

Traditionally<sup>1</sup>, after the judge has questioned the potential jurors, the defense conducted voir dire. After the defense had concluded questioning, the People were permitted to do so. Since the recent law changes, the procedures vary considerably from County to County and from judge to judge. Some judges continue to conduct voir dire in the traditional manner, permitting both sides considerable latitude in their questioning. Others exercise strict control and do not permit the attorneys to ask any questions. Many judges travel the middle path and permit limited questioning by attorneys in narrow areas. Consult with your colleagues if you are unsure as to a particular judge's practice.

What is to be done when assigned to a judge that prohibits or severely limits attorney conducted voir dire? Simply prepare a written list of questions and submit them to the court. Ask the court to include your questions in the court's voir dire. Since (with luck) your submitted questions are neutrally phrased, and designed to elicit specific bias, attitude, and predisposition on issues crucial to the prosecution's case, the court will very frequently ask most or all of your requested questions.

The first challenge for cause is made by the defense. After all the challenges for cause, if any, are heard, the People have the first peremptory challenge. Neither side loses a peremptory challenge by "passing," however if both sides pass consecutively, all remaining peremptory challenges are waived and the jury is sworn.

The court may cause alternate jurors to be examined and sworn. It is a good idea to have at least one, even on a two day trial. Each side gets one peremptory challenge for each alternate to be sworn.

#### GENERAL GUIDELINES

1. Tie your voir dire to your theme/theory of the case, as well as your opening statement, your evidence, and your argument.
2. ASK OPEN ENDED QUESTIONS and LISTEN TO THE ANSWERS. Hear what the juror is saying to you ( and what the juror is NOT saying.)

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1. i.e., pre-prop 115.

## MECHANICS AND GOOD IDEAS

1. Speak up.
2. Stand erect.
3. Position yourself at proper distance.
4. Look at jurors (all of them.), Watch their eyes.
5. Be yourself, don't talk down.
6. Never argue with a juror.
7. Use group or "panel" questions first -- get them nodding or raising their hands.
8. Always be polite and professional -- first impressions count.
9. Never apologize -- be positive.
10. Deal with sensitive subjects - profanity, sex, blood, etc
11. Steal D's thunder -- protect his rights.
12. Highlight weaknesses.
13. Some may want to answer in camera.
14. Refer to D by name -- point to D, use D.
15. Memorize names or at least something about every one.
16. Talk about "Truth".
17. Project image of confidence and preparation.
18. If a your challenge for cause is denied, use a preemp.
19. All things being equal, short or restricted voir dire is in our favor.
20. In general, you should object when the defense attorney attempts to propagandize the jury or when he attempts to get specific facts before the jury
21. Get the jurors talking and keep them talking; avoid leading questions ---"Will you be fair and impartial?" -- as opposed to questions like "tell me about your ability to be fair and impartial in a case where your brother has been arrested for the same offense."
22. Attempt to contrast with the defense. If she has been long, dull and boring, do not ask the same questions or be long, dull, or boring.

23. It can be a lot of fun to pass. After your second or third pass, and the def is still busy bouncing people, try a resigned smile and say "Gee, Your Honor, the People still believe the jury to be fair -- we pass"

24. Don't rely on stereotypes -- they tend to inhibit communication.

25. Keep the questions simple and short. Remember, these are the common people, the salt of the earth.

#### KINESICS (Body Language)

A huge amount of research has been done in this area -- see bibliography. My advice is DON'T GET WRAPPED AROUND THE AXLE ON THIS -- who's got which legs crossed, arms crossed, hands open, hands closed, sitting forward, sitting back, etc. Just GO WITH YOUR GUT - bounce people you're uncomfortable with, keep those you are comfortable with. After all, you've been using body language for years.

#### TRENDS

Clearly, the judicial trend in voir dire is to limit it. CCP 223 was enacted specifically to limit the length and scope of voir dire in criminal cases. It specifically requires the judge to forbid questions that educate, indoctrinate, or instruct the jury on the facts or the law of the case. Strictly applied, this can be very favorable to the prosecution. However, the courts still seem to be less than consistent in the application.

