU, APPARENTLY, HAVE NO SPECIFIC RECOLLECTION, BUT I WOULD ASK YOU TO KEEP THAT THOUGHT IN MIND AND CERTAINLY NOT BE INFLUENCED IN ANY WAY BY ANYTHING THAT YOU MIGHT RECALL FROM SOME OTHER SOURCE, BUT MAKE YOUR DECISION, IF YOU'RE ASKED TO REACH ONE HERE, STRICTLY ON THE EVIDENCE THAT'S PRESENTED HERE.

WITH THAT, IT WOULD APPEAR TO ME FROM REVIEW OF YOUR QUESTIONNAIRE THAT YOU, IF SELECTED, YOU ARE AVAILABLE TO PARTICIPATE AS A JUROR FOR THE LENGTH OF THE TRIAL, IF SELECTED; AM I RIGHT?

A. THAT'S CORRECT.

Q. OKAY. AND, ALSO, I WANT TO ASK YOU, WHEN THE ATTORNEYS AND THE DEFENDANTS WERE INTRODUCED TO YOU WHEN LAST YOU WERE HERE, WHEN THEY STOOD UP, DID YOU RECOGNIZE ANY OF THEM? DID YOU KNOW ANY OF THEM FROM BEFORE?

A. NO.

Q. OKAY. AS I JUST MENTIONED TO YOU A MOMENT AGO, I DO HAVE A FEW QUESTIONS FOR YOU ON THE TOPIC GENERALLY OF PENALTY OR PUNISHMENT, AND MORE SPECIFICALLY ON THE POSSIBILITY THAT THERE MAY BE A PENALTY PHASE IN THIS CASE, AS I SAY, SIMPLY BECAUSE OF THE NATURE OF THE

CHARGES AND IN ORDER TO GET US TO A POINT WHERE WE CAN HAVE THAT DISCUSSION, TO GET US THERE IN AS TIMELY WAY AS POSSIBLE, I'LL ASK YOU TO MAKE A COUPLE ASSUMPTIONS FOR ME STRICTLY FOR THE PURPOSE OF THESE QUESTIONS; OKAY?

I'M GOING TO ASK YOU TO ASSUME, FIRST OF ALL, THAT THE JURY SELECTION PROCESS IN THIS CASE IS COMPLETE. OBVIOUSLY THAT'S AN ASSUMPTION. WE'RE IN THE MIDDLE OF DOING THAT RIGHT NOW, BUT ASSUME THAT IT'S OVER, AND JUST ASSUME YOU'VE BEEN SELECTED AS ONE OF THE TWELVE JURORS, ASSUME FOR ME ALSO THE FIRST PHASE OF THE CASE, WHAT I DESCRIBED AS THE GUILT PHASE, HAS GONE FORWARD AND IS THROUGH, IT'S COMPLETE, AND THAT'S THE PART, AS YOU MAY REMEMBER, IN WHICH EVIDENCE IS PRESENTED TO THE JURY RELEVANT TO THE CHARGES THAT HAVE BEEN ALLEGED HERE.

NOW, ASSUME FOR ME ALSO THAT, AS I SAY, THAT PHASE IS OVER, THAT YOU'VE HAD YOUR DELIBERATIONS WITH THE OTHER JURORS, YOU'VE TALKED ABOUT THE EVIDENCE AND THE LAW THAT I WOULD INSTRUCT YOU ABOUT AT THAT POINT, AND HYPOTHETICALLY, OBVIOUSLY, THE JURY HAS ARRIVED AT A VERDICT, AND AS THAT VERDICT RELATES TO THE DEFENDANT STEVENS, ASSUME FOR ME IN MY HYPOTHETICAL THAT THE JURY HAS FOUND HIM GUILTY OF AT LEAST ONE FIRST DEGREE MURDER AND THAT AT LEAST ONE SPECIAL CIRCUMSTANCE IS TRUE.

NOW, THAT BEING THE HYPOTHETICAL VERDICT AS I JUST EXPLAINED TO YOU, PROCEDURALLY, THE CASE THEN WOULD AUTOMATICALLY MOVE INTO A SECOND PHASE. I REFER TO IT AS A PENALTY PHASE IN WHICH EVIDENCE IN ADDITION TO THE EVIDENCE ABOUT THE CRIMES WOULD BE PRESENTED TO THE JURY

FOR THE EXPRESS PURPOSE OF ASSISTING THEM IN CHOOSING THE APPROPRIATE PUNISHMENT OF WHICH, AT THAT POINT, THERE WOULD ONLY BE TWO POSSIBILITIES, AS I EXPLAINED.

BY WAY OF THAT HYPOTHETICAL VERDICT, YOU UNDERSTAND THAT BEFORE WE START THE SECOND PHASE, BEFORE THERE IS ANY EVIDENCE PRESENTED IN THAT SECOND PHASE, OBVIOUSLY THE JURY WOULD HAVE REACHED CERTAIN FINDINGS OR CONCLUSIONS BASED ON THE EVIDENCE THAT THEY'VE REVIEWED IN THE FIRST PHASE, AND IN THIS PARTICULAR CASE, THE JURY WOULD HAVE DETERMINED BEYOND A REASONABLE DOUBT THAT WITH RESPECT TO CERTAIN INCIDENTS THAT TOOK PLACE OR NEAR THE I-580 FREEWAY IN 1989, AS WE TOUCHED UPON IN THAT QUESTIONNAIRE, THAT THE DEFENDANT, CHARLES STEVENS, HERE IS GUILTY OF AT LEAST ONE FIRST DEGREE MURDER AND THAT AT LEAST ONE OF THOSE SPECIAL CIRCUMSTANCE ALLEGATION, WHETHER IT BE LYING IN WAIT OR MULTIPLE MURDER, IS TRUE. THE JURY WOULD HAVE DECIDED THAT.

THE JURY MIGHT ALSO HAVE DECIDED THAT HE WAS GUILTY OF ONE OR MORE OR ALL OF THE SIX ATTEMPTED MURDERS THAT HE'S CHARGED WITH, BUT THE POINT IS THAT THE JURY WOULD HAVE MADE THAT DECISION OR THOSE DECISIONS BEFORE THE CASE WOULD EVER GET INTO A SECOND PHASE. NOW, AS I MENTIONED TO YOU, IT WOULD BE UP TO THE JURY TO CHOOSE THE PUNISHMENT AT THE END OF THAT SECOND PHASE, BUT I ALSO STATED TO YOU THAT THE JURY IS NOT SUPPOSED TO MAKE UP THEIR MINDS AS TO THE APPROPRIATE PUNISHMENT HAVING HEARD ONLY THE EVIDENCE ABOUT THE CRIMES.

IN OTHER WORDS, YOU'RE SUPPOSED TO WAIT, PROCEED

THROUGH THAT SECOND PHASE, THAT PENALTY PHASE, LISTEN TO AND CAREFULLY CONSIDER WHATEVER ADDITIONAL EVIDENCE MAY BE PRESENTED TO YOU IN THAT PHASE. AS I EXPLAINED, THE PROSECUTION HAS THE OPPORTUNITY TO PRESENT WHAT ARE CALLED AGGRAVATING CIRCUMSTANCES OR AGGRAVATING FACTORS.

THE DEFENSE MAY PRESENT MITIGATING FACTORS OR CIRCUMSTANCES, BUT THE POINT IS YOU ARE SUPPOSED TO CONSIDER, LISTEN TO AND VERY CAREFULLY REVIEW ALL OF THAT BEFORE MAKING UP YOUR MIND AS TO THE APPROPRIATE PENALTY.

NOW, SOME PEOPLE MIGHT SAY TO ME BASED ON THE TYPE OF CRIMES, THE NATURE OF THE CRIMES, THE NUMBER OF THE CRIMES, IF YOU WILL, THAT I OUTLINED HERE, THAT IN A CASE LIKE THIS, BASED ON WHAT THEY KNOW ABOUT IT, THEY WOULD ALWAYS VOTE FOR THE DEATH PENALTY REGARDLESS OF WHATEVER ADDITIONAL INFORMATION OR EVIDENCE MIGHT BE PRESENTED TO THEM IN THE SECOND PHASE.

OTHER PEOPLE BASED ON THE SAME DISCUSSION WITH ME MIGHT SAY TO ME THAT THEY WOULD NEVER VOTE FOR A DEATH PENALTY IN A CASE LIKE THIS, BUT THE POINT IS REGARDLESS OF WHAT CIRCUMSTANCES OR EVIDENCE MIGHT BE PRESENTED IN THE SECOND PHASE.

IN OTHER WORDS, THOSE ARE PEOPLE WHO I DESCRIBED IN MY OPENING REMARKS TO YOU ARE PEOPLE WHO WOULD AUTOMATICALLY VOTE FOR ONE PENALTY OR THE OTHER BASED ONLY ON THE EVIDENCE ABOUT THE CRIMES, AND WOULD NOT KEEP AN OPEN MIND AND TO CONSIDER AND REVIEW THE OTHER EVIDENCE THAT MIGHT BE PRESENTED.

NOW, I'M BRINGING IT MORE DIRECTLY TO YOU. LET ME

ASK YOU WITH RESPECT TO THE TYPE OF CRIMES THAT I'VE OUTLINED HERE, IF YOU ARE SELECTED AS A JUROR IN THIS CASE, WOULD YOU HAVE AN OPEN MIND IN STARTING ANY PENALTY PHASE IN THIS MATTER AS TO SAY BOTH POSSIBLE PENALTY CHOICES AND WOULD YOU SERIOUSLY CONSIDER BOTH PENALTY CHOICES ONLY AFTER HAVING HEARD AND REVIEWED ALL THE EVIDENCE PRESENTED NOT ONLY IN THE FIRST PHASE OF THE CASE BUT THE SECOND PHASE AS WELL?

A. I WOULD LIKE TO THINK I WOULD HAVE AN OPEN MIND.

I AM A LITTLE NERVOUS ABOUT CAPITAL PUNISHMENT JUST BECAUSE OF THE WAY I WAS BROUGHT UP AND THAT KIND OF THING, AND I DON'T KNOW HOW DEEP THAT REALLY GOES BECAUSE I NEVER REALLY DWELLED ON IT FOR LONG PERIODS OF TIME, SO I DON'T -- I HONESTLY DON'T KNOW. I WOULD TRY TO BE VERY OPEN, BUT I HONESTLY DON'T KNOW.

Q. BEAR IN MIND NOW, CERTAINLY I, NOR ANYBODY HERE, WOULD ASK YOU HOW YOU WOULD VOTE IN A CASE LIKE THIS BECAUSE YOU HAVEN'T HEARD THE EVIDENCE.

WHAT WE DO NEED TO KNOW IS WHETHER, WHEN YOU SIT THERE NOW, BASED ON YOUR OWN STATE OF MIND, AND AS YOU SAY, CONSIDERING OTHER FACTORS THAT MAY HAVE EVOLVED FROM WHAT YOUR STATE OF MIND IS, WHETHER, AS YOU SIT THERE NOW, IN REALITY, YOU HAVE EXCLUDED ONE PENALTY OR THE OTHER REGARDLESS OF WHAT EVIDENCE MIGHT BE PRESENTED IN THAT SECOND PHASE.

CAN YOU ASSIST ME THERE? HAVE YOU IN YOUR OWN MIND EXCLUDED THE DEATH PENALTY, FOR EXAMPLE, BASED ON WHAT YOU HEARD ABOUT THE CASE SO FAR?

A. NO.
Q. ALL RIGHT. DO YOU HAVE AN OPEN MIND AS TO THE POSSIBILITY OF IMPOSING THAT PENALTY IF YOU FELT IT WAS THE APPROPRIATE PENALTY AFTER YOU HEARD EVERYTHING IN BOTH PHASES OF THE CASE?
A. I THINK I WOULD.
Q. ALL RIGHT. NOW, THIS PROCESS THAT I'M TALKING ABOUT, AND BY THE VERY NATURE OF THE PROCESS, THE QUESTIONS AND THE ANSWERS CAN BE DIFFICULT, BUT THE PROCESS THAT I'M TALKING ABOUT IS A PROCESS, AND I'M TALKING NOW ABOUT THE DECISION MAKING PROCESS THAT MIGHT BE INVOLVED IN THE SECOND PHASE OF THE CASE. I TALKED TO YOU ABOUT THE PRESENTATION, POSSIBLY, OF WHAT ARE CALLED AGGRAVATING FACTORS BY ONE SIDE, MITIGATING FACTORS BY THE OTHER SIDE. BUT I DID NOT MEAN TO SUGGEST BY THAT DISCUSSION THAT THE DECISION MAKING PROCESS IS ONE IN WHICH IS SCIENTIFIC OR MATHEMATICAL IN NATURE. IT'S NOT A QUESTION OF SIMPLY ADDING UP A CERTAIN NUMBER OF FACTORS ON ONE SIDE OR THE OTHER OF AN IMAGINARY SCALE AND REACHING A DECISION THAT WAY, AS YOU CAN APPRECIATE IT, FROM THE THINKING YOU'VE DONE ABOUT IT, IT'S A SUBJECTIVE PROCESS.
NOW, THE COURT WOULD GIVE YOU CERTAIN GUIDELINES AT THE END OF THE SECOND PHASE, IF THERE IS ONE, AS TO HOW TO CONSIDER THE EVIDENCE THAT MIGHT BE PRESENTED, AND YOU WOULD BE INSTRUCTED IN PART THAT TO RETURN A JUDGMENT OF DEATH, YOU, PERSONALLY, WOULD HAVE TO BE PERSUADED THAT THE EVIDENCE IN AGGRAVATION IS SO SUBSTANTIAL IN

COMPARISON WITH THE EVIDENCE IN MITIGATION THAT IT WARRANTS DEATH INSTEAD OF LIFE WITHOUT PAROLE.

NOW, HAVING HEARD ALL THIS, IS IT YOUR BELIEF, YOUR HONEST BELIEF THAT YOU WOULD BE ABLE TO FOLLOW THE COURT'S INSTRUCTIONS AND THAT YOU WOULD BE OPEN TO THE POSSIBILITY OF IMPOSING EITHER PENALTY IN THIS CASE DEPENDING UPON ALL THE EVIDENCE THAT WAS PRESENTED?

A. I THINK SO.

Q. ALL RIGHT. HERE'S MY LAST QUESTION FOR YOU. AS AN INDIVIDUAL, AS A PERSON, BUT IN THIS CONTEXT OBVIOUSLY AS A PERSON WHO COULD CONCEIVABLY BE ON THIS JURY, COULD YOU, AS A PERSON, ACTUALLY CAST A VOTE, TO IMPOSE EITHER OF THOSE TWO PENALTIES, THE DEATH PENALTY OR LIFE IN PRISON WITHOUT THE POSSIBILITY OF PAROLE, IF AFTER HAVING HEARD ALL THE EVIDENCE YOU FELT THAT WAS THE APPROPRIATE PENALTY, COULD YOU CAST THAT VOTE?

A. I THINK SO.

THE COURT: OKAY, MR. BURR.

MR. BURR: THANK YOU.

VOIR DIRE EXAMINATION

BY MR. BURR:

Q. GOOD AFTERNOON.

WHEN YOU HEARD THAT THIS CASE INVOLVED THE DEATH PENALTY, HOW DID YOU FEEL?

A. NERVOUS.

Q. I'LL ASK YOU TO POINT THAT AT YOUR MOUTH. IF YOU POINT THE END OF IT AT YOUR MOUTH.

A. THIS WAY?

Q. YES, IT MAKES ALL THE DIFFERENCE IN THE WORLD.

SINCE YOU WERE LAST HERE, HAVE YOU THOUGHT ABOUT BEING PLACED IN THIS SITUATION OF VOTING TO END ANOTHER HUMAN BEING'S LIFE?

A. YES.

Q. WHAT HAVE YOU THOUGHT?

A. I'M NERVOUS ABOUT IT. I MEAN, I'M NOT -- I HAVE A SLIGHT PROBLEM WITH, YOU KNOW, HAVING THAT KIND OF, NOT AUTHORITY, IF YOU WILL, BUT THAT KIND OF POSSIBILITY, JUDGMENT.

Q. LET ME REACQUAINT YOU WITH THE FACTS OF THE CASE, NOT THE FACTS SO MUCH, BUT WHO'S WHO AND WHAT'S GOING ON.

OUR CLERK READ THE 10 CRIMES. OF THOSE 10 CRIMES, THE DEFENDANT SEATED CLOSEST TO YOU, MR. CLARK HERE, HE'S CHARGED WITH ONE OF THEM. IT'S VERY SERIOUS. HE'S CHARGED WITH MURDERING SOMEBODY.

THE MAN AT THE END OF THE TABLE WITH THE GLASSES ON HERE, THIS IS MR. STEVENS. HE'S CHARGED WITH ALL 10 CRIMES. MURDERING FOUR PEOPLE AND ATTEMPTING TO MURDER SIX OTHERS.

MR. CLARK, WE'RE NOT SEEKING THE DEATH PENALTY FOR HIS CRIME.

MR. STEVENS, WE ARE SEEKING THE DEATH PENALTY.

NOW, A NUMBER OF PEOPLE WHO, OVER THEIR MORNING COFFEE, READING A NEWSPAPER, COUNT THE LIST OF CRIMES THAT THE DEFENDANT STEVENS IS CHARGED WITH MIGHT SAY, "YOU KNOW, WELL, IF HE DID THESE THINGS, THAT'S WHAT THE DEATH PENALTY IS FOR. THAT'S WHY I VOTED FOR THE DEATH

PENALTY."

THAT PERSON COMES INTO THIS COURTROOM, OCCUPIES ONE OF THESE CHAIRS, AND THERE'S A REAL PERSON NOT 40 FEET AWAY, IT'S NOT UNUSUAL FOR PEOPLE TO REEVALUATE, AND BECAUSE NOW WE'RE NOT JUST TALKING IN THE ABSTRACT, WE'RE TALKING ABOUT A REAL PERSON, A REAL LIFE.

AND EVEN THOUGH THEY MIGHT SUPPORT THE DEATH PENALTY AND TALK REAL LOUD AND STRONG ABOUT IT, THERE'S A SOBERING EXPERIENCE OF BEING HERE AND BEING CONFRONTED WITH THE IDEA THAT IT'S NO LONGER IN THE ABSTRACT. WE'RE TALKING ABOUT THE REAL THING, AND SOME PEOPLE, BECAUSE OF PRIOR RELIGIOUS TRAINING OR BECAUSE OF THEIR OWN ETHICAL SYSTEM OR THEIR OWN VALUES OR BECAUSE OF WHAT'S GOING ON IN THEIR LIFE AT THIS POINT IN TIME, THINGS ARE STRESSFUL ENOUGH, THEY DON'T NEED THIS KIND OF BAGGAGE. OR SOME PEOPLE, JUST BECAUSE OF THEIR OWN DECISION MAKING PROCESSES, THAT IT'S TOUGH ENOUGH TO MAKE A DECISION THAT AFFECTS MY OWN LIFE, LET ALONE WHETHER OR NOT SOMEONE ELSE SHOULD DIE, AND TELLS US THAT, "HEY, I'M GETTING IN OVER MY HEAD. THIS IS SOMETHING I CAN'T DO."

AND A LOT OF PEOPLE, WHEN THEY COME IN HERE, THINK THERE'S A RIGHT OR WRONG ANSWER, BUT THE ONLY RIGHT OR WRONG ANSWER IS HOW THEY FEEL AND THE TRUTH. BECAUSE THIS IS THE ONLY TIME WE GET TO TALK WITH FOLKS, IT'S THE ONLY TIME TO FIND OUT WHETHER THIS IS AN APPROPRIATE CASE FOR THEM TO SIT ON, AND IF THIS IS A CASE THAT YOU CAN'T IMPOSE EITHER OF THE TWO PENALTIES, THEN, IT'S NOT AN APPROPRIATE CASE FOR YOU TO SIT ON.

WHAT ARE YOUR THOUGHTS?

A. I -- I WAS TRAINED WHEN I GREW UP, YOU KNOW, CATHOLIC ENVIRONMENT, WHERE CAPITAL PUNISHMENT WAS A NO NO.

SINCE I HAVE BECOME OLDER, THERE ARE CERTAIN SITUATIONS WHERE IT DOESN'T OFFEND ME TO SEE IT HAPPENING.

I REALLY DON'T KNOW. I NEVER REALLY FELT THAT STRONGLY OR BEEN INVOLVED IN ANYTHING THAT WOULD ALLOW ME TO HAVE TO MAKE A DECISION LIKE THAT. I MEAN, I DISCUSSED IT WITH MY HUSBAND, WHO'S ALL FOR IT, AND I STILL DON'T KNOW. I MEAN, I DON'T -- I'M NOT REAL STRONG ABOUT -- I FEEL -- I FEEL INADEQUATE TO KIND OF MAKE THAT DETERMINATION IN THOSE THINGS. I DON'T KNOW WHETHER THAT WOULD FOLLOW ME ALL THE WAY OR WHETHER IT'S JUST SOMETHING I FEEL NOW BECAUSE I DON'T KNOW ANYTHING REALLY ABOUT THE CASE.

Q. I DON'T THINK ANYONE WHO WALKS INTO THIS SITUATION IS GOING TO BE HONEST WITH THEMSELVES, WOULDN'T ADMIT THAT THIS IS A DIFFICULT SITUATION TO BE IN.

THERE ARE SOME PEOPLE WHO WILL SAY, "YOU KNOW, I DON'T LIKE THE IDEA OF VOTING TO END ANOTHER HUMAN BEING'S LIFE, BUT I COULD DO IT."

AND THERE ARE OTHERS WHO SAY, "IT'S NOT ONLY THAT I DON'T LIKE THE IDEA, JUST KNOWING MYSELF, AS ONLY I COULD KNOW MYSELF, REALISTICALLY, THERE'S NO WAY I COULD DO THAT." AND IF THAT'S HOW YOU FEEL, THEN THIS IS NOT AN APPROPRIATE CASE FOR YOU TO SIT ON.

SO I GUESS THAT'S REALLY WHAT WE'RE TRYING TO FIND

OUT. ONLY YOU CAN TELL US THAT, AND I DO GET A GREAT SENSE OF UNEASINESS.

A. I AM. I'M VERY UNEASY ABOUT IT. I WOULD RATHER NOT HAVE TO BE IN A POSITION TO MAKE THAT KIND OF A JUDGMENT.

THE COURT: WE CERTAINLY APPRECIATE THAT AND WHAT MR. BURR IS TRYING TO GET TO, AND WHAT I'M TRYING TO GET TO, AND THE OTHER QUESTIONS WILL GET TO, IS IF CALLED UPON TO MAKE THAT DECISION, AS A JUROR, RECOGNIZING YOUR PREFERENCE AND EVERYTHING ELSE YOU TOLD US, AS YOU SIT THERE NOW, DO YOU FEEL THAT YOU COULD MAKE THAT DECISION AND VOTE FOR EITHER PENALTY IF YOU FELT IT WAS THE APPROPRIATE PENALTY? THAT'S WHAT WE NEED, THE "COULD YOU DO THAT?"

PROSPECTIVE JUROR DOMENICHELLI: I THINK I COULD.

MR. BURR: Q. SOMETIMES WORDS, YOU FEEL IT'S AN APPROPRIATE PENALTY, THERE ARE SOME PEOPLE WHO SAY, "YEAH, IN THE ABSTRACT, I COULD, IF I THINK IT'S AN APPROPRIATE PENALTY."

BUT IN REALITY, THE CASE, THIS TYPE OF CASE COULD NEVER GET TO THAT POINT, THEY WOULD NEVER BELIEVE IT TO BE AN APPROPRIATE PENALTY BECAUSE OF THEIR ETHICAL BACKGROUND OR MORAL FEELINGS, RELIGIOUS BELIEFS THAT MAY BE REKINDLED. WHEN WE SAY, IF YOU THINK IT'S AN APPROPRIATE PENALTY, GIVEN WHAT WE'RE TALKING ABOUT HERE, SEEKING THE DEATH PENALTY FOR KILLING ANOTHER HUMAN BEING, DO YOU THINK THAT THAT IS A REAL SITUATION THAT YOU COULD ACTUALLY VOTE FOR?

A. YES, I DO.
Q. ALL RIGHT. I ASK THIS QUESTION OF EVERYBODY, BECAUSE IF WE GET TO THE PENALTY PHASE, I'M GOING TO STAND HERE AND URGE THE JURY TO IMPOSE THE DEATH PENALTY ON THE MAN AT THE END OF THE TABLE OVER THERE.
A. UH-HUH.
Q. AND BECAUSE IT'S A SITUATION THAT MANY PEOPLE HAVEN'T REALLY THOUGHT TOO MUCH ABOUT, I ASK THIS QUESTION TO TRY TO PLACE YOU THERE, BECAUSE IT'S NOT FAIR TO YOU AND IT'S NOT FAIR TO THE PEOPLE THAT I REPRESENT IF WE GET TO THAT POINT IN TIME AND SAY, "I CAN'T DO THIS," BECAUSE OTHERWISE, I'M JUST TALKING TO A BLANK WALL, IT'S NOT A FAIR TRIAL.

ASSUME YOU'RE ON THE JURY, ASSUME THAT WE'RE IN THE PENALTY PHASE, YOU'VE HEARD ALL THE EVIDENCE, AND YOU'RE DELIBERATING WITH THE OTHER JURORS AS TO WHAT THE PENALTY SHOULD BE IMPOSED.

IN TALKING WITH THE OTHER ELEVEN, IT BECOMES CLEAR TO YOU THAT THEY HAVE REACHED A POINT IN THEIR OWN MIND THAT THEY HAVE DECIDED THAT THE PROPER PENALTY HE SHOULD RECEIVE FOR HIS CRIMES IS DEATH. AND YOU MULL IT OVER SOME MORE IN YOUR MIND, YOU GO OVER THE EVIDENCE IN YOUR MIND MORE, PERHAPS TALK WITH THE OTHER ELEVEN JURORS A LITTLE BIT MORE, AND FINALLY, YOU'VE REACHED A POINT WHERE YOU DECIDE, "YES, FROM WHAT HE'S DONE, THIS IS A PROPER CRIME FOR THE DEATH PENALTY."

AND IF YOU VOTE FOR DEATH, CAST THE TWELFTH VOTE, WHICH IS WHAT WE NEED, WE NEED TWELVE PEOPLE, WE NEED A

UNANIMOUS VERDICT, AND YOUR TWELFTH VOTE IS THE FIRST STEP THAT WILL TAKE THE MAN AT THE END OF THE TABLE IN THE GLASSES DOWN THERE FROM THIS COURTROOM, ACROSS THE BAY TO SAN QUENTIN WHERE SOMEWHERE, SOMETIME DOWN THE ROAD, HE'LL BE BROUGHT INTO ONE OF TWO DEATH CHAMBERS. IT'S HIS CHOICE WHICH ONE.

IN ONE HE'LL BE STRAPPED DOWN ON A GURNEY AND THE NEEDLE WILL BE STUCK INTO HIS BODY AND POISON WILL FLOW THROUGH THAT NEEDLE INTO HIS BODY UNTIL HE'S DEAD.

THE OTHER ONE IS THE GAS CHAMBER WHERE HE'LL BE STRAPPED IN THE CHAIR, SEALED INTO THAT CHAMBER AND FORCED TO BREATHE LETHAL GAS UNTIL HE'S DEAD.

KNOWING THAT, COULD YOU CAST THAT TWELFTH VOTE?

A. UH-HUH.

Q. WHEN WE TALK ABOUT AN APPROPRIATE CASE, BECAUSE YOU'VE INDICATED THERE'S SOME CASES, WHAT KINDS OF CASES ARE YOU ENVISIONING THAT YOU COULD VOTE, ACTUALLY VOTE FOR THE DEATH PENALTY?

A. WELL, IT WOULD OBVIOUSLY HAVE TO BE MURDER OR MULTIPLES THEREOF.

I CAN'T THINK OF MANY OTHER REASONS REALLY.

Q. AND IN THIS PARTICULAR CASE, WE TALK IN TERMS OF FOUR MURDERS AND THE ATTEMPT TO MURDER SIX OTHER PEOPLE. HE MAY BE CONVICTED OF ALL THOSE CRIMES. WE MAY GET IN A SITUATION WHERE THE JURY CONVICTS HIM OF ONLY ONE MURDER WITH THE ONE SPECIAL CIRCUMSTANCE OF LYING IN WAIT. IF WE GET INTO THAT TYPE OF SITUATION, DOES IT STILL FALL INTO THE CATEGORY OF THE TYPE OF CASE THAT YOU COULD ACTUALLY

VOTE FOR THE DEATH PENALTY OR WOULD YOU SAY, "THAT'S SERIOUS, BUT GIVEN THE OPTION, I'D ALWAYS VOTE FOR LIFE WITHOUT PAROLE."

A. I DON'T -- I COULDN'T MAKE UP MY MIND JUST BASED ON THAT, NO.

Q. THE IDEA OF, IF WE ONLY CONVICT HIM OF ONE MURDER WITH A SPECIAL CIRCUMSTANCE, IS THAT A SITUATION THAT YOU COULD IMPOSE THE DEATH PENALTY FOR?

A. POSSIBLY, UH-HUH.

MR. BURR: THANK YOU.

THE COURT: MR. SELVIN.

MR. SELVIN: YES.

VOIR DIRE EXAMINATION

BY MR. SELVIN:

Q. GOOD AFTERNOON, MISS DOMENICHELLI.

A. DOMENICHELLI.

Q. WITH A HARD K?

A. RIGHT.

Q. MY NAME IS ALEXANDER SELVIN, MY CO-COUNSEL, MICHAEL BERGER, OUR CLIENT, CHARLES STEVENS.

I THINK YOU MADE YOUR DECISION PRETTY MUCH CLEAR WITH RESPECT TO YOUR ABILITY TO IMPOSE EITHER PUNISHMENT.

THE QUESTIONS ASKED BY MR. BURR ADDRESS THEMSELVES TO THE QUESTION OF YOUR CAPACITY IN A APPROPRIATE CIRCUMSTANCE TO IMPOSE THE DEATH PENALTY, AND YOU INDICATED, "YES."

MY QUESTION IS THIS. IF AFTER HEARING ALL THE EVIDENCE IN THE PENALTY PHASE YOU FELT THAT THE

APPROPRIATE PENALTY WAS LIFE WITHOUT POSSIBILITY OF PAROLE, WOULD YOU BE ABLE TO IMPOSE THAT PARTICULAR PENALTY?

A. THERE WOULD BE TWO CHOICES, RIGHT.

Q. YES?

A. YEAH, YES.

Q. THE DEATH PENALTY AND LIFE WITHOUT POSSIBILITY, THOSE ARE THE ONLY TWO CHOICES.

A. OKAY.

Q. AND YOU'VE INDICATED TO MR. BURR, IF YOU FELT THAT IT WAS APPROPRIATE, YOU COULD IMPOSE THE DEATH PENALTY.

A. RIGHT.

Q. AND I'M ASKING, CONVERSELY, IF YOU FELT THAT IT WAS FAIR, YOU COULD IMPOSE --

A. YES.

Q. IMPOSE LIFE WITHOUT POSSIBILITY OF PAROLE?

A. THAT'S CORRECT.

Q. AND YOU UNDERSTAND THAT LIFE WITHOUT POSSIBILITY OF PAROLE, AS THE LAW PRESENTLY STANDS, THE PRESENT LAW IS IN FACT LIFE WITHOUT POSSIBILITY OF PAROLE?

A. UH-HUH.

Q. MR. STEVENS WOULD NEVER GET OUT OF PRISON IF THAT'S THE PENALTY THAT YOU IMPOSE.

A. (NODS HEAD.)

Q. ONE MORE THING. WE'VE BEEN TALKING PENALTIES AND THAT'S, IN A SENSE, WE'VE BEEN PUTTING THE CART BEFORE THE HORSE, BECAUSE OBVIOUSLY, BEFORE WE REACH THAT STAGE, YOU AND THE OTHER ELEVEN JURORS MUST HAVE FOUND OUR CLIENT

GUILTY OF CERTAIN CRIMES.

AS YOU HAVE HEARD FROM MR. BURR AND AS THE JUDGE HAS READ THE CHARGES, WE HAVE 10 CRIMES. YOUR DUTY WITH THE REST OF THE JURORS IS TO DETERMINE IF THEY'RE SUFFICIENT EVIDENCE TO CONVICT OUR CLIENT WITH RESPECT TO EACH AND EVERY CRIME CHARGED; DO YOU UNDERSTAND THAT?

A. YES, I DO.

Q. YOU HAVE TO ANSWER --

A. YES, I COULD.

Q. AND IT'S POSSIBLE THAT YOU MAY FEEL HE COMMITTED ONE MURDER AND ONE ASSAULT OR TWO MURDERS, TWO ASSAULT OR WHATEVER COMBINATIONS --

A. UH-HUH.

Q. AND THE ONLY THING I ASK YOU IS THAT, AS YOU SIT -- I'D ASK THAT WHEN YOU'RE SITTING AS A JUROR, THAT YOU CONSIDER THE EVIDENCE THAT'S PRESENTED TO YOU VERY CAREFULLY IN ALLOCATING WHAT LIABILITY OR NONLIABILITY TO EACH PARTICULAR CRIME, TO EACH PARTICULAR CRIME, AND YOU'LL DO THAT?

A. YES, I WILL.

Q. BECAUSE THERE'S A NATURAL TENDENCY WHEN YOU HAVE 10 CHARGES AND YOU HAVE -- AND THE CRIMES ARE VERY SIMILAR THAT THERE'S A LOT OF FREEWAY TYPE KILLINGS, THAT ONCE YOU FIND HIM GUILTY OF ONE AND SAY, "WELL, HE DID THIS AND THE OTHER ONE IS SIMILAR, I DON'T KNOW IF MR. BURR HAS PROVEN BEYOND A REASONABLE DOUBT TO A MORAL CERTAINLY, BUT IT'S CLOSE ENOUGH, AND I'LL GIVE HIM THE BENEFIT."

THAT'S NOT THE WAY IT WORKS. THE JUDGE WILL

INSTRUCT YOU AS TO THE CONCEPT OF BEYOND A REASONABLE DOUBT TO A MORAL CERTAINTY. WHAT THAT MEANS, WE'LL ARGUE THAT ISSUE AND THAT'LL BE YOUR DUTY TO DECIDE THAT.

A. I UNDERSTAND.

MR. SELVIN: THANK YOU.

THE COURT: ALL RIGHT. MR. ZIMMER, OTHER SUBJECTS?

MR. ZIMMER: THANK YOU.

VOIR DIRE EXAMINATION

BY MR. ZIMMER:

Q. GOOD AFTERNOON.

ONE MORE TO GO, MAYBE. THERE MAY BE MORE QUESTIONS BY THE OTHER ATTORNEYS.

I'M RICHARD ZIMMER, THIS IS MY CLIENT, RICHARD CLARK, DIRECTLY TO MY LEFT.

AS I THINK YOU KNOW, MR. CLARK IS NOT BEING CHARGED WITH A CRIME THAT WOULD HAVE HIM FACING THE DEATH PENALTY, EVEN IF HE SHOULD GET CONVICTED, SO I'M NOT GOING THE ASK YOU ANY MORE QUESTIONS ABOUT YOUR DEATH PENALTY VIEWS.

A. THANK YOU.

Q. THERE IS, HOWEVER, GOING TO BE A TRIAL WITH RESPECT TO MR. CLARK WHICH IS A VERY IMPORTANT TRIAL WHICH DEALS WITH HIS GUILT OR INNOCENCE WITH THE CRIME WITH WHICH HE'S CHARGED, AND SOMETIMES BECAUSE WE START TALKING TO JURORS ABOUT PENALTY FROM THE BEGINNING, AND ALL YOUR CONCENTRATION DURING THIS PROCESS IS ON THE PENALTY PHASE OF THE CASE, WE TEND TO FORGET ABOUT THE GUILT OR INNOCENCE PART OF THE CASE, AND I'LL BE ARGUING VERY STRONGLY THAT HE SHOULD BE FOUND NOT GUILTY AFTER YOU HEAR

THE EVIDENCE.

AND WITH RESPECT TO THAT PHASE OF THE CASE, THERE IS ONE AREA IN THE QUESTIONNAIRE I'D LIKE TO TOUCH ADDITIONAL BASES WITH YOU ON, THAT WAS AN AREA WHERE WE WERE TRYING TO FIND OUT IF JURORS HAD ANY STRONG FEELINGS ONE WAY OR THE OTHER ABOUT THE VALUE OF TESTIMONY FROM PSYCHIATRISTS OR PSYCHOLOGISTS IN CRIMINAL TRIALS, AND YOU'RE SMILING A LITTLE BIT. YOU DIDN'T INDICATE ANY STRONG FEELING ON YOUR QUESTIONNAIRE. I'M CURIOUS NOW WHERE THAT SMILE COMES FROM.

A. I -- I SORT OF DOWNPLAY THE PSYCHIATRIC APPROACH A LOT. THE COUNSELING THAT HAPPENS WHEN THEY'RE LIKE, YOU KNOW, CRIMES WITH SCHOOL CHILDREN, YOU KNOW, THAT KIND OF THING, REALLY KIND OF BOTHERS ME A LITTLE BIT.

Q. WHEN YOU FIND PEOPLE -- LET ME SEE IF I COULD MAKE SURE I UNDERSTAND WHAT YOU'RE TELLING ME, SO CORRECT ME IF I'M WRONG.

A. OKAY.

Q. IS WHAT BOTHERS YOU THAT SOMETIMES YOU SEE PEOPLE HAVING COMMITTED CRIMES AND THEN RECEIVING COUNSELING AS A SENTENCE?

A. NO.

Q. OKAY.

A. JUST THE GENERAL APPROACH TO PSYCHIATRY IN THIS COUNTRY, I THINK IT'S USED TOO MUCH AS A CRUTCH.

Q. I SEE. YOU SAY AS A CRUTCH AS OPPOSED -- PEOPLE BLAMING THE WAY THEY WERE BROUGHT UP FOR DOING WHAT THEY HAD DONE AS OPPOSED TO TAKING RESPONSIBILITY THEMSELVES?

A. PARTLY. THERE'S ALWAYS A COUNSELOR FOR SOME GIVEN AREA OF RESPONSIBILITY. I JUST THINK IT'S OVERPLAYED.

Q. LET ME FOCUS ON JUST A LITTLE DIFFERENT ASPECT OF PERHAPS WHAT PSYCHIATRISTS OR PSYCHOLOGISTS DO. SOMETIMES IF THERE WERE TO BE SUCH TESTIMONY PRESENTED IN THIS CASE, IT WOULD PROBABLY HAVE TO DO WITH TRYING TO ASSIST THE JURY IN MAKING A DECISION AS TO WHY SOMEBODY ENGAGED IN CERTAIN BEHAVIOR OR WHY THEY DID WHAT THEY DID, AND PSYCHOLOGISTS AND PSYCHIATRISTS OBVIOUSLY HAVE THEORIES AS TO WHAT SHAPES BEHAVIOR OR WHY PEOPLE ARE THE WAY THEY ARE. AND PUTTING ASIDE FOR THE MOMENT THE QUESTION WHETHER OR NOT YOU'RE TRYING TO EXCUSE CONDUCT BY THOSE THEORIES, I'M CURIOUS IF YOU THINK THERE'S ANY VALIDITY TO A PSYCHIATRIST'S OR PSYCHOLOGIST'S OPINION AS TO WHY SOMEBODY DID SOMETHING OR WHAT MOTIVATED THEIR BEHAVIOR.

A. WELL, I'M OPEN ENOUGH TO LISTEN TO SOMETHING LIKE THAT.

MR. ZIMMER: THANK YOU VERY MUCH.

THE COURT: MR. BURR.

MR. BURR: I HAVE NOTHING FURTHER. THANK YOU.

THE COURT: MR. BERGER.

MR. BERGER: NO, I HAVE NO QUESTIONS. THANK YOU.

THE COURT: THANK YOU VERY MUCH FOR BEING WITH US THIS AFTERNOON. WE APPRECIATE IT. THAT COMPLETES THE QUESTIONING PROCESS AS IT RELATES TO YOU PERSONALLY.

I'LL EXCUSE YOU NOW AND ASK YOU TO RETURN TO THIS COURTROOM NEXT MONDAY, THAT'S JANUARY 25TH AT 2:00 O'CLOCK IN THE AFTERNOON. THE BAILIFF WILL GIVE YOU A PIECE OF

PAPER THAT HAS THAT DATE AND TIME ON IT. AND THAT'S, WE'RE NOT GOING TO ASK YOU ANY MORE QUESTIONS THAT DAY. IT'S SIMPLY THE NEXT PHASE OF THE JURY SELECTION PROCESS.

I WILL REMIND YOU, PLEASE, BETWEEN NOW AND THEN, HAVE NO DISCUSSION ABOUT THE CASE, ANYTHING YOU LEARNED ABOUT IT SO FAR OR YOUR PROSPECTIVE SERVICE AS A JUROR WITH ANYBODY, AND DON'T LET ANYBODY TALK TO YOU ABOUT IT.

WE'LL SEE YOU ON JANUARY 25TH AT 2:00 O'CLOCK. THANK YOU.

THE CLERK: THE NEXT PROSPECTIVE JUROR IS THEODORE NELSON.

THEODORE NELSON

VOIR DIRE EXAMINATION

BY THE COURT:

Q. IT'S A BIT OF DIFFERENT WAY TO SPEND YOUR BIRTHDAY; ISN'T IT, SIR?

A. YEAH, WASN'T MY CHOICE.

Q. WELL, WE APPRECIATE YOU BEING HERE. LET ME JUST SAY TO YOU THAT WE ARE GOING TO ASK YOU A FEW QUESTIONS RELATIVE TO YOUR QUALIFICATIONS TO SERVE ON THIS JURY, AND I'M GOING TO START THAT PROCESS.

BEFORE WE DO, I HAD JUST A COUPLE FOLLOW-UP QUESTIONS FOR YOU. IN YOUR QUESTIONNAIRE YOU INDICATED IN REFERENCE TO YOUR AVAILABILITY TO PARTICIPATE AS A JUROR HERE, YOU MADE REFERENCE TO YOUR WIFE'S HEALTH, AND I WANT TO ASK YOU A BIT MORE ABOUT THAT.

WHAT IS THE SITUATION, AND PARTICULARLY, I DON'T MEAN TO PROBE. I'M SIMPLY -- WHAT I'M DIRECTING THE

APPENDIX N

PROCEEDINGS

MONDAY, JANUARY 25, 1993 AFTERNOON SESSION

(THE FOLLOWING PROCEEDING WERE HAD OUTSIDE THE PRESENCE OF THE PROSPECTIVE JURORS.)

THE COURT: WE'LL GO INTO SESSION BRIEFLY IN THE MATTER OF THE PEOPLE VS. STEVENS AND CLARK.

THE RECORD WILL REFLECT THAT ALL PARTIES ARE PRESENT.

JUST FOR PURPOSES OF OUR RECORD, COUNSEL, IT'S MY UNDERSTANDING THAT THE DEFENDANTS ARE PREPARED TO WAIVE THEIR JOINT CHALLENGES AND THE COURT WILL BE AWARDING EACH DEFENDANT 15 INDIVIDUAL CHALLENGES; THAT'S MY UNDERSTANDING, CORRECT, IN THAT REGARD, MR. SELVIN?

MR. SELVIN: THAT'S CORRECT, YOUR HONOR.

THE COURT: MR. ZIMMER?

MR. ZIMMER: THAT'S RIGHT.

THE COURT: THAT'S AGREEABLE, MR. BURR?

MR. BURR: YES, YOUR HONOR.

THE COURT: ALL RIGHT. AND THAT BEING THE CASE, MISS CLERK, THEN, WE WILL CALL THE JURY PANEL IN FOR THE PURPOSE OF CALLING THE ROLE.

(THE FOLLOWING PROCEEDINGS WERE HAD IN THE PRESENCE OF THE PROSPECTIVE JURORS.)

THE COURT: VERY WELL. WE'LL CALL THE MATTER OF THE PEOPLE VERSUS STEVENS AND CLARK.

THE RECORD WILL REFLECT THAT BOTH DEFENDANTS ARE PRESENT HERE AS ARE ALL COUNSEL AS ARE ALL MEMBERS OF OUR

JURY PANEL, THE PROSPECTIVE JURORS.

AT THIS TIME, LADIES AND GENTLEMEN, FIRST OF ALL, LET ME WISH YOU ALL A GOOD AFTERNOON AND WE WELCOME YOU ALL BACK TO DEPARTMENT 6 OF THE ALAMEDA COUNTY SUPERIOR COURT. I WANT TO, ONCE AGAIN, OF COURSE, THANK YOU FOR YOUR PRESENCE HERE TODAY.

AS I HAVE PREVIOUSLY, AS WELL AS ON THOSE PREVIOUS OCCASIONS WHEN YOU HAVE BEEN ASKED TO BE HERE WITH US FOR THE PURPOSE OF ASSISTING US, AS I'VE EXPLAINED, IN THE SELECTION OF A TRIAL JURY IN THIS CASE, AS I SAY, I THANK YOU ALL VERY MUCH FOR YOUR COOPERATION IN THAT REGARD. OBVIOUSLY, THE SYSTEM OF JURY SELECTION THAT WE HAVE ADOPTED COULD NOT BE SUCCESSFUL WERE IT NOT FOR THE COOPERATION OF ALL OF YOU, AND WE VERY MUCH APPRECIATE THAT.

I WILL TELL YOU THAT WITH REGARD TO THIS AFTERNOON, BY WAY OF EXPLANATION THAT, AS I TOLD EACH OF YOU WHEN YOU WERE HERE WITH US INDIVIDUALLY, THAT THE INDIVIDUAL QUESTIONING SEGMENT IN WHICH EACH OF YOU PARTICIPATED IN WHICH IT WAS DETERMINED THAT EACH OF YOU WOULD BE ABLE BY WAY OF QUALIFICATION TO SERVE AS A JUROR IN THIS CASE, THAT PHASE OF THE JURY SELECTION PROCESS IS NOW COMPLETE. TODAY IS WHEN THE ACTUAL SELECTION OF A TRIAL JURY IN THIS CASE WILL GO FORWARD.

IN A MOMENT, I'M GOING TO BE ASKING THE CLERK TO CALL THE FIRST 12 NAMES WHICH HAVE BEEN RANDOMLY SELECTED. THOSE NAMES WILL BE CALLED. IF YOUR NAME IS ONE OF THOSE, YOU'LL BE ASKED TO COME FORWARD AND BE DIRECTED TO A

PARTICULAR SEAT HERE IN THE JURY BOX BY THE BAILIFF.

AS I HAVE SAID, THE QUESTIONING OF PROSPECTIVE JURORS IS COMPLETE, SO THERE WON'T BE FURTHER QUESTIONS DIRECTED TOWARDS YOU GENERALLY.

HOWEVER, BOTH SIDES NOW HAVE AN OPPORTUNITY TO EXERCISE WHAT ARE KNOWN AS PEREMPTORY CHALLENGES. A PEREMPTORY CHALLENGE IS ONE WHICH MAY BE EXERCISED BY A PARTY TO AN ACTION WITHOUT ASSIGNING ANY REASON FOR THAT CHALLENGE. DO NOT FEEL AT ALL EMBARRASSED BECAUSE OF THE EXERCISE OF PEREMPTORY CHALLENGE BY COUNSEL. IT IS THE RIGHT OF LITIGANTS TO HAVE A TRIAL BY JURY OF THEIR OWN SELECTION. IT IS A BASIC RIGHT UNDER OUR LAW. THE REASONS FOR ITS EXERCISE ARE IMMATERIAL AND MUST NEVER BE MADE THE SUBJECT OF SPECULATION, SURMISE OR CONJECTURE ON THE PART OF EITHER THE JUROR EXCUSED OR THE REMAINING MEMBERS OF THE PANEL.

AND SO WITH THAT, AGAIN, I THANK YOU FOR YOUR PRESENCE, AND MISS CLERK, WOULD YOU BE GOOD ENOUGH NOW TO CALL FORWARD THE FIRST 12 NAMES OF THE FIRST PROSPECTIVE JURORS.

THE CLERK: DONALD LATREILLE, L A T R E I L L E.

RICHARD GERBER, G E R B E R.

MARK SMITH, S M I T H.

CLIFTON WINNIE, W I N N I E.

EDWARD NEWBEGIN, N E W B E G I N.

RODOLFO SALAZAR, S A L A Z A R.

HENRY HILL, H I L L.

ARTHUR WILNER, W I L N E R.

LEIGH IRWIN, I R W I N.

EDWARD KURRELS, K U R R E L S.

LANNIE NEAL, N E A L.

LARRY FOSTER, F O S T E R.

THE COURT: VERY WELL. THANK YOU ALL FOR COMING FORWARD.

AND WITH THAT, THE FIRST PEREMPTORY CHALLENGE WILL BE WITH THE PEOPLE.

MR. BURR: PEOPLE WOULD THANK AND ASK THE COURT TO EXCUSE JUROR NUMBER SEVEN, MR. HILL.

THE COURT: VERY WELL, MR. HILL, THANKS VERY MUCH FOR PARTICIPATING, SIR, YOU ARE EXCUSED. THANK YOU.

MISS CLERK.

THE CLERK: VIRGINIA WATKINS, W A T K I N S.

THE COURT: ALL RIGHT. THANK YOU.

THE CHALLENGE THEN IS WITH THE DEFENDANT STEVENS.

MR. SELVIN: YES, YOUR HONOR.

THE DEFENDANT STEVENS WILL THANK AND EXCUSE JUROR NUMBER ONE, MR. LATREILLE.

THANK YOU VERY MUCH, MR. LATREILLE.

THE COURT: ALL RIGHT. MR. LATREILLE, THANK YOU FOR PARTICIPATING HERE, SIR, YOU ARE EXCUSED.

PROSPECTIVE JUROR LATREILLE: THANK YOU.

MISS CLERK.

THE CLERK: RAYMOND CARDENAS, C A R D E N A S.

THE COURT: RIGHT UP TO THE VACANT CHAIR, SIR.

PEREMPTORY CHALLENGE IS WITH THE PEOPLE.

MR. BURR: PEOPLE WOULD THANK AND ASK THE COURT TO

EXCUSE MR. WILNER, JUROR NUMBER EIGHT.

THE COURT: MR. WILNER, THANK YOU VERY MUCH FOR PARTICIPATING, SIR, YOU ARE EXCUSED.

THE CLERK: RALPH STRACNER, S T R A C N E R.

THE COURT: THANK YOU, SIR.

THE PEREMPTORY CHALLENGE IS WITH THE DEFENDANT CLARK.

MR. ZIMMER: THANK YOU. THE DEFENDANT CLARK WOULD THANK AND EXCUSE JUROR NUMBER 11, MR. NEAL.

MR. NEAL, THANK YOU, SIR.

THE COURT: MR. NEAL, THANK YOU FOR PARTICIPATING, SIR, YOU ARE EXCUSED.

THE CLERK: RICHARD WEBER, W E B E R.

THE COURT: THANK YOU, SIR.

PEREMPTORY CHALLENGE IS WITH THE PEOPLE.

MR. BURR: PEOPLE WOULD THANK AND ASK THE COURT TO EXCUSE MR. FOSTER, JUROR NUMBER 12.

THE COURT: MR. FOSTER, THANKS FOR PARTICIPATING, SIR, YOU ARE EXCUSED.

THE CLERK: ROY MC DONALD, M C D O N A L D.

THE COURT: PEREMPTORY CHALLENGE IS WITH THE DEFENDANT STEVENS.

MR. SELVIN: YOUR HONOR, THE DEFENDANT STEVENS WOULD LIKE TO THANK AND EXCUSE JUROR NUMBER TWO, MR. GERBER.

THANK YOU VERY MUCH, MR. GERBER.

THE COURT: MR. GERBER, THANKS FOR PARTICIPATING, SIR.

THE CLERK: BRUCE RANNEY, R A N N E Y.

THE COURT: PEREMPTORY CHALLENGE IS WITH THE PEOPLE.

MR. BURR: PEOPLE WOULD THANK AND ASK THE COURT TO EXCUSE MR. MC DONALD.

THE COURT: THAT'S JUROR NUMBER 12, MR. MC DONALD, THANK YOU, SIR, FOR PARTICIPATING. YOU ARE EXCUSED.

THE CLERK: THEODORE SIMAS, S I M A S.

THE COURT: PEREMPTORY CHALLENGE IS WITH THE DEFENDANT CLARK.

MR. ZIMMER: DEFENDANT CLARK WOULD THANK AND EXCUSE JUROR NUMBER 10, MR. KURRELS.

THE COURT: ALL RIGHT, MR. KURRELS, THANKS FOR PARTICIPATING HERE, SIR, WE APPRECIATE IT, THANK YOU. YOU ARE EXCUSED.

THE CLERK: LISA NELSON, N E L S O N.

THE COURT: PEREMPTORY CHALLENGE IS WITH THE PEOPLE.

MR. BURR: PEOPLE WOULD THANK AND ASK THE COURT TO EXCUSE MR. SIMAS, JUROR NUMBER 12.

THE COURT: OKAY, MR. SIMAS, THANKS FOR PARTICIPATING. YOU ARE EXCUSED.

THE CLERK: GLORIA BRUDER, B R U D E R.

THE COURT: PEREMPTORY CHALLENGE IS WITH THE DEFENDANT STEVENS.

MR. SELVIN: THE DEFENDANT STEVENS WILL THANK AND EXCUSE JUROR NUMBER 15, MR. STRACNER, PLEASE.

MR. BURR: I'M SORRY, WHICH?

THE COURT: JUROR NUMBER EIGHT.

MR. SELVIN: EIGHT, I'M SORRY.

THE COURT: MR. STRACNER, THANK YOU FOR PARTICIPATING, SIR, YOU ARE EXCUSED.

THE CLERK: JEAN CLEMONS, C L E M O N S.

THE COURT: PEREMPTORY CHALLENGE IS WITH THE PEOPLE.

MR. BURR: PEOPLE WOULD THANK AND ASK THE COURT TO EXCUSE MISS BRUDER, JUROR NUMBER 12.

THE COURT: ALL RIGHT, MISS BRUDER, THANKS FOR PARTICIPATING. YOU ARE EXCUSED.

THE CLERK: DENISE HOFFMAN, H O F F M A N.

THE COURT: PEREMPTORY CHALLENGE IS WITH THE DEFENDANT CLARK.

MR. ZIMMER: THANK YOU.

DEFENDANT CLARK WOULD THANK AND EXCUSE JUROR NUMBER 11, MR. WEBER.

THE COURT: OKAY, MR. WEBER, THANKS FOR PARTICIPATING. YOU ARE EXCUSED.

THE CLERK: WALLACE GOBIN, G O B I N.

THE COURT: PEREMPTORY CHALLENGE IS WITH THE PEOPLE.

MR. BURR: PEOPLE WOULD THANK AND ASK THE COURT TO EXCUSE MR. CARDENAS, JUROR NUMBER ONE.

THE COURT: OKAY, MR. CARDENAS, THANKS FOR PARTICIPATING, SIR, YOU ARE EXCUSED.

THE CLERK: PAUL OVERFIELD, O V E R F I E L D.

THE COURT: PEREMPTORY CHALLENGE IS WITH THE

DEFENDANT STEVENS.

MR. SELVIN: THE DEFENDANT STEVENS WOULD LIKE TO THANK AND EXCUSE JUROR NUMBER 23, DENNIS HOFFMAN --

PROSPECTIVE JUROR HOFFMAN: I'M SORRY?

THE COURT: THAT'S ALL RIGHT. NUMBER 12, MR. HOFFMAN. THANK YOU FOR PARTICIPATING. YOU ARE EXCUSED.

THE CLERK: DANA MERCIE, M E R C I E.

THE COURT: PEREMPTORY CHALLENGE IS WITH THE PEOPLE.

MR. BURR: PEOPLE WOULD THANK AND ASK THE COURT TO EXCUSE MR. OVERFIELD, JUROR NUMBER ONE.

THE COURT: MR. OVERFIELD, THANKS FOR PARTICIPATING HERE.

THE CLERK: JACKLIN SIZER, S I Z E R.

THE COURT: PEREMPTORY CHALLENGE IS WITH THE DEFENDANT CLARK.

MR. ZIMMER: DEFENDANT CLARK WOULD PASS.

THE COURT: CLARK PASSES.

PEREMPTORY CHALLENGE IS WITH THE DEFENDANT STEVENS.

MR. SELVIN: THE DEFENDANT STEVENS PASSES.

THE COURT: PEREMPTORY CHALLENGE IS WITH THE PEOPLE.

MR. BURR: PEOPLE WOULD THANK AND EXCUSE MR. SMITH, JUROR NUMBER THREE.

THE COURT: ALL RIGHT, MR. SMITH, THANK YOU FOR PARTICIPATING. YOU ARE EXCUSED.

THE CLERK: ROBERT WARFIELD, W A R F I E L D.

THE COURT: PEREMPTORY CHALLENGE IS WITH THE

DEFENDANT CLARK.

MR. ZIMMER: THE DEFENDANT CLARK WOULD THANK AND EXCUSE JUROR NUMBER ONE, MISS SIZER.

THE COURT: ALL RIGHT, MISS SIZER, THANKS FOR PARTICIPATING. YOU ARE EXCUSED.

THE CLERK: DIANE BURBANK, B U R B A N K.

THE COURT: PEREMPTORY CHALLENGE IS WITH THE PEOPLE.

MR. BURR: THE PEOPLE WOULD THANK AND EXCUSE MR. RANNEY, JUROR NUMBER TWO.

THE COURT: ALL RIGHT, MR. RANNEY, THANK YOU FOR PARTICIPATING, SIR, YOU ARE EXCUSED.

THE CLERK: BRADFORD JENSEN, J E N S E N.

THE COURT: PEREMPTORY CHALLENGE IS WITH THE DEFENDANT STEVENS.

MR. SELVIN: THE DEFENDANT STEVENS THANKS AND EXCUSES JUROR NUMBER ONE, MISS BURBANK.

THE COURT: ALL RIGHT, MISS BURBANK, THANK YOU FOR PARTICIPATING. YOU ARE EXCUSED.

THE CLERK: HECTOR VELEZ, V E L E Z.

THE COURT: PEREMPTORY CHALLENGE IS WITH THE PEOPLE.

MR. BURR: THE PEOPLE WOULD THANK AND ASK THE COURT TO EXCUSE MISS CLEMONS.

PROSPECTIVE JUROR CLEMONS: I'M SORRY. DID YOU SAY CLEMONS?

MR. BURR: YES.

THE COURT: MISS CLEMONS, THANK YOU. YOU ARE

EXCUSED.

THE CLERK: SHERRIL NUNES, N U N E S.

THE COURT: PEREMPTORY CHALLENGE IS WITH THE DEFENDANT CLARK.

MR. ZIMMER: DEFENDANT CLARK WOULD THANK AND EXCUSE JUROR NUMBER THREE, MR. WARFILED.

THE COURT: ALL RIGHT, MR. WARFIELD, THANKS FOR PARTICIPATING, SIR, YOU ARE EXCUSED.

THE CLERK: CATHERINE RIEHL, R I E H L.

THE COURT: PEREMPTORY CHALLENGE IS WITH THE PEOPLE.

MR. BURR: PEOPLE WOULD ACCEPT THE JURY AS PRESENTLY CONSTITUTED, YOUR HONOR.

THE COURT: PEOPLE PASS.

PEREMPTORY CHALLENGE IS WITH THE DEFENDANT STEVENS.

MR. SELVIN: THE DEFENDANT STEVENS WILL THANK AND EXCUSE JUROR NUMBER THREE, MISS RIEHL.

THE COURT: ALL RIGHT, MISS RIEHL, THANK YOU FOR PARTICIPATING. YOU ARE EXCUSED.

THE CLERK: MARLENE FAVAREILLE, F A V A R E I L L E.

THE COURT: PEREMPTORY CHALLENGE IS WITH THE PEOPLE.

MR. BURR: THE PEOPLE WOULD ACCEPT THE JURY AS PRESENTLY CONSTITUTED, YOUR HONOR.

THE COURT: PEOPLE PASS.

PEREMPTORY CHALLENGE IS WITH THE DEFENDANT CLARK.

MR. ZIMMER: THANK YOU.

MAY CLARK HAVE JUST A MOMENT.

THE COURT: SURE.

(PAUSE.)

MR. ZIMMER: DEFENDANT CLARK WOULD THANK AND EXCUSE JUROR NUMBER TWO, MR. JENSEN.

THE COURT: ALL RIGHT, MR. JENSEN, THANK YOU FOR BEING HERE. YOU ARE EXCUSED.

THE CLERK: WALTER SIMPSON, S I M P S O N.

THE COURT: PEREMPTORY CHALLENGE IS WITH THE PEOPLE.

MR. BURR: PEOPLE WOULD THANK AND ASK THE COURT TO EXCUSE MR. SIMPSON, JUROR NUMBER TWO.

THE COURT: ALL RIGHT, MR. SIMPSON, THANKS FOR PARTICIPATING. YOU ARE EXCUSED.

MR. ZIMMER: YOUR HONOR, THERE IS A MOTION THAT NEEDS TO BE MADE AT THIS POINT.

THE COURT: LET ME HAVE COUNSEL APPROACH.

(OFF THE RECORD DISCUSSION BETWEEN THE COURT AND COUNSEL IN CHAMBERS.)

THE COURT: VERY WELL, LADIES AND GENTLEMEN, AT THIS POINT, IT WILL BE APPROPRIATE HERE IN THE COURSE OF THE SELECTION PROCESS THAT WE'LL NEED TO TAKE A VERY SHORT RECESS. FOR THAT PURPOSE, I WILL NEED TO ASK YOU TO LEAVE THE COURTROOM AND WAIT OUTSIDE. I DO NOT EXPECT THIS TO TAKE VERY LONG, BUT IT'S SOMETHING THAT NEEDS TO BE ADDRESSED NOW. I REGRET THE INCONVENIENCE, BUT THERE IS NO ALTERNATIVE.

WHAT I'M GOING TO DO, AS I SAY, I DON'T EXPECT TO KEEP YOU HERE LONG THIS AFTERNOON. I'LL ASK YOU ALL TO

WAIT OUTSIDE IN THE COURTROOM IN THE GENERAL VICINITY, IF YOU WILL, IN THE HALLWAY RIGHT OUT THERE. AS SOON AS WE HAVE ADDRESSED WHAT WE NEED TO ADDRESS, WE WILL BE CALLING YOU BACK IN.

WHEN WE DO CALL YOU BACK IN, THOSE OF YOU WHO ARE OCCUPYING CHAIRS IN THE JURY BOX, BE SURE AND HAVE THAT CHAIR IN MIND WHERE YOU ARE BECAUSE I'M GOING TO ASK YOU TO RETURN DIRECTLY TO THAT VERY SAME CHAIR. IF YOU COME BACK TO A DIFFERENT CHAIR, OUR WHOLE SYSTEM WILL HAVE DIFFICULTIES, SO BE SURE AND RETURN TO THE SAME CHAIRS.

THOSE OF YOU IN THE SPECTATOR SECTION NEED NOT RETURN TO ANY PARTICULAR CHAIR. OBVIOUSLY, YOU DO ALL NEED TO RETURN.

I'LL REMIND YOU ALL DURING THE COURSE OF THE RECESS, PLEASE HAVE NO DISCUSSION ABOUT THE CASE, ANYTHING YOU'VE LEARNED ABOUT THE CASE EITHER INDIVIDUALLY OR AS A GROUP, AND HAVE NO DISCUSSION, PLEASE, ABOUT YOUR PROSPECTIVE SERVICE AS JURORS IN THIS CASE. BY ALL MEANS, FEEL FREE TO CONVERSE, JUST DON'T CONVERSE ABOUT THOSE SUBJECTS AMONG YOURSELVES, AND CLEARLY, DON'T LET ANYONE ELSE TALK TO YOU ABOUT THAT.

SO, WE WILL BE IN RECESS NOW. I WOULD ESTIMATE THIS RECESS TO BE NO LESS THAN 15 MINUTES BY THIS CLOCK, SO I WILL ASK YOU ALL TO BE OUTSIDE THAT DOORWAY NO LATER THAN QUARTER TO 3:00 OUTSIDE THAT DOORWAY, NO LATER THAN QUARTER TO 3:00.

THANK YOU VERY MUCH FOR YOUR COURTESY.

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(THE FOLLOWING PROCEEDINGS WERE HAD OUTSIDE THE PRESENCE OF THE JURY PANEL.)

THE COURT: ALL RIGHT. THE RECORD WILL REFLECT THAT ALL PROSPECTIVE JURORS NOW, AT THE COURT'S REQUEST, HAVE EXITED THE COURTROOM.

PRESENT HERE ONLY ARE THE PARTIES, COUNSEL AND COURT PERSONNEL, AND WE'VE TAKEN THIS RECESS, THE COURT HAVING BEEN ADVISED, FOR PURPOSES OF OUR RECORD, IN CHAMBERS THERE WAS A MOTION THAT THE PARTIES WISH TO MAKE. I DON'T KNOW WHETHER IT'S JOINTLY. ON BEHALF OF THE DEFENDANTS, MR. SELVIN, MR. ZIMMER?

