MICHAEL J. HADDAD (State Bar No. 189114)
JULIA SHERWIN (State Bar No. 189268)
TERESA ALLEN (State Bar No. 264865)
HADDAD & SHERWIN LLP
505 Seventeenth Street
Oakland, California 94612
Telephone: (510) 452-5500
Facsimile: (510) 452-5510
Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

MARIO GONZALEZ, Deceased, through his Successor in Interest, M.G.C., a minor through his mother and Next Friend Andrea Cortez, individually and as successor in interest for MARIO GONZALEZ, Deceased,

Plaintiffs,

vs.

CITY OF ALAMEDA, a public entity; FORMER CITY OF ALAMEDA INTERIM POLICE CHIEF RANDY FENN, in his individual and official capacities; ALAMEDA POLICE OFFICERS ERIC MCKINLEY, JAMES FISHER, and CAMERON LEAHY, and DOES 1-10, Jointly and Severally,

Defendants.

Case No.: 4:21-cv-09733-DMR

DECLARATION OF LOIS P. HEANEY IN SUPPORT OF PLAINTIFFS' MOTION IN LIMINE FOR ATTORNEY VOIR DIRE AND A JOINT JURY QUESTIONNAIRE

Trial Date: November 6, 2023

STATE OF CALIFORNIA)
)
COUNTY OF ALAMEDA)

I, LOIS P. HEANEY, declare under penalty of perjury under the laws of the State of California that the following is true and correct:

1. I am writing this declaration at the request of counsel for Plaintiffs in support of their motion for a jury questionnaire and attorney participation in voir dire.

2. I am a senior trial consultant and president of NJP Litigation Consulting, Western Regional Office, formerly known as National Jury Project/West, located at 1970 Broadway, Suite 830, Oakland, California, 94612, and I have been so employed since 1979. NJP was established in 1975 and is one of the nation's oldest jury consulting firms. As an organization we collaborated and wrote Jurywork: Systematic Techniques, Thomson Reuters (2d ed. 1983 & annual supplements). Its earliest version was published in 1975 under the title The Jury System: New Methods for Reducing Prejudice, Cambridge, MA: National Jury Project.

3. NJP is author of several amicus curiae briefs concerned with voir dire and jury selection (*People v. Williams*, 29 Cal. 3d 392 (1981), cited by the Court at 403, n.5 on voir dire and brief in *Mu'Min v. Virginia*, 111 S.Ct. 1899 (1991), cited by Justice Marshall in his dissent at footnote 4). We submitted an amicus brief to the United States Supreme Court in the matter of *LaCaze v. State of Louisiana* (No. 16-1125) a highly publicized triple murder case in which the victims were two civilian restaurant employees and an off- duty police officer. The LaCaze case highlights the problem of jurors' failure to disclose important information in voir dire. In that case three jurors were selected who did not reveal highly prejudicial information, including that one juror was working in the police dispatch office when the crime was reported, then attended the officer's funeral and that her husband served on the same police force as the victim; another failed to state that he had more than 20 years of employment in various law enforcement agencies; and a third juror failed to reveal that two of her brothers had been murdered in separate incidents.

4. I have consulted on over 1,000 criminal and civil cases on a variety of issues, including inter alia, pretrial publicity, change of venue, jury composition, survey research, juror attitudes, and the use of peremptory challenges and strike procedures in both State and Federal court. I have been an invited speaker on jury-related subjects at a variety of legal organizations including the Ninth Circuit Judicial Conference; Northern District of California Judicial

Conference; Federal Judicial Center; Annual Conference of the National Association of Women Judges; Florida Conference of County Court Judges; State of New York Unified Court System Judicial Seminar; Association of Trial Lawyers of America; American Bar Association; Association of Business Trial Lawyers; trial lawyer associations in Alaska, California, Florida, New Jersey, Oregon and Washington; California Attorneys for Criminal Justice; National Association of Criminal Defense Lawyers; United States Department of Justice, Civil Rights Division; and at many law schools. I am a co-author of Jurywork: Systematic Techniques and have authored several articles on jury selection, voir dire, venue, and severance issues, including an article on voir dire for sexual orientation bias co-authored with Judge Helen G. Berrigan, U.S.D.C. Eastern District of Louisiana ("Sexual Orientation Bias in the Court," Trial, August 1999.) I am also the author of an article entitled "The Trouble with Judge-Conducted Voir Dire," CACJ Forum, 1998, Vol. 25, No. 2.

