SUPREME COURT MINUTES
FRIDAY, SEPTEMBER 13, 2024
SAN FRANCISCO, CALIFORNIA

S087560 **PEOPLE v. NADEY, JR., (GILES ALBERT)**

Rehearing denied

Defendant Giles Albert Nadey, Jr., has petitioned for rehearing of this matter and filed a request for judicial notice in support. In large part, the petition merely repeats arguments based on *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*) and *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*) that have already been rejected by a majority of this court. To that extent, defendant provides no basis for rehearing, and his petition warrants no further comment.

However, as our dissenting colleagues note, defendant goes further. He refers to a pending federal court investigation into potential *Batson/Wheeler* violations and discriminatory jury selection practices by prosecutors in the Alameda County District Attorney's Office, and he requests judicial notice of a document produced in related federal court litigation that purports to reflect a prosecutor's notes regarding jury selection in a different case.

We emphasize that defendant's allegations of racial bias, if true, are profoundly troubling. Racial discrimination in jury selection affects not only the defendant, but the integrity of the justice system itself. "When the government's choice of jurors is tainted with racial bias, that 'overt wrong . . . casts doubt over the obligation of the parties, the jury, and indeed the court to adhere to the law throughout the trial . . . .' [Citation.] That is, the very integrity of the courts is jeopardized when a prosecutor's discrimination 'invites cynicism respecting the jury's neutrality,' [citation], and undermines public confidence in adjudication." (*Miller-El v. Dretke* (2005) 545 U.S. 231, 238 (*Miller-El*); accord, *People v. Armstrong* (2019) 6 Cal.5th 735, 782.)

But the only potential evidence defendant offers to support these serious allegations is contained in his request for judicial notice. It consists of a single document that, according to a supporting declaration, was produced in federal court litigation and reflects jury selection notes in a different capital case by the same prosecutor who handled defendant's trial. Although this document will presumably receive thorough examination and consideration in the federal court, we deny defendant's request for judicial notice here because the document does not fall within any category of judicially noticeable materials in Evidence Code section 452. Defendant observes that we may judicially notice court records (*id*., subd. (d)), as do our dissenting colleagues, but the document at issue was produced in discovery. Defendant has not shown it was filed in any court. And, even if it had been, we may judicially notice only its existence in the court file, not the truth of its hearsay contents. (*In re Vicks* (2013) 56 Cal.4th 274, 314.)

Moreover, to the extent defendant would like to pursue his allegations based on extra-record evidence of discrimination in jury selection, this appeal is not the proper vehicle to do so. "Appellate jurisdiction is limited to the four corners of the record on appeal . . . ." (*In re Carpenter* (1995) 9 Cal.4th 634, 646.) "[W]e cannot consider on appeal evidence that is not in the record." (*People v. Fairbank* (1997) 16 Cal.4th 1223, 1249.) Thus, even if defendant had

established a basis for judicial notice, it would properly be denied "because it is 'in contravention of the general rule that an appellate court generally is not the forum in which to develop an additional factual record . . . .' " (*People v. Jenkins* (2000) 22 Cal.4th 900, 952-953.) Instead, the proper forum is a petition for writ of habeas corpus, which allows for the presentation and development of extra-record evidence. (*Id*. at p. 953; cf. *People v. Ramirez* (2022) 13 Cal.5th 997, 1145 ["Nothing we say here precludes defendant from developing extra-record evidence bearing on these factors in support of a petition for writ of habeas corpus"].) The limited and specific examples of judicial notice cited by our dissenting colleagues do not suggest otherwise. (See *People v. Hayes* (1990) 52 Cal.3d 577, 611, fn. 3 [taking judicial notice of amended criminal complaint]; *People v. Belcher* (1974) 11 Cal.3d 91, 94, fn. 2 [taking judicial notice of federal indictment and judgment presented to the trial court; rejecting judicial notice of affidavit of federal public defender].)