MR. ZIMMER: YES, YOUR HONOR, WE ARE -- I THINK IT'S ON BEHALF OF BOTH DEFENDANTS. WE ARE BRINGING A MOTION THAT THE PROSECUTOR HAS IMPERMISSIBLY DISQUALIFIED JURORS ON THE BASIS OF BIAS BECAUSE OF RACE. OF THE 11 CHALLENGES THAT HE'S EXERCISED, FOUR OF THE JURORS HAVE BEEN AFRO-AMERICAN. OUR CLIENTS, OF COURSE, ARE AFRO-AMERICAN.

IN TERMS OF THE WHEELER, IT'S NOT NECESSARY TO REPRESENT STANDING. ALL FOUR OF THOSE JURORS, AND THEY ARE ON THE JURY LIST NUMERICALLY, JUROR NUMBER SEVEN, HENRY HILL, JUROR NUMBER 12, LARRY FOSTER, JUROR NUMBER 22, JEAN CLEMONS, AND NUMBER 35, WALTER SIMPSON ARE ALL AFRO-AMERICANS. THEY'RE THE ONLY FOUR AFRO-AMERICANS TO HAVE BEEN AMONGST THE 12 AND ALL FOUR HAVE BEEN EXCUSED BY MR. BURR, AND HE'S USED A TOTAL OF 11 CHALLENGES. ALL FOUR OF THOSE JURORS PASSED FOR CAUSE AND WE FEEL THAT IS A RACE BIAS WHICH HAS PROMPTED THE EXCLUSION OF THOSE

JURORS AND THAT'S IMPROPER.

THE COURT: ON BEHALF OF MR. STEVENS, MR. SELVIN?

MR. SELVIN: YES, YOUR HONOR.

MR. STEVENS JOINS IN THIS PARTICULAR MOTION ON THE GROUNDS STATED BY MR. ZIMMER.

THE COURT: MR. BURR, DO YOU WISH TO BE HEARD?

MR. BURR: YES, YOUR HONOR.

THE COURT: AT THIS POINT?

MR. BURR: NO, I DON'T.

THE COURT: WELL, AT THIS POINT, THEN, THE COURT WILL MAKE A FINDING THAT THERE HAS BEEN ESTABLISHED A PRIMA FACIE CASE, AND THAT BEING THE FINDING, WILL INVITE THE RESPONSE FROM THE PROSECUTION AS TO THE BASIS FOR THE CHALLENGES EXERCISED AS TO THE FOUR DESCRIBED AND NAMED JURORS.

ARE YOU READY TO PROCEED AT THIS TIME?

MR. BURR: YES, I AM.

THE COURT: ALL RIGHT.

MR. BURR: THE BASIS FOR THE CHALLENGES ARE THE SAME AS FOR ALL OF THE PEOPLE THAT I HAVE CHALLENGED, AND THAT IS ON THE BASIS THAT THE PEOPLE DIDN'T FEEL THEY WOULD GET A FAIR TRIAL WITH THOSE JURORS, SPECIFICALLY, WITH REGARD TO EITHER THE GUILT PHASE OR THE PENALTY PHASE, SHOULD WE GET THAT FAR.

AND LOOKING AT THE -- WITH REGARD TO ALL FOUR OF THE JURORS, I INDICATED IN ONE WAY OR ANOTHER AT THE VERY LEAST AN AMBIVALENCE AND THE LACK OF COMMITMENT, AT LEAST IN MY MIND, OF THEIR WILLINGNESS TO IMPOSE THE DEATH

PENALTY. THAT THERE WAS A VACILLATION THAT THEY REFLECTED AND A SITUATION THAT I FELT I COULD NOT TAKE THE CHANCE OF THEM HANGING THIS SHOULD WE GET TO THE POINT OF A DEATH PENALTY, A PENALTY PHASE.

MR. HILL, IN ADDITION TO THAT AMBIVALENCE THAT HE REFLECTED, AND I SHOULD INDICATE THAT THE BASIS OF THE INFORMATION THAT I MADE THAT ON WAS THE TOTALITY OF THE INFORMATION THAT WAS SUPPLIED TO BEGIN WITH.

MR. HILL, IT WAS NOT JUST MERELY THE WORDS THAT THEY SPOKE OR WHAT THEY HAD WRITTEN ON THE QUESTIONNAIRE, BUT ALSO THE MANNER IN WHICH THEY RESPONDED TO MY QUESTIONS, AND SPECIFICALLY, THEIR ABILITY TO CARRY IT OUT, AND READING NOT ONLY WHAT THEY SAID, BUT ALSO HOW THEY RESPONDED PHYSICALLY TO THE QUESTION ITSELF. THEIR ABILITY TO COMMUNICATE TO ME, THEIR ABILITY TO DO THAT OR WHETHER IT WAS VACILLATING.

WITH MR. HILL, HE REFERRED TO THE SITUATION, HE KEPT ON BOUNCING AROUND, AT LEAST IN TERMS OF A CERTAIN AMOUNT OF AMBIVALENCE THAT HE REFLECTED, ALWAYS FALLING BACK, "CAN YOU DO IT?"

AND THE ANSWER IS, "WELL, I'LL TAKE A LOOK AT ALL THE INFORMATION. I NEED ALL THE INFORMATION BEFORE I COULD MAKE A DECISION."

AT ONE LEVEL THAT MAY BE UNDERSTANDABLE. AT ANOTHER LEVEL AND MY DIRECT CONTACTS WITH HIM IN MY QUESTIONING OF HIM, IT APPEARED TO BE MORE OF AN AMBIVALENCE.

AND THEN IT WAS ALSO ONE OTHER THING THAT I HAD

GREAT CONCERNS. AS I WAS TALKING WITH HIM, I COULD SMELL A VERY STRONG ODOR OF ALCOHOL ON HIM, AND HE ADMITS IN HIS QUESTIONNAIRE THAT HE IS AN ALCOHOLIC AND THAT ALCOHOL HAS GOTTEN HIM INTO TROUBLE. AND I'M ALWAYS CONCERNED ABOUT SOMEONE WHO'S DRINKING IN THE MIDDLE OF THE DAY BECAUSE WE DID INTERVIEW HIM IN THE MIDDLE OF THE DAY, AND WHO ADMITS THAT HE'S GOT AN ALCOHOL PROBLEM AND HE'S STILL DRINKING.

WITH REGARD TO MR. FOSTER, HE TOO REFLECTED AN AMBIVALENCE IN HIS ABILITY TO CARRY FORTHWITH THE DEATH PENALTY, WHILE IN THE QUESTIONNAIRE, HE INDICATED HE WAS MODERATELY FOR IT. WHEN IT CAME DOWN TO WHETHER OR NOT HE WOULD VOTE FOR IT IF THE ISSUE WERE ON THE BALLOT, HE SAID, "I HONESTLY DON'T KNOW." AND IN TALKING WITH HIM, HE SAID, "WELL, I'LL FOLLOW THE LAW WITH REGARD TO WHATEVER THE JUDGE TELLS ME."

AND WHEN YOU PUT IT IN TERMS THAT, WELL, THE LAW DOESN'T MANDATE THAT YOU HAVE TO IMPOSE THE DEATH PENALTY, THAT'S SOMETHING THAT'S UP TO YOU. HE INDICATED, AGAIN, JUST AN AMBIVALENCE IN HIS ABILITY AND SHOWED A LACK OF COMMITMENT IN THE ABILITY TO IMPOSE THE DEATH PENALTY.

MISS CLEMONS WAS IN A LIKE SITUATION OF INDICATING, "I THINK I COULD DO IT," BUT REFLECTING, AGAIN, A LACK OF CONVICTION IN HER ABILITY TO DO IT, WHICH GAVE ME A GREAT DEAL OF CONCERN AS TO WHETHER I COULD AFFORD TO TAKE THE CHANCE.

AND WITH MR. SIMPSON, HE WAS ONE OF THE MOST EVASIVE PEOPLE THAT WE SAW ON THIS JURY. I MEAN, HE HAD THE VERBAL SKILLS TO BE EVASIVE, BUT YOU TAKE A LOOK AT

HIS QUESTIONNAIRE AND HE NEVER REALLY SAYS ANYTHING IN HIS QUESTIONNAIRE THAT TELLS US ANYTHING ABOUT HOW HE FEELS AND THE SAME THING WITH REGARD TO HIS VERBAL RESPONSES TO THE QUESTIONS. AND SPECIFICALLY, FOR EXAMPLE, IN HIS RESPONSE TO OUR QUESTION ON PAGE 15 OF THE QUESTIONNAIRE WITH REGARD TO HIS ABILITY TO FOLLOW THE LAW OR WHETHER THERE WAS ANY PHILOSOPHICAL, ETHICAL OR RELIGIOUS CONVICTIONS THAT WOULD GIVE HIM DIFFICULTIES IN CONVICTING SOMEONE OF MURDER, HIS RESPONSE WAS THAT, "THERE MAY BE," WHICH IN MY MIND GAVE ME SOME CONCERNS WHETHER HE WOULD BE WILLING TO SUBORDINATE HIS BELIEFS TO THE LAW, AND HE WAS A VERY STRONG WILLED INDIVIDUAL, MUCH LIKE MR. WILNER WHO I ALSO EXCUSED.

MR. WILNER, I THINK WAS JUROR NUMBER EIGHT OR NINE, AND ONE OF THE FIRST CHALLENGES I EXERCISED AND HE'S, BY HIS OWN DEFINITION, THAT HE IS CAUCASIAN, AND HE TOO WHILE HE INDICATED A WILLINGNESS TO IMPOSE THE DEATH PENALTY, THE NATURE OF HIS PERSONALITY WAS SUCH THAT I THOUGHT IT WOULD BE EXTREMELY DISRUPTIVE AS OPPOSED TO COHESIVE IN A JURY ENVIRONMENT.

AND MR. SIMPSON, HIS EVASIVENESS GAVE ME CONCERNS TO HIS ABILITY AND WILLINGNESS TO IMPOSE THE DEATH PENALTY, AND THEN THIS PERSONALITY OF HIS THAT I DIDN'T THINK WOULD MESH.

NOW, I WOULD ALSO THINK THAT, ON THE RECORD, WHEN A WHEELER MOTION IS MADE, I UNDERSTAND THE NEED FOR DEFENSE COUNSEL TO MAKE IT TO PROTECT THEIR RECORD, BUT IT IS REALLY A PERSONAL INSULT TO ME. I'VE BEEN PRACTICING IN

THESE COURTS FOR 12 YEARS IN THE SUPERIOR COURT AND I DARE SAY I HAVE PROBABLY TRIED MORE SERIOUS FELONY CASES THAN ANY MEMBER OF MY OFFICE IN THAT PERIOD OF TIME. AND GIVEN THE FREQUENCY WITH WHICH I TRY CASES AND THE FACT THAT THE PROSECUTION TRYS MORE CASES THAN MOST DEFENSE ATTORNEYS, I PROBABLY HAVE TRIED MORE FELONY JURY TRIALS THAN ANY ATTORNEY IN THIS COUNTY, AND WHEN YOU MAKE A WHEELER MOTION, YOU ARE MAKING A PERSONAL ATTACK UPON THE INTEGRITY OF THE ATTORNEY, BASICALLY MYSELF, AND I TAKE GREAT EXCEPTION TO THAT. ALSO, IN LIGHT OF THE FACT THAT THE BULK OF THE VICTIMS IN MY CASE ARE IN FACT OF AFRO-AMERICAN DISSENT, AND I WOULD LIKE TO HAVE THAT REPRESENTED ON THE JURY.

IT IS, JUST IN MY VIEW AND MY EXPERIENCE, THAT I DIDN'T FEEL THAT THESE PEOPLE HAD THE PERSONAL FORTITUDE TO IN FACT IMPOSE A DEATH PENALTY VERDICT, IF IT SHOULD GET THERE, AND I AM GREATLY INSULTED WHEN WE START TALKING ON AND SAYING I'M EXCLUDING PEOPLE BECAUSE OF THEIR HERITAGE. THAT'S NOT WHAT I'M DOING AND I GREATLY OBJECT TO THAT.

I WOULD ALSO LIKE TO HAVE THAT POINT OF VIEW REFLECTED ON THIS JURY BUT, UNFORTUNATELY, THESE JURORS, I DON'T BELIEVE, HAVE THE ABILITY, THE INTERNAL FORTITUDE TO SAY TO MR. STEVENS "DEATH" IF WE SHOULD GET THERE.

SUBMITTED.

THE COURT: ALL RIGHT. MR. SELVIN, ANYTHING FURTHER?

MR. SELVIN: NOTHING FURTHER.

THE COURT: SUBMITTED?

MR. ZIMMER: NO, I THINK THERE'S ONE THING --

THE COURT: I'M SORRY. I JUST WANTED TO FINISH OFF WITH DEFENDANT STEVENS.

MR. SELVIN, IS IT SUBMITTED ON BEHALF OF STEVENS?

MR. SELVIN: SUBMITTED ON BEHALF OF STEVENS.

THE COURT: MR. ZIMMER, AS TO CLARK?

MR. ZIMMER: THANK YOU.

I THINK THERE'S ONE THING THAT SHOULD BE NOTED WITH RESPECT TO MR. HILL. I AM CERTAINLY NOT IN THE POSITION FROM WHERE I VOIR DIRE THE JURORS TO NOTICE WHETHER HE DID OR DID NOT HAVE ALCOHOL ON HIS BREATH, EITHER MR. SELVIN OR MR. BERGER OR BOTH, I THINK, WOULD HAVE BEEN IN THAT POSITION, AND I THINK THEY CAN ATTEST TO THEIR OWN OBSERVATIONS. IN MY VIEW, I DID NOT DETECT ANY ODOR OF ALCOHOL.

MORE IMPORTANTLY, THAT IS SOMETHING THAT IF THAT HAD BEEN SO, SOMETHING SHOULD HAVE BEEN NOTED ON THE RECORD AT THE TIME. THAT IS NOT REFLECTED ON THE RECORD AND IT WOULD HAVE BEEN A CHALLENGE FOR CAUSE, AND I THINK THAT IF THERE IS A PROBLEM WITH ADVANCING THAT AS A JUSTIFICATION FOR EXCUSING MR. HILL AT THIS POINT.

WITH RESPECT TO THE THREE REMAINING JURORS, AS I LOOK THROUGH MY NOTES ON EACH OF THOSE JURORS, I THINK EACH OF THEM ARE JURORS THAT COULD HAVE MADE EXCELLENT PROSECUTION JURORS.

I NOTE THAT MR. FOSTER HAS PREVIOUSLY SERVED ON A JURY ON A CHILD MOLESTATION CASE IN 1989. HIS VIEWS ON

THE DRUG AND ALCOHOL USAGE WHICH I THINK IS QUITE TELLING ON JURIES' VIEWS WAS QUITE HARSH. HE'S BEEN EMPLOYED BY THE SAME COMPANY FOR A TOTAL OF 32 YEARS, AND HE SAID QUITE CONVINCINGLY THAT, "IF THE CASE CALLED FOR IT, I COULD DO THAT," WHEN HE WAS TALKING ABOUT THE DEATH PENALTY AND HIS ABILITY TO IMPOSE IT. AND MR. FOSTER, AS EACH OF THESE JURORS DID, SURVIVED RATHER GRAPHIC QUESTIONING ON MR. BURR'S BEHALF WITH REGARDS TO THE DEATH PENALTY AND THE IMPACT OF IMPOSING THE DEATH PENALTY. EACH OF THEM SAID THEY COULD DO IT.

MISS CLEMONS IS CURRENTLY A HOMEMAKER BUT HAD BEEN IN SALES FOR ZEROX. SHE HAS CHILDREN AND HER SPOUSE IS A PRIVATE INVESTIGATOR. SHE WAS A PRIOR JUROR ON A RAPE CASE. HER DAUGHTER WORKED ON THE OAKLAND POLICE DEPARTMENT. SHE ALSO WANTED STIFFER PENALTIES FOR DRUG DEALING, AND SHE SAID THAT SHE FELT THE DEATH PENALTY SHOULD BE BASED ON WHETHER THE CIRCUMSTANCES OR WHETHER OR NOT THE CRIME FIT THE PENALTY, AND AGAIN, WENT THROUGH THAT VERY GRAPHIC EXAMPLE OF MR. BURR'S.

I MIGHT ALSO ADD THE FIRST JUROR, MR. HILL, MR. BURR CLAIMS BECAUSE HE WANTED TO HEAR ALL THE FACTS AND CIRCUMSTANCES BEFORE HE MADE A DECISION, IN FACT, THAT'S WHAT WE TELL THE JURY THAT THEY'RE SUPPOSED TO DO WHEN WE FIRST TALK TO THEM, AND I FIND THE FACT THAT MR. HILL WANTED TO FIND THE SUGGESTION TO ARGUE A BASIS FOR CLAIMING CONCERNS OVER HIS ABILITY TO IMPOSE THE DEATH PENALTY.

MR. SIMPSON, OTHER THAN HIS RACE, HE LOOKS LIKE THE

PERFECT PROSECUTION JUROR. HE'S WELL EDUCATED, HAS DEGREES IN PSYCHOLOGY AND BUSINESS. HE'S A PERSONNEL DIRECTOR OF A FIRM. HE'S A VERY FORCEFUL AND COMMANDING PERSON.

AND AGAIN, I THINK THAT ALL OF THOSE JURORS ARE VERY SIMILAR SITUATED IN REGARDS TO THEIR DEMOGRAPHICS, IF YOU WILL, IN REGARDS TO THEIR ANSWERS TO THE DEATH PENALTY QUESTIONS AND THE OTHER JURORS THAT MR. BURR LEFT ON THE JURY AT THIS POINT.

WITH THAT, I'LL SUBMIT THE MATTER.

THE COURT: ALL RIGHT, SIR.

MR. BURR, ANYTHING FURTHER?

MR. BURR: YEAH, JUST TO RESPOND BRIEFLY WITH REGARD TO MR. HILL'S BREATH. I FIND IT INTERESTING THAT WE CAN ATTACK MY PERSONAL INTEGRITY WITH REGARD TO MY BASIS FOR EXCUSING PEOPLE, AT THE SAME POINT IN TIME, WE CAN'T ACCEPT MY REPRESENTATION THAT I SMELLED ALCOHOL ON HIS BREATH WHICH I SUPPOSE THE TWO SORT OF GO HAND IN HAND WITH REGARD TO WHETHER OR NOT THAT WOULD BE A CHALLENGE FOR CAUSE, I MEAN, I'M NOT SAYING THE MAN WAS DRUNK, THAT WOULD HAVE BEEN OBVIOUS TO EVERYONE.

BUT I AM CONCERNED WHEN WE HAVE AN INDIVIDUAL WHO COMES IN HERE AND THAT I COULD SMELL AN ODOR OF ALCOHOL ON HIM AND I GOT THREE TO FIVE FEET AWAY FROM MOST OF THESE PEOPLE AS THEY WERE WALKING ALONG, AND HE, IN HIS OWN QUESTIONNAIRE, REPORTS A PROBLEM WITH ALCOHOL THAT HE'S AWARE OF.

NOW, WITH REGARD TO THIS, HIS STATEMENT THAT, YOU

KNOW, "I WANT TO HEAR ALL THE EVIDENCE," I AGREE THAT'S WHAT WE INSTRUCT THEM, BUT HE WAS USING IT AS A DEVICE NOT TO ANSWER MY QUESTIONS WHICH WAS THE REAL THRUST OF WHAT I'M GETTING AT HERE.

AND WITH REGARD TO THESE INDIVIDUALS, SOME OF THEM MAY HAVE BEEN PEOPLE THAT I WOULD ACCEPT ON A JURY IF ALL I HAD TO BE CONCERNED ABOUT WAS GETTING PAST A GUILT PHASE.

BUT WITH REGARD TO THE PENALTY PHASE AND THE ABILITY TO HAVE THE INTERNAL FORTITUDE TO SUPPORT A DEATH PENALTY VERDICT AND VOTE FOR IT, I THINK THAT'S ANOTHER THING.

MISS CLEMONS, IN THE QUESTION THAT WE ASKED AS TO HOW THEY FEEL, A RANGE OF EMOTION ABOUT THE DEATH PENALTY IN GENERAL, SHE REFLECTS A NEUTRAL FEELING AND SHE'S NOT SURE WHETHER SHE WOULD VOTE FOR IT IF IT WERE ON THE BALLOT. AND AGAIN, IT DOES COME DOWN TO A LACK OF CERTAINTY AND CONVICTION THAT IS PROMULGATED FROM WHAT SHE HAS TO SAY OR THE PROSPECTIVE JUROR HAS TO SAY AS WELL AS HOW THEY SAY IT AND RELYING UPON MY EXPERIENCE IN JUDGING AND EVALUATING PEOPLE.

AND I WOULD SUBMIT THAT ALL THE FOLKS THAT I'VE EXCUSED HERE, YOU'LL FIND SIMILAR SITUATED PEOPLE WHO REFLECTED SOME DEGREE OF AN INABILITY OR A QUESTIONING IN THERE OWN MINDS AS TO THEIR ABILITY TO IMPOSE THE DEATH PENALTY OR PEOPLE THAT I THOUGHT WOULD BE DISRUPTIVE TO THE MIX OF A JURY, AND MR. SIMPSON CERTAINLY FALLS INTO THAT CATEGORY IN MY OPINION, MUCH LIKE MR. WILNER DID.

BOTH ARE WELL EDUCATED INDIVIDUALS WITH VERY STRONG PERSONALITIES THAT I THINK WOULD HAVE BEEN EXTREMELY DOMINEERING TO A POINT OF CREATING DIVISION WITHIN THE JURY AS OPPOSED TO REACHING A CONSENSUS WHICH IS WHAT I NEED TO ACHIEVE.

MR. BERGER: YOUR HONOR, IF I MAY, ON BEHALF OF MR. STEVENS, I JUST WANT TO ADD A COUPLE OF POINTS TO WHAT MR. ZIMMER SAID IN RESPONSE TO MR. BURR.

I THINK IT'S UNFORTUNATE THAT THIS MOTION HAS BEEN TAKEN OR SUGGESTED AS A PERSONNEL ATTACK ON MR. BURR. CLEARLY, IT'S WARRANTED AND I THINK IT WOULD BE INCOMPETENT OF US NOT TO HAVE RAISED IT AT THIS POINT ON THE STATE OF THE RECORD, AND FOR THAT TO BE OBJECTED TO ON THE RECORD AS SOMEHOW A PERSONAL ATTACK ON THE PROSECUTOR I THINK IS UNWARRANTED AND UNFORTUNATE.

I WILL REPRESENT, HOWEVER, THAT IN THE COURSE OF MY VOIR DIRE, I DID APPROACH EVERY PROSPECTIVE JUROR PROBABLY APPROXIMATELY AS CLOSE AS MR. BURR DID. I NOTICED NOTHING ON THE BREATH OF MR. HILL. I NOTICED NOTHING IN THE WAY THAT HE WAS RESPONDED TO QUESTIONS THAT WOULD HAVE SUGGESTED HE WAS UNDER THE INFLUENCE OF ALCOHOL TO ANY DEGREE WHATSOEVER.

AND I AGREE WITH MR. ZIMMER THAT IF THAT IN FACT WAS AN OBSERVATION THAT MR. BURR HAD MADE, THE PROPER TIME TO CALL IT TO COURT AND COUNSEL'S ATTENTION WOULD HAVE BEEN WHILE HE WAS SITTING IN THE BOX AND WE COULD HAVE ADDRESSED IT THEN AND THERE AND DONE FURTHER INVESTIGATION. I THINK IT'S FUTILE TO RAISE IT AT THIS

POINT. I DON'T THINK THAT BELONGINGS ON THE RECORD.

THE FACT THAT HE CALLS HIMSELF AN ALCOHOLIC I DON'T THINK IS TELLING ON POINT. MANY PEOPLE CALL THEMSELVES AN ALCOHOLIC WHO ARE IN FACT RECOVERING ALCOHOLICS AND HAVEN'T HAD A DRINK IN YEARS. THAT'S THE PARLANCE OF TYPES THAT ONCE YOU'RE AN ALCOHOLIC, YOU'RE ALWAYS AN ALCOHOLIC. I DON'T BELIEVE THAT'S GERMANE AND IF MR. BURR FELT THAT IT WAS, I THINK THE TIME TO INQUIRE WAS WHEN HE WAS IN THE BOX.

THE ONLY OTHER POINT I WOULD ADD IS THAT AS MR. SIMPSON, THE SINCERITY OF HIS ANSWERS IS REVEALED I THINK BY THE FACT THAT HE TRULY WANTED TO BE RELEASED FROM JURY SERVICE IN THIS CASE. HE ASKED TO BE LET OFF BECAUSE OF PRESSURES OF THE JOB, DEMANDS OF WORK. HE SAID HE WAS IN THE LAYOFF PROCESS, HE WAS NEEDED, HIS COMPANY WOULD SUFFER, HIS CAREER MIGHT SUFFER, WE DID NOT DEEM THAT TO BE SUFFICIENT GROUNDS TO HAVE HIM RELEASED. HE WAS CERTAINLY AN INTELLIGENT ENOUGH MAN TO HAVE GOTTEN HIMSELF OFF BY ENGINEERING HIS ANSWERS APPROPRIATELY, HE CHOSE NOT TO DO SO, AND I THINK THAT BY ITSELF SPEAKS TO THE SINCERITY OF HIS ANSWERS. HIS ANSWERS WERE ALL PERFECTLY IN ACCORD WITH WHAT WE EXPECT FROM A PROPER JUROR.

I WOULD SUBMIT IT ON THAT.

THE COURT: ALL RIGHT. SUBMITTED?

MR. ZIMMER: YES.

MR. BURR: I WOULD JUST LIKE TO ADD TWO POINTS.

ONE, I THINK WHICH IS AN APPROPRIATE ISSUE FOR THE COURT TO TAKE INTO CONSIDERATION, IS MY REPUTATION IN THIS

COURT AND IN THIS COUNTY. AND I THINK THAT THAT IS APPROPRIATE TO BE CONSIDERED, AND BY ITS VERY NATURE, WHEN DEFENSE COUNSEL SAYS WE THINK THAT THE PROSECUTION IS USING ITS CHALLENGES IN A FASHION TO ELIMINATE A COGNIZABLE GROUP OF THIS COMMUNITY, THAT'S AGAINST THE LAW, THE VERY THING WHICH I STAND FOR AND REPRESENT, AND DARN RIGHT I'M GOING TO BE INSULTED BY IT EVEN THOUGH I UNDERSTAND THEIR NEED TO DO IT. AT THE SAME POINT IN TIME, MY REPUTATION, I THINK IS A SUFFICIENT FACTOR AS ONE OF THE FACTORS THAT THE COURT CAN TAKE INTO CONSIDERATION IN THE MOTION ITSELF.

AND THEN, FINALLY, WITH REGARD TO MR. HILL, THE ODOR OF ALCOHOL THAT I DETECTED IS JUST ONE OF THE FACTORS THAT I RELIED UPON. AGAIN, COMING DOWN TO THE BOTTOM LINE THAT I DON'T THINK THAT HE COULD OR I DIDN'T BELIEVE THAT HE HAD THE INTERNAL FORTITUDE TO IMPOSE THE DEATH PENALTY AND I DIDN'T WANT TO TAKE A CHANCE ON A HUNG JURY.

NOW ITS SUBMITTED.

THE COURT: SUBMITTED, COUNSEL?

MR. ZIMMER: SUBMITTED.

MR. BERGER: SUBMITTED.

MR. SELVIN: SUBMITTED.

THE COURT: ALL RIGHT. WE'LL BE IN RECESS BRIEFLY. I WANT TO HAVE AN OPPORTUNITY TO REVIEW MY NOTES ON THIS ISSUE BEFORE I RULE, SO WE WILL BE IN RECESS. I WOULD ASK YOU TO REMAIN IN OR ABOUT THE COURTROOM AND WE'LL BE BACK IN SESSION SHORTLY, OKAY. THANK YOU.

(RECESS.)

THE COURT: ALL RIGHT. THE RECORD WILL REFLECT THAT THE MEMBERS OF THE JURY PANEL CONTINUE TO BE EXCUSED FROM THE COURTROOM, HOWEVER, THAT THE PARTIES AND COUNSEL ARE ALL PRESENT HERE.

WITH RESPECT TO THE DEFENDANT'S MOTION PURSUANT TO PEOPLE VERSUS WHEELER, THAT MOTION NOW HAVING BEEN SUBMITTED BY ALL PARTIES, THE RECORD SHOULD REFLECT THAT THE COURT HAS CONSIDERED THE ARGUMENTS AND THE REPRESENTATIONS OF COUNSEL, AS WELL AS THE COURT'S OWN NOTES, UNDER THE CIRCUMSTANCES OF THIS CASE, AS EARLIER SET FORTH ON THE RECORD, THE COURT HAD FELT THAT THE DEFENDANTS WHO JOIN IN THIS MOTION HAD ESTABLISHED A PRIMA FACIE CASE OF GROUP DISCRIMINATION AS PREVIOUSLY DESCRIBED HERE, ACCORDINGLY, THE BURDEN SHIFTED. AND THE COURT ASKED THE PROSECUTOR TO SHOW IF HE COULD, THAT THE PEREMPTORY CHALLENGES WERE NOT PREDICATED ON GROUP BIAS ALONE.

AFTER AN ANALYSIS OF THE PROFFERED REASONS AND THE COURT'S OWN OBSERVATIONS, THE COURT WILL FIND THAT THE PROSECUTION MET ITS BURDEN TO REBUT THE INFERENCE OF GROUP BIAS AS TO THE PROSPECTIVE JURORS WHO HAVE BEEN NAMED HERE AND AT THIS TIME IS SATISFIED THAT THE PEREMPTORY CHALLENGES WERE NOT PREDICATED SOLELY ON GROUP BIAS.

ALL RIGHT. NOW, WITH THAT, THEN, MR. BAILIFF.

MR. ZIMMER: COULD WE HAVE JUST ONE MATTER OF BOOKKEEPING WITH REGARDS TO THIS?

SINCE ONE OF THE THINGS THAT THE COURT, OF COURSE, HAS DONE IS LOOKING AT THE POSITION OF THE JURORS THAT

WERE EXCUSED IN LIGHT OF THE CIRCUMSTANCES THAT PERTAINED TO THE JURORS THAT REMAINED ON THE JURY, I WOULD ASK THAT THE COURT -- I DON'T KNOW WHAT THE COURT HAS BEEN DOING OR WAS GOING TO DO WITH THE QUESTIONNAIRES OF JURORS WHO HAD BEEN EXCUSED TODAY, BUT I THINK IN LIGHT OF THIS MOTION, IN LIGHT OF THE STANDARD AS I UNDERSTAND IT, THE QUESTIONNAIRE SHOULD BE MAINTAINED NOW AT THIS POINT. I HATE TO IMPOSE THAT BURDEN ON THIS COURT. IN ORDER TO PROVIDE ADEQUATE APPELLATE REVIEW WE NEED TO HAVE ALL QUESTIONNAIRES RETAINED.

THE COURT: I AGREE WITH YOU.

MR. SELVIN: YES, MAY I ALSO MAKE A SUGGESTION, YOUR HONOR, THAT WE MOVE -- THAT WE FIND THOSE PARTICULAR QUESTIONNAIRES AND WE MOVE THEM IN AS EXHIBITS INTO EVIDENCE AT THIS POINT. I THINK THAT WOULD BE PROPER AS WELL.

THE COURT: WELL, I DON'T KNOW THAT I WOULD AGREE WITH YOU THAT THEY WOULD BE MOVED INTO EVIDENCE.

LET ME JUST SAY THIS, THAT I AGREE WITH MR. ZIMMER, IN EFFECT BOTH OF YOU, THAT THE QUESTIONNAIRES OF THE JURORS SHOULD BE MAINTAINED FOR WHATEVER PURPOSE, AND I DIRECTED THE CLERK TO SEE TO IT THAT THE ORIGINAL OF EACH QUESTIONNAIRE OF EACH JUROR WHO CAME FORWARD IN THIS COURTROOM AS A MEMBER OF THE PANEL WILL BE MAINTAINED AS A PART OF THE RECORD, AND CLEARLY, AS PART OF THAT MAINTENANCE, IT WOULD BE MY EXPECTATION TO SEPARATELY CATEGORIZE, IF YOU WILL, THOSE INDIVIDUALS WHO ARE ULTIMATELY SELECTED ON THE JURY, AND IF YOU WISH, I CAN

DIRECT THE CLERK ULTIMATELY TO KEEP AS A GROUP, IF YOU WILL, THE JURORS WHO WERE THE SUBJECT OF THIS MOTION.

ALL RIGHT?

MR. SELVIN: I WOULD REQUEST THAT, YOUR HONOR.

THE COURT: THAT'LL BE FINE.

MISS CLERK, I'LL ASK YOU TO DO THAT; OKAY?

MR. BURR: JUST SO I UNDERSTAND, WE'RE TALKING ABOUT ALL THE QUESTIONNAIRES, NOT JUST THE ONES THAT WE -- OF THE JURORS THAT WE JUST GOT THROUGH DISCUSSING, BUT ALL?

THE COURT: ALL QUESTIONNAIRES. I'VE DIRECTED THE CLERK TO MAINTAIN THE ORIGINAL. OBVIOUSLY, COUNSEL HAD COPIES, WHICH HAVE BEEN RETURNED AND WILL BE DESTROYED, BUT THE ORIGINALS OF EACH JUROR QUESTIONNAIRE WILL BE MAINTAINED AS PART OF THIS RECORD.

OKAY. ALL RIGHT. MR. BAILIFF, WILL YOU ASK THE JURY PANELS TO COME BACK IN.

WE'LL BE OFF THE RECORD.

(THE FOLLOWING PROCEEDINGS WERE HAD IN THE PRESENCE OF THE PROSPECTIVE JURORS.)

THE COURT: ALL RIGHT. THE RECORD WILL REFLECT NOW THAT THE PROSPECTIVE JURORS HAVE REJOINED US AND THE JURORS IN THE BOX HAVE RETAINED THEIR ASSIGNED SEATS. I APPRECIATE THAT. I APPRECIATE ALL OF YOU RETURNING.

I ALSO WANT TO THANK YOU FOR YOUR PATIENCE. AS I SAY, THE MATTERS THAT WE NEED TO ADDRESS HERE SOMETIMES TAKE A BIT LONGER THAN WE PROJECT, OBVIOUSLY, THAT OCCURRED. I CAN ASSURE YOU THAT WE HAVE ALL BEEN RIGHT

HERE DOING THAT. I KNOW THAT THAT DOESN'T MAKE YOUR WAITING ANY MORE QUICKLY AND I APPRECIATE YOUR PATIENCE AND COURTESY IN AFFORDING US THE OPPORTUNITY TO DO THAT.

AND NOW, MS. CLERK, IF YOU WILL CALL A PROSPECTIVE JUROR FOR CHAIR NUMBER TWO, PLEASE.

THE CLERK: BARBARA HENRY, H E N R Y.

THE COURT: VERY WELL. THE PEREMPTORY CHALLENGE IS WITH THE DEFENDANT STEVENS.

MR. SELVIN: THE DEFENDANT STEVENS WILL THANK AND EXCUSE JUROR NUMBER ONE, MR. VELEZ.

THANK YOU VERY MUCH, MR. VELEZ.

THE COURT: MR. VELEZ, THANK YOU FOR PARTICIPATING, SIR, YOU ARE EXCUSED HERE.

THE CLERK: ALMETA PERSONS, P E R S O N S.

THE COURT: THE PEREMPTORY CHALLENGE IS WITH THE PEOPLE.

MR. BURR: PEOPLE WOULD THANK AND ASK THE COURT TO EXCUSE MISS HENRY, JUROR NUMBER TWO.

THE COURT: ALL RIGHT, MISS HENRY, THANKS FOR PARTICIPATING HERE. YOU ARE EXCUSED.

THE CLERK: KENRICK LEE, L E E.

THE COURT: PEREMPTORY CHALLENGE IS WITH THE DEFENDANT CLARK.

MR. ZIMMER: THANK YOU.

DEFENDANT CLARK WOULD THANK AND EXCUSE JUROR NUMBER TWO, MR. LEE.

THE COURT: ALL RIGHT, MR. LEE, THANKS FOR PARTICIPATING HERE. YOU'RE EXCUSED, SIR.

THE CLERK: PATRICIA KING, K I N G.

THE COURT: PEREMPTORY CHALLENGE IS WITH THE PEOPLE.

MR. BURR: PEOPLE WOULD THANK AND ASK THE COURT TO EXCUSE MISS KING.

THE COURT: ALL RIGHT, MISS KING, THANKS FOR PARTICIPATING. YOU ARE EXCUSED.

THE CLERK: JERRY ROSE, R O S E.

MR. BERGER: YOUR HONOR, MAY WE APPROACH?

THE COURT: YEAH, JUST A SECOND.

(OFF THE RECORD DISCUSSION BETWEEN THE COURT AND COUNSEL IN CHAMBERS.)

THE COURT: ALL RIGHT, LADIES AND GENTLEMEN, WE'RE GOING TO BE IN CHAMBERS FOR JUST A FEW MINUTES.

IF YOU PLEASE, ALL COUNSEL AND COURT REPORTER IN CHAMBERS, PLEASE.

(THE FOLLOWING PROCEEDINGS WERE HAD IN CHAMBERS.)

THE COURT: ALL RIGHT. THE RECORD WILL REFLECT THAT WE'RE NOW PRESENT IN CHAMBERS, BOTH DEFENDANTS, ALL COUNSEL ARE PRESENT HERE.

IT HAS BEEN AGREED -- WELL, FIRST OF ALL, I UNDERSTAND, THE COURT WAS ADVISED -- COUNSEL REQUESTED TO APPROACH COURT. THE COURT WAS ADVISED THAT THE DEFENSE HAS A MOTION.

AND MR. SELVIN OR MR. ZIMMER, JUST STATE THE MOTION FOR THE RECORD, PLEASE.

MR. ZIMMER: WE'RE RENEWING THE MOTION WE BROUGHT

PREVIOUSLY SINCE OUR LAST -- SINCE THE MOTION WAS JUST HEARD, THERE HAVE BEEN ONE, TWO, THREE JURORS SEATED. THE PROSECUTION HAS EXERCISED TWO PEREMPTORY CHALLENGES. IF I'M NOT MISTAKEN, THE LAST ONE BEING PATRICIA KING. MISS KING IS AFRO-AMERICAN. AGAIN, WE FEEL THIS IS JUST ANOTHER EXAMPLE OF CANDOR THAT WE HAD ALLUDED TO EARLIER.

THE COURT: JUST FOR THE RECORD, THE PARTIES ALERTED THE COURT THEY WISH TO MAKE THIS MOTION AND AGREED IT COULD BE MADE WITHIN THE CHAMBERS FOR PURPOSES OF HEARING THE MOTION.

AS TO THE PROSPECTIVE JUROR KING, MR. BURR, YOUR RESPONSE?

MR. SELVIN: YOUR HONOR, MAY THE RECORD ALSO REFLECT THE DEFENDANTS ARE PRESENT IN CHAMBERS?

THE COURT: I BELIEVE IT DOES. IF IT DOESN'T, IT WILL AGAIN.

GO AHEAD, SIR.

MR. BURR: WELL, I EXCUSED MISS KING PROBABLY FOR THE SAME REASON MR. CLARK EXCUSED MR. LEE. MR. LEE WAS FROM KIYANA. HE WOULD CERTAINLY BE CLASSIFIED OF AFRO-AMERICAN DISSENT. HE'S A NATURALIZED CITIZEN.

AND JUST AS THE DEFENSE, I PRESUME, DIDN'T FEEL MR. LEE WOULD GIVE A FAIR TRIAL TO THEM, AND WHATEVER TACTICAL REASON THEY CHOSE TO EXCUSE HIM, I EXCUSED MISS KING. AND I BELIEVE IT WAS VERY CLEAR ON THE RECORD IN TALKING WITH HER THAT SHE INDICATED THAT SHE WOULD TRY, BUT SHE WASN'T SURE SHE COULD IMPOSE THE DEATH PENALTY AND THAT IS SOMETHING THAT IN A TREMENDOUS AMOUNT OF TALKING WITH HER

SHE HAD CLEARLY APPEARED TO HAVE A TREMENDOUS AMOUNT OF DIFFICULTY IN EXUDING CONFIDENCE IN HER ABILITY TO DO THAT. SHE DID IT ENOUGH TO GET PAST A CHALLENGE FOR CAUSE, BUT SHE WAS EXTREMELY EQUIVOCAL. SHE WAS A VERY CHARMING LADY, BUT AGAIN, JUST AS I EXCUSED OTHER PEOPLE WHO REFLECTED, THAT WERE NOT OF AFRO-AMERICAN DISSENT, THAT REFLECTED A CONCERN ABOUT LINGERING DOUBT AND REFLECTED AMBIVALENCE AND THEIR ABILITY TO IMPOSE THE DEATH PENALTY SO I EXCUSED MISS KING.

THE COURT: OKAY, MR. ZIMMER, MR. SELVIN, DO YOU WISH TO BE HEARD?

MR. ZIMMER: I WOULD JUST SIMPLY NOTE THAT, AGAIN, MR. BURR DID GIVE A VERY GRAPHIC EXAMPLE OF WHAT THESE JURORS WOULD BE VOTING FOR AND SHE PASSED THAT EXAMPLE.

I WOULD NOTE THAT SHE IS A WELL EDUCATED LADY, SHE HAS A BACHELOR OF ARTS IN FRENCH AND HISTORY, SHE'S GOT HER TEACHING CREDENTIAL --

THE REPORTER: MR. ZIMMER --

THE COURT: SLOW DOWN.

MR. ZIMMER: SHE HAS A TEACHING CREDENTIAL, SHE'S THE PROGRAM COORDINATOR FOR, I BELIEVE, THE INTERNATIONAL STUDIES AT THE UNIVERSITY. IF I READ MY OWN NOTES PROPERLY, SHE'S BEEN ON A PRIOR JURY, PRIOR CRIMINAL JURY. SHE HAS A COUSIN WHO'S A CORRECTIONAL OFFICER. IN TERMS OF HER DEATH PENALTY VIEW, SHE SAID IN THE QUESTIONNAIRE THAT SHE UNDERSTOOD THAT ROSE BIRD WAS NOT EFFECTIVE AND THAT'S CERTAINLY A VIEW POINT THAT'S INDICATIVE WHEN SOMEBODY SUPPORTS THE DEATH PENALTY, AGAIN, YOU'D THINK

SHE'S ANOTHER PERSON THAT CERTAINLY LOOKS LIKE A WONDERFUL JUROR.

MR. BURR: WELL, AGAIN, MR. ZIMMER ISN'T THE PROSECUTOR IN THE CASE. ALL HE NEEDS IS ONE TO HANG THIS CASE UP. I'VE GOT TO CONVINCE ALL 12. AND WHILE SHE MAY MAKE AN EXCELLENT GUILT JUROR, I'VE GOT TO LOOK AT THE TAIL END PHASE OF THIS. THE TAIL END PHASE IS WHETHER OR NOT SHE COULD ACTUALLY BRING HERSELF TO IMPOSE THE DEATH PENALTY AND THAT IS A VERY GREAT CONCERN ON MY PART. AND IN TALKING WITH HER, WHEN YOU SAY THAT SHE PASSED MY GRAPHIC TEST, SHE MIGHT HAVE SAID THE WORDS OR ENOUGH TO SAY THAT SHE THOUGHT SHE COULD DO IT OR SHE SAID, "I'LL TRY," SHE DIDN'T SAY SHE COULD DO IT.

MR. BERGER: YOUR HONOR, IF I MAY ADD TO MR. ZIMMER'S REPRESENTATION.

MY NOTES INDICATE THAT MISS KING LISTED HERSELF AS MODERATELY IN FAVOR OF THE DEATH PENALTY ON HER QUESTIONNAIRE. ON THE PRIOR CRIMINAL JURY IN WHICH SHE SERVED, THERE WAS A VERDICT REACHED AND SHE INDICATED THAT SHE WAS IN FAVOR OF THE DEATH PENALTY AS A NECESSARY INSTITUTION IF THERE'S ABSOLUTELY NO DOUBT OF THE GUILT OF THE DEFENDANT. HER INDICATION WAS WHEN SHE WAS CERTAIN OF GUILT, SHE WOULD IN FACT BE ABLE TO IMPOSE THE DEATH PENALTY. SHE SAID THAT IT WOULD BE DIFFICULT, I DON'T THINK THAT'S INAPPROPRIATE. SHE DOES BELIEVE THAT THE DEATH PENALTY SERVES AS A DETERRENT AND IS IN FAVOR FOR IT FOR THAT REASON.

MR. ZIMMER: I'D SUBMIT.

MR. BURR: YES.

THE COURT: JUST SO OUR RECORD IS TOTALLY COMPLETE BECAUSE I WANT IT TO BE COMPLETE FOR ALL PARTIES, IN TERMS OF THE JURORS WHO HAVE BEEN CALLED FORWARD SINCE YOUR PREVIOUS MOTION WAS MADE, THERE HAS BEEN REFERENCE MADE TO JUROR MR. LEE.

MR. ZIMMER: CORRECT.

THE COURT: JUST FOR THE RECORD, I BELIEVE MR. LEE WAS A BLACK JUROR, AFRO-AMERICAN JUROR. OBVIOUSLY, MISS KING, WHO IS THE SUBJECT OF THIS MOTION WAS A BLACK AFRICAN-AMERICAN JUROR.

ALSO, PRESENTLY SEATED IN THE JURY BOX IN CHAIR NUMBER ONE IS MISS --

MR. ZIMMER: PERSONS.

THE COURT: WHO ALSO IS A BLACK, AFRICAN-AMERICAN JUROR. I JUST WANT THE RECORD TO BE COMPLETE IN TERMS OF WHAT HAS OCCURRED.

ALL RIGHT. HAVING CONSIDERED NOW, WITH REGARD TO THIS PRESENT MOTION, THE ARGUMENTS OF COUNSEL AND ALSO MY OWN OBSERVATIONS AND RECOLLECTION OF THIS JUROR, THE COURT WILL FIND AT THIS TIME THAT THE PROSECUTION HAS MET ITS BURDEN TO REBUT THE INFERENCE OF GROUP BIAS AS TO THAT JUROR AND TO THE PROSPECTIVE JURORS WHO HAVE BEEN DESCRIBED HERE AND IS SATISFIED AT THIS TIME THAT THE PEREMPTORY CHALLENGE IN QUESTION WERE NOT PREDICATED SOLELY ON GROUP BIAS AND HAS PREVIOUSLY ADDRESSED ON THE RECORD THIS JUROR'S QUESTIONNAIRE ALONG WITH THE QUESTIONNAIRES OF ALL JURORS, IT WILL BE AFFIXED AND A

PART OF THE RECORD OF THESE PROCEEDINGS.

ALL RIGHT. WE'LL RETURN TO THE COURT.

(THE FOLLOWING PROCEEDINGS WERE HAD IN OPEN COURT.)

THE COURT: ALL RIGHT. THE RECORD WILL REFLECT NOW WE HAVE RETURNED TO THE OPEN COURTROOM.

AND AT THIS TIME, THE PROSPECTIVE CHALLENGE -- THE CHALLENGE IS WITH THE DEFENDANT, MR. STEVENS.

MR. SELVIN: THE DEFENDANT STEVENS WILL PASS, YOUR HONOR.

THE COURT: ALL RIGHT. THE CHALLENGE THEN IS WITH THE DEFENDANT CLARK.

MR. ZIMMER: DEFENDANT CLARK IS SATISFIED WITH THE JURY AND PASSES.

THE COURT: BOTH DEFENDANTS PASS.

THE CHALLENGE IS WITH THE PEOPLE.

MR. BURR: PEOPLE WOULD THANK AND ASK THE COURT TO EXCUSE MR. ROSE, JUROR NUMBER TWO.

THE COURT: ALL RIGHT, MR. ROSE, THANKS FOR PARTICIPATING, SIR, YOU ARE EXCUSED.

ALL RIGHT, MISS CLERK.

THE CLERK: ELAINE BACHRACH, B A C H R A C H.

THE COURT: PEREMPTORY CHALLENGE IS WITH THE DEFENDANT STEVENS.

MR. ZIMMER: COULD WE HAVE JUST A MOMENT? I'M SORRY.

THE COURT: SURELY.

(PAUSE.)

MR. ZIMMER: I'M SORRY. WE LOST TRACK.
WAS IT WITH DEFENDANT STEVENS?
THE COURT: DEFENDANT STEVENS.
MR. SELVIN: THE DEFENDANT STEVENS WILL PASS.
THE COURT: ALL RIGHT. DEFENDANT CLARK.
MR. ZIMMER: DEFENDANT CLARK WILL PASS.
THE COURT: PEOPLE.
MR. BURR: PEOPLE WOULD THANK AND ASK THE COURT TO EXCUSE MISS BACHRACH, JUROR NUMBER TWO.
THE COURT: OKAY, MISS BACHRACH, THANK YOU FOR PARTICIPATING. YOU ARE EXCUSED.
THE CLERK: SARAH MC CALL, M C C A L L.
THE COURT: ALL RIGHT. THE CHALLENGE IS WITH THE DEFENDANT STEVENS.
MR. ZIMMER: DEFENDANT CLARK'S CHALLENGE? I'M SORRY?
THE COURT: STEVENS.
MR. SELVIN: THE DEFENDANT STEVENS WILL PASS, YOUR HONOR.
THE COURT: DEFENDANT CLARK.
MR. ZIMMER: PASS.
THE COURT: PEOPLE.
MR. BURR: PEOPLE WOULD THANK AND ASK THE COURT TO EXCUSE MISS MC CALL, JUROR NUMBER TWO.
THE COURT: ALL RIGHT, MISS MC CALL, THANK YOU FOR PARTICIPATING.
MR. BERGER: MAY WE APPROACH?
MR. SELVIN: AGAIN, YOUR HONOR.

THE COURT: ALL RIGHT. I'LL ASK ALL PARTIES, COUNSEL, COURT REPORTER TO ACCOMPANY ME IN CHAMBERS, PLEASE.

(THE FOLLOWING PROCEEDINGS WERE HAD IN CHAMBERS.)

THE COURT: ALL RIGHT. THE RECORD WILL REFLECT THAT AGAIN ALL DEFENDANTS AND COUNSEL ARE PRESENT IN CHAMBERS AND THERE'S A MOTION FOR THE RECORD.

MR. ZIMMER: YES.

WE WOULD RENEW THE MOTION PREVIOUSLY MADE ON THE BASIS THAT MISS MC CALL, WHO WAS JUST EXCUSED, IS AN AFRO-AMERICAN.

MISS PERSONS IS STILL ON THE JURY, BUT PROSECUTION HAS YET TO PASS THE JURY.

MR. SELVIN: YOUR HONOR, JUST SO THE RECORD REFLECTS THIS, JUST -- WE HAVE JOINED ALL OTHER WHEELER MOTIONS. JUST IN CASE I HAVEN'T OFFICIALLY SAID WE JOIN, WE CERTAINLY JOIN EVERY WHEELER MOTION.

THE COURT: YOU'RE RIGHT TO MAKE THAT POINT. I THINK IT'S CLEAR, BUT IT'S MADE AGAIN. BOTH PARTIES, IN TERMS OF BOTH DEFENDANTS, ARE JOINING IN THESE MOTIONS?

MR. SELVIN: THAT'S CORRECT.

THE COURT: ALL RIGHT.

MR. BURR, I'D LIKE YOUR SPECIFIC RESPONSES AS TO JUROR MC CALL.

MR. BURR: AGAIN, WITH MISS MC CALL, SHE WOULDN'T TELL ME WHETHER OR NOT SHE WAS FOR OR AGAINST THE DEATH PENALTY. I ASKED HER THE QUESTION WHETHER OR NOT SHE

WOULD VOTE FOR IT IF IT WERE ON THE BALLOT, AND SHE SAID SHE COULDN'T SAY AT THIS TIME OR WOULDN'T SAY, SHE DANCED AROUND IN HER ANSWERS WITH ME, AND WAS, I THOUGHT, VERY VAGUE ON THE ISSUE AS TO WHETHER OR NOT SHE COULD ACTUALLY IMPOSE THE DEATH PENALTY.

HER RESPONSES WERE SIMILAR TO A NUMBER OF OTHER JURORS THAT I HAD EXCUSED AND THE SAME VEIN AS FAR AS WHETHER OR NOT THEY COULD DO IT.

MR. SIMAS, MR. MC DONALD, BOTH OF THEM INDICATED A CERTAIN REAL COMMITMENT AS TO WHETHER THIS IS SOMETHING THEY COULD DO. AT ONE LEVEL THEY SAID THAT THEY'D WAIT UNTIL THEY HEARD ALL THE EVIDENCE AND THEY MIGHT, BUT THERE IS THIS SPECTOR THAT I JUST DIDN'T FEEL SHE COULD IMPOSE THE DEATH PENALTY AND I EXCUSED HER BECAUSE I COULD NOT FEEL CONFIDENT THAT WE COULD GET A FAIR SHOT AT A DEATH PENALTY VERDICT FROM HER.

THE COURT: ALL RIGHT, COUNSEL, ANYTHING FURTHER?

MR. ZIMMER: I HAVE NOTHING FURTHER.

MR. BERGER: MISS MC CALL INDICATED ON HER QUESTIONNAIRE THAT SHE WAS, TOO, MODERATELY IN FAVOR OF THE DEATH PENALTY. SHE SAID THAT THE DEATH PENALTY WAS APPROPRIATE DEPENDING ON THE OFFENSE. SHE WAS NOT CHALLENGED FOR CAUSE. I CERTAINLY DON'T THINK A CHALLENGE WOULD HAVE BEEN WELL TAKEN AS TO HER. I THINK SHE ANSWERED ALL QUESTIONS APPROPRIATELY AND WOULD, BY ALL MEANS, HAVE BEEN AN APPROPRIATE JUROR.

SUBMITTED.

MR. SELVIN: MAY I JUST ADD ONE THING, YOUR HONOR?

I THINK AT SOME POINT THE QUESTION OF NUMBERS BECOMES QUITE SIGNIFICANT IN THIS SITUATION. BEFORE WE EVEN GOT HERE, THERE HAS BEEN QUITE A BIT OF SCREENING PROCESS, IN TERMS OF THE QUESTIONNAIRE, IN TERMS OF THE JURY SELECTION, AND IN TERMS OF THE TOTALITY OF INFORMATION THAT EXISTS, AND THE FACT THAT NOW THERE HAS BEEN THE EXCUSE OF FIVE BLACK JURORS, YOU KNOW, THAT BECOMES EXTREMELY, EXTREMELY SIGNIFICANT.

I KNOW MR. BURR HAS -- HE HAS STRESSED HIS OWN PERSONAL INTEGRITY. THE POINT IS WE'RE NOT DEALING WITH THE ISSUE OF HIS PERSONAL INTEGRITY. HE MAY HAVE A LOT OF PERSONAL INTEGRITY, WE'RE NOT DENYING THAT, BUT THE POINT IS A TACTICAL DECISION, HE DOESN'T WANT THOSE PARTICULAR JURORS. AND WHEN I TALK ABOUT TACTICAL DECISIONS, I'M TALKING TACTICAL ON THE BASIS OF THE RACE, BECAUSE, YOU KNOW, THE RACE CAN PLAY A BASIS AS FAR AS TACT IS CONCERNED IN TERMS OF HOW THE JURORS ARE GOING TO BE, BUT THE WHOLE POINT OF THE WHEELER CASE IS TO ELIMINATE RACE EVEN AS A TACTICAL DECISION.

AND THE ISSUE -- NO ONE IS ACCUSING MR. BURR PERSONALLY, BUT THAT'S NOT EVEN THE ISSUE HERE BEFORE US. THE ISSUE IS THE INTEGRITY OF THE ENTIRE SYSTEM, AND AT SOME POINT IN TIME WHEN YOU GET TO A POINT WHEN THE NUMBERS ARE SUCH AS WE SEE HERE, THERE'S NO OTHER -- THERE'S NO OTHER REASONABLE -- I SHOULDN'T SAY NO OTHER LIKELIHOOD, THERE'S NO OTHER REASONABLE EXPLANATION OF CHALLENGING CONSTANTLY BLACK JURORS.

IT'S INTERESTING ENOUGH THAT THERE'S ONE CASE

RECENTLY THAT CAME DOWN FROM SAN FRANCISCO SUPERIOR COURT. IT WAS AN APPELLATE DECISION WHERE THEY UPHELD THE WHEELER CASE ON THE BASIS OF I BELIEVE ONE CHALLENGE OF ONE BLACK INDIVIDUAL. ONE. I DON'T KNOW IF THAT CASE WILL HOLD ON APPEAL OR WHATEVER IT IS.

THE COURT: I'M SORRY. YOU SAID THAT WAS THE APPELLATE DIVISION?

MR. SELVIN: OF SAN FRANCISCO SUPERIOR COURT. THEY REFUSED THE TRIAL COURT ON THE BASIS OF THE CHALLENGE OF ONE BLACK INDIVIDUAL. NOW WE'VE REACHED A POINT HERE WHERE WE'RE DEALING WITH FIVE.

MR. BERGER: SIX.

MR. SELVIN: IT'S GOING TO BE HARD FOR ANYBODY REVIEWING THE RECORD ON THE BASIS OF THE RECORD THAT WE HAVE. I'M NOT GOING TO ARGUE THE RECORD, THE TRANSCRIPTS OF WHAT WENT ON SINCE WE HAVEN'T CROSSED THAT LINE. THAT'S ALL I'LL MENTION. I WON'T REPEAT MYSELF AGAIN.

THE COURT: I JUST WANT TO CLARIFY ONE THING THAT IS CLEAR TO US, BUT I WANT TO MAKE SURE IT'S CLEAR ON THE RECORD WHERE YOU INDICATED SCREENING THAT HAD BEEN DONE BEFORE WE GOT TO THIS POINT. WHAT YOU WERE REFERRING TO WAS THE REVIEW OF QUESTIONNAIRES?

MR. SELVIN: THAT'S CORRECT.

THE COURT: THE STIPULATION BY THE PARTIES THAT CERTAIN JURORS BE EXCUSED, IS THAT WHAT YOU'RE REFERRING TO AS THE SCREENING BEFORE WE GOT HERE TODAY?

MR. SELVIN: THAT'S CORRECT.

THE COURT: NOW MR. BURR.

MR. BURR: THANK YOU.

WELL, YOU KNOW, AT ONE LEVEL HE SAYS HE DOESN'T GET INTO MY PERSONALITY AND MY PROFESSIONAL INTEGRITY, BUT HE DOES. HE'S ALLUDING TO THE FACT THAT I'VE ADOPTED A TACT OF EXCLUDING A PARTICULAR SETTING OF THE COMMUNITY; THAT DOES GET INTO MY REPUTATION. THAT'S WHY MY PROFESSIONAL REPRESENTATION IS AN APPROPRIATE FACTOR TO BE CONSIDERED BECAUSE OF THE CASES I'VE TRIED IN THIS COUNTY, THE NUMBERS THAT I HAVE TRIED, AND MY REPUTATION IN THIS COUNTY.

IT IS CLEAR THAT I DON'T RESORT TO THIS TACTIC IN CASES. I DON'T HAVE TO. WHAT IT COMES DOWN TO IS HAVING THE RIGHT JURIES AND THE RIGHT JURORS. AND THE RIGHT JURORS IN THIS PARTICULAR CASE DON'T INCLUDE THOSE THAT I EXCLUDED AT THIS POINT IN TIME, WHETHER THEY'RE WHITE, BLACK, PURPLE OR ANYTHING.

AND THE IDEA OF THE PROCESS THAT WE'VE GOTTEN DOWN TO GET TO THIS POINT IN TIME IS AN ALLUSION TO SIMPLY THOSE QUESTIONNAIRES THAT WERE CLEAR ON THEIR FACE WHERE THEY SAY, "I COULD NEVER IMPOSE THE DEATH PENALTY. I'M AGAINST THE DEATH PENALTY," OR, "I WOULD ALWAYS IMPOSE THE DEATH PENALTY." AND MANY PEOPLE WE EXCLUDED JUST SIMPLY BECAUSE THEY SAID AN EYE FOR AN EYE, AND I WOULD GO ALONG WITH THAT, BELIEVING THAT EIGHT TIMES OUT OF 10, MOST OF THOSE PEOPLE AREN'T GOING TO QUALIFY. BUT WHAT I HAVE TO LOOKOUT FOR IS THE ONE JUROR WHO SAYS, "WELL, I'M FOR THE DEATH PENALTY AND I SUPPORT IT IN CERTAIN CASES," BUT WHEN PUSH COMES TO SHOVE, THEY DO NOT HAVE THE INTERNAL

FORTITUDE TO ACTUALLY IMPOSE THE DEATH PENALTY THEMSELVES IN A REAL CASE.

IT'S REAL EASY TO GIVE LIP SERVICE TO A PARTICULAR CONCEPT OR PRINCIPLES TO GET INTO A SITUATION AND PUT YOUR MONEY WHERE YOUR MOUTH IS. AND I JUST DO NOT BELIEVE THAT ANY OF THESE PEOPLE THAT I'VE EXERCISED CHALLENGES ON HAVE THAT INTERNAL FORTITUDE TO GO FORWARD AND IMPOSE THE DEATH PENALTY. THEY CAN SAY, "WELL, UNDER THE RIGHT CIRCUMSTANCES WHEN I'M ABSOLUTELY CERTAIN," BUT THE REALITY IS, AND WE'VE ALL BEEN THERE, THAT THOSE PEOPLE WILL NEVER HAVE ENOUGH EVIDENCE TO CONVICT SOMEBODY OR NOT CONVICT SOMEBODY, BUT TO IMPOSE THE DEATH PENALTY, AND IN SOME INSTANCES, EVEN TO CONVICT SOMEBODY, AGAIN, I'M NOT LOOKING TO HANG THE CASE. I'M LOOKING FOR 12 PEOPLE WHO WILL WORK TOGETHER AND WHO I'VE GOT A FIGHTING SHOT AT IMPOSING THE DEATH PENALTY. AND THESE PEOPLE THAT I'VE EXERCISED CHALLENGES ON CAN'T CUT THAT, CAN'T DO THAT.

AND MY EXPERIENCE AND GIVEN MY DEALINGS IN QUESTIONING WITH THESE JURORS AND THE QUESTIONING IS VERY SIGNIFICANT, SIMPLY BECAUSE THE WAY THEY INTERACT WITH ME AT THAT LEVEL AND THEIR RESPONSES ARE VERY EQUIVOCAL.

THE COURT: ALL RIGHT. SUBMITTED?

MR. ZIMMER: YES.

MR. SELVIN: SUBMITTED.

THE COURT: ALL RIGHT. AGAIN, AS PREVIOUSLY DESCRIBED, HAVING CONSIDERED THE TOTALITY OF THESE CIRCUMSTANCES HERE WHICH, AS WE'VE SAID, INCLUDES THE QUESTIONNAIRES AND CLEARLY THE JURORS' RESPONSES WHICH ARE

SET FORTH ON THE TRANSCRIPT OF OUR QUESTIONING OF THOSE JURORS, AND ALSO THE COURT'S OWN OBSERVATIONS, AT THIS TIME THE MOTION WILL CONTINUE TO BE DENIED FOR THE REASONS PREVIOUSLY STATED.

ALL RIGHT. LET'S PROCEED.

(THE FOLLOWING PROCEEDINGS WERE HAD IN OPEN COURT.)

THE COURT: ALL RIGHT, MISS CLERK.

THE CLERK: TERRY TRUE, T R U E.

THE COURT: THE CHALLENGE IS WITH THE DEFENDANT STEVENS.

MR. SELVIN: YES, YOUR HONOR, THE DEFENDANT STEVENS WILL THANK AND EXCUSE JUROR NUMBER FOUR, MR. WINNIE.

THANK YOU VERY MUCH, MR. WINNIE.

THE COURT: ALL RIGHT. MR. WINNIE, THANKS FOR PARTICIPATING HERE, SIR, YOU ARE EXCUSED.

THE CLERK: JOYCE GRAY, G R A Y.

THE COURT: THE CHALLENGE IS WITH THE PEOPLE.

MR. BURR: PEOPLE WOULD THANK AND EXCUSE MISS GRAY.

MR. SELVIN: YOUR HONOR, MAY WE APPROACH?

THE COURT: LADIES AND GENTLEMEN, I THINK THIS WILL BE A GOOD TIME PERHAPS TO TAKE A RECESS RATHER THAN KEEP YOU WAITING IN THE COURTROOM, SO WE WILL DO THAT.

PLEASE REMEMBER WHAT I SAID BEFORE. THOSE OF YOU PRESENT IN THE JURY BOX, PLEASE CONTINUE TO -- DON'T -- I'LL EXCUSE YOU IN JUST A SECOND, PLEASE. WHEN YOU RETURN TAKE UP THOSE SAME SEATS, IF YOU WILL, AND THOSE OF YOU IN THE SPECTATOR SECTION, PLEASE, YOU NEED NOT TAKE UP THOSE

SAME SEATS, BUT PLEASE RETURN. WHAT I'LL DO IS TAKE A SHORT RECESS.