5. I have consulted with lawyers on a wide range of State and Federal civil and criminal cases including capital cases, highly publicized cases, police abuse cases, as well as a wide range of civil cases including asbestos, products liability, civil rights and complex commercial cases. My case experience includes United States v. Larry Layton (Northern District of California, No. CR-80-416-RFP), involving the death of Congressman Leo Ryan and the mass suicide at the People's Temple in Jonestown, Guyana; United States v. Stacey Koon, et al. (Central District of California, No. CR-92-686-JGD), the federal civil rights prosecution of the police officers charged in the beating of Rodney King, on behalf of the United States Department of Justice; United States v. Theodore Kaczynski (Eastern District of California, No. CR S-96-0259 GEB), a capital case known in the media as the Unabomber; United States v. Richard Lee Tuk Chong (District of Hawaii, CR. No. 98-00416 ACK), the first capital case in Hawaii in nearly 50 years; United States v. Naeem Williams (District of Hawaii, No. CR-06-00079 JMS-KSC), a capital case involving an African American soldier charged with killing his daughter on an Army base; United States v. Dennis Cyrus, (Northern District of California, No. CR-05-00324-MMC), a gang-related triple homicide capital case; United States v. Gary Watland (District of Colorado No. 1:11: CR-00038-JLK), a capital case involving a prison killing at Florence Penitentiary; United States v. Ryan Payne (District of Nevada No. 2:16-CR-00046-GMN-PAL), a case arising out of the stand-off at the Bundy Ranch; and New Mexico v. Sandy and Perez (Bernalillo County, New Mexico, Nos. D-202-CR-2015-00104 and 00105), on behalf of the prosecution in a case in which law enforcement officers were charged with murder in the death of James Boyd a homeless, mentally ill man. NJP consultants frequently assist attorneys in civil cases in federal court including numerous cases

alleging civil rights violations and abuse by law enforcement officers. These include Espinosa v. City and County of San Francisco (Northern District of California, No. C06-04686 JSW); Hunter v. City and County of San Francisco (Northern District of California, No. CV11-4911SC); Oliver v. City and County of San Francisco (Northern District of California, No. C 07 0246 JL); Smith v. City of Oakland (Northern District of California, No. 3: CO5-4045); M.H. v. County of Alameda, et al. (Northern District of California, No. C11-2868 JST); and May v. County of San Mateo (Northern District of California, No. 3:16-cv-00252-LB).

6. I have qualified as an expert witness for change of venue and voir dire motions regarding pretrial publicity, case recognition, prejudgment of guilt or innocence and media behavior and voir dire procedures in:

- Government of United States of America v. Oludayo Kowole John Adeagbo; Westminster Magistrates Court, London, England (2021) (extradition proceeding)
- California Commission on the Fair Administration of Justice, 2008
- South Dakota v. Wilson and Midmore, Custer, 2008
- California v. William Choyce, San Joaquin, 2007
- Wyoming v. Andrew Yellowbear, Hot Springs, 2006
- California v. Joseph Teitgen, Solano, 2003
- California v. Hai Minh Le, et al., Alameda, 2002
- California v. Robert Salazar, Los Angeles, 2002
- California v. Denny Davis, Redding, 2001

In addition, I testified in post-conviction hearings in Mickey v. Jill Brown, U.S. District Court, Northern District, San Jose Division, 2004, habeas petition before Judge Ronald Whyte and In Re Andrew Hoeft-Edenfield Habeas Corpus, Supreme Court State of California, No. S 204745, Alameda County, 2014.

