

1 NANCY E. O'MALLEY
2 District Attorney
3 County of Alameda
4 900 Courthouse
5 1225 Fallon Street
6 Oakland, CA 94612-4292
7 (510) 272-6222
8
9 David R. Stein
10 Deputy District Attorney
11 [State Bar # 158028]

**ENDORSED
FILED**
ALAMEDA COUNTY

APR 23 2010

CLERK OF THE SUPERIOR COURT
BY: M. [Signature] Deputy

7
8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF ALAMEDA

10 THE PEOPLE OF THE STATE
11 OF CALIFORNIA,

12 v.

13
14
15 JOHANNES MEHSERLE,

16 Defendant.

No. 161210/AOC # 1009606-10

17
18
19
20
21
22
23
24
25
26
27
28
**PEOPLE'S MEMORANDUM OF POINTS
AND AUTHORITIES IN OPPOSITION TO
DEFENDANT'S MOTION TO AUGMENT
JURY VENIRE**

Date: May 7, 2010
Time:
Dept: 104

29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47
48
49
50
51
52
53
54
55
56
57
58
59
60
61
62
63
64
65
66
67
68
69
70
71
72
73
74
75
76
77
78
79
80
81
82
83
84
85
86
87
88
89
90
91
92
93
94
95
96
97
98
99
100
101
102
103
104
105
106
107
108
109
110
111
112
113
114
115
116
117
118
119
120
121
122
123
124
125
126
127
128
129
130
131
132
133
134
135
136
137
138
139
140
141
142
143
144
145
146
147
148
149
150
151
152
153
154
155
156
157
158
159
160
161
162
163
164
165
166
167
168
169
170
171
172
173
174
175
176
177
178
179
180
181
182
183
184
185
186
187
188
189
190
191
192
193
194
195
196
197
198
199
200
201
202
203
204
205
206
207
208
209
210
211
212
213
214
215
216
217
218
219
220
221
222
223
224
225
226
227
228
229
230
231
232
233
234
235
236
237
238
239
240
241
242
243
244
245
246
247
248
249
250
251
252
253
254
255
256
257
258
259
260
261
262
263
264
265
266
267
268
269
270
271
272
273
274
275
276
277
278
279
280
281
282
283
284
285
286
287
288
289
290
291
292
293
294
295
296
297
298
299
300
301
302
303
304
305
306
307
308
309
310
311
312
313
314
315
316
317
318
319
320
321
322
323
324
325
326
327
328
329
330
331
332
333
334
335
336
337
338
339
340
341
342
343
344
345
346
347
348
349
350
351
352
353
354
355
356
357
358
359
360
361
362
363
364
365
366
367
368
369
370
371
372
373
374
375
376
377
378
379
380
381
382
383
384
385
386
387
388
389
390
391
392
393
394
395
396
397
398
399
400
401
402
403
404
405
406
407
408
409
410
411
412
413
414
415
416
417
418
419
420
421
422
423
424
425
426
427
428
429
430
431
432
433
434
435
436
437
438
439
440
441
442
443
444
445
446
447
448
449
450
451
452
453
454
455
456
457
458
459
460
461
462
463
464
465
466
467
468
469
470
471
472
473
474
475
476
477
478
479
480
481
482
483
484
485
486
487
488
489
490
491
492
493
494
495
496
497
498
499
500
501
502
503
504
505
506
507
508
509
510
511
512
513
514
515
516
517
518
519
520
521
522
523
524
525
526
527
528
529
530
531
532
533
534
535
536
537
538
539
540
541
542
543
544
545
546
547
548
549
550
551
552
553
554
555
556
557
558
559
560
561
562
563
564
565
566
567
568
569
570
571
572
573
574
575
576
577
578
579
580
581
582
583
584
585
586
587
588
589
590
591
592
593
594
595
596
597
598
599
600
601
602
603
604
605
606
607
608
609
610
611
612
613
614
615
616
617
618
619
620
621
622
623
624
625
626
627
628
629
630
631
632
633
634
635
636
637
638
639
640
641
642
643
644
645
646
647
648
649
650
651
652
653
654
655
656
657
658
659
660
661
662
663
664
665
666
667
668
669
670
671
672
673
674
675
676
677
678
679
680
681
682
683
684
685
686
687
688
689
690
691
692
693
694
695
696
697
698
699
700
701
702
703
704
705
706
707
708
709
710
711
712
713
714
715
716
717
718
719
720
721
722
723
724
725
726
727
728
729
730
731
732
733
734
735
736
737
738
739
740
741
742
743
744
745
746
747
748
749
750
751
752
753
754
755
756
757
758
759
760
761
762
763
764
765
766
767
768
769
770
771
772
773
774
775
776
777
778
779
780
781
782
783
784
785
786
787
788
789
790
791
792
793
794
795
796
797
798
799
800
801
802
803
804
805
806
807
808
809
810
811
812
813
814
815
816
817
818
819
820
821
822
823
824
825
826
827
828
829
830
831
832
833
834
835
836
837
838
839
840
841
842
843
844
845
846
847
848
849
850
851
852
853
854
855
856
857
858
859
860
861
862
863
864
865
866
867
868
869
870
871
872
873
874
875
876
877
878
879
880
881
882
883
884
885
886
887
888
889
890
891
892
893
894
895
896
897
898
899
900
901
902
903
904
905
906
907
908
909
910
911
912
913
914
915
916
917
918
919
920
921
922
923
924
925
926
927
928
929
930
931
932
933
934
935
936
937
938
939
940
941
942
943
944
945
946
947
948
949
950
951
952
953
954
955
956
957
958
959
960
961
962
963
964
965
966
967
968
969
970
971
972
973
974
975
976
977
978
979
980
981
982
983
984
985
986
987
988
989
990
991
992
993
994
995
996
997
998
999
1000