PLEASE REMEMBER THE ADMONITION, HAVE NO DISCUSSION ABOUT THE CASE, AND I'M GOING TO ASK YOU TO BE AVAILABLE TO CONTINUE THESE PROCEEDINGS AT 15 MINUTES TO 4:00, 15 MINUTES TO 4:00 BY THIS CLOCK SINCE THIS IS THE ONLY CLOCK WE HAVE IN COMMON.

THANK YOU. AND IF YOU COULD JUST WAIT OUTSIDE.

(THE FOLLOWING PROCEEDINGS WERE HAD OUTSIDE THE PRESENCE OF THE PROSPECTIVE JURORS.)

THE COURT: ALL RIGHT. THE RECORD WILL REFLECT THE PROSPECTIVE JURORS HAVE BEEN EXCUSED FROM THE COURTROOM.

AND THE DEFENSE INDICATED THEY WISH TO MAKE A FURTHER MOTION.

MR. ZIMMER, MR. SELVIN, JUST FOR THE RECORD.

MR. BERGER: YOUR HONOR, WE WOULD RENEW THE WHEELER MOTION PREVIOUSLY MADE ON BEHALF OF MR. STEVENS AND INDICATING THAT THE PROSECUTION HAS JUST CHALLENGED JOYCE GRAY, WHO IS AN AFRICAN-AMERICAN WOMAN --

THE COURT: ALL RIGHT.

MR. BERGER: -- WHO NOW HAS CHALLENGED EIGHT OUT OF NINE AFRO-AMERICANS WHO HAVE BEEN CALLED TO THE JURY WITH THE EXCEPTION OF MR. LEE WHO WAS CHALLENGED BY THE DEFENDANT CLARK.

MR. ZIMMER: AND I WOULD JOIN.

THE COURT: ALL RIGHT, MR. BURR.

MR. BURR: I DON'T THINK IT'S ANY GREAT SURPRISE TO ANYONE THAT MISS GRAY IS WHO I CHALLENGED FOR CAUSE

INITIALLY WHICH THE COURT FOUND SHE PASSED, AT LEAST FOR PURPOSES OF GETTING PAST THE CHALLENGE FOR CAUSE, THAT I WOULD CHALLENGE HER WHEN SHE HITS THE BOX.

SHE WAS A WOMAN WHO INDICATED THAT SHE HAD STRONGLY SUPPORTED OR WAS STRONGLY AGAINST THE DEATH PENALTY UNTIL SHE HERSELF WAS A VICTIM OF A CRIME LAST SUMMER AND AT THAT POINT IN TIME STARTED TO REEVALUATE. AND THERE WERE MANY TIMES IN HER ANSWERS TO MY QUESTIONS WHICH MADE IT CLEAR THAT IN ALL REALITY, THERE WAS NO WAY SHE WAS GOING TO IMPOSE THE DEATH PENALTY. SHE SAID IT'S POSSIBLE, BUT I HAVE NO CONFIDENCE IN HER ABILITY TO IMPOSE THE DEATH PENALTY, AT LEAST TO THE POINT WHERE I COULD TAKE A CHANCE.

THE COURT: OKAY. MR. SELVIN? MR. ZIMMER?

MR. SELVIN: I THINK THE RECORD IS QUITE CLEAR. WE'RE DEALING WITH THE SAME PATTERN AS FAR AS MR. STEVENS IS CONCERNED AND WILL SUBMIT IT WITH THAT.

MR. ZIMMER: YES, I WOULD SUBMIT THE MATTER.

THE COURT: ALL RIGHT. AND THE RECORD SHOULD REFLECT, AS WAS POINTED OUT BY MR. BURR, THIS PROSPECTIVE JUROR, NOW REFERRING TO MISS GRAY, WAS THE SUBJECT OF A EARLIER CHALLENGE FOR CAUSE BY THE PROSECUTION. I PARTICULARLY HAVE HER ANSWERS IN THE QUESTIONNAIRE AND HER ANSWERS TO OUR QUESTIONS IN MIND BECAUSE I SPECIFICALLY REVIEWED THAT FOR PURPOSES OF RULING ON THE CHALLENGE FOR CAUSE. AND HAVING CONSIDERED ALL THAT, AT THIS TIME, THE MOTION WILL CONTINUE TO BE DENIED FOR THE REASONS PREVIOUSLY STATED.

ALL RIGHT. WE'LL BE OFF THE RECORD.

(RECESS.)
(THE FOLLOWING PROCEEDINGS WERE HAD IN OPEN COURT.)

THE COURT: VERY WELL. MISS CLERK, IF YOU'LL CALL A NAME FOR CHAIR NUMBER FOUR, PLEASE.

THE CLERK: ROBERT AMOR, A M O R.

THE COURT: VERY WELL. THE CHALLENGE IS WITH THE DEFENDANT CLARK.

MR. ZIMMER: THE DEFENDANT CLARK THANKS AND EXCUSES JUROR NUMBER FOUR, MR. AMOR.

THE COURT: OKAY, MR. AMOR, THANKS FOR PARTICIPATING, SIR, YOU ARE EXCUSED.

THE CLERK: SIDNEY SANTOS, S A N T O S.

THE COURT: PEREMPTORY CHALLENGE IS WITH THE PEOPLE.

MR. BURR: PEOPLE WOULD ACCEPT THE JURY AS PRESENTLY CONSTITUTED.

THE COURT: PEOPLE PASS.

PEREMPTORY CHALLENGE IS WITH THE DEFENDANT STEVENS.

MR. SELVIN: THE DEFENDANT STEVENS THANKS AND EXCUSES MISS SANTOS, JUROR NUMBER FOUR, MISS SANTOS.

THE COURT: ALL RIGHT, MISS SANTOS, THANKS FOR PARTICIPATING. YOU ARE EXCUSED.

THE CLERK: ARMOND JORDON, J O R D O N.

THE COURT: CHALLENGE IS WITH THE PEOPLE.

MR. BURR: PEOPLE WOULD ACCEPT THE JURY AS PRESENTLY CONSTITUTED.

THE COURT: PEOPLE PASS.

CHALLENGE IS WITH THE DEFENDANT CLARK.

MR. ZIMMER: DEFENDANT CLARK THANKS AND EXCUSES JUROR NUMBER FOUR, MR. JORDON.

THE COURT: OKAY. MR. JORDON, THANK YOU VERY MUCH, SIR. YOU ARE EXCUSED. WE APPRECIATE YOUR PRESENCE HERE.

MISS CLERK.

THE CLERK: CHARLES PETERS, P E T E R S.

THE COURT: CHALLENGE IS WITH THE PEOPLE.

MR. BURR: PEOPLE WOULD ACCEPT THE JURY AS PRESENTLY CONSTITUTED.

THE COURT: PEOPLE PASS.

CHALLENGE IS WITH THE DEFENDANT STEVENS.

MR. SELVIN: THE DEFENDANT STEVENS WILL THANK AND EXCUSE JUROR NUMBER TWO, MR. TRUE.

THANK YOU VERY MUCH.

THE COURT: ALL RIGHT, MR. TRUE, THANKS FOR PARTICIPATING, SIR, YOU ARE EXCUSED.

THE CLERK: EDWARD PRODGER, P R O D G E R.

THE COURT: CHALLENGE IS WITH THE PEOPLE.

MR. BURR: THE PEOPLE WOULD ACCEPT THE JURY AS PRESENTLY CONSTITUTED.

THE COURT: PEOPLE PASS.

CHALLENGE IS WITH THE DEFENDANT CLARK.

MR. ZIMMER: DEFENDANT CLARK WOULD THANK AND EXCUSE JUROR NUMBER TWO, MR. PRODGER.

THE COURT: OKAY, MR. PRODGER, THANKS FOR PARTICIPATING, SIR, YOU ARE EXCUSED.

THE CLERK: HERLAINE KERFOOT.

THE COURT: ALL RIGHT. THE PROSPECTIVE JUROR KERFOOT IS NOT PHYSICALLY PRESENT, BUT HER NAME WILL BE AFFIXED TO CHAIR NUMBER TWO.

AND THE CHALLENGE IS WITH THE PEOPLE.

MR. BURR: PEOPLE WOULD THANK AND EXCUSE JUROR NUMBER TWO, MISS KERFOOT.

THE COURT: ALL RIGHT. MISS KERFOOT IS EXCUSED.

ALL RIGHT, MISS CLERK.

THE CLERK: KAY YOSHIURA, Y O S H I U R A.

THE COURT: THE CHALLENGE IS WITH THE DEFENDANT STEVENS.

MR. SELVIN: THE DEFENDANT STEVENS WILL THANK AND EXCUSE JUROR NUMBER TWO, MRS. YOSHIURA.

THE COURT: THANKS FOR PARTICIPATING, MISS YOSHIURA.

THE CLERK: JAMES COLLONDREZ, C O L L O N D R E Z.

THE COURT: CHALLENGE IS WITH THE PEOPLE.

MR. BURR: THE PEOPLE WOULD ACCEPT THE JURY AS PRESENTLY CONSTITUTED.

THE COURT: PEOPLE PASS.

CHALLENGE IS WITH DEFENDANT CLARK.

MR. ZIMMER: DEFENDANT CLARK ACCEPTS THE JURY AS PRESENTLY CONSTITUTED.

THE COURT: CHALLENGE IS WITH THE DEFENDANT STEVENS.

MR. SELVIN: THE DEFENSE IS SATISFIED.

THE COURT: DEFENDANT STEVENS IS SATISFIED AND PASSES.

ALL PARTIES HAVE PASSED ON THIS JURY.

IS THAT CORRECT, MR. BURR?

MR. BURR: YES, YOUR HONOR.

THE COURT: MR. SELVIN?

MR. SELVIN: YES.

THE COURT: MR. ZIMMER?

MR. ZIMMER: YES, YOUR HONOR.

THE COURT: ALL RIGHT. LET ME SEE COUNSEL JUST BRIEFLY, PLEASE.

(OFF THE RECORD DISCUSSION BETWEEN THE COURT AND COUNSEL IN CHAMBERS.)

THE COURT: ALL RIGHT. MISS CLERK, I'M GOING TO ASK YOU TO CALL THE NAMES OF THE NEXT THREE PROSPECTIVE JURORS.

LADIES AND GENTLEMEN, LET ME EXPLAIN TO YOU, THE JURY IN THIS MATTER NOW HAS BEEN SELECTED. THIS WILL BE AND IS THE TRIAL JURY IN THIS CASE, HOWEVER, WE NEED TO -- THE SELECTION PROCESS IS NOT YET COMPLETE, AND THE REASON IT IS NOT, AND I WANT YOU TO UNDERSTAND WHY, IS THAT WE NOW HAVE TO CHOOSE THREE ALTERNATE JURORS. AND I KNOW SOME OF YOU HAVE HAD PREVIOUS JURY EXPERIENCES, IF YOU HAVE NOT, I WILL SIMPLY TELL YOU THE ROLE OF AN ALTERNATE JUROR IS TO BE PRESENT THROUGHOUT THE PROCEEDINGS AND TO BE AVAILABLE AS MAY BE NECESSARY AND AS MAY BE DEMONSTRATED BY LEGAL CAUSE TO REPLACE ONE OF THE SITTING TRIAL JURORS IF THERE BECOMES AN APPROPRIATE REASON TO DO THAT.

AND SO, NOW, MISS CLERK, IF YOU WOULD CALL FORWARD

THE NEXT THREE JURORS.

AND MR. BAILIFF, THEY WILL BE -- THE FIRST JUROR WILL BE SEATED IN JUROR NUMBER ONE, WHICH IS TO MY LEFT, FIRST, SECOND AND THIRD

GO AHEAD, MISS CLERK.

THE CLERK: PAUL TOY, T O Y.

ALDENE CROSWELL, C R O S W E L L.

MARY DOMENICHELLI, D O M E N I C H E L L I.

THE COURT: VERY WELL. THE FIRST THREE PROSPECTIVE ALTERNATE JURORS HAVE BEEN SEATED AS DESCRIBED NUMERICALLY.

THE PEREMPTORY CHALLENGE IS WITH THE PEOPLE.

MR. BURR: PEOPLE WOULD THANK AND ASK THE COURT TO EXCUSE MISS CROSSWELL, ALTERNATE NUMBER TWO.

THE COURT: ALL RIGHT. MISS CROSSWELL, THANK YOU FOR PARTICIPATING. YOU'RE EXCUSED. THANK YOU.

THE CLERK: MANUEL MIGUEL, M I G U E L.

THE COURT: ALL RIGHT. PEREMPTORY CHALLENGE IS WITH THE DEFENDANT STEVENS.

MR. SELVIN: EXCUSE ME, YOUR HONOR.

THE COURT: THE CHALLENGE IS WITH DEFENDANT STEVENS.

MR. SELVIN: YES, THE DEFENDANT STEVENS WILL THANK AND EXCUSE ALTERNATE NUMBER TWO, MR. MIGUEL.

THANK YOU VERY MUCH, MR. MIGUEL.

THE COURT: ALL RIGHT. MR. MIGUEL, YOU ARE EXCUSED. THANK YOU FOR BEING HERE, SIR.

PROSPECTIVE JUROR MIGUEL: THANK YOU.

THE CLERK: HERSCHEL STEPHENS, S T E P H E N S.

THE COURT: PEREMPTORY CHALLENGE IS WITH THE PEOPLE.

MR. BURR: PEOPLE WOULD ACCEPT THE ALTERNATES.

THE COURT: PEOPLE PASS.

PEREMPTORY CHALLENGE IS WITH THE DEFENDANT CLARK.

MR. ZIMMER: WE'D THANK AND EXCUSE JUROR NUMBER ONE, MR. TOY.

THE COURT: ALL RIGHT. MR. TOY, THANKS FOR PARTICIPATING, SIR.

THE CLERK: MARIANNA SUNDSTROM, S U N D S T R O M.

THE COURT: PEREMPTORY CHALLENGE IS WITH THE PEOPLE.

MR. BURR: PEOPLE ACCEPT THE ALTERNATES.

THE COURT: ALL RIGHT. PEOPLE PASS.

WITH THE DEFENDANT STEVENS.

MR. SELVIN: ONE SECOND, YOUR HONOR.

THE COURT: SURE, TAKE YOUR TIME.

(PAUSE.)

MR. SELVIN: THE DEFENDANT STEVENS WILL THANK AND EXCUSE ALTERNATE NUMBER TWO, STEPHENS. THANK YOU.

THE COURT: ALL RIGHT. MR. STEVENS, THANK YOU FOR PARTICIPATING.

THE CLERK: SHERI BANKS, BANKS.

THE COURT: I'M SORRY?

THE CLERK: SHERI BANKS.

THE COURT: MISS BANKS IS NOT PHYSICALLY PRESENT, AS HAS BEEN DISCUSSED WITH COUNSEL, BUT HER NAME NOW WILL

BE AFFIXED IN THE POSITION AS ALTERNATE JUROR CHAIR NUMBER TWO AND THE CHALLENGE IS WITH THE PEOPLE.

MR. BURR: PEOPLE WOULD ACCEPT THE ALTERNATES.

THE COURT: PEOPLE PASS.

THE CHALLENGE THEN GOES TO DEFENDANT CLARK.

MR. ZIMMER: COULD WE HAVE JUST ONE MOMENT?

THE COURT: SURE.

(PAUSE.)

MR. ZIMMER: I'M SORRY. FOR CLARIFICATION PURPOSES, THE CHALLENGE IS WITH DEFENDANT CLARK?

THE COURT: IT IS. THE CHALLENGE IS WITH THE DEFENDANT CLARK.

LET ME HAVE COUNSEL APPROACH PLEASE.

(OFF THE RECORD DISCUSSION BETWEEN THE COURT AND COUNSEL IN CHAMBERS.)

THE COURT: NOW, MR. ZIMMER, YOU ASKED FOR CLARIFICATION.

MR. ZIMMER: I BELIEVE IT WAS MY CHALLENGE.

THE COURT: THE CHALLENGE IS WITH THE DEFENDANT CLARK.

MR. ZIMMER: RIGHT. DEFENDANT CLARK PASSES.

THE COURT: ALL RIGHT. CHALLENGE IS WITH DEFENDANT STEVENS.

MR. SELVIN: DEFENDANT STEVENS IS SATISFIED WITH THE COMPOSITION OF THE JURY AND PASSES.

THE COURT: PEOPLE HAVE PREVIOUSLY PASSED WITH REGARD TO THESE THREE PROSPECTIVE JURORS, WHICH INCLUDES MISS BANKS, WHO WILL BE OCCUPYING CHAIR NUMBER TWO; IS

THAT CORRECT?

MR. BURR: THAT IS CORRECT.

MR. ZIMMER: YES.

MR. SELVIN: YES.

THE COURT: WITH THAT UNDERSTANDING, ALL PARTIES PASSED ON THE ALTERNATES.

MR. BURR?

MR. BURR: YES, YOUR HONOR.

THE COURT: MR. SELVIN?

MR. SELVIN: YES.

THE COURT: MR. ZIMMER?

MR. ZIMMER: YES.

MR. SELVIN: THERE IS -- MISS BANKS, SHE WILL BE HERE.

THE COURT: IS THAT RIGHT, MISS CLERK?

THE CLERK: THAT'S RIGHT.

THE COURT: ALL RIGHT, LADIES AND GENTLEMEN, I WILL SAY TO YOU NOW THAT THE, AS I INDICATED BEFORE, THE TRIAL JURY HAS BEEN SELECTED IN THIS MATTER, AND ALSO THE ALTERNATE JURORS, WHO WILL BE AVAILABLE AS MAY BE NECESSARY DURING THE COURSE OF THE TRIAL, HAVE ALSO BEEN SELECTED.

AND SO IN A MOMENT THOSE OF YOU WHO FIND YOURSELVES TO CONTINUE TO OCCUPY PLACES IN THE SPECTATOR SECTION, I AM GOING TO BE EXCUSING YOU IN JUST A MINUTE.

BEFORE I DO THAT, I JUST WANT YOU TO KNOW, AS I SAID, AT THE BEGINNING THIS AFTERNOON, THIS HAS BEEN A PROCESS OF SOME LENGTH. IT CLEARLY HAS INVOLVED A

APPENDIX O

WHITEWASHING THE JURY BOX

How California Perpetuates the Discriminatory Exclusion of Black and Latinx Jurors



Berkeley Law | Death Penalty Clinic

JUNE 2020

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Founded in 2001, the Berkeley Law Death Penalty Clinic seeks justice for individuals facing the death penalty by providing them with high quality representation; offers students a rich opportu nity for meaningful hands on experience in high stakes, complex litigation; and exposes problems endemic to the administration of capital punishment. More information about the clinic is avail able at https://www.law.berkeley.edu/experiential/clinics/death penalty clinic.

ACKNOWLEDGEMENTS

We are immensely grateful to AJ Kutchins (Supervising Deputy State Public Defender, Office of the State Public Defender) and Elias Batchelder (Supervising Deputy State Public Defender, Office of the State Public Defender) for their subject matter expertise and advice throughout the pro cess, and to Brooke McCarthy (Deputy State Public Defender, Office of the State Public Defender) for research assistance and insights concerning California district attorney training manuals.

We benefited tremendously from our consultations with Lila Silverstein (Staff Attorney, Wash ington Appellate Project) about *Batson* litigation in the state of Washington and the Washington Supreme Court's adoption of General Rule 37.

We are indebted to Berkeley Law Professor Catherine Albiston for her time and essential contribu tions to the empirical analysis of California Courts of Appeal opinions.

Our thanks to Elaine Alexander (Executive Director, Appellate Defenders, Inc.), Richard Lennon (Executive Director, California Appellate Project), Patrick McKenna (Executive Director, Sixth District Appellate Program), J. Bradley O'Connell (Assistant Director, First District Appellate Project), and Laurel Thorpe (Executive Director, Central California Appellate Program) for their assistance in our research of the opinions of the California Courts of Appeal.

We are grateful to Oscar Bobrow (Chief Deputy Public Defender, Solano County) and Brendon Woods (Chief Public Defender, Alameda County) for their comments on portions of the report.

Our research into California district attorney training manuals would not have been possible without the work of the ACLU of Northern California, which collected these materials. Our special thanks to ACLU NC litigation assistant Tara Coughlin.

Berkeley Law has a world class library staff who support our faculty and students in countless ways and on countless projects. We are especially grateful to Dean Rowan, Berkeley Law Li brary Director of Reference and Research Sciences, for his endless assistance with source col lection, and to Reference Librarians Joe Cera, Kristina Chamorro, Edna Lewis, and I Wei Wang for their responsiveness at any hour of the day.

We were fortunate to have the assistance of Berkeley Law Clinical Program Legal Case Manager Olivia Layug Balbarin's impeccable proofreading and Bluebooking skills.

Our thanks as well to Sarah Weld and Laurie Frasier for their exacting editorial, design, and production support, and to Amy Utstein for her administrative leadership.

We are grateful to the Vital Projects Fund, including Sophie Cull, for financial assistance in the publication of the report. We also extend our thanks to Dean Erwin Chemerinsky for his ongo ing support of Berkeley Law's clinics, and to donors to the Death Penalty Clinic without whom the clinic's litigation on behalf of individuals facing capital punishment and its research proj ects would not be possible.

Thousands of California citizens have been denied the right to serve on juries because of their race or ethnicity, and thousands of California criminal defendants have been tried by juries from which those citizens were excluded. The authors hope this report will serve as a catalyst for reform that results in vigorous enforcement of the constitutional rights of those whose lives depend upon a fair and equitable jury selection system and of those who are eligible to serve on juries. In this regard, the authors thank Assemblymember Dr. Shirley K. Weber (Dist. 79) for her leadership in introducing Assembly Bill 3070, which offers California the opportuni ty to eliminate discriminatory peremptory challenges.

Cover illustration by Davide Bonazzi

EXECUTIVE SUMMARY, FINDINGS, AND RECOMMENDATIONS

Racial discrimination is an ever present feature of jury selection in California. This report investigates the history, legacy, and continuing practice of excluding people of color, especially African Americans, from California juries through the exercise of peremptory challenges. Un like challenges for cause, each party in a trial has the right to excuse a specific number of jurors without stating a reason and without the court's approval. In California, peremptory challenges are defined by statute.

Historically, the main vice of peremptory challenges was that prosecutors wielded them with impunity to remove African Americans from jury service. These strikes were part and parcel of the systematic exclusion of Blacks from civil society. We found that prosecutors continue to exercise peremptory challenges to remove African Americans and Latinx people from Califor nia juries for reasons that are explicitly or implicitly related to racial stereotypes.

In 1978, in *People v. Wheeler*, our state supreme court was the first court in the nation to adopt a three step procedure intended to reduce prosecutors' discriminatory use of peremptory chal lenges. Almost a decade later, in *Batson v. Kentucky*, the United States Supreme Court approved a similar approach with the goal of ending race based strikes against African American pro spective jurors. An essential feature of the "*Batson*/*Wheeler* procedure" is that it only provides a remedy for *intentional* discrimination. Thus, at step one, the objecting party must establish a sufficient showing—known as a "prima facie case"—of purposeful discrimination. At step two, if the trial court agrees that the objecting party has made such a showing, the burden of pro ducing evidence shifts to the striking party to give a "race neutral" reason. At step three, the trial court decides whether the objecting party has established purposeful discrimination. If the court finds that the striking party's reason was credible, it denies the *Batson* objection.

In his concurring opinion in *Batson*, Justice Thurgood Marshall warned that *Batson*'s three step procedure would fail to end racially discriminatory peremptory strikes. He anticipated that prosecutors would easily be able to produce "race neutral" reasons at *Batson*'s second step, and that judges would be ill equipped to second guess those reasons. Further, Justice Marshall doubted *Batson*'s efficacy because the procedure did nothing to curb strikes motivated by un conscious racism—known more often today as implicit bias.

Justice Marshall was prescient: 34 years after *Batson* was decided, prosecutors in California still disproportionately exercise peremptory challenges to exclude African Americans and Latinx people from juries.

The Berkeley Law Death Penalty Clinic explored the shortcomings of the *Batson* procedure. Our report investigates how the California Supreme Court went from a judiciary that cham pioned the eradication of race based strikes to a court that resists the United States Supreme Court's limited efforts to enforce *Batson*. We conclude that *Batson* is a woefully inadequate tool to end racial discrimination in jury selection.

FINDINGS

1. Many decades after *Wheeler* and *Batson* were decided, California prosecutors' use of peremptory challenges to exclude African Americans and Latinx citizens from juries is still pervasive.

2. Historically and still today, in California, the overwhelming number of *Batson* objections are brought by defense attorneys against prosecutors' peremptory challenges.

3. Empirical evidence overwhelmingly shows that implicit biases play a significant role in prosecutors' peremptory challenges. Strikes based on these biases most often adversely affect Black defendants and Black jurors. Implicit biases are, by definition, deeply held and reflexive. Inasmuch as each of us acts on them without awareness, lawyers most often will not recognize their biases, much less be able to acknowledge them. Judges are no better at identifying them. *Batson*'s requirement that the objecting party prove intentional discrimination allows these biases to operate unchecked.

4. Our empirical analysis of California appellate court opinions shows that prosecutors routinely and successfully cite a Black or Latinx prospective juror's distrust of law en forcement or the criminal legal system to justify a peremptory strike against the juror. Social science research demonstrates that most African Americans and Whites do not share the same views of law enforcement or the criminal legal system. The differences in attitude are long standing and rooted in the nation's history of institutional racism, as well as the present day differential treatment of Blacks and Latinx people by actors in the criminal legal system, including by members of law enforcement. More than 40 years ago, in *Wheeler*, the California Supreme Court announced that these differences do not support the exercise of peremptory challenges: "The representation on juries of these differences in juror attitudes is precisely what the representative cross section standard . . . is designed to foster." California courts long ago lost sight of this goal.

5. District attorney training manuals on peremptory challenges encourage discriminatory strikes in at least three respects:

   - Prosecutors are trained to identify the "ideal juror" as a person who most resembles them—"attached to the community, educated, stable, [and] professional[]." They are likewise advised to avoid individuals who are members of groups in which people of color are overrepresented, that is, "less educated people and blue collar workers," and those who are "unemployed or underemployed" or who have family members experiencing similar economic hardship.

- Prosecutors are instructed to strike jurors based on their "gut reactions" to jurors' facial expressions, body language, clothing, and hairstyle, and to rely on lengthy stock lists of court approved "race neutral" reasons to explain their challenges. Social science has repeatedly shown that "gut reactions" are often the product of implicit biases that correlate with racial and ethnic stereotypes.

- Prosecutors are trained to strike prospective jurors who have had or whose relatives have had a negative experience with law enforcement or are distrustful of the criminal legal system. They are, in other words, instructed to exploit the historic and present day differential treatment of Whites and people of color, especially African Americans and Latinx people, by the police, prosecutors, and the courts.

6. The California Supreme Court's definition of a "race neutral" reason is so expansive that any explanation short of the admission of a discriminatory motive will suffice at *Batson*'s second step, and, ultimately, defeat a *Batson* challenge. This also allows prosecutors to rely successfully on a laundry list of judicially approved "race neutral" reasons when they explain their peremptory challenges. Courts have consistently upheld reasons such as a juror's prior arrest, a juror's loved one's incarceration, or a juror's distrust of the criminal legal system as facially race neutral and, overwhelmingly, sufficient to defeat a *Batson* objection.

7. We evaluated nearly 700 cases decided by the California Courts of Appeal from 2006 through 2018, which involved objections to prosecutors' peremptory challenges. In near ly 72% of these cases, district attorneys used their strikes to remove Black jurors. They struck Latinx jurors in about 28% of the cases, Asian American jurors in less than 3.5% of the cases, and White jurors in only 0.5% of the cases.

- Prosecutors most often gave demeanor based justifications for their strikes. The next most common reason related to a prospective juror's relationship with someone who had been involved in the criminal legal system. This was followed almost as frequently by a prospective juror expressing a distrust of law enforcement or the criminal legal system or a belief that law enforcement or the criminal legal system is racially and/or class biased.

- Prosecutors in these cases successfully used their peremptory challenges against African Americans because they had dreadlocks, were slouching, wore a short skirt and "blinged out" sandals, visited family members who were incarcerated, had negative experiences with law enforcement (often many years before they were called for jury duty), or lived in East Oakland, Los Angeles County's Compton, or San Francisco's Tenderloin.

- Prosecutors also successfully struck Latinx prospective jurors for frowning, seeming confused, wearing large earrings, stating that a loved one had been wrongfully accused of a crime, expressing a belief that the criminal legal system treats people differently

based on their race, or being "kicked off a ladder by a border patrol officer who was chasing" undocumented people three decades earlier.

8. Between 2003 and 2019, the United States Supreme Court issued a series of decisions that signaled the need for lower courts to more rigorously enforce *Batson*. The California Supreme Court has largely disregarded those directives. Here are three examples:

- For years, at step one of the process, the California Supreme Court required the objecting party to show that it was more likely than not that the strike was based on intentional discrimination. Unless the standard was satisfied, the striking party did not have to give reasons for the peremptory challenge. In 2005, in *Johnson v. California*, the United States Supreme Court rejected California's test as unduly burdensome and inconsistent with *Batson*'s rule that step one is a low threshold; the objecting party need only raise an inference of discrimination. Despite the United States Supreme Court's intervention, in the 42 step one cases the state supreme court has since decided, the court has not once found *Batson* error.

- The United States Supreme Court has left no doubt that *Batson* requires the *attorney* to provide the reasons for the strikes, and that the trial judge and reviewing courts must base their rulings on the reasons the attorney offers. However, the California Supreme Court has consistently approved speculation by trial and appellate courts about reasons the prosecution could have (but did not) offer for its strikes in order to uphold the denial of a *Batson* objection.

- Since 2003, the United States Supreme Court has endorsed a method of analyzing a *Batson* objection known as "comparative juror analysis," an approach central to each of its subsequent favorable *Batson* decisions. In over 30 years, the California Supreme Court has never used this analysis to expose discrimination. Rather, in case after case, the state supreme court has declined to engage in comparative analysis, restricted its application, or conducted the analysis but found it unpersuasive. The court's resistance to this powerful analytic tool also explains its extraordinarily high affirmance rate.

9. California courts—the California Supreme Court and Courts of Appeal—have an abysmal record in *Batson* cases. In the last 30 years, the California Supreme Court has reviewed 142 cases involving *Batson* claims and found a *Batson* violation only three times (2.1%).

10. It has been more than 30 years since the California Supreme Court found a *Batson* violation involving the peremptory challenge of an African American prospective juror.

11. It has been more than 30 years since the California Supreme Court found that a trial court committed error in denying a defendant's objection to the prosecutor's use of pe remptory challenges at the first step of the *Batson* procedure.

12. California Courts of Appeal, which follow the state supreme court's precedent, rarely find error when trial courts deny defense attorneys' *Batson* motions challenging the removal of Black and Latinx jurors. From 2006 through 2018, our appellate courts found error in just 18 out of 683 decisions (2.6%).

13. In our examination of California state cases between 1993 and 2019, which were later reviewed by the Ninth Circuit Court of Appeals in habeas corpus proceedings, the Ninth Circuit granted *Batson* relief 15% of the time—almost six times more often than the Cal ifornia Courts of Appeal and over seven times more frequently than the California Su preme Court. This is particularly noteworthy because the Ninth Circuit, applying federal law, is obliged to use a much stricter standard of review than that employed by our state courts.

14. In two opinions in 2019, California Supreme Court and Court of Appeal justices urged immediate, decisive action to remedy *Batson*'s failure in California. In the words of Su preme Court Justice Goodwin Liu, it is "past time for course correction." Justice Liu has repeatedly dissented from the majority in *Batson* cases since joining the court in 2011. He has criticized the court's persistent failure to apply *Batson*'s precedents with the "vigi lance required by the constitutional guarantee of equal protection of the law." Justice Jim Humes, a member of the California Court of Appeal, similarly urged that "the time has come" for the state "to consider meaningful measures to reduce actual and perceived bias in jury selection." In May 2020, in another dissenting opinion, Justice Liu declared that the "*Batson* framework, as applied by this court, must be rethought in order to fulfill the constitutional mandate of eliminating racial discrimination in jury selection."

15. Across the country, members of the state and federal bench—including United States Su preme Court Justice Stephen Breyer—legal scholars, and some state supreme courts have acknowledged *Batson*'s failure as a mechanism for eliminating discriminatory peremptory challenges, and have called for or implemented reform. In 2018, the Washington Supreme Court took a leadership role when the court adopted General Rule 37 to reform *Batson*.

16. We acknowledge the California Supreme Court's interest in studying *Batson*'s shortcom ings by announcing the formation of a "work group" in January. There has been no sub sequent statement regarding the goals of the work group or its membership. Over the last three decades, the court has declined many opportunities to remedy these inequities. The legislature—through the passage of AB 3070—is better suited to effectively address persistent discrimination in jury selection in a timely manner. As this report makes ev ident, the topics identified for study by the "work group" have been amply studied. The questions posed have been answered. The time for a decisive "course correction" by the California Legislature is now.

RECOMMENDATIONS

Batson has failed in part because the California Supreme Court has declined to enforce it vig orously and consistently. But more fundamentally, *Batson* has failed because its approach was flawed from the outset. Only a drastic course correction that encompasses significant changes to the *Batson* procedure can eliminate the exercise of discriminatory peremptory challenges. For purposes of our recommendations, we use the term "protected group" to refer to a pro spective juror's race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation.

We recommend the following:

1. ***Batson*'s first step should be eliminated.** If a party objects that the opposing party exercised a peremptory challenge based on discrimination against one of the protect ed groups, the trial court should always require the striking party to state the rea son(s) for the strike. The elimination of *Batson*'s first step prevents a trial court's own implicit bias from insulating potentially discriminatory strikes from direct judicial inquiry. This reform makes the determination of whether the peremptory challenge is legally permissible more expeditious and avoids unnecessary appellate litigation.

2. **The burden of proof should rest with the party exercising the peremptory challenge.** Under *Batson*, the burden rests with the objecting party to prove that the challenging party acted with intentional discrimination. If peremptory challenges are to continue to have a legitimate place in the jury selection process, the challenging party should bear the burden of justifying challenged strikes. This reform takes into account the significant role peremptory challenges have played and continue to play in the exclusion of African American and Latinx citizens from juries.

3. **The trial court should be required to act with awareness of the role implicit, institutional, and unconscious bias has played in the discriminatory exclusion of jurors in California.** Making explicit that which has gone unsaid and unacknowl edged is an essential feature of the proposed reforms. This change will ensure that trial courts scrutinize peremptory challenges to better root out the vestiges of histor ical and present day discrimination in the jury selection process.

4. **The trial court should be required to evaluate the striking party's reasons for the peremptory challenge in light of the totality of the circumstances.** A require ment that the trial court make its ruling in light of the totality of the circumstances pertaining to the objection retains *Batson*'s approach, which appropriately encourag es careful and thorough decision making.

5. **The court should sustain the objection if it determines that an objective observ er could view race, ethnicity, gender, gender identity, sexual orientation, na tional origin, or religious affiliation as a factor in the exercise of the peremptory challenge.** *Batson*'s requirement that the objecting party prove intentional discrim ination has perpetuated the use of strikes based on implicit and institutional bias and the resulting disproportionate exclusion of African American and Latinx citizens from jury service. A wholesale reform of the standard, which this recommendation endorses, is imperative. The adoption of an objective standard ensures that the court will be attentive to bias in all its forms. At the same time, it eliminates the stigma associated with a subjective finding of intentional discrimination, e.g., that the court, in making its ruling, is labeling the striking party "racist."

6. **The trial court should be required to explain its ruling on the record**. A require ment that the trial court explain its ruling on the record encourages careful and thorough decision making, and enables appellate courts to fully and fairly evaluate the trial court's ruling.

7. **There should be a presumption that reasons historically associated with im proper discrimination are invalid.** Restricting the use of reasons historically associ ated with improper discrimination will reduce the influence of implicit, unconscious, and institutional biases in the jury selection process.

    a. *The following reasons should be presumptively invalid*:

        1. Expressing a distrust of or having a negative experience with law enforcement or the criminal legal system;
        2. Expressing a belief that law enforcement officers engage in racial profiling or that criminal laws have been enforced in a discriminatory manner;
        3. Having a close relationship with people who had prior contact with law enforcement or criminal legal system;
        4. A prospective juror's neighborhood;
        5. Having a child outside of marriage;
        6. Receiving state benefits;
        7. Not being a native English speaker;
        8. Having the ability to speak another language;
        9. A prospective juror's dress, attire, or personal appearance that is historically associated with a prospective juror's race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation;
        10. Employment in a field that is disproportionately occupied or that disproportionately serves members of a protected group;

11. The prospective juror's unemployment or underemployment or that of a prospective juror's family member;
12. Friendliness with another prospective juror who is a member of the same protected group as the prospective juror;
13. Any other reason that applies to a seated juror who is not a member of the same group as the struck juror.

b. *The following reasons are historically associated with improper discrimination. They should be presumptively invalid unless they are corroborated by the trial court or op posing counsel*:

1. A party that intends to strike a juror for specified demeanor based reasons should provide reasonable notice to the trial court and the op posing party so that all parties can verify and address the behavior. The court should find these reasons invalid if it or opposing counsel cannot corroborate them.
2. These reasons include:
    a. Sleeping, appearing inattentive, or staring;
    b. Failing to make eye contact;
    c. Exhibiting a lack of rapport;
    d. Exhibiting a problematic attitude, body language, or demeanor;
    e. Providing unintelligent or confused answers.

8. **Courts should be prohibited from speculating or hypothesizing about the rea sons the striking party offered or did not offer, and from substituting their rea sons for those of the striking party**. Trial and appellate courts should not speculate about or assume the existence of reasons for the challenge that the striking party did not offer. The appellate court should not offer its own reasons to explain the strik ing party's failure to challenge similarly situated jurors who are not members of the same protected group as the challenged juror. This prohibition requires parties and the trial court to make a complete record. Of equal importance, it prevents trial and appellate courts from substituting their explanation for a peremptory challenge for that of the striking party, and thereby shielding impermissible strikes from proper judicial scrutiny.

9. **Appellate courts should review trial court rulings de novo.** An appellate court should be required to review the trial court's ruling de novo, which is to say that the appellate court should do so without deferring to the trial court's ruling. However, an appellate court should be permitted to defer to the trial court's determination verify ing a prospective juror's demeanor, unless clearly erroneous. This standard of review ensures that deference will not shield objectively discriminatory strikes while credit ing certain factual findings that the trial court is in the best position to make.

I.

A BRIEF HISTORY OF DISCRIMINATORY EXCLUSION

African Americans have historically been, and continue to be, disproportionately excluded from juries. This exclusion, which affects both who is summoned for jury duty and who serves on the trial jury, has evolved over time, responding primarily to changes in the law that prohibit inten tional racial discrimination in these processes. Prosecutors have whitewashed juries through the exercise of peremptory challenges for as long as African Americans have been eligible for jury service. The practice is still widespread today. While both the California and United States Supreme Courts sought to curb discriminatory strikes through decisions announced in 1978 and 1986, respectively, the courts' remedial mechanisms have proved ineffective. Further, the California Supreme Court has been reluctant to follow recent United States Supreme Court decisions that were meant to strengthen the procedure, further crippling this state's judicial response to racially discriminatory jury selection.

A. The Exclusion of African Americans from Juries

Prosecutors' current use of peremptory challenges to exclude African Americans from juries has its roots in the history of slavery and the wholesale exclusion of Black citizens from all aspects of civil society in many states following Reconstruction.[1] Although today African Amer icans have "secured a place on the jury rolls," many prosecutors continue to prevent them from serving on juries through the exercise of racially discriminatory peremptory challenges.[2]

After the nation abolished slavery, the federal government attempted to "guarantee the mean ingful inclusion of African Americans in the social, political and legal fabric of the United States" through the passage of the Civil Rights Act of 1866 and the Fourteenth Amendment.[3] During Reconstruction, legislatures in many Southern states repealed formal race based jury requirements.[4] The Civil Rights Act of 1875 included a provision outlawing race based discrimi nation in jury service.[5] However, the provision was never effectively enforced.[6]

In 1879, in *Strauder v. West Virginia*, the United States Supreme Court held unconstitutional state statutes that, on their face, restricted jury service to Whites.[7] It was, however, becoming apparent that institutional opposition to Black enfranchisement and political participation had taken hold in the South, ushering in "the Jim Crow era of white supremacy, state terrorism, and apartheid . . . ."[8] Although laws no longer explicitly barred African Americans from jury service, in many states, "local officials achieved the same result by . . . implementing ruses to exclude black citizens."[9] For example, some jurisdictions employed jury lists in which the names of Whites and Blacks were "printed on different color paper" or instituted "vague requirements" for jury service—"such as intelligence, experience, or good moral character"—to conceal, albeit thinly, their intention of keeping African Americans off the rolls.[10] "In essence, the right not to be excluded from jury service because of one's race promised only the *possibility* of having members of one's racial group sitting on a particular jury, nothing more."[11]

In opinion after opinion following *Strauder*, the Supreme Court placed procedural barriers be tween local and state sanctioned discrimination and federal judicial review.[12] The Court con cluded either that the defendant's case was insufficient to merit federal review, or that "racist

state practices were inevitability protected by a futile search for discriminatory purpose on the part of state officials."[13]

In 1935, in *Norris v. Alabama*, the Supreme Court finally addressed the total and systematic exclusion of African Americans from jury pools in the second trial of one of the "Scottsboro Boys."[14] Clarence Norris, one of nine Black teenagers falsely accused of raping two White women, was twice tried, convicted, and sentenced to death by an all White jury.[15] The Court agreed that the "long continued, unvarying, and wholesale exclusion" of Blacks from the grand and petit jury venires denied him equal protection under the Fourteenth Amendment.[16] The opinion "signaled a major shift: the Court would no longer tolerate the *total exclusion*, by law or by practice, of black citizens from jury rolls."[17]

Following *Norris*, "state officials became more imaginative in their efforts to limit minority participation on juries," allowing token African Americans to serve on juries to avoid total ex clusion.[18] Thus, the discriminatory use of peremptory challenges "immediately counteracted" the limited gains of African American inclusion on the jury rolls.[19] Some counties in Califor nia continued the wholesale exclusion of Black jurors, even if statutes prohibited the prac tice. For example, in *People v. Hines,* an all White jury convicted a Black defendant of shoot ing and killing a Black man.[20] The California Supreme Court overturned Hines's conviction because, despite constituting 8% of the population, "no negro had ever been placed on the venires or called for jury service in criminal cases in Merced county."[21] The court found that discrimination did not stem from the law as written, but from the "custom of the officers to exclude negroes in selecting and impaneling juries in Merced county."[22]

The United States Supreme Court also retreated from *Norris* by deferring to state court deci sions and focusing on the subjective intent of local officials rather than statistical proof.[23] For example, in *Akins v. Texas*, a death sentenced defendant challenged the racial composition of his grand jury, which included only one Black juror.[24] He provided statistical evidence that African Americans were underrepresented on county grand juries.[25] Several grand jury com missioners had testified in the trial court that they intended to place "just one negro on the grand jury," and had deliberately done nothing to include more than one African American member.[26] The Supreme Court, however, was "unconvinced" that the commissioners inten tionally limited the number of Black grand jurors.[27]

It was not until the 1960s and '70s, when the Supreme Court adopted a "fair cross section" standard requiring the jury and grand jury pools to reflect the demographics of the jurisdic tion that some progress was made in increasing the representation of citizens of color in jury pools.[28]

B. The Exclusion of African Americans from California Jury Rolls

As briefly summarized above, the United States has a long history of denying full citizenship rights to African Americans, women, and members of other groups. People of color—espe cially African Americans—are disproportionately excluded at every stage of jury selection.[29]

Prospective jurors summoned to appear in California courts reflect that underrepresentation.[30] The exercise of peremptory challenges, which occurs at the last stage of jury selection, exacer bates the underrepresentation that occurs at the front end. However, it is essential to at least describe the disproportionate exclusion of people of color from the process by which jury rolls are assembled.

The superior court judges of each county appoint the county's jury commissioner who, at least once a year, creates a master list of prospective jurors by randomly selecting names from source lists of eligible citizens in the community.[31] As mandated by article 1, section 16 of the California Constitution, a state statute specifies that source lists be "inclusive of a represen tative cross section of the population of the area served by the Court."[32] Also by statute, the source list of registered voters ("ROV") and licensed drivers from the Department of Motor Vehicles ("DMV") are "appropriate source lists for selection of jurors and shall be considered inclusive of a representative cross section of the population, within the meaning of subdivision (a), which defines a fair cross section."[33] As a result of this statute, every California county uses only the ROV and DMV databases as jury source lists.[34]

Names are drawn from the source lists to create a master list.[35] The jury commissioner's office notifies individuals whose names are selected from the master list to appear in court for possi ble jury selection and appearance in the venire.[36]

Studies have shown that using ROV and DMV records as source lists results in the underrepre sentation of African Americans.[37] One study, which surveyed a total of 1,275 community resi dents on a master list in Orange County, revealed that when both the ROV and DMV lists were used, African Americans were underrepresented by 18.92% relative to their numbers in the pop ulation.[38] An early, but still cited, study on jury composition estimated that the use of ROV lists automatically excludes approximately one third of the adult population, reducing the number of people of color, including African Americans, in the master lists.[39]

The same study reported that 41.3% of jury eligible individuals in California are not on ROV lists.[40] Of the 41.3% of jury eligible individuals who do not appear on California ROV lists, a disproportionately large number are African American. This is due in part to felony disenfran chisement.[41] Until January 2020, Californians who had a felony conviction were not permitted to serve on juries.[42]

Of those African Americans who are eligible to vote, additional socioeconomic barriers make them less likely to register than Whites.[43] People with unstable employment experience higher rates of residential and geographic mobility.[44] These factors have been shown to decrease the likelihood that they will register to vote and therefore appear on ROV lists.[45] Using national data over a three year period, one study found that 48% of African Americans were geographi cally transient, compared to only 25.2% of Whites.[46] This makes it less likely African Americans will appear on ROV lists than Whites.[47]

Several studies have demonstrated that using multiple source lists increases the percentage of African Americans in the master list.[48] The use of additional source lists such as tax lists, prop erty lists, utility customer lists, city and telephone directories, and welfare or public benefit payment lists would increase the number of African Americans on the master list.[49] To date, only one California county uses source lists beyond the ROV and DMV; no California courts supplement their lists with welfare or unemployment records.[50]

It has been more than 35 years since the California Supreme Court found that a defendant had established underrepresentation of people of color in the composition of a jury sufficient to satisfy the state or federal constitutional fair cross section requirement.[51] In several cases, however, courts of appeal have acknowledged findings that African Americans are underrepre sented in jury venires.[52] Some California studies also confirm that these disparities exist in Cal ifornia jury pools. For example, a 2010 survey conducted in Alameda County showed underrep resentation of African Americans in its jury pools.[53] The survey found that African Americans "represent 18% of the eligible jury pool in the county but comprised only 8% of the people who appeared for jury duty" in the trials studied.[54] Whites comprised the same percentage of the jury pool as the percentage of jury eligible Whites in Alameda County, suggesting that Whites may not be affected by the many legal and non legal obstacles that result in the underrepresen tation of African Americans in jury source lists.[55]

C. Peremptory Challenges: From Judicial Intervention to Judicial Retreat

"The essential nature of the peremptory challenge is that it is one exercised without a reason stated, without inquiry and without being subject to the court's control."[56] The peremptory challenge has its roots in English common law.[57] As early as the 14th century, however, Parlia ment began to restrict the right of the King's counsel to exercise peremptory challenges.[58] In American courts, the right of the defendant to exercise peremptory challenges "was accepted as part of the common law."[59] However, the prosecution was not universally entitled to exercise peremptory challenges in the United States until the late 19th century.[60] Unlike challenges for cause, peremptory challenges are not constitutionally guaranteed.[61]

1. The United States Supreme Court's Resistance to Remedying Exclusion

The United States Supreme Court has readily acknowledged that the peremptory challenge is "'frequently exercised on grounds normally thought irrelevant to legal proceedings or official action, namely, the race, religion, nationality, occupation or affiliations of people summoned for jury duty.'"[62] For almost two centuries, state and federal courts in this country accepted these strikes as "a necessary part of trial by jury."[63]

In 1965, in *Swain v. Alabama*, the Court ruled for the first time that the prosecution's exercise of peremptory challenges against Black prospective jurors *might*, in very specific circumstanc es, violate the Equal Protection Clause.[64] In *Swain*, an Alabama case in which a Black man was convicted and sentenced to death by an all White jury for the rape of a White woman,[65] the

prosecutor struck all six of the prospective Black jurors.[66] The Court found that the utility of peremptory challenges in "the institution of the jury trial" precluded it from examining the prosecution's strikes in the specific case, much less finding that those challenges violated the Equal Protection Clause.[67] The Court expressed a willingness to entertain a constitutional ar gument, but only upon a showing that the prosecution exercised strikes systematically, in trial after trial, so as not "to leave a single Negro on any jury in a criminal case."[68]

2. California's Intervention in People v. Wheeler

In 1977, *American Law Reports* published a nationwide review of the use of peremptory challeng es and the application of the *Swain* standard in civil and criminal cases.[69] The author analyzed every criminal case decided in the 10 years after *Swain* in which courts had considered an objection to the exercise of peremptory challenges against Black jurors.[70] The report found that, under the *Swain* standard, it was nearly impossible to prove that a peremptory challenge was based on race.[71] "[I]n all of the cases involving this issue thus far, *all of which have dealt with blacks as the group peremptorily challenged*, no defendant has yet been successful" in proving the peremptory challenges were exercised in a discriminatory manner.[72]

A year later, in *People v. Wheeler*, our state supreme court, relying on the independent force of article 1, section 16 of the California Constitution, acknowledged the injustice that the United States Supreme Court would not begin to address until eight years later.[73] In *Wheeler*, as the prosecutor struck all the prospective Black jurors, the defense attorneys repeatedly moved for a mistrial, arguing that the prosecutor's challenges made it impossible for the defendants to be tried by "'a fair cross section of the community.'"[74] The trial judge denied their motions, and the two Black defendants were tried and convicted of the murder of a White man by an all White jury.[75] The California Supreme Court reversed their convictions.[76] The court held that, in a criminal case, when any party exercises a peremptory challenge because the juror belongs to "an identifiable group distinguished on racial, religious, ethnic, or similar grounds," the con duct "violates the right to trial by a jury drawn from a representative cross section of the community."[77]

The court in *Wheeler* found it intolerable that, under *Swain*, defendants had a federal constitu tional right to equal protection that they could not secure because the standard made it "virtu ally impossible" to do so.[78] A defendant could only meet the *Swain* bar by proving that the pros ecutor struck every Black juror in "an undetermined number of individual trials."[79] The court observed that "numerous black defendants have attempted to comply with [the *Swain* burden of proof], but none has succeeded."[80] Criminal defendants had neither the time nor funds to conduct the research, nor was the data—including a record of the race of each struck juror in every trial—reasonably available.[81] The court cited the 1977 *American Law Reports* article, and agreed that the "California experience has been identical."[82]

The California Supreme Court in *Wheeler* acknowledged the high court's unwillingness to disturb the "nature and operation" of peremptory challenges.[83] The court recognized that the

Supreme Court would reject any challenge under any provision of the federal Constitution that might diminish the prosecution's ability to strike jurors free from scrutiny, and declared, "*Swain v. Alabama* is not to be followed in our courts."[84]

The *Wheeler* opinion announced a procedure by which a party could demonstrate that the opposing attorney was exercising a peremptory challenge based "on the ground of group bias alone."[85] In its search for a remedy, the court looked to legal scholars.[86] However, two un examined premises restricted the court's options: (1) the assumption that retaining at least some peremptories serves a necessary function in ensuring the parties' ability to excuse some jurors who have invidious biases, but who are not so clearly biased as to be subject to a cause challenge; and (2) the assumption that prosecutors will act honestly, fairly, and free of racial prejudice in exercising strikes unless and until the defense shows the contrary.[87] Given these assumptions, proposals to eliminate peremptory challenges or allow them only for the defense were off the table.[88] Although the court's decision was grounded in the state Constitution's fair cross section provision, the court adopted an approach that was lifted from equal protection analysis.[89] This report explains why the chosen remedy was destined to fail and how that failure has played out over the last 40 plus years.

Wheeler adopted a three step test. First, the attorney objecting to the strike, having made a record of what has transpired, must show both that the jurors who were the subject of the strikes belong to "a cognizable group" and establish "a strong likelihood" of a fair cross section violation, also known as a prima facie showing.[90] Second, if the judge finds a prima facie show ing (which *Wheeler* also referred to as "a reasonable inference"), the burden shifts to the party who made the peremptory challenges to show that the party did not act on the basis of "group bias alone."[91] Third, the trial judge determines the validity of the reasons.[92] If the court finds that any one of the challenges was based on group bias, the fair cross section requirement has not been met, and the judge must dismiss the venire and begin jury selection again.[93]

As we explain below, when the United States Supreme Court reversed *Swain* in *Batson* in 1986 on equal protection grounds, the Court adopted a similar three step procedure.[94] For simplic ity, when discussing objections to peremptory challenges, we refer throughout the report to the *Batson* procedure—rather than to the *Batson*/*Wheeler* procedure—unless there is a specific reason to reference *Wheeler*.[95]

3. The United States Supreme Court Decides Batson v. Kentucky

In 1986, the United States Supreme Court decided *Batson v. Kentucky*, announcing that *Swain*'s evidentiary burden was "crippling," and that "a defendant may establish a prima facie case of purposeful discrimination in the selection of the petit jury based solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial."[96] The Court held that discriminatory jury selection practices "harm" the defendant, the excluded juror, and "the entire community" because they "undermine public confidence in the fairness of our system of justice."[97] The Court's identification of these three interests was foundational to its extension of *Batson*'s protections in subsequent opinions.[98]

Unlike *Wheeler*, the decision in *Batson* was grounded squarely in the Fourteenth Amendment's Equal Protection Clause.[99] But like *Wheeler*, the Supreme Court in *Batson* adopted a three step (or three stage) procedure for determining whether the prosecution purposefully discrimi nated against a Black prospective juror in the exercise of a peremptory challenge.[100] At step one, the defendant must establish a "prima facie case" of purposeful discrimination.[101] To do so, the defendant need only raise an "inference" of discrimination based upon "all relevant circumstances."[102] If the trial court agrees that the defendant has made a prima facie showing, the inquiry moves to the second step. At step two, the prosecution must "come forward with a neutral explanation for challenging black jurors," which must be "related to the particular case to be tried."[103] The majority stated that a prosecutor may not rebut the prima facie showing by simply "denying" that he had "a discriminatory motive" or insisting that he acted in "good faith."[104] At the third step, the trial court decides whether the defendant has established pur poseful discrimination.[105] The Court left no doubt that, consistent with all other equal protec tion challenges, the defendant must establish a "'racially discriminatory purpose'" to prevail on a *Batson* motion.[106]

Justice Thurgood Marshall concurred in *Batson* to acknowledge that the Court had taken a "historic step," but cautioned that the eradication of racial discrimination in jury selection "can be accomplished only by eliminating peremptory challenges entirely."[107] He offered several rea sons for his view. First, while a three step procedure similar to the one adopted in *Batson* was already the law in states such as California and Massachusetts, the small numbers of African Americans in the venire made it exceedingly difficult for the defendant to establish a prima facie showing.[108] Second, he described the ease with which prosecutors could "assert facial ly [race] neutral reasons," especially when they rely on a prospective juror's demeanor, thus creating a "difficult burden" for judges who must assess the credibility of those reasons.[109] Last, Justice Marshall addressed the issue of "conscious or unconscious racism," which leads prose cutors to characterize Black jurors in negative terms—especially with regard to demeanor—and judges to credit those reasons.[110] This report shows how, in case after case, decade after decade, Justice Marshall's predictions have been borne out.

Batson only prohibited prosecutors from striking Black jurors in trials involving Black defen dants.[111] In later decisions, the Supreme Court extended *Batson* to apply to civil and criminal trials, to all trials irrespective of the race of the parties, to defense attorneys as well as prosecu tors, and to strikes based on ethnicity or gender.[112] Some lower federal courts and state courts have expressly extended *Batson* to other groups such as those who have in common national origin, sexual orientation, or religious affiliation.[113] Some states prohibit discrimination in jury selection under their state constitutions, by statute, or both.[114]

4. California Codifies the Prohibition Against Discriminatory Strikes

Ten years after *Wheeler*, in 1988, the California Legislature consolidated the relevant Penal and Civil Code sections into the Trial Jury Selection and Management Act, which governs "the selection of jurors, and the formation of trial juries, for both civil and criminal cases, in all trial

courts of the state."[115] California Code of Civil Procedure section 231.5 now states, "A party shall not use a peremptory challenge to remove a prospective juror on the basis of an assump tion that the prospective juror is biased merely because of a characteristic listed or defined in section 11135 of the Government Code, or similar grounds."[116] This section codifies the *Wheeler* decision. Government Code section 11135(a) prohibits discrimination by any state entity "on the basis of sex, race, color, religion, ancestry, national origin, ethnic group identification, age, mental disability, physical disability, medical condition, genetic information, marital status, or sexual orientation."

5. California Declines to Enforce Batson

From 2003 through 2008, the United States Supreme Court issued a series of opinions in *Bat son* cases. Several decisions clarified aspects of the *Batson* procedure in a way that signaled the need for lower courts to be more vigilant in disallowing discriminatory peremptory challenges: *Miller El v. Cockrell* (*Miller El I*), *Johnson v. California*, *Miller El v. Dretke* (*Miller El II*), and *Snyder v. Louisiana*.[117] As we detail in Section III.E, dissenting justices on the California Supreme Court often rely on those decisions to demonstrate that the majority is failing to adhere to the high court's *Batson* precedents.

In *Johnson*, the Supreme Court concluded that the test applied by California courts for deter mining whether a party has made out a prima facie case of purposeful discrimination at the first step of the *Batson* procedure was an "inappropriate yardstick."[118] For decades, at step one, our state courts required a party to demonstrate "'it is more likely than not'" that the peremp tory challenge was based on group bias.[119] The Supreme Court in *Johnson* reaffirmed *Batson*'s stage one requirement: a party need only show that all of the circumstances give "'rise to an inference of discriminatory purpose.'"[120] Writing for the majority, Justice John Paul Stevens explained, "The *Batson* framework is designed to produce actual answers to suspicions and inferences that discrimination may have infected the jury selection process."[121] Therefore, when there is an inference that a peremptory challenge was based on race, the trial judge should not speculate about the purpose because "a direct answer can be obtained by asking a simple ques tion": What was the reason for the strike?[122] Since *Johnson* was decided in 2005, the California Supreme Court has not found step one error in a single case.[123] In Sections III.E.1 and III.E.2, we discuss how the California Supreme Court, employing a variety of analytic techniques—in cluding hypothesizing about reasons the prosecutor never offered—continues to impose an heightened threshold at step one.

Miller El II, a Texas death penalty case, involved the third step of the *Batson* procedure, that is, whether, considering all of the circumstances, a party intentionally exercised a peremptory challenge based on race.[124] The prosecutor in *Miller El II* used his peremptory strikes to remove 10 of 11 African American prospective jurors.[125] The Supreme Court commented, "More pow erful than these bare statistics, however, are side by side comparisons of some black venire panelists who were struck and white panelists allowed to serve."[126] This approach, known as comparative juror analysis, was central to the Court's decision in *Miller El II*,[127] even under

the highly deferential standard of review that applies when federal courts review state court judgments in habeas corpus proceedings.[128] The Court compared the struck Black panelists to the seated White jurors in several respects, including the similarity of their answers to spe cific questions and the prosecution's disparate questioning of Black and White jurors on the same topic.[129] The Court in *Miller El II* also emphasized that this type of comparison requires only that the jurors be "similarly situated," not that they be "identical in all respects."[130] "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 cut ters."[131] Because the party exercising the strike bears the burden of providing an explanation, the majority warned against speculation by trial or reviewing courts that might "imagine a reason" when "the stated reason does not hold up."[132] The Court also declared that when a rea son turns out to be false, unsupported by the record, or pretextual, any "new explanation" is highly suspect.[133]

In *Snyder*, a Louisiana death penalty case, the prosecution struck all the African Americans in the venire, but the Supreme Court decided the *Batson* issue based on just one of the perempto ry challenges.[134] The prosecutor said that he struck Mr. Brooks, an African American man who was studying for his teaching credential, based on his demeanor (nervousness) and his univer sity related obligations, which the prosecutor asserted might lead the juror to convict Snyder of a lesser included offense in order to avoid sitting through a penalty phase trial.[135] Because there was no record as to whether the trial judge credited the demeanor based reason, the Court would not "presume" that the judge had done so, and decided the issue solely on the sec ond reason.[136] The Court reviewed the voir dire transcript and acknowledged the "implausibili ty" of the reason concerning the juror's schedule.[137] The Court then compared the struck juror's situation to that of two seated White male jurors. It found that the White jurors had "conflict ing obligations that appear to have been at least as serious as Mr. Brooks'," and concluded that the strike was the result of intentional discrimination.[138]

There are at least three important take aways from *Snyder* when considering how the California Supreme Court has applied the opinion. First, the high court reaffirmed its position in *Batson* that the "Constitution forbids striking even a single prospective juror for a discriminatory pur pose."[139] Second, when the party making the strike gives two reasons, one based on the juror's demeanor and the other a non–demeanor based reason, if the trial court denied the motion "without explanation," a reviewing court may not defer to the demeanor based reason.[140] Third, consistent with *Miller El II*, the Supreme Court conducted a comparative juror analysis.[141] The Court contrasted the prosecutor's questioning of the struck Black juror about his obligations with his questioning of the White seated jurors about their conflicting responsibilities.[142] It con cluded that the prosecution gave a "pretextual explanation."[143]

In Section III.E.5, we examine the California Supreme Court's application of *Miller El II* and *Snyder*. We describe barriers the court has erected to the meaningful application of compara tive juror analysis based on the majority's fundamental reservations about the approach. These hurdles, dissenting justices explain, cannot be reconciled with the high court's robust use of the analysis.

In two more recent decisions, *Foster v. Chatman* and *Flowers v. Mississippi*, the Supreme Court employed comparative juror analysis in deciding that the prosecution had violated *Batson*.[144] In *Foster*, for example, the prosecutor gave eight reasons for removing a Black juror, including the age of the juror's son (close to the defendant's), his "confused" view about the death penalty, and his wife's work at a hospital for "mentally ill people."[145] The Court found, however, that the prosecutor retained White jurors whose sons were young men and who also expressed "con fusion about the death penalty questions," and did not strike a White juror who worked at the same hospital.[146] In *Flowers*, the state challenged a Black woman because, among other reasons, she was acquainted with members of the defendant's family.[147] The Court concluded that the explanation was pretextual because her relationship with the family was similar to that of other seated White jurors.[148] Employing "side by side" juror comparisons as a critical method of analysis in both cases, the Court adhered to its view that any justification that applies equally to both the struck juror and one or more seated jurors is evidence of discriminatory intent, re gardless of whether the jurors were dissimilar in other respects.[149] By contrast, as Section III.E.5 explains, the California Supreme Court continues to raise the bar for finding *Batson* error using this approach by requiring that the Black struck jurors and seated White jurors be substantially similar in all respects.

This brief overview shows that, historically, California was not exempt from the wholesale exclusion of people of color—especially African Americans—from jury service and that un derrepresentation in jury venires is a present day inequity in our judicial system. Although the California Supreme Court in *Wheeler* was a leader in addressing discriminatory peremptory chal lenges, today's court does not adhere to the United States Supreme Court's directives aimed at enforcing *Batson*. Through our empirical investigation of court of appeal opinions and prosecu tion training practices, analysis of social science research on discrimination, and an examination of the California Supreme Court's jurisprudence, we expose the intractable and irremediable nature of discriminatory peremptory challenges under the *Batson* regime.

II.
EMPIRICAL FINDINGS

We conducted an empirical study to understand how prosecutors use peremptory challenges and how California courts review *Batson* claims. We found that prosecutors across California use peremptory strikes to disproportionately remove African American and Latinx citizens. Further, California appellate courts seldom reverse trial court decisions for *Batson* error, instead upholding prosecutors' reasons for striking Black and Latinx jurors as race neutral and credible. Taken together, these findings suggest both that California has a serious *Batson* problem and lacks an effective judicial mechanism (or the judicial will) to address it. This section first de scribes our empirical findings about how prosecutors in California use peremptory challenges against Black and Latinx jurors, offering examples from cases that illustrate the insidiousness of purportedly "race neutral" justifications. Second, this section catalogues the state supreme court and court of appeal California *Batson* cases, revealing the shockingly low rate at which they find *Batson* error. Finally, comparing the reversal rate in our state courts with that of the Ninth Circuit in its review of California *Batson* cases under a highly restrictive standard, we show that the circuit nonetheless finds *Batson* error over seven times more often than the Cali fornia Supreme Court and almost six times more often than the California Courts of Appeal.