7. In 2016 I was invited to participate in a panel presentation chaired by Judge Chhabria at the Northern District of California Judicial Conference on voir dire, jury questionnaires and jury selection. Following that presentation, I was invited by Judge Breyer to chair a committee with representatives of the U.S. Attorney's Office, the Federal Public Defender and the private defense bar to draft suggested criminal jury questionnaires. Judge Breyer went on to write the following:

> Several years ago, at a conference of judges and attorneys from my District there was a discussion about the use of questionnaires in criminal jury cases. Many of my colleagues expressed reluctance to utilize this tool. They were concerned about undue consumption of time, invasion of prospective jurors' privacy, and usurpation of the judge's prerogative to conduct voir dire.

But after much consideration, the judges of my Court agreed that these concerns were unfounded, and that juror questionnaires were more likely to further our obligation to impanel an impartial jury than hinder it. It was recognized that absent a meaningful inquiry into jurors' attitudes towards the issues implicated in criminal cases, a jury will be composed of twelve individuals about whom virtually nothing of import is known.

After this conference our Court with the cooperation of the United States Attorney, Federal Public Defender and private counsel, and the aid of the National Jury Project's able expertise, developed a standard questionnaire which our judges now regularly employ. Needless to say, it will become an even more essential tool for jury selection during the pandemic. Our Court is grateful to the National Jury Project for its assistance in developing a process which makes jury selection more transparent and just. (reprinted in JuryWork: Systematic Techniques, Thomson Reuters.)

8. Although this is not a criminal case, the present matter contains controversial and sensitive issues well suited for a jury questionnaire and attorney conducted voir dire. It arises in the context of national attention focused on allegations of excessive use of force by law enforcement officers particularly on people of color and marginalized communities. The deaths of George Floyd in Minneapolis, Michael Brown in Ferguson; Eric Garner in Staten Island; Oscar Grant in Oakland; Andy Lopez in Santa Rosa; Alex Nieto in San Francisco; Michael Tyree in Santa Clara, James Boyd in Albuquerque, and many others have brought the issues into the national spotlight. Several of these cases involved deaths due to restraint asphyxiation and the now infamous cry of "I can't breathe."

9. Jurors will be faced with evaluating controversial issues including the credibility of police testimony, matters of responsibility and possibly compensatory and punitive damages against public servants and their city. The justification for the arrest is at issue. Police are often the gatekeepers when it comes to deciding whether a person in distress enters the mental health system or the criminal justice system. Here there appears to be a basic question as to whether Mr. Gonzalez was even in the kind of distress which warranted attention from either system.

10. The case calls into question the training and qualifications of officers to evaluate mental distress and intoxication, their adherence to that training, their decision to forego involvement by mental health professionals on the Mobile Crisis Team, their use of force in making the arrest and restraint of Mr. Gonzalez. Jurors will consider whether officers had reason to detain Mr. Gonzalez because they thought he was intoxicated due to the nearby bottles of alcohol in combination with his slurred speech and affect, along with evidence of methamphetamine revealed in the autopsy.

11. The sensitive matter of substance use, especially methamphetamine requires inquiry and is better addressed in the relative privacy of a juror questionnaire. Drug abuse and most particularly methamphetamines has had a devastating impact on many communities and families. Behavioral changes fueled by methamphetamine can include highly "erratic, aggressive, irritable or violent behavior" including psychotic episodes. While these can be horrific for the person using meth they can also highly traumatizing for those who witness it, including family members and children. In fact, meth use is a frequent basis for family intervention by Children and Family Services.

12. There is also a potential for racial bias to the case which may be relevant to the officers' evaluation of Mario Gonzalez, as well as how jurors evaluate Gonzalez's conduct and their consideration of money damages. At the time of this incident, he was unemployed and the noncustodial parent of plaintiff M.G.C., a young child. Mr. Gonzalez was an outsider to the City of Alameda, a 26-year-old Latino, who was obese, and as police learned resided in Oakland. He was a minority in the City of Alameda. The US Census 2022 population estimates for the cities of Alameda and Oakland are quite different:

	City of Alameda	Oakland
White, alone	42%	29%
Asian	31	16
Latinx	12	27
Black	6	22
All others	9	6

13. As a trial consultant for more than 40 years, I have observed and participated in jury selection in hundreds of cases. It is clear to me that it is a difficult task to talk about highly sensitive subjects and to reveal bias, especially implicit biases, during voir dire, for as Justice Mosk observed, "bias deceives its holder." (People v. Williams, 29 Cal.3d 392 (1981).