Office of the
District
Attorney
Alameda County
California

**I SECTION 219 OF THE CALIFORNIA CODE OF CIVIL PROCEDURE PROHIBITS
CERTAIN PEACE OFFICERS FROM BEING SELECTED FOR VOIR DIRE.**

California Code of Civil Procedure Section 219, subdivision (b)(1) specifically prohibits
certain peace officers from being selected for voir dire in civil or criminal matters. "[N]o peace

1 officer, as defined in Section 830.1, subdivision (a) of Section 830.2, and subdivision (a) of Section
2 830.33, of the Penal Code, shall be selected for voir dire in civil or criminal matters.” (Code Civ.
3 Proc. § 219, subd. (b)(1).) Several additional groups of peace officers are excluded from voir dire in
4 criminal matters only. “[N]o peace officer, as defined in subdivisions (b) and (c) of Section 830.2 of
5 the Penal Code, shall be selected for voir dire in criminal matters.” (Code Civ. Proc. §219, subd.
6 (b)(2).)

7 A. Excluded Peace Officers are Limited By Specific Penal Code Sections

8 Peace officers specifically excluded from both criminal and civil voir dire include:

- 9 • Any sheriff, undersheriff, or deputy sheriff, employed in that capacity, of a
10 county, any chief of police of a city or chief, director, or chief executive
11 officer of a consolidated municipal public safety agency that performs police
12 functions, any police officer, employed in that capacity and appointed by the
13 chief of police or chief, director, or chief executive of a public safety agency,
14 of a city, any chief of police, or police officer of a district, including police
15 officers of the San Diego Unified Port District Harbor Police, authorized by
16 statute to maintain a police department, any marshal or deputy marshal of a
17 superior court or county, any port warden or port police officer of the Harbor
18 Department of the City of Los Angeles, or any inspector or investigator
19 employed in that capacity in the office of a district attorney.

(Pen Code § 830.1, subd. (a).)

- 16 • Any member of the Department of the California Highway Patrol including
17 those members designated under subdivision (a) of Section 2250.1 of the
18 Vehicle Code, provided that the primary duty of the peace officer is the
19 enforcement of any law relating to the use or operation of vehicles upon the
20 highways, or laws pertaining to the provision of police services for the
21 protection of state officers, state properties, and the occupants of state
22 properties, or both, as set forth in the Vehicle Code and Government Code.

(Pen Code § 830.2, subd. (a).)

- 20 • A member of the San Francisco Bay Area Rapid Transit District Police
21 Department..

(Pen. Code §830.33, subd. (a).)

22 Peace officers specifically excluded from voir dire in criminal cases only are:

- 23 • member[s] of the University of California Police Department.

(Pen Code §830.2, subd. (b).)

- 24 • member[s] of the California State University Police Departments.

(Pen Code §830.2, subd. (c).)