A. California Prosecutors Use Peremptory Strikes to Disproportionately Remove Black and Latinx Jurors

We reviewed 683 decisions of the California courts of appeal involving *Batson* claims from 2006 through 2018.[150] (Appendix A sets out the methods used in the data collection and analysis). During this 12 year period, defense counsel objected to prosecutors' strikes in 670 cases, 98.0% of the total number of cases involving *Batson* claims.[151] *See* Figure 1. Of these 670 cases, 71.6% (480) involved objections to prosecutors' use of peremptory challenges to remove Black jurors. Of the remaining cases, prosecutors removed Latinx jurors in 28.4% (190) of cases, Asian Amer ican jurors in 3.4% (23) of cases, and White jurors in three cases (0.5%). Only 14 cases (2.0% of the total) involved claims that defense counsel had exercised discriminatory peremptory strikes. Defense counsel struck Asian American jurors in four cases, White jurors in four cases, Black jurors in three cases, and Latinx jurors in one case.[152] *See* Figure 2.

Percentage of *Batson* Motions by Party

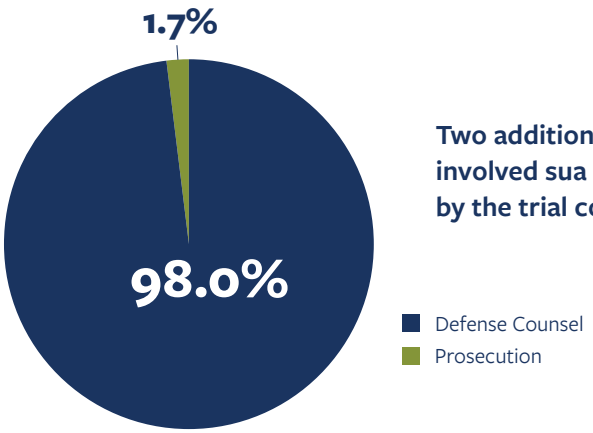


Figure 1[153]

Strikes by Race and Ethnicity

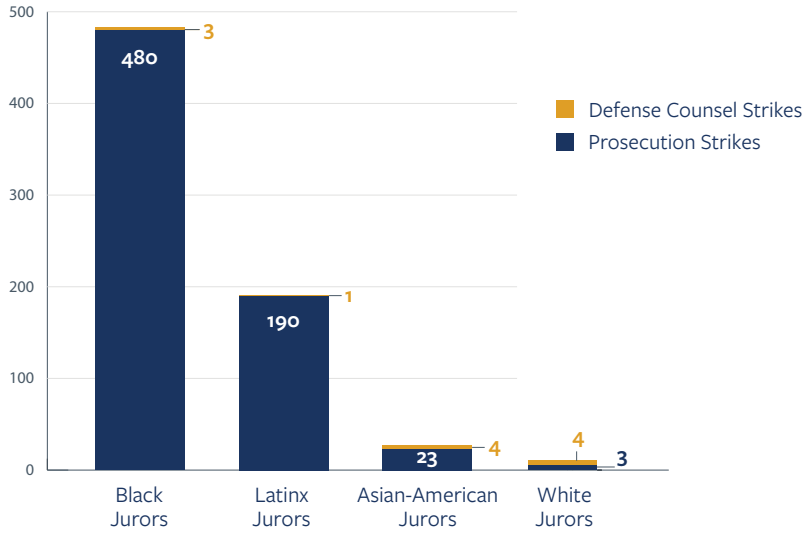


Figure 2

B. California Prosecutors Rely on Racial and Ethnic Stereotypes to Remove Black and Latinx Jurors

We coded the reasons prosecutors gave for striking jurors into six categories. These catego ries are nearly identical to those listed in subsections (h) and (i), respectively, of Washington Supreme Court General Rule 37 ("GR 37"): "Reasons Presumptively Invalid" and "Reliance on Conduct." We discuss GR 37 in Section IV.C. A copy of GR 37 is Appendix B to the report. GR 37 declares that the enumerated "reasons for peremptory challenges have been associated with improper discrimination in jury selection in Washington State."[154] The categories are:

a. having prior contact with law enforcement officers;
b. expressing a distrust of law enforcement or a belief that law enforcement officers engage in racial profiling;
c. having a close relationship with people who have been stopped, arrested, or convicted of a crime;
d. living in a high crime neighborhood;
e. having a child outside of marriage; and
f. demeanor based conduct.[155]

We did not include two of GR 37's categories, (h)(vi) "receiving state benefits" and (h)(vii) "not being a native English speaker," because these were almost never used.

For most of the analysis that follows, we report data at the case level. However, we also coded the reasons offered for peremptory challenges at the juror level to accurately account

for cases in which more than one juror was struck. We use that data to report the type of challenge raised against jurors of different races and ethnicities below. For more information see Appendix A.

1. Reliance on Racial and Ethnic Stereotypes: Case-Level Data

Prosecutors' reasons for striking jurors correlate with racial stereotypes. (Sections III.A, III.C, and III.D discuss implicit and explicit racial stereotypes.) As Figure 3 below shows, prosecutors relied on demeanor as a reason for their peremptory challenges in over 40% of the cases.[156] Demean or based explanations were used to exclude jurors who exhibited a poor attitude, were sleeping, appeared confused, or failed to make eye contact with the prosecutor. In 35% of the cases, prosecu tors relied on a juror's close relationship with people who had been stopped, arrested, or convicted of a crime. Nearly as often, in over 34% of the cases, prosecutors explained that the struck jurors distrusted law enforcement or the criminal legal system or believed that law enforcement or the criminal legal system is racially or class biased. Prosecutors gave prior contact with law enforce ment or the criminal legal system as a reason in more than 21% of the cases. And in approximately 4% and 1.5% of the cases, respectively, prosecutors struck jurors because they lived in a high crime neighborhood or had a child outside of marriage.

Prosecution's Reasons for Challenging Jurors by Case

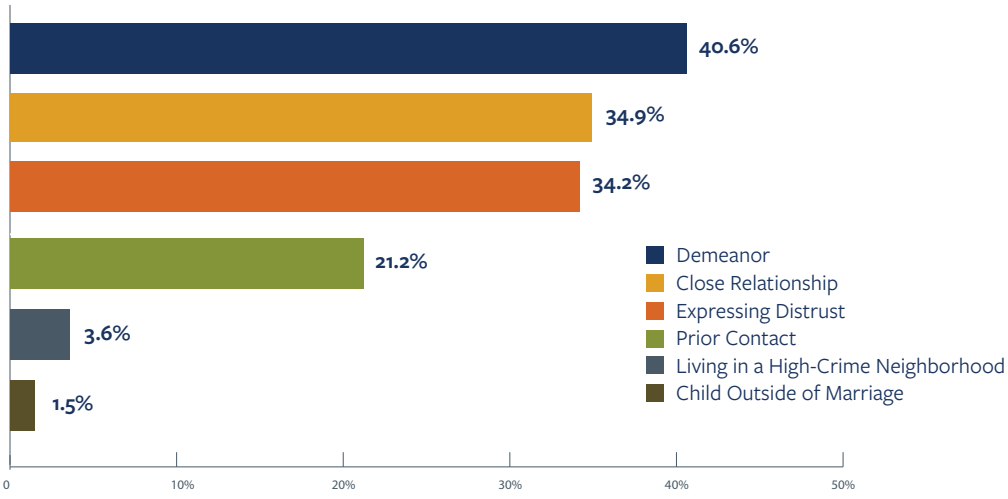


Figure 3[157]

A review of these cases leaves no doubt that prosecutors' exercise of race based peremptory challenges is very much a present day practice. Consistent with the findings of every other study, prosecutors in California disproportionately use peremptory challenges to exclude Blacks from juries.[158] As in other jurisdictions, prosecutors often offer many reasons—a "laundry list"—for each strike.[159] For example, an Alameda County prosecutor struck a Black juror because he was slouch ing, pursuing a criminal justice degree, believed the criminal legal system was unbalanced, and cited the events in Ferguson, Missouri to explain why he no longer wanted to be a police officer.[160]

2. "Race-Neutral" Reasons: Strikes of Black Jurors

Our study found that prosecutors disproportionately strike Black prospective jurors and justify these strikes because of the prospective jurors' demeanor, appearance, distrust of the criminal legal system, relationship with someone who had a negative experience with law enforcement, and place of residence. Here, we report on the reasons prosecutors gave for striking Black jurors and the frequency with which they gave these reasons for their strikes.

We determined that prosecutors most often relied on demeanor as a reason for striking Black jurors. Of the 480 cases in which prosecutors struck Black jurors, they offered a de meanor based reason in 37.5% (180 cases) of these cases. As we discuss in Sections III.A and III.C, these reasons correlate with racial stereotypes of African Americans because we uncon sciously and reflexively categorize people based on demeanor. For example, in a 2014 trial, an Alameda County prosecutor struck a Black juror, in part, because he "'had a very harsh demeanor . . . [The juror] was an imposing individual who gave short curt answers . . . [and] was falling asleep.'"[161] In a 2014 trial, a Los Angeles County prosecutor struck two Black jurors because both did not make eye contact with her, and one was "'sleeping out in the hallway" during a break.[162] In another Los Angeles County trial, a prosecutor excused a Black juror because she "'felt that he just wasn't that bright.'"[163] In yet another Los Angeles County case, a prosecutor struck a Black juror because she "had few interactions with others in the hallway and had not made friends with the other jurors, as well as seem[ed] animated and attentive to defense topics and questions, but not so animated during prosecution questions."[164] A Riv erside County prosecutor struck a Black juror who he described as "'very defensive, because she had her arms crossed, and . . . seemed a little hostile by her body language.'"[165] In another Riverside County trial, a prosecutor excluded a Black juror because he was "over eager . . . and did not stay focused."[166]

"Appearance" was not one of the GR 37 categories, and therefore we did not separately code appearance as a category. However, prosecutors also offered both demeanor and appear ance based reasons as grounds for a single peremptory challenge with sufficient frequency to warrant mention. As we discuss in Section III.D, California prosecutors are trained to avoid successful *Batson* objections by justifying strikes based on a prospective juror's appearance. Section III.A shows that these reasons also correlate with racial stereotypes of African Amer icans: we unconsciously and reflexively categorize people based on their appearance. For example, a Riverside County prosecutor struck a Black juror because he was wearing dollar sign diamond earrings and, thus, was not the ideal conservative juror.[167] A Los Angeles County prosecutor explained that she struck a Black juror because his dreadlocks touched the floor, which made him incompatible with a "'cohesive group' of persons made of persons 'of the same, kind of fall into societal norms.'"[168] Another Los Angeles County prosecutor exercised a peremptory challenge against a Black woman because "'she was wearing a very short skirt, 12 inch earrings, and had on these sandals that were blinged out with . . . at least 100 cubic zirco nia on each one.'"[169] Yet another Los Angeles County prosecutor said that she struck a Black juror because the juror had "'extraordinarily long pink fingernails' and braided hair" and

therefore was likely "'fairly liberal.'"[170] In a 2015 trial, a Yolo County prosecutor explained that she struck a Black juror because she was "'morbidly obese,'" stating that she has "'concern about people who are morbidly obese, how they might interact with other jurors, [and] what motivates them.'"[171] A Sacramento County prosecutor struck one Black juror because "'he was wearing dreadlocks. And it's my understanding . . . that dreadlocks are somewhat associated with a Reggae culture . . . [that] promotes drug use . . . in general.'"[172]

When a prosecutor challenges a juror based upon the juror's status (such as employment, age, education level) or statement, or based upon an inference the prosecutor has drawn from the juror's status or statement, the record—the jury questionnaire and/or the voir dire transcript—can refute or confirm the accuracy of the explanation. When a prosecutor relies on demeanor or appearance, there are only two checks on the accuracy of the reasons: (1) the defense counsel's rebuttal, if any; and (2) the court's ruling, which often does not address the accuracy of the prosecutor's description and is highly susceptible to the judge's implicit biases.[173] As Section III.A discusses, judgments based upon demeanor and appearance are particularly susceptible to implicit bias. In ruling on the motion, the trial judge is as likely as the prosecutor to be influenced by implicit bias.

Nearly as often as demeanor based reasons, prosecutors struck Black jurors for expressing a distrust of law enforcement or the criminal legal system or a belief that law enforcement or the criminal legal system is racially or class biased. This occurred in 34.8% (167 cases) of the 480 cases in which defense counsel challenged prosecutors' strikes of Black jurors. In Sections III.A and III.C, we discuss the racialized content of these reasons, including African Americans' greater distrust—compared to Whites'—of law enforcement and the criminal legal system based on the history of anti Black racism in the United States and their lived ex periences. For instance, an Alameda County prosecutor struck a Black juror because, accord ing to the prosecutor, the juror would not be willing to follow the law since "'she hopes the system is fair but it does need some overhaul when it comes to minorities being arrested and jailed more than non minorities, especially in reference to drugs.'"[174] In a Los Angeles County case, a prosecutor struck a Black juror because the juror may have struggled "'to determine whether [the defendant] is guilty or not'" since the juror saw "'flaws'" in the criminal legal system, such as better outcomes for wealthy criminal defendants.[175] In another Los Angeles County trial, a prosecutor struck a Black juror because the prosecutor concluded that the juror expressed "'a lack of faith in law enforcement'" because the juror was "robbed of jew elry at gunpoint yet had failed to report the crime to the police."[176] The prospective juror, however, "claimed he had not reported the crime because he was not physically injured and only material items were taken . . . ."[177] In yet another Los Angeles County case, a prosecutor excluded a Black juror because the juror described her husband's arrest when he was a minor as a "'victim of [police] decision,'" stating, "'I feel that shows a bias.'"[178] A San Joaquin Coun ty prosecutor struck a Black juror because he stated that he had been "'falsely accused'" and spent four months in jail, which, according to the prosecutor and despite the juror's assertion otherwise, "'gave him a lot of empathy and . . . sympathy for . . . [the] defendant.'"[179]

Next, prosecutors relied on the juror's close relationship with someone who had negative con tact with law enforcement—that is, a person who had been stopped, arrested, or convicted of a crime—as the reason for the strike. As Section III.C discusses, African Americans are more likely to be stopped, arrested, and convicted of a crime than any other racial or ethnic group. Prosecu tors offered this reason for striking Black jurors in 33.3% (160) of the 480 cases in which defense counsel challenged prosecutors' strikes of Black jurors. For example, in an Alameda County case, the prosecutor explained that she struck a Black juror because the prosecutor believed that the juror could not be fair "'in light of the fact that her family members all have had dealings with the Oakland Police Department.'"[180] A Los Angeles County prosecutor struck a Black juror because "'her son was arrested for a D.U.I.'"[181] In another Los Angeles County case, a prosecutor struck six of the nine Black jurors he ultimately removed because they all had family members who were convicted of a crime or were in prison.[182] In a Sacramento County case, the prosecutor struck a Black juror because he had visited his two siblings when they were incarcerated.[183] In another Sacramento County case, a prosecutor excluded a Black juror because she reported in her ques tionnaire that her "son had been in jail for unlawful driving or taking of a vehicle," but noted that he had "'done wrong and had to serve time.'"[184] In another Alameda County trial, a prosecutor re moved a Black juror because, according to the prosecutor, the juror stated that "'a number of her family members were involved in crimes and that she doesn't deal with them.'" [185] The prosecutor said, "'I find that kind of hard to believe that even if it were true.'"[186] In none of these instances did the jurors state that they could not be fair as a result of their relationships with individuals who had been arrested or incarcerated.

In 21.7% (104) of these cases, prosecutors struck African Americans because the juror had a negative experience with police or the criminal legal system, although the juror may not have expressed a general distrust of law enforcement or the system. A Los Angeles County prosecutor struck a Black juror because he had been, in the juror's own words, "'detained for being in the wrong part of town while black.'"[187] In an Alameda County trial, a prosecutor excused a Black juror because she "had been arrested for purse snatching and placed on probation as a juvenile, and had on another occasion . . . been arrested by the Oakland Police Department and jailed."[188] Another Alameda County prosecutor struck a Black juror because the prosecutor believed that the "traffic citation she received more than 10 years previously for driving without her seat belt . . . weighed heavily" on the juror.[189] In a 2005 Alameda County trial, a prosecutor excluded a Black juror who expressed dislike for a particular law enforcement officer who had ticketed her for running a stop sign in 1982.[190] In a 2013 trial, a Contra Costa County prosecutor explained that she struck a Black juror because of his 1962 "'experience with a police officer . . . [who] he thought . . . was being rac ist,'" although the juror made it clear that this event was "'in the past.'"[191]

Prosecutors also gave Black jurors' residence in a particular neighborhood as the reason for striking them.[192] Prosecutors offered this justification in 2.5% (12) of cases. Given the history of slavery, Jim Crow, redlining, and the home ownership gap between Blacks and Whites, the neighborhood in which African Americans live highly correlates with racial stereotyping. *See* Section III.C. In a San Francisco County case, the prosecutor explained that when asked about

"quality of life," a Black juror who "'lives in the Tenderloin . . . had no response"[193] A prosecu tor in Alameda County said that she struck a Black juror because the juror "appeared desen sitized to violence, based on the fact [*sic*] she lived in East Oakland and had been burglarized 15 times."[194] A Los Angeles County prosecutor removed a Black juror because he was raised around gangs in Compton.[195] In another Los Angeles County case, the prosecutor struck a Black juror because the prosecutor found it "incredible" that she lived in South Central Los Angeles but had no contact with gang members.[196]

3. "Race-Neutral" Reasons: Strikes of Latinx Jurors

Prosecutors exercised peremptory challenges against Latinx jurors for reasons similar to those they gave for their strikes against African American jurors, but not nearly as frequently. Pros ecutors removed Latinx jurors in 28.4% (190) of cases. As with Black jurors, prosecutors most often, in 41.1% (78) of these 190 cases, offered demeanor based reasons for striking Latinx jurors. For example, in a Tulare County case, the prosecutor struck two Latino jurors based on their demeanor: one because he frowned and the other because he "'seemed like he was con fused.'"[197] A Fresno County prosecutor struck a Latina juror because she "did not seem very friendly or communicative."[198] In an Orange County case, the prosecutor said that they struck the Latina juror because they "'didn't like her,'" and described her as "'flippant'" and someone who spoke "'like a Valley Girl or like a teenager.'"[199] A Los Angeles County prosecutor struck three Latinx jurors because one seemed "unsure of herself," another had a "strong, aggressive personality," and the other "was anti social and withdrawn."[200] Another Los Angeles County prosecutor struck a Latino juror because the juror had "the most dialogue" with defense coun sel.[201] A San Bernardino prosecutor struck four of the six Latinx jurors he challenged because one talked and thought "slow," another was "'very timid,'" the third did not "appear 'too bright,'" and the last was "'very timid' . . . and also lacked intelligence."[202]

Prosecutors also offered appearance based reasons for striking Latinx jurors. In a 2015 Los An geles County case, a prosecutor struck a Latino juror because of his "'big lobe earrings. . . .'"[203] The prosecutor said, "'[I]t is almost like somebody walking in . . . with their pants falling down and showing their underwear.'"[204] A Contra Costa County prosecutor struck two Latino jurors based on their appearance—one because he wore "'a large earring'" and had "'a goatee,'" and the other because he had "'extremely long, curly hair.'"[205] In a 2011 Santa Clara County case, a prosecutor gave a Latino juror's attire as a reason:

> '[He] was wearing long shorts. Hanging out of . . . one of the shorts pockets was a red San Francisco 49ers lanyard, which is the type of lanyard you see being handed out in San Jose by the bail bonds people as a free gift . . . He had long white tube socks on pulled up to his knees and Nike Cortez sneakers on, which I know to be attire of some body who is a gang member.'[206]

A San Mateo County prosecutor struck a Latina juror for her "youthful and untraditional appear ance, which included blue nail polish and very torn jeans."[207]

Nearly as often as demeanor based reasons, prosecutors based their strikes on a Latinx juror's close relationship with someone who had a negative experience with law enforcement, including having been stopped, arrested, or convicted of a crime. Prosecutors offered this reason in 33.7 % (64) of cases. A Riverside County prosecutor excluded three Latinx jurors because they all had family members who were incarcerated.[208] In a Contra Costa County trial, the prosecutor struck a Latina juror because someone in her family had been in prison, notwithstanding the fact that (1) the family member was a stepson who had been incarcerated 10 years earlier and with whom she had little contact, and (2) her deceased husband had been a police officer for two decades.[209] In a 2015 Los Angeles County case, the prosecutor struck two Latinx jurors because he was "concerned that they both had a close family member involved with the criminal justice system," though he acknowledged that the jurors "believed they could be fair."[210] In a 2016 Los Angeles County trial, the prosecutor struck one Latino juror because his wife had pleaded guilty to wel fare fraud, even though the juror stated "that would not prevent him from being fair."[211] A Fresno County prosecutor struck a Latina juror because of possible bias from the search and arrest of her husband, despite her assertion that she would not hold this incident against the police.[212]

In 26.8% (51) of cases involving challenges to Latinx jurors, prosecutors removed them for ex pressing a distrust of law enforcement or the criminal legal system or a belief that law enforce ment or the criminal legal system is racially or class biased. In a Yolo County case, the prosecu tor struck a Latina juror because she had a negative experience with law enforcement that led her to conclude "'anyone can be accused of something they didn't do and are treated like a criminal even when the police report states otherwise.'"[213] A Santa Clara County prosecutor struck a Lati na juror because she stated that her cousin had been treated unfairly by the criminal legal system, which the prosecutor believed gave her "sympathy for defendants."[214] In a Sacramento County case, the prosecutor struck a Latina juror because she indicated on her juror questionnaire that "the justice system treats people unfairly because of race or ethnic background."[215]

In 17.4% (33) of cases involving challenges to Latinx jurors, prosecutors cited jurors' own prior experience with law enforcement or the criminal legal system as a reason for their peremptory challenges. A Los Angeles County prosecutor struck a Latino juror because, in the 1970s, the juror and a Black friend had a negative experience with police officers in which the officers hit his friend.[216] The juror "stated that nonetheless he did not harbor any resentment toward officers."[217] In another Los Angeles County case, a prosecutor struck a Latina juror because she had an eight year old D.U.I. conviction, despite her belief she had been treated fairly in those proceedings.[218] In a 2008 Yolo County trial, the prosecutor removed a Latino juror because 42 years earlier, as a teenager, he "had been kicked off of a ladder by a border patrol officer who was chasing" undocu mented people.[219] A Tulare County prosecutor struck a Latino juror because he had been charged with a D.U.I., which the prosecutor assumed biased him against law enforcement.[220]

In 6.3% (12) of cases involving strikes of Latinx jurors, prosecutors offered a juror's neighbor hood as the reason for their peremptory challenge. For example, a Kern County prosecutor struck a Latina juror because the juror had "'just moved out of Wasco,'" and the prosecutor had a "'degree of skepticism about anybody from Wasco'" because of "'the people in that town and their criminality.'"[221] In a Riverside County case, the prosecutor struck a Latina juror because the prosecutor found it "'very difficult to believe'" that the juror was from Moreno Valley and had not seen graffiti or was not aware of gangs in the area.[222] A Contra Costa County prosecu tor struck a Latino juror because the juror was "'from the San Pablo area which is a lower class area within our county.'"[223]

4. Reliance on Racial and Ethnic Stereotypes: Juror-Level Data

We coded the reasons for each of the jurors by race and ethnicity—that is, the juror was the unit of analysis. *See* Figure 4. Of the total number of Black jurors they struck, prosecutors asserted that:

1. 25.6% expressed a distrust of law enforcement or the criminal legal system or a belief that law enforcement or the criminal legal system is racially or class biased;
2. 23.5% had a close relationship with people who had prior contact with law enforcement or the criminal legal system;
3. 23.2% had inappropriate demeanor;
4. 13.2% had prior contact with law enforcement or the criminal legal system;
5. 1.4% lived in a high crime neighborhood; and
6. 0.6% had a child outside of marriage.[224]

Of the total number of Latinx jurors they struck, prosecutors asserted that:

1. 20.8% had inappropriate demeanor;
2. 15.8% had a close relationship with people who had prior contact with law enforcement or the criminal legal system;
3. 10.8% expressed a distrust of law enforcement or the criminal legal system or a belief that law enforcement or the criminal legal system is racially or class biased;
4. 6.9% had prior contact with law enforcement or the criminal legal system;
5. 2.1% lived in a high crime neighborhood; and
6. 0.9% had a child outside of marriage.[225]

Prosecution's Reasons for Challenging Jurors By Juror Race/Ethnicity

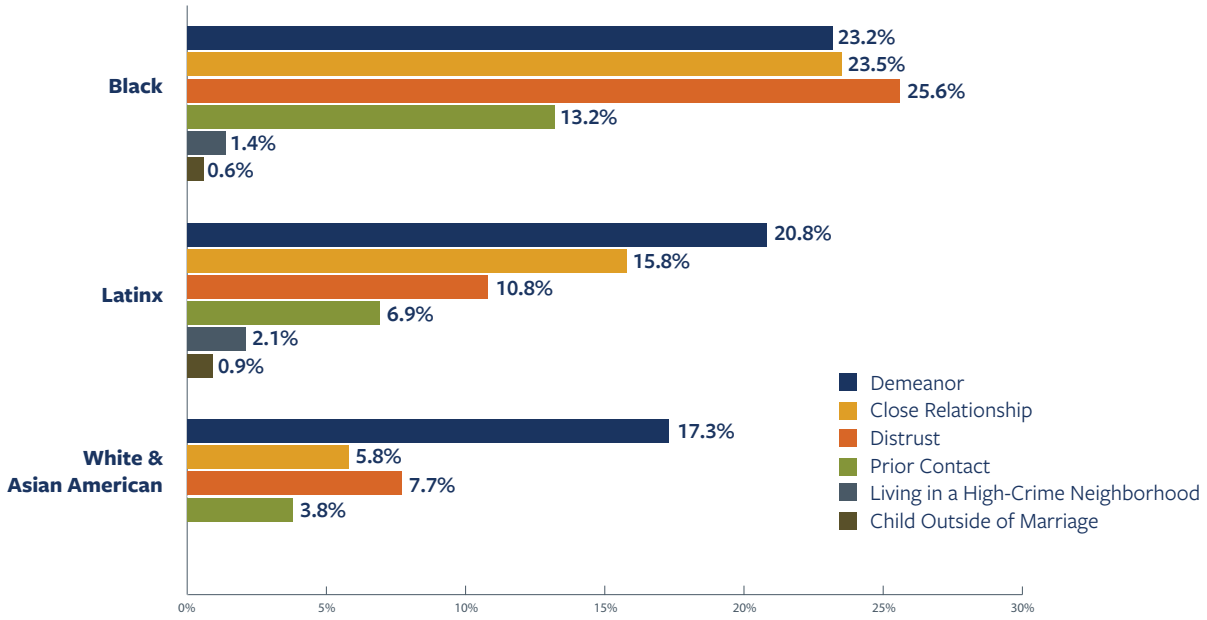


Figure 4[226]

5. Strikes of Cognizable Subgroups: Women of Color

Gender cases involving race or ethnicity are difficult to categorize. In Appendix A, we explain our decision not to report the data on the frequency of strikes against racial and ethnic subgroups. Nei ther the United States Supreme Court nor most lower federal courts have held that racial or ethnic subgroups—Black women, for example—are cognizable.[227] The California Supreme Court, however, has long held that subgroups can comprise a distinct cognizable class.[228] Irrespective of how defense counsel, the trial court, or the court of appeal characterizes the *Batson* objection, some California appellate opinions reveal both the sexism and racism embedded in prosecutors' reasons—either im plicit or explicit.[229] When striking female jurors, prosecutors offered the following reasons with suf ficient frequency to warrant mention: jurors' nail length and color, heel height and shoe color, hair style and color, and clothing style, including type of jewelry, especially when the prospective juror was an African American woman. The following are representative examples of these explanations:

> "'I did not like the way she was dressed and presented herself . . . to me that's a sign of lack of maturity. Low cut clothing with sandals.'"[230]

> "'The other part of my reason is, frankly, her orange hair color which indicates to me she is not really one to conform with others.'"[231]

> "Juror B. was a single mother who had her first child at age 18 and her second at age 21, by different fathers. Juror B. seemed to have a very nontraditional and 'kind of counter cultural' lifestyle . . . . [T]he prosecutor cited her 'red streakish hair.' She believed Juror B. was 'not someone who would be . . . a conservative juror that would convict somebody.'"[232]

> "'I excused this person based on her physical appearance as she came in yesterday. She was wearing 5 inch heels, red pumps. She had gray, 3 inch claw nails. She had folded arms the entire time. She was wearing a spider pin. Her entire appearance seemed to me like the type of person who has her own personality, someone who is not afraid to be different, someone who may be a problem in the jury room, . . . someone who can main tain her position and, therefore, possibly hang the jury.'"[233]

The California courts of appeal are sources of precedent in *Batson* cases. Our study finds that the opinions overwhelmingly affirm the use of peremptory challenges to exclude Black and Latinx jurors. Although most of these opinions are unpublished, they serve to validate prosecutors' reliance on explicitly or implicitly discriminatory stereotypes as permissible and effective, and incentivize prosecutors to continue to employ these explanations.

C. California Courts Rarely Find *Batson* Error

Our review of California *Batson* cases revealed not only that prosecutors disproportionately use peremptory challenges to strike Black and Latinx prospective jurors, but that our state supreme court and courts of appeal rarely find that these strikes were unconstitutionally race based. The California Supreme Court has found *Batson* error in 2.1% of the cases it reviewed in the last 30 years. The courts of appeal error rate was only 2.6% between 2006 and 2018. By, contrast, the Ninth Circuit found *Batson* error in of the 15% the California cases it decided between 1993 and 2019, and did so applying a much more stringent standard of review than our state courts employ.

1. The California Supreme Court's Abysmal Batson *Record*

The California Supreme Court's record in enforcing *Batson* is abysmal. Over a 30 year period (1989 2019), the court reviewed 142 *Batson* cases and found error only three times (2.1%).[234] *See* Figure 5. In 2019, Justice Goodwin Liu observed that it has been "more than 30 years since this court has found *Batson* error involving the peremptory strike of a black juror."[235] As he comment ed and our report and numerous studies show, "'Racial discrimination against black jurors has not disappeared here or elsewhere during that time."[236]

California Supreme Court *Batson* Ruling Decisions

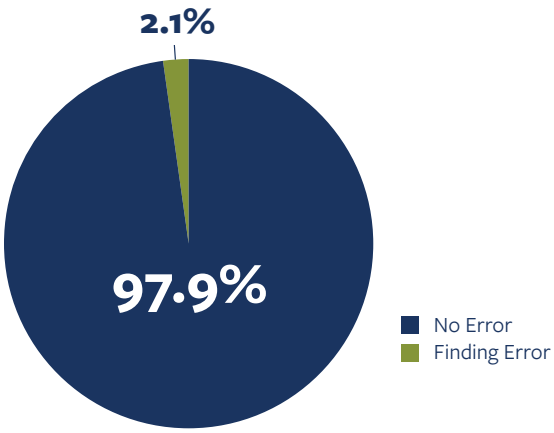


Figure 5

In Section III.E, we look closely at the opinions that produced the court's *Batson* record.

2. The California Courts of Appeal's Almost Equally Abysmal Record

The record of California's courts of appeal in *Batson* cases is only marginally better than that of the state supreme court. From January 1, 2006, through December 31, 2018, the courts of appeal issued a total of 683 opinions involving *Batson* claims. The six appellate districts found *Batson* error in only 18 cases (2.6%) and remanded three cases (0.4%) for the trial court to rehear the *Batson* motion.[237] *See* Figure 6.

Courts of Appeal *Batson* Decisions

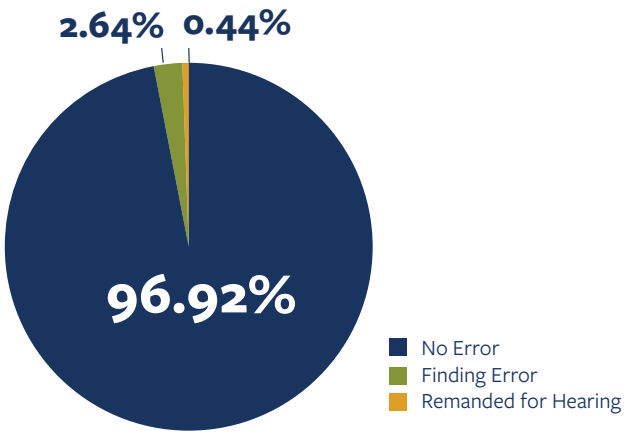


Figure 6

3. The Ninth Circuit's More Rigorous Adherence to Batson

The Ninth Circuit has been more willing than California appellate courts to apply *Batson* prec edent and uphold the Equal Protection Clause.[238] The disparity between grants of *Batson* relief in the California courts and the Ninth Circuit is notable because the circuit decided 18 of the 21 habeas cases from California under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA").[239] As we explain, under the AEDPA, federal courts are extraordinarily constrained by the degree of deference they must afford to the state court decision.

Since 1993, the Ninth Circuit has found *Batson* error in 21 (15%) of the 140 cases the circuit reviewed in which relief had been denied by California appellate courts, including the state supreme court.[240] *See* Figure 7. In at least two other cases, the Ninth Circuit remanded the matter to the district court for a hearing, which led to a grant of relief.[241] As discussed above, the California Supreme Court granted relief in just three of 142 *Batson* cases decided between 1989 2019. Thus, the Ninth Circuit has granted *Batson* relief over seven times as often as the California Supreme Court.[242]

Ninth Circuit *Batson* Ruling Decisions

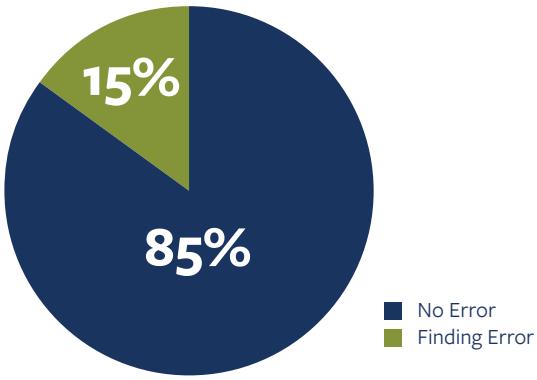


Figure 7

A defendant who has been convicted in a California court may seek relief in federal court only after the defendant has presented his or her claims in state appellate and habeas corpus proceedings.[243] Because "state courts are the principal forum for asserting constitutional chal lenges to state convictions," federal courts will not consider claims rejected in state court on procedural grounds or on the merits unless one of the AEDPA's statutory exceptions applies.[244] The federal habeas corpus statute reflects the view that "habeas corpus is a 'guard against extreme malfunctions in the state criminal justice systems,' not a substitute for ordinary error correction through appeal."[245]

The AEDPA imposes a "highly deferential standard" of review.[246] The federal court may not grant a habeas petition with respect to any claim decided on the merits in state court unless

the state court decision was: (1) "'contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States'"; or (2) "'was based on an unreasonable determination of the facts in light of the evidence pre sented in the State court proceeding.'"[247] Simply put, the AEDPA permits federal courts to grant habeas relief only in cases "where there is no possibility fairminded jurists could disagree that the state court's decision conflicts" with the precedents of the United States Supreme Court.[248]

The Ninth Circuit's repeated disapproval of our state courts' failure to follow *Batson*, that is, to enforce the Equal Protection Clause, is well illustrated by its decisions involving step one of the *Batson* procedure. For example, in *Fernandez v. Roe,* California courts failed to find that there was a prima facie case of discrimination after the prosecutor used his peremptory strikes against four of seven Latinx jurors and the only two African American jurors in the venire.[249] The California Court of Appeal agreed with the trial judge that the defendant had not estab lished a prima facie case because he "had not shown a 'strong likelihood' that the prosecutor had challenged the prospective jurors on account of their race or ethnicity."[250] The Ninth Cir cuit reversed.[251] It found that in *Fernandez* and other cases, California courts "erroneously re quired a defendant to show a 'strong likelihood' of discrimination in order to establish a *prima facie* case rather than just an 'inference' of discrimination as required by *Batson*."[252] The circuit remanded the case for an evidentiary hearing to apply the constitutionally proper test.[253]

Even after the Ninth Circuit disapproved of the heightened prima facie standard in cases such as *Fernandez*, California courts continued to require that defendants satisfy the higher stan dard. At step one, defendants still had to show that "it is more likely than not" the opposing party's strike "was based on impermissible group bias,"[254] rather than simply raise "an infer ence" of discrimination as *Batson* requires.[255] After years of insistence by California courts that the party making the *Batson* objection must meet this onerous standard, the United States Su preme Court intervened in *Johnson v. California*.[256] It held that California's test was an "inappro priate yardstick by which to measure the sufficiency of a prima facie case."[257] Even after *Johnson* was decided, California appellate courts, in practice, continue to require an elevated threshold at step one, contradicting clearly established federal law as determined by the high court.[258]

Below are but two examples of cases in which the Ninth Circuit, applying the AEDPA's high ly deferential standard, reversed California state court convictions for *Batson* error at step three. In *Kesser v. Cambra*, the Ninth Circuit reversed the California Court of Appeal's decision that the prosecutor's removal of three Native American women from the jury did not violate the Equal Protection Clause.[259] The prosecutor offered several reasons for striking the Native American women. He described one woman as a "'darker skinned female.'"[260] He expressed concern that because the prospective juror worked for a tribe, she would be more likely to identify with the culture and beliefs of the tribe than "'the mainstream system.'"[261] The prose cutor also described Native Americans as "'resistive'" and "'suspicious'" of the criminal justice system, and stated that "there are a whole bunch of people that violate our laws that are Native Americans."[262] The state appellate court acknowledged "some degree of racial stereotyping," but concluded that the prosecution presented sincere, nonracial reasons for striking the Native American prospective jurors.[263] The California Supreme Court denied review.[264]

The Ninth Circuit in *Kesser* held that the California courts had unreasonably accepted the prosecution's "nonracial motives as genuine" by failing to consider any "evidence outside the prosecutor's own self serving *Batson* testimony."[265] Unlike the trial court and state court of appeal, the Ninth Circuit reviewed the voir dire transcript and juror questionnaires, which "clearly and convincingly" refuted each of the prosecutor's nonracial grounds.[266] The compar ative juror analysis revealed that the prosecutor's "ostensibly 'race neutral' reasons show[ed] themselves to be only a veneer, a pleasing moss having no depth."[267] The circuit court declared that "the racial animus behind the prosecutor's strikes is clear."[268] The court concluded, "We cannot deny Kesser a representative jury by turning a blind eye to the prosecutor's pretextual, make weight justifications for his race based strikes. . . . [S]tate courts must review the record to root out such deceptions."[269]

More recently in *Castellanos v. Small*, the Ninth Circuit found a *Batson* violation after a prose cutor struck four Latinx jurors.[270] The trial court did not conduct a comparative juror analysis and found no purposeful discrimination at step three.[271] The state appellate court also did not engage in a comparative juror analysis or examine the record to determine whether the prose cutor's reasons were pretextual.[272] Therefore, the Ninth Circuit conducted its own analysis of the record.[273]

The circuit court found that the prosecutor's explanation that he struck a Latina juror because she had no children was pretextual for several reasons.[274] First, the question to which the juror responded was: "Do you have adult children; if so, how many?"[275] The prosecutor's reason was "factually erroneous" because the prospective juror stated that she had two adult children.[276] Second, three other jurors who did not have adult children were ultimately seated as was another seated juror who refused to answer the question.[277] Third, the circuit court found that the prosecutor's question was "a rather odd way of getting at what the prosecutor purportedly sought to identify," which was whether jurors could understand young children such as the prosecution's child witness.[278] The Ninth Circuit held that because comparative juror analysis "reveals such significant evidence of pretext," the California court's finding to the contrary amounted to an "unreasonable determination of the facts in light of the evidence presented."[279]

Despite the heightened burden and procedural hurdles in federal habeas cases, criminal de fendants have been significantly more successful in the Ninth Circuit than in our state courts because of the Ninth Circuit's willingness to more faithfully adhere to United States Supreme Court precedent.

III.

WHY RACIAL DISCRIMINATION IN JURY SELECTION PERSISTS

As Justice Marshall presaged in his concurring opinion, the procedure the Court announced in *Batson v. Kentucky* would not be adequate to eradicate the discriminatory use of peremptory challenges.[280] Justice Marshall identified three flaws in *Batson* that would destine it to fail. The first concerned the extent to which the requirement that the defendant make a prima facie showing would defeat *Batson*'s goal, especially in jurisdictions in which there are few Black jurors in the venire and fewer still who remain after cause challenges.[281]

Second, Justice Marshall warned that prosecutors could "easily assert facially neutral reasons" when challenged for striking a Black prospective juror and that "trial courts are ill equipped to second guess those reasons."[282] Because prosecutors could so readily mask discriminatory peremptory strikes with race neutral justifications, Justice Marshall feared that "the protection erected by the Court today may be illusory."[283]

Third, Justice Marshall doubted the efficacy of the *Batson* procedure because it failed to account for prosecutors' and judges' unconscious racism.[284] He warned, "Even if all parties approach the Court's mandate with the best of conscious intentions, that mandate requires them to confront and overcome their own racism on all levels—a challenge I doubt all of them can meet."[285] That is, even assuming that attorneys and judges make a good faith attempt not to use peremptory strikes in a discriminatory manner, the *Batson* procedure does nothing to ferret out the unconscious biases that infect nearly every person's decision making. Justice Marshall further observed that prosecutors' "seat of the pants instincts" about a juror, on which they often rely in exercising peremptory strikes, may "be just another term for racial prejudice."[286]

This section explores why, 34 years after *Batson* was decided, racial discrimination in jury se lection persists in California. It reveals that Justice Marshall was prescient: the flaws in *Batson* he identified in 1986 continue to cripple its efficacy today. In Section I.B, we surfaced Justice Marshall's first concern: the ongoing underrepresentation of African Americans in California jury venires. Here, we address how unconscious racism—more commonly referred to now as implicit bias—affects the exercise of peremptory challenges and judicial rulings and contrib utes to the disproportionate exclusion of African Americans from juries. We also explore pros ecutors' long standing resistance to *Batson*. We show how prosecutors' frequent use of facially "neutral" reasons, such as having a negative view of the criminal legal system, exploits the dif ferent views Blacks and Whites hold due to historical and personal experiences. We investigate how California prosecutors are trained to overcome *Batson* objections by employing the very tactics Justice Marshall anticipated, e.g., "gut instincts" and ready made lists of "race neutral" reasons. As Justice Marshall predicted, *Batson* allows this prosecutorial behavior to continue unchecked with pernicious results. Finally, we assess the ways in which the California Supreme Court has failed to enforce *Batson*'s mandate.

A. Implicit Bias Taints Peremptory Challenges

1. Overview of Implicit Bias and Batson

"Implicit bias" is bias based on subconscious attitudes or stereotypes.[287] Implicit biases encom pass stereotypes about a range of identities, including race, ethnicity, gender, religion, body weight, and disability.[288] This section focuses on how implicit bias affects understandings of race, particularly as it concerns African Americans.

Implicit bias, in part, explains prosecutors' race based strikes. Social science research has illu minated the direct impact that implicit biases have on the exercise of peremptory strikes. The results led one legal scholar to conclude that the *Batson* framework is "psychologically naïve" in its reliance on self reporting.[289] She explained that because of the "wide dissociative gap between what we believe our feelings to be and what they actually are,"[290] a lawyer's inability to assess how a "juror's race has affected her decision to strike" also means that "she will be unable to explain it."[291] The commentator concluded that "*Batson* rests on outdated and inaccu rate assumptions about human behavior."[292] These are the same assumptions Justice Marshall identified in 1986 as fatal to *Batson*'s prospects.[293] It is now both unrefuted and widely acknowl edged that "powerful and pervasive" implicit biases affect the exercise of peremptory challeng es as well as how judges rule on the lawfulness of those challenges.[294] The *Batson* procedure "both allows the implicit and explicit biases of attorneys to impact jury composition and may provide a false veneer of racial neutrality to jury trials."[295]

Writing for the majority in *Batson v. Kentucky*, Justice Lewis Powell declared that "peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.'"[296] His words acknowledged the "purposeful" racial bias that the Court's three step analysis of peremptory strikes was intended to ameliorate, if not altogether elimi nate.[297] As noted elsewhere in this report, Justice Marshall concurred in the opinion, but cau tioned that the Court's prescription "will not end the racial discrimination that peremptories inject into the jury selection process."[298] Justice Marshall gave several reasons for his warning, including the following:

> A prosecutor's own conscious or unconscious racism may lead him easily to the con clusion that a prospective black juror is "sullen," or "distant," a characterization that would not have come to his mind if a white juror had acted identically. A judge's own conscious or unconscious racism may lead him to accept such an explanation as well supported.[299]

Well before *Batson*, social science research had documented the stereotypic association of Black Americans as violent and criminal.[300] A year following the decision, a legal scholar wrote:

> [R]equiring proof of conscious or intentional motivation as a prerequisite to constitutional recognition that a decision is race dependent ignores much of

> what we understand about how the human mind works. It also disregards both the irrationality of racism and the profound effect that the history of American race relations has had on the individual and collective unconscious.[301]

Within several years, another legal scholar criticized the *Batson* inquiry on the ground that it "focused almost entirely on proof of the discriminatory state of mind of the striking party," and could not effectuate its mandate of prohibiting all race based discrimination.[302]

More than 30 years later, a wealth of empirical evidence confirms Justice Marshall's observation that individual actors in the criminal legal system are incapable of being fully aware of their race based biases.[303] The studies leave no doubt that the "old tools of detecting racism—asking people to report on their own attitudes"—are largely ineffective.[304] Post *Batson* research has shown that implicit biases in the exercise of peremptory challenges are unconscious and therefore impossible to elicit from the party exercising the strike.[305] These studies provide insight into modern understandings of racism as often subtle, unintentional, and unconscious, and offer one way to understand our empirical findings that race based strikes persist in California courts.[306]

Implicit biases are particularly challenging to regulate because they occur when people "discriminate without intending to do so."[307] Simply put, "one does not have to be a Racist with a capital R . . . to harbor implicit racial bias."[308] Implicit bias "suggests that actors do not always have conscious, intentional control over the processes of social perception, impression formation, and judgment that motivate their actions."[309] These implicit biases "produce behavior that diverges from a person's avowed or endorsed beliefs or principles."[310] Such biases make the *Batson* framework, which depends upon the subjective judgments of the parties and judges, incapable of ferreting out invidious unconscious biases and stereotypes.[311]

2. A Half Century of Research on Implicit Bias

By 1954, researchers had hypothesized that racialized schemas[312] could be activated unconsciously.[313] The next major breakthrough in this research was the development of the distinction between "controlled" and "automatic" information processing made by cognitive psychologists who discovered that automatic processing is "difficult to alter, to ignore, or to suppress once learned."[314] Many studies in the following two decades demonstrated the pervasiveness of unconscious processing and found that awareness of stereotypes can manifest in social judgments and behaviors that are uncontrolled and differ from the subjects' reported attitudes.[315]

In the 1980s, research on "implicit memory" led scholars to develop two new understandings of implicit thought development in humans: "implicit attitudes" and "implicit stereotypes."[316] Researchers defined implicit attitudes as an evaluative disposition that "indicates favor or disfavor toward some object but is not understood by the actor as expressing that attitude."[317]

They defined implicit stereotype as "a mental association between a social group or category and a trait."[318] Researchers then identified "implicit biases" as "discriminatory biases based on implicit attitudes or implicit stereotypes."[319]

A deeper understanding of implicit bias based on race was solidified in a groundbreaking study in 1989. In that study, researchers showed that even the preconscious presentation of racial material (material shown so quickly that the observer is not able to consciously register it) is sufficient to trigger the use of racial stereotypes.[320]

Development of the Implicit Association Test (IAT) in 1998 also expanded scientific under standing of the scope of implicit bias.[321] When respondents were asked about their "favoritism toward advantaged versus disadvantaged groups" across a dozen topics including race, gender, ethnicity, religion, and sexual orientation, 42% of respondents "expressed exact or near exact neutrality" between advantaged and disadvantaged groups.[322] By contrast, data analysis of IAT results—the objective reality of those same respondents' implicit or unconscious views—re vealed that "only 18% of respondents demonstrated sufficiently small implicit bias to be judged implicitly neutral."[323] These results show that implicit biases are far more pervasive than explic it biases.[324]

Studies have found that implicit bias extends beyond "in group preference," which is defined as "favoritism toward groups to which one belongs."[325] Implicit bias establishes a general pattern of attributing positive attributes to White individuals and negative attributes to Black individ uals, regardless of the race of the respondent.[326] Another study using the IAT found that there is a stronger association between the word "pleasant" and European Americans than there is between "pleasant" and African Americans.[327] The findings also demonstrate that there is a "greater favoritism to advantaged groups found in IAT measures than in explicit measures," revealing that discrimination across racial groups has a higher prevalence in an individual's implicit biases than any existing overtly racist views.[328]

A 2000 neurological study analyzed levels of activation in the amygdala—the area of the brain that controls fear—when participants were shown unfamiliar Black and White male faces with neutral, non menacing expressions.[329] The results revealed that White participants exhibited the highest increased levels of activation in the amygdala when presented with Black faces.[330] The display of African Americans "evoke[d] differential amygdala activity" that is "related to unconscious social evaluation."[331] A later social psychological study further evaluated the associative link between African Americans and fear, and found that Whites hold strong asso ciations between race and crime and are most fearful of the risk of crime when "in the pres ence of black strangers."[332] White respondents' estimates of "victimization risk" were "heavily influenced by racial composition," even though the study also made plain that actual crime risk is "not affected by racial composition."[333]

3. Pervasive Implicit Bias in the Criminal Legal System and in the Exercise of Peremptory Challenges

A growing body of social science research on implicit bias focuses on the pervasiveness of im plicit biases in the criminal legal system.[334] The findings, confirmed by articles in peer reviewed journals, are that "[i]mplicit biases—by which we mean implicit attitudes and stereotypes—are both pervasive (most individuals show evidence of some biases), and large in magnitude, statis tically speaking. In other words, we are not, on average or generally, cognitively colorblind."[335] Much of the research has shown that implicit bias is widespread in all aspects of the criminal legal system, resulting in discrimination against both Black defendants and Black jurors by vari ous actors, including police officers, attorneys, judges, and jurors.[336]

Empirical research confirms that individuals generally associate persons of color—particu larly African Americans—with criminality more often than they do Whites. This association has had and continues to account for "a disproportionate amount of crime arrests" of African Americans,[337] a higher likelihood of conviction when charged with a crime jurors associate with Blacks,[338] and lengthier sentences for Black defendants than those imposed on comparable White defendants.[339] Most of the social science research has focused on the Black White di chotomy. However, studies examining the effects of implicit bias on other people of color have produced similar results.[340]

In a five study publication, researchers determined that the association between African Amer icans and criminality is bidirectional; exposure of participants to Black male faces "lowers the perceptual threshold at which they detect degraded images of crime relevant objects (e.g., guns and knives)" and, conversely, "exposing people to crime relevant objects prompts them to vi sually attend to Black male faces."[341] These findings demonstrate the "durability" of the associ ation between African Americans and criminality.[342] In another study, researchers showed that the unconscious association of African Americans with criminality is so strong that it impacted response times in gun use against an individual viewed as a threat. Participants were quicker to "shoot" an armed Black target than an armed White target and were slower to "not shoot" an unarmed Black target than an unarmed White target.[343]

Implicit racial biases affect decision making in jury deliberations, and studies have shown that racially diverse juries reduce deliberation inaccuracies and racially discriminatory deci sion making. For example, a mock jury study found that racial diversity motivated White par ticipants to contribute more fact based, unbiased commentary during the deliberations, which reduced racial disparities in the outcomes.[344] Another mock jury study concluded that heteroge neous groups produced higher quality deliberations in that the jurors "deliberated longer and considered a wider range of information than did homogeneous groups."[345] In mock jury de liberation situations in which Black participants were present, White participants raised more case facts, made fewer factual errors, and "were more amenable to discussion of race related issues" than when they deliberated in a non diverse group.[346]

Researchers have demonstrated that implicit bias against African Americans affects jury selec tion, specifically influencing the exercise of peremptory challenges.[347] For example, 28 practic ing attorneys with jury trial experience, 90 undergraduate college students, and 81 law students participated in a study involving a hypothetical burglary case with DNA evidence.[348] They were asked to assume the role of the prosecutor and to exercise their final peremptory strike against one of two prospective jurors.[349] The juror profiles were designed to be equally unattractive to the prosecution: the first hypothetical juror had "written articles about police misconduct," and the second hypothetical juror was skeptical of statistical evidence.[350] Each participant responded to two different scenarios. In the first experiment, Juror #1 was Black and Juror #2 was White.[351] In the second experiment, the race of the juror profiles was switched.[352]

The study found that the participants' strike decisions varied sharply by race. When the first juror—the individual familiar with police misconduct—was Black, "participants challenged him 77% of the time; this same individual was challenged just 53% of the time when he was White."[353] The second juror—the individual who was skeptical of statistical evidence, like DNA testing—was challenged "47% of the time when he was Black, compared to 23% when he was White."[354] Despite these disparities, participants "rarely cited race as influential, focusing instead on the race neutral characteristics associated with the Black prospective juror,"[355] even though the characteristics of the juror profiles remained exactly the same and only the race of the juror switched in the two scenarios. Researchers found that "a prospective juror's race can influence peremptory challenge use and that self report justifications are unlikely to be useful for identifying this influence."[356]

Although not directly addressing the issue of race, research on implicit bias with respect to gender shows that explicit instructions against the use of gender in exercising peremptory strikes is ineffective in altering the effects of implicit bias on behavior.[357] In research involv ing two studies, college students were asked to assume the role of a prosecutor and exercise a single peremptory challenge against one of two prospective jurors in the mock trial of a female defendant accused of killing her husband.[358] Both studies used the same prospective juror profiles, which "included at least one characteristic that could be construed as unattractive to a prosecutor."[359] In the first study, "juror selection was driven by gender. Across conditions, 71% of participants chose to eliminate the female juror."[360] The results revealed that "jurors with otherwise identical profiles were likely to be retained when male but excused when female."[361] In the second study, the mock prosecutors in one group were given an explicit instruction that "according to the U.S. Supreme Court, you may not decide to remove a juror because of his or her gender"; the mock prosecutors in the second group did not receive this instruction.[362] This warning "failed to decrease gender bias": 59% of jurors who received the warning removed the female juror.[363] Similarly, 60% of participants in the second group—who did not receive the warning—also removed the female juror.[364] The researchers found that "warnings against bias led participants to go to greater lengths to conceal that bias."[365] In considering remedies for

discrimination in peremptory challenges discussed in Section IV, the authors concluded that instructing attorneys about implicit bias will not significantly reduce discriminatory peremp tory challenges.

In the face of this growing body of research, California judges have expressed similar con cerns about implicit biases and *Batson*'s inability to identify and preclude them. In September 2019, concurring in *People v. Bryant*, two California Court of Appeal justices announced that the "case highlights the serious shortcomings with the *Batson* framework," aligning with oth ers "who are calling for meaningful reform."[366] In his concurring opinion, Justice Jim Humes wrote that the *Batson* procedure, which is limited to acts of intentional discrimination, "plain ly fails to protect against—and likely facilitates—implicit bias."[367] Quoting United States Su preme Court Justice Stephen Breyer, Justice Humes explained that "it is not hard to wonder, '[h]ow . . . trial judges [can] second guess an instinctive judgment the underlying basis for which may be a form of stereotyping invisible even to the prosecutor.'"[368]

Concurring last year in *People v. Smith*, Court of Appeal Justice Jon Streeter discussed courts' overreliance on the seating of jurors who are the same race as the struck jurors to legitimize a prosecutor's peremptory challenges.[369] The trial court in *Smith* found a prima facie showing of discrimination based upon the prosecutor's use of peremptory challenges to strike four Black jurors.[370] In the trial judge's view, however, the fact that one Black juror was seated and another Black juror served as an alternate constituted "'powerful evidence' supporting the credibility of the prosecutor's proffered reasons for excusing jurors."[371] Justice Streeter ob jected that attaching "too much significance to the prosecutor's willingness to pass the panel with one or two same race jurors in it 'would provide an easy means of justifying a pattern of unlawful discrimination which stops only slightly short of total exclusion.'"[372] Justice Streeter explained that, because "the Constitution forbids striking even a single prospective juror for a discriminatory purpose, the question before the trial court was whether the prosecutor's reasons for excusing the four jurors "were pretextual, not whether his decision to pass on some other juror was free of discrimination."[373]

Justice Streeter turned to the psychological literature demonstrating that discrimination can be "masked by a discriminator's attempt to demonstrate lack of prejudice on a prior occa sion."[374] He pointed to the same language in Justice Thurgood Marshall's opinion in *Batson* quoted at the beginning of this section as "[a]nticipating the need to apply concepts of im plicit bias to the discriminatory use of peremptory challenges," as well as the influence of "[a] judge's own conscious or unconscious racism" in issuing a ruling.[375] Thus, he wrote that the prosecutor's retention of two Black jurors, "may have been indicative of good faith, but good faith in and of itself was not the issue. Many perpetrators of discrimination are sincere."[376]

B. Prosecutors' Continued Resistance to *Batson*

Prosecutors' efforts to oppose remedies to discriminatory jury selection practices are long standing. When the United States Supreme Court was considering *Batson*, the National District Attorneys Association ("NDAA") filed a brief in support of the state of Kentucky.[377] The NDAA argued, "Prosecutorial peremptory juror challenges to remove . . . all members of a defendant's race is not violative of a defendant's right to be tried by an impartial jury . . . under the sixth amendment of the United States Constitution."[378] In Justice Marshall's concurring opinion in *Batson*, he wrote that the "misuse of the peremptory challenge to exclude black ju rors has become both common and flagrant."[379] Justice Marshall referenced an instruction book used by the Dallas County, Texas District Attorney's Office, which "explicitly advised prosecu tors that they conduct jury selection so as to eliminate 'any member of a minority group.'"[380] Until 2010, the NDAA refused to adopt *Batson* as a standard. Instead, the organization recom mended that prosecutors "be familiar with the decisions . . . [and] closely follow other cases that develop . . . *Batson* . . . issues."[381]

Prosecutors across the country are trained in how to use peremptory strikes against African Americans and other jurors of color without violating *Batson*. A year after *Batson*, then Phila delphia Assistant District Attorney Jack McMahon gave a videotaped training session to prose cutors in his office. He instructed them to circumvent *Batson* by thoroughly questioning Black jurors so that "you [have] more ammunition to make an articulable reason as to why you are striking them, not for race."[382] At a 1995 North Carolina Conference of District Attorneys train ing program, attendees received a one page handout titled "*Batson* Justifications: Articulating Juror Negatives."[383] It provided 10 vague reasons such as inappropriate dress, physical appear ance, poor attitude, or body language.[384] In 2004, a list of purportedly race neutral justifications was distributed to Texas prosecutors that included suggestions such as "Watched gospel TV programs" and "Agreed with O.J. Simpson verdict."[385] A 2005 edition of a national trial manual for prosecutors did not once refer to *Batson*.[386] As we show below, exploiting *Batson*'s deficien cies in order to strike jurors of color is by no means restricted to prosecutors in states other than California.

C. Prosecutors Strike Black Jurors Based on Their Different Experiences with the Criminal Legal System

Consistent with other studies, our empirical research found that prosecutors often use pe remptory strikes against jurors of color who hold negative views of the criminal legal system or law enforcement.[387] The California Supreme Court has repeatedly held that these reasons are facially race neutral, therefore sufficient to get prosecutors past *Batson*'s second step and, almost always, adequate to defeat a defense objection.[388] Indeed, as Section III.D shows, prose cution training manuals often cite these very reasons as legally sound, "race neutral" bases for peremptory strikes, and urge prosecutors to use them as justifications.

The effect, however, of using peremptory strikes to remove jurors who hold negative views of law enforcement or have been involved with the criminal legal system is anything but "race neutral." Overall, African Americans and Whites differ in their views of the criminal legal system.[389] African Americans are more likely than Whites to view the system as racially discriminatory and unjust, and are therefore less supportive of punitive criminal justice policies.[390] These views are embedded in the nation's long history of racial oppression, and the differential treatment of African Americans by the criminal legal system, including by members of law enforcement.[391] Moreover, because of the racially discriminatory nature of policing and mass incarceration, African American prospective jurors are more likely to have had personal or familial involvement with the criminal legal system.

Both the reality and prosecutors' perceptions of these differences in opinion between Blacks and Whites lead prosecutors to disproportionately—and successfully—exercise peremptory challenges against African Americans. Whether a challenge is based on a prosecutor's sincere (though demonstrably false) belief that the criminal legal system treats everyone fairly and equally irrespective of race or the strike is simply a tactical decision to remove a prospective juror the prosecutor instinctively believes will be unsympathetic, the result is discriminatory in at least two respects. As noted (and as will be detailed presently), African Americans generally have sound reason to doubt the fairness of the criminal justice system; thus using that as a reason to eliminate prospective jurors necessarily has a disparate impact on the proportion of their representation on the jury. Moreover, the *a priori* assumption that *every* African American is going to be hostile to law enforcement is a paradigmatic example of "group bias"—the very evil that *Wheeler* set out to cure. Yet both prosecutors and the judges who pass on the legitimacy of their peremptory challenges continue to give credence to such biased views, consciously or unconsciously, with the result that African Americans and other persons of color continue to be eliminated disproportionately.[392]

1. African Americans' Distrust of the Criminal Legal System Is Rooted in Its Racist History

When slavery was abolished, Whites turned to new methods of social and economic control. For the all too brief Reconstruction period (1865 77), African American men began to gain a toehold in civil society.[393] They held elected office, gained the right to vote and serve on juries, and began to establish "businesses, churches, schools and other legacy institutions."[394] However, the White backlash against Reconstruction's civic reforms was brutal and swift.[395] Though the South was defeated in the Civil War, "white supremacist ideologies continued, unbridled and disengaged from the institution of slavery."[396] States in the South "began to look to the criminal justice system to construct policies and strategies to maintain the subordination of African Americans."[397] They found inspiration in the text of the Thirteenth Amendment, which outlawed slavery and involuntary servitude "except as a punishment for a crime."[398] Southern states enacted "Black codes" and adopted vagrancy laws, which "essentially made it a criminal offense not to work and were applied selectively to blacks."[399] Once convicted, Blacks were often "contracted out as laborers to the highest private bidder" as part

of the brutal system known as convict leasing.[400] Thus, the institution of slavery was revived in all but name for African Americans who were caught up in the criminal legal system.

