# APPENDIX 1

# Jury Selection Cheat Sheet: Case Law

Here are a few citations and code sections relating to jury selection, in general, that we may all know but never remember, as well as the most recent issues surrounding *Wheele*r etc.

## A. Code Sections Relating to Jury Selection

California Constitution Article 1 §16- Right to a jury trial.

**CCP § 203- Qualifications of jurors**

Disqualifies:

Non-residents of County where action is tried
Felons who have not have civil rights restored (pardon)
Those who do not possess sufficient knowledge of English

**CCP § 223- Right to examine jurors**

***Moore v. Preventive Medicine Medical Group, Inc*. (1986) 178 Cal.App.3d 728, 741-742**

California Code of Civil Procedure section 223 provides the statutory rules related to voir dire in criminal cases. Pursuant to section 223, although "the court shall conduct an initial examination of prospective jurors[,] . . . counsel for each party shall have the right to examine, by oral and direct questioning, any or all of the prospective jurors." Although parties are entitled to examine the jurors, "[t]he court may specify the maximum amount of time that counsel for each party may question an individual juror, or may specify an aggregate amount of time for each party, which can then be allocated among the prospective jurors by counsel." (*Ibid*.) Thus, parties have a right to examine prospective jurors, and courts have a right to limit that inquiry.

**CCP § 225- Challenges denied**

**CCP § 229 & 230- Challenges for cause**

**CCP § 205(d)- Jury questionnaires**

**CCP § 231 - Number of preemptories for each side**

- If a life case, each side gets 20.
  If co-defendants at a joint life trial, then defense team gets 20 joint, plus 5 for each separate defendant. DA gets an amount equal to the ***total*** for the defense team.
- Non life case is 10
  If co-defendants at a joint non-life trial, then defense team gets 10 joint and 5 for each defendant. DA gets an amount equal to the ***total*** for the defense team.

**CCP § 234 & 235- Alternate jurors**

**CCP § 206- Attorney Contact with Juror, Discussion of Case**

## B. Venue

***Odle v. Superior Court*** **(1982) 32 Cal.3d 932**
Procedures and timing regarding request for change of venue motions**.**

## C. Exercising Peremptory Challenges (Order)

***People v. Dolan*** **(1892) 96Cal. 315**
Party may pass jury as presently constituted and if other side exercises peremptory challenge, may then use peremptory challenge on any person. (Yes it is old, but still the law, and always has been)

## D. Batson-Wheeler (See CCP 231.5)

***People v. Wheeler*** **(1978) 22 Cal.3d 258**
Jurors cannot be excused for sole reason of group bias (protected classes). (**prima facie showing of "strong likelihood" reversed by Johnson.)

***Batson v. Kentucky*** **(1986) 476 U.S. 79**
Prosecutors cannot exclude jurors for the sole reason of their race being the same as the defendant. Requires a prima facie case by showing that (1) the defendant is a member of a cognizable group; (2) the prosecution has removed members of such a group; and (3) circumstances raise an "inference" that the challenges were motivated by race.

***Powers v. Ohio*** **(1991) 499 U.S. 400**

Defendants may object to race based exclusions whether or not the jurors and the defendant share the same race.

***People v. Harris*** **(1992) 10 Cal.App.4th 672**
Exercise of peremptory challenges cannot be done at sidebar (even to help avoid Wheeler problem). Must be done in open court.

***Georgia v. McCollum*** **(1992) 505 U.S. 42**
Prior to Jury selection, the government moved to prohibit the McCollum's from exercising preemptory challenges based on race. The trial court denied the motion and the US Supreme court overturned, stating the government has standing to complain that the trial judge's excusal of a juror based on race, even though it was upon request of the defendant, amounts to state action (Court) and is a violation of Equal Protection.

***US v. Vasquez-Lopez*** **(1994, 9th Circuit) 22 F.3d 900**
One excluded juror does not suggest bias by itself, but court may view other factors. One juror may be enough as well.

***Purkett v. Elam*** **(1995) 514 U.S. 162**
Side accused of improper exclusion whether or not the jurors and the defendant share the same race.

***People v. Willis*** **(2002) 27 Cal.4th 811**
Remedy for granted Wheeler motion can be release of jury panel or other sanctions in lieu of. MUST be consented to by moving party**.**

***Fernandez v. Roe*** **(9th Circuit, 2002) 286 Fed.3d 1073**
Latino gang member on trial for murder of a rival gang member established by an inference in initial case of discrimination where the prosecutor used peremptory challenges on four of seven Hispanic jurors, and two of two African-American jurors.

***Johnson v. California*** **(2005) 545 U.S. 162**
California's "more likely than not" standard is an inappropriate yardstick by which to measure the sufficiency of a prima facie case of purposeful discrimination in jury selection. (**Overrules Wheeler *only* as it conflicts with Batson standard.)