Our dissenting colleagues' proposal - to essentially stay the present action in order to allow separate proceedings to develop and then invite updates on the status of those proceedings - seems destined to run afoul of these fundamental principles. It would encourage defendant to present extra-record evidence in support of his claim so that we might weigh its evidentiary value. And the Attorney General then would likely be compelled to respond with extra-record evidence of his own, which we would be asked to weigh as well. That is not how direct appellate review works. It is, instead, precisely what habeas corpus proceedings are designed to accommodate. In fact, in *Miller-El, supra*, 545 U.S. 231, also cited by our dissenting colleagues, the United States Supreme Court was not reviewing a judgment on direct appeal, but instead was reviewing the denial of a writ of habeas corpus. While our dissenting colleagues see no harm in "hit[ting] 'pause' " on defendant's direct appeal (dis. statement of Liu, J., at p. 6), the passage of time will not change what is possible in this proceeding. Our dissenting colleagues' proposal to essentially stay proceedings in this court, while well-intentioned, will only delay finality of defendant's direct appeal and thereby slow the litigation of the very habeas corpus proceedings that are essential to resolving the issues raised here. Moreover, we are not persuaded by our dissenting colleagues' suggestion that we wait and see if more information can be presented in the future. As described above, defendant's petition for rehearing relies on jury selection notes, which he admits are not part of the record - thus, extra-record evidence. The dissenting statement relies heavily on these notes and contends (incorrectly in our view) that we can take judicial notice of them. But then the dissenting statement pivots (perhaps recognizing that *extra-record* evidence is not the proper subject of judicial notice) and states that we can rely on these notes to grant rehearing in the hope that defendant may be able to procure evidence at some unspecified future date that *is* the proper subject of judicial notice. Needless to say, a petition for rehearing must be evaluated based upon the evidence that can be appropriately considered at the time the petition is made, not upon an ill-defined hope that admissible evidence may be produced at some later date.

In sum, we agree with our dissenting colleagues that the exploration of these serious allegations is critically important, but direct appeal does not provide the proper forum by which we can give these rapidly evolving claims the consideration they deserve. Defendant's petition for rehearing is denied without prejudice to his ability to "present[] such information on a fuller record in connection with a petition for habeas corpus if he so chooses." (*People v. McDaniel* (2021) 12 Cal.5th 97, 128.)

Liu and Evans, JJ., are of the opinion the request for judicial notice should be granted and the petition for rehearing should be conditionally granted.
Kruger, J., is of the opinion the petition for rehearing should be conditionally granted.

(See Dissenting Statement by Liu, J., joined by Evans, J.)

Dissenting Statement by Justice Liu

Defendant Giles Albert Nadey, Jr., petitions for rehearing of this court's decision affirming the death judgment against him and requests that we take judicial notice of jury selection notes produced in *Lynch v. Davis* (N.D.Cal. No. 3:18-cv-00444) (*Lynch*), a capital habeas matter pending in federal court. The notes show that Alameda County Deputy District Attorney James Anderson, who also prosecuted Nadey's case, marked two prospective jurors with the letter "B" and wrote by hand in the top left margin, "NOTE FOR WHEELER." These notes, Nadey argues, further bolster his claim of racial discrimination in jury selection under *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*) and *People v. Wheeler* (1978) 22 Cal.3d 258.
This petition presents unusual circumstances, to say the least. Over the past five months, an investigation by the Alameda County District Attorney's Office in connection with a capital habeas proceeding in the United States District Court for the Northern District of California has revealed "strong evidence that, in prior decades, prosecutors from the office were engaged in a pattern of serious misconduct, automatically excluding Jewish and African American jurors in death penalty cases." (*Dykes v. Martel* (N.D.Cal. Apr. 22, 2024, No. 11-cv-04454) Order Lifting Confidentiality of Jury Selection Files, Dock. No. 164 (*Dykes* Order).) In the case of Ernest Dykes, who was tried in 1995, jury selection documents show that the same prosecutor, Anderson, made notes about prospective jurors that included the letters "FB" next to a Black female juror, the words "Must go" next to a Black male juror described as "MB," and the underscoring of the word "Jewish" on another juror's questionnaire along with a handwritten note that said, "I liked him better than any other Jew. But no way." As a result of this prosecutorial misconduct, Dykes was resentenced in July and may be released next year.
Then, in August, the federal district court vacated the capital conviction of Curtis Lee Ervin, who was sentenced to death in 1991, after the Alameda County District Attorney conducted a thorough review of his trial and found "serious prosecutorial misconduct." (Office of the Alameda County District Attorney, *DA Pamela Price Announces Death Penalty Conviction of Curtis Ervin Overturned Due to Prosecutorial Misconduct* (Aug. 7, 2024).) According to the District Attorney, the same prosecutor, Anderson, had removed nine out of 11 Black prospective jurors, and "[t]he use of strikes could not be explained without reference to the race of the jurors or the defendant. There was also evidence that Anderson used disparate questioning and investigation of Black and White prospective jurors and misrepresented information to the Court about one of the jurors." (*Ibid.*)
Now we are presented with jury selection notes in the case of Franklin Lynch, who was also prosecuted by Anderson and sentenced to death in 1992. Again, the notes appear to show a list of prospective jurors with the letter "B" next to two jurors and the handwritten words "NOTE FOR WHEELER" in the top left corner. I would grant Nadey's request for judicial notice of this document. The accompanying declaration of Lynch's federal habeas counsel states that he