Beginning around the turn of the century, an "epidemic of lynchings" engulfed the South; thousands of African Americans were tortured and killed.[401] Extrajudicial executions profound ly impacted race relations in the United States and "shaped the geographic, political, social, and economic conditions" of African Americans in ways that are still visible today.[402] Across the South, "someone was hanged or burned alive every four days from 1889 to 1929."[403] Most of the southern Black population had "witnessed a lynching in their own communities or knew people who had."[404]

The specter of lynching reached far beyond the South. During the Great Migration, which lasted from the early 1900s through the 1970s, "some six million black southerners left the land of their forefathers and fanned out across the country for an uncertain existence in nearly every other corner of America."[405] Not only were people lynched throughout the United States, including in California, but those African Americans who left the South during the Great Migra tion brought with them their lived experiences and fears.[406] Therefore, "a potential unintended consequence of the 'Great Migration' was a cultural transmission of the history of southern lynchings among African Americans" all over the country.[407]

The administration of the criminal law is interwoven with the history of lynching in ways that "continue to contaminate the integrity and fairness of the justice system."[408] In particular, ex trajudicial lynchings in the South were increasingly replaced by state executions.[409] The decline in lynchings "relied heavily on the increased use of capital punishment imposed by court order following an often accelerated trial."[410] White leaders in the South "acknowledged that capital punishment could serve the same function as lynchings—the control and intimidation of Afri can Americans."[411] Indeed, both White and Black Southerners viewed state executions as "legal lynchings."[412] Therefore, African Americans' widespread opposition to capital punishment is linked to this history and to the use of capital punishment by the state as a way to replace and reinvent the racial terrorism of lynching.[413]

Throughout the 20th century, the criminal legal system continued to disproportionately pun ish African Americans. The use of the criminal legal system as a vehicle for segregating and oppressing Blacks was far from a uniquely Southern phenomenon. On the contrary, "disparate enforcement of various laws against 'suspicious characters,' disorderly conduct, keeping and visiting disorderly houses, drunkenness, and violations of city ordinances made possible new forms of everyday surveillance and punishment in the lives of black people in the Northeast, Midwest, and West."[414] As a result of racist laws, policing, and enforcement, Whites came to associate Blacks with crime and used that harmful stereotype to justify further discriminatory policies. "The high arrest and incarceration rates of black Americans—though based on . . . rac ist policies . . . served to create what historian Khalil Gibran Muhammad has called a 'statisti

cal discourse' about Black crime in the popular and political imagination, and this data deeply informed national discussions about racial differences that continue to this day."[415]

As the Jim Crow regime was slowly dismantled through the gains of the Civil Rights Movement, explicitly racist calls for White supremacy and segregation were replaced by racially coded appeals to "law and order."[416] "Proponents of racial hierarchy found they could install a new racial caste system without violating the law or new limits of acceptable political discourse, by demanding 'law and order' rather than 'segregation forever.'"[417] Public figures and the media amplified paranoia about urban crime in ways that reinforced racial stereotypes. The messaging worked: "By 1968, 81 percent of those responding to the Gallup Poll agreed with the statement that 'law and order has broken down in this country,' and the majority blamed 'Negroes who start riots' and 'Communists.'"[418]

Over the succeeding decades, mass incarceration boomed, fueled by racially discriminatory ste reotypes of African American criminality. "As law enforcement budgets exploded, so did prison and jail populations."[419] By the 1990s, "the Sentencing Project reported that the number of peo ple behind bars in the United States was unprecedented in world history."[420] Today, the "Amer ican criminal justice system holds almost 2.3 million people in 1,833 state prisons, 110 federal prisons, 1,772 juvenile correctional facilities, 3,134 local jails, 218 immigration detention facili ties, and 80 Indian Country jails as well as in military prisons, immigration detention facilities, civil commitment centers, state psychiatric hospitals, and prisons in the U.S. territories."[421]

The present day criminal legal system is unique not just in its massive size, but its racially dis criminatory character. The statistics are dizzying: "Black men comprise about 13 percent of the U.S. male population, but nearly 35 percent of all men who are under state or federal jurisdic tion with a sentence of more than one year."[422] One third of Black men born in 2001 will likely be incarcerated in their lifetime.[423] "Black people are incarcerated in state prisons at a rate 5.1 times greater than that of white people."[424] In 2010, 8% of American adults had been convicted of a felony compared to 33% of Black men.[425]

Further, African Americans and Whites have significantly different experiences with law en forcement. Recent Bureau of Justice Statistics data confirm that Black Americans are "more likely to be stopped by police than white or Hispanic residents, both in traffic and street stops."[426] Once stopped, Black drivers are "far more likely to be searched and arrested" than Whites.[427] This is true even though police find contraband at a lower rate when they search Black drivers as compared to White drivers.[428] "In 2016, Black Americans comprised 27% of all individuals arrested in the United States—double their share of the total population."[429] Only 15% of children in the United States are Black, yet 35% of juvenile arrests in 2016 were of Black children.[430] In 2015, 25% of people arrested for drug infractions were Black, despite evidence that suggests "drug rates do not differ substantially by race or ethnicity."[431]

Blacks are also disproportionately the victims of police violence. In 2018, police "were twice as likely to threaten or use force" against African Americans and Latinx people than Whites during stops.[432] This violence can be fatal. Black men are "2.5 times more likely than White men and boys to die during an encounter with cops."[433] About one in 1,000 Black men in America will be killed by the police.[434]

The egregious racial disparities summarized here also play out in criminal case prosecutions and outcomes. Our criminal legal system continues to treat Whites and Blacks differently. For example, federal "prosecutors . . . are twice as likely to charge African Americans with offenses that carry a mandatory minimum sentence than similarly situated whites."[435] And state "prose cutors are also more likely to charge black rather than similar white defendants under habitual offender laws."[436] In addition, judges are more likely to "sentence people of color than whites to prison and jail and to impose longer sentences, even after accounting for differences in crime severity, criminal history, and education level."[437]

2. Blacks and Whites Differ in Their Views of the Criminal Legal System

Decades of social science research confirms that African Americans and Whites differ in their views of the criminal legal system, with more Blacks consistently expressing the opinion that the system is racially discriminatory. The reasons for the divide in perception are rooted in the historic and present day differences, described above, between how the two groups experience the criminal legal system, including their interactions with law enforcement.

Blacks consistently support the death penalty at lower rates than Whites. For example, "only around a third of blacks (36%) support capital punishment . . . compared with nearly six in ten whites (59%)."[438] Scholars have further noted that "doubts about capital punishment cut across socioeconomic, political, and religious lines within the African American community."[439] Un surprisingly, Blacks' opposition to the death penalty is rooted at least in part in the historical awareness and/or lived experience that it is racially discriminatory.[440] A 2015 survey revealed that "77% of blacks said that minorities are more likely than whites to be sentenced to death for committing similar crimes."[441] Research confirms that, in California, African American sup port for the death penalty is lower than among Whites. For example, in a 2011 survey, 45.1% of African Americans in California favored abolishing capital punishment, compared to just 25.5% of Whites.[442] Similarly, 66% of African Americans said that they preferred life imprisonment without parole over the death penalty, while 45% of Whites reported the same.[443] Two surveys conducted in Solano County in 2014 and 2016 show a clear and consistent difference between Black and White support for the death penalty.[444] In the 2016 survey, just "27% of African Amer ican respondents supported the death penalty compared to 66% of white respondents."[445]

Importantly, African Americans' relatively higher opposition to the death penalty leads to their disproportionate removal from juries in capital cases.[446] Capital juries are almost always "death qualified," which means that prosecutors can successfully challenge for cause jurors who have reservations about the death penalty.[447] Because African Americans are more likely than Whites

to oppose the death penalty, African Americans are routinely removed from capital juries before the prosecution exercises any peremptory strikes. Death qualification is yet another part of the jury selection process that contributes to the whitewashing of juries.[448]

Research published in 2019 showed that almost 80% of African Americans—as compared with more than 30% of Whites—consider the treatment of people of color by the criminal legal system to be a significant problem.[449] Similarly, around 90% of African Americans believe that "blacks are generally treated less fairly by the criminal justice system than whites," while only about 60% of Whites hold that view.[450] A 2013 study revealed that more than two thirds of Blacks surveyed perceived the criminal justice system as biased against Blacks, compared to just one quarter of Whites.[451] These African Americans described their personal experiences with the criminal legal system—and the system itself—as "[u]nfair, illegitimate, and excessive."[452]

These recent findings illustrating stark differences in how Blacks and Whites view the criminal legal system are consistent with social science research conducted during the past several de cades. An empirical study published in 2007 found that "African Americans and Whites do not conceptualize 'American justice' in the same terms. Whereas Whites tend to see the scales of justice as reasonably balanced, African Americans are inclined to believe that unfairness, based on race, is integral to the operation of the criminal justice system."[453] Research analyzing nation al data collected between late 2000 and early 2001 showed that "while 74.0% of Blacks do not agree that the justice system treats people fairly and equally, only 44.3% of whites express sim ilar sentiments."[454] The research also revealed that 61% of Blacks, compared to 26% of Whites, "do not trust the courts to give a fair trial."[455]

Empirical studies from the 1990s, 1980s, and 1970s are consistent with these findings and reveal that skepticism of the criminal legal system among African Americans is not a new phenome non. For instance, a national survey conducted in 1999 found that African Americans had less confidence in the performance of the courts than all other groups in the sample.[456] Based on their research, scholars writing in 1997 similarly concluded that "African Americans see the criminal justice system as racially biased, while the majority of whites generally believe the system is racially neutral and reflects the ideal of equal treatment before the law."[457] They noted that their research "results point to a deep and persisting racial cleavage in perceptions of racial injustice."[458] In 1982, John Hagan and Celesta Albonetti published the results of a study conduct ed in 1977 that surveyed Americans' views of the criminal legal system.[459] "The salient finding," they wrote, was "the persistent and often striking influence of race on the perception of crim inal injustice."[460] The research showed that, even controlling for socioeconomic class, Blacks were far more likely than Whites to view the criminal legal system as unjust.[461]

The differences between how Whites and African Americans view the fairness of the criminal legal system apply to their opinions about law enforcement. Blacks are more likely than Whites to hold negative views of the police. For example, one study found that "Blacks are three times more likely than are whites—39% versus 12.8%—to have unfavorable opinions of their local police and four times more likely—30.3% versus 7.7%—to have unfavorable views of the state police."[462] Blacks are also less likely than Whites to say that the police do a good job of

interacting with members of their community.[463] A 2015 literature review of 92 studies found that "individuals who identified themselves as black, non white, or minority were more likely to hold negative perceptions and attitudes toward police as compared to whites."[464]

Significantly more Whites than Blacks believe that the police in their communities treat racial and ethnic minorities equally.[465] For example, according to a 2019 Pew Research Center report, "84% of black adults said that, in dealing with police, blacks are generally treated less fairly than whites. A much smaller share of whites—though still a 63% majority—said the same."[466] A similar study in 2016 found that only about one third of Blacks—compared to three quarters of Whites—believe that their local police do a good job "treating all racial and ethnic minorities equally."[467] A 2002 survey showed that both Blacks and Latinxs were more likely than Whites to perceive the police as racially biased.[468] According to the research, "three quarters of blacks and half of His panics expressed that the police treated blacks and Hispanics worse than whites in their city."[469] By contrast, a vast majority of Whites (about 75%) said that "the police treated all of these groups equally."[470] This empirical data further supports the findings discussed above: Blacks are more likely to view aspects of the criminal legal system negatively because they perceive the system to be racially discriminatory, while Whites are more trusting of the system because they believe it operates fairly.

Blacks are also much more likely than Whites to report that police have treated them unfairly and to report that they had a negative experience with the police. In a 2016 Pew Research Sur vey, nearly half of all African American respondents (44%) reported that they had been "unfairly stopped by police because of their race or ethnicity."[471] Just 9% of Whites said the same.[472] Ac cording to research published in 2010, "one of every three African Americans reported being treated unfairly by the police because of their race, whereas closer to only one of ten whites reported unfair treatment for any reason at all."[473] This disparity is consistent with research published in the preceding decade. For example, in 2002, 40% of Blacks reported "having been stopped by the police because of their race."[474] The same study found that 95% of Whites said that they had never been the victim of racial profiling.[475]

Similar fissures exist between Whites and Blacks on the issue of police use of force. In a 2016 study, 75% of Whites expressed the view that "their police do an excellent or good job when it comes to using the right amount of force for each situation" compared to just 33% of Blacks."[476] Consistent with the findings cited above, this disparity has persisted for decades. For example, in a 1999 Gallup poll that surveyed Americans about police brutality in their communities, "58% of non whites believed police brutality took place in their area, in contrast to only 35% of whites."[477]

African Americans and Whites also react differently to the high profile police killings of unarmed Black men that have garnered media attention in recent years.[478] For about eight in 10 Blacks these killings "signal a larger problem between police and the black community," in contrast to a narrow majority of Whites.[479] Additionally, Blacks and Whites differ in their perceptions of pro tests in response to the killings. A substantial majority of Whites (85%) saw anti police bias as a "significant reason" for such protests.[480] By comparison, only 56% of Blacks shared that view.[481] "Blacks are also about twice as likely as whites to attribute a great deal of the motivation for the demonstrations to the desire to hold officers accountable (55% v. 27%)."[482]

In sum, Blacks are more likely than Whites to view the criminal legal system as racially discrim inatory, to hold critical views of the police, and to have personally experienced negative inter actions with law enforcement. African Americans are therefore more skeptical of the funda mental fairness of the administration of justice.

As a result of the view that racial bias infects the criminal legal system, African Americans are generally less punitive than Whites, who largely believe that the system operates in race neutral and legitimate ways.[483] Whites' support for specific criminal justice policies reflects their more punitive views. For example, a "national survey conducted between 2000 and 2001 showed that 70% of whites, in contrast to 52% of blacks, supported 'three strikes' laws that compelled life sentences for people convicted of a third serious offense."[484] The same survey asked respondents whether juveniles should be tried as adults.[485] A majority of Whites (60%) agreed that they should, while 46% of Blacks held that view.[486]

Although Whites are the victims of crime far less often than African Americans, they consis tently support harsher crime policies.[487] Blacks are more likely than Whites to be the victims of household burglary, motor vehicle theft, robbery, sexual assault, aggravated assault, and homicide.[488] A 2018 survey found that "black adults were roughly twice as likely as whites to say crime is a major problem in their local community (38% vs. 17%)."[489]

Despite Blacks' greater likelihood of being crime victims, Whites are more punitive. This is because African Americans' "negative encounters with the criminal justice system and great er recognition of the root causes of crime temper their preferences for punitive policies."[490] By contrast, Whites "have less frequent and more positive criminal justice contact, endorse more individualistic causal explanations of crime, and are more likely to harbor overt racial prejudice."[491] It is clear that racial biases—and particularly misperceptions about *who* commits crime—lead Whites to be both trusting of the criminal legal system and punitive.

The stark racial nature of the American criminal legal system has led commentators to liken it to a modern racial caste system: "the New Jim Crow" or a revival of the "peculiar institu tion."[492] Given both its history and its current administration, it is unsurprising that many African Americans view the criminal legal system differently—and, generally, more negative ly—than Whites. That view is inarguably legitimate in light of historical and modern day cir cumstances; Blacks have been targeted and persecuted by the criminal legal system in ways that Whites have not. The criminal legal system has historically treated Whites and Blacks unequal ly and continues to do so. In the context of jury selection, however, prosecutors and judges do not treat these two viewpoints—though both are grounded in history and lived experience—equally. Rather, our study shows that prosecutors in California continue to use peremptory strikes against Black jurors based on both their perceived distrust of the criminal legal system and the specific reality of their negative experiences with that system. Our courts continue to approve the legitimacy of these strikes. As this report demonstrates, the *Batson* framework, which requires a showing of purposeful discrimination, never had the capacity to remedy these entrenched racial disparities and has most assuredly failed to do so.

D. Training Manuals Instruct Prosecutors to Conceal Race-Based Strikes

Prosecutor training is likely a key driver of California prosecutors' disproportionate removal of Black and Latinx prospective jurors through the exercise of peremptory challenges. Indeed, our review of district attorney training materials from 15 counties in California between 1990 and 2019 demonstrates that the *Batson* regime has failed in this state for the very reasons Justice Mar shall predicted in his concurring opinion.[493] The training of prosecutors—as evidenced by these documents—all but ensures the continuation of the pernicious legacy of racial discrimination in jury selection in several ways. First, the materials teach prosecutors to select an "ideal juror" prototype that, explicitly or implicitly, directs them to strike Black jurors and other jurors outside of their "in group." Second, they instruct prosecutors to rely on their gut in deciding whether to dismiss jurors, belying decades of empirical research demonstrating that implicit biases fuel intuitive or instinctive decisions.[494] Third, the materials are a playbook for contravening *Batson*. They include tips for concealing implicit and explicit bias through extensive, ready made lists of "race neutral" reasons for striking Black jurors and provide trial tactics to avoid the appearance of racism.

At their core, the materials instruct prosecutors to strike jurors based on "group bias," precisely the stereotypical reasoning the California Supreme Court prohibited in *People v. Wheeler*.[495] The court defined group bias as the assumption that certain jurors are biased merely because they are members of an identifiable group.[496] *Wheeler* held that exercising a peremptory challenge based on "group bias" violates the state constitutional right to trial by a jury drawn from a represen tative cross section of the community.[497] The court declared, "'Jury competence is an individual rather than a group or class matter. That fact lies at the very heart of the jury system. To disre gard it is to open the door to class distinctions and discriminations which are abhorrent to the democratic ideals of trial by jury.'"[498]

The United States Supreme Court in *Batson* and subsequent opinions also condemned group bias in jury selection. In *Batson*, the Court stated, "Competence to serve as a juror ultimately depends on . . . individual qualifications and ability impartially to consider evidence presented at a trial."[499] Later, in *J.E.B. v. Alabama ex rel. T.B.*, the high court observed that reliance on a juror's member ship in a group as a proxy for competence or impartiality "'open[s] the door to . . . discrimina tions which are abhorrent to the democratic ideals of trial by jury.'"[500]

Training prosecutors to rely on group characteristics such as occupation, age, marital status, or education allows prosecutors (consciously or unconsciously) to use those characteristics as prox ies for race based on the characteristics' implicit or explicit association with race.[501] For example, the manuals do not direct prosecutors to inquire about how a prospective juror's occupation has influenced the juror's views about issues relevant to the case on trial.[502] Rather, stereotypes about how an individual who has a given profession or occupation would sympathize with a defendant or distrust the prosecution serve as the basis for a peremptory challenge.[503] Striking the juror simply *because* he is a social worker and might work or identify with Black communities, without evidence of specific bias towards the defendant or against the prosecution, constitutes the very group bias *Batson* and *Wheeler* condemned.[504]

1. Identifying the "Ideal" Prosecution Juror

An Orange County training document explains: "The law says we want 12 fair and impartial jurors" but "[i]n reality, if we had our choice, we would pick 12 biased jurors in our favor."[505] Thus, prosecutors must "ferret out [jurors'] biases and then select the jurors who are most biased for us."[506]

Prosecutors are instructed explicitly and implicitly to preference jurors who are most demo graphically similar to themselves. The first question many of the materials pose is: Who is the ideal juror for your case? *Ned's Compleat* [*sic*] *Voir Dire Manual*, a publication by New Prosecu tor's College used in San Diego County, states that a "Prosecution Jury" will include people who "have a stake in the community," "homeowners," and people who "have children in the home" and "can work together" with other people in "'committee like' environments."[507] It also includes a list of "GOOD PEOPLE," consisting of "middle class, middle aged homeowners," people with a "steady job," and "persons with traditional lifestyles."[508] Likewise, one Orange County directive "on whom to excuse" states that "Good" jurors are "attached to community, educated, stable, [and] professionals."[509] Other Orange County materials explain that the ideal prosecution jurors "Have a Stake in the Community," "Can Work Together," are "Mature Indi viduals," "Respect the System,"[510] and are "normal regular people."[511]

On the other hand, training documents advise prosecutors against accepting certain types of jurors. For example, a Ventura County trainer is "very cautious about . . . people who are mar ginalized by societal norms."[512] *Ned's Compleat* [*sic*] *Voir Dire Manual* lists "BAD PEOPLE," who are defined as those who are "unusual or weird," have themselves or their family members had "previous arrests or convictions . . . for the same/similar offense," or have "occupations sympa thetic to defendants."[513]

Nearly all of the training materials emphasize that *Batson* permits prosecutors to base their strikes on membership in groups in which African Americans are overrepresented, e.g., "less educated people and blue collar workers" and both "ex felons" and relatives of those who are incarcerated.[514] The message is that if a prosecutor relies on characteristics that are facially neu tral but in fact apply disproportionately to members of a protected group, they will survive a *Batson* objection.[515] Directing prosecutors to use non cognizable group labels encourages them to evade accountability under *Batson* for discriminatory peremptory challenges.

Using employment status as a basis for a peremptory challenge disproportionately excludes Black and Latinx jurors. Between 1954 and 2013, "the unemployment rate for blacks has aver aged about 2.2 times that for whites," varying between 2.77 at its highest and 1.67 times higher at its lowest.[516] According to a review of multiple studies conducted between 1989 and 2015, "[o]n average, white applicants receive 36% more callbacks than equally qualified African Americans . . . representing a substantial degree of direct discrimination. White applicants receive on average 24% more callbacks than Latinos."[517] Compared to White men, Black and Latino men are less likely to be called for interviews for low wage jobs based on their resumes,

to be hired, and to be offered a job involving customer service.[518] While more than half of Amer icans experience some period of poverty, 84% of African Americans "spend at least a year in poverty over their lifetime."[519]

The characteristics of the "ideal juror" are all but identical to those of most prosecutors. Al most by definition, prosecutors are well educated, have stable employment and strong com munity ties, and are predominantly White. In California in 2015, 69.8% of prosecutors were White and only 5.8% of prosecutors were Black, although Whites constituted only 38.5% of the population.[520] In 2018, the national average salary for entry level prosecutors was $56,200, and was $84,400 for prosecutors with 11 to 15 years of experience.[521] In California, district attorneys' salaries are significantly higher than the national average. For example, an entry level district attorney in Tulare County earns between $62,277 and $75,899 annually[522] and the majority of managing deputy district attorneys in Riverside County have an annual salary of $214,649.26.[523]

Social psychologists have demonstrated the tendency for people, especially Whites, to show "implicit preferences for groups with higher social status [such as Whites,] to groups with low er social status."[524] Specifically, social scientists have shown that individuals display "implicit in group favoritism," a phenomenon whereby "people automatically associate the in group, or 'us,' with positive characteristics, and the out group, or 'them,' with negative characteristics."[525] As of 2005, "nearly one hundred studies" had demonstrated the effects of "ingroup favorit ism."[526] For example, people "judge same group members more positively, see and describe failures as situational rather than dispositional, overrate achievements considerably, [and] punish more leniently."[527] Both conscious and implicit bias in favor of in groups do not develop because of "invidious dislike of the outgroup, but rather 'because positive emotions such as admiration, sympathy, and trust are reserved for the ingroup.'"[528]

Thus, prosecutorial training embraces in group favoritism towards White jurors explicitly through the typology of an "ideal juror." The training also does so implicitly by validating trust and respect for those in the in group.

2. Racial Stereotyping by Reliance on "Gut Instincts"

District attorney trainings direct prosecutors to trust their gut reactions when exercising peremptory challenges. The training materials are replete with reminders that a mere hunch is a sufficient basis for a strike. For example, Monterey County uses a jury selection worksheet emblazoned with "FOLLOW GUT INSTINCTS" in large capital letters.[529] San Diego County prosecutors are told to "go with your gut."[530] Orange County prosecutors are instructed that when watching jurors' body language: "'GO WITH YOUR GUT INSTINCTS !!,'"[531] "ALWAYS, ALWAYS TRUST YOUR INSTINCTS,"[532] and do not "ignore your personal reaction to a pro spective juror."[533] Specifically, they are directed: "If you have a vague feeling that there is some thing wrong about a prospective juror, don't gamble."[534] Ventura County tells its prosecutors: "When in doubt, Kick 'em Out (don't let your intellect get in the way of your instincts)."[535] The same materials instruct prosecutors that "gut instincts mean everything in jury selection."[536] Unsurprisingly, absent from every training manual is any discussion of how "gut instinct" is influenced by unconscious racial biases.

Gut reactions, which have been central to prosecutorial training for decades, are now recog nized as quintessential opportunities for individuals to act based upon unconscious biases.[537] Psychological research has demonstrated that the goal of our unconscious thinking system "is to detect patterns in the environment as quickly as possible and to signal the person as to whether they are good or bad."[538] One type of unconscious, "automatic thinking is the tendency to categorize and stereotype."[539] Once learned, stereotypes are applied "non consciously, un intentionally, uncontrollably, and effortlessly."[540] Researchers have found that decision makers increase their use of stereotypes when they have a strong motivation to "predict the behavior of a person[,] . . . 'time pressure, a need for closure, [and] moderate cognitive load.'"[541] Thus, attorneys exercising peremptory challenges under the constraints of trial are particularly sus ceptible to the use of stereotypes in the exercise of peremptory strikes.

Prosecutors are no different from the general public; even when they condemn overt racism, implicit biases—most often associating African Americans with negative views—remain key components of their decision making.[542] The activation of implicit biases is such an automat ic reaction that prosecutors may not even realize they are relying on race based stereotypes in their choices.[543] Instead, they are likely to interpret evidence as supporting their gut reac tion—e.g., if there are Blacks on the jury, the jury is more likely to fail to agree on a verdict.[544] This is because "once a correlation is learned, the nonconscious system tends to see it where it does not exist, thereby becoming more convinced that the correlation is true."[545] As soon as a prosecutor categorizes a prospective juror into a group, the prosecutor will "tend to remember the person's behaviors that are associated with that group."[546]

Decisions based upon demeanor and appearance are highly susceptible to implicit bias.[547] As Justice Marshall wrote in *Batson*, "A prosecutor's own conscious or unconscious racism may lead him easily to the conclusion that a prospective black juror is 'sullen,' or 'distant,' a charac terization that would not have come to his mind if a white juror had acted identically."[548] Yet, prosecutors are explicitly taught to select the "ideal jury" through the observation of jurors' nonverbal cues as well as their answers to questions. The training documents encourage pros ecutors to note jurors whose body language they deem "Hostile," "Defensive,"[549] "Unfriendly" or if the juror demonstrates an "unwillingness or inability to interact with other jurors."[550] One training manual instructs prosecutors that "the way a juror is dressed should give you some idea as to whether or not he or she is a conformist. It should also give you a clue as to how seriously he or she takes jury duty."[551] An Orange County training document states even more directly that "Dress and grooming can telegraph a juror's conformance with social norms" and "Race, religion, gender, socioeconomic status and culture all have their own nonverbal markers."[552] Another training guide instructs prosecutors to "[p]ay attention to the physical, non verbal responses. 'Body language' is very telling."[553] More pointedly, a San Diego County deputy district attorney instructed her colleagues to "Watch [the jurors] whenever and wherev er you can. Locate the loners, big mouths and losers; then execute them."[554]

"[S]ocial psychological research strongly supports the conclusion that . . . [w]hen a lawyer sees a potential juror, she will almost instantaneously categorize that person . . . on the basis of race."[555] This categorization activates stereotypes, not necessarily consciously, so that the

lawyer will assign the stereotypical attributes to the potential juror.[556] Even if she is not aware of the stereotypes and even if she does not believe them, she will "search for, and pay greater attention to information that confirms her expectations."[557] Then, "she will encode the infor mation in a different way, and recall it more easily."[558]

Other research, as discussed in Section III.A, demonstrates that individuals are more likely to associate ambiguous behavior as aggressive when exhibited by a Black person.[559] Police officers have been found to "interpret ambiguous behaviors performed by blacks as suspicious [and criminal] . . . while similar behaviors engaged in by whites would go unnoticed."[560] Another study found that both Black and White students considered "relatively innocuous" acts by Black males as "more threatening than the same behaviors by white males."[561] Legal scholars have interrogated the pervasive stereotype of the "Angry Black Woman" as one who is "out of control, disagreeable, overly aggressive, physically threatening, loud (even when she speaks softly), and to be feared."[562] This scholarship all but draws a direct line between prosecutors' reliance on body language, facial expressions, or eye contact and racially discriminatory strikes. As Section II.B.1 shows, on a case by case basis, California prosecutors use demeanor based reasons more often than any other explanation when exercising peremptory challenges against Black and Latinx jurors.

Prosecutors' implicit biases can also negatively impact their treatment of Black jurors, caus ing a Black juror to appear uncomfortable. For example, when a prosecutor questions Black prospective jurors, the interaction "might activate any of these negative stereotypes as well as more general negative implicit attitudes" causing the prosecutor to "project this negativity through body language and gestures."[563] This could, in turn, "cause jurors to avoid eye contact, provide awkward or forced answers that make the juror appear less intelligent, or simply fidget and look nervous."[564]

While the empirical evidence demonstrates that demeanor and appearance based reasons for striking a juror often are proxies for race or race and gender, these explanations are insulated from scrutiny under *Batson* because courts almost always find them to be facially neutral.[565] For example:

> A prosecutor looking for "deferential" jurors might interpret a venire woman's words as "aggressive," but interpret the same words stated in the same way by a man merely as "assertive," or perhaps not even notice the words at all. The prosecutor remembers this evaluation, rather than simply the words themselves, and might therefore strike the wom an from the venire. But for the potential juror's gender, the prosecutor would not have exercised the strike.[566]

Even though the prosecutor unconsciously struck the juror based on her gender, a court would be unlikely to find a violation because the prosecutor "subjectively believes that she struck the juror because she was too aggressive, which is a gender neutral reason."[567] The cases in which courts have held that demeanor and appearance based reasons are proxies for race are few and far between.[568] It has been almost 20 years since the California Supreme Court has discredited a prosecutor's demeanor or appearance based reason.[569]

Only one court has addressed these pretextual explanations. Washington Supreme Court General Rule 37 makes it more difficult for courts to credit demeanor based reasons for "peremptory challenges [that] have historically been associated with improper discrimination in jury selection."[570] For example, if a party strikes a juror because he was "inattentive," "exhibited a problematic attitude, body language, or demeanor[,] or provided unintelligent or confused answers[,]" the opposing counsel or judge must corroborate the observation or the court will reject the reason for the strike.[571]

Consistent with the data presented in Section II.B, as long as *Batson* remains the procedure in California, prosecutors will continue to offer reasons for striking Black jurors based on their "Gut instinct" about jurors' demeanor, body language, clothing, and hairstyle.[572] Courts will continue to sanction those explanations. Continued reliance on these rationales validates Justice Marshall's warning that "'seat of the pants instincts' may often be just another term for racial prejudice."[573]

3. Reliance on Stock "Race-Neutral" Reasons and Other Tactics that Facilitate Discriminatory Strikes

District attorney training materials combine "practical tips"[574] from post *Batson* case law with encyclopedias of stock, court approved "race neutral"[575] reasons and so called proven strategies aimed at avoiding "the Wheeler problem."[576] For example, a 2019 Orange County training document offers practical tips to prosecutors: (1) keep a member of a cognizable group on the jury if possible and (2) give multiple reasons for each challenge.[577]

Prosecutors are directed to rely on their biases, both explicit and unconscious, in deciding which jurors to strike, but to conceal them by offering judicially sanctioned "race neutral" reasons.[578] Los Angeles County goes so far as to tell its prosecutors to "bite your tongue" if their reasons for excusing a juror "sound bogus or pretextual."[579] Similarly, a California District Attorneys Association ("CDAA") publication states that "any justification that even hints at racism must be avoided . . . ; if it sounds at all offensive, do not say it."[580] The lesson: Racism—whether it is conscious or unconscious—is acceptable as long as you do not place it on the record.

Prosecutors' exhaustive lists of go to reasons enable them to readily produce a "race neutral" response to any imaginable *Batson* objection. For example, a Los Angeles training manual directs: "Take to court a list of acceptable justifications which have been affirmed on appeal."[581] The CDAA advises prosecutors to offer "quotations where it would be most useful to know and *emulate particular language that has been deemed proper*."[582] The manual *Mr. Wheeler Goes to Washington* includes a section titled "*Wheeler* Words That Work: A Primer on Providing Peremptory Challenge Justifications."[583] It lists 16 race neutral reasons for dismissing jurors and an additional 18 demeanor based explanations so that prosecutors can "give detailed verbal expression to . . . subjective instincts."[584] For each of these reasons, the manual provides extensive citations to opinions in which a reviewing court upheld the reason as race neutral.[585] The manual explains that the "key attribute [from a case] is noted in boldface," presumably so that the prosecutor can easily identify a facially neutral reason to strike the juror.[586]

The *Inquisitive Prosecutor's Guide* lists 77 race neutral reasons for striking a juror.[587] The list of race neutral justifications encompasses over a fifth of the entire guide, consisting of almost 30 single spaced pages.[588] This list instructs that a prosecutor may use both the fact that a pro spective juror had too much or too little education as a race neutral reason to strike a juror.[589] A prosecutor may strike a juror for lack of community or family ties or too many of those rela tionships.[590] And a prosecutor may excuse a prospective juror for having previously served on a hung jury or on a jury that acquitted, or because they never served on a jury.[591] The list aptly illustrates Justice Powell's observation in *Batson* that "peremptory challenges . . . per mit—'those to discriminate who are of a mind to discriminate.'"[592]

Some counties distribute a two page document entitled the "*Wheeler*/*Batson* Guide," written by an Orange County deputy district attorney, which appears to be intended for use as a quick reference during jury selection.[593] The first page lists the seminal cases, the *Batson* procedure, and other important aspects of the doctrine.[594] The second page lists each cognizable group, non cognizable groups, and 32 race neutral justifications.[595] Similar to other lists, this docu ment reduces the case law into quick reference group characteristics. This enables the prosecutor—without the need for any reflection on the competence of the individual as a pro spective juror—to select a court approved, race neutral reason from the list when facing a *Batson* objection.

Although they can function as cover for purposeful discrimination, reliance on these pre ap proved lists of race neutral reasons does not necessarily mean that a prosecutor's strike is in tentionally racist. Rather, the lists allow district attorneys to act based upon on their gut reac tions, "often reflecting an attorney's own unconscious stereotypes."[596] It offers prosecutors an easy pick of facially nonracial reasons for the strike, including a "reason [that] may be covering for implicit bias."[597] As a result, "[t]he remaining jurors are likely to be those who the attorney believes fit a favorable stereotype."[598]

Although the first of the Orange County strategies perversely directs prosecutors to explicitly consider race in selecting juries in order to defeat *Batson* challenges, it has been widely em ployed. In 2006, the CDAA instructed: "If possible, keep on the jury one or more members of each cognizable group from which you are challenging persons" to "create a record that will justify any challenges you make."[599] That advice was already perceived wisdom among prose cutors; in 1988, a San Diego trainer wrote, "I personally favor having a defendant being told by members of his own race rather than from some other race, that they disapprove of his conduct and that they would like to see him in the state prison. So, I try never to have a jury that does not have at least one person that is a member of the defendant's race."[600]

This is, of course, simply racial discrimination in another form. It also is directly contrary to the United States Supreme Court's decision in *Miller El II*. There, 11 African Americans re mained on the panel after jurors were excused for cause or by agreement. [601] The prosecutor struck 10 of the Black prospective jurors, but made a "late stage decision to accept a [Black] panel member willing to impose a death sentence."[602] The Court called the move an effort "to obscure the otherwise consistent pattern of opposition to seating" Black jurors.[603] But while the Supreme Court was not fooled by this transparent effort at violating *Batson* without facing

the consequences, California courts have too frequently sanctioned this tactic and held that the inclusion of one or more members of the protected group is persuasive evidence that no discrim ination occurred.[604]

Often, instructional materials encourage district attorneys to offer *many* race neutral reasons for striking a juror. For example, an Alameda County training document directs prosecutors to "be certain to state all the reasons for your challenge, beyond what is stated in your written notes."[605] Another Alameda training instructs: "Prosecutors need to give a full explanation of the reasons for their challenges. . . . One of the reasons for this thoroughness is comparative juror analy sis."[606] Orange County—on a slide discussing comparative analysis—urges prosecutors, "Don't just state a single reason, but give all applicable reasons."[607] The Ventura County District Attor ney's Office directs prosecutors to:

> try to show that excused panelists in the alleged subject group had similar characteristics to other excused panelists or that you had a non discriminatory reason for excusing the juror. Do not assume one justification will suffice. Case law indicates there is strength in quantity. One should not fail to mention any justification because it seems trivial.[608]

The underlying assumption is that if a prosecutor offers many reasons, when a trial or appellate court conducts a comparative juror analysis, the court will be less likely to view the struck and seated jurors as similar.[609] A San Francisco County manual states, "If you develop multiple rea sons, any one reason susceptible to comparative analysis will not be found wanting on pretextual grounds in light of the other reasons."[610] The more justifications on the record that demonstrate dissimilarity between the two groups, the higher the chance that the judge will overrule the *Bat son* motion.[611]

However, the United States Supreme Court has criticized the prosecution's use of "a laundry list of reasons" to justify a strike.[612] The California Supreme Court initially expressed concern that the "laundry list" approach "carries a significant danger," noting 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."[613] However, the state supreme court has not found *Batson* error when prosecutors employed this strategy in striking jurors.[614]

The training materials compile lists of other ways to avoid *Batson* challenges. For example, the CDAA suggests strategies such as the following: (1) "using [a] juror questionnaire to avoid [a] claim of disparate questioning";[615] (2) making "notes of demeanor attributes, looking for differ ences between those of potential challenges and potential keepers";[616] (3) giving "a detailed ver bal expression to such subjective instincts," which can be accomplished by using the 18 "accept able attributes for demeanor challenges";[617] and (4) using "tactical voir dire dynamics reasons" such as the "desire to seat more favorable looking members of the venire."[618]

The organization also advises district attorneys to "always kick off your most hateful juror earliest in the process, before your opponent has built up enough steam to make a successful *Wheeler* challenge."[619]

Batson may have reduced explicit directives in prosecutorial training materials to striking Black prospective jurors, other jurors of color, and women. However, as Justice Marshall predicted, *Batson* failed to account for implicit bias and the ease with which prosecutors would find work arounds for excusing Black jurors. The training materials' reliance on ready made, race neutral, and judicially approved reasons should leave no doubt that California courts will not put an end to prosecutors' long standing practice of using peremptory challenges to remove Black prospec tive jurors.

E. The California Supreme Court's Resistance to *Batson*

Certainly, credit goes to the California Supreme Court for its *Wheeler* opinion in 1978, adopting measures to reduce peremptory challenges motivated by group bias almost a decade before the high court's decision in *Batson*.[620] The state supreme court's ambition, however, was short lived.

Beginning in the late 1980s, in almost every significant post *Batson* decision, a majority of the California Supreme Court took a wrong turn. As this section shows, the court did so over the ob jections of dissenting justices as well as criticism by the Ninth Circuit. Rather than acknowledge the flaws in the *Batson/Wheeler* procedure, the majority disregarded them. For instance, when, more than a decade ago, the United States Supreme Court began to issue opinions calling upon lower courts to enforce *Batson* more rigorously, our state supreme court balked. Thus, in three decades, the California Supreme Court has all too often selected the course least likely to restrain prosecutors' use of discriminatory peremptory challenges, least likely to ensure trial court ac countability, and most likely to produce one affirmance after another. Though it is by no means an all inclusive account of the shortcomings in the court's *Batson* precedents, this sub section serves to elucidate the course the state supreme court has pursued.

As noted in Section II.C.1, over a 30 year period (1989 2019), the court reviewed 142 *Batson* cases and found error only three times. The first two of the three reversals were in death penalty cases.[621] In these first two cases, decided in 1991 and 2001, the prosecutors' intentional removal of jurors of color through their peremptory challenges was patent. In *People v. Fuentes*, the first reversal, the prosecutor was found to have violated *Batson* only "a few months earlier," and then used "[t]en of his first 11 challenges" to remove Black jurors, leading one judge to remark that the prosecutor had "failed—or refused—to learn his lesson."[622] In the second case, *People v. Silva*,[623] "the prosecutor, believing that the jury in the first trial had 'hung . . . on racial grounds,' struck all five Hispanic members of the venire and all but announced his desire not to have any Hispanic person serve on the second jury."[624]

In *People v. Gutierrez*, a non capital case and the third reversal, the court granted a *Batson* claim for "the first time in 16 years, and the second time in over 25 years."[625] The opinion stands out because it is difficult to distinguish the circumstances in *Gutierrez* from the many cases in which the court found no error, some of which we discuss in this section of the report. The court did not overrule its precedent; it simply looked past it. At the time of the *Batson* objection, the pros ecutor had used 10 of 16 strikes to remove Latinx prospective jurors.[626] The seated jury included

one Latino.[627] The majority did not disapprove of its policy of "reflexive application of defer ence" (discussed in this section) to unexplained trial court rulings.[628] Rather, the court pointed to the inadequacy of the trial judge's ruling as one of the factors in its decision to scrutinize the prosecutor's peremptory challenge.[629] The majority found that the trial court "never clari fied why it accepted [the prosecution's explanation] as an honest one" and had made a "global finding" that the prosecutor's reasons did not appear "to be a pretext in this particular case."[630] Taking a page from Justice Liu's critical analyses of the court's *Batson* jurisprudence (discussed in this section), the majority, *in this anomalous case*, found error, concluding it was not satisfied that the trial judge had "made a *reasoned* attempt to determine whether the justification was a credible one."[631]

1. Elevating Batson*'s Step-One Low Threshold to an Unconstitutional Burden*

As discussed in Section I.C.5, in 2005, in *Johnson v. California*, the United States Supreme Court declared that California's step one test was unconstitutional because it imposed an undue burden on the party making the *Batson* objection.[632] The California Supreme Court last found a *Batson* violation at the first stage in 1986, more than 30 years ago.[633] To put this in perspec tive, it is quite likely that in thousands of California trials, judges improperly refused to require prosecutors to give reasons for their strikes, and in hundreds of appellate cases, reviewing courts improperly short circuited *Batson* claims. Over the decades, the court's majority deflect ed criticism from dissenting justices and repeated admonitions by the Ninth Circuit that it had gone off course.[634] For example, in 1992, Justice Joyce Kennard took issue with the majority's view that the prosecutor's strikes against the only two Black prospective jurors was a "meager" prima facie showing.[635] Consistent with Justice Thurgood Marshall's warning in *Batson*, Justice Kennard declared that when there is a small number of African Americans in the venire, the prosecutors' removal of "all the African American jurors who were tentatively seated" is suffi cient for a prima facie showing. [636] Justice Kennard wrote, "To hold otherwise would improperly sanction the use of racially motivated challenges when only one or two members of the target ed race are present in the venire."[637]

People v. Carasi[638] is one of several cases that illustrate the state supreme court's tenacious application of an elevated standard at step one, notwithstanding *Johnson* and the court's sub sequent acknowledgement that the prima facie showing involves only a "low threshold."[639] In the 2008 opinion, the court independently applied the *Johnson* test to a *Batson* claim arising out of a case tried before *Johnson*.[640] The majority found that the prosecutor's use of 20 of his 23 peremptory challenges against women prospective jurors was insufficient to raise an infer ence of discrimination.[641] Justice Kennard wrote separately to object to the majority's dismissal of the overwhelming statistical evidence, especially in a trial in which the co defendant was a woman.[642] She pointed to the trial judge's observation that the percentages of the prosecutor's challenges against women were "'eyebrow raising, to say the least,'" a comment the majority never mentioned.[643] Justice Kennard stated that had the pattern been "the only evidence on this issue," she would have found a prima facie showing of discrimination.[644] Her assessment was in line with *Johnson*'s reaffirmation that satisfying step one requires only "producing evidence" of an inference of discrimination.[645]

At the end of 2019, in *People v. Rhoades*, Justice Liu criticized the majority's "latest steps on what has been a one way road" that "'improperly elevated the standard . . . beyond the showing that the high court has deemed sufficient to trigger a prosecutor's obligation to state the actual reasons for the strike.'"[646] The prosecutor in *Rhoades* peremptorily challenged four of eight Black prospective jurors, thereby stripping the jury box of all African Americans.[647] Justice Liu commented on the similarity between the facts in *Rhoades* and *Johnson v. California*.[648] In *Johnson*, even applying the unconstitutionally burdensome "strong likelihood" standard at step one, the trial court observed that the showing was "'very close,'" and the state supreme court agreed that the prosecutor's removal of all three Black prospective jurors from the jury "'certainly looks suspicious.'"[649] The circumstances in *Rhoades*, Justice Liu submitted, were sufficient for the majority to have found an inference of discrimination under the standard mandated by *Johnson*.[650]

Justice Liu remarked that in the 14 years since *Johnson*, the California Supreme Court had decided 42 cases involving *Batson*'s first step, all of them capital cases.[651] Although each case was tried before *Johnson*, when California trial courts were applying the heightened step one standard, the state supreme court reviewed the cases independently using the correct test and did not find error in a single case.[652] As a result, in Justice Liu's estimation, it "is past time for a course correction."[653] In Section IV.A, we discuss Justice Liu's proposed alternatives for a change in the court's "analytical approach."[654]

2. Disregarding the High Court's Prohibition Against Judicial Speculation at Step One

In addition to disapproving of the California Supreme Court's step one test, the Supreme Court in *Johnson* reiterated the prohibition against judicial speculation.[655] The Court explained, "The *Batson* framework is designed to produce actual answers to suspicions and inferences that discrimination may have infected the jury selection process."[656] Thus, trial judges are precluded from hypothesizing, that is, coming up with "'good reasons'" a proponent "'might have had'" for a strike; they are limited to considering "'the real reason.'"[657] Simply put, when the strike opponent has raised an inference of discrimination, the trial court must obtain "a direct answer" from the strike proponent "by asking a simple question."[658]

Justice Liu's dissenting opinions in step one cases also illustrate how the California Supreme Court repeatedly ignores *Johnson*'s directive against judicial speculation.[659] For example, in *People v. Harris*, the jury could not reach a verdict in the defendant's first trial, with the only Black juror voting to acquit.[660] At the second trial, the defense objected to the prosecution's strike of the first two of three Black prospective jurors.[661] Defense counsel argued that African Americans were "underrepresented in the venire, not[ing] that the holdout juror from [the defendant's] first trial was African American" and that the prosecutor had challenged the jurors in the belief they would vote to acquit, as a Black juror in the first trial had done.[662] The trial court denied the *Batson* motion because the defense had not made a prima facie showing of purposeful discrimination.[663] The California Supreme Court affirmed, *offering its own possible reasons* for the prosecutor's strikes.[664]

Justice Liu concurred in the result, but wrote separately to explain that the majority's *Batson* precedents conflict "with principles set forth by the United States Supreme Court."[665] In *Harris*, Justice Liu described the court's "pattern of decisions" that misapply *Johnson* to defeat the United States Supreme Court's "objective" of obtaining "'actual answers'" from the prosecution at step one.[666] He explained that "the mere fact that a court can find *possible* race neutral reasons in the record for a prosecutor's strikes does not negate an inference of discrimination at *Batson*'s first step."[667] Given the "'inherent uncertainty present in inquiries of discriminatory purpose,'" Justice Liu pointed out that *Johnson* demands refusal to "'engag[e] in needless and imperfect speculation when a direct answer can be obtained by asking a simple question'" of the prosecutor.[668] In *Harris*, Justice Liu called for reform from another body: "The fact that our jurisprudence appears quite entrenched only heightens the need for a course correction by higher authority."[669]

In *People v. Reed*, the defendant, who is Black, objected to the prosecution's use of five of its first eight peremptory challenges to remove five of the six Black prospective jurors in the jury box.[670] The trial judge, applying the "strong likelihood" test, ruled that Reed had not made a prima facie showing of discrimination and denied the *Batson* objection.[671] The California Supreme Court independently reviewed the ruling and, applying the *Johnson* test, upheld the trial judge's decision on several grounds. They included: (1) the total number of strikes the prosecutor exercised throughout jury selection (not just at the time of the objection); (2) race neutral reasons the majority discerned from the record that would have supported the strikes; and (3) a comparison of the struck Black jurors with some of the seated White jurors.[672]

Justice Liu dissented and found fault with the court's analysis on all counts.[673] At bottom, his disagreement—shared by Justice Kennard—was both with the court's failure to adhere to the United States Supreme Court's directives in *Johnson* and the court's inconsistent application of its own precedent.[674] Here, we highlight the former, specifically the court's practice of hypothesizing reasons for a prosecutor's strike, a practice the Supreme Court "has never approved."[675] Justice Liu carefully examined the majority's hypothesized reasons, demonstrating that they did not hold up, especially when compared to the circumstances or answers of White jurors whom the prosecution retained.[676] For example, the majority speculated that the prosecutor may have had reservations about struck jurors Janice C. and Mary C. because, according to their questionnaires, their spouses "had prior contact with law enforcement.[677] The court cited its long standing precedent that "'a negative experience with the criminal justice system is a valid neutral reason for a peremptory challenge.'"[678] Justice Liu pointed out that "at least three non black jurors seated on the final jury had relatives who had been arrested."[679] Concluding that the trial court should have required the prosecutor to give his reasons for removing five of six Black jurors, Justice Liu wrote, "Today's opinion does exactly what the high court says we should not do: it indulges 'the imprecision of relying on judicial speculation to resolve plausible claims of discrimination.'"[680]

The same day the California Supreme Court issued its opinion in *Rhoades*, the court decided *People v. (Joe Edward) Johnson*, again upholding a trial judge's ruling that the defendant had not made a prima facie showing of discrimination.[681] The defendant, who is Black, was sentenced to

death for the murder of a White man.[682] The prosecution, in support of the death penalty, intro duced evidence that the defendant had been convicted of the rape of a White woman.[683]

Before jury selection commenced, the prosecutor announced that he had run a criminal histo ry check on "'some of the jurors.'"[684] He learned that one of the African American prospective jurors, Kenneth M., had two misdemeanor convictions, though the juror indicated on his ques tionnaire that he had never been accused of or arrested for a crime.[685] The trial judge rejected the defendant's motion that the prosecution turn over the information about all the jurors it had investigated, agreeing that the prosecution might be required to do so if the defendant made a prima facie showing of a *Batson* violation.[686] Over the defendant's objection, the pros ecutor used three of his first 15 peremptory challenges to remove three of the five Black jurors who, at different times, were seated in the jury box.[687] The trial court found that the defendant had not satisfied step one as to any of the objections.[688] When Kenneth M. was called to the box as a prospective alternate juror, the prosecutor struck him over the defendant's objection.[689] The trial court again ruled that the defendant had not made a prima facie showing of discrimi nation, and found that nothing about the prosecution's investigation of Kenneth M. supported such a showing.[690] The seated jury included three African Americans.[691] On appeal, the Califor nia Supreme Court held that there was no *Batson* error at step one. The court was not persuad ed by the number of strikes against Black jurors, the rate at which the prosecutor removed African Americans, or the prosecutor's background check on Kenneth M. and some of the other jurors.[692] The majority was primarily influenced by the number of Blacks on the seated jury, i.e., the fact that the prosecutor had accepted those jurors.[693]

Justices Goodwin Liu and Mariano Florentino Cuéllar dissented. Justice Cuéllar criticized the majority for turning "a blind eye" to discrimination against Black prospective jurors.[694] He wrote:

> The trial court had compelling evidence that the prosecutor, even before striking any African American jurors, had singled out African American jurors for special—and unlawful—scrutiny. Yet when the prosecutor sought to excuse a majority of the African American prospective jurors from the jury that would decide whether defendant Joe Edward Johnson would be subject to the death penalty, no one asked the prosecutor to explain his reasons.[695]

Justice Cuéllar faulted the majority for not taking into account four factors, which demon strated that the record was "more than sufficient" to raise an inference of discrimination: (1) "issues of race were salient in this case"; (2) "the prosecutor appeared to single out African American jurors in conducting his extrajudicial criminal history investigation"; (3) the prosecu tor excluded most Black jurors who were in the box and struck them "at a far higher rate than other jurors"; and (4) neither the record nor the majority offered reasons "that would necessar ily dispel any inference of bias."[696] Justice Cuéllar called the majority opinion "a road map for ensuring that unlawful discrimination evades judicial scrutiny."[697] The decision, he explained, "encourages prosecutors to . . . single out the disfavored group for intensive investigation prior

to jury selection, use the results to disqualify as many members of that cognizable group as possible in voir dire, and then stonewall any inquiry into whether the investigation was mere racial profiling."[698]

Justice Liu, who joined Justice Cuéllar's dissenting opinion, separately described *Johnson* as "yet another case in which a black man was sentenced to death for killing a white victim after a jury selection process in which the prosecution disproportionately excused black prospective jurors," and "yet another case in which this court has refused to find any inference of discrimination in jury selection."[699] He commented: "[I]f the facts in this case do not give rise to an inference of discrimination, then I am not sure what does."[700] Justice Liu reiterated his "'serious doubts'" about the majority's adherence to "'*Batson*'s mandate.'"[701] Though he addressed each of the "three dimensions of harm" *Batson* was intended to remedy—the denial of equal protection to the Black defendant who is tried by a jury from which Blacks have been excluded, deprivation of the indi vidual Black juror's citizenship rights, and subversion of the public's faith in the criminal legal system—here, Justice Liu emphasized the latter.[702] Justice Liu wrote, "Today, as when *Batson* was decided, it is a troubling reality, rooted in history and social context, that our black citizens are generally more skeptical about the fairness of our criminal justice system than other citizens."[703] Justice Liu's observation coheres with our findings regarding the "reality" of many African Amer icans' experiences and perceptions, how both are exploited by prosecutors to disproportionately strike Black jurors, and how California courts, applying the three step procedure, largely facilitate discrimination.

3. Denying Meaningful Appellate Review of the Prosecution's Reasons for Its Strikes

The great weight of authority requires that an appellate court reach the ultimate question—did the trial court commit *Batson* error?—if the striking party gave reasons for the strike and the trial judge ruled on the *Batson* objection.[704] For decades, the California Supreme Court vacillated on this issue. In some opinions, the court followed the majority of federal and state courts, and in others, the court revisited the first step of the procedure to conclude that the defendant had not made a prima facie showing of discrimination.[705] In the latter circumstance, dissenting justices insisted that the majority was ignoring "federal constitutional law."[706]

Several years ago, in *People v. Scott*, a majority of the court, acknowledging that its decisions have "not always been entirely consistent," resolved that it would, once and for all, go its own way.[707] To clarify its past practices, the court held that when a trial judge finds no prima facie showing at step one, but "allows or invites" the prosecution to offer its explanation, and then denies the motion, a reviewing court "should begin its analysis . . . with a review of the first stage ruling."[708] Justice Liu, joined by Justice Leondra Kruger, objected that, in so doing, the court had overruled its own recent precedent, which held that once the prosecutor states a reason and the court rules on the reason, "the first stage of the *Batson* inquiry . . . is moot."[709] As had some of his predeces sors on the court, Justice Liu pointed out that the decision also put California "at odds with the majority of state high courts and federal circuit courts that have considered the issue."[710]

In *Scott*, Justice Liu also wrote that the majority's departure "scrambles . . . clear and well estab lished [*Batson*] procedure."[711] As a result, "the court opts to resolve *Batson*'s inquiry into discrimi natory purpose based on 'needless and imperfect speculation' as to why the prosecutor might have struck [the juror] even though 'actual answers' to that question were stated by the prosecutor and evaluated by the trial court."[712] Justice Liu predicted, "Under today's decision, when a pros ecutor has stated a facially neutral reason that nonetheless reveals discrimination . . ., the *Batson* violation will evade appellate review so long as the trial court did not err in its first stage ruling."[713]

4. Reflexive Deference: Allowing Trial Courts to Avoid Their Gatekeeping Responsibility

As a general rule, appellate courts afford "great deference" to trial court findings of fact, such as a finding of purposeful discrimination at step three of the *Batson* procedure.[714] This is because the ruling is largely determined by credibility assessments.[715] For about a decade after *Wheeler*, the California Supreme Court required that the trial judge make a "sincere and reasoned" attempt to evaluate a prosecutor's explanation for each peremptory challenge to which the defense objected before the court would defer to the judge's denial of a *Batson* objection.[716] Applying this standard, the court reversed for step three *Batson* error in several cases.[717] The court's resolve, however, waned in the late 1980s, as it began to defer to trial judges' unexplained decisions while continuing to pay lip service to the rule.[718] In the 1990s, the California Supreme Court moved towards aban doning the rule.[719]

In 2001, in *People v. Silva*, the court offered the following nonbinding comment, known as "dic tum:" "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."[720] Justice Liu later observed that this language had "come to comprise the rule that crucially qualifies the trial court's obligation to make a sincere and reasoned attempt to evaluate the prosecutor's explana tions at *Batson*'s third stage."[721] He pointed out that, two years later, in *People v. Reynoso*, reversing the appellate court's finding of *Batson* error, the court "turned *Silva*'s dicta into doctrine."[722]

Reynoso was a 4 3 decision from which Justices Joyce Kennard, Kathryn Werdegar, and Carlos Moreno dissented.[723] Both Justice Kennard's opinion and that of Justice Moreno concluded that the majority had done grave damage to the right of Latinx citizens—the subject of the prosecu tion's strikes—to serve on California juries.[724] Justice Moreno wrote that the decision constituted "a significant retreat" from the court's "*Wheeler* jurisprudence and strikes a major blow against a defendant's constitutional right to a fair, impartial, and representative jury."[725] Observing that the majority's "standard of appellate review . . . effectively insulates discriminatory strikes from mean ingful scrutiny at both the trial and appellate stages," Justice Kennard predicted what has come to pass at the court. [726] A decade later, Justice Liu explained that the "practical effect" of deferring to a trial court's unexplained denial of a *Batson* objection "is to hold that what a trial court leaves unsaid in denying a *Batson* claim will be construed on appeal *in favor of the prosecution*."[727] In his estimation, the impact of the majority's rule is all the more intolerable "in light of what decades of research have revealed about the stubborn role of race in jury selection."[728]

It would be a mistake to suggest that Justice Liu's criticism of the majority's "reflexive defer ence" to unexplained trial court *Batson* rulings is based simply on a preference for the court's rule prior to *Reynoso*. Rather, he objects to the California Supreme Court's "fail[ure] to evaluate [the] defendant's claim in the manner that high court precedent requires."[729] The following two relatively recent opinions illustrate how the court's current practice of automatic deference continues to strike a "major blow" to the rights of prospective jurors of color and those of crim inal defendants.[730]

In *People v. Williams*, a capital case, defense counsel made three *Batson* motions in response to the prosecutor's use of peremptory challenges against five Black women.[731] The court asked the prosecutor to provide explanations for the first objection, involving the first three strikes, to which the prosecutor replied that each of the three Black women seemed reluctant to impose the death penalty.[732] The trial judge denied the motion without explanation.[733] The defense objected separately to the prosecution's strikes of the fourth and fifth African American wom en.[734] The prosecutor gave the same reason—his belief that each would be reluctant to impose the death penalty—for excusing both women, emphasizing that he based his opinion more on the jurors' demeanor and the delivery of their responses than what they actually said.[735] The trial judge declared that she did not have any recollection of the fourth African American woman the prosecutor struck and had not taken any notes, but "would accept the prosecutor's expla nation."[736] As to the fifth, the trial court declared that it did not recall the juror, again had not taken any notes, "could only go by what the prosecutor was saying, and it accepted the prosecu tion's explanation."[737] Defense counsel then requested that the trial court review the statistical racial makeup of the jury.[738] The trial judge responded: "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 difficult no matter what it is.'"[739] The California Supreme Court deferred to the trial court's ruling, and held that there was no *Batson* violation.[740]

Dissenting in *Williams*, Justice Liu found that there was no basis—such as a "'sincere and rea soned effort'" by the trial judge to analyze all of the relevant circumstances—for the California Supreme Court to defer to the judge's decision.[741] He wrote that deference where a trial judge merely announces a ruling without evaluating the prosecutor's reasons "all but drains the con stitutional protection against discrimination in jury selection of any meaningful application."[742] Justice Liu concluded, "The upshot of this erroneous application of deference is the denial of defendant's *Batson* claim despite the fact that *no court*, trial or appellate, has ever conducted a proper *Batson* analysis."[743]

Justice Werdegar joined Justice Liu's dissent and wrote separately.[744] She found it unnecessary to engage in line drawing about appellate deference because of "[t]he egregious circumstances of the present case" in which the trial judge had no notes or recollection of the fourth and fifth Black jurors, relied solely on what the prosecutor said, and supported her ruling with her obser vation about "Black women['s]" views on capital punishment.[745]

In *People v. Hardy*, the defendant, who is African American, was convicted and sentenced to death for the rape murder of a White woman.[746] The prosecutor exercised her peremptory challenges to remove the only African American, Frank G., who was in the jury box during the selection of the 12 jurors who would decide the case.[747] She struck the first two Black prospec tive jurors from the alternate panel, though one African American remained after the parties had exhausted their challenges.[748] In response to the defendant's *Batson* motion, the trial judge found that he had not made a prima facie showing of discrimination.[749] However, the prosecu tor volunteered her reasons—offering six for striking Frank G.—and the trial judge ultimately denied the motion because the prosecutor had "explained race neutral reasons for excusing the jurors."[750] On appeal, the California Supreme Court, which the year before had rejected a trial court's "global finding" in *Gutierrez*, announced it was satisfied that deference to the trial court was appropriate here because "'the prosecutor's stated reasons are both inherently plausible and supported by the record.'"[751] To the extent there was ambiguity and indeed an outright mistake about a juror's answer in one of the prosecutor's reasons, the court blamed defense counsel for neglecting to call the judge's attention to the prosecutor's error.[752]

Justice Liu dissented on several grounds, among them, the majority's willingness to defer to the trial court's ruling.[753] The majority, he explained, acknowledged that "at least two of the [prosecutor's] reasons are 'weak,' the demeanor based reason finds no support in the record," and, upon examination, the prosecutor's reasons are also not self evident.[754] Justice Liu further criticized the majority for assigning blame to defense counsel, writing that "this reasoning is at odds with what we said in *Gutierrez*."[755] In *Williams*, *Hardy*, and other cases, Justice Liu has urged that where a trial court bypasses its duty to explain its decision, United States Supreme Court precedent does not sanction deference.[756] In cases such as these, deference all but "dis pense[s] with appellate review . . . since it is so easy to rationalize a silent record with a cacoph ony of presumptions."[757]

5. Constraining Comparative Juror Analysis at Step 3: Undermining Batson*'s Most Effective Tool*

> Reflexive application of deference where there is nothing in the record to defer to, judicial speculation as to the reasons for a strike where the prosecutor has offered none, and unduly limited and grudging application of comparative juror analysis *combine to erect a virtually impossible hurdle* for *Batson* claims to surmount.[758]

As discussed in Sections I.C.5, comparative juror analysis—the side by side comparison of struck and seated jurors—is an effective method of assessing whether discrimination has occurred. The California Supreme Court approved this approach in *Wheeler*, and employed it often in subsequent opinions such as *People v. Trevino*.[759] In 1989, in *People v.* (*James Willis*) *Johnson*, a majority of the court retrenched.[760] The court held that *Trevino* had "placed un due emphasis" on these comparisons.[761] Observing that the "majority pay[s] lip service to the *Batson* rule, but in fact violate[s] both its letter and its spirit," Justice Stanley Mosk dissented because the court found no error in a case in which "the prosecutor deliberately struck all the

Blacks, all the Asians, and all the Jews from the jury that condemned [the defendant] to death."[762] He enumerated the ways in which the majority had disregarded other *Wheeler* precedents.[763] Justice Mosk was especially baffled by the majority's "attack" on the comparative juror analysis described in *Trevino*.[764] Calling it "a highly useful analytical tool," Justice Mosk observed, "Virtually every one of our decisions both before and after *Trevino* relied on this same analytical technique."[765]

The United States Supreme Court endorsed comparative juror analysis in 2003 and 2005 in *Miller El v. Cockrell* (*Miller El I*) and *Miller El v. Dretke* (*Miller El II*).[766] As we described above, this powerful analytic approach was central to the court's grant of relief in *Miller El II* and three sub sequent *Batson* cases: *Snyder v. Louisiana, Foster v. Chatman,* and *Flowers v. Mississippi*.[767]

Three years after *Miller El II*, the California Supreme Court, in *People v. Lenix*, reluctantly con ceded that its "practice of declining to engage in comparative juror analysis [at step three] for the first time on appeal" could not be reconciled with *Miller El II* and *Snyder* because the practice "unduly restricts review based on the entire record."[768] The court, however, wasted no words in expressing its reservations about this approach, and signaled its intention to conduct the analysis sparingly.[769] The California Supreme Court listed several reasons for its view that the approach has limited utility on appeal, e.g., comparative juror analysis is "performed on a cold record" and may miss the "nuances" of live communication; jury selection is "a fluid process" that changes until the jury is sworn; and "[v]oir dire is a process of risk assessment" about how a juror will act individually and how the group will act collectively.[770] In opinion after opinion, the court has relied on these and other like objections to constrain the efficacy of comparative juror analysis as a tool for ferreting out discriminatory peremptory challenges.[771]

The approach, as conceptualized by the United States Supreme Court, is not complicated: it involves "side by side comparisons" of "similarly situated" struck Black and non Black jurors.[772] To be similarly situated, jurors need not be "identical in all respects."[773] The Court agreed that such a requirement "would leave *Batson* inoperable; potential jurors are not products of a set of cookie cutters."[774] If the prosecutor's reason for the strike "applies just as well" to a struck and "otherwise similar" seated juror, "that is evidence tending to prove purposeful discrimination to be considered at *Batson*'s third step."[775]

The United States Supreme Court has conducted a comparative analysis of the prosecution's treatment of struck and seated jurors in a variety of circumstances, including: (1) asking most Black jurors different questions about executions than White jurors;[776] (2) eliciting assurances from White jurors who had scheduling conflicts that they could serve, but asking for no such as surances from Black jurors;[777] (3) striking an African American juror because of his wife's employ ment at a hospital while retaining a White juror who worked in the same hospital;[778] (4) asking a large number of questions of the struck Black jurors and relatively few of the seated White jurors;[779] and (5) investigating the background of struck Black jurors while conducting no investi gation of seated White jurors.[780]

In *Miller El II*, the Supreme Court also reaffirmed the prohibition on speculation at the step three determination, faulting the federal court of appeals' "substitution" of its own reason for the prosecution's strike of one of the African American jurors.[781] The Court, wrote: "If the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false."[782] Our state supreme court also relies on hypothesized reasons to uphold prosecutors' peremptory challenges, and in particular, to conclude that the excused Black or Latinx jurors were not sufficiently similar to the White jurors whom the prosecutor retained to warrant a finding of *Batson* error.