***Rice v. Collins*** **(2006) 546 U.S. 333**
Johnson only changes standard of prima facie showing in CA. Still takes 1) prima facie showing; 20 if some burden shifts for showing of NON biased explanation; 3) court determines whether burden has been met for purposeful discrimination.

***Yee v. Warden*** **(9th Circuit, 2006) 441 Fed.2d, 851**
Prosecutor's response that she could not remember why she challenged a juror was insufficient to satisfy Batson error regarding gender discrimination.

***People v Gonzales*** **(2008) 165 Cal.App.4th 620**

Batson-Wheeler challenge improperly denied and case reversed when prosecutor did not give race-neutral reason for exercising preemptory challenge based solely on juror being bi-lingual. The fact that juror was bi-lingual was not a race-neutral reason for excusing him.

***People v. Watson*** **(2008) 43 Cal.4th 652**
Batson-Wheeler challenge properly denied in a gang case when prosecutor excused one juror who had substantial exposure to gangs and who did not believe in the death penalty for drive-by shootings (in a drive-by shooting case), and a second juror who grew up in a gang neighborhood and had several Bloods as friends. The court found the prosecutor had stated a "sufficient basis of concern and found no systematic exclusion of jurors based on race."

***People v. Lenix*** **(2008) 44 Cal.4th 602**
Batson-Wheeler challenge properly denied in a gang case when prosecutor challenged juror because gang members murdered juror's brother.

***People v Kelly*** **(2008) 162 Cal.App.4th 797**
At a Batson-Wheeler hearing, a defendant is not entitled to review the Prosecutor's voir dire notes, the prosecutor does not have to be under oath when giving reasons for excusing potential jurors and the prosecutor cannot be cross-examined by the defense.

***People v Simian*** **(2008) 162 Cal.App.4th 701**
Batson-Wheeler challenge properly denied when only African-American potential juror was excused because he was a pastor. Race-neutral, legitimate reason for challenge was that he was in the business of forgiving and court found the fact of a pastor's business applies to pastors of any race.

## E. GANG SPECIFIC BATSON/WHEELER

(2 cases explored in depth)

*People v. Watson* (2008) 43 Cal.4th 652

The African-American defendant made a *Batson/Wheeler* claim that "the prosecutor used peremptory challenges in a racially discriminatory manner to excuse nine African-American prospective jurors." (*Id*. at p. 669.) The prosecutor's response to two of the strike challenges were justified based on the jurors' attitude or experience towards gangs, and will be described below.

One of the stricken prospective jurors was D.H. "D.H. said she had gone to school with gang members in Compton and South Central Los Angeles, specifically members of the In Hood, Rolling 60's, and Compton Crips." (*Id.* at p. 673.) "She did not, however, like to be around gang activity." (*Ibid*.) In response to the *Batson/Wheeler* motion, "[t]he prosecutor explained he excused D.H. because of her substantial exposure to gang members while growing up in Compton and her belief that a driveby shooting does not

warrant the death penalty." (*Id*. At p. 671.) Then, "[t]he trial court denied the *Wheeler* motion, concluding the prosecutor had stated 'a sufficient basis of concern as to the three jurors individually and collectively' and finding no indication of 'systematic exclusion' of the jurors based on race." (*Ibid*.)

Later during the selection process, "the prosecutor exercised another peremptory challenge against T.S., an African-American man. Again, the defendant renewed his *Wheeler* motion." (*Id*. at p. 673.) "T.S. acknowledged during general voir dire that he had had contact with members of the Bloods street gang when he lived in Compton. He admitted to being close friends with some gang members, but insisted he was not involved in gang activity and that his exposure to gangs would not bias him." (*Id*. At p. 679.) "The prosecutor stated he excused T.S. primarily because he had grown up in a gang neighborhood and counted many members of the Bloods street gang among his friends. The prosecutor did not want T.S. to substitute his own knowledge of gangs in place of the expected testimony of the gang expert witness." (*Ibid*.) But, notably, the reasons for excusing T.S. also included the prosecutor's concern that "because [T.S.] had been late twice, appeared to be generally immature, and had suggested he might hold the prosecution to too strict a standard of proof." Ultimately, "[t]he trial court denied the motion, finding the prosecutor had articulated a nonracial basis for the peremptory challenge." (*Ibid*.)

***People v. Lenix* (2008) 44 Cal.4th 602, 608**

The defendant made a Batson/Wheeler claim on appeal "to the challenge of C.A., the Black panelist, arguing the prosecutor's stated reasons were pretextual." (Id. at p. 611.)

"When asked whether anything about the nature of the case concerned her, C.A. stated 'the murder aspect.' Defense counsel then asked her if she understood that charges do not equate with guilt and that a determination of guilt must be based on evidence, to which C.A. replied yes. C.A. also stated that she could evaluate the credibility of witnesses and treat all witnesses the same." (Id. at p. 609.)