received the notes through discovery in the investigation occurring in federal court. Court records are judicially noticeable pursuant to Evidence Code section 452, subdivision (d). And the District Attorney's official act of reviewing capital cases for discrimination in jury selection - including producing related jury selection documents such as the notes in *Lynch* - is also subject to judicial notice under Evidence Code section 452, subdivision (c).

Ervin was prosecuted by Anderson in 1991, Lynch in 1992, and Dykes in 1995. The defendant here, Nadey, was prosecuted by Anderson in 1999, in a trial where Anderson struck five of six Black prospective jurors, all women, and no Black juror served on the guilt-phase jury. (*People v. Nadey* (2024) 16 Cal.5th 102, 125 (*Nadey*).) Under controlling precedent, the practices of the same prosecutorial office in other cases - indeed, the practices of the same prosecutor - are relevant in evaluating a claim of racial discrimination in jury selection. (*Miller-El v. Dretke* (2005) 545 U.S. 231, 240-241 (*Miller-El*).)

In *Miller-El*, the high court found that the prosecution's peremptory strikes of ten Black venire members were racially motivated. "[T]he appearance of discrimination [was] confirmed by widely known evidence of the general policy of the Dallas County District Attorney's Office to exclude black venire members from juries at the time Miller-El's jury was selected." (*Miller-El*, *supra*, 545 U.S. at p. 253.) Relying on evidence developed in a prior proceeding, the high court observed that prosecutors in Miller-El's case employed tactics commonly associated with race-based jury selection, such as jury shuffling and disparate questioning. (*Id.* at pp. 253-262.) The high court said, "We know that for decades leading up to the time this case was tried prosecutors in the Dallas County office had followed a specific policy of systematically excluding blacks from juries . . . ." (*Id*. at p. 263.) Testimony from former Dallas assistant district attorneys and a jury selection manual presented as evidence in an earlier proceeding showed that the office " 'had a systematic policy of excluding African-Americans from juries.' " (*Id*. at p. 264.) *Miller-El* concluded, "It is true, of course, that at some points the significance of Miller-El's evidence is open to judgment calls, but when this evidence on the issues raised is viewed cumulatively its direction is too powerful to conclude anything but discrimination." (*Id*. at p. 265.)

The Alameda County District Attorney's investigation into the county's death penalty cases is ongoing, and we do not know what more it will reveal. What we do know, from *Miller-El*, is that the practices of the District Attorney's office in other cases are relevant to evaluating Nadey's *Batson* claim. And we know that the federal court in the *Dykes* proceeding has already found "strong evidence that, in prior decades, prosecutors from the office were engaged in a *pattern* of serious misconduct, *automatically* excluding Jewish and African American jurors in death penalty cases." (*Dykes* Order, *supra*, italics added.)

