

DECLARATION OF BRIAN M. POMERANTZ

I, Brian M. Pomerantz, hereby state and declare as follows:

1. I am an attorney duly licensed to practice law before all of the courts of the States of California and New York. I am admitted to practice before the Federal District Court for the Northern District of California, among many other Federal courts, including the United States Supreme Court. I have personal knowledge of the following facts, I am over eighteen years of age, and I could competently testify thereto, if called on to do so.

2. Along with Ann-Kathryn Tria, I am counsel representing Ernest Dykes in *Dykes v. Ayers*, CAND Case No. 3:11-cv-04454-SI. I am also appointed to represent Mark Schmeck in *Schmeck v. Andes*, Case No. 3:13-cv-05415-RS. As part of my representation of Mr. Dykes and Mr. Schmeck, and in my capacity as counsel appointed along with Ms. Tria to represent a number of other petitioners for the limited purpose of facilitating settlement negotiations,¹ we are overseeing the collection and review of voir dire related discovery emanating from capital cases prosecuted by the Alameda District Attorney's Office.

3. We received from the Office of the Alameda District Attorney, approximately 61,000 pages of voir dire related materials from a total of twenty-two current capital cases and eight former capital cases. I have thus far only reviewed a small portion of that discovery.

¹ See *Boyette v. Andes*, Case No. 3:13-cv-04376-WHO; Doc. 86; *Bonilla v. Andes*, Case No. 4:08-cv-00471-YGR, Doc. 433; *Ervin v. Davis*, Case No. 3:00-cv-01228-VC, Doc. 477; *Lynch v. Andes*, Case No. 3:18-cv-00444-EMC, Doc. 109; *Pollock v. Hill*, Case No. 3:05-cv-01870-JSC, Doc. 119; *Hill v. Davis*, Case No. 3:94-cv-00641-VC, Doc. 469; *Friend v. Andes*, Case No. 4:15-cv-03514-HSG, Doc. 115; *Seumanu v. Andes*, Case No. 3:17-cv-05483-RS, Doc. 79; *Stanley v. Andes*, Case No. 3:07-cv-04727-EMC, Doc. 372; *Tully v. Andes*, Case No. 3:18-cv-04763-EMC, Doc. 56; *Zambrano v. Andes*, Case No. 3:09-cv-04917-AMO, Doc. 79.

4. In addition to Mr. Dykes' case, I have seen evidence of a "focus on race in the prosecution's file [that] plainly demonstrates a concerted effort to keep black prospective jurors off the jury," in a number of other cases I have reviewed. *Foster v. Chatman*, 578 U.S. 488, 514 (2016).

5. After becoming apprised of the fact that Michael Nieto, one of the prosecutors in the cases under review, was recently appointed to the bench for Contra Costa County by the Governor, I moved that case to the forefront of my review.

6. The case that Mr. Nieto prosecuted was *People v. Evans (Christopher)*, California Supreme Court Case No S182232. This is reflected in the Reporter's Transcript from that case. We received 7,373 pages of discovery from that case.

7. The discovery, which was scanned at the Alameda District Attorney's Office by vendors sent at my direction, includes multiple copies of a two page document titled "Random List," which is a printout of sixty-six jurors who had apparently qualified for jury selection, i.e., survived hardship and cause excusals. One of the versions has "Nieto Copy" written in the upper right corner of the first page. The Random List includes five columns of information: (1) a tag number for each juror; (2) a number that designates the order of the randomly shuffled jurors; (3) a "part no."; (4) each juror's name; and (5) a score on a scale from one to five. We have seen such scores in many of the cases (sometimes zero to ten). The lower the number, the less desirable the potential juror was to the prosecutor, the higher the number, the more desirable.

8. On the Nieto version of the Random List, twelve of the jurors, tag numbers: B4, A64, B13, A62, D3, E72, E24, F38, G76, H61, D48, and D39, had asterisks placed next to their names. Those twelve jurors self-identified on their juror questionnaires as follows.