14. Social science tells us that these types of attitudes are very resistant to change, and will have a significant impact on juror decision-making, regardless of how conscientiously the juror approaches his or her job.[1] As the situation in the LaCaze case illustrates, jurors are not always forthcoming even about undisputable facts and circumstances in their lives, such as their own experience working with law enforcement, let alone what attitudes they may hold. To select a jury that will base its decision on the law and evidence, jurors with strong attitudes and pertinent experiences must be identified. Without an effective juror questionnaire and attorney conducted voir dire, it is highly likely that jurors with strong bias will be seated—and that no one will ever know.

15. An effective juror questionnaire goes a long way toward revealing pertinent experiences and attitudes. It places questions squarely before every juror and seeks answers not just from those willing to speak before others in open court. The questionnaire provides a relatively protected opportunity in which jurors may express their experience with and attitudes about a variety of sensitive issues, including alcohol dependence, drug use and dependence, homelessness, and lawsuits, including lawsuits against law enforcement. Questionnaires effectively address the frequent problem that those who serve on juries are the ones attorneys and the court know the least about, as can often happen when the sole source of information is judge conducted voir dire, and the information about perspective jurors dwindles as time wears on in voir dire.

16. There is a general agreement amongst social scientists that self-reports about bias and prejudice and the manner and extent to which they affect one's actions and decisions are highly unreliable.[2] Jurors' natural desire to appear fair and impartial diminishes candor in open court when they suspect that the answer may disqualify them. This tendency is heightened when the Court conducts the voir dire examination.[3] Jurors perceive the authority of the Court and receive the implicit message that to be "good" citizens they must say they can set aside their biases and prejudices, and follow the law, without knowing whether they are truly capable of doing so. Unfortunately, such blanket assertions are often naive and hollow. In Irwin v. Dowd (1960) 366 U.S. 717, 759, the U.S. Supreme Court recognized what is referred to as "demand characteristics"

---

[1] Jost, J. Resistance to Change: A Social Psychological Perspective, Social Research Vol. 82, No. 3; (2015); Howe, L. et al., Attitude Strength, Annual Review of Psychology (2017) 68:237-51

[2] Sue, S., et al., *Authoritarianism, Pretrial Publicity and Awareness of Bias in Simulated Jurors*, 37 Psychol. Reports 1299, 1302 (1975).

[3] Jones, *Judges-versus Attorney-Conducted Voir Dire: An Empirical Investigation on Juror Candor*, 11 Law and Human Behavior 131, 143 (1987).

or psychological processes present during jury selection which lead biased jurors to pronounce their ability to be fair:

> No doubt each juror was sincere when he said that he would be fair and impartial to petitioner, but the psychological impact requiring such a declaration before one's fellows is often its father.

17. It has been well documented in numerous studies (including our book, Jurywork: Systematic Techniques) that many jurors enter the courtroom with strong and often fixed beliefs and concerns that they may have held for their entire adult life. These beliefs are so deeply seated and strongly held that they are certain to influence jury behavior in several significant ways.

18. Social science research devoted to explaining the dynamics of human behavior in public situations is instructive in evaluating the effectiveness of various voir dire procedures. This research indicates that the quality of information obtained in any interview is controlled by the conditions under which the interview is conducted, the type of information sought, and the interview subject's perceptions of the interview's end results.

19. For example, when they are aware of being evaluated, most people become concerned with their performance. This concern, sometimes called evaluation apprehension, influences the responses people give.[4] Even without intending to do so, people devote considerable attention to learning what factors have a positive influence on how they are received or evaluated, and they adopt behavior that will enable them to leave a potentially embarrassing situation as quickly as possible.[5]

20. In the context of voir dire, fairness and impartiality are the most positive or socially desirable characteristics to be portrayed. The tendency of individuals to portray themselves in the most socially desirable light, *e.g.*, fair rather than unfair, honest rather than dishonest, is well documented in the social science literature.[6]

---

[4] E.g., *When Dissonance Fails: On Eliminating Evaluation Apprehension from Attitude Measurement,* 1 Journal of Social Psychology 28 (1965).