Given these circumstances, I would conditionally grant Nadey's petition for rehearing in order to preserve our jurisdiction (Cal. Rules of Court, rule 8.532(b)(1)(B)) and then defer action on the matter and await any further results from the federal proceedings. The court says there is no point in waiting because any extra-record evidence submitted by the parties would not be properly cognizable on direct appeal. (*People v. Nadey*, S087560, Supreme Ct. Mins., Sept. 13, 2024, at pp. 3-4.) But, given what has already come to light that is properly subject to judicial notice, including the notes in *Lynch* and federal court findings in *Dykes* (*Nadey*, *supra*, 16 Cal.5th at pp. 204-205 (dis. opn. of Liu, J.)), I suggest we wait to see if the ongoing investigation yields more information that is relevant to Nadey's *Batson* claim. To the extent such information is forthcoming, it would inform our consideration of " 'all relevant circumstances' " bearing on his

claim (*Miller-El, supra,* 545 U.S. at p. 232) and is properly cognizable on direct appeal. Such information is properly cognizable on direct appeal. (*People v. Collie* (1981) 30 Cal.3d 43, 57, fn. 10 [scope of appellate review is limited "to matters either preserved in the record or properly subject to judicial notice"]; see, e.g., *People v. Hayes* (1990) 52 Cal.3d 577, 611, fn. 3 [giving consideration to exhibit appended to defendant's appellate brief that was "a proper subject of judicial notice and pertinent to an issue raised on appeal"]; *People v. Belcher* (1974) 11 Cal.3d 91, 94, fn. 2 [same].)

Today's order says "the proper forum" for presenting and developing evidence of racial discrimination from the ongoing investigation "is a petition for writ of habeas corpus." (*People v. Nadey*, S087560, Supreme Ct. Mins., Sept. 13, 2024, at p. 2.) But "[t]here are 363 death-sentenced people awaiting initial appointment of counsel for state habeas litigation, more than half of all people sentenced to death in California. Eighty-five people on death row have been waiting for appointment of habeas counsel for more than 20 years." (Com. on Revision of the Pen. Code, Death Penalty Report (Nov. 2021) p. 32, fns. omitted.) If the District Attorney's investigation results in additional judicial findings that bolster Nadey's *Batson* claim, why should Nadey be relegated to the years-long wait for appointment of habeas counsel instead of having his claim adjudicated properly on direct appeal? The latter approach would not "slow the litigation" of habeas corpus proceedings (*People v. Nadey*, S087560, Supreme Ct. Mins., Sept. 13, 2024, at p. 3) since Nadey is and has long been entitled to the appointment of habeas counsel. Moreover, even if counsel were appointed, that would merely initiate the lengthy process of preparing and filing a petition, the Attorney General's return, and the traverse. By contrast, there is no reason to think that a rehearing of this direct appeal, if warranted by circumstances arising from the investigation, would require such a protracted period of time.

I do not know whether the inquiry in the federal proceeding will surface evidence of racial discrimination in Nadey's case or " 'a systematic policy of excluding African-Americans from [capital] juries' " in Alameda County during the relevant time period. (*Miller-El, supra*, 545 U.S. at p. 264.) But there is every sign that the District Attorney is proceeding expeditiously in her investigation, and any judicial findings will be subject to judicial notice in this court. I do not see why we need to close out Nadey's direct appeal right now and effectively kick the can down the long road to habeas. We should hit "pause" on this matter and allow a serious and relevant investigation to run its course. If the investigation does not yield any information that changes the court's mind about Nadey's *Batson* claim, the court can then say so and reinstate its previous decision affirming the judgment. But if the investigation yields additional findings that are judicially noticeable and supportive of the *Batson* claim, then a rehearing of this direct appeal is the proper forum for reconsideration of Nadey's claim.

LIU, J.