"The prosecutor subsequently asked C.A., '[Y]ou had indicated to [defense counsel] that you were particularly troubled by some of the charges, especially the murder charges; is that correct?' C.A. answered yes. The prosecutor then inquired, 'I know anybody, of course, would be troubled by charges like that, but is there something—if I can ask—is there something beyond that.' C.A. replied, 'The fact that someone lost a life.' The prosecutor then asked, 'Have you yourself had anyone close to you involved in something like that?' C.A. answered that her sister's husband, to whom she was close, had been murdered 10 or 11 years ago. When asked if the murder was gang related, C.A. answered yes." (Id. at p. 609.)

Then, "[t]he prosecutor asked which gang committed the offense. C.A. said the murder had occurred in Los Angeles County and no one had ever been arrested. Asked if she had 'any trouble' with law enforcement for failing to make an arrest, C.A. said no. The prosecutor asked, 'Was it one of those situations where basically nobody had an idea who did it?' C.A. said yes, and that she would not hold the experience against

defendant. Asked whether there was anything else the parties needed to know about her brother-in-law's murder or any 'similar situations,' C.A. said no." (Id. at p. 609.)

"Later, the prosecutor asked the entire venire: 'Has anybody here had any contacts with law enforcement that were hostile, confrontational, adverse, however you want to describe it, that might carry over into what we're going to do here in this courtroom? Anybody at all? Traffic ticket you didn't feel you deserved?'" (Id. at p. 609.)

"C.A. was the sole panelist to reply and stated that she had gotten a traffic ticket. When asked whether the officer was impolite 'or anything like that,' C.A. answered, 'No. Well, no one ever feels they deserve a ticket. That was all.' The prosecutor asked, 'You feel that maybe he was a little shading the truth a little bit in it?' C.A. answered, 'Yeah.' The prosecutor then asked, 'Did you feel you deserved it?' C.A. replied, "I didn't know if I deserved it or not, so I just went along with it.'" (Id. at p. 609.)

The prosecutor used a peremptory challenge to strike C.A.. (Id. at p. 610.) Ultimately, "[t]he jury was composed of six Caucasians, four Hispanics, and two Filipinos. No Blacks served as jurors or alternates." (Ibid.) In response to the Batson/Wheeler motion regarding the striking of C.A., the prosecutor offered two reasons.

First, the prosecutor "stated, 'I was particularly concerned about her statement about the traffic ticket. When I was asking about uncomfortable run-ins with the police, she was actually the only juror who raised her hand. She indicated it was a traffic ticket, but then seemed to indicate that it wasn't adversarial and said that she didn't know the officer was lying, and just kind of didn't fight it because she wanted to take his word for it. Quite honestly, your Honor, I thought there was probably a lot more to it than that, and I felt uncomfortable with her because of that." (Id. at p. 610.)

Second, the prosecutor stated, "I was also somewhat concerned with the fact that her brother [sic] was involved in a gang-related homicide, because it's been my experience more often than not that people who are themselves victims of gangs, not always by any means, but quite often are themselves gang members, and I was concerned with any kind of negative repercussions my case might have in that regard, as well.'" (Id. at pp. 610-611.)

The trial court's finding that the prosecutor's explanations for exercising a peremptory challenge against C.A. were not pretexts designed to disguise racial prejudice was "reasonable and supported by substantial evidence." (*Id*. at p. 628.) Our Supreme Court found the explanation related to the ticket was reasonably based on a negative experience with law enforcement, and because her equivocation indicated she was not being completely forthcoming. (*Id*. at p. 628.)

"As to the prosecutor's second reason for excusing C.A, he noted that her 'brother' had been killed 10 or 11 years earlier in a gang-related murder. The prosecutor stated that it was his experience that 'victims of gangs, not always by any means, but quite often are themselves gang members,' and so he was concerned about 'negative repercussions' for defendant's case." (*Id*. at p. 629.)

The defendant argued two things. First, "Defendant complains that the prosecutor never confirmed that C.A.'s brother-in-law was a gang member[.]" (*Id*. at p. 629.) Second, Defendant argued that the prosecution never "explained how such an association would affect C.A.'s performance as a juror." (*Id*. at p. 629.)

"However, the prosecutor was entitled to rely on this concern. Gang affiliation was at issue in the trial. Defendant was charged with a violation of carrying a loaded firearm in public while an active member of a criminal street gang (§ 12031, subd. (a)(2)(C)), and the venire panel was advised that 'there's going to be some gang evidence.'" (*Id*. at p. 629.)

"As the Court of Appeal stated: 'The prosecutor's concern about possible 'negative repercussions' of the gang-related homicide in C.A.'s family arose from his own experience that victims of gangs tend to be members of gangs. Like his trepidation about her negative experience with law enforcement, his wariness about a possible family gang connection was comprehensible, neither discriminatory nor implausible, and at variance with nothing in the record.'" (*Id*. at p. 629.)