#### The (dreaded) WHEELER Problem

Although a thorough treatment of the Wheeler case ((1978) 22 C3 258) is beyond the scope of this lecture, all prosecutors must read the case, which concerns limiting use of peremptory challenges to prevent systematic exclusion of any constitutionally cognizable group from the jury. Exclusion by race is a good example. Don't do it.

Grossly oversimplified, first the defense must specifically object to your use of a peremptory challenge on Wheeler grounds. The defense must make a prima facie showing that you are excluding members of a cognizable group based on their group association rather than specific bias. Second, the court must find that a sufficient prima facie showing has been made. Third, once the court has found a prima facie showing, the prosecution has the burden of justifying his or her peremptory challenges.

You can avoid the Wheeler problem by taking the first 12, or very near to it.

Ned's GOOD PEOPLE

cops  
middle class, middle aged homeowners  
ties  
prior jurors (unless hung)  
pleasant, congenial people  
friends/relatives in law enforcement  
people who dislike defense attorney  
retired persons  
retired service persons  
followers ( up to 11 per jury)  
steady job  
rapport  
persons with children at home  
persons with traditional lifestyles



Ned's BAD PEOPLE

lawyers

Teenagers/ young people

post graduate education (think too hard -- over-represented as forepersons)

small claims or traffic court litigants

people who have been on hung juries (unless they voted G)

previous arrests or convictions of juror or family for same/similar offense

occupations sympathetic to defendants

evidence of anti-establishment or anti-police attitudes (especially if prosecuting cops)

unusual or weird people

writers

( people who have trouble making decisions -- philosophers or people who are overly thoughtful, introspective, or conscientious

people who ramble on and talk too much in voir dire

any display of antagonism towards you or judge

people who have led sheltered lives, with little practical experience

social workers

teachers (same thing)

scientists

cosmetologists/barbers

bartenders

## THE QUESTION COMPENDIUM

Here, in no particular order are a bunch of questions I have used at one time or another. Some worked, some didn't. No guarantees, no promises.

Remember, try to ask panel questions first, then follow with questions to individual potential jurors.

### Military Service

- Q: Have you or your spouse ever been in the military?
- Q: What branch of the service were you in?
- Q: What rank did you obtain?
- Q: Did you serve in the Military Police?
- Q: Did you ever serve as a member of a Court Martial?

### Volunteer and Part-Time Jobs

- Q: Have you ever been a volunteer for any group, club, or organization?
- Q: What kind of part-time jobs have you had?

### Education

- Q: What is your educational background?
- Q: (Follow up with majors, degrees, schools, etc)
- Q: Do you have any plans to go back to school?

## Membership/Participation in Organizations and Groups

Q: What organizations of a civic, religious, political, or social nature are you involved in?

Q: Do you support or belong to a group or organization that supports a change in our laws concerning \_\_\_\_\_? (eg MADD, NORML, NRA, etc)

Q: (follow up -- how active, how long, etc)

## Juror as Witness

Q: have you ever been a witness before?

Q: what was the nature of the proceeding?

Q: Testify for plaintiff or defendant?

## Involvement with Persons arrested or Charged

Q: Have you ever posted bail for anyone who was arrested?

Q: (Who/what crime/when/relation to)

## Objections

Q: Our legislature has made rules to keep out improper or unreliable evidence. Consequently, during trial I may object to questions asked by Ms. Defense Lawyer. If Judge Lastname upholds my objection, you may not be able to hear the answers to these questions. Will you earnestly avoid guessing or speculating about the answers?

Q: Do you understand that attorneys are allowed to make objections because this provides the only means by which the judge can decide what is proper evidence?

Q: Sometimes Judge Lastname may overrule an objection. Would you be prejudiced against a lawyer because the lawyer was not correct?

#### Questions concerning TV and Movies

Q: You understand that (this trial/real life/police work) will not be like (television/LA LAW/Hill Street Blues/Miami Vice)?

Q: If (I/the police) do something, and you think to yourself "hey, that's not the way (Don Johnson/Grace VanOwen/Perry Mason) would do it!" -- would you vote to acquit D based on that alone?

Q: Similarly, if my opponent were to make what you perceived as an error -- would you convict D just to teach the attorney a lesson?