1 B. Many Peace Officers are Not Excluded from Jury Service by Penal Code Section
2 219.

3 Penal Code Sections 830.1 - 830.5 enumerate many different peace officers. With the
4 exceptions noted above, all are eligible for jury voir dire. The eligible peace officers include:

- 5 • Members of the Office of Correctional Safety of the Department of Corrections and
6 Rehabilitation; Members of the Officer of Internal Affairs of the Department of
7 Corrections and Rehabilitation; Employees of the Department of Fish and Game;
8 Employees of the Department of Parks and Recreation; The Director and Employees
9 of Forestry and Fire Protection; Employees of the Department of Alcoholic
10 Beverages; California Exposition and State Fair Marshals; and the Inspector General
11 (Pen Code Section 830.2, subds. (d-j).
- 12 • Employees of the Division of Investigation of the Department of Consumer Affairs;
13 Investigators of the Medical Board of California, and the Board of Dental Examiners;
14 Voluntary fire wardens designated by the Director of Forestry and Fire Protection;
15 Employees of the Department of Motor Vehicles, Investigators of the California
16 Horse Racing Board; the State Fire Marshall; Inspectors of the food and drug section
17 of the Health and Safety Code; Investigators of various State Departments; the chief
18 and investigators of the Bureau of Fraudulent Claims; employees of the Department
19 of Housing; Investigators of the Office of the Controller; Investigators of the
20 Department of Corporations; persons employed by the contractors state License
21 Board; The Chief and coordinators of the law enforcement division for the Office of
22 Emergency Services; Investigators of the office of the Secretary of State; The deputy
23 director of security of the lottery; Investigators employed by the employment
24 development division, security of the California Science Center, employees of the
25 Franchise Tax Board; Investigators of the Department of Managed Health Care;
26 Employees of the Office of Protective Services. (Pen. Code § 830.3, subds. (a)-(v).)
- 27 • Los Angeles County Police; Park rangers; Officer of General Services of the City of
28 Los Angeles; Housing authority patrol officers (Pen. Code § 830.31, subds. (a)-(d).)
- Community College and School District Police. (Pen. Code § 830.32(a)-(c).)
- Harbor or Port Police, Transit Police, Airport Law Enforcement Officers; Railroad
Police. (Pen. Code § 830.33 subds. (b)-(e).)
- Municipal utility district and county water district security officers; public utilities
commission security officer; park rangers in a water district. (Pen. Code § 830.34
subds. (a)- (d).)
- Welfare fraud of child support investigator or inspector; coroner. (Pen. Code §
830.35 subds. (a)-(c).)
- Sergeant-at-Arms; Supreme Court Marshalls; appeals court bailiffs; court services
officers. (Pen. Code § 830.36 subds. (a)-(c).)
- Arson-investigating unit; fire department of fire protection agency members;
voluntary fire wardens; military firefighter/security guards. (Pen. Code § 830.37
subds. (a)-(d).)
- State hospital officers. (Pen. Code § 830.38.)

- 1 • Oregon, Nevada, and Arizona officers. (Pen. Code § 830.39.)
- 2 • Members of the National Guard, treasurer's officer guard or messenger; security
- 3 officers of justice department, and Hastings College of Law. (Pen. Code § 830.4,
- 4 subds. (a)-(d).)
- 5 • Parole or Probation officers; Correctional or medical facility employees (Pen. Code
- 6 § 830.5., subds (a)-(h).)

7 **II. SECTION 219 OF THE PENAL CODE DOES NOT VIOLATE THE SIXTH**
8 **AMENDMENT OR THE CALIFORNIA CONSTITUTION.**

9 A. States are not Prevented from Excluding Members of Certain Occupations.

10 A defendant enjoys a Sixth Amendment right to impartial jury trial, which includes a right to
11 the presence of a fair cross section of the community on venire panels or lists from which grand and
12 petit juries are drawn. (*Taylor v. Louisiana* (1975) 419 U.S. 522, 526-29.) The federal and state
13 guarantees are coextensive and the analyses are identical. (*People v. Howard* (1992) 1 Cal. 4th 1132,
14 1159, citing *People v. Bell* (1989) 49 Cal.3d 502, 525, fn. 10.) The right to the presence of a fair
15 cross section has been litigated to prevent states from, for example, systematically excluding women
16 (*Taylor v. Louisiana*, (1975) 419 U.S. 522), or African Americans. (*Peters v. Kiff* (1972) 401 U.S.
17 493). California has applied similar analysis under the Sixth Amendment and the California
18 Constitution to prevent the exclusion of lesbians and gay men. (*People v. Garcia* (2000) 77
19 Cal.App.4th 1269.)