[5] Arkin, *Social Anxiety, Self-Presentation and the Self-Service Bias in Causal Attribution,* 38 Journal of Personality and Social Psychology 23 (1980).

[6] E.g., Marlow and Crown, *Social Desirability and Response to Perceived Situational Demands,* 25 Journal of Consulting Psychology 109 (1968).

21. This tendency increases with the social distance of the interviewer from the subject and with the presence of others at the interview. Thus, when voir dire questioning is conducted by the judge only, jurors increase efforts to please the interviewer (judge) or conform to what they believe the interviewer expects.

22. Many aspects of voir dire prevent jurors from giving frank and open responses to the questions asked. First, the courtroom is an intimidating place for most prospective jurors who are often unaccustomed to and uncomfortable with speaking in front of large groups as they must during voir dire. Jurors are fully aware that they will be included or excluded from the jury based upon their answers to the questions asked, and such a setting is likely to inhibit many jurors from responding frankly and openly.

23. Many aspects of the large group voir dire inhibit jurors and deter candor. A report prepared for the Administrative Office of the Courts of California by the National Center for State Courts in 2004[7] noted:

> … studies have suggested that the relative intimacy of the voir dire setting has an effect on juror candor, with jurors providing more candid information when they are questioned individually rather than as part of the entire panel. Judge Gregory E. Mize (ret.) reported on particularly striking results with this technique while serving on the D.C. Superior Court. In 1999, Judge Mize wrote that nearly 20% of "silent jurors" – that is, prospective jurors who failed to disclose information during voir dire with the entire panel – nevertheless disclosed case-relevant information when given an opportunity to do so in the relative intimacy of individual voir dire.

24. Mize reported that in the course of some 30 trials using this technique that in 90% of these trials between one and four of these previously silent jurors expressed bias sufficient to led to a removal for cause.[8]

25. Second, juror responses during voir dire are influenced by what the juror believes the trial judge expects and wishes to hear. Psychological studies indicate that subjects avoid contradicting or displeasing an interviewer who is perceived as having higher social status than the subject.[9] In the courtroom, the judge is the most highly respected authority figure, and

---

[7] Hannaford-Agor, P.L. *Examining Voir Dire in California*, Prepared for the Administrative Office of the Courts (August 2004) p. 4-5.

[8] Mize, G.E. (1999). *On better jury selection: Spotting UFO jurors before they enter the jury room*, Connecticut Review Spring, 33.

[9] NJP Litigation Consulting, Krauss & Wiley (eds), *Jurywork: Systematic Techniques,* Thomson Reuters, Eagan, MN, 2013, Sections 2:2 and 2:3.

consequently, jurors attempt to give responses that they believe the judge will approve. In short, judge-conducted voir dire can inadvertently encourage prospective jurors to tailor their responses to what they perceive is the relevant judicial attitude, rather than expressing their own convictions.[10]

26. Third, the expressed attitudes of prospective jurors are often affected by what they learn about the beliefs of other jurors. In a group situation, many people will respond in what they perceive as a socially appropriate manner instead of simply speaking truthfully. This tendency is reinforced by the unfamiliar and highly formal atmosphere that a courtroom presents to most prospective jurors. Under such conditions of unfamiliarity and uncertainty, the tendency to conform as closely as possible to the behavior of others is undeniably strong.

27. Fourth, voir dire frequently focuses on very personal issues about which jurors are sometimes hesitant to speak publicly. Subjected to public scrutiny in the presence of a large and unfamiliar audience, potential jurors tend to respond by minimizing the information disclosed. In addition, jurors will often adjust or disguise their responses, either to match those of other individuals in the group or to obtain what they perceive as the approval of the court.