B4: Black

A64: Black

B13: African American

A62: Black

D3: Black

E72: African-American

E24: Black

F38: African American

G76: African American

H61: African American

D48: Black

D39: African American

9. There were no Black jurors who qualified for voir dire that did not have an asterisk next to their name. Eight of the Black potential jurors made it to the jury box. Potential jurors A62, B4, D3, E24, E72, and F38, were struck by the prosecution. Jurors A64 and B13 were empaneled. Juror A64 was the subject of a previous *Wheeler* challenge (RT 1027). I do not know at this time whether that was a factor in her acceptance.

10. One potential juror, C26, appears to have her name underlined on the random list. She self-identified as “White/Jewish.” She is the only qualified juror who identified as Jewish in their questionnaire. She is the only potential juror whose name is underlined.

11. Two of the potential jurors (D74 and H79) gave questionnaire answers indicating that they were lesbians. Only D74 made it to the box, she was struck. One potential juror who was removed by stipulation during selection (H74) was referred to as a “dyke” in the notes we received.

12. Three of the qualified jurors had the words “no way” written on the front of their juror questionnaires (A55, B18, and C26). Having reviewed A55’s juror questionnaire, I see no reason for the vehement reaction. We have seen “no way” or similar things written in reference to some Jewish jurors in other cases. For example, in Mr. Dykes’ case the prosecutor wrote, “pro [death penalty] but no way” on potential juror B51’s questionnaire. Both B18 and C26 gave answers that arguably indicated they were anti-death penalty. C26 did not make it to the box.

13. Jack Quatman explained in the *Freeman* hearing that after an “individual juror passed both the death qualification and the general voir dire, they were passed for the panel, that would then be subjected [to the] exercise of peremptories.” *Freeman* hearing transcript at 102. In Alameda County, the particular term they use to refer to the exercise of peremptory challenges is the “big spin.” *Freeman* hearing transcript at 102–103.

14. In many of the cases, the prosecutors used index cards or rolodex cards to synthesize the information that was most important to them for jury selection. Mr. Quatman testified in the *Freeman* hearing that he took such cards “down to court for the big spin. [He] took no notes other than 100 Rolodex cards in alphabetical order.” *Id.* at 155. He “reduced large voir dire notes on to one of the big spin cards.” *Id.* at 235.

15. We were given these cards in some of the cases from which we received discovery. We received sixty-six cards from the *Evans* case. The information on those cards should be that which was most critical to Mr. Nieto’s jury selection. In my review and determinations as to whether I believe there may have been discrimination in jury selection, I place significant weight on what was written on the big spin cards.

16. On the card belonging to C26, the single qualified Jewish juror, the big spin card noted that she was Jewish. For qualified jurors D74 and H79, their cards noted they were lesbians. Race was noted on all cards.

17. Particularly troubling to me in my review has been instances where the prosecutors appear to have been pre-crafting excuses that would satisfy the second step of *Batson v. Kentucky*, 476 U.S. 79 (1986). On the back of juror A62’s card, someone has written “I didn’t ask him any more ?s because of his views on DP.” One of the things that the Supreme Court has flagged for concern in death penalty voir dire selection is disparate questioning of white and Black jurors. It is possible that the statement on the back of A62’s card was written to temper such a claim that he was struck because he was Black.

18. Based on my review of only a portion of the materials I received from the Office of the District Attorney, it is my opinion that for several prosecutors race or sexual orientation was a significant factor that affected their jury selection processes. I am concerned from my review of Mr. Evans' case that may have been true for Michael Nieto. Central to my opinion is the placement of asterisks next to only the Black jurors' names on his Random List and the writing of "Jewish" and "lesbian" on big spin cards.

19. While I cannot say for certain that Michael Nieto wrote these things because I do not have a writing sample to compare, he was the prosecutor, so the documents I have reviewed must have come from his case file.

I declare under penalty of perjury under the laws of the United States of America, that the foregoing is true and correct to the best of my knowledge.

Executed on this 4th day of July, 2024.

/s/ Brian M. Pomerantz

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