20 The United States Supreme Court has, however, recognized that states have the right to grant
21 exemptions from jury service to other groups, including occupational groups. In *Taylor* the
22 Supreme Court stated, "The States are free to grant exemptions from jury service . . . to those
23 engaged in particular occupations the uninterrupted performance of which is critical to the
24 communities welfare." (*Taylor v. Louisiana, supra*, 419 U.S. at pp. 534-535, citing *Rawlins v.*
25 *Georgia* (1906) 201 U.S. 638.)

26 The specific exclusion from voir dire of certain peace officers in Penal Code Section 219
27 falls squarely in the category of individuals "engaged in particular occupations the uninterrupted
28 performance of which is critical to the community's welfare." California has the right to exclude
those peace officers it finds are critical to the community's welfare. Under *Taylor* there is nothing

1 unconstitutional about Penal Code section 219's limited exclusion of some peace officers from jury
2 service.

3
4 B. Penal Code Section 219 Does not Deprive Defendant of the Presence of a Fair Cross
5 Section of the Community on his Jury Venire.

6 Following *Taylor*, in *Duren v. Missouri*, The United States Supreme Court articulated a
7 procedure to address a Sixth Amendment Challenge based on an allegation that defendant was
8 deprived of the presence of a fair cross section of the community. The defendant first must make a
9 prima facie case. The defendant must prove:

- 10 (1) that the group alleged to be excluded is a "distinctive" group in the community;
11 (2) That the representation of this group in venires from which juries are selected is not
12 fair and reasonable in relation to the number of such persons in the community; and
13 (3) that this under representation is due to systematic exclusion of the group in the jury-
14 selection process.

15 (*Duren v. Missouri*, (1979) 439 U.S. 357, 364; *People v. Howard* (1992) 1 Cal.4th 1132,
16 1159.)

17 After defendant has met his burden, the state may then rebut a prima facie showing if "it may
18 be fairly said that the jury lists or panels are representative of the community," and that "a
19 significant state interest is manifestly and primarily advanced by those aspects of the jury selection
20 process . . . that result in the disproportionate exclusion of a distinctive group." (*Duren, supra*,
21 439 U.S. at pp. 367-68.)

22 Following the analysis in *Duren*, the Eleventh Circuit specifically upheld challenges to a
23 similar federal statute excluding police officers from federal jury service. (*United States v.*
24 *Henderson* (11th Cir. 2005) 409 F.3d 1293; *United States v. Terry* (11th Cir. 1995) 60 F.3d 1541).
25 In *Terry*, the Eleventh Circuit examined a portion of the 1968 Jury Selection and Service Act, 28
26 U.S.C. § 1983, which excludes police officers from federal jury service: "The following persons are
27 barred from jury service on the ground that they are exempt: . . . (B) members of the fire or police
28 departments of any State, the District of Columbia, any territory or possession of the United States,
or any subdivision of a State, the District of Columbia, or such territory of possession." (28 U.S.C

1 § 1863, subd. (B).) In *Terry*, the Eleventh Circuit found that the defendant's Sixth Amendment
2 rights were not violated by the statute, stating, "allowing police officers to perform their duties
3 without the interruptions of jury service is good for the community (for example, many police forces
4 have only a few officers to begin with) and [we] hold that the exemption of police officers is
5 reasonable." (*United States v. Terry, supra*, 60 F.3d at p. 1544).

6 Ten years later, in *Henderson*, the defendant challenged the same federal statute along with a
7 provision of the Middle District of Florida that federal law enforcement officers were also exempt,
8 and a practice in the district to exempt anyone with arrest powers, including part time law
9 enforcement officers and even private law enforcement. Like the Court in *Terry*, the *Henderson*
10 court specifically ignored the issue of whether the defendant made a *prima facie* Sixth Amendment
11 violation because even if it were made, it could be rebutted by a legitimate state interest.
12 (*Henderson, supra*, 409 F.2d at p. 1306.) The Court relied on Henderson's own figures that 0.55%
13 of the eligible jury pool was exempt as law enforcement and found, "It may be fairly said that the
14 jury lists of panels are representative of the community" and that "a significant state interest is
15 manifestly and primarily advance by the Middle District of Florida's Jury Plan." (*Ibid.*)
16 Specifically, the *Henderson* court held that there was a significant state interest in "allowing police
17 officers to perform their duties without the interruption of jury service." (*Id., citing Terry, supra*, 60
18 F.3d 1541.)