28. When the judge conducts the *voir dire*, it sometimes consists of leading questions which cause prospective jurors to readily agree. When a judge asks a prospective juror, "You can be fair and impartial, can't you?" the obvious appropriate answer is, "Yes." Few jurors ever dare to disagree. Social science studies have repeatedly shown that jurors are acutely aware of even the subtlest cues or indications from the judge. Fearing the court's disapproval, jurors will usually respond to the court's queries in a manner they believe is acceptable to the court without considering their own individual, personal and honest responses.[11]

29. The Supreme Court noted:

> The influence of the trial judge on the jury "is necessarily and properly of great weight" and "[the] lightest word or intimation is received with deference and may prove controlling."
>
> Oeurcia v. United States, 289 U.S. 466, 470, 53 S. Ct. 698, 77 L, Ed. 2d 1321 (1933).

---

[10] L.L. Marshall & A. Smith, *The Effects of Demand Characteristics, Evaluation Anxiety, and Expectancy on Juror Honesty During Voir Dire,* 120 J. Psychol. No. 3, at 205 (1986).

[11] Note, *Judges' Non-Verbal Behavior in Jury Trials: A Threat to Judicial Impartiality*, 61 Va. L. Rev. 1266 (1975); *see* Broeder, *Examinations: An Empirical Study*, 38 S.Cal. L. Rev. 503, 506, 513 (1965) and the discussion contained in G. Mize & P. Hannaford-Agor, *Building a Better Voir Dire Process,* 47 The Judges' Journal No. 1 (ABA, Winter, 2008).

30. Jurors' self- assessment of their impartiality is inherently unreliable, which heightens the importance of an effective voir dire so that jurors with actual or implied biases can be identified and then excused through cause challenges. This requires obtaining honest answers and sufficient information during voir dire. Attorney participation in voir dire is a more effective tool for eliciting bias than questioning conducted by the judge alone. The social distance between the questioner and the prospective jurors is reduced, and jurors may feel less inhibited about offering more candid responses to an attorney. Furthermore, the judge cannot have the same interest in discerning juror bias as does an adversary, and the adversaries may be more sensitive to those juror responses which may need follow-up inquiry. In addition, the trial judge is obviously less familiar with the evidence and case theories than are the parties. In United States v. Ledee, 549 F.2d 990, 993 (5th Cir. 1977), the Court stated:

> A judge cannot have the same grasp of the facts, the complexities and nuances as the trial attorneys entrusted with the preparation of the case. The court does not know the strength and weakness of each litigant's case. Justice requires that each lawyer be given an opportunity to ferret out possible bias and prejudice of which the juror himself may be unaware until certain facts are revealed.

31. There are good reasons that attorney-conducted voir dire is the standard practice in most state courts. Social science research demonstrates that attorneys are more effective than judges in eliciting candid self-disclosure from potential jurors.[12] Attorney-conducted voir dire minimizes the pressure to conform to a set of perceived judicial standards that arises due to questions from the judge. In one study, subjects changed their answers almost twice as much when questioned by a judge as when interviewed by an attorney.[13]

32. There is no substitute for attorney participation in voir dire in combination with a thorough voir dire questionnaire. The questionnaire proposed by the plaintiff provides jurors with relative privacy in responding to questions, promotes candor and allows the court and counsel to efficiently identify jurors who may hold attitudes which should be probed for cause. The trial attorneys, for the plaintiff and defense, have worked hundreds of hours for years and are thoroughly familiar with the case issues, themes, nuances, parties, facts, issues, law and witnesses of a case.

---

[12] Suggs, David & Sales, Bruce D. (1981). *Juror Self-Disclosure in the Voir Dire: A Social Science Analysis.* Indiana Law Journal, 56, 367-288 and Williams, J. Allen (1968), *Interviewer Role Performance: A Further Note on Bias in the Information Interview,* Public Opinion Quarterly, 32, 287-294.

[13] Jones, "*Judge-Versus Attorney-Conducted Voir Dire*," 2 Law and Human Behavior 131 (1987).