#### Questions about Defendant

Q: I am sure you have noticed that D appears to be (young/old/attractive/ugly/handicapped etc). Do all of you agree that the law should be applied to all persons regardless of their age/appearance/physical condition?

Q: Is there anyone on the jury who would have a difficult time finding the defendant guilty because of her (age/appearance/disability)?

Pro Pers

Q: As you have seen, D is not represented by an attorney. Rather, he has chosen to represent himself in the trial. Do you understand that D has a right under the law to be represented by counsel if D chooses?

Q: Do you understand, Mr. Juror, that D has a perfect right to represent herself and that there is nothing wrong with doing this?

Q: Do you realize that her representation of herself is her own choice and a decision she made for herself?

Q: The defendant has chosen to represent herself despite the fact that the state would appoint an attorney to represent her at no charge or cost if she could not afford an attorney. Does anyone think it is unfair to try D when she is not represented by counsel?

Q: In fact, the choice the defendant has made to represent herself won't even enter into your deliberations, will it?

Q: Would you be willing to hold the defendant to the same standards of conduct during the trial as you would expect of me or any other attorney?

Q: Will all of you be able to set aside any feelings of pity or sympathy that you have for the defendant because she is not represented by an attorney?

Q: What feelings or opinions do you have about the fact that D is representing herself?

Q: Understand sole purpose here is final truth.

## Sympathy for Defendant

Q: During the trial, you may become aware that D's (wife/mother/kids/etc) will generally be present in the courtroom. Will you be able to ignore their presence and consider only the evidence in reaching your verdict?

Q: Do you understand that the evidence presented by D is not entitled to any more weight simply because he is accused of a crime?

Q: By a show of hands, how many have children between 18 & 25? How old? Son or Daughter?

Q: Would the similarity in ages between you kids and the D have any effect on this case?

### General Questions:

Q: Have you or any member of your family ever had a bad experience with a law enforcement officer? (eg- impolite cop, undeserved ticket, unsolved crime, etc)

Q: Have you or any member of your family been involved in a court case in any way -- including as a P, D, witness, juror, etc, including traffic or small claims?

Q: Where were you raised? (judge will likely ask where they reside)

Q: Familiar with location of crime? Had occasion to drive by or near?

## Liars

Q: Do you have children?

Q: Have you ever been lied to?

Q: How could you tell?

Q: Do you think its possible that someone might take an oath to tell the truth, and then lie from the witness stand?

Q: In sorting fact from fiction, would consider

-surrounding facts (other evidence)?

-demeanor of witness on stand?

- motive to lie or tell the truth?

- absence of motive to lie?

- corroboration (or lack of )?

Q: Would you agree that liars ordinarily have a reason to lie?

Q: If one side or the other presents a witness and there is no evidence that person is lying, will that suggest to you that the person is telling the truth?

## Mistakes

Q: If you felt the (police/prosecutor/witness) made a mistake, but you were otherwise convinced D was guilty -- would you acquit just to teach a lesson?

## Unsympathetic Victims or Witnesses

Q: Would you automatically disbelieve or reject the testimony of a witness or victim because you do not like their appearance? The actions they took? Their conduct or morals?

## Reasonable Doubt

Q: Is there anyone here who will disregard the judge's instructions and require the People to prove more than the law requires?

Q: You understand that the law only requires that I prove the case BRD? Not beyond any possible doubt, or any doubt whatsoever?

Q: Lets talk for a moment about what is NOT reasonable doubt. For example, it is possible in this case, as in any other, that there may be a conflict in the evidence. You understand that simply because one or more facts are disputed that that alone does not give rise to reasonable doubt?

Q: Similarly, in some cases that def testifies. Without more, do you understand that merely because the defendant denies a charge does not give rise to reasonable doubt -- otherwise how would anyone ever be convicted of any crime if all they had to do was deny the crime?

Q: Have you and your (spouse/parents/significant other/old friend) ever recollected differently about an event where you were both present -- first date, proposal, prom, etc) Does that



mean that one of you was lying? You agree then that two person witnessing the same event may recall it somewhat differently?

Q: Understand that the only thing the People have to prove BRD are the elements of the offense? That there may be loose ends and incomplete pictures about non-crucial facts at the end of the trial? That real life rarely ties things up