19 1. *Defendant has not Made a Prima Facie showing of a Violation.*

20 Defendant has not met the first requirement of the *prima facie* case under *Duren* by showing
21 that police officers are a distinctive group. In California, the applicable Sixth Amendment case law
22 uses the term "cognizable class" to define a group that cannot be systematically excluded from jury
23 service. (*People v. Wheeler* (1978) 22 Cal.3d 258; *Rubio v. Superior Court* (1979) 24 Cal.3d 93,
24 97.) A "cognizable class" is defined as a group whose members:

25 share a common perspective arising from their life experience in the group, i.e. a
26 perspective gained precisely because they are members of that group. It is not enough to find a cha
27 characteristic must also impart to its possessors a common social or psychological outlook on
28 human events.

(*Rubio, supra*, 24 Cal.3d at p. 98.)

1 A unifying viewpoint is not enough, however; "the party seeking to prove a violation
2 must also show that no other members of the community are capable of adequately
3 representing the perspective of the group assertedly excluded. This is so because
4 the goal of the cross section rule is to enhance the likelihood that the jury will be
5 representative of significant community *attitudes*, not of groups per se.
6 (*Id.* emphasis in the original)

7 Even assuming *arguendo* that Peace Officers have a unifying viewpoint, the defendant has
8 failed to meet the second prong of the "cognizable group" test: that no other members of the
9 community adequately represent the particular viewpoints of Peace Officers. (*Id.* at p. 99.) First of
10 all, as discussed in the first section of this paper, there is an extensive list of peace officers who are
11 not excluded from jury duty. Each of these officers could represent the viewpoint of Peace
12 Officers. In most sections of the Penal Code, "Peace Officers" are treated as one group. The laws
13 that regulate and protect peace officers do not differentiate between Peace Officers. (See, e.g., Pen.
14 Code §§ 118.1 [false reports by peace officers], 243(c)(2) [battery on a peace officer] and 243(f)
15 [defining peace officer by reference to all the sections in the chapter beginning with Penal Code
16 section 830.] Defendant attempts to make a subgroup class of peace officers excluded from jury
17 duty. It is disingenuous to claim that Peace officers are a cognizable class, and then state that some
18 members of the class cannot represent the viewpoints of other members.¹ In some cases, a group of
19 officers eligible for jury service is quite similar to a group which is ineligible. For example,
20 University of California Police are excluded from service, but Community College Police Officers
21 are not.

22 Additionally, former and retired police officers are also eligible to serve on a jury. Nothing
23 prevents a 25 year veteran of the Los Angeles Police Department from being called to voir dire on
24 her first day of retirement. Nothing prevents a person who left the profession from serving. All of
25 these individuals, having been members of the group, could represent the viewpoints of peace
26 officers perhaps better than a rookie.

27 In *Rubio*, the court found that neither resident aliens nor felons were a cognizable group.

28 ¹ In addition, some of defendant's attempts to parse the group of peace officers are inaccurate. The numerous peace officers employed by the Department of Corrections, the parks, and the Railroad might take issue with his claim that most officers ineligible for jury duty do not wear uniforms.

1 While the court found that the first requirement of being a unified group was met for each group, it
2 concluded that the claim of a violation of the representative cross section rule failed because neither
3 group could show that no other members of the community adequately represented the particular
4 viewpoints. (*Rubio*, at 24 Cal.3d 93. at 98-99.) In the case of felons, the court found that several
5 classes of persons eligible for jury service had similar experiences with loss of personal liberty and
6 social stigmatization. In the case of resident aliens, the court found that naturalized citizens would
7 adequately represent the interests. (*Id.* at p 99-100; see also *People v. Karis* (1988) 46 Cal.3d 612,
8 631-32 [neither the exclusion of resident aliens or felons violates a defendant's right to a fair trial
9 under the California Constitution or the Sixth Amendment.].) Here, actual peace officers or retired
10 or resigned officers are more qualified to present the interests of peace officers than the groups in
11 *Rubio* were qualified to present the interests of felons or resident aliens.