That familiarity places them in the best position to meaningfully inquire about jurors' attitudes and life experiences which the case may tap. In Harold v. Corwin, 846 F.2D 1148 (1988), Lay, Chief Judge, concurring wrote:

> The grave danger of a voir dire controlled solely by the judge is found in the unnecessary reversal of cases where the judge offers allegedly neutral, flat and non-penetrating questions to potential jurors. Where the judge alone conducts the voir dire it generally provides a paucity of information to allow a judgmental exercise for peremptory challenges by counsel.... (See United States v. Davis, 583 F.2d 190, 198 (5th Cir.1978); United States v. Bear Runner, 502 F.2d 908 (8th Cir.1974); United States v. Dellinger, 472 F.2d 340, 366-70 (7th Cir.1972), cert. denied, 410 U.S. 970, 93 S.Ct. 1443, 35 L.Ed.2d 706 (1973); United States v. Banks, 687 F.2d 967, 982 (7th Cir.1982) (Swygert, J., dissenting) ('trial judge['s] questions [were] general, rhetorical [and] totally insufficient.'); see also United States v. Hill, 738 F.2d 152, 153-54 (6th Cir.1984) ('voir dire tends to be extensive and probing, operating as a predicate for the exercise of peremptories, one of the most important of the rights secured') (quoting Swain v. Alabama, 380 U.S. 202, 218-19, 85 S.Ct. 824, 835, 13 L.Ed.2d 759 (1964)); United States v. Rossbach, 701 F.2d 713, 716 (8th Cir.1983) ('[a] searching voir dire is a necessary incident to the right to an impartial jury') (citation omitted).
>
> . . .
>
> any busy trial judge must candidly admit that he or she knows far less of a given case at the time voir dire commences than the lawyers who have prepared the case for months or years. This reason alone compels the conclusion that lawyers should participate in voir dire.

33. While attorney voir dire and juror questionnaires are the practice in most state courts and addressed in California in the Code of Civil Procedure (CCP 222.5) it has also been permitted in some Federal cases with which I am familiar and frequently in cases involving highly charged issues including allegations of police abuse. In all six of the law enforcement abuse cases in the Northern District referred to earlier (Espinosa, Hunter, Oliver, Smith, M.H., and May) attorney-conducted voir dire was permitted. Attorney voir dire was also permitted in the matter of U.S. v. Koon, et al. concerning officers charged with civil rights violations in the case involving Rodney King.

34. Attorney-conducted voir dire combined with the information obtained in a juror questionnaire can be both efficient and effective. However, it is necessary to provide enough time in which to read and review all the juror questionnaires and prepare juror specific follow-up questions. Based on the information contained in the questionnaire, attorneys from both sides may be able to agree in advance of voir dire to excuse some number of jurors who express bias or other concerning information, saving in-court time. This can be accomplished without any loss of court time by having jurors complete the questionnaires on a Friday and return for voir dire on Monday or

Tuesday, allowing the attorneys to work with the questionnaires over the weekend. This schedule has worked well in my experience. Attorney-conducted voir dire does not necessarily take more time than court-conducted voir dire. This was noted in the Report of the Federal Judicial Center, *Conduct of the Voir Dire Examination: Practices and Opinions of Federal District Judges (1977)*, page 14. Quite clearly any abuse of voir dire by counsel can be eliminated by supervision by the court. At a minimum, I suggest that attorneys be permitted to conduct some voir dire with the entire panel and suggest that each side be permitted two hours to follow-up with individual jurors where an issue or cause has emerged during the voir dire conducted either by the court or counsel.

35. In the course of my work, I have reviewed voir dire transcripts, new trial motions and appellate briefs in which issues have emerged where particularly salient and prejudicial information about a juror's background was not uncovered in voir dire. In my experience large group voir dire and/or voir dire conducted by the court or counsel which is not probing, runs the risk of permitting jurors to withhold important information.

36. I have personal knowledge of the facts stated in this declaration. If called upon to testify to same, I am competent to do so. I declare under penalty of perjury under the laws of the United States and the State of California that the foregoing is true and correct, except as to those matters stated on information and belief, and as to those matters, I believe them to be true.

Executed the 3rd day of Oct., 2023 at Oakland California.

Lois P Heaney

Lois P. Heaney