The court's decision in *People v. Jones*, illustrates this practice.[783] The *Batson* claim involved the prosecution's strikes against three African American jurors.[784] The prosecutor gave sev eral reasons for removing one of them, Juror G.G., including the fact that the juror was a bus driver in the area where the crime had occurred, and might substitute his own views about the bus routes for the witnesses' testimony.[785] He stated that he was also concerned about other jurors who were bus drivers in that area.[786] The trial judge denied the motion.[787] On appeal, Jones argued that the prosecutor did not strike two White jurors who were bus drivers in the area.[788] The California Supreme Court concluded that "[t]he record strongly suggests race neutral reasons why he chose to accept the others despite his concern that they were bus drivers."[789] The court found that the two seated jurors were "'strongly in favor'" of the death penalty—a reason the prosecutor never offered for striking Juror G.G. —whereas the struck juror was "'moderately in favor.'"[790] Notwithstanding *Miller El II*'s rule against speculation, the court concluded that the United States Supreme Court's decisions presented no obstacle to substituting reasons never offered by the prosecutor that might explain why he did not peremptorily challenge the seated jurors to whom the struck juror was compared.[791]

The state supreme court has done more than hypothesize reasons a prosecutor might have had to strike a juror of color. The court has also speculated about characteristics never offered by the prosecution as reasons for its strike that "*would have made* [*the seated jurors*] *more at tractive* '*in the eyes of a prosecutor* seeking a death sentence.'"[792] The court's practice defies the Supreme Court's requirement that "when illegitimate grounds like race are in issue, a prose cutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives."[793]

Increasingly, the California Supreme Court has required that the seated jurors expressed "'a substantially similar *combination* of responses,' in all material respects, to the jurors ex cused."[794] In *People v. Winbush*, Justice Liu cautioned that the majority's approach "appears in tension" with *Miller El II*, *Snyder*, and *Foster*.[795] He pointed out that in the Supreme Court cases, the prosecutor had given more than one reason for each disputed peremptory chal lenge, but that in making its analysis, the high court "drew inferences of discrimination by comparing struck and seated jurors with respect to one or more of the stated reasons *consid ered individually*."[796]

The United State Supreme Court's approach in *Foster* is illustrative. There, the court called the prosecutor's 11 reasons for striking Marilyn Garrett, an African American woman, a "laundry list."[797] It is noteworthy that most of the prosecution's explanations were similar to those (1) California district attorney training manuals recommend; (2) California prosecutors routinely give; and (3) California courts endorse as "race neutral."[798] They included the juror's employ ment as a teacher's aide for "disadvantaged youth," the fact that she "kept looking at the ground during voir dire," the shortness of her answers, her "nervous" appearance; her youth; "misrep resent[ation of] her familiarity with the location of the crime," her failure to "disclose that her cousin had been arrested on a drug charge," and the fact that she was divorced and had two children.[799] The Supreme Court engaged in a thorough analysis of each of the 11 explanations, and found that a number of the reasons were "contradicted by the record," and others "difficult to credit because the State willingly accepted white jurors with the same traits that supposedly rendered Garrett an unattractive juror."[800] The court went through the same careful examina tion of the eight reasons the prosecution gave for striking Eddie Hood, an African American man, with the same result; most of the justifications were unsupported by the evidence or ap plied equally to seated White jurors.[801] The Supreme Court, however, did not examine whether each of the seated White jurors matched Ms. Garrett or Mr. Hood in all respects. Instead, taking the prosecution's explanations one after another, the court identified seated White jurors who were similarly situated to Ms. Garrett or Ms. Hood as to *that particular reason*.[802] The court held: "Two peremptory strikes on the basis of race are two more than the Constitution allows."[803]

In *People v. Hardy*, introduced above in our discussion of "reflexive deference," the court agreed that the prosecutor's strikes merited "close scrutiny" because she had removed every African American she could strike and the "case had definite racial overtones."[804] The majority concluded, however, that Frank G., who the prosecutor struck and who was the only Black prospective juror on the main panel, was distinguishable from the seated White jurors to whom Justice Liu, in dissent, compared him.[805]

Justice Liu also parted company with the majority opinion on its comparative juror analysis.[806] Examining several of the prosecutor's explanations for removing Frank G., Justice Liu identified at least two other seated non Black panelists whose answers to specific questions were no more favorable to the prosecution than those of Frank G.[807] Consider the prosecution's concern that Frank G., who is not a lawyer, supervised civil litigation for a major car rental company, knew many attorneys, and spoke with lawyers on a daily basis.[808] The majority was satisfied that no seated non Black jurors were similarly situated.[809] Yet, as Justice Liu showed, the seated jury included a legal secretary who "knew 'too [many] lawyers to name,'" two jurors whose family members are lawyers, and one juror who was studying to be a paralegal and had "close lawyer acquaintances."[810] Consider also the prosecutor's objections to Frank G.'s death penalty views. Her sixth reason for striking Frank G. was his belief that "life without the possibility of parole [is] . . . a worse punishment than death."[811] Justice Liu pointed to two seated non Black jurors whose questionnaire responses were "substantially similar."[812] Both also explained why they held this view, whereas "Frank G., who favored the death penalty and thought it was used 'too seldom,'" also stated that "he could accept that death was the worse penalty, as the law

required."[813] Justice Liu wrote that the majority's insistence that the comparator jurors "exactly match[]" the struck jurors "'leave[s] *Batson* inoperable; potential jurors are not products of a set of cookie cutters.'"[814]

In *People v. Smith*, citing *Foster*, the California Supreme Court suggested that a prosecutor's strategy of offering "multiple reasons," may "fatally impair the prosecutor's credibility" as some prove to be "implausible or unsupported by the facts."[815] The court cautioned against replicating a trial court's "shortcut" by "picking one plausible item from the list and summarily accepting it without considering . . . the prosecutor's explanation as a whole."[816] Despite the opportunity to disapprove of the use of a "laundry list" in several cases, the court has taken the opposite tack. For example, the prosecutor in *People v. Armstrong* gave eight reasons for excus ing Juror E.W.[817] Rather than evaluate all of them, the trial court and the majority focused on the juror's two statements about capital punishment, dismissing the other six as "lesser fac tors," which could "fairly" cause the prosecutor to hesitate to retain E.W. on the jury.[818]

The dissent in *Armstrong*—Justice Liu, joined by Justice Cuéllar and by Justice Dennis Perluss of the Court of Appeal—began by acknowledging the "'definite racial overtones'" that "'raise[] heightened concerns about whether the prosecutor's challenge was racially motivated.'"[819] First, the defendant, a Black man, was sentenced to death for the rape murder of a White woman.[820] Second, "[i]n the capital trial of Armstrong's confederate, Warren Hardy, the same prosecutor struck every black juror she could have removed and gave six reasons for striking a black man, Frank G., from the main panel."[821] Third, here, the prosecutor's peremptory challenges against four African American male jurors left no Black men on the jury.[822] The majority noted these facts, but did not include them in their consideration of "all relevant circumstances" at step three as *Batson* requires.[823]

With regard to the strike of E.W., the third African American man removed by the prosecutor, the dissent in *Armstrong* reviewed each of her eight reasons.[824] The dissent concluded that the majority's handpicking of just two of the prosecutor's explanations was inconsistent with the court's statement in *Smith*, which in turn was grounded in the Supreme Court's holding in *Foster*.[825] Concluding, the dissent returned to the deficiencies in the record—explanations that were "implausible, misleading, contradicted by the record, or difficult to credit in light of the prosecutor's disparate treatment of similarly situated jurors" and the trial court's failure to "press[] the prosecutor on these points."[826] The record, Justice Liu wrote, showed "'it was more likely than not that the challenge was improperly motivated.'"[827]

In *People v. Chism*, the California Supreme Court imposed yet another limitation on compar ative juror analysis that runs counter to the plain language of United States Supreme Court precedent, and, as Justice Liu explained, conflicts with the state supreme court's precedent. The majority in *Chism* announced that an appellate court will only compare a struck juror to jurors seated at the time the judge ruled on the *Batson* objection unless the defendant renews the objection to allow for a comparison to jurors who were seated after the ruling.[828] This con straint defies the Supreme Court's mandate that reviewing courts, as well as trial judges, are obliged to evaluate a *Batson* claim based on "'*all* of the circumstances that bear upon the issue of racial animosity.'"[829]

Justice Liu observed that the majority's "new law" in *Chism* will restrict the use of comparative juror analysis in cases in which that approach would substantially support a *Batson* claim.[830] In *People v. Manibusan*, for example, the prosecutor struck a Black woman who had previously served on a jury that was unable to reach a verdict, stating that he had "'an absolute policy of getting rid of people whose only jury experience resulted in a hung jury.'"[831] After the trial court denied the *Batson* motion, jury selection continued, and the prosecutor accepted two non Black jurors whose only prior jury experience was serving on juries that did not reach a verdict.[832] Un der *Chism*'s crabbed approach, the truth about the prosecutor's "policy" would escape judicial review. Justice Liu observed that *Chism* was the second opinion in one year in which the court had rejected a defense objection to the prosecution's removal of Black women from the jury.[833] He wrote, "Our *Batson* jurisprudence . . . leaves one to wonder whether any circumstances, short of an outright admission by the prosecutor . . . will ever suffice to prove a violation."[834]

In case after case, the California Supreme Court has devised rationales to avoid comparative analysis, to restrict its application, to speculate about jurors' similarities and differences rather than adhere to the record, or to find the analysis itself unpersuasive. The court's hostility to and parsimonious application of this approach cannot be reconciled with the Supreme Court's generous use of the analysis.

IV.

REFORM OPTIONS

Ultimately, our empirical findings that prosecutors continue to disproportionately strike Black and Latinx prospective jurors despite *Batson* should not be surprising. To the extent that *Batson* can make some progress in reducing discriminatory strikes, it requires vigorous judicial en forcement, which our state courts have not provided.

Batson has failed and was destined to fail. Prosecutors across the state persist in disproportion ately striking Black and Latinx jurors. They justify these strikes on the basis of "race neutral" reasons that are often thinly veiled ethnic or racial stereotypes, which courts at every level tol erate. The California Supreme Court has found *Batson* error only three times in the last three decades. *Batson* is an ineffective judicial mechanism. We agree with Justice Goodwin Liu that it is "past time for a course correction."[835]

Members of the bench and legal scholars have called for an end to the *Batson* procedure, or at least, for dramatic reform. In this section, we explore those critiques and the various reform options proposed by judges, legal scholars, social scientists, and public figures. We examine ac tions taken by other states to remedy discrimination in jury selection—most notably, Washing ton Supreme Court General Rule 37 ("GR 37").[836] We note that the California Supreme Court recently announced that it will convene a "workgroup" to study peremptory challenges. We urge, however, that comprehensive legislation is the only realistic, expeditious means of elimi nating the discriminatory jury selection practices detailed in this report.

A. Judicial Calls for *Batson* Reform

Recognizing its deficiencies, justices in California have called for substantial *Batson* reform.[837] Dissenting from the California Supreme Court's final *Batson* opinion of 2019, Justice Liu pro posed several concrete measures to move the majority in the direction of enforcing the Equal Protection Clause.[838] First, he proposed that the United States Supreme Court "could make clear that reliance on hypothesized reasons in first stage *Batson* analysis is generally impermis sible."[839] Thus, a trial judge could no longer offer his or her own race neutral reasons to explain a prosecutor's peremptory challenge. Rather, the trial court would have to rely on the prosecu tor's reasons in ruling on the *Batson* objection.

Second, Justice Liu suggested that the California Supreme Court, the California Judicial Coun cil, or the California Legislature "follow the lead of several state high courts that have essen tially eliminated *Batson*'s first step."[840] Once a party objects, the party making the strike would have to provide reasonably "'specific and clear race neutral explanations for the strike.'"[841] This reform, Justice Liu explained, would serve the goals of "promoting transparency, creating a record for appellate review, and ensuring public confidence in our justice system, while im posing 'the comparatively low cost of requiring a party to state its actual reasons for striking a minority prospective juror.'"[842] He wrote that "our Legislature has passed laws expanding protections against discrimination in jury selection (see, e.g., Code of Civ. Proc., § 231.5), and it can do so again."[843] Justice Liu's proposal to eliminate the first step of the *Batson* procedure is a core feature of AB 3070.

In September 2019, two Justices of the California Court of Appeal published an unusual opinion urging that "[t]he time has come" for California government, including the legislature, "to con sider meaningful measures to reduce actual and perceived bias in jury selection."[844] The opinion's author, Justice Jim Humes, pointed to several possible reforms, including Washington Supreme Court General Rule 37—the model for AB 3070—discussed below.[845]

Justice Humes observed that there are "good reasons to question whether [*Batson*'s] promise is being realized."[846] He focused on several significant deficiencies in the California Supreme Court's *Batson* precedents, and, more broadly, the *Batson* procedure itself. First, Justice Humes noted that because *Batson* is limited to identifying "intentional discrimination in jury selection, it plainly fails to protect against—and likely facilitates—implicit bias. Implicit bias is increasingly accepted as pervasive throughout the criminal justice system, and it is particularly pernicious in the context of peremptory challenges."[847]

Second, Justice Humes wrote that because *Batson* tolerates explanations that appear to be facial ly non discriminatory, the procedure "makes it easy to assert justifications that mask bias" and "makes it nearly impossible for trial courts to meaningfully evaluate those justifications."[848] Here, Justice Humes singled out the reasons prosecutors frequently give for exercising peremptory challenges against Black jurors, such as "negative experience with law enforcement or skepticism about the fairness of the criminal justice system."[849] He explained that, in view of "the undeniable evidence" of racial bias by law enforcement and in the criminal legal system more broadly, "[r]eflexively allowing these strikes compounds institutional discrimination" by removing jurors of color, "diminish[ing] public confidence" in the legal system, and "undermin[ing] the value of having juries that represent a fair cross section of the community."[850]

Third, Justice Humes explained that the "inadequacies of the *Batson* framework at the trial court level are, in turn, exacerbated on appeal" because appellate courts must defer to the trial court's step three credibility determination.[851]

B. Alternatives to *Batson*

In addition to the judicial call for *Batson* reform, legal scholars and social scientists have pro posed wide ranging alternatives to remedy the pervasive race based discrimination the *Batson* procedure has failed to eliminate. These reforms vary greatly in their approach. Some focus on "category conscious" jury selection.[852] The strongest of these category conscious options calls for a "certain minimum number or percentage of minorities" on the seated jury,[853] ranging from a proposal that at least half of the members of the jury be of the same race as the defendant on tri al[854] to a minimum number of three same race jurors.[855] However, it is reasonably likely that, given its recent equal protection jurisprudence, the current Supreme Court would find this race con scious approach unconstitutional.[856]

Other reforms focus on affirmative selection of the jury, rather than the dismissal based structure of the current peremptory challenge scheme.[857] Parties in this jury selection structure would have the "right to choose affirmatively some or all of the potential jurors, and generally could use race" as a basis for their selection.[858] Again, race conscious selection procedures would likely not survive a challenge under the federal Constitution.[859]

Other proposals include expanded voir dire[860] and greater use of jury questionnaires.[861] It does not require a study to predict that both proposals would likely impose new costs on the judicial system. One team of researchers suggested requiring attorneys to "articulate before voir dire the juror characteristics they prefer for their case."[862] This would "permit more meaningful scrutiny of peremptory challenge use" and make it more challenging for a prosecutor to justify a strike that goes against those prior stated goals.[863] This proposal will be largely ineffective as long as the courts are limited by the *Batson* procedure, particularly its tolerance for "race neutral" reasons and its requirement that the objecting party prove intentional discrimination. As Section III.D discusses, district attorneys know precisely "the juror characteristics they prefer for their case." And they are well schooled in how to eliminate prospective jurors who do not have those characteristics by relying on "race neutral" explanations approved by the California Supreme Court and Courts of Appeal.

Scholars have also called for a series of incentive based reforms that would impose severe sanctions on the attorney responsible for exercising a racially discriminatory peremptory challenge. These proposals include: an ethical rule that a *Batson* violation is professional misconduct;[864] providing additional peremptory challenges to the non striking party or reducing the number of available challenges to the party who improperly exercised a peremptory challenge;[865] and considering disciplinary actions against prosecutors, such as complaint citations, censure, or suspension.[866] However, California courts already have latitude in devising remedies for *Batson* violations, including sanctioning attorneys, and there is no evidence to suggest alternative remedies have reduced discrimination.[867] The most extreme of these proposals is "'dismissal of the criminal prosecution with prejudice' arguing by analogy to the exclusionary rule" when a prosecutor exercises a discriminatory peremptory challenge.[868] The authors see no real prospect that the legislature or the courts are prepared to adopt such a severe penalty.[869]

C. The Washington State Supreme Court's *Batson* Reform

One state supreme court, acknowledging *Batson*'s failings, has taken an active role in pursuing reforms. In 2018, the Washington Supreme Court adopted General Rule 37 ("GR 37"), which altogether replaces the *Batson* procedure.[870] In response to a proposal by the American Civil Liberties Union to create an alternative to the *Batson* framework, the Washington Supreme Court convened a "workgroup" to draft a rule that would significantly reduce, if not end, discriminatory jury selection procedures.[871] The Connecticut Supreme Court followed Washington's example, and announced in December 2019 that it will convene a task force to examine racial discrimination in jury selection in that state.[872]

Washington's *Batson* reform has four key features. First, GR 37 eliminates *Batson*'s first step; once there is an objection, the party who made the peremptory challenge must offer an explanation.[873] Second, the trial court serves as "an objective observer . . . aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have resulted in the unfair exclusion of potential jurors."[874] Third, the court must deny the peremptory challenge if it finds that "an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge."[875] Fourth, GR 37 lists reasons for peremptory strikes that are presumptively invalid because they have been historically associated with racial or ethnic discrimination, and acknowledges the role demeanor based reasons have played in the exercise of discriminatory strikes.[876]

D. Assembly Bill 3070 and the California Supreme Court

Assembly Bill (AB) 3070 was introduced by Asssemblymember Dr. Shirley Weber on February 21, 2020.[877] Passage of AB 3070 would support growing efforts in all branches of California government to reduce the impacts of implicit bias in the criminal legal system, particularly as they adversely affect African Americans. In 2016, California Supreme Court Chief Justice Tani Cantil Sukuaye told a joint session of the legislature that "implicit bias is a factor in the national discussion about race and justice."[878] The Chief Justice highlighted "implicit bias education and training" for judges.[879] Just last year, the legislature enacted a law requiring mandatory trainings on implicit bias for lawyers and judges.[880] Acknowledging the need for these measures, the legislature stated that "most people have an implicit bias that disfavors African Americans and favors Caucasian Americans, resulting from a long history of subjugation and exploitation of people of African descent."[881] In addition to our Chief Justice, other members of the bench have commented on the need to address implicit bias in the criminal legal system, including in the jury selection process.[882]

The California Supreme Court recently expressed interest in examining *Batson*'s limitations. On January 29, 2020, Chief Justice Cantil Sakauye announced that a jury selection work group would "study whether modifications or additional measures are needed to guard against impermissible discrimination in jury selection."[883] According to the news release, "[i]n the coming weeks," the Chief Justice would "appoint a diverse group of members" to consider issues such as: whether an alternative to *Batson*'s purposeful discrimination standard is appropriate; the role of "unconscious bias" in jury selection; whether exclusion of prospective jurors on grounds such as their negative experience with law enforcement leads to "disproportionate exclusion of jurors of certain backgrounds;" and whether there are "other impediments to eliminating impermissible discrimination."[884] We note that, as of the publication of this report, the Chief Justice has not publicly named anyone to the work group. The authority, if any, of the group to be a catalyst for change is at best unknown. The work group is not under the umbrella of the Judicial Council, which is the "policy making body of the California courts"[885] that operates "primarily through the work of its advisory committees and task forces."[886]

We acknowledge the state supreme court's interest in studying *Batson*'s shortcomings. How ever, the legislature—through the passage of AB 3070—is better suited to effectively address persistent discrimination in jury selection in a timely manner. In our view, and as this report makes evident, the topics identified for study by the work group have been amply studied. The questions posed have been answered. The time for a decisive "course correction" by the Cali fornia Legislature is now.[887] We need look no further than Washington's example to make this point. Studies leading to the adoption of GR 37 identified the same intractable discriminatory jury selection practices under *Batson* as this report has detailed.[888] The Washington Supreme Court implemented a practical, workable solution through GR 37, which is the basis for AB 3070. There is a bill before the legislature that will effectively remedy the long standing defi ciencies of the *Batson* procedure. It is past time for a work group to spend years re examining this issue.

APPENDICES

A. California Courts of Appeal Research Method

Our primary research objective was to determine whether there were patterns of racial, ethnic, and gender discrimination in jury selection in California non capital felony trials. This study investigated the following questions: (1) from 2006 to 2018, how many times did the courts of appeal decide a *Batson* claim in cases involving non capital felony convictions; (2) in these cases, how frequently did defense attorneys make *Batson* objections to prosecution strikes and how frequently did prosecutors make *Batson* objections to defense strikes; (3) in how many of these cases did prosecutors and defense attorneys exercise peremptory challenges to exclude Black, Latinx, Asian American, White, women, and men jurors; and (4) when examining the reasons for these strikes, did prosecutors and defense attorneys offer some reasons more fre quently than others when required to explain their challenges?

In California, trial records and appellate briefs for felony trials not resulting in a death sen tence are not readily accessible or easily reviewable.[889] Therefore, the data set for the study consisted of the opinions—mostly unpublished[890]—of the courts of appeal.[891] Employing the search parameters discussed below, we identified every appellate opinion issued between January 1, 2006, and December 31, 2018, in which the court decided a claim of *Batson* error. Of the 767 opinions, 683 were relevant for the purposes of the study.[892] *See* Section II. From this group of cases, we determined the following: (1) the number of cases in which prosecutors and defense attorneys exercised strikes against prospective jurors of a specific race, ethnicity, and gender;[893] (2) the identity of the party exercising the strike(s) (defense or prosecution); (3) the reason(s) for the peremptory challenge given by the party exercising the strike; and (4) wheth er the appellate court found a *Batson* violation.[894]

Although the data set was constant, the unit of analysis varied depending upon the query. In our investigation of how frequently the courts of appeal decided *Batson* claims between 2006 and 2018, the unit of analysis was the case, specifically the court of appeal case. In our investi gation of the number of prosecution and defense strikes, the unit of analysis was the case, i.e., the court of appeal case. In our determination of how frequently jurors of color and women were struck, the unit of analysis was also the case. In our examination of the number of cases in which the parties offered the defined categories as reasons for their strikes, the unit of analy sis was the case. In our examination of how often the parties offered the defined categories as reasons for their strikes of jurors by race and ethnicity, the unit of analysis was the juror.

In some appellate cases, multiple peremptory challenges were at issue and multiple reasons were offered. The following explains how we coded the data in these circumstances: (1) the *Batson* motions of both the prosecution and defense were at issue on appeal, resulting in one *Batson* motion code for both sides (a total of two) for a single case; (2) both a Black and Latinx juror were struck, resulting in codes for both a race and ethnicity based strike for a single case; (3) in a given case, each reason offered, regardless of frequency, was coded to the case once; and (4) for a given juror, if multiple reasons were offered for the strike that fit into the defined categories, each reason was coded to that juror.

Question 1: From 2006 to 2018, how many times did the courts of appeal decide a *Batson* claim in cases involving non-capital felony convictions?

We used Thomson Reuters Westlaw to conduct the search. We limited the search to opinions that mentioned "*Batson*/*Wheeler*" or "*Wheeler*/*Batson*,"[895] included both published and unpublished opinions, set the date range from January 1, 2006, through December 31, 2018, and restricted the search to California courts of appeal opinions.[896] The search returned 767 opinions. We omitted from the study opinions in which the appellate court did not reach a decision on the merits of the *Batson* claim, e.g., the claim was not properly preserved. We counted as a single opinion cases that were appealed more than once, e.g., a decision was appealed, remanded for a *Batson* hearing, and appealed again following the hearing. After eliminating duplicates, we determined that the courts of appeal decided 683 opinions involving *Batson* claims between 2006 and 2018.

Question 2: In how many cases did defense counsel object to prosecution strikes, and in how many cases did prosecutors object to defense strikes?

We coded all observations, i.e., cases, based upon which party's *Batson* motion was at issue on appeal.[897] In 670 of our observations, defense counsel had objected to prosecutors' strikes. Therefore, we coded 98.0% of the total number of cases involving *Batson* claims as prosecution strikes. *See* Section II.A. Only 14 cases involved claims that defense counsel had exercised racially discriminatory peremptory strikes. *See* Section II.A. The 14 cases included two in which the trial court found *sua sponte* that defense counsel's peremptory strikes were based on race or ethnicity, two cases in which the prosecution objected to defense strikes based on gender, and one case in which the defense objected to some of the prosecution's strikes based on race and vice versa. Because each side made a *Batson* objection that was at issue on appeal in this last instance, there are a total of 684 "cases" in the study as opposed to the 683 relevant "opinions." This is why add ing the count for both sides results in one more than the total number of opinions issued.

Question 3: In how many of these cases did prosecutors and defense attorneys exercise peremptory challenges to exclude Black, Latinx, Asian-American, White, women, and men jurors?

In determining the number of cases in which White jurors, jurors of color, men, and women were struck, the unit of analysis was the case. We coded these observations by race and ethnicity. Below and in Section II.B.5, we explain the difficulty of teasing out the number of cases in which gender, uncoupled from race or ethnicity, was the basis for a strike. Therefore, we did not report the data on any gender based strikes.

Using each case as a unit of analysis, we determined the number of cases in which a party made at least one peremptory strike to remove a juror of color. Four hundred fifty cases involved chal lenges to multiple jurors.

We acknowledge that race and ethnicity are social constructs and are mindful that these categories can be misleading, especially as the number of people who identify as multiracial or

multiethnic increases.[898] For purposes of the data analysis, the study categorizes as "Latinx" individuals who self identified or have a Spanish surname or whom the trial or appellate court identified as "Latino," "Chicano," or "Hispanic."[899] The study categorizes as "Asian American" individuals who self identified or whom the trial or appellate court identified as Filipino, Samo an, Pacific Islander, Vietnamese, South Asian, or Indian.[900]

We explored the option of analyzing the frequency of peremptory challenges against racial or ethnic subgroups by gender, e.g., Black women, and determined that we could not do so reliably based upon the available source material, which was limited to appellate court cases.[901] There was insufficient consistency in how attorneys (almost always defense counsel) characterized their objection to strikes of racial or ethnic subgroups, how trial judges ruled on the objection, and how appellate courts framed their decisions. For example, even if the attorney objected to strikes against "Hispanic women," more often than not, the trial judge's ruling was based on either the race/ethnicity or the gender of the struck jurors, but not on both. Even when the appellate court acknowledged that the objection was based on a racial or ethnic subgroup by gender, the appellate court analyzed the trial judge's determination in the way in which the trial judge characterized the ruling, which most often was solely race or ethnicity. Therefore, we decided that the only reliable measure for the study was race or ethnicity rather than racial or ethnic subgroups by gender.

Question 4: When examining the reasons for these strikes, did prosecutors and defense attorneys offer some reasons more frequently than others when required to explain their challenges?

We used subdivisions (h) and (i) of Washington Supreme Court General Rule 37 ("GR 37") as a starting point for categorizing the reasons for the peremptory challenges.[902] GR 37 is Appen dix B to the report. Subdivision (h) identifies specific reasons as "presumptively invalid" when offered as explanations for a peremptory challenge because they "have historically been associ ated with improper discrimination in jury selection in Washington State." The reasons are: "(i) having prior contact with law enforcement; (ii) expressing a distrust of law enforcement or a belief that law enforcement officers engage in racial profiling; (iii) having a close relationship with people who have been stopped, arrested, or convicted of a crime; (iv) living in a high crime neighborhood; (v) having a child outside of marriage; (vi) receiving state benefits; and (vii) not being a native English speaker."[903] As we explain in Section II.B, we did not code "receiving state benefits" and "not being a native English speaker" because prosecutors almost never gave them as reasons.

We used two different approaches to answering this question. In calculating the number of cases in which these reasons appeared, the unit of analysis was the case. For example: "Prosecu tors relied on demeanor as a reason for their peremptory challenges in over 40% of the cases." Because we also coded cases by the race and ethnicity of the struck jurors, we also coded the reason(s) offered for that racial or ethnic group. For the racial and ethnic breakdown by rea sons per case, we calculated the percentages by dividing the number of cases/observations in which the reason appeared for that race or ethnicity by the total number of cases/observations

in which the prosecutor struck that race or ethnicity. For example: "Of the 480 cases in which prosecutors struck Black jurors, they offered demeanor in 37.5% (180 cases) of these cases." In determining how frequently parties offered the defined categories as reasons for strikes by race and ethnicity, the unit of analysis was the juror. *See* Section II.B.4, Figure 4. We coded each struck juror's race or ethnicity and the reason(s)stated for the peremptory challenge. We calculated the percentages by dividing the frequency with which reasons were offered for that race or ethnicity by the total number of times prosecutors struck jurors of that race or ethnicity. *See* Table A and Section II.B.4, Figure 4.

Reason(s) Given by Prosecutors	Black	Latinx	White & Asian American
Demeanor	23.2%	20.8%	17.3%
	(N=218)	(N=117)	(N=9)
Close Relationship	23.5%	15.8%	5.8%
	(N= 221)	(N= 89)	(N=3)
Distrust	25.6%	10.8%	7.7%
	(N=241)	(N=61)	(N=4)
Prior Contact with Law Enforcement	13.2%	6.9%	3.8%
	(N=124)	(N=39)	(N=2)
Living in a High-Crime Neighborhood	1.4%	2.1%	--
	(N=13)	(N=12)	--
Child Outside of Marriage	0.6%	0.9%	--
	(N=6)	(N=5)	--
Total N of Racial Category	940	563	52

Table A

We expanded two GR 37 categories in our study. We expanded the category "prior contact with law enforcement officers" to "prior contact with law enforcement or the criminal legal system." Using this expanded category, we coded an observation—the case and the juror—when a party struck a juror because the juror had been stopped, arrested, charged with a crime, and/or convicted of a crime. We also coded an observation when a party struck a juror because the juror had reported a crime to law enforcement and had a negative experience as a result.

We expanded the category "expressing a distrust of law enforcement or a belief that law enforcement officers engage in racial profiling" to "expressing a distrust of law enforcement

or the criminal legal system or a belief that law enforcement officers or the criminal legal system is racially or class biased." We coded an observation when a party struck a juror because (1) the juror expressed distrust of law enforcement or the criminal legal system (e.g., "The system is rigged in favor of wealthy defendants."); (2) the prosecutor concluded that the juror was dis trustful based upon the juror's statement (e.g., "I believe that the Black Lives Matter movement has raised a lot of important issues."); (3) the juror had a negative experience with law enforce ment or the criminal legal system and the prosecutor concluded that the juror was distrustful (even where the juror said otherwise); or (4) the juror said that a family member or someone to whom the juror is close had a negative experience, and the prosecutor concluded that the juror was distrustful (even when the juror said otherwise).

We assigned the code "having a close relationship with someone who has been stopped, arrested, or convicted of a crime" to any juror struck because the juror's family member or another person to whom the juror was close had been stopped by police, arrested, or convicted of a crime.

We assigned the code "living in a high crime neighborhood" to any juror struck because the juror lived in a neighborhood that was labeled "gang" or "low income" or "urban."

We assigned the code "a child outside of marriage" to any juror struck because the juror had a child with someone to whom the juror was not married. This included challenges for which the prosecutor gave as a reason the fact that the juror had children below the age of 18 but was "single" or "unmarried."

There is significant overlap among the first three categories: (1) prior contact with law enforce ment or the criminal legal system; (2) expressing a distrust of law enforcement or the criminal legal system or a belief that law enforcement officers or the criminal legal system engage in racial profiling; and (3) having a close relationship with someone who has been stopped, arrested, or con victed of a crime. For example, parties struck some jurors because they expressed (or the prose cutor concluded they did) distrust of law enforcement or the criminal legal system based on their own experiences and those of family members. Therefore, we coded all three of these reasons.

Subdivision (i) of GR 37 states that "the following reasons for peremptory challenges also have historically been associated with improper discrimination in jury selection in Washington State: allegations that the prospective juror was sleeping, inattentive, staring or failing to make eye contact, exhibited a problematic attitude, body language, or demeanor, or provided unintelligent or confused answers."[904] We coded "demeanor" for any strike based on one or more of the reasons listed in subdivision (i).

If a party struck a juror based upon a reason that did not fit into any of the above categories, the reason was not coded. In the course of this study, however, it became evident that prosecutors of fered explanations that were not included in GR 37 (h) or (i)—and therefore not part of the study design—but were also historically associated with discrimination. *See* Section II.B. These reasons include hair style or color, fingernail color or length, makeup, tattoos, clothing, jewelry, current or previous employment as a social worker or in the postal service, and gang affiliation. Prosecutors offered these reasons with sufficient frequency to warrant mention.

If the trial court, before or during the denial of the *Batson* motion, offered reasons for the strike that fit into the categories above, we did not code those reasons in the data analysis. However, if the court offered one or more of these reasons, and the striking *party* said that the court's reasons were the reasons for the party's strike(s), we coded the reason(s) for purposes of the data analysis.

B. Washington Supreme Court General Rule 37

GR 37
Jury Selection

(a) Policy and Purpose. The purpose of this rule is to eliminate the unfair exclusion of potential jurors based on race or ethnicity.

(b) Scope. This rule applies in all jury trials.

(c) Objection. A party may object to the use of a peremptory challenge to raise the issue of improper bias. The court may also raise this objection on its own. The objection shall be made by simple citation to this rule, and any further discussion shall be conducted outside the presence of the panel. The objection must be made before the potential juror is excused, unless new information is discovered.

(d) Response. Upon objection to the exercise of a peremptory challenge pursuant to this rule, the party exercising the peremptory challenge shall articulate the reasons the peremptory challenge has been exercised.

(e) Determination. The court shall then evaluate the reasons given to justify the peremp tory challenge in light of the totality of circumstances. If the court determines that an objective observer could view race or ethnicity as a factor in the use of the peremp tory challenge, then the peremptory challenge shall be denied. The court need not find purposeful discrimination to deny the peremptory challenge. The court should explain its ruling on the record.

(f) Nature of Observer. For purposes of this rule, an objective observer is aware that im plicit, institutional, and unconscious biases, in addition to purposeful discrimination, have resulted in the unfair exclusion of potential jurors in Washington State.

(g) Circumstances Considered. In making its determination, the circumstances the court should consider include, but are not limited to, the following:

(i) the number and types of questions posed to the prospective juror, which may include consideration of whether the party exercising the peremptory challenge failed to question the prospective juror about the alleged concern or the types of questions asked about it;

(ii) whether the party exercising the peremptory challenge asked significantly more questions or different questions of the potential juror against whom the peremptory challenge was used in contrast to other jurors;

(iii) whether other prospective jurors provided similar answers but were not the subject of a peremptory challenge by that party;

(iv) whether a reason might be disproportionately associated with a race or ethnicity; and

(v) whether the party has used peremptory challenges disproportionately against a given race or ethnicity, in the present case or in past cases.

(h) Reasons Presumptively Invalid. Because historically the following reasons for pe remptory challenges have been associated with improper discrimination in jury selection in Washington State, the following are presumptively invalid reasons for a peremptory challenge:

(i) having prior contact with law enforcement officers;

(ii) expressing a distrust of law enforcement or a belief that law enforcement officers en gage in racial profiling;

(iii) having a close relationship with people who have been stopped, arrested, or convicted of a crime;

(iv) living in a high crime neighborhood;

(v) having a child outside of marriage;

(vi) receiving state benefits; and

(vii) not being a native English speaker.

(i) Reliance on Conduct. The following reasons for peremptory challenges also have his torically been associated with improper discrimination in jury selection in Washington State: allegations that the prospective juror was sleeping, inattentive, or staring or fail ing to make eye contact; exhibited a problematic attitude, body language, or demeanor; or provided unintelligent or confused answers. If any party intends to offer one of these reasons or a similar reason as the justification for a peremptory challenge, that party must provide reasonable notice to the court and the other parties so the behavior can be verified and addressed in a timely manner. A lack of corroboration by the judge or opposing counsel verifying the behavior shall invalidate the given reason for the pe remptory challenge.

[Adopted effective April 24, 2018.]

ENDNOTES

1 Equal Justice Initiative, Illegal Racial Discrimination in Jury Selection: A Continuing Legacy 9 (2010), https://eji.org/wp content/uploads/2019/10/illegal racial discrimination in jury selection.pdf.

2 *See People v. Miles*, No. S086234, 2020 WL 2760163, at *64 (Cal. May 28, 2020) (Liu, J., dissenting) ("With today's decision, this court extends its record of not having found *Batson* error involving the peremptory strike of a black juror in more than 30 years — despite the fact that '[t]he high court's opinion [in *Batson*] responded specifically to the pernicious history of African Americans being excluded from jury service, calling such exclusion "a primary example of the evil the Fourteenth Amendment was designed to cure."'" (alterations in original) (quoting *People v. Hardy*, 5 Cal. 5th 56, 124 (2018) (Liu, J., dissenting))); *People v. (Joe Edward) Johnson*, 8 Cal. 5th 475, 528 (2019) (Liu, J., dissenting) (describing the majority opinion as "yet another case in which a black man was sentenced to death for killing a white victim after a jury selection process in which the prosecution disproportionately excused black prospective jurors," and "yet another case in which this court has refused to find any inference of discrimination in jury selection"); *People v. Bryant*, 40 Cal. App. 5th 525, 544 46 (2019) (Humes, J., with Banke, J., concurring) (discussing the *Batson* procedure's inability to preclude strikes based on implicit bias, describing courts' "[r]eflexive[]" approval of prosecutors' reasons for striking Black jurors as "compound[ing] institutional racism," and supporting the call for "meaningful reform"); *Flowers v. State*, 947 So. 2d 910, 937, 939 (Miss. 2007) (finding that "racially motivated jury selection is still prevalent twenty years after *Batson* was handed down," warranting reassessment of the *Batson* inquiry and peremptory challenges, and warning prosecutors that if they continue to violate *Batson*, changes are likely); *State v. Saintcalle*, 309 P.3d 326, 334 (Wash. 2013), *abrogated on other grounds by City of Seattle v. Erickson*, 398 P.3d 1124 (2017) (finding that "[t]wenty six years later it is evident that *Batson*, like *Swain* before it, is failing" to eliminate racial discrimination in jury selection); *id.* at 335 ("In over 40 cases since *Batson,* Washington appellate courts have *never* reversed a conviction based on a trial court's erroneous denial of a *Batson* challenge."); David Cole, No Equal Justice 120 (1999) ("*Batson* has by all accounts done relatively little to eliminate the use of race based peremptory strikes."); Randall Kennedy, Race, Crime and the Law 208 (1997) ("Despite *Batson*, prosecutors continue to deploy racially motivated peremptory challenges."); David C. Baldus et al., *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3 U. Pa. J. Const. L. 3, 10 (2001) (summarizing the empirical studies to date; examining 317 Philadelphia capital murder cases tried in the 1980s, and finding that, post *Batson*, discriminatory strikes based upon race and gender remain "widespread," and prosecutors are significantly more successful than defense counsel in "control[ling] jury composition" with the result that their conduct increased "the probability of death for all defendants," as well as the racially discriminatory application of capital punishment, and significantly decreased the chance that black men would serve as jurors in the trials of black defendants"); David C. Baldus et al., *Statistical Proof of Racial Discrimination in the Use of Peremptory Challenges: The*

Impact and Promise of the Miller El *Line of Cases As Reflected in the Experience of One Philadelphia Capital Case*, 97 Iowa L. Rev. 1425, 1446 65 (2012) (examining the race based practices of one experienced Philadelphia prosecutor); Jeffrey Bellin & Junichi P. Semitsu, *Widening* Batson*'s Net to Ensnare More than the Unapologetically Bigoted or Painfully Unimaginative Attorney*, 96 Cornell L. Rev. 1075, 1092 (2011) (examining 269 federal civil and criminal *Batson* decisions over a nine year period, and finding that relief in the form of a new trial was granted in fewer than seven percent of the cases and that in "85.1% [of the] cases, the court rejected the *Batson* claim altogether"); Jef frey S. Brand, *The Supreme Court, Equal Protection, and Jury Selection: Denying That Race Still Matters*, 1994 Wis. L. Rev. 511, 584 (1994) (examining every federal case decided post *Batson* through May 1993, and finding the "inability" of *Batson*'s procedure, which "search[es] for discriminatory purpose and pay[s] deference to trial court findings, to eliminate or even identify race based challenges"); Douglas L. Colbert, *Challenging the Challenge: The Thirteenth Amendment as a Prohibition Against the Racial Use of Peremp tory Challenges*, 76 Cornell L. Rev. 1, 96 (1990) ("[T]he *Batson* remedy has proven to be ineffective against prosecutors whose trial strategy involves the elimination of prospective black jurors."); Equal Justice Initiative, *supra* note 1, at 4 (presenting two years of research in eight southern states that "uncovered shocking evidence of racial discrimination in jury selection in every state"); Catherine M. Grosso & Barba ra O'Brien, *A Stubborn Legacy: The Overwhelming Importance of Race in Jury Selection in 1973 Post* Batson *North Carolina Capital Trials*, 97 Iowa L. Rev. 1531, 1533, 1538 39 (2012) (employing a data set including more than 7,400 peremptory strikes by North Carolina prosecutors in 173 capital trials between 1990 and 2010, and finding that prosecutors struck 51% of prospective Black jurors as compared to 26% of all other jurors, resulting in a removal rate for Blacks that was 2.5 times the rate for all other jurors); Kenneth J. Melilli, Batson *in Practice: What We Have Learned About* Batson *and Peremptory Challenges*, 71 Notre Dame L. Rev. 447, 448, 458 59 (1996) (examining "virtually every relevant reported decision of every federal and state court applying *Batson*" between mid 1986, when *Batson* was decided, and the end of 1993, and find ing that criminal defendants brought more than 95% of the objections to peremptory strikes and that discrimination persists); Daniel R. Pollitt & Brittany P. Warren, *Thirty Years of Disappointment: North Carolina's Remarkable Appellate* Batson *Record*, 94 N.C. L. Rev. 1957, 1959, 1962 63 (2016) (examining published cases, and finding that it had been 30 years since the North Carolina Supreme Court found a *Batson* violation, but noting that, during this period, the state's appellate court had remedied two instances of "'reverse *Batson*' claims where the court found purposeful discrimination against white jurors challenged by black defendants.") (citing *State v. Hurd*, 246 N.C. App. 281 (2016); *State v. Cofield*, 498 S.E. 2d 823 (1998)); Ronald F. Wright et al., *The Jury Sun shine Project: Jury Selection Data as a Political Issue*, 2018 U. Ill. L. Rev. 1407, 1425 tbl.2 (2018) (examining data on over 29,000 North Carolina prospective jurors in non capital felony trials between 2011 and 2012, and finding that prosecutors exercised peremptory challenges against Black jurors at twice the rate as white jurors).

3 Brand, *supra* note 2, at 532 34.

4 Michael J. Klarman, From Jim Crow to Civil Rights 10, 39 (2004).

5 Ch. 114, § 4, 18 Stat. 335, 336 37 (an act to protect all citizens in their civil and legal rights).

6 *See* Equal Justice Initiative, *supra* note 1, at 9 10 (citing Kennedy, *supra* note 2, at 172.

7 *Strauder v. West Virginia*, 100 U.S. 303, 310 (1879).

8 *See* Equal Justice Initiative, *supra* note 1, at 9.

9 *Id*. at 10.

10 *Id*.; *see also* Klarman, *supra* note 4, at 42.

11 Brand, *supra* note 2, at 542.

12 *Id*. at 539 49; *see* Equal Justice Initiative, *supra* note 1, at 9 10.

13 Brand, *supra* note 2, at 539 49; *see* Equal Justice Initiative, *supra* note 1, at 9 10.

14 *Norris v. Alabama*, 294 U.S. 587, 588 (1935).

15 *See generally* Dan T. Carter, Scottsboro: A Tragedy of the American South (rev. ed. 1979).

16 *Norris*, 294 U.S. at 597.

17 Equal Justice Initiative, *supra* note 1, at 11.

18 Brand, *supra* note 2, at 556; *see also* Kennedy, *supra* note 2, at 178 79.

19 Equal Justice Initiative, *supra* note 1, at 12; *see also* Brand, *supra* note 2, at 564.

20 *People v. Hines*, 12 Cal. 2d 535, 537 (1939).

21 *Id*. at 538.

22 *Id*. at 539; *but see People v. Parman*, 14 Cal. 2d 17, 19 20 (1939) (affirming a conviction and death sentence by an all male jury where, although women were legally eligible to serve, Placer County did not place any women on the jury list in 1939, and distinguish ing *Hines* because the exclusion was not based on the race of the defendant).

23 Brand, *supra* note 2, at 556; *see Swain v. Alabama*, 380 U.S. 220 (1965).

24 *Akins v. Texas*, 325 U.S. 398, 399 400 (1945).

25 *Id*. at 405.

26 *Id*. at 406 07.

27 *Id*. at 407.

28 Equal Justice Initiative, *supra* note 1, at 11; *see e.g*., *Taylor v. Louisiana*, 419 U.S. 522, 53 (1975) (holding that the systematic exclusion of women from the venire violates the fair cross section requirement of the federal Constitution).

29 Hiroshi Fukurai & Edgar W. Butler, *Sources of Racial Disenfranchisement in the Jury and Jury Selection System*, 13 UCLA Nat'l Black L.J. 238, 238 (1994) (finding that, at every stage of the jury selection process, there are legal and non legal factors that play a role in excluding African Americans from petit and grand juries such that "potential ju rors with specific human capital factors, such as higher income, higher education, and white racial background, were more likely to be represented on juries"); Hiroshi Fuku rai et al., *Where Did Black Jurors Go? A Theoretical Synthesis of Racial Disenfranchisement in the Jury System and Jury Selection*, 22 J. Black Stud. 196, 197 (1991) (finding that Af rican Americans are disproportionately excluded from the jury pool). The article used the word "pool" to describe, broadly, the "jury selection process." *Id.* at 199.

30 Hiroshi Fukurai, *The Representative Jury Requirement: Jury Representativeness and Cross Sectional Participation from the Beginning to the End of the Jury Selection Process*, 23 Int'l J. Comp. & Applied Crim. Just. 55, 74 (1999) (finding that African Americans are dis proportionately excluded throughout the jury selection process in California courts).

31 Cal. Civ. Proc. Code § 198(b).

32 *Id.* § 197(a).

33 *Id.* § 197(b).

34 Judicial Council of Cal., Final Report: Task Force on Jury System Improvements 10 (2003), https://www.courts.ca.gov/documents/tfjsi_final.pdf (recommending that one or more California counties conduct a pilot study supplementing the DMV and ROV lists with other comprehensive lists of persons living in California, such as wel fare and unemployment lists).

35 Civ. Proc. § 198(a) (b).

36 *Id*. § 198(c).

37 Fukurai & Butler, *supra* note 29, at 250; Fukurai, *supra* note 30, at 56; David Kairys et al., *Jury Representativeness: A Mandate for Multiple Source Lists*, 65 Calif. L. Rev. 776, 819 (1977) (arguing that the use of multiple source lists increases minority representation in jury pools). The article uses the term "pool" to refer to individuals who have met the "established requirements for jury service." *Id*. at 822.

38 Fukurai, *supra* note 30, at 70 tbl.2.

39 Kairys et al., *supra* note 37, 805 06.

40 *Id*. at 809, tbl.D.

41 *See* Cal. Elec. Code § 2101.

42 With the passage of S.B. 310, effective January 1, 2020, persons convicted of a felony are permitted to serve on juries unless they are incarcerated, under any form of super vision, or are a registered sex offender. *See Governor Newsom Signs Criminal Justice Bills to Support Reentry, Victims of Crime and Sentencing Reform*, Office of Governor Gavin Newsom (Oct. 8, 2019), https://www.gov.ca.gov/2019/10/08/governor newsom signs criminal justice bills to support reentry victims of crime and sentencing reform/.

43 Fukurai, *supra* note 30, at 2; Fukurai et al., *supra* note 29, at 201 03.

44 Fukurai et al., *supra* note 29, at 202.

45 *Id*. at 202; Fukurai, *supra* note 30, at 6.

46 Ronald J. McAllister et al., *Residential Mobility of Blacks and Whites: A National Longitu dinal Survey*, 77 Am. J. Soc. 445, 448 (1971).

47 Fukurai et al., *supra* note 29, at 203.

48 Thomas G. Munsterman et al., Paula L. Hannaford Agor & G. Marc Whitehead, Jury Trial Innovations 10 (2d ed. 2006); Paula L. Hannaford Agor, *Systematic Negli gence in Jury Operations: Why the Definition of Systematic Exclusion in Fair Cross Section Claims Must Be Expanded*, 59 Drake L. Rev. 761, 780 (2011) (suggesting that multiple source lists will increase "demographic representation" of minorities); Kairys et al., *supra* note 37, at 819.

49 *See* Kairys et al., *supra* note 37, at 825 26 (discussing how to increase representation of "people with lower socio economic status and minority groups").

50 Judicial Council of Cal., *supra* note 34, at 11 ("Although no California courts sup plement their source lists with welfare or unemployment lists, the Superior Court of Modoc County supplements its master list with public utility customer lists."). Senate Bill 1001, introduced in the California Senate on February 13, 2020, would have ex panded the source lists beyond the ROV and DMV lists to require the inclusion of the Franchise Tax Board (FTB) as a third source list. The author withdrew SB 1001 due to the COVID 19 pandemic.

51 *People v. Harris*, 36 Cal. 3d 36, 59 (1984) (holding that the defendant met all three prongs of the *Duren* test and established a "prima facie showing of a gross dispari ty resulting in a violation of defendant's right to an impartial jury drawn from a fair cross section of the community"). *Harris* was abrogated by *People v. Bell*, 49 Cal. 3d 502, 526 n.12 (1989), which concluded that "the *Harris* court erred in . . . accepting total population figures regardless of the actual availability of more refined data." Both opinions refer to two leading United States Supreme Court cases that set stan dards for the fair cross section requirement. In *Duren v. Missouri*, 439 U.S. 357, 364 (1979), the high court held that in "order to establish a prima facie violation of the fair cross section requirement, the defendant must show: (1) the group is a "distinctive group" in the community; (2) the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) this underrepresentation is due to systematic exclusion of the group in the jury selection process." In *Berghuis v. Smith*, 559 U.S. 314, 329 (2010), the court observed that "neither *Duren* nor any other decision of this Court speci fies the method or test courts must use to measure the representation of distinctive groups in jury pools," such as "absolute disparity, comparative disparity, and stan dard deviation." *See* Nina Chernoff, *The 16 Things Every Defense Attorney Should Know About Fair Cross Section Challenges*, Champion 18 (2013), http://www1.cuny.edu/mu/law/files/2014/01/chernoff kadane_december_2013_16things.pdf (explaining that the Supreme Court has declined to decide which method of measuring disparity must be used so that measures of absolute disparity, comparative disparity, standard deviation analysis, and probability analysis are all permissible). The California Supreme Court most recently considered a jury composition challenge in *People v. Henriquez*, 4 Cal. 5th 1 (2017). The court concluded that that the defendant failed to carry his burden of showing that underrepresentation of African Americans in jury pools was the product of systematic exclusion. *Id*. at 20. *See also People v. Ramos*, 15 Cal. 4th 1133, 1155 (1997) (explaining that neither the United States nor California Supreme Courts has articulat ed the constitutional limit of permissible disparity—either comparative or absolute—between the representation of the distinctive group and its size in the general commu nity for the purposes of the second prong of the *Duren* test).

52 *See People v. Currie*, 87 Cal. App. 4th 225, 235 (2001) ("The underrepresentation of African Americans on Contra Costa County jury venires . . . is a longstanding problem, dating back at least 20 years."); *People v. Jones*, 151 Cal. App. 3d 1029, 1031 (1984)

(agreeing with the evidentiary showing that African Americans over 18 years of age constituted 8.1% of Contra Costa's population in that age group, and that only 4.2% of persons called for jury service were African American); *People v. Black*, 160 Cal. App. 3d 480, 483 (1984) (Racanelli, J., concurring) (agreeing with the evidentiary showing that African Americans comprised 8.1% of Contra Costa's voter eligible population but only 2.86% of the "prospective jurors in the jury pool for the week involved," and that this reflected the "seemingly chronic appearance of unrepresentative criminal juries in Contra Costa County").

53 ACLU of N. Cal., Racial and Ethnic Disparities in Alameda County Jury Pools 1 (2010), https://www.aclunc.org/sites/default/files/racial_and_ethnic_disparities_in_alameda_county_jury_pools.pdf (finding that the "Alameda County Superior Court suffers from systemic underrepresentation of African American and Latino jurors in its jury pools"). The report used the word "pool" to describe groups of jurors who were summoned to appear and "sent to a court room for trial . . . including jurors ultimately dismissed for hardships." *Id*. at 2. The researchers collected the demographic data of nearly 1,500 prospective jurors in 11 felony cases set for trial from 2009 through 2010. *Id*. They used the 2000 Census data to estimate the county's jury eligible population. *Id*.

54 *Id*. at 3.

55 *Id*. The ACLU study identified several potential causes of the disparity. Among them were that "[i]ndividuals with less money are more likely to move within a year, and African Americans and Latinos are more likely to be lower income." *Id*. at 4.

56 *Swain*, 380 U.S. at 220.

57 *Id*. at 217 18.

58 Note, *Limiting the Peremptory Challenge: Representation of Groups on Petit Juries*, 86 Yale L.J. 1715, 1719 n.21 (1977) [hereinafter *Limiting the Peremptory Challenge*] (citing Jon Van Dyke, Jury Selection Procedures 147 48 (1977)).

59 *Id*.

60 *Id*. (citing *Hayes v. Missouri*, 120 U.S. 68 (1887); *Swain*, 380 U.S. at 220).

61 *Rivera v. Illinois* 556 U.S. 148, 152 (2009) ("The right to exercise peremptory challenges in state court is determined by state law."); *see also Swain*, 380 U.S. at 219.

62 *Swain*, 380 U.S at 220.

63 *Id*. at 219.

64 *Id*. at 223 24.

65 *Id.* at 231 (Goldberg, J., dissenting).

66 *Id.* at 205 (majority opinion).

67 *Id*. at 222.

68 *Id.* at 224.

69 James Pearson, Annotation, *Use of Peremptory Challenge to Exclude from Jury Persons Belonging to a Class or Race*, 79 A.L.R. 3d Art. 14 (1977).

70 *Id*.

71 *Id.*

72 *Id.* at 19 (emphasis added).

73 *People v. Wheeler*, 22 Cal. 3d 258, 265 66, 272 (1978). The court made explicit its reliance on the state Constitution's fair cross section guarantee rather than on any provision of the United States Constitution. *Id*. at 270.

74 *Id.* at 262 65.

75 *Id.*

76 *Id*. at 287.

77 *Id.* at 276 78, 282 n.29 (declining to decide whether the decision applied to civil cases).

78 *Id.* at 287.

79 *Id.* at 286.

80 *Id.*

81 *Id.* at 285 86.

82 *Id.* at 286.

83 *Id*. at 284.

84 *Id.* at 284 85, 287.

85 *Id.* at 280.

86 *Id*. at 278 80 nn.19, 23, 25 (citing the scholarly literature the Court considered in for mulating a remedy).

87 *See id*. at 274 75 & n.16 (citations omitted) (explaining that the peremptory challenge also "allows a party to remove a juror whom he has offended by a probing voir dire or by an unsuccessful challenge for cause" as well as ensure that "the defendant will not be tried by anyone whom he intuitively dislikes"); *id*. at 278 (stating "the proposition . . . that a party exercising a peremptory challenge is doing so on a constitutionally permissible ground.").

88 *Id*. at 278 n.19 (stating that recent scholarship has offered "a variety of solutions . . . that do not seem entirely satisfactory," and listing articles, including Note, *Peremptory Chal lenge Systematic Exclusion of Prospective Jurors on the Basis of Race*, 39 Miss. L.J. 157, 164 (1967) (proposing approaches to address discriminatory peremptory strikes, including "the total abolition of the peremptory challenge" and "giving the defendant exclusive use of the peremptory challenge"), and Lewis H. LaRue, *A Jury of One's Peers*, 33 Wash. & Lee L. Rev. 841, 873 (1976) (proposing, among other solutions, "curtail[ing] sharply, and perhaps eliminat[ing] entirely, the currently used challenge procedures")).

89 *Id*. at 280 n.25 (explaining that the "solution" adopted "is supported, with variations, by a substantial body of scholarly opinion" and listing some of the scholarship). For exam ple, the court cited Roger Kuhn's extensive analysis on "discrimination in the selection of juries in state courts." *Id*. (citing Roger Kuhn, *Jury Selection: The Next Phase*, 41 So. Cal. L. Rev. 235, 237 (1968)). Kuhn proposed permitting the defense to question the prosecu tion's strikes "only when the prosecution's use of its challenges gives rise to a reasonable inference of discrimination." Kuhn, *supra,* at 294. It should be noted that the commenta tors on whom the court relied anticipated that the three step inquiry would be employed much more robustly than it has been. *See Wheeler*, 22 Cal. 3d at 280 n.25 (citing *Limiting the Peremptory Challenge, supra* note 58, at 1738 41). For example, the Yale Law Journal note proposed that a trial court automatically find a prima facie showing whenever there is a statistical disproportion between the "actual rate of exclusion" and the "expected rate of exclusion" and require that the prosecution's justifications "have been applied con sistently to similarly situated jurors of other groups, and [are] reasonably relevant to the particular trial or to non group characteristics of the parties or witnesses." *Limiting the Peremptory Challenge, supra* note 58, at 1739 40.

90 *Wheeler,* 22 Cal. 3d at 280 81. The court did not define the term "cognizable group" as there was "no doubt that the blacks in the present case constitute a cognizable group." *Id*. at 280 n.26.

91 *Id*. at 281.

92 *Id*. at 280 82.

93 *Id*. at 282. The remedy was modified so that "the trial court, acting with the [injured party]'s assent, [has] discretion to consider and impose remedies or sanctions short of outright dismissal of the entire jury." *People v. Willis*, 27 Cal. 4th 811, 815 (2002) (brackets

in original). *See also People v. Mata*, 57 Cal. 4th 178, 185 86 (2013) (holding that the assent may be given by counsel rather than by the party, and that failure to object to the trial court's proposed alternative remedy "when the opportunity to do so arises" constitutes an implied waiver of "the right to the default remedy of quashing the entire venire" and an implied consent to the alternative remedy).

94 *See Batson v. Kentucky*, 476 U.S. 79, 82 n.1, 95 98 (1986).

95 Courts have held that an objection brought under *Wheeler* will also be deemed an objection under *Batson*. *See, e.g.*, *Tolbert v. Gomez,* 190 F.3d 985, 987 (9th Cir. 1999) ("In California, a *Wheeler* motion is the procedural equivalent of a federal *Batson* challenge." (citing *People v. Jackson*, 10 Cal. App. 4th 13, 21 n.5 (1992)); *People v. Lenix*, 44 Cal. 4th 602, 610 n.5 (2008) ("An objection under *Wheeler* suffices to preserve a *Batson* claim on appeal." (citing *People v. Lancaster*, 41 Cal. 4th 50, 73 (2007); *People v. Gray*, 37 Cal. 4th 168, 184 n.2 (2005))).

96 *Batson*, 476 U.S. at 92, 96.

97 *Id*. at 87.

98 *See e.g.*, *Flowers v. Mississippi*, 139 S. Ct. 2228, 2242 43 (2019); *Miller El v. Dretke* (*Miller El II*), 545 U.S. 231, 237 38 (2005); *Georgia v. McCollum*, 505 U.S. 42, 49 (1992); *Powers v. Ohio*, 499 U.S. 400, 404, 412 (1991).

99 *Batson*, 476 U.S. at 84 (declaring that the Court has "'consistently and repeatedly'" reaffirmed the amendment's prohibition against a "State's purposeful or deliberate denial" of Blacks' participation in juries (quoting *Swain*, 380 U.S. at 203 04)); *id*. at 89 ("[T]he State's privilege to strike individual jurors through peremptory challenges is subject to the commands of the Equal Protection Clause.").

100 *Id*. at 93 98.

101 *Id*. at 93 94.

102 *Id*. at 93 94, 96. The major substantive difference between *Batson* and *Wheeler* was at step one, the prima facie showing. *Batson* made it unmistakable that this showing was satisfied when the objecting party raised an "inference" of purposeful discrimination. *Batson*, 476 U.S. at 93 94, 96. In *Wheeler*, the California Supreme Court used the terms "strong likelihood" and "reasonable inference" to describe the standard at step one. *Wheeler*, 22 Cal. 3d at 280. For decades, the California Supreme Court insisted, in the face of repeated disagreement by the Ninth Circuit, that these two phrases described the same standard, and that the standard was consistent with *Batson*. *See People v. Johnson*, 30 Cal. 4th 1302, 1312 18 (2003) (discussing the history of the court's reason ing and its dispute with the Ninth Circuit, and explaining that the term "more likely than not" has also been used by California courts to describe the stage one test). The

issue was finally resolved by the United States Supreme Court in *Johnson v. California*, 545 U.S. 162 168 (2005), discussed in Section III.E.1, which rejected the California Su preme Court's interpretation.

103 *Batson*, 476 U.S. at 97 98. The reason offered at step two need not be "'persuasive, or even plausible'; so long as the reason is not inherently discriminatory, it suffices." *Rice v. Collins*, 546 U.S. 333, 338 (2006) (quoting *Purkett v. Elem*, 514 U.S. 765, 767 68 (1995) (per curiam)).

104 *Batson,* 476 U.S. at 98.

105 *Id.* In later opinions, the Court affirmed the trial court's duty to decide the ultimate question based upon "'all of the circumstances that bear upon the issue of racial ani mosity.'" *Foster v. Chatman*, 136 S. Ct. 1737, 1748 (2016) (quoting *Snyder v. Louisiana*, 552 U.S. 472, 478 (2008)); *see also Miller El II*, 545 U.S. at 252 (directing that the step three ruling must be made "in light of all evidence with a bearing on it").

106 *Batson*, 476 U.S. at 98 (quoting *Washington v. Davis*, 46 U.S. 229, 240 (1976)) (citing other equal protection cases). Other sections of the report discuss the application of the three stage framework by the United States and California Supreme Courts over the decades, including opinions that curtailed *Batson*'s promise and others that argu ably sought to advance it.

107 *Id*. at 102 03 (Marshall, J., concurring).

108 *Id*. at 105.

109 *Id*. at 105 06.

110 *Id.* at 106.

111 *Id.* at 92, 96 98.

112 *J.E.B v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994) (extending *Batson* to gender based strikes); *McCollum*, 505 U.S. 42 (holding that *Batson* applies to peremptory challeng es by defense counsel in criminal trials); *Hernandez v. New York*, 500 U.S. 352 (1991) (extending *Batson* to Latinx prospective jurors); *Edmonson v. Leesville Concrete Co*., 500 U.S. 614 (1991) (holding that *Batson* applies to civil trials); *Powers*, 499 U.S. 400 (apply ing *Batson* to any litigant regardless of race).

113 *See, e.g.*, *SmithKline Beecham Corp. v. Abbott Laboratories*, 740 F.3d 471, 486 (9th Cir. 2014) (recognizing "sexual orientation" as a cognizable group for *Batson* purposes); *United States v. Brown*, 352 F.3d 654, 669 70 (2d Cir. 2003) (holding that a peremptory strike based on religious affiliation violates *Batson*); *People v. Douglas*, 22 Cal. App. 5th 1162, 1172 (2016) (holding that a peremptory challenge based on sexual orientation

violates California's fair cross section guarantee and the Fourteenth Amendment); *State v. Fuller*, 862 A.2d 1130, 1132 33 (N.J. 2004) (holding that a peremptory challenge based on religious affiliation violates *Batson*).

114 Some state constitutional guarantees encompass religious groups. *See State v. Gilmore*, 511 A.2d 1150, 1159 n.3 (N.J. 1986) (decided shortly after *Batson*, but grounded solely in the state Constitution's representative cross section rule prohibiting discrimina tion based on "religious principles, race, color ancestry, national origin, and sex"); *State v. Levinson*, 795 P.2d 845, 849 (Haw. 1990) (relying on the Hawaii Constitution); *Thorson v. State*, 721 So. 2d 590, 594 (Miss. 1998) (en banc) (relying on the Mississippi Constitution); *People v. Langston*, 163 Misc. 2d 400 (N.Y. Sup. Ct. 1996) (prohibiting a strike against a Muslim juror based upon the Equal Protection Clause of the New York Constitution); *State v. Eason*, 445 S.E.2d 917, 921 23 (N.C. 1994) (holding that article I, section 26 of the North Carolina Constitution prohibits exclusion "from jury service on account of sex, race, color, religion, or national origin").

115 Cal. Civ. Proc. Code § 192. The consolidation was contained in AB 2617, which created Chapter One of the California Code of Civil Procedure.

116 Passed in 2015 and effective January 1, 2016, California Assembly Bill 87 amended Code of Civil Procedure section 231.5 to prohibit a party from using a peremptory challenge to strike a juror on the basis of any characteristic listed in section 11135 of the Government Code. Prior to its amendment, section 231.5 prohibited a party from striking a juror on the basis of "his or her race, color, religion, sex, national origin, sexual orientation, or similar grounds." *Id.* § 231.5 (2001) (amended by Stats. 2015, c. 115 (A.B. 87), §1, eff. Jan. 1, 2016).