12 *People v. Garcia*, (2001) 77 Cal.App.4th, in which the California Court of Appeals held that
13 gay men and lesbians were a cognizable group, is distinguishable on the issue of whether other
14 members of the community can adequately represent the particular viewpoint. The court found that
15 no one else "shares the perspective of the homosexual community" (*Id.* at p. 1279.) and the issue in
16 the case was that all members were excluded. In our case there are numerous people who could
17 adequately represent the viewpoints of excluded Peace Officers.

18 The defendant also fails to meet the second prong of the *prima facie* case. Defendant has
19 failed to show that the exclusion of some peace officers from jury service in Los Angeles County
20 will result in an unfair and unreasonable representation of this group in venires in relation to the
21 number of such persons in the community. Defendant has provided no information with which the
22 Court or counsel can evaluate this prong of the *prima facie* test.

23 The People do not challenge the third prong of the *prima facie* case.

24
25 2. *Even if Defendant has made a Prima Facie Case, the State has a Legitimate
State Interest in Excluding Certain Peace Officers.*

26 The State has a legitimate interest in excluding certain peace officers from jury duty.
27 Because of this interest, like the Eleventh Circuit in *Henderson*, the court does not even need to
28 address the *prima facie* case. "Allowing police officers to perform their duties without the

1 interruption of jury service is a significant state interest.” (*Henderson, supra*, 409 F.3d 1293,
2 1306.) “The States are free to grant exemptions from jury service to individuals in case of special
3 hardship or incapacity and to those engaged in particular occupations the uninterrupted performance
4 of which is critical to the community’s welfare.” (*Taylor v. Louisiana* (1975) 419 U.S. 522, 534-
5 535. Defendant, who argues so strenuously about the special training and responsibilities of police
6 officers, is unlikely to disagree that the state has an interest in not interrupting the performance of
7 their duties. Defendant himself cites *Pasadena Police Officers Assoc. v. City of Pasadena* in
8 quoting that law enforcement officers as a group are “alone the guardians of peace and security for
9 the community, and the efficiency of our whole system, designed for the purpose of maintaining law
10 and order, depends upon the extent to which such officers perform their duties and are faithful to the
11 trust reposed in them.” (*Pasadena Police Officers Assoc. v. City of Pasadena* (1990) 51 Cal.3d
12 564, 572.)

13 The legislative history of section 219 is telling. This section was enacted in 1988. (Code
14 Civ. Proc. § 219.) The 2001 amendment, Senate Bill 303, which added BART officers to the group
15 excluded from jury duty, discussed the rationale behind the original exemptions. “The rationale
16 behind this exemption was not only to allow better protection of the public by not pulling these
17 officers away from their duties, but also that peace officers are almost never selected to serve on
18 juries, particularly in criminal cases, and so the time they spent reporting for jury duty was truly
19 wasted time.” (Assembly Committee on the Judiciary, Analysis of Senate Bill 303 (2000-2001
20 Reg. Sess.) June 19, 2001, p. 4.) BART was the sponsor of the 2001 amendment and argued that
21 “BART is requesting the change in order to avoid lost time on the job for its police officers, who
22 provide a valuable public service.” (Id. at p. 2-3.)

23 The People acknowledge that there are other groups which protect the public who are not
24 exempt from jury service. While true, this does not detract from the significant state interest
25 California has in exempting those Peace Officers listed under Code of Civil Procedure section 219.

1 **III DEFENDANT MEHSERLE HAS NO CLAIM UNDER EQUAL PROTECTION.**

2 A. Equal Protection Arguments Do Not Apply to Occupations.

3 In *Batson v. Kentucky* the United States Supreme Court held that purposeful racial
4 discrimination in selection of the venire violates a defendant's right to equal protection because it
5 denies him the protection that a trial by jury is intended to secure. (*Batson v. Kentucky* (1988) 476
6 U.S. 79, 86.)

7 Equal Protection in jury selection was extended to gender based selection in *J.E.B. v.*
8 *Alabama ex rel. T.B.* (1994) 511 U.S. 127, 129. The Court reasoned that "[I]ntentional
9 discrimination on the basis of gender by state actors violates the Equal Protection Clause,
10 particularly where, as here, the discrimination serves to ratify and perpetuate invidious, archaic, and
11 overbroad stereotypes about the relative abilities of men and women." (*Id.* at 130-131.)