I Concur:
EVANS, J.

S086355 **PEOPLE v. LEWIS (KEITH ALLEN)**

Extension of time granted

Upon application of counsel Pamala Sayasane, an extension of time in which to serve and file appellant's supplemental opening brief is granted to November 15, 2024. After that date, no further extensions will be granted. Within 30 days after any supplemental opening brief has been filed pursuant to this order, the People may serve and file a supplemental answering brief, not to exceed 50 pages in length. Appellant may thereafter serve and file a reply, not to exceed 25 pages in length, within 20 days after the People have filed their supplemental answering brief.

S149039 **PEOPLE v. AGUAYO (JOSEPH MORENO)**

Extension of time granted

Upon application of counsel Pamala Sayasane, an extension of time in which to serve and file appellant's supplemental opening brief is granted to November 18, 2024. After that date, no further extensions of time beyond counsel's anticipated filing date of January 17, 2025, will be granted. Within 30 days after any supplemental opening brief has been filed pursuant to this order, the People may serve and file a supplemental answering brief, not to exceed 50 pages in length. Appellant may thereafter serve and file a reply, not to exceed 25 pages in length, within 20 days after the People have filed their supplemental answering brief.

S167010 **PEOPLE v. ARIAS (LORENZO INEZ) & MENDOZA (LUIS)**

Extension of time granted

Upon application of Supervising Deputy State Public Defender Alyssa Mellott, an extension of time in which to serve and file appellant Lorenzo Inez Arias' supplemental opening brief is granted to November 19, 2024. Within 30 days after any supplemental opening brief has been filed pursuant to this order, the People may serve and file a supplemental answering brief, not to exceed 50 pages in length. Appellant may thereafter serve and file a reply, not to exceed 25 pages in length, within 20 days after the People have filed their supplemental answering brief.

S167010 **PEOPLE v. ARIAS (LORENZO INEZ) & MENDOZA (LUIS)**

Extension of time granted

Upon application of counsel Michael S. Magnuson, an extension of time in which to serve and file appellant Luis Mendoza's supplemental opening brief is granted to November 19, 2024. Within 30 days after any supplemental opening brief has been filed pursuant to this order, the People may serve and file a supplemental answering brief, not to exceed 50 pages in length. Appellant may thereafter serve and file a reply, not to exceed 25 pages in length, within 20 days after the People have filed their supplemental answering brief.

S212161 **PEOPLE v. WALTERS (MICHAEL J.)**

Extension of time granted

Based upon Deputy Attorney General Kathryn L. Althizer's representation that the respondent's brief is anticipated to be filed by January 16, 2025, an extension of time in which to serve and file that brief is granted to November 18, 2024. After that date, only one further extension totaling about 60 additional days is contemplated.
An application to file an overlength brief must be served and filed no later than 60 days before the anticipated filing date. (See Cal. Rules of Court, rule 8.631(d)(1)(A)(ii) & (B)(ii).)

S225020 **PEOPLE v. MURTAZA (IFTEKHAR)**

Extension of time granted

Based upon counsel Debra S. Sabah Press's representation that the appellant's reply brief is anticipated to be filed by November 30, 2024, an extension of time in which to serve and file that brief is granted to November 19, 2024. After that date, only one further extension totaling about 11 additional days is contemplated.
An application to file an overlength brief must be served and filed no later than 60 days before the anticipated filing date. (See Cal. Rules of Court, rule 8.631(d)(1)(B)(ii).)

S258581 **PEOPLE v. VILLANUEVA (RIGOBERTO)**

Extension of time granted

On application of appellant, it is ordered that the time to serve and file appellant's opening brief is extended to November 15, 2024.

S286551 B340123 Second Appellate District, Div. 4 **HARBER (DANNY) v. S.C. (PEOPLE)**

Extension of time granted

On application of real party in interest and good cause appearing, it is ordered that the time to serve and file the answer to petition for review is extended to September 26, 2024. No further extensions will be contemplated. Petitioner may then file a reply on or before October 8, 2024.