117 *Snyder v. Louisiana,* 552 U.S. 472 (2008); *Miller El v. Dretke* (*Miller El II*), 545 U.S. 231 (2005); *Johnson v. California*, 545 U.S. 162 (2005); and *Miller El v. Cockrell* (*Miller El I*), 543 U.S. 322 (2003). *See infra* note 766 for an explanation of the Supreme Court's use of comparative juror analysis in *Miller El I*. As we discuss in Section III.E., the state supreme court was out of step with *Batson* and retrenching from its own *Wheeler* prec edents long before 2003.

118 *Johnson*, 545 U.S. at 168.

119 *Id*. (quoting *Johnson*, 30 Cal. 4th at 1318).

120 *Id*. at 163 (quoting *Batson*, 476 U.S. at 94).

121 *Id*. at 172.

122 *Id*.

123 *See People v. Rhoades*, 8 Cal. 5th 393, 458 (2019) (Liu, J., dissenting).

124 *Miller El II*, 545 U.S. at 235.

125 *Id*. at 240 41.

126 *Id* at 241.

127 Justice Thomas objected to the majority's use of comparative juror analysis in *Mill er El II* because this approach was not presented by the petitioner to the Texas courts. *Id*. at 281 (Thomas, J., dissenting). The *Miller El II* majority disagreed, holding that this analysis is entirely proper where "the evidence on which [a defendant] bases his arguments"—such as the voir dire transcript—is before the appellate court. *Id*. at 241 n.2.

128 *Id*. at 235. This type of review, which is governed by the Antiterrorism and Effective Death Penalty Act, is explained in Section II.C.3.

129 *Id*. at 244 45, 247 51, 255 63.

130 *Id*. at 247 n.6.

131 *Id*.

132 *Id*. at 252.

133 *Id*. at 246.

134 *Snyder*, 552 U.S. at 476 78.

135 *Id*. at 478.

136 *Id*. at 479.

137 *Id*. at 482 83.

138 *Id*. at 482 83, 485 86.

139 *Id*. at 478 (internal quotation marks omitted).

140 *Id*. at 479.

141 *Id*. at 485.

142 *Id*.

143 *Id*.

144 These are, respectively, 136 S. Ct. 1737 (2016) and 139 S. Ct. 2228 (2019).

145 *Foster*, 136 S. Ct. at 1751 52, 1754.

146 *Id.*

147 *Flowers*, 139 S. Ct. at 2249.

148 *Id*.

149 *See id*. at 2247, 2249; *Foster*, 136 S. Ct. at 1751 52, 1754.

150 As of 2014, "from the sentence of death to the California Supreme Court's disposi tion of the automatic appeal, between 11.7 and 13.7 years will have elapsed." *Jones v. Chappell*, 31 F. Supp. 3d 1050, 1057 (C.D. 2014), *reversed by Jones v. Davis*, 806 F.3d 538 (9th Cir. 2015). The federal district court in *Jones* further explained that "much of that time" passes while defendants wait for the court to appoint counsel and schedule oral argument. *Id*. (The Ninth Circuit opinion reversing *Jones* was based on procedural grounds, and therefore did not take issue with the district court's evidentiary findings. 806 F.3d at 543.) The authors therefore thought it important to examine appellate opinions reviewing more recent trials. Many non capital appeals are decided within a couple of years of trial. *See, e.g.*, *People v. Davis*, No. B259412, 2016 WL 3960036 (Cal. Ct. App. July 21, 2016) (stating that the trial court judgment was on October 7, 2014). We commenced our analysis in 2019, and examined California courts of appeal opinions during the preceding 12 year period. The study includes a total of 683 courts of appeal "opinions" and 684 "cases." The discrepancy between the numbers is based on one opinion in which both the prosecution and defense counsel made *Batson* objections to the others' use of peremptory challenges. For that reason, we counted this "opinion" as two "cases." *See* Appendix A.

151 Throughout this subsection and the next, the authors use "case" when referring to an appellate court opinion.

152 In a total of 12 cases, prosecutors made *Batson* motions to defense peremptory chal lenges. The 14 cases include two involving sua sponte *Batson* motions by the trial court challenging defense counsel's peremptory strikes, two cases in which the prosecution objected to defense strikes based on gender (not described above), and one case in which the defense objected to some of the prosecution's strikes and vice versa. In the latter case, the trial court denied the defendant's *Batson* motion and granted the pros ecution's. On appeal following his conviction, the defendant challenged both rulings.

153 In nearly every court of appeal opinion, a *Batson* claim involves a defense objection to the prosecution's peremptory challenge(s) at trial. This finding is consistent with previous studies. *See, e.g.*, Melilli, *supra* note 2, at 448, 457 (examining "virtually every relevant reported decision of every federal and state court applying *Batson*" between

mid 1986, when *Batson* was decided, and the end of 1993, and finding that more than 95 percent of the challenges were brought by criminal defendants).

154 Wash. Ct. R. General Applicability, General R. 37(h) [hereinafter GR 37]; *see* Proposed New GR 37—Jury Selection Workgroup Final Report App. 2 (2018) [hereinafter GR 37 Workgroup Final Report] (citing Task Force on Race and Criminal Justice System, Preliminary Report on Race and Washington's Criminal Justice System 7 (2011), https://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20Orders/OrderNo25700 A 1221Workgroup.pdf) (Statement of American Civil Liberties Union of Washington, et al.).

155 GR 37(h)(i) (v), (i).

156 *See id.* 37(i).

157 *See* Appendix A.

158 *See supra* note 2.

159 *Foster v. Chatman*, 136 S. Ct. 1737, 1748 (2016) (describing the prosecutor's 11 reasons for striking a Black juror); *see also People v. Hardy*, 5 Cal. 5th 56, 110 11 (2018) (Liu, J., dissenting) (quoting *Foster* and criticizing the court's failure to examine the prosecu tor's "'laundry list'" of six reasons for striking a Black juror); Brief for Joseph diGeno va et al., as Amici Curiae in Support of Petitioner, *Foster*, 136 S. Ct. 1737 (No. 14 8349).

160 *People v. Tabron*, No. A144079, 2018 WL 6426375, at *6 (Cal. Ct. App. Dec. 7, 2018). Not every opinion contains information about the date of the trial and/or the county in which the case was tried. To the extent that the information is not in the opinion, it can be found by searching the case docket on the website of the appellate court that issued the opinion.

161 *People v. Torrence*, No. A142592, 2018 WL 1376741, at *6 (Cal. Ct. App. Mar. 19, 2018). Unless otherwise indicated, internal quotation marks in subsections II.A and II.B refer to statements by the prosecutor or the juror.

162 *People v. Russell*, No. B258669, 2017 WL 588031, at *3 (Cal. Ct. App. Feb. 14, 2017).

163 *People v. Jones*, No. B197793, 2008 WL 4060941, at *5 (Cal. Ct. App. Sept. 3, 2008).

164 *People v. Anderson*, No. B251527, 2015 WL 4477688, at *14 (Cal. Ct. App. July 22, 2015).

165 *People v. Jamison*, No. E041904, 2008 WL 2933867, at *7 (Cal. Ct. App. July 31, 2008).

166 *People v. Christian*, No. E059966, 2015 WL 5145693, at *4 (Cal. Ct. App. Sept. 2, 2015).

167 *Jamison*, 2008 WL 2933867, at *8.

168 *People v. Harris*, No. B223174, 2011 WL 925723, at *8 (Cal. Ct. App. Mar. 18, 2011).

169 *People v. Crosby*, No. B251779, 2015 WL 340803, at *16 (Cal. Ct. App. Jan. 27, 2015).

170 *Davis*, 2016 WL 3960036, at *4.

171 *People v. Soto*, No. C079705, 2016 WL 6472879, at *2 (Cal. Ct. App. Nov. 2, 2016).

172 *People v. Duncan*, No. C049739, 2006 WL 3480375, at *2 (Cal. Ct. App. Dec. 4, 2006).

173 Because the trial judge makes a credibility determination at step three, "a reviewing court ordinarily should give those findings great deference." *Batson v. Kentucky*, 476 U.S. 79, 98 n.21 (1986). As Section III.E.4 explains, the California Supreme Court rou tinely defers to the trial court's denial of a *Batson* objection, even when the trial court makes no "explicit findings or analysis" of the prosecutor's reasons. *People v. Mai*, 57 Cal. 4th 986, 1062 (2013), *as modified on denial of reh'g* (Oct. 2, 2013) (Liu, J., con curring). The state supreme court's failure to require a trial court to give a reasoned explanation of its ruling increases the likelihood that prosecutors' demeanor based reasons will escape judicial scrutiny. *See* Section III.E.4.

174 *People v. Edwards*, No. A139460, 2018 WL 2426168, at *6 (Cal. Ct. App. May 30, 2018).

175 *People v. Austin*, No. B266558, 2018 WL 2011470, at *9 (Cal. Ct. App. Apr. 30, 2018).

176 *People v. Miller*, No. B276572, 2018 WL 1465807, at *3 (Cal. Ct. App. Mar. 26, 2018).

177 *Id.*

178 *People v. Garcia*, No. B231949, 2012 WL 3538984, at *5 (Cal. Ct. App. Aug. 17, 2012).

179 *People v. Dungo*, No. C055923, 2013 WL 4494710, at *5 (Cal. Ct. App. Aug. 21, 2013).

180 *People v. Jordan*, 146 Cal. App. 4th 232, 239 40, 242 (2006). The Oakland Police Depart ment had arrested the juror's brother at least five times, her sister two or three times, and her son at least once. *Id.*

181 *People v. Marquez*, No. B259210, 2017 WL 3484548, at *8 (Cal. Ct. App. Aug. 15, 2017).

182 *People v. Sullivan*, No. B216780, 2011 WL 1549702, at *3 6 (Cal. Ct. App. Apr. 26, 2011).

183 *People v. Thomas*, No. C068672, 2012 WL 6604993, at *3 (Cal. Ct. App. Dec. 19, 2012).

184 *People v. Jones*, No. C058674, 2009 WL 1177055, at *1 2 (Cal. Ct. App. May 4, 2009).

185 *People v. Winters*, No. A122443, 2010 WL 2691622, at *4 5 (Cal. Ct. App. July 8, 2010).

186 *Id*.

187 *People v. Brooks*, No. B283558, 2018 WL 3153552, at *4 (Cal. Ct. App. June 28, 2018).

188 *People v. Brown*, No. A118569, 2011 WL 1197465, at *9 (Cal. Ct. App. Mar. 30, 2011).

189 *People v. Johnson*, No. A112111, 2007 WL 594355, at *1 (Cal. Ct. App. Feb. 27, 2007).

190 *People v. Jenkins*, No. A109403, 2006 WL 3042944, at *12 (Cal. Ct. App. Oct. 27, 2006).

191 *People v. Fuller*, No. A143419, 2017 WL 1131822, at *7 8 (Cal. Ct. App. Mar. 27, 2017).

192 Some courts, including the Ninth Circuit, have held that a juror's neighborhood may be a reason that is *not* racially neutral and therefore insufficient to pass muster at step two of the *Batson* analysis. *See, e.g.*, *United States v. Bishop*, 959 F.2d 820, 822 n.2 (9th Cir. 1992), *overruled on other grounds by United States v. Nevil*s, 598 F.3d 1158 (9th Cir. 2010) (where the prosecution struck a Black woman because she lived in Compton and would likely be sympathetic to those who are not "upper middle class" and also hostile to law enforcement, finding that the challenge was a proxy for race, and noting that African Americans made up about three fourths of Compton's population) (in ternal quotation marks omitted). The California Supreme Court has not adopted this view. In *People v. Gutierrez*, 2 Cal. 5th 1150, 1154 (2017), a murder case involving several Latinx defendants, the prosecutor used 10 of 16 peremptory challenges to remove Latinx prospective jurors. He struck a Latina teacher on the ground that she lived in Wasco—the home base of a gang in which one of the defendants was allegedly a mem ber—and was unaware of gang activity in her community. *Id*. at 1160. The prosecutor used the same explanation for challenging at least one other Latinx juror. *Id*. at 1161. The trial court made a "global finding that the prosecutor's strikes were neutral and nonpretextual," including the strike of this juror. *Id*. at 1157. Although the court noted that Wasco's population is more than 75% Latinx, it found "the Wasco reason to be facially neutral." *Id*. at 1167 68. However, the California Supreme Court reversed the judgment because the prosecutor's reason was "not self evident," and the trial judge failed to state that it had credited the reason." *Id*. at 1171.

193 *People v. Walker*, No. A121341, 2009 WL 2973551, at *4 (Cal. Ct. App. Sept. 17, 2009). The prosecutor also objected that the juror, who was a "merchant seaman," lacked hygiene and "seemed disheveled," stating that some witnesses described the defendant "that way," so that the juror "may identify with the defendant." *Id*.

194 *People v. Ivey*, No. A120368, 2009 WL 1668994, at *3 (Cal. Ct. App. June 15, 2009).

195 *People v. Cox*, 187 Cal. App. 4th 337, 347 48 (2010).

196 *People v. Nino*, No. B221514, 2011 WL 5314895, at *3 (Cal. Ct. App. Nov. 7, 2011).

197 *People v. Barajas*, No. F066418, 2015 WL 3566803, at *6 (Cal. Ct. App. June 9, 2015).

198 *People v. Deanda*, No. F072163, 2018 WL 2148288, at *6 (Cal. Ct. App. May 10, 2018).

199 *People v. Medina*, No. G043130, 2011 WL 4091493, at *6 (Cal. Ct. App. Sept. 15, 2011). When the judge pointed out that the prosecutor had confused this juror with anoth er Latina juror, the prosecutor added yet another reason: the prospective juror was "a self professed cat lady." *Id.* The court again corrected the prosecutor's error—the juror "stated simply she is 'single, no children, single with a cat'"—and questioned the reliability of the prosecutor's note taking. *Id*. The prosecutor then offered two addi tional explanations, the second based on demeanor: (1) the juror's friends dated police officers and (2) the juror did not give the prosecutor "a good vibe." *Id*. at *7.

200 *People v. Jiminez*, No. B279690, 2018 WL 1616735, at *1 (Cal. Ct. App. Apr. 4, 2018).

201 *People v. Torres*, No. B266700, 2016 WL 4150707, at *4 (Cal. Ct. App. Aug. 4, 2016).

202 *People v. Tonga*, No. E054683, 2013 WL 32143, at *5 7 (Cal. Ct. App. Jan. 3, 2013).

203 *People v. Moya*, No. B264683, 2018 WL 1081909, at *10 (Cal. Ct. App. Feb. 28, 2018).

204 *Id.*

205 *People v. Barajas*, No. A137263, 2014 WL 49856, at *1 2 (Cal. Ct. App. Jan. 7, 2014).

206 *People v. Vale*, No. H037358, 2013 WL 5278501, at *3 (Cal. Ct. App. Sept. 19, 2013).

207 *People v. Martinez,* No. A134714, 2013 WL 3777125, at *3 (Cal. Ct. App. July 18, 2013).

208 *People v. Martinez*, No. E056034, 2014 WL 970214, at *2 (Cal. Ct. App. Mar. 13, 2014).

209 *People v. Ruiz*, No. A139127, 2016 WL 1120858, at *11 (Cal. Ct. App. Mar. 22, 2016).

210 *People v. Kim*, No. B267523, 2017 WL 372008, at *5 (Cal. Ct. App. Jan. 26, 2017).

211 *People v. Celaya*, No. B270857, 2017 WL 4004371, at *3 (Cal. Ct. App. Sept. 12, 2017).

212 *People v. Fernandez*, No. F058462, 2011 WL 199510, at *1 2 (Cal. Ct. App. Jan. 24, 2011).

213 *People v. Sanchez*, No. C059763, 2011 WL 3806264, at *8 (Cal. App. Dist. Aug. 30, 2011).

214 *People v. Valdivia*, No. H038360, 2015 WL 4385858, at *8 9 (Cal. Ct. App. July 17, 2015).

215 *People v. Bee Vue*, No. C055534, 2008 WL 4412089, at *13 (Cal. Ct. App. Sept. 30, 2008).

216 *People v. Mojarro*, No. B223035, 2011 WL 3055345, at *4 (Cal. Ct. App. July 22, 2011).

217 *Id.*

218 *People v. Solis*, No. B196976, 2008 WL 3508160, at *4 5 (Cal. Ct. App. Aug. 14, 2008).

219 *Sanchez*, 2011 WL 3806264, at *7 8.

220 *People v. Salinas*, No. F058255, 2010 WL 5073340, at *3 (Cal. App. Dist. Dec. 14, 2010).

221 *People v. Parker*, No. F060839, 2012 WL 1239249, at *4 (Cal. Ct. App. Apr. 13, 2012).

222 *People v. Rodriguez*, No. G041444, 2011 WL 1885327, at *4 (Cal. Ct. App. May 18, 2011).

223 *People v. Stevenson*, No. A121825, 2010 WL 709183, at *1 (Cal. Ct. App. Mar. 2, 2010). The full text of the prosecutor's reasons amply demonstrate that the juror's neighborhood was a proxy for race: "He also was unemployed which is a reason that is common for us to kick individuals. It tends to be an indication that they do not work with the other twelve people in the panel. They're not productive members of society. He also does not have children, indicating that he is not a contributing member of society. He's from the San Pablo area which is a lower class area within our county."

224 Across the 670 cases in which their strikes were at issue, prosecutors struck 940 Black jurors.

225 Across the 670 cases in which their strikes were at issue, prosecutors struck 563 Latinx jurors.

226 *See* Appendix A.

227 The United States Supreme Court has not addressed the issue, and federal courts of appeal have yet to recognize subgroups. *See* Elisabeth Semel, Batson *and the Discrimi natory Use of Peremptory Challenges in the 21st Century, in* Jurywork: Systematic Tech niques 278 (2019 20 ed.).

228 *See, e.g.*, *People v. Garceau*, 6 Cal. 4th 140, 171 (1993), *abrogated on other grounds by People v. Yeoman*, 31 Cal. 4th 93, 117 (2003) (upholding the defendant's contention that Span ish surnamed women are a distinct group); *People v. Clair*, 2 Cal. 4th 629, 652 (1992) (holding that "Black women are a cognizable subgroup for *Wheeler*"); *People v. Gray*, 87 Cal. App. 4th 781, 788 89 (2001), *as modified on denial of reh'g* (Apr. 3, 2001) (holding that African American men are a distinct group).

229 *See* Brief for the Nat'l Cong. of Black Women & the Black Women Lawyers Ass'n of L.A., Inc., as Amici Curiae Supporting Petitioner, *Williams v. California*, 571 U.S. 1197 (2014) (No. 13 494), 2013 WL 6091783, at *11 (observing that "African American

women are often subjected to a double dose of discrimination in jury selection") (cit ing *People v. Motton*, 704 P.2d 176, 181 (Cal. 1985) (in bank))); Jean Montoya, *"What's So Magic[al] About Black Women?" Peremptory Challenges at the Intersection of Race and Gender*, 3 Mich. J. Gender & L. 369, 400 (1996)).

230 *People v. Dean*, No. B258927, 2017 WL 5898578, at *7 (Cal. Ct. App. Nov. 30, 2017).

231 *People v. Ware*, No. B200018, 2008 WL 5147841, at *2 (Cal. Ct. App. Dec. 4, 2008).

232 *People v. Brooks*, No. A110696, 2007 WL 1785473, at *7 (Cal. Ct. App. June 21, 2007).

233 *People v. Bordeaux*, No. B200449, 2009 WL 323859, at *4 (Cal. Ct. App. Feb. 11, 2009).

234 The three reversals in chronological order are *People v. Fuentes*, 54 Cal. 3d 707 (1991); *People v. Silva*, 25 Cal. 4th 345 (2001); and *People v. Gutierrez*, 2 Cal. 5th 1150 (2017). To calculate the total number of decisions, we started with Justice Liu's finding that, between 1993 and 2013, the California Supreme Court reviewed 102 cases with claims of racial discrimination in jury selection, and reversed only one. *See People v. Harris*, 57 Cal. 4th 804, 892 98 (2013) (Liu, J., concurring). We determined that between 1989 and the start of Justice Liu's calculation in 1993, the court decided 12 *Batson* cases, and reversed one. We determined that between 2013 and 2019, the court decided another 28 *Batson* cases, and reversed one. Consistent with Justice Liu's method, our search parameters included all cases in which a *Batson* issue was raised in the appeal whether or not the court decided the claim on the merits. Information on file with the Berkeley Law Death Penalty Clinic.

235 *People v. Rhoades*, 8 Cal. 5th 393, 457 58 (2019) (Liu, J., dissenting) (citing *People v. Snow*, 44 Cal. 3d 216, 242 (1987)).

236 *People v.* (*Joe Edward*) *Johnson*, 8 Cal. 5th 475, 528 (2019) (Liu, J., dissenting) (quoting *People v. Hardy*, 5 Cal. 5th 56, 124 (2018) (Liu, J., dissenting)); *see supra* note 2.

237 The authors used the same data for this analysis as they used for their analysis of California prosecutors' peremptory challenges against Black and Latinx prospective jurors. *See* Section II.A & B.

238 The authors used Thomson Reuters Westlaw to conduct the search of federal habeas petitions originating in California courts involving *Batson* claims. We conducted two methods of research to produce the most exhaustive list. First, we searched the Ninth Circuit Court of Appeals cases and used the search terms "*Batson*" and "2254" and "California." We included both published and unpublished opinions, and set the date range from January 1, 1993 until December 31, 2019. This search returned 174 opinions. Second, we ran a search based on the *Batson* citing references. We narrowed the citing references by using the search terms "2254" and "California" and limited the results to the Ninth Circuit between January 1, 1993 and December 31, 2019. After

cross listing all the cases, there were an additional 11 cases that were not includ ed in the first search. We recorded but did not count duplicates and opinions that mentioned but did not address *Batson* claims. Duplicates include opinions in which the case and the *Batson* claim were before the circuit more than once. Opinions that mentioned but did not address *Batson* claims include opinions that mentioned *Batson* in passing and those in which the claim was not preserved during trial or raised prop erly on appeal. Thus, we concluded that the Ninth Circuit decided 140 unique federal habeas petitions involving *Batson* claims originating in California state court during the relevant period.

239 Antiterrorism and Effective Death Penalty Act § 107, Pub. L. 104 132, 110 Stat. 1214, 1221 (1996).

240 *Currie v. McDowell*, 825 F.3d 603 (9th Cir. 2016); *Shirley v. Yates*, 807 F.3d 1090 (9th Cir. 2015); *Crittenden v. Chappell*, 804 F.3d 998 (9th Cir. 2015); *Williams v. Pliler*, 616 Fed. App'x 864 (9th Cir. 2015); *Pao Lo v. Kane*, 584 Fed. App'x 885 (9th Cir. 2014); *Castel lanos v. Small*, 766 F.3d 1137 (9th Cir. 2014); *Love v. Cate*, 449 Fed. App'x 570 (9th Cir. 2011); *Reynoso v. Hall*, 395 Fed. App'x 344 (9th Cir. 2010); *Ali v. Hickman*, 584 F.3d 1174 (9th Cir. 2009); *Paulino v. Harrison*, 542 F.3d 692 (9th Cir. 2008); *Green v. LaMarque*, 532 F.3d 1028 (9th Cir. 2008); *Calhoun v. Harrison*, 225 Fed. App'x 724 (9th Cir. 2007); *Kesser v. Cambra*, 465 F.3d 351 (9th Cir. 2006); *Currie v. Adams*, 149 Fed. App'x 615 (9th Cir. 2005); *Thomas v. Roe*, 138 Fed. App'x 936 (9th Cir. 2005); *Lewis v. Lewis*, 321 F.3d 824 (9th Cir. 2003); *Daniels v. Roe*, 53 Fed. App'x 476 (9th Cir. 2002); *McClain v. Prunty*, 217 F.3d 1209 (9th Cir. 2000); *Ricardo v. Rardin*, 189 F.3d 474 (9th Cir. 1999); *Turner v. Marshall*, 121 F.3d 1248 (9th Cir. 1997); *Johnson v. Vasquez*, 3 F.3d 1327 (9th Cir. 1993). Additionally, the Ninth Circuit found that California courts had committed error in other cases, but could not grant relief due to the AEDPA's highly deferential standard of review. *See, e.g.*, *Lewis v. Calderon*, 189 F. App'x 658, 659 (9th Cir. 2006) ("The issue in the context of this case is close and we may not have reached the same conclusion as the state court had we reviewed the record on direct appeal. The statutory limita tions on the scope of federal court review compel affirmance of the district court's denial of relief."); *Nieblas v. Rimmer*, 203 F. App'x 56, 57 (9th Cir. 2006) ("Though petitioner makes some colorable arguments against it, under the deferential standard we are required by AEDPA to apply, we cannot conclude that the state court made 'an unreasonable determination of the facts in light of the evidence presented' or other wise acted 'contrary to, or involved an unreasonable application of,' *Batson*.").

241 *Johnson v. Finn*, Nos. Civ. S 03 2063 JAM JFM P, Civ. S 04 2208 JM JFM P, 2012 WL 4050068, at *1 (E.D. Cal. Sept. 13, 2012); *Williams v. Runnels*, 640 F. Supp. 2d 1203 (C.D. Cal. 2009).

242 Compare the 2.1% *Batson* reversal rate in the California Supreme Court to the 15% reversal rate in the Ninth Circuit.

243 *See* 28 U.S.C. § 2254(b).

244 *Harrington v. Richter*, 562 U.S. 86, 103 (2011).

245 *Id.* at 102–03 (quoting *Jackson v. Virginia,* 443 U.S. 307, 332 n.5 (1979) (Stevens, J., concurring)).

246 *Woodford v. Visciotti,* 537 U.S. 19, 24 (2002) (internal citation omitted).

247 *Richter*, 562 U.S. at 97 98 (quoting 28 U.S.C. § 2254(d)). A state court decision is "contrary to" Supreme Court precedent if it "arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law" or arrives at a result "opposite to that reached by [the Supreme] Court" when confronted with facts "that are mate rially indistinguishable from a relevant Supreme Court precedent." *Williams v. Taylor*, 529 U.S. 362, 405 06 (2000). A state court engages in an "unreasonable application" of federal law if it "identifies the correct governing legal principle from the Supreme Court's decisions but unreasonably applies it to the facts of the prisoner's case." *Id.* at 413.

248 *Richter,* 562 U.S. at 101.

249 *Fernandez v. Roe,* 286 F.3d 1073, 1075 76 (9th Cir. 2002).

250 *Id.* at 1076.

251 *Id.* at 1077.

252 *Id.* (quoting *Wade v. Terhune*, 202 F.3d 1190, 1197 (9th Cir. 2000)).

253 *Id.* at 1080.

254 *Johnson v. California*, 545 U.S. 162, 168 (2005); *see supra* note 102 (explaining the gene sis of California's step one standard in *Wheeler*, 22 Cal. 3d at 280, and its demise in the United States Supreme Court's *Johnson* decision).

255 *Paulino v. Castro*, 371 F.3d 1083, 1090 (2004) (internal quotations and citations omit ted) (reiterating its holding that California's test "'is impermissibly stringent'" (quot ing *Wade*, 202 F.3d at 1997)).

256 *Johnson*, 545 U.S. at 168.

257 *Id.*

258 *See Shirley*, 807 F.3d at 1101, *as amended* (Mar. 21, 2016) ("The California Court of Appeal acted contrary to clearly established law when it based its prima facie analysis on the discredited, pre *Johnson,* standard articulated by the California Supreme Court. . . .") (internal citation and quotation marks omitted). The authors did not

identify any published court of appeal opinions post *Johnson* finding error at step one. After an extensive search, we found two unpublished step one reversals involving prosecutors' objections to defense strikes. *See People v. Gonzales*, 2012 WL 413868, at *10 13 (Cal. Ct. App. Feb. 8, 2012) (finding error at both steps one and three in a case involving a prosecutor's *Batson* objection to the defendant's strike of an Asian American juror); *People v. Nino*, 2007 WL 211011, at *8, *10 (Cal. Ct. App. July 24, 2007) (holding that the trial court erred "by incorrectly determining that no prima facie case of jury discrimination existed," and reversing without a remand because, based on the record, it was unreasonable to conclude that the prosecutor could provide reasons additional to those given at the first trial, which were "inade quate as a matter of law"). *See also Rhoades*, 8 Cal. 5th at 458 (Liu, J., dissenting) (ob serving that in the 14 years since *Johnson* was decided, the California Supreme Court has never found step one error).

259 *Kesser*, 465 F.3d at 353.

260 *Id*. at 353.

261 *Id*. at 354.

262 *Id*. at 354, 356.

263 *Id*. at 357.

264 *Id*.

265 *Id*. at 358.

266 *Id*. at 360.

267 *Id*. at 362.

268 *Id*. at 357.

269 *Id*. at 371.

270 *Castellanos*, 766 F.3d at 1140.

271 *Id*. at 1143.

272 *See People v. Castellanos*, No. B190581, 2007 WL 2660214, at *5 (Cal. Ct. App. Sept. 12, 2007).

273 *Castellanos,* 766 F.3d at 1148 49.

274 *Id*.

275 *Id*. at 1141 (internal quotation marks omitted).

276 *Id*. at 1148.

277 *Id*. at 1149.

278 *Id*.

279 *Id*. at 1150.

280 *Batson v. Kentucky*, 476 U.S. 79, 102 103 (1986) (Marshall, J., concurring).

281 *Id*. at 105.

282 *Id*. at 106.

283 *Id*.

284 *Id*.

285 *Id*.

286 *Id*.

287 Cheryl Staats et al., Kirwan Inst. for the Study of Race & Ethnicity, State of the Science: Implicit Bias Review 14 (2016), http://kirwaninstitute.osu.edu/wp con tent/uploads/2016/07/implicit bias 2016.pdf.

288 *See* Project Implicit, http://projectimplicit.net/ (last visited May 14, 2020). Proj ect Implicit was founded in 1998, and is an "international collaboration between researchers who are interested in implicit social cognition." *See About Us*, Project Implicit, http://projectimplicit.net/about.html (last visited May 14, 2020). Project Implicit has been collecting the results from Implicit Association Tests (IAT). *See Education: About the IAT,* Project Implicit, https://implicit.harvard.edu/implicit/iat details.html (last visited May 14, 2020). The project measures implicit attitudes and stereotypes on topics including race, gender, age, politics, and disability. *See* Project Implicit, https://implicit.harvard.edu/implicit/ (last visited May 14, 2020) (tests). Be tween 1998 and 2018, there were over 20 million visitors to the site. *See Tracking the Use of Project Implicit Data*, Project Implicit: Blog (May 30, 2018), https://implicit. harvard.edu/implicit/blog.html.

289 Caren Myers Morrison, *Negotiating Peremptory Challenges*, 104 J. Crim. L. & Crimi nology 1, 30 (2014). Morrison also explained that if lawyers are exercising strikes based on implicit bias, they "will have the double incentive of not losing the strike by admitting that race was a factor and the generally shared desire not to appear racially biased." *Id.* at 32.

290 *Id.* at 32.

291 *Id.*

292 *Id*. at 31.

293 *Id*. (citing *Batson*, 476 U.S. at 106 (Marshall, J., concurring)).

294 Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge Dominated Voir Dire, the Failed Promise of* Batson*, and Proposed Solu tions*, 4 Harv. L. & Pol'y Rev. 149, 150 (2010).

295 *Id.*

296 *Batson*, 476 U.S. at 96 (quoting *Avery v. Georgia*, 345 U.S. 559, 562 (1953)).

297 *Id*. at 98 99.

298 *Id*. at 102 03 (Marshall, J., concurring).

299 *Id*. at 106. At least a decade before *Batson*, legal scholarship began to focus on the role unconscious bias plays in juror attitudes and, in turn, the relationship between un conscious bias and peremptory challenges. *See Limiting the Peremptory Challenge*, *supra* note 58, at 1720 & n.25 (1977); *id*. at n.28 (discussing the role of social scientists in "identifying unconscious bias in jurors in important trials during the last decade").

300 *See* Gordon W. Allport, The Nature of Prejudice (1954) (studying the nature and roots of prejudice, and theorizing that prejudice causes discrimination); Birt L. Dun can, *Differential Social Perception and Attribution of Intergroup Violence: Testing the Lower Limits of Stereotyping Blacks*, 34 J. Personality & Soc. Psychol. 590 (1976) (finding that subjects reported observed behaviors as more violent when the individual per forming the behavior was Black than when he was White); H. Andrew Sagar & Janet Ward Schofield, *Racial and Behavioral Cues in Black and White Children's Perceptions of Ambiguously Aggressive Acts*, 39 J. Personality & Soc. Psychol. 590 (1980) (finding that both Black and White sixth graders rated aggressive behavior as meaner and more threatening when the individual performing the behavior was Black than when he was White).

301 Charles R. Lawrence III, *The Id, the Ego and Equal Protection: Reckoning with Uncon scious Racism*, 39 Stan. L. Rev. 317, 323 (1987).

302 *See* Brand, *supra* note 2, at 599.

303 *See generally* Joshua Correll et al., *The Police Officer's Dilemma: Using Ethnicity to Dis ambiguate Potentially Threatening Individuals*, 83 J. Personality &. Soc. Psychol. 1314

(2002); Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J. Personality & Soc. Psychol. 5 (1989); Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. Personality & Soc. Psychol. 876 (2004); Anthony G. Greenwald et al., *Targets of Discrimination: Effects of Race on Responses to Weapons Holders*, 39 J. Experimental Soc. Psychol. 399 (2003); Anthony Page, Batson*'s Blind Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. Rev. 155 (2005); B. Keith Payne, *Prejudice and Perception: The Role of Automatic and Controlled Processes in Misperceiving a Weapon*, 81 J. Personality & Soc. Psychol. 181 (2001).

304 Page, *supra* note 303, at 184.

305 Samuel R. Sommers & Michael J. Norton, *Race and Jury Selection: Psychological Perspec tives on the Peremptory Challenge Debate*, 63 Am. Psychologist 527, 533 (2008).

306 Page, *supra* note 303; Nilanjana Dashupta et al., *Automatic Preference for White Amer icans: Eliminating the Familiarity Explanation*, 36 J. Experimental Soc. Psychol. 316, 316 17 (2000) (finding that despite a decline in overt racism, "subtle and implicit forms of prejudice and discrimination remain pervasive").

307 Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 Seattle U. L. Rev. 795, 795 (2012).

308 Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post Ra cial Society*, 91 N.C. L. Rev. 1555, 1577 (2013).

309 Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 Calif. L. Rev. 945, 946 (2006).

310 *Id.* at 951.

311 Page, *supra* note 303, at 235; Sommers & Norton, *supra* note 305, at 533 (explaining that, in their study, "self report measures did not reflect the significant influence of race on peremptory challenge use").

312 Page, *supra* note 303, at 189. The term "schema" has been defined by social scientists to mean an "active organization of past reactions, or past experiences, which must always be supposed to be operating in any well adapted organic response." *Id.* at 189 n.158 (citing F.C. Bartlett, Remembering: A Study in Experimental and Social Psychology 201 (1932) (finding that memory is a process of reconstruction based on the socialization of the actor)). Schemas "serve as the basis for all human information processing, e.g. perception and comprehension, categorization and planning, recogni tion and recall, and problem solving and decision making." Ronald W. Casson, *Sche mata in Cognitive Anthropology*, 12 Ann. Rev. Anthropology 429, 430 (1983).

313 Allport, *supra* note 300, at 17 27.

314 Richard M. Shiffrin & Walter Schneider, *Controlled and Automatic Human Information Processing: Perceptual Learning, Automatic Attending, and a General Theory*, 84 Psychol. Rev. 127, 127 (1977).

315 *See, e.g.*, Mahzarin R. Banaji et al., *Implicit Stereotyping in Person Judgment*, 65 J. Per sonality & Soc. Psychol. 272, 278 (1993); Devine, *supra* note 303, at 6, 15; Patricia G. Devine & Margo J. Monteith, *Automaticity and Control in Stereotyping*, *in* Dual Process Theories in Social Psychology 339 60 (Chaiken & Trope eds., 1999); Anthony G. Greenwald & Mahzarin R. Banaji, *Implicit Social Cognition: Attitudes, Self Esteem, and Stereotypes*, 102 Psychol. Rev. 4, 15 (1995).

316 Greenwald & Krieger, *supra* note 309, at 948.

317 *Id.*

318 *Id.*

319 *Id.* at 951.

320 Devine, *supra* note 303, at 8 12 (using three studies to test automatic processes in sub jects' perceptions of the personality traits of African Americans).

321 *See About Us*, *supra* note 288.

322 Greenwald & Krieger, *supra* note 309, at 955.

323 *Id.*

324 *Id.* at 959 60; Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. Rev. 465, 471 (2010).

325 Greenwald & Krieger, *supra* note 309, at 951. Research has found that "those who belong to social groups deemed to be 'good' (e.g., . . . European Americans . . .) show strong preference for their own group." Kang & Lane, *supra* note 324, at 476.

326 Greenwald & Krieger, *supra* note 309, at 953.

327 *Id.*

328 *Id.* at 956, 957 tbl.1.

329 Elizabeth A. Phelps et al., *Performance on Indirect Measures of Race Evaluation Predicts Amygdala Activation*, 12 J. Cognitive Neuroscience 729, 730 (2000).

330 *Id.* at 732.

331 *Id.* at 733.

332 Lincoln Quillian & Devah Pager, *Estimating Risk: Stereotype Amplification and the Per ceived Risk of Criminal Victimization*, 73 Soc. Psychol. Q. 79, 82 (2010).

333 *Id.* at 95.

334 *See* Mark W. Bennett & Victoria C. Plaut, *Looking Criminal and the Presumption of Dan gerousness: Afrocentric Facial Features, Skin Tone, and Criminal Justice*, 51 U.C. Davis L. Rev. 745, 784 (2018) (finding that Afrocentric features affect the length of sentences); Jennifer L. Eberhardt et al., *Looking Deathworthy, Perceived Stereotypicality of Black De fendants Predicts Capital Sentencing Outcomes*, 17 Psychol. Sci. 383, 384 (2006) (finding that, in cases involving a White victim, the more stereotypically Black defendants are perceived to be, the more likely defendants will receive a death sentence); Eberhardt et al., *supra* note 303, at 889 (finding that police officers exhibit a pattern of attitudi nal bias that "associate[s] Blacks with the specific concept of crime"); David B. Mus tard, *Racial, Ethnic, and Gender Disparities in Sentencing: Evidence from the U.S. Federal Courts*, 44 J. L. & Econ. 285, 285, 300 12 (2001) (finding that federal judges imposed sentences on Black defendants that were 12% longer than those imposed on compa rable White defendants, and that Black defendants were "less likely to get no prison term when that option [was] available; less likely to receive downward departures; and more likely to receive upward adjustments"); Jeffrey J. Rachlinski et al., *Does Uncon scious Racial Bias Affect Trial Judges?*, 84 Notre Dame L. Rev. 1196, 1221 (2009) (finding that judges harbor the same kinds of implicit biases as the general American popula tion); Sommers & Norton, *supra* note 305, at 533 (finding that implicit biases result in the underrepresentation of Blacks on juries, in part because "prospective jurors were significantly more likely to be challenged when Black than when White").

335 Kang & Lane, *supra* note 324, at 473.

336 *See supra* note 334.

337 Kelly Welch, *Black Criminal Stereotypes and Racial Profiling*, 23 J. Contemp. Crim. Just. 276, 286 (2007).

338 Christopher S. Jones & Martin F. Kaplan, *The Effects of Racially Stereotypical Crimes on Juror Decision Making and Information Processing Strategies*, 25 Basic & Applied Soc. Psychol. 1, 9 (2003).

339 Mustard, *supra* note 334 at 306, 307 tbl.9 (finding also that "blacks and Hispanics are much less likely than whites to be assigned no prison term when that is an option").

340 *See* Jaihyun Park et al., *Implicit Attitudes Toward Arab Muslims and the Moderating Effects of Social Information*, 29 Basic & Applied Soc. Psychol. 35, 38 (2007) (comparing re actions to Arab and Muslim names and Eurocentric White names and finding implicit

bias in favor of White names); Wade C. Rowatt et al., *Patterns and Personality Correlates of Implicit and Explicit Attitudes Toward Christians and Muslims*, 44 J. for Sci. Study Religion 29, 35 36 (2005) (finding implicit prejudice towards Muslims based on comparing Muslim and Judeo Christian names with pleasant and unpleasant words as stimuli for the IAT).

341 Eberhardt et al., *supra* note 303, at 878.

342 *Id.* at 877.

343 Correll et al., *supra* note 303, at 1315 17 (describing the test procedure); *see also* Greenwald et al., *supra* note 303, at 401 03 (finding similar results).

344 Liana Peter Hagene, *Jurors' Cognitive Depletion and Performance During Jury Deliberation as a Function of Jury Diversity and Defendant Race*, 43 L. & Hum. Behav. 232, 232 (2019).

345 Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. Personality & Soc. Psychol. 597, 606 (2006).

346 *Id.*

347 *See* Samuel R. Sommers & Michael I. Norton, *Race Based Judgments, Race Neutral Justifications: Experimental Examination of Peremptory Use and the* Batson *Challenge Procedure*, 31 L. & Hum. Behav. 261 (2007).

348 *Id.* at 265 66.

349 *Id.*

350 *Id.* at 265.

351 *Id.* at 266.

352 *Id.*

353 *Id.* at 267.

354 *Id.*

355 *Id.* at 269.

356 *Id.*

357 Michael J. Norton et al., *Bias in Jury Selection: Justifying Prohibited Peremptory Challeng es*, 20 J. Behav. Decision Making 467, 475 (2007).

358 *Id*. at 473 74.

359 *Id*. at 470, 473. In the first study, participants were asked to make their strikes in two scenarios. *Id*. at 471. The researchers used the same juror profiles in each scenario, except that they switched the jurors' gender in the second scenario. *Id*.

360 *Id*. at 471.

361 *Id*.

362 *Id*. at 474. The researchers did not alter the gender of the jurors in the second study because their "interest was in exploring the impact of an explicit warning." *Id*. at 473.

363 *Id*. at 474.

364 *Id*.

365 *Id*. at 474.

366 *People v. Bryant*, 40 Cal. App. 5th 525, 544 (2019) (Humes, J., with Banke, J., concur ring).

367 *Id*. at 545. In Section IV.A, we discuss the various deficiencies in the *Batson* procedure that the author, Justice Jim Humes, enumerated.

368 *Id*. (quoting *Rice v. Collins*, 545 U.S. 333, 343 (2006) (Breyer, J., concurring)).

369 *People v. Smith*, 32 Cal. App. 5th 860, 883 (2019), *as modified on denial of reh'g* (Mar. 1, 2019), *review denied* (May 15, 2019) (Streeter, J., concurring).

370 *Id*. at 871.

371 *Id*.

372 *Id*. at 881 (quoting *People v. Snow*, 44 Cal. 3d 216, 225 (1987)).

373 *Id*. at 883 (citing *Snyder v. Louisiana*, 552 U.S. 472, 478 (2008)) (describing the "net result" of the opinion as a "'zero tolerance' policy'" for discriminatory strikes).

374 *Id*. at 883.

375 *Id*. at 884.

376 *Id*. at 883.

377 Brief for the Nat'l Dist. Attorneys Ass'n as Amicus Curiae Supporting Respondent, *Batson v. Kentucky*, 476 U.S. 79 (1976) (No. 84 6263), 1985 WL 669927, at *4.

378 *Id.*

379 *Batson*, 476 U.S. at 103 (Marshall, J., concurring).

380 *Id.* The defendant in *Miller El v. Dretke* was tried in Dallas before *Batson*. *Miller El v. Dretke* (*Miller El II*), 545 U.S. 231, 236 (2005). He presented evidence that the dis trict attorney's office "'had adopted a formal policy to exclude minorities from jury service,'" including a training manual containing an article "'outlining the reason ing'" for the policy. *Id*. at 264 (quoting *Miller El v. Cockrell* (*Miller El I*), 537 U.S. 322, 334 (2003)). The manual "instructed its prosecutors to exercise peremptory strikes against minorities: 'Do not take Jews, Negroes, Dagos, Mexicans or a member of any minority race on a jury, no matter how rich or how well educated.'" *Miller El I*, 537 U.S. at 334 35. The Court noted that the manual "remained in circulation until 1976, if not later, and was available at least to one of the prosecutors in Miller El's trial." *Id.* at 335.

381 NDAA, *Jury Selection Standards*, cmt., *in* National Prosecution Standards 206 (2d ed. 1991). The NDAA's current policy is found in NDAA, Nat'l National Prosecu tion Standards 74 (3d ed. 2010), https://ndaa.org/wp content/uploads/NDAA NPS 3rd Ed. w Revised Commentary.pdf. Standard 6 2.3 provides: "A prosecutor should not exercise a peremptory challenge in an unconstitutional manner based on group membership or in a manner that is otherwise prohibited by law." The commentary to this standard reminds prosecutors that they represent "all of the people in [their] ju risdiction[s]" and states that "it is important that none of those people be obstructed from serving on a jury because of their status as a member of a particular group." *Id.*

382 Nancy S. Marder, *The Jurisprudence of Justice Stevens: Justice Stevens, the Perempto ry Challenge, and the Jury*, 74 Fordham L. Rev. 1683, 1726 (2006). McMahon offered other advice such as the following: "'My experience, young black women are very bad. There's an antagonism. I guess maybe they're downtrodden in two respects. They are women and they're black . . . so they somehow want to take it out on somebody, and you don't want it to be you.'" Barry Siegel, *Storm Still Lingers over Defense Attorney's Training Video*, L.A. Times (Apr. 29, 1997), https://www.latimes.com/archives/la xpm 1997 04 29 mn 53632 story.html. The title refers to the fact that, after he left the District Attorney's Office, McMahon became a defense lawyer. *Id.*

383 The handout is available online through the American Civil Liberties Union. Batson *Justifications: Articulating Juror Negatives* [hereinafter Batson *Justifications*], https://

www.aclu.org/legal document/north carolina v tilmon golphin christina wal ters and quintel augustine batson (last visited May 13, 2020); *see also* Jacob Biba, *Did Prosecutors Use a "Cheat Sheet" to Strike Black Jurors in North Carolina Death Penalty Case?*, The Appeal (Sept. 4, 2018), https://theappeal.org/did prosecutors use a cheat sheet to strike black jurors in north carolina death penalty case/.

384 Batson *Justifications*, *supra* note 383.

385 Gilad Edelman, *Why Is It So Easy for Prosecutors to Strike Black Jurors?*, New Yorker (June 5, 2015), https://www.newyorker.com/news/news desk/why is it so easy for prosecutors to strike black jurors.

386 *See generally* Prosecutors Research Inst., Basic Trial Techniques for Prosecutors (2005), https://ndaa.org/wp content/uploads/basic_trial_techniques_05.pdf. The man ual's discussion of peremptory challenges informs prosecutors that they may strike whomever they wish provided the strikes are not made "in a discriminatory manner," and that when challenging "a member of a suspect or protected class, they should be prepared to provide the court with a logical reason." *Id.* at 9.

387 *See generally supra* note 2.

388 *See, e.g.*, *People v. Winbush*, 2 Cal. 5th 402, 436 37 (2017) (affirming that "a negative attitude toward law enforcement" or "a juror's negative experience with law enforce ment" is "a valid reason for exclusion" and citing earlier opinions holding the same); *id.* at 439 (stating that "[a] prospective juror's distrust of the criminal justice system is a race neutral basis for excusal" and citing earlier opinions holding the same); *id.* (observing that "[s]kepticism about the fairness of the criminal justice system to indi gents and racial minorities has also been recognized as a valid race neutral ground for excusing a juror" and citing earlier opinions holding the same).

389 *See, e.g.*, Nazgol Ghandnoosh, Sentencing Project, Race and Punishment: Racial Perceptions of Crime and Support for Punitive Policies 3 (2014), https://www. sentencingproject.org/wp content/uploads/2015/11/Race and Punishment.pdf; John Gramlich, *From Police to Parole, Black and White Americans Differ Widely in Their Views of Criminal Justice System*, Pew Res. Ctr. (May 21, 2019), https://www.pewresearch.org/ fact tank/2019/05/21/from police to parole black and white americans differ widely in their views of criminal justice system/.

390 *See, e.g.*, Gramlich, *supra* note 389.

391 *See generally* Equal Justice Initiative, *supra* note 1, at 3; Ghandnoosh, *supra* note 389, at 4.

392 *See Bryant*, 40 Cal. App. 5th at 546 (Humes, J., with Banke, J., concurring) (explaining that because of the "undeniable evidence" of racial bias in law enforcement and the

criminal legal system, "[r]eflexively allowing these strikes compounds institutional discrimination").

393 Henry Louis Gates, Jr., The Stony Road: Reconstruction, White Supremacy, and the Rise of Jim Crow xi (2019).

394 *Id.* at 2, 7 8; *see also* Michelle Alexander, The New Jim Crow 36 37 (anniversary ed. 2020); Equal Justice Initiative, *supra* note 1, at 9.

395 Equal Justice Initiative, *supra* note 1, at 9 ("By 1880, a backlash against black enfran chisement and political participation was already underway in the South, and the Jim Crow era of white supremacism, state terrorism, and apartheid had begun.").

396 Gates, *supra* note 393, at 14.

397 Bryan Stevenson, *A Presumption of Guilt*, N.Y. Rev. Books, July 13, 2017, at 8.

398 U.S. Const. amend. XIII.

399 Alexander, *supra* note 394, at 35.

400 *Id.* at 38. Both states and private businesses used convict labor. Michelle Alexander de scribes how, in Mississippi, convict labor became the foundation of the state's prison system. *Id.* at 39. "The state of Mississippi eventually moved from hiring convict labor to organizing its own convict labor camp, known as Parchman Farm." *Id.* Parchman Prison is still operating as a maximum security facility today. *See* W. Ralph Eubanks, *Mississippi's Notorious Parchman Prison Doesn't Have to Be a Death Machine*, CNN (Feb. 8, 2020), https://www.cnn.com/2020/02/08/opinions/parchman prison mississip pi deaths eubanks/index.html.

401 James D. Unnever & Francis Cullen, *Reassessing the Racial Divide in Support for Capital Punishment: The Continuing Significance of Race*, 44 J. Res. Crime & Delinq. 124, 128 (2007).

402 Equal Justice Initiative, Lynching in America: Confronting the Legacy of Ra cial Terror at 3 (3d ed. 2017), https://lynchinginamerica.eji.org/drupal/sites/default/ files/2019 08/lynching in america 3d ed 080219.pdf.

403 Isabel Wilkerson, The Warmth of Other Suns: The Epic Story of America's Great Migration 39 (2010).

404 *Id.*

405 *Id.* at 9.

406 Ken Gonzales Day, Lynching in the West, 1850 1935, at 46 (2006).

407 Unnever & Cullen, *supra* note 401, at 128.

408 Equal Justice Initiative, *supra* note 402, at 3.

409 Unnever & Cullen, *supra* note 401, at 128 (citing James Clarke, *Without Fear or Shame, Lynching, Capital Punishment, and the Subculture of Violence in the American South*, 28 British J. Pol. Sci. 269 (1998)).

410 Equal Justice Initiative, *supra* note 402, at 5.

411 Unnever & Cullen, *supra* note 401, at 128.

412 *Id*.

413 *Id*. at 148 ("This firmness of the racial divide in death penalty attitudes again leads us to suggest that it may be rooted in African Americans' shared history of racial oppression—epitomized by the use of lynchings as a mechanism of racial control in the South—that causes Blacks generally to be wary of the use of lethal action by the state.").

414 Elizabeth Hinton et al., Vera Inst., An Unjust Burden: The Disparate Treatment of Black Americans in the Criminal Justice System 2 (2018), https://www.vera.org/downloads/publications/for the record unjust burden racial disparities.pdf.

415 *Id*. at 3 (quoting Khalil Gibran Muhammad, The Condemnation of Blackness: Race, Crime, and the Making of Modern Urban America (2011)).

416 Alexander, *supra* note 394, at 49 50.

417 *Id*. at 50.

418 *Id*. at 59 60.

419 *Id*. at 71.

420 *Id*.

421 Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, Prison Pol'y Initiative (Mar. 24, 2020), https://www.prisonpolicy.org/reports/pie2020.html.

422 Hinton et al., *supra* note 414, at 1.

423 *Id*.

424 *Id*.

425 Sentencing Project, Report of the Sentencing Project to the United Nations Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia, and Related Intolerance 9 (2018), https://www.sentencingproject.org/publications/un report on racial disparities.

426 Alexei Jones, *Police Stops Are Still Marred by Racial Discrimination, Data Shows*, Prison Pol'y initiative (Oct. 12, 2018), https://www.prisonpolicy.org/blog/2018/10/12/policing/.

427 Sentencing Project, *supra* note 425, at 5.

428 *Id*.

429 *Id*. at 2.

430 *Id*.

431 *Id*. at 3.

432 Jones, *supra* note 426.

433 Amina Khan, *Getting Killed by Police Is a Leading Cause of Death for Young Black Men in America*, L.A. Times (Aug. 6, 2019), https://www.latimes.com/science/story/2019 08 15/police shootings are a leading cause of death for black men.

434 *Id.*

435 Sentencing Project, *supra* note 425, at 7 8.

436 *Id.*

437 Ghandnoosh, *supra* note 389, at 26.

438 Gramlich, *supra* note 389.

439 Unnever & Cullen, *supra* note 401, at 147 48.

440 *See*, *e.g.*, *id.* at 149 ("[W]ithin the African American community, executions are more likely to raise questions about whether justice has been served—whether the accused is truly guilty or, if guilty, whether a White offender would have received the same penalty.").

441 Gramlich, *supra* note 389.

442 Field Research Corp., Tabulations from a Survey of California Registered Voters About the Death Penalty and Life in Prison Without the Possibility of Parole 317 (2011), https://media.sacbee.com/smedia/2011/09/28/19/33/HSgPj.So.4.pdf.

443 Mark DiCamillo & Mervin Field, Support for Death Penalty Still Very Strong. But Increasing Preference for Life in Prison Without Parole for those Con victed of Serious Crimes 4 (2011), https://web.archive.org/web/20120529145007/http://www.field.com/fieldpollonline/subscribers/Rls2393.pdf.

444 Mona Lynch & Craig Haney, *Death Qualification in Black and White, Racialized Decision Making and Death Qualified Juries*, 40 L. & Pol'y 148, 157 (2018). The Berkeley Law Death Penalty Clinic has litigated challenges to death qualification on behalf of de fendants in four California counties based upon the disproportionate exclusion of African American prospective jurors. Information on file with the Berkeley Law Death Penalty Clinic.

445 *Id*.

446 *See, e.g*, *id.* (using data from surveys of Solano County, California, jury eligible respon dents to show that death qualification disproportionately excludes African Americans based on their opposition to the death penalty); Ann Eisenberg, *Removal of Women and African Americans in Jury Selection in South Carolina Capital Cases, 1997 2012*, 9 Ne. U. L.J. 299, 333 34 (2017) (finding that a majority of those Blacks removed for cause from South Carolina capital juries were excused because of their death penalty opposition, in comparison to Whites); Aliza Plenar Cover, *The Eighth Amendment's Lost Jurors*, 92 Ind. L.J. 113, 137 (2016) (finding, in a study of Louisiana capital juries, that Blacks were 1.8 times more likely to be removed based upon their opposition to the death penalty than Whites).

447 Both the United States and California Supreme Courts have held that, while not re quired, "death qualification" is constitutional. *See, e.g*, *Morgan v. Illinois*, 504 U.S. 719, 729 (1992); *Lockhart v. McCree*, 476 U.S. 162, 167 (1986); *Hovey v. Superior Court*, 28 Cal. 3d 1, 63 (1980). Although *Morgan*, 504 U.S. at 729, provides that death qualification is supposed to apply equally to "automatic" death penalty opponents and supporters, empirical evidence is to the contrary. Cause challenges are primarily used to remove jurors who voice opposition to, rather than support for, the death penalty. *See, e.g.*, Cover, *supra* note 446, at 133 34 (finding that "an average of 22%" of the jury was removed based upon death penalty opposition in contrast to "an average of 12.4%" of venire members who were excluded based upon their death penalty support).

448 *See* Lynch & Haney, *supra* note 444, at 157.

449 Gramlich, *supra* note 389. While there is significantly less empirical research compar ing multiple racial groups on this question, a 2002 survey revealed that both Blacks

and Latinx people were more likely than Whites to perceive the police as racially bi ased. Ghandnoosh, *supra* note 389, at 13; *see also* H. Peck, *Minority Perceptions of the Po lice: A State of the Art Review*, 38 Policing: An Int'l J. Police Strategies & Mgmt. 173, 173 (2015). *But see* Yuning Wu, *Race/Ethnicity and Perceptions of the Police: A Comparison of White, Black, Asian and Hispanic Americans*, 24 Policing & Soc'y 135, 148 (2014) (dis cussing a study conducted in Seattle, finding that Blacks are significantly more likely to experience police as biased, compared to Whites, Asians, and Latinx people, and finding that the latter three groups did not significantly differ from each other).

450 Gramlich, *supra* note 389.

451 Ghandnoosh, *supra* note 389, at 4.

452 *Id*. at 33.

453 Unnever & Cullen, *supra* note 401, at 146.

454 Jon Hurwitz & Mark Peffley, *Explaining the Great Racial Divide: Perceptions of Fairness in the U.S. Criminal Justice System*, 67 J. Pol. 762, 768 69 (2005).

455 *Id*. at 769.

456 Nat'l Ctr. for State Courts, How The Public Views The State Courts: A 1999 National Survey 7, 22 (1999), https://www.flcourts.org/content/down load/217619/1971660/publicop_natl.pdf.

457 Francis T. Cullen & Martha L. Henderson, *The Impact of Race on Perceptions of Criminal Injustice*, 25 J. Crim. Just. 447, 455 (1997).

458 *Id*.

459 John Hagan & Celesta Albonetti, *Race, Class, and the Perception of Criminal Injustice in America*, 88 Am. J. Soc. 329, 339 (1982).

460 *Id*. at 343.

461 *Id*.

462 Ronald Weitzer & Steven A. Tuch, *Perceptions of Racial Profiling: Race, Class, and Person al Experience*, 40 Criminology 435, 443 (2002).

463 Gramlich, *supra* note 389.

464 Peck, *supra* note 449, at 173.

465 Gramlich, *supra* note 389.

466 *Id.*

467 Rich Morin & Renee Stepler, *The Racial Confidence Gap in Police Performance*, Pew Res. Ctr. (Sept. 29, 2016), http://www.pewsocialtrends.org/2016/09/29/the racial confi dence gap in police performance/.

468 Ghandnoosh, *supra* note 389, at 29 (citing Ronald Weitzer & Steven A. Tuch, *Racially Biased Policing: Determinants of Citizen Perceptions*, 83 Soc. Forces 1009, 1017 (2005)).

469 *Id.*

470 *Id.*

471 Gramlich, *supra* note 389.

472 *Id.*

473 Ghandnoosh, *supra* note 389, at 29 (citing Jon Hurwitz & Mark Peffley, Justice in America: The Separate Realities of Blacks and Whites 41 42 (2010)).

474 Weitzer & Tuch, *supra* note 462, at 443. The study revealed just how common it is for young African Americans to be racially profiled by the police: "nearly three quarters (72.7%) of black men in the 18 34 year age group claiming to have been victimized by racial profiling at least once." *Id.* Further, "young black women—although much less likely than young black men to report being stopped—are 13 times more likely than young white women to say that they have been stopped because of their race." *Id.*

475 *Id.*

476 Morin & Stepler, *supra* note 467.

477 Ghandnoosh, *supra* note 389, at 29.

478 In the past several years, the killings of Michael Brown and Eric Garner, for example, catalyzed a national conversation about race and policing. *See* Katie Nodjimbadem, *The Long, Painful History of Police Brutality in the U.S.*, Smithsonian (July 27, 2017), https://www.smithsonianmag.com/smithsonian institution/long painful histo ry police brutality in the us 180964098/. However, police violence against African Americans and Black communities had its origins in colonial "slave patrols." *See, e.g.*, Chelsea Hansen, *Slave Patrols: An Early Form of American Policing*, Nat'l L. Enforce ment Museum: Blog: On the Beat (July 10, 2019), https://lawenforcementmuseum. org/2019/07/10/slave patrols an early form of american policing/. As we published this report, protests were taking place across the country in response to the po lice killing of George Floyd. *See, e.g.*, Dionne Searcey & David Zucchino, *Protests Swell*

Across America as George Floyd Is Mourned Near His Birthplace, N.Y. Times (June 6, 2020), https://www.nytimes.com/2020/06/06/us/george floyd memorial protests.html.

479 Morin & Stepler, *supra* note 467.

480 *Id.*

481 *Id*.

482 *Id*. The study did not have participants name just one factor that might have motivat ed the protests, which explains why the percentages add up to greater than 100%.

483 Lawrence D. Bobo & Devon Johnson, *A Taste for Punishment: Black and White Amer icans' Views on the Death Penalty and the War on Drugs*, 1 Du Bois Rev.: Soc. Sci. Res. on Race 151, 151 (2004) (discussing a 2004 study which explained that as "a result of beliefs about the extent of racial bias" in the criminal legal system, African Americans are "consistently less punitive than whites").

484 Ghandnoosh, *supra* note 389, at 8 9.

485 *Id*. at 9.

486 *Id.*

487 *Id.* at 3.

488 *Id*. at 10. Specifically, in 2008, Blacks "were 78% more likely than whites to experience household burglary, [and] 133% more likely to experience motor vehicle theft." *Id*. In 2011, the "homicide rate for blacks was 6.2 times higher than for whites." *Id*. at 11. In 2012, "blacks were 66% more likely than whites to be victims of sexual assault, rob bery, aggravated assault, and simple assault." *Id*. at 10.

489 Gramlich, *supra* note 389; *see also* Ghandnoosh, *supra* note 389, at 12 ("African Amer icans are more likely than whites to report dissatisfaction with their level of safety: in 2003, 43% of Blacks said they were 'very satisfied' about their physical safety in con trast to 59% of Hispanics, and 63% of whites.").

490 Ghandnoosh, *supra* note 389, at 6.

491 *Id*.

492 *See* Alexander, *supra* note 394, at 13; Bobo & Johnson, *supra* note 483, at 153 (observ ing that "sociologist Loic Wacquant characterizes current rates of Black incarceration and changes in policing practices and policy as tantamount to a new 'peculiar institu tion' or fourth stage of American racial oppression aptly termed the 'carceral state'")

(internal citation omitted).

493 *See* Section I.C.3. County district attorney offices provided the training materials in response to requests by the American Civil Liberties Union of Northern California ("ACLU NC") pursuant to the California Public Records Act ("CPRA") requests. The materials are on file with the Berkeley Death Penalty Clinic. All citations to the train ing materials use the format "[Name of] County, at [page number]" unless otherwise noted.

494 *See* Section III.A.

495 *See* Section I.C.2; *People v. Wheeler*, 22 Cal. 3d 258 (1978).

496 *Wheeler*, 22 Cal. 3d at 276. Group bias stands in contrast to specific bias, which is "a bias relating to the particular case on trial or the parties or witnesses." *Id.*

497 *Id.* at 276 77.

498 *Id.* at 268 (quoting *Thiel v. S. Pac. Co.*, 328 U.S. 217, 220 (1946)).

499 *Batson*, 476 U.S. at 87 (citing *Thiel,* 328 U.S. at 223 24).

500 *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 145 n.19 (1994) (quoting *Thiel*, 328 U.S. at 220).

501 *See, e.g.*, Santa Clara Cty. Dist. Attorney's Office, *The Inquisitive Prosecutor's Guide* 4 5, 73 79 (June 10, 2016) [hereinafter *The Inquisitive Prosecutor's Guide*]. This edition of the bi weekly publication was obtained through the ACLU NC's CPRA request. Although the guide is a Santa Clara County publication, the manual is likely used by prosecutors statewide as it is available on a password protected portal on the CDAA website. *See also* San Francisco County, at 11; Orange County, at 8 9; San Diego County, at 112 (listing "occupations sympathetic to defendants" and "social workers," "teach ers," "scientists," "cosmetologists/barbers," and "bartenders" as "BAD PEOPLE").

502 *See, e.g.*, *The Inquisitive Prosecutor's Guide*, *supra* note 501, at 73 79; San Francisco Coun ty, at 11; Orange County, at 8 9; San Diego County, at 112.

503 Alameda County, at 78 (explaining that a valid reason for dismissing a juror is that a "Juror (or Spouse of Juror) is Employed In a Job or Engages in Activities That Reflect an Orientation Towards Rehabilitation and Sympathy for the Defendants").

504 *See Batson*, 476 U.S. at 87; *Wheeler*, 22 Cal. 3d at 276 77.

505 Orange County, at 412.

506 *Id.*

507 San Diego County, at 106.

508 *Id*. at 111.

509 Orange County, at 288.

510 *Id*. at 406.

511 *Id*. at 198.

512 Ventura County, at 28.

513 San Diego County, at 112.

514 *See, e.g.*, Tulare County, at 13; Ventura County, at 70 71, 176; Orange County, at 563; Monterey County, at 7; Riverside County, at 259; Los Angeles County, at 7.

515 *See Batson*, 476 U.S. at 96; *Winbush*, 2 Cal. 5th 402, 436 37 (2017); *see supra*, note 388 (discussing the California Supreme Court's well established precedent that a juror's negative experience with or negative attitude toward law enforcement as well as a juror's skepticism about the fairness of the criminal legal system are race neutral rea sons for a peremptory challenge).