12 The Equal Protection clause does not extend to occupational groups.² Police officers have
13 not suffered discrimination nor have they suffered from overbroad stereotypes similar to those
14 women and racial minorities have suffered. In the context of equal protection *Batson* challenges to
15 jury selection, occupation has been upheld as a permissible reason to exclude a juror.³ (See *People*
16 *v. Adanandus* (2007) 157 Cal.App.4th 496, 507 [The prosecutor's concern that a juror's
17 employment as a counselor working in Oakland schools might make her more partial to the defense
18 is a justifiable reason for the strike; *People v. Ervin*, (2000) 22 Cal.4th 48, 75 [juror was a juvenile
19 counselor with a belief in rehabilitation; properly excused in death penalty case]; *People v. Barber*
20 (1988) 200 Cal.App.3d 378, 389-394 [juror excused because spouse worked for a liberal attorney
21 was a valid use of a peremptory challenge; another juror properly excused because juror was a
22 teacher]; *People v. Landry* (1996) 49 Cal.App.4th 785, 789-790 [juror was a teacher and was on
23 board of a drug treatment program; another juror had an education background in psychiatry or

24
25 ² *Thiel v. Southern Pacific Co.* (1946) 328 U.S. 217, holding that it is improper to systematically
26 exclude working class people, is inapplicable as *Thiel* was decided on the grounds of a defendant's
right to a cross section of the community, not equal protection.

27 ³ Code of Civil Procedure 231.5 specifically protects certain groups, but not occupational groups.
28 "A party may not use a peremptory challenge to remove a prospective juror on the basis of an
assumption that the prospective juror is biased merely because of his or her race, color, religion,
sex, national origin, sexual orientation, or similar grounds." (Code Civ. Pro. § 231.5.)

1 psychology, and worked in a youth services agency; both properly excused by prosecutor.]

2 B. Defendant has no Standing.

3 Defendant Mehserle does not have standing to assert a claim of equal protection with regard
4 to the exclusion of current police officers. Code of Civil Procedure section 219 only excludes
5 certain peace officers from serving as jurors. It does not exclude any person who once served as a
6 police officer but quit, retired, resigned, or was fired. Defendant Mehserle resigned from the BART
7 Police department. People in his exact status – resigned from an agency exempt from jury duty
8 under the provisions of Penal Code 219 – are eligible for jury service and may even be part of the
9 venire in this case.⁴

10 Third Party standing of the sort raised in *Powers v. Ohio* (1991) 499 U.S. 400 is inapplicable
11 here, even if occupation was protected in the context of jury selection. In *Powers*, the Supreme
12 Court found that “A criminal defendant has standing to raise the third-party equal protection claims
13 of jurors excluded by the prosecution because of their race.” The court found that 1) the defendant
14 had a cognizable injury “because racial discrimination in jury selection casts doubt on the integrity
15 of the judicial process and places the fairness of the criminal proceeding in doubt,” 2) The defendant
16 can be an effective proponent of the excluded juror’s rights because both have a common interest in
17 eliminating racial discrimination from the courtroom and 3) It “is unlikely that a juror dismissed
18 because of race will possess sufficient incentive to set in motion the arduous process needed to
19 vindicate his or her own rights.” (*Id.* at 401.)

20 Here, the facts are entirely different. First, unlike excluding people due to racial
21 discrimination, there is nothing about the exclusion of some peace officers from jury service that is a
22 cognizable harm to the integrity of the jury selection process. Second, the defendant is unlikely to
23 be an effective proponent of the rights of police officers. Code of Civil Procedure section 219 was
24 passed at the lobbying of different agencies, including BART. (Assembly Committee on the
25 Judiciary, Analysis of Senate Bill 303 (2000-2001 reg. sess.) June 19, 2001, p. 5.) Third, because

26
27
28
Office of the
District
Attorney
Alameda County
California

⁴ Mehserle’s lack of standing only serves to underscore the distinction between groups like peace officers, from which people can come and go, and groups like women, racial groups, and gays and lesbians, to which people are born.

1 peace officers are generally represented by unions, they are in a much better position to vindicate
2 their rights if they actually feel as though they have lost them.

3 Defendant does not have an Equal Protection claim.
4

5 **III. CONCLUSION**

6 For the foregoing reasons, the People respectfully request that defendant's motion be denied.
7

8 DATED: April 23, 2010

Respectfully Submitted,

NANCY E. O'MALLEY
District Attorney

By: _____

David R. Stein
Deputy District Attorney