The Supreme Court continued, "[a]n advocate is permitted to rely on his or her own experiences and to draw conclusions from them." (*Id*. at p. 629.) "We have recognized that even hunches and idiosyncratic reasons may support a peremptory challenge. [Citation.]" (*Ibid*.)

## F. PURPOSE OF VOIR DIRE

*In re Hitchings* (1993) 6 Cal.4th 97, 110-111
The purpose of voir dire is to uncover jurors' potential biases

*Moore v. Preventive Medicine Medical Group, Inc*. (1986) 178 Cal.App.3d 728, 741-742
"Jurors do not enter deliberations with their personal histories erased, in essence retaining only the experience of the trial itself. Jurors are expected to be fully functioning human beings, bringing diverse backgrounds and experiences to the matter before them. Indeed, the purpose of voir dire is to provide counsel the opportunity to learn about a prospective juror's background, experiences, and philosophy as it relates to the matter to be heard." See also *Mu'Min v. Virginia* (1991) 500 U.S. 415, 431.) Thus, a degree of jury education about the case during voir dire is inevitable, and therefore acceptable.

## G. Manner of voir dire

*People v. Lenix* (2008) 44 Cal.4th 602, 608
The California Supreme Court warned trial courts that they must allow attorneys substantial time to fully investigate potential panel members during voir dire. "The trial courts must give advocates the opportunity to inquire of panelists and make their record. If the trial court truncates the time available or otherwise overly limits voir dire, unfair conclusions might be drawn … Undue limitations on jury selection can also deprive advocates of the information they need to make informed decisions rather than rely on less demonstrable intuition.

In addition to the statutory rules for voir dire, "California trial judges have broad discretion over the specific manner in which voir dire is conducted[.]" "[I]n exercising that discretion, trial courts should seek to balance the need for effective trial management with the duty to create an adequate record and allow legitimate inquiry." (*Id*. at p. 625, fn. 16.)

*People v. Osslo* (1958) 50 Cal.2d 75, 99
A prosecutor may properly ask questions "designed to elicit relevant information concerning the prospective jurors' state of mind."

- *United States v Wright* (8th Circuit 2008), 536 Fed 3d 819.
  It is proper to voir dire on defendant's gang membership.

- *People v Romero* (2008) 44 Cal. 4th 386
  Proper to Voir Dire on gang affiliation

- *People v Fierro*, (1991) 1 Cal.4th 173, 209: "It is, of course, well settled that the examination of prospective jurors should not be used ''to educate the jury panel to the particular facts of the case, to compel the jurors to commit themselves to vote a particular way, to prejudice the jury for or against a particular party, to argue the case, to indoctrinate the jury, or to instruct the jury in matters of law.'' [Citations]."

## H. Prosecutor Statements During Voir Dire

*People v. Franco* (1994) 24 Cal.App.4th 1528
The defendant alleged prosecutorial misconduct as a result of two extraneous gang references during voir dire. First, the defendant challenged when "the prosecutor stated: 'I think we can all pretty much admit that there is a tremendous gang problem in Los Angeles County, there is a lot of violence. [P] There is not a day that goes by that you don't open up the Metro Section and read about some senseless drive-by shooting.'" (*Id* at p. 1535.)

The appellate court's response was that "[a]lthough we do not commend the remark, we cannot, in context, condemn it as misconduct." (*Id* at p. 1535.) The court reasoned, "[a] jury questionnaire had asked numerous questions concerning gangs: whether prospective jurors were familiar with them, knew members, had themselves belonged, etc." (*Ibid*.) The court also found it significant that "defense counsel, *before* the prosecutor made the subject remark, had commented about publicized shootings and killings of innocent people, had stated 'all . . . of us have heard a lot of publicity about shootings, drive-bys . . . gangs,' had referred to a 'gang type situation,' and represented that appellant may be a member of a gang." (*Ibid*.) The appellate court also noted that the remark stated public knowledge, and any prejudice was cured by the trial court's admonishment that the reference was not to the case at hand. (*Ibid*.)

Also in *Franco*, the defendant challenged when "[t]he prosecutor stated 'It's a small world' because 'I work with the District Attorney's Hardcore Gang Division'[.]" (*Id*. at p. 1536.) On appeal, the court found that, "[a]lthough inappropriate, this unelaborated reference to the hardcore gang division did not deprive appellant of a fair trial." (*Ibid*.) The court reasoned, "[t]he comment was addressed to a prospective juror who did not sit on the jury, was made months before jury deliberations began, was neither repeated nor elaborated upon, was not inflammatory and if not common knowledge (that such specialized units exist), was hardly startling." (*Ibid*.)