516 Drew Desilver, *Black Unemployment Rate Is Consistently Twice that of Whites,* Pew Res. Ctr. (Aug. 21, 2013), https://www.pewresearch.org/fact tank/2013/08/21/through good times and bad black unemployment is consistently double that of whites/.

517 Lincoln Quillian et al., *Meta Analysis of Field Experiments Shows No Change in Racial Discrimination in Hiring over Time*, 114 Proceedings Nat'l Acad. Sci. 10870, 10871 (2017).

518 Am. Psychological Ass'n, Stress and Health Disparities: Contexts, Mechanisms, and Interventions Among Racial/Ethnic Minority and Low Socioeconomic Sta tus Populations 13 14 (2017), https://www.apa.org/pi/health disparities/resources/stress report.pdf.

519 *Id*. at 15.

520 Katherine J. Bies et al., Stanford Criminal Justice Ctr., Stuck in the '70s: The Demographics of California Prosecutors 10 (2015), https://law.stanford.edu/wp content/uploads/2015/08/Stuck in the 70s Final Report.pdf.

521 Press Release, Nat'l Ass'n for Law Placement, New Public Service Attorney Salary Fig ures from NALP Show Slow Growth Since 2004, at 3 (July 9, 2018), https://www.nalp.org/uploads/PSASR_7 9 18_FINAL.pdf.

522 Tulare County District Attorney Job Posting, Gov't Jobs, https://www.governmentjobs.com (last visited Apr. 13, 2020) (search job title field for "district attorney" and search city field for "Tulare, CA").

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524 Robert J. Smith et al., *Implicit White Favoritism in the Criminal Justice System,* 66 Ala. L. Rev. 871, 878 (2015). *See also* Greenwald & Krieger, *supra* note 309, at 955 57; John T. Jost et al., *A Decade of System Justification Theory: Accumulated Evidence of Conscious and Unconscious Bolstering of the Status Quo*, 25 Pol. Psychol. 881, 889 90 (2004).

525 Smith et al., *supra* note 524, at 895.

526 Page, *supra* note 303, at 196.

527 *Id*. at 195 96.

528 *Id*. at 198 (quoting Marilynn B. Brewer, *The Psychology of Prejudice: Ingroup Love or Out group Hate?*, 55 J. Soc. Issues 429, 438 (1999)).

529 Monterey County, at 21.

530 San Diego County, at 128, 178, 181.

531 Orange County, at 406.

532 *Id*. at 447.

533 *Id*. at 326.

534 *Id*.

535 Ventura County, at 129.

536 *Id*. at 154.

537 *See generally* Page, *supra* note 303, at 177, 177 n.97 (explaining that attorneys often strike jurors based on "a hunch, instinct, or gut feeling," which, in fact, is the result of implicit bias, but the attorney "will neither know what the reason actually was nor even know that she does not know").

538 Timothy D. Wilson, Strangers to Ourselves: Discovering the Adaptive Uncon scious 50 (2002).

539 *Id*. at 53.

540 *Id*.

541 Page, *supra* note 303, at 212 (quoting Mary E. Wheeler & Susan T. Fiske, *Controlling Racial Prejudice: Social Cognitive Goals Affect Amygdala and Stereotype Activation*, 16 Psychol. Sci. 56, 57 (2005).

542 *See* Alexander, *supra* note 394, at 147 ("Numerous studies have shown that prosecutors interpret and respond to identical criminal activity differently based on the race of the offender."); *see also* Page, *supra* note 303, at 190 (citations omitted) ("[P]eople's conscious (or explicit) attitudes and their unconscious (or implicit) attitudes (or associations, or beliefs) are often different, or to use the psychological term, dissociated.").

543 *See* Greenwald & Banaji, *supra* note 315, at 4; *see also* Anthony G. Greenwald et al., *A Unified Theory of Implicit Attitudes, Stereotypes, Self Esteem and Self Concept*, 109 Psychol. Rev. 3 (2002).

544 Wilson, *supra* note 538, at 54.

545 *Id*.

546 Page, *supra* note 303, at 220.

547 *See* Bennett & Plaut, *supra* note 334, at 785 (stating that "repeated studies" find that "Blacks with darker skin tones and stronger Afrocentric facial features 'activate automatic associations with negative behavioral stereotypes of Black men, such as aggression, violence, and criminality'"); *see also* Page, *supra* note 303, at 227 ("A prosecutor who sees a potential juror with messy hair as similar to herself may attribute the curious hairstyle to windy conditions (transient, external) whereas if she sees the potential juror as dissimilar she may attribute it to a slovenly character (stable, internal).").

548 *Batson*, 476 U.S. at 106 (Marshall, J., concurring).

549 San Francisco County, at 58.

550 *The Inquisitive Prosecutor's Guide, supra* note 501, at 63, 64.

551 Orange County, at 325.

552 *Id*. at 437.

553 *Id*. at 326.

554 San Diego County, at 6.

555 Page, *supra* note 303, at 228.

556 *Id*.

557 *Id*.

558 *Id*.

559 Devine, *supra* note 303, at 7 8; Eberhardt et al., *supra* note 334, at 881, 883, 885 87.

560 L. Song Richardson, *Arrest Efficiency and the Fourth Amendment*, 95 Minn. L. Rev. 2035, 2062 (2011).

561 Bennett & Plaut, *supra* note 334, at 786 (citing Sagar & Schofield, *supra* note 300, at 596).

562 Trina Jones & Kimberly Jade Norwood, *Aggressive Encounters & White Fragility: Decon structing the Trope of the Angry Black Woman*, 102 Iowa L. Rev. 2017, 2049 (2017).

563 Smith & Levinson, *supra* note 307, at 819.

564 *Id.*

565 *See, e.g.*, *People v. Lenix*, 44 Cal. 4th 602, 613 (2008) ("A prospective juror may be excused based upon facial expressions, gestures, hunches, and even for arbitrary or idiosyncratic reasons."); *People v. Gutierrez*, 28 Cal. 4th 1083, 1125 (2002) ("Hostile looks from a pro spective juror can themselves support a peremptory challenge"); *see* Sections II.A, II.B (discussing the authors' study of California appellate opinions in *Batson* cases); Semel, *supra* note 227, at 342 46 (citing cases and studies); *id.* at 343 (commenting that "*Bat son* jurisprudence is littered with federal and state court decisions upholding demean or based strikes").

566 Page, *supra* note 303, at 224 25.

567 *Id*. at 225.

568 *See, e.g.*, *Kesser v. Cambra*, 465 F. 3d 351, 364 (9th Cir. 2006) (finding that the prosecutor's reason was not race neutral where he struck a Native American juror for being "misty" because she "'teared up' when talking about her daughter's molestation"); *Clayton v. State*, 341 Ga. App. 193, 199 (2017) ("The potential iconoclasm of having gold teeth does not negate its usage in American culture as a stereotypical proxy for (or association with) the African American race. Under these circumstances, striking the African Amer ican juror because he had a full set of gold teeth cannot be said to be race neutral.").

569 *See People v. Silva*, 25 Cal. 4th 345, 385 86 (2001).

570 GR 37(i).

571 *Id*.

572 *Inquisitive Prosecutor's Guide*, *supra* note 501, at 15.

573 *Batson*, 476 U.S. at 106 (Marshall, J., concurring) (internal citation omitted).

574 Orange County, at 596.

575 *Id*. at 612.

576 San Diego County, at 110.

577 Orange County, at 32.

578 *Id*. at 35.

579 Los Angeles County, at 44.

580 San Francisco County, at 57.

581 Los Angeles County, at 44.

582 San Francisco County, at 46 (emphasis added).

583 *Id*.

584 *Id*. at 47 55, 58.

585 *Id*. at 47 56.

586 *Id*. at 49.

587 *The Inquisitive Prosecutor's Guide*, *supra* note 501, at 4 6, 51 80.

588 *Id*.

589 *Id*. at 71.

590 *Id*. at 79.

591 *Id*. at 71 72.

592 *Batson*, 476 U.S. at 96 (quoting *Avery*, 345 U.S. at 562).

593 *See, e.g.*, Orange County, at 74 75; San Mateo County, at 208 09; San Francisco County, at 10 11.

594 Orange County, at 74 75

595 *Id*.

596 Chris C. Goodman, *Shadowing the Bar: Attorneys' Own Implicit Bias*, 28 Berkeley La Raza L.J. 18, 31 (2008).

597 *Id*. at 31 32.

598 *Id*. at 31.

599 San Francisco County, at 34.

600 San Diego County, at 174.

601 *Miller El II*, 545 U.S. at 241 42.

602 *Id*. at 250.

603 *Id*. Other courts and individual judges have been critical of the reliance on the number of seated jurors in the cognizable group as a basis for denying a *Batson* motion, reason ing, for example, that "a prosecutor who intentionally discriminates against a prospec tive juror on the basis of race can find no refuge in having accepted others [*sic*] veni repersons of that race for the jury." *Holloway v. Horn*, 355 F.3d 707, 729 (3d Cir. 2004). Section III.A.3 discusses Justice Jon Streeter's recent concurring opinion in *People v. Smith*, observing that courts have placed "too much significance" on the "prose cutor's willingness to pass the panel with one or two" jurors of the same race as the defendant. 32 Cal. App. 5th 860, 881 (2019), *as modified on denial of reh'g* (Mar. 1, 2019), *review denied* (May 15, 2019) (Streeter, J., concurring). Justice Streeter concluded that this undue emphasis "provide[s] an easy means of justifying a pattern of unlawful discrimination which stops only slightly short of total exclusion." *Id*. (internal citation and quotation marks omitted).

604 *See, e.g.*, *People v. Lomax*, 49 Cal.4th 530, 576 (2010) ("Acceptance of a panel containing African American jurors 'strongly suggests that race was not a motive' in the challeng es of an African American panelist.") (quoting *People v. Lenix*, 44 Cal. 4th at 629).

605 Marin County, at 27. Although this is an Alameda County training document, the Marin County District Attorney's Office included the material in response to the ACLU NC CPRA request.

606 Marin County, at 44.

607 Orange County, at 7.

608 Ventura County, at 147.

609 *See* Bellin & Semitsu, *supra* note 2, at 1104 ("Unfortunately, any attorney smart enough to pass a bar exam can easily circumvent the comparative analysis pitfall by 'pack aging' additional characteristics in a way that makes it statistically impossible that another individual will have an identical response").

610 San Francisco County, at 34.

611 *See* Bellin & Semitsu, *supra* note 2, at 1104 06.

612 *Foster v. Chatman*, 136 S. Ct. 1737, 1748 (2016) (using this phrase to describe the prose cutor's 11 reasons for striking a Black juror).

613 *People v. Smith*, 4 Cal. 5th 1134, 1157 58 (2018).

614 *See People v. Armstrong*, 6 Cal. 5th 735 (2019) (Liu, J., with Cuéller and Perluss, J.J., dissenting) (citing *Smith* and criticizing the majority's failure to examine each of the prosecutor's eight reasons for striking one of the jurors); *People v. Hardy*, 5 Cal. 5th 56, 110 11 (2018) (Liu, J., dissenting) (quoting *Foster* and criticizing the majority's failure to examine the prosecutor's "'laundry list'" of six reasons).

615 San Francisco County, at 57.

616 *Id.*

617 *Id.* at 58 (listing "Soft spoken"; "Long hair"; "Unkempt/poorly groomed"; "Frowning"; "Tentative/low keyed"; "Inappropriate laughter"; "Hostile"; "Hesitant"; "Cavalier"; "Looked away from prosecutor"; "Smiled at defendant"; "Fidgety"; "Nervous"; "Up set"; "Defensive"; "Tired"; "Overweight"; and "Weird" as acceptable attributes for demeanor based challenges).

618 *Id.* at 58 59. With regard to the latter approach, five years ago, a California appellate court held that preference for another juror is no different than an assertion of good faith or denial of a discriminatory motive; this justification "is, in effect, no reason at all." *People v. Cisneros*, 234 Cal. App. 4th 111, 121 (2015) (citing *Batson*, 476 U.S. at 97 98). *Id.* (explaining that "in each instance . . . the prosecutor elected to strike a prospective male juror rather than one of the many prospective female jurors then seated in the jury box").

619 San Francisco County, at 45.

620 *See People v. Wheeler*, 22 Cal. 3d 258 (1978); *Batson v. Kentucky*, 476 U.S. 79 (1986).

621 *People v. Silva*, 25 Cal. 4th 345, 385 86 (2001); *People v. Fuentes*, 54 Cal. 3d 707 (1991).

622 *Fuentes*, 54 Cal. 3d at 712; *id.* at 722 (Mosk, J., concurring).

623 *Silva*, 25 Cal. 4th at 354.

624 *Harris*, 57 Cal. 4th at 885 (Liu, J., concurring) (quoting *Silva*, 25 Cal. 4th. at 375).

625 *People v. Gutierrez*, 28 Cal. 4th 1083, 1175 (2002) (Liu, J., concurring).

626 *Id*. at 1156.

627 *Id*. at 1157.

628 *Harris*, 57 Cal. 4th at 890 (Liu, J., concurring).

629 *Gutierrez*, 2 Cal. 5th at 1171 72 (majority opinion).

630 *Id*. at 1168, 1171.

631 *Id*. at 1172. Nothing in the majority opinion suggests that the court has abandoned its "reflexive deference" approach. *See id*. at 1172 (stating, "[W]e . . . typically afford defer ence to a trial court's *Batson*/*Wheeler* rulings . . . ."). On the contrary, in *People v. Arm strong*, the court deferred to the trial judge's credibility determination, finding that he had "engaged in a reasoned examination of Armstrong's showing in light of the record . . . ." 6 Cal. 5th 735, 768, 777 78 (2019). The dissent disagreed as to struck Juror E.W. *Id*. at 802 05 (Liu, J., with Cuéllar and Perluss, J.J., dissenting).

632 *Johnson v. California*, 545 U.S. 162, 168 (2005).

633 *People v. Turner*, 42 Cal. 3d 711, 719 20 (1986) (holding that the defendant established a prima facie showing where, over his objection, the prosecutor had peremptorily challenged the only two Black prospective jurors in the box, and later struck the only other African American called to the box).

634 For opinions by the Ninth Circuit, *see e.g.*, *Wade v. Terhune*, 202 F.3d 1190, 1197 (9th Cir. 2000) ("California courts in following the 'strong likelihood' language of *Wheeler* are not applying the correct legal standard for a *prima facie* case under *Batson*."); *Fernan dez v. Roe,* 286 F.3d 1073, 1077 (9th Cir. 2002) (citing *Wade*, and declining to defer to the California appellate court because it applied the wrong test at step one); *Paulino v. Castro*, 371 F.3d 1083, 1090 (2004) (citing *Wade* and *Fernandez*, and declining to defer to the California appellate court because it applied the wrong test at step one).

635 *People v. Howard*, 1 Cal. 4th 1132, 1154, 1202 (1992) (in bank) (Kennard, J., concurring and dissenting).

636 *Id.* at 1207 (Kennard, J., concurring and dissenting) (citing *Turner*, 42 Cal. 3d at 719); *see Batson*, 476 U.S. at 105 (Marshall, J., concurring); *see also City of Seattle v. Erickson*, 398 P.3d 1124, 1126 (Wash. 2017) (en banc) (holding that when the prosecutor exercises a peremptory challenge against the sole African American in the venire, the trial court must find a prima facie showing of discrimination).

637 *Howard*, 1 Cal. 4th at 1207 (Kennard, J., concurring and dissenting).

638 *People v. Carasi*, 44 Cal. 4th 1263 (2008).

639 *People v. Scott*, 61 Cal. 4th 363, 384 (2015).

640 *Carasi*, 44 Cal. 4th at 1292 93. *See People v. Rhoades*, 8 Cal. 5th 393, 428 29 (2019) (ex plaining that, in deciding cases tried before *Johnson*, the court will "'review the record independently to determine whether the record supports an inference that the prose cutor excused a juror on a prohibited discriminatory basis'" (quoting *People v. Kelly*, 42 Cal. 4th 763, 779 (2007)) (citing other cases endorsing this approach)).

641 *Carasi*, 44 Cal. 4th at 1291, 1294 95.

642 *Id.* at 1319, 1321 (Kennard, J., concurring and dissenting).

643 *Id*. at 1318.

644 *Id*. at 1321. *Carasi* also exemplifies the layers of judicial wrangling that characterize the court's step one opinions. None of the complexities are warranted given the extremely low threshold set by *Batson* and affirmed in *Johnson*. Here, the majority's dissection of the pattern of strikes against women required Justice Kennard to respond by explain ing how the prosecutor temporarily (and strategically) accepted panels of jurors with women in them. *Id*. at 1320 21. Justice Kennard then resorted to a flawed legal tech nique to reach the same conclusion: she reviewed the struck jurors' answers on their questionnaires and during voir dire "to see whether those answers suggest a reason for the prosecutor's peremptory challenges." *Id*. at 1321. As we discuss immediately below, Justice Kennard's reliance on speculation at step one, an approach the court employed before *Johnson* and continues to utilize, cannot be reconciled with *Johnson*'s holding.

645 *Johnson*, 545 U.S. at 170.

646 *Rhoades*, 8 Cal. 5th at 458 (2019) (Liu, J., dissenting) (quoting *People v. Harris*, 57 Cal. 4th 804, 864 (2013) (Liu, J., concurring)).

647 *Id*. at 456.

648 *Id*. at 460 61.

649 *Id*. at 457, 460 61 (quoting *Johnson*, 545 U.S. at 165, 173).

650 *Id*. at 459 60. Justice Liu also found that the majority exacerbated its error at step one by disregarding *Johnson*'s prohibition against speculation—positing reasons the prosecution might have removed jurors, rather than confining its analysis to the expla nations actually given. *Id*. at 461 66. He also criticized the majority's rewriting of its historical unwillingness to engage in comparative juror analysis at step one, rather than forthrightly overruling its precedent. *Id*. at 468 69.

651 *Id*. at 458.

652 *Id*.

653 *Id*.

654 *Id*. at 470.

655 *Johnson*, 545 U.S. at 172.

656 *Id*.

657 *Id*. (quoting *Paulino*, 371 F.3d at 1090).

658 *Id*. at 171.

659 *See Chism*, 58 Cal. 4th 1266, 1352 (2014) (Liu, J., concurring and dissenting); *Harris*, 57 Cal. 4th at 890 (Liu, J., concurring).

660 *Harris*, 57 Cal. 4th at 863 (Liu, J., concurring).

661 *Id*. at 834 (majority opinion).

662 *Id*.

663 *Id*.

664 *Id*. at 835 38.

665 *Id*. at 864 (Liu, J., concurring).

666 *Id*. at 880 82 (quoting *Johnson*, 545 U.S. at 172) (citing *People v. Clark*, 52 Cal. 4th 856, 907 (2011) (holding that there was no prima facie showing because "the record of voir

dire suggests race neutral reasons for excusing each of the four jurors in question")); *People v. Hartsch*, 49 Cal. 4th 472, 487 89 (2010) (providing race neutral reasons to justify four of the first five strikes against Black jurors); *People v. Hoyos*, 41 Cal. 4th 872, 900 (2007), *abrogated on other grounds by People v. McKinnon*, 52 Cal. 4th 610 (2011) (internal citations and quotation marks omitted) (concluding that affirmance is war ranted where "the record suggests grounds upon which the prosecutor might reason ably have challenged the jurors in question").

667 *Id.* at 872.

668 *Id.* at 873 (quoting *Johnson*, 545 U.S. at 172).

669 *Id.* at 880.

670 *People v. Reed*, 4 Cal. 5th 989, 998 (2018); *id.* at 1020 (Liu, J., dissenting).

671 *Id.* at 998 (majority opinion).

672 *Id.* at 1000 03.

673 *Id.* at 1020 28 (Liu, J., dissenting).

674 *Id.* at 1021 (Liu, J., dissenting). Justice Kruger dissented separately "for the reasons expressed in Justice Liu's dissenting opinion." *Id.* at 1031 (Kruger, J., dissenting). As to the court's inconsistent application of its precedent, Justice Liu first pointed out that the court's consideration of the factors in the jury selection that occurred after the *Batson* motion "is at odds" with its holding that "'the question at the first stage concerning the existence of a prima facie case depends on consideration of the entire record of voir dire *as of the time the motion was made. . . .*'" *Id.* at 1021 (quoting *Scott*, 61 Cal. 4th at 384) (citing *Lenix*, 44 Cal. 4th at 624).

675 *Id.* at 1023.

676 *Id.* at 1025 28.

677 *Id.* at 1001 (majority opinion).

678 *Id.* (quoting *Harris*, 57 Cal. 4th at 836).

679 *Id.* at 1026 (Liu, J., dissenting). Justice Liu also criticized the inconsistency in the majority's reliance on a comparative juror analysis at the first *Batson* step for purposes of bolstering its decision given the court's "prior statements that comparative juror analysis in evaluating hypothesized reasons at stage one 'is inappropriate' (citation omitted) or 'has little or no use' (citation omitted)." *Id.* at 1025 26.

680 *Id*. at 1027 28 (quoting *Johnson*, 545 U.S. at 173). Justice Liu further explained that the relevant comparison is not the one the majority selected, i.e., total number of African Americans in the venire compared to the total number the prosecution struck. *Id*. at 1022 23. Rather, it is the total number of African Americans the prosecutor could have peremptorily challenged because they were seated in the box compared to the total number he excused. *Id.* Of this group, the prosecutor excused seven out of 10 African Americans, which supports, rather than diminishes, the inference of discrimination. *Id*. at 1023.

681 *People v. (Joe Edward) Johnson*, 8 Cal. 5th 475, 507 09 (2019).

682 *Id*. at 481, 510; *id*. at 528 29 (Liu, J., dissenting); *id*. at 536 (Cuéller, J. with Liu, J., dis senting).

683 *Id*. at 482 83 (majority opinion); *id*. at 529 (Liu, J., dissenting).

684 *Id*. at 503 (majority opinion).

685 *Id*.

686 *Id*. at 503 04.

687 *Id*. at 529 (Liu, J., dissenting). The prosecutor used 60% of those strikes against Black jurors and 34% against non Black jurors in the box. *Id*.; *see also id*. 504 06 (majority opinion) (describing the sequence of peremptory challenges).

688 *Id*. at 504 06 (majority opinion).

689 *Id*. at 505.

690 *Id*.

691 *Id*. 506.

692 *Id*. at 508 509.

693 *Id*.

694 *Id*. at 546 (Cuéller, J., with Liu, J., dissenting).

695 *Id*. at 536.

696 *Id*. at 536 37.

697 *Id*. at 546.

698 *Id.*

699 *Id*. at 528 (Liu, J., dissenting).

700 *Id*. at 528 29.

701 *Id*. at 536 (quoting *Harris*, 57 Cal. 4th at 866).

702 *Id*. at 535 36 (citing *Batson*, 476 U.S. at 85, 87) (also citing *Flowers v. Mississippi*, 139 S. Ct. 2228, 2238 39 (2019); *Powers v. Ohio*, 499 U.S. 400, 409 (1991)).

703 *Id*. at 535 (quoting *Harris*, 57 Cal. 4th at 865).

704 *See Hernandez v. New York*, 500 U.S. 352, 359 (1991) (plurality opinion) (deciding that where the trial court does not rule on the prima facie showing, but the proponent offers reasons for the strike—whether solicited or volunteered—and the court then rules on the ultimate question, the step one ruling is moot); *Scott*, 61 Cal. 4th at 414 15 (Liu, J., with Kruger, J., concurring) (citing cases); *People v. Howard*, 42 Cal. 4th 1000, 1034 (2008) (Kennard, J., with Moreno, J., concurring and dissenting) (opining that the majority had failed to follow the weight of authority on the proper constitutional test at step one); *People v. Boyette*, 29 Cal. 4th 381, 469 70 (2002) (Kennard, J., dissenting) (citing cases and opining that the majority had failed to follow the weight of authority on the proper con stitutional test at step one); *see* Semel, *supra* note 227, at 311 12 (citing cases and discuss ing the California Supreme Court's minority position in the split of authority).

705 *See Scott*, 61 Cal. at 386 87 (comparing opinions).

706 *Boyette*, 29 Cal. 4th at 469 70 (Kennard, J., dissenting); *see also Howard*, 42 Cal. 4th at 1034 (Kennard, J., with Moreno, J., concurring and dissenting) (citing cases).

707 *Scott*, 61 Cal. 4th at 386 87 (comparing opinions).

708 *Id.* at 391.

709 *Id*. at 409 (Liu, J., with Kruger, J., concurring) (citing *People v. Banks*, 59 Cal. 4th 1113, 1146 (2014); *People v. McKinzie*, 54 Cal. 4th 1302, 1320 (2012)).

710 *Id*. at 414.

711 *Id.* at 411, 413 14 (citing *Hernandez*, 500 U.S. at 372).

712 *Id.* at 409 (quoting *Johnson*, 545 U.S. at 172).

713 *Id.*

714 *See Batson*, 476 U.S. at 98 n.21; *see also Hernandez*, 500 U.S. at 364; *Lenix*, 44 Cal. 4th at 614.

715 *Snyder v. Louisiana*, 552 U.S. 472, 479 (2008) (explaining that deference is "especially appropriate where a trial judge has made a finding that an attorney credibly relied on demeanor in exercising a strike," but unwarranted where the record does not show that determination).

716 *See People v. Hall*, 35 Cal. 3d 161, 167 68 (1983) (in bank); *Turner*, 42 Cal. 3d at 721 (in bank) (citing *Hall*); *People v. Snow*, 44 Cal. 3d 216, 222 (1987) (quoting *Hall*). In *People v. Mai*, Justice Liu mapped the downward trajectory of the court's jurisprudence on this issue. 57 Cal. 4th 986, 1067 73 (2013), *as modified on denial of reh'g* (Oct. 2, 2013) (Liu, J., concurring).

717 *Mai*, 57 Cal. 4th at 1067 71 (Liu, J., concurring) (citing *Silva*, 25 Cal. 4th at 385 (finding reversible error where the trial judge failed to examine and address the discrepancies between the record and the prosecutor's proffered explanations); *Fuentes*, 54 Cal. 3d at 721 (finding reversible error where the trial court did not analyze the prosecutor's explanations for his strikes); *Snow*, 44 Cal. 3d at 216 (finding reversible error where the trial court accepted without question the prosecutor's denial of group bias); *Turner*, 42 Cal. 3d at 727 28 (reversing the capital conviction because the trial court summarily denied the *Batson* motion)).

718 *People v.* (*James Willis*) *Johnson*, 47 Cal. 3d 1194, 1218 (1989) (in bank) (distinguishing *Hall*); *id*. at 1283, 1289 90 (Mosk, J., with Broussard, J., dissenting) (citing *Hall* and criticizing the majority for deferring to the trial judge's ruling which was "a rambling statement" that, at most, found that the prosecutor's reasons were race neutral, but not that they were credible).

719 *Mai,* 57 Cal. 4th at 1068 70 (Liu, J., concurring) (citing *People v. Jackson*, 13 Cal. 4th 1164 (1996); *People v. Cummings*, 4 Cal. 4th 1233 (1993); (*James Willis*) *Johnson*, 47 Cal. 3d 1194).

720 *Silva*, 25 Cal. 4th at 386.

721 *Mai,* 57 Cal. 4th at 1070 (Liu, J., concurring); *see also Chism*, 58 Cal. 4th at 1349 (Liu, J., concurring and dissenting) (criticizing the majority for deferring to the trial court where the trial judge had failed to make "'a sincere and reasoned effort to evaluate'" all relevant circumstances bearing on a *Batson* claim, especially where "the prosecutor did not rely on [the struck juror's] demeanor or other intangible qualities apparent only to the trial court") (quoting *Lenix*, 44 Cal. 4th at 614)).

722 *Mai,* 57 Cal. 4th at 1070 (Liu, J., concurring) (citing *People v. Reynoso*, 31 Cal. 4th 903 (2003)).

723 *See Reynoso*, 31 Cal. 4th at 929; *id*. at 929 35 (Kennard, J., with Werdegar and Moreno, J.J., dissenting); *id*. at 935 45 (Moreno, J., with Kennard and Werdegar, J.J., dissenting).

724 *Id.* at 930 (Kennard, J., with Werdegar and Moreno, J.J., dissenting) (concluding that the majority opinion "undermines the right of Hispanics to sit on juries in California state courts and the right of criminal defendants to jury selection procedures free of pur poseful discrimination against Hispanic prospective jurors"); *id.* at 935 (Moreno, J., with Kennard and Werdegar, J.J., dissenting) ("Because today's majority opinion shelters a prosecutor's pretextual peremptory challenge of a Hispanic juror from further inquiry by the trial court, I dissent.").

725 *Id.* at 945 (Moreno, J., with Kennard and Werdegar, J.J., dissenting).

726 *Id.* at 930 (Kennard, J., with Werdegar and Moreno, J.J., dissenting).

727 *Mai,* 57 Cal. 4th at 1075 (Liu, J., concurring) (emphasis added).

728 *Id.* There is a split of authority on the requirements for appellate deference. *See People v. Williams*, 56 Cal. 4th 630, 701, 709 14 (2013) (Liu, J., dissenting) (assessing the split of authority among the state and federal appellate courts, and explaining that the Califor nia Supreme Court has "aligned itself with one side of this split, but not the side that reflects the United States Supreme Court's teachings on the careful scrutiny that trial courts and reviewing courts must apply to ferret out unlawful discrimination in jury selection"); *see also* Semel, *supra* note 227, at 336 40 (reviewing the split of authority).

729 *Mai,* 57 Cal. 4th at 1058 (Liu, J., concurring); *id.* at 1059 (pointing to "the thorough and careful inquiry at *Batson*'s third step" required by the high court's decisions in *Miller El v. Dretke* (*Miller El II*), 545 U.S. 231 (2005), and *Snyder v. Louisiana,* 552 U.S. 472 (2008)); *see Snyder*, 552 U.S. at 479 (refusing to defer to, or even consider, the trial court's ruling where the prosecutor objected based on the struck juror's demeanor, and the trial court "simply allowed the challenge without explanation").

730 *See also Mai*, 57 Cal. 4th at 1062 (holding that appellate deference is required "so long as the prosecutor's stated reason for striking a minority juror is (1) inherently plausi ble and (2) supported by the record"); *id.* at 1059 (Liu, J., concurring) (concluding that the trial court's ruling did not warrant deference where the trial judge stated only that discriminatory intent was not "'inherent in the explanations'" and that "'the reasons appear to be race neutral'").

731 *Williams*, 56 Cal. 4th at 649.

732 *Id.* at 650.

733 *Id.*

734 *Id.* at 651.

735 *Id*.

736 *Id.*

737 *Id*. at 652.

738 *Id.*

739 *Id.*

740 *Id*. at 650.

741 *Id.* at 700 (Liu, J., dissenting). *See also Chism,* 58 Cal. 4th at 1349 (Liu, J., concurring) (writing that where the trial judge made no effort to compare the struck juror to seat ed jurors, to "examine discrepancies" between the struck juror's statements and the prosecutor's characterization, or to ask the struck juror about one of the prosecutor's reasons—an issue about which the juror was never questioned—"it is unclear what exactly this court is deferring to here").

742 *Id.* at 700.

743 *Id.*

744 *Id.* at 698 (Werdergar, J., dissenting).

745 *Id*. at 699.

746 *People v. Hardy*, 5 Cal. 5th 56, 63 (2018); *id.* at 107 (Liu, J. dissenting).

747 *Id*. at 75.

748 *Id*.

749 *Id*.

750 *Id*.

751 *Id*. at 76 (quoting *Williams*, 56 Cal. 4th at 653) (internal citation in *Williams* omitted by the court).

752 *Id*. at 80.

753 *Id.* at 111, 113 (Liu, J., dissenting).

754 *Id*. at 111 (quoting *id.* at 82 83 (majority opinion)).

755 *Id.* at 113.

756 *People v. Manibusan*, 58 Cal. 4th 40, 107 08 (2013) (Liu, J., concurring and dissenting) (citing generally *Snyder*, 552 U.S. 472; *Miller El II*, 545 U.S. 231). In *Manibusan*, the defendant made a *Batson* objection to the prosecution's strikes against three Afri can American women, one Asian American woman, and two Latinx jurors. Denying the motion as to Juror No. 22, a Black woman, the trial court said only, "'It's a proper use of a peremptory challenge.'" *Id.* at 76. A majority of the California Supreme Court held that the ruling was sufficient for deference on appeal. *Id.* at 76 77. Justice Liu disagreed, writing that an unexplained ruling does not warrant deference because "'if there is nothing in the record reflecting the trial court's decision, then there is nothing to which we can defer.'" *Id.* at 107 (Liu, J., dissenting and concurring) (quoting *United States v. Rutledge*, 648 F.3d 555, 559 (7th Cir. 2011)).

757 *Mai*, 57 Cal. 4th at 1062 (Liu, J. concurring).

758 *Harris*, 57 Cal. 4th at 890 (Liu, J., concurring). *See also Mai*, 57 Cal. 4th at 1066 67 (Liu, J., concurring) (observing that these "habits of unwarranted deference, speculative inference, and overreliance on gap filling presumptions have been entrenched in our *Batson* jurisprudence for some time now").

759 In *Wheeler*, the court pointed out that the prosecution might defeat an objection by showing that it peremptorily challenged "similarly situated members of the majori ty group on identical or comparable grounds." 22 Cal. 3d at 282. However, where the record showed the opposite, the prosecutor would not prevail. For example, in *People v. Trevino*, the prosecution, over objection, struck six Latinx jurors. 39 Cal. 3d 667, 688 (1985), *disapproved by* (*James Willis*) *Johnson,* 47 Cal. 3d at 1219 21. The court compared the struck Latinx jurors to several of the seated White jurors and found that the pros ecutor's reasons for his strikes applied equally to the latter. *Id.* at 691 92. *E.g.*, *id.* at 691 (where the prosecutor explained that he struck one Latinx juror because the juror's child was "close in age to at least one defendant," finding that he left three Whites on the jury whose sons were similar in age).

760 (*James Willis*) *Johnson*, 47 Cal. 3d at 1219 21.

761 *Id.* at 1220.

762 *Id.* at 1254 (Mosk, J., dissenting).

763 *Id.* at 1280 83 (discussing cases).

764 *Id.* at 1292.

765 *Id.* at 1292 95 (discussing the California Supreme Court's reliance on comparative juror analysis as well as its use by the state courts of appeal, the New Jersey Supreme Court, and the federal circuit courts).

766 These are, respectively, 537 U.S. 322 (2003) and 545 U.S. 231 (2005). *Miller El I*, 543 U.S. at 326, concerned the proper standard for the issuance of a certificate of appealability under the AEDPA. Therefore, the Supreme Court's inquiry was limited to whether the Fifth Circuit had made the proper "threshold inquiry" into the merits of Miller El's *Batson* claim, rather than whether he was entitled to relief on the claim under the AEDPA. *Id*. at 327. In answering the question, the Supreme Court analyzed some of the evidence supporting the claim, comparing, for example, the difference, "on the appar ent basis of race," in how prosecutors asked prospective jurors their views about the sentence for murder under Texas law. *Id*. at 332.

767 These are, respectively, 552 U.S. 472 (2008); 136 S. Ct. 1737 (2016); and 139 S. Ct. 2228 (2019).

768 *Lenix*, 44 Cal. 4th at 622.

769 *Id*. at 622 24.

770 *Id*. at 622 24.

771 *See, e.g.*, *People v. Armstrong*, 6 Cal. 5th 735, 780 81 (2019) (quoting *Lenix*, 44 Cal. 4th at 622, 624); *Williams*, 56 Cal. 4th at 662 (quoting *Lenix*, 44 Cal. 4th at 622 23); *Chism*, 58 Cal. 4th at 1318 (relying on *Lenix*, 44 Cal. 4th at 622, to restrict comparative analysis to the jurors seated at the time the trial court ruled on the *Batson* motion unless the defendant later renews the objection).

772 *Miller El II*, 545 U.S. at 241, 247 n.6.

773 *Id*. at 247 n.6.

774 *Id*.; *see also Flowers*, 139 S. Ct. at 2249 (citing *Miller El II*).

775 *Miller El II*, 545 U.S. at 241.

776 *Id*. at 255 60.

777 *Snyder*, 552 U.S. at 484.

778 *Foster,* 136 S. Ct. at 1754.

779 *Flowers*, 139 S. Ct. at 2246 47.

780 *Id*. at 2247.

781 *Miller El II*, 545 U.S. at 252.

782 *Id.*

783 *People v. Jones*, 51 Cal. 4th 346 (2011).

784 *Id*. at 356 57.

785 *Id*. at 358.

786 *Id*.

787 *Id*. at 359.

788 *Id*. at 364.

789 *Id*. at 365.

790 *Id*.; *see id*. at 358 59 (listing the prosecutor's reasons for striking Juror G.G.).

791 *Id*. at 364 66 (reasoning that the limitations of conducting a comparative juror analysis for the first time on appeal allow the court to examine the record in this manner). *But see Miller El II*, 545 U.S. at 252 (holding that trial and reviewing courts are precluded from hypothesizing a reason for the strike "if the stated reason does not hold up").

792 *People v. O'Malley*, 62 Cal. 4th 944, 979 (2016) (emphasis added) (quoting *Miller El II*, 545 U.S. at 247); *id*. at 976 77 (citing *Jones*, and comparing the death penal ty views of the struck jurors who were at issue with those of some of the seated jurors, even though the prosecutor did not rely on those views as a reason for his peremptory challenges).

793 *Miller El II*, 545 U.S. at 252. In *People v. Winbush*, the majority suggested that it may be appropriate to permit a trial judge to rely on his or her own experiences as a lawyer and judge as well as "'common practices'" of the prosecutor and the prose cutor's office in exercising peremptory challenges. 2 Cal. 5th 402, 434 (2017) (quot ing *Wheeler*, 22 Cal. 3d at 281). Justice Liu objected that "there is good reason not to do so." *Id*. at 491 (Liu, J., concurring). He pointed to two federal circuits that had rejected this approach because it allows the trial court to rely on information the defendant has "no opportunity to rebut" and to "'base such decisions on personal relationships outside of the courtroom.'" *Id.* at 491 92 (quoting *Coulter v. McCann*, 484 F.3d 459, 465 (7th Cir. 2007)) (citing *Adkins v. Warden*, 710 F.3d 1241, 1254 (11th Cir. 2013)).

794 *Winbush*, 2 Cal. 5th at 443 (quoting *People v. DeHoyos*, 57 Cal. 4th 79, 107 (2013)) (italics in *Winbush*).

795 *Id*. at 491 (Liu, J., concurring).

796 *Id*.

797 *Foster*, 136 S. Ct. at 1748. Section III.D introduces this topic in the context of jury selection training for California prosecutors.

798 *See* Sections II.B.1–4, II.C.1–2, III.D.

799 *Id*.

800 *Id*. at 1749–51.

801 *Id*. at 1751–54

802 *Id*. For instance, among the prosecutor's reasons for striking Mr. Hood was the fact that the prospective juror's son was close in age to the defendant. *Id*. at 1752. The court compared Mr. Hood to seated White jurors Graves and Duncan, both of whom had sons close in age to the defendant. *Id*. The prosecutor also struck Mr. Hood because he "'appeared to be confused and slow in responding to questions concerning his views on the death penalty.'" *Id*. at 1754 (internal citation omitted). Here, the court compared Mr. Hood to a different seated White juror, Huffman, who "showed similar confusion." *Id*.

803 *Id*. at 1755. The State used its peremptory challenges to remove all four African Americans who remained in the panel after cause challenges. *Id*. at 1743. Only the strikes of Jurors Garrett and Hood were at issue in the case before the Supreme Court. *Id*. at 1748. There were other egregious examples of discrimination in *Fos ter*, such as race-coded jury lists and additional notes in the State's file showing its "concerted effort to keep black prospective jurors off the jury." *Id*. at 1748–50, 1753, 1755.

804 *Hardy*, 5 Cal. 5th at 78.

805 *Id*. at 83–84; *id*. at 107 (Liu, J., dissenting) (explaining that the prosecutor "struck the only black prospective juror from the main panel, Frank G.").

806 Justice Liu emphasized other aspects of the *Batson* analysis in ways the majority did not, e.g., (1) the prosecutor's removal of "every African American prospective juror she could have excused," *id*. at 108; (2) the "definite racial overtones" of the case discussed above, *id*.; (3) evidence that Frank G. "'should have been an ideal juror in the eyes of a prosecutor seeking a death sentence,'" *id*. at 109 (quoting *Miller-El II*, 545 U.S. at 231); and (4) the prosecutor's use of the "'laundry list'" approach, *id*. at 110 (quoting *Foster*, 136 S. Ct. at 1748).

807 *Id*. at 111 18 (Liu, J., dissenting). One of the six reasons—the prosecutor's assertion that Frank G. expressed in his questionnaire a belief that "'police are not always truthful and tend to exaggerate'"—was simply wrong. *Id*. at 111 12 (quoting the prose cutor). Frank G.'s questionnaire response concerned prosecutors (not police), and he wrote that he had the same view of defense lawyers. *Id*. The majority agreed that the prosecutor was mistaken about Frank G.'s statement, but, as mentioned above, rather than fault her or the trial court for the error, the majority criticized defense counsel for failing to notice the error and call it to the judge's attention. *Id*. at 79 80 (majority opinion).

808 *Id*. at 81 (majority opinion).

809 *Id*.

810 *Id*. at 114 (Liu, J., dissenting).

811 *Id*. at 82.

812 *Id*. at 117.

813 *Id*. at 117 18. (Liu, J., dissenting).

814 *Id*. at 119 (quoting *Miller El II*, 545 U.S. at 247 n.6).

815 *People v. Smith*, 4 Cal. 5th 1134, 1157 58 (2018) (citing *Foster*, 136 S. Ct. at 1748; U*nited States v. Chinchilla*, 874 F.2d 695, 699 (9th Cir. 1989)).

816 *Id*. at 1157.

817 *People v. Armstrong*, 6 Cal. 5th 735, 802 03 (2019) (Liu, J., with Cuéllar and Perluss, J.J., dissenting).

818 *Id*. at 782 (majority opinion).

819 *Id*. at 801 (Liu, J., with Cuéllar and Perluss, J.J., dissenting) (quoting *Hardy*, 5 Cal. 5th at 78).

820 *Id*. at 800 01. The majority began the *Batson* discussion by stating the race of the vic tim and the defendants. *Id*. at 765 (majority opinion).

821 *Id*. at 801. As noted above, Justice Liu also dissented in *Hardy*.

822 *Id*. The majority acknowledged that no African American men were on the seated jury and that, in California, Black men, a group "lying at the intersection of race *and* gen der, are cognizable under *Wheeler*." *Id*. at 765, 768 69 (majority opinion).

823 The requirement flows directly from *Batson*, 476 U.S. at 96 97, in which the Court stated, "In deciding whether the defendant has made the requisite showing, the trial court should consider all relevant circumstances." *See also Miller El II*, 545 U.S. at 240 (quoting *Batson*, 476 U.S. at 96 97); *Snyder*, 552 U.S. at 478 (citing *Miller El II*, 545 U.S. at 239). The Supreme Court used this language to describe the third step determina tion in the two successful post *Snyder* cases, *Foster v. Chatman* and *Flowers v. Mississip pi*. *Foster*, 136 S. Ct. at 1748 (quoting *Snyder*, 552 U.S. at 478); *Flowers*, 139 S. Ct. at 2251 (describing "all of the relevant facts and circumstances taken together" that support ed a finding of *Batson* error).

824 *Armstrong*, 6 Cal. 5th at 805 15 (Liu, J., with Cuéllar and Perluss, J.J., dissenting).

825 *Id*. at 804 05.

826 *Id*. at 815.

827 *Id*. at 816 (quoting *Johnson*, 545 U.S. at 170).

828 *Chism*, 58 Cal. 4th at 1319 (majority opinion). The court raised the prospect of forfei ture in *Lenix*, 44 Cal. 4th at 624. However, because *Lenix* did not involve a comparison with later seated jurors, the statement was dictum. *Id*. at 1351 (Liu, J., concurring).

829 *Chism*, 58 Cal. 4th at 1351 (Liu, J., concurring) (quoting *Snyder*, 552 U.S. at 478) (italics in *Chism*); *see supra*, note 826 (tracing the requirement to *Batson*).

830 *Chism*, 58 Cal. 4th at 1350.

831 *Manibusan*, 58 Cal. 4th at 107 (Liu, J., concurring and dissenting).

832 *Id*. at 107 08.

833 *Chism*, 58 Cal. 4th at 1338 (Liu, J., concurring and dissenting) (citing *Williams*, 56 Cal. 4th at 698).

834 *Id*. at 1352.

835 *People v. Rhoades*, 8 Cal. 5th 393, 458 (2019) (Liu, J., dissenting).

836 GR 37(h).

837 In addition to these California state court judges, United States Supreme Court justices and other members of the bench have criticized *Batson* and its progeny. As discussed in Sections I.C.3 and III, Justice Marshall predicted that *Batson* would fail to achieve its objective: "The decision today will not end the racial discrimination that peremptories inject into the jury selection process. That goal can be accomplished

only by eliminating peremptory challenges entirely." *Batson v. Kentucky*, 476 U.S. 79, 102 03 (1986) (Marshall, J., concurring); *id*. at 107 (citing Van Dyke, *supra* note 58, at 167 68 (proposing "tak[ing] away all peremptory challenges from the prosecution" whose duty it is to "see that the accused is tried by a fair, impartial and representative jury" instead of limiting the jury to those "approved . . . by the government's repre sentative in court;" and noting that "good reasons exist for giving the defense pe remptories.")). Justice Breyer embraced Justice Marshall's concerns in his concurring opinions in *Miller El v. Dretke* and *Johnson v. California*, both decided in the same year. *Miller El v. Dretke*, 545 U.S. 231, 273 (2005) (Breyer, J., concurring) ("I believe it nec essary to reconsider *Batson's* test and the peremptory challenge system as a whole."); *id*. at 272 (discussing proposals to eliminate peremptory strikes); *Johnson v. California*, 545 U.S. 162, 173 (2005) (Breyer, J., concurring) (reiterating his position in *Miller El v. Dretke*). In 2019, Iowa Supreme Court Justices Mark S. Cady and David Wiggins, writing separately, joined Justice Marshall's call to abolish peremptory challenges. *See State v. Veal*, 930 N.W.2d 319, 340 (2019) (Cady, J., concurring specially) ("[T]he solu tion in the future is to do away with the use of peremptory challenges."); *id.* (Wiggins, J., concurring in part and dissenting in part) ("I think it is time to abolish peremptory challenges in Iowa."). *See Flowers v. State*, 947 So. 2d 910, 937, 939 (Miss. 2007) (finding that "racially motivated jury selection is still prevalent twenty years after *Batson* was handed down," warranting reassessment of the *Batson* inquiry and peremptory chal lenges, and warning prosecutors that if they continue to violate *Batson*, changes are likely); *State v. Saintcalle*, 309 P.3d 326, 334 (Wash. 2013), *abrogated on other grounds by City of Seattle v. Erickson*, 398 P.3d 1124 (2017) (finding that "[t]wenty six years later it is evident that *Batson*, like *Swain* before it, is failing" to eliminate racial discrimination in jury selection). *See also supra*, notes 88 89 (discussing the options the California Supreme Court considered in *Wheeler*).

838 *Rhoades,* 8 Cal. 5th at 459 (Liu, J., dissenting).

839 *Id*. at 456.

840 *Id*. at 469.

841 *Id.* (citing *State v. Parker*, 836 S.W.2d 930, 939 (Mo. 1992)).

842 *Id*. at 469 70 (citing *Harris*, 57 Cal. 4th 804, 884 (2013) (Liu, J., concurring)).

843 *Id*. at 470.

844 *People v. Bryant*, 40 Cal. App. 5th 525, 548 49 (2019) (Humes, J., with Banke, J., concur ring).

845 *See id*. at 548.

846 *Id*. at 544.

847 *Id*. at 545.

848 *Id*. at. 544.

849 *Id*. at 546 (internal citations and quotation marks omitted).

850 *Id*.

851 *Id*. at 545.

852 Page, *supra* note 303, at 246 51 (2005).

853 *Id*. at 247.

854 *See* Daniel W. Van Ness, *Preserving a Community Voice: The Case for Half and Half Juries in Racially Charged Criminal Cases*, 28 J. Marshall L. Rev. 1, 5, 45 (1994) (proposing the use of a half and half jury in "racially charged trials requiring a change of venue"); Derrick A. Bell, Jr., Race, Racism and American Law 273 74 (1980) (discussing race conscious selection and minimum number guarantees).

855 *See* Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 Mich. L. Rev. 1611, 1698 99 (1985) (advocating for three same race jurors in cases involving non white defendants based on social psychological research indicating that this is the minimum number required to influence the remaining jurors).

856 *See generally Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*., 551 U.S. 701 (2007); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

857 Sommers & Norton, *supra* note 305, at 536.

858 Page, *supra* note 303, at 249 (citing Tracey L. Altman, Note, *Affirmative Selection: A New Response to Peremptory Challenge Abuse*, 38 Stan. L. Rev. 781, 806 08 (1986) (providing a detailed description of the procedure of an affirmative selection system)); *see* Donna J. Meyer, *A New Peremptory Inclusion to Increase Representativeness and Impartiality in Jury Selection*, 45 Case W. Res. L. Rev. 251, 280 87 (1994) (describing a system called "peremptory inclusion" that allows defendants to use a challenge to secure a person's spot on the jury); Deborah Ramirez, *Affirmative Jury Selection: A Proposal to Advance Both the Deliberative Ideal and Jury Diversity*, 1998 U. Chi. Legal F. 161, 171 74 (1998) (advocating for a system that gives each "litigant a fixed number of affirmative pe remptory choices").

859 *See generally Parents Involved in Cmty. Sch*., 551 U.S. 701; *Bakke*, 438 U.S. 265.

860 *See generally* Valerie P. Hans & Alayna Jehle, *Avoid Bald Men and People with Green Socks? Other Ways to Improve the Voir Dire Process in Jury Selection*, 78 Chi. Kent L. Rev. 1179 (2003).

861 Barbara Allen Babcock, *A Place in the Palladium: Women's Rights and Jury Service*, 61 U. Cin. L. Rev. 1139, 1177 (1993) ("[T]ailored questionnaires can help the parties base their arguments for cause challenges and their exercise of peremptories on actual sus picion of race prejudice rather than simply on the color of the potential juror's skin."); Jean Montoya, *The Future of the Post* Batson *Peremptory Challenge: Voir Dire by Ques tionnaire and the "Blind" Peremptory*, 29 U. Mich. J. L. Reform 981, 1015 17 (1996) (de scribing a survey, which showed trial lawyers believe that voir dire by questionnaire is the best way to ensure fair and impartial juries); Sommers & Norton, *supra* note 305, at 535.

862 Sommers & Norton, *supra* note 305, at 536.

863 *Id*.

864 Lonnie T. Brown, Jr., *Racial Discrimination in Jury Selection: Professional Misconduct, Not Legitimate Advocacy*, 22 Rev. Litig. 209, 308 09 (2003) (arguing that there should be a uniform rule providing that *Batson* violations are professional misconduct).

865 *Koo v. McBride*, 124 F.3d 869, 873 (7th Cir. 1997) (stating that granting the defendant additional peremptory challenges might be a remedy for a *Batson* violation); David D. Hopper, Note, Batson v. Kentucky *and the Prosecutorial Peremptory Challenge: Arbitrary and Capricious Equal Protection?*, 74 Va. L. Rev. 811, 837 (1988).

866 Charles J. Ogletree, *Just Say No! A Proposal to Eliminate Racially Discriminatory Uses of Peremptory Challenges*, 31 Am. Crim. L. Rev. 1099, 1122 (1994).

867 In *Batson*, the Supreme Court expressed no "view on whether it is more appropriate in a particular case . . . for the trial court to discharge the venire and select a new jury . . . or to disallow the discriminatory challenges and resume selection with the improperly challenged jurors reinstated on the venire." 476 U.S. at 99 n.24. *See People v. Overby*, 124 Cal. App. 4th 1237, 1244 46 (2004) (concluding that defense counsel's request that a struck juror remain in the courtroom and statement of "submit" in response to reseating the struck juror waived any objection on appeal to the trial judge's use of an alternative remedy); *People v. Muhammad*, 108 Cal. App. 4th 313, 324 325 (2003) (overturning the trial court's monetary sanction against a prosecutor for improperly discriminating in the exercise of peremptory strikes only because of the trial court's failure to comply with the statutory provisions for imposing monetary sanctions under California Code of Civil Procedure section 177.5); *People v. Willis*, 27 Cal. 4th 811, 824 (2002) (modifying the decision in *Wheeler* to allow trial courts, with the express consent of the strike opponent, to adopt alternative measures short of

dismissal of the venire, such as reseating the struck jurors if they are available and imposing sanctions against the proponent of the strikes).

868 Page, *supra* note 303, at 253 (citing Ogletree, *supra* note 869, at 1117).

869 Professor Abbe Smith has called for an end to prosecutor peremptories in light of "the well documented and longstanding abuse by prosecutors of peremptory challenges, the procedural asymmetry in our system of criminal justice, the different ethical roles of prosecutors and defenders, and the importance of 'buy in' for criminal defendants." Abbe Smith, *A Call to Abolish Peremptory Challenges by Prosecutors*, 27 Geo. J. Legal Ethics 1163, 1184 (2014). While the authors agree that Professor Smith's position is well reasoned from both a legal history and constitutional rights perspective, they do not believe the proposal is likely to be adopted by a legislature or by the bench.

870 GR 37(h).

871 GR 37 Workgroup Final Report, *supra* note 154 at 1; *see also* Annie Sloan, *"What to do about* Batson*?": Using a Court Rule to Address Implicit Bias in Jury Selection*, 108 Calif. L. Rev. 233, 244 53 (2020) (describing the process that led to the adoption of GR 37). Sloan notes that a plurality of the Washington Supreme Court called for meaningful *Batson* reform in a 2013 decision, *Saint v. Saintcalle*, 309 P.3d 326, 332 34 (Wash. 2013): "multiple members of the nine justice Supreme Court expressed deep concerns that the overall *Batson* framework was not 'robust enough' to effectively combat race discrimination in jury selection." *Id.* at 245. In response to this "call to action" the ACLU drafted a new court rule, relying on "numerous studies and research identifying *Batson*'s flaws." *Id.* at 246 47. The rule eliminated *Batson*'s intentional discrimination requirement and listed presumptively invalid reasons for a peremptory strike. *Id.* at 247 48. Following a period of public comment on the proposed rule, the Washington Supreme Court convened a "workgroup" on the issue, "which included a broader array of perspectives, like those of prosecutors and additional judges." *Id.* at 250. The work group promulgated what is now GR 37 in April 2018 with the support of the original ACLU coalition. *Id.* at 253.

872 Dave Altimari, *State Supreme Court Calls for Commission to Study Whether Jury Selection System Is Unfair to Minorities,* Hartford Courant (Dec. 28, 2019), https://www.courant.com/news/connecticut/hc news supreme court jury review 20191228 kg7iiay7uj fudifyeaw407inem story.html.

873 GR 37(c) (d).

874 *Id.* 37(f).

875 *Id.* 37(e).

876 *Id.* 37(h), (i).

877 *See* A. 3070, 2019 2020 Reg. Sess. (Cal. as amended, May 4, 2020), http://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB3070 (Juries: Peremptory Challenges).

878 The Honorable Tani Cantil Sakauye, Chief Justice, Cal. Supreme Court, State of the Judiciary, Address to a Joint Session of the California Legislature (Mar. 8, 2016), https://www.courts.ca.gov/34477.htm (transcript and video available on the California Courts website).

879 *Id*.

880 A. 242 (Cal. 2019) (codified at Cal. Bus. & Prof. Code § 6070.5; Cal. Gov't Code § 68088), https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200AB242.

881 *Id*. § 1(a)(3).

882 *See* Bennett, *supra* note 294, at 150 (stating that "[j]udge dominated voir dire and the *Batson* challenge process are well intentioned methods of attempting to eradicate bias from the judicial process, but they actually perpetuate legal fictions that allow im plicit bias to flourish"); Terry Carter, *Implicit Bias Is a Challenge Even for Judges*, A.B.A. J. (Aug. 5, 2016), https://www.abajournal.com/news/article/implicit_bias_is_a_challenge_even_for_judges (reporting on a program by the ABA's Judicial Division at the American Bar Association's 2016 annual meeting that addressed implicit bias among members of the judiciary); *Fighting Implicit Bias*, A.B.A., https://www.americanbar.org/groups/judicial/committees/fighting_implicit_bias/ (last visited May 4, 2020) (describing the American Bar Association's Joint Committee on Fighting Implicit Bias in the Justice System, which is chaired by the Hon. Bernice B. Donald and is publishing a book "on fighting implicit bias in the justice system"); Rachlinski et al., *supra* note 334, at 1221 (in a study co authored by a California federal magistrate judge, finding that judges harbor implicit racial bias that can influence their judgment).

883 News Release, Supreme Court of Cal., Supreme Court Announces Jury Selection Work Group (Jan. 29, 2020), https://newsroom.courts.ca.gov/news/supreme court announces jury selection work group.

884 *Id*.

885 *Judicial Council*, Cal. Ct., https://www.courts.ca.gov/policyadmin jc.htm (last visited May 14, 2020).

886 *Advisory Bodies*, Cal. Ct., https://www.courts.ca.gov/advisorybodies.htm (last visited May 14, 2020).

887 *Rhoades*, 8 Cal. 5th at 470 (Liu, J., dissenting).

888 *See supra* note 885; *see generally* Research Working Grp. & Task Force on Race & the Crim inal Justice Sys., *Preliminary Report on Race and Washington's Criminal Justice System*, 35 Seattle U. L. Rev. 623 (2012), http://www.law.washington.edu/About/RaceTaskForce/pre liminary_report_race_criminal_justice_ 030111.pdf.

889 Pursuant to section 1239 of the California Penal Code, defendants sentenced to death in capital cases automatically appeal their conviction and death sentence to the California Supreme Court. We discuss the California Supreme Court's record in *Batson* cases in Section II.C.1. California has five appellate projects that oversee felony appeals. Each is a nonprofit office under contract with the appellate courts. *See Appellate Projects*, Cal. Ct., https://www.courts.ca.gov/13714.htm (last visited May 14, 2020). According to the directors of each appellate project, there is no central repository of trial court records or briefing in these cases. Information on file with the Berkeley Law Death Penalty Clinic.

890 *Depublication of California Court of Appeal Decisions: Rules for Publishing and Citing to Appellate Cases*, UCLA, Sch. of L. Hugh & Hazel Darling L. Libr., https://libguides.law.ucla.edu/depublication (last visited Apr. 27, 2020) ("In California, the rules regarding publication of appellate opinions is quite complex."). Ultimate authority to publish or depublish a court of appeal opinion is vested in the California Supreme Court. *See* Cal. R. Ct. 8.512 (2020), https://www.courts.ca.gov/cms/ rules/index.cfm?title=eight&linkid=rule8_512; 8.516, https://www.courts.ca.gov/cms/rules/ index.cfm?title=eight&linkid=rule8_516; 8.1105(g), https://www.courts.ca.gov/cms/rules/ index.cfm?title=eight&linkid=rule8_1105); 8.1110, https://www.courts.ca.gov/cms/rules/ index.cfm?title=eight&linkid=rule8_1110; 8.11120, https://www.courts.ca.gov/cms/rules/ index.cfm?title=eight&linkid=rule8_1120; 8.1125, https://www.courts.ca.gov/cms/rules/ index.cfm?title=eight&linkid=rule8_1125. Rule 8.1115 governs the citation of unpublished opinions, https://www.courts.ca.gov/cms/rules/index.cfm?title=eight&linkid=rule8_1115. There is an extensive scholarly literature examining California's publication rules, in cluding articles arguing that the rules permit the California Supreme Court to "set California law without actually hearing individual cases" by "chang[ing] what the law is by ordering an opinion published or depublished." Shawn J. Bayern, *Case Interpretation*, 36 Fla. St. U. L. Rev. 125, 154 (2009). *See* Stephen R. Barnett, *Making Decisions Disappear: Depublication and Stipulated Reversal in the California Supreme Court*, 26 Loy. L.A. L. Rev. 1033 (1993) (criticizing the California Supreme Court's depublication authority as per mitting it to "mak[e] judicial decisions disappear"); Stephen R. Barnett, *No Citation Rules Under Siege: A Battlefield Report and Analysis*, 5 J. App. Prac. & Process, 473, 486 & n.107 (2003) (detailing how "California . . . issues ninety three percent of its court of appeals opinions 'unpublished' and refuses to allow their citation" and suggesting that the rule "may reflect habits of undue leisure on the part of the state's court of appeal justices."); Robert A. Mead, *Unpublished Opinions and Citation Prohibitions: Judicial Muddling of California's Developing Law of Elder and Dependent Adult Abuse Committed by Health Care Providers*, 37 Wm. Mitchell L. Rev. 206, 210, 265 (2010) (discussing how "California's appellate publication practices and the related prohibition on the citation of, or reliance upon, unpublished opinions interfere[s]" with the law's development in elder and depen

dent adult abuse practice and proposes a general solution of permitting "lawyers, justices, and judges to openly read and cite unpublished decisions as persuasive authority but not controlling precedent"); Rafi Moghadam, *Judge Nullification: A Perception of Unpublished Opinions*, 62 Hastings L.J. 1397, 1397 (2011) (criticizing the California Supreme Court's approach as "a mechanism for questionable discrimination against unpublished deci sions" that "exhibit[s] vibrant legal discourse"). While this scholarship pre dates the Cal ifornia Supreme Court's recent amendments to the publication rules in 2016, the Court's minor changes do not address these scholars' broader critiques.

891 Because the data set consisted of courts of appeal opinions, a limitation of this study is the inability to count every peremptory challenge to which a *Batson* objection was made at trial. Appeals to the appellate courts from trial occur only following a conviction.

892 We use "cases" instead of "opinions" throughout the report, except where "opinions" was appropriate. The two are synonymous for purposes of the report.

893 Not every *Batson* objection made and adjudicated by the trial court is raised on appeal. The observations were limited to peremptory challenges that were made to which there was a *Batson* objection at trial, a ruling by the trial court, and a merits determination by the court of appeal.

894 In two cases, the appellate court identified the race of the struck jurors and the party (defense or prosecution) that made the objection, but did not provide the number of struck jurors.

895 The Westlaw search query was: "advanced: ("Batson/Wheeler" OR "Wheeler/Batson")."

896 Most appellate opinions are not published. *See* Cal. R. Ct. 8.1105; *see also supra* note 890. The study included published and unpublished opinions.

897 A single *Batson* objection is not necessarily equivalent to one peremptory challenge. Often, a single *Batson* objection is made in response to multiple strikes.

898 *See, e.g.*, Taeku Lee, *Between Social Theory and Social Science Practice*, *in* Measuring Iden tity: A Guide for Social Scientists 113, 140 44 (Rawi Ahdelal et al. eds., 2009) (noting both the acknowledgment of the social construction of race—"a social construct marked by fluidity, multiplicity, and contingency"—and the difference between how social theo rists and social scientists measure race and ethnicity, and observing that "[t]his tension is further exacerbated by the gap between race or ethnicity as social theorists describe it (as a fluid and contingent social construction) and race or ethnicity as social scientists measure it (as a fixed and categorical observable reality)"); Pew Research Ctr., Mul tiracial in America: Proud, Diverse and Growing in Numbers (2015), https://www.pewsocialtrends.org/wp content/uploads/sites/3/2015/06/2015 06 11_multiracial in amer ica_final updated.pdf ("Multiracial Americans are at the cutting edge of social and demo graphic change in the U.S. . . . and growing at a rate three times as fast as the population as a whole.").

899 The U.S. Census considers "Hispanic origin" as an "ethnicity" only. U.S. Census Bureau, Race & Ethnicity (2017), https://www.census.gov/mso/www/training/pdf/race ethnicity onepager.pdf. The California Supreme Court has long held that jurors who have a Spanish surname are "Latino" or "Hispanic" for purposes of determining whether they were excused by an impermissible peremptory challenge. *See, e.g.*, *People v. Davis*, 46 Cal. 4th 439, 584 (2009).

900 This group is broader than the U.S. Census's racial groups, which categorize individ uals who are from or descendants of individuals from the Far East, Southeast Asia, or India as "Asian," and those who are from or descendants of individuals from Hawaii, Guam, Samoa, and the Pacific Islands as "Native Hawaiian or Other Pacific Islander." U.S. Census Bureau, *supra* note 899.

901 *See, e.g.*, Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 Stan. L. Rev. 1241, 1243 44 (1991) ("[T]he experi ences of women of color are frequently the product of intersecting patterns of racism and sexism. . . . Because of their intersectional identity as both women *and* of color within discourses that are shaped to respond to one *or* the other, women of color are marginalized within both.").

902 GR 37(h), (i).

903 *Id.* 37(h).

904 *Id.* 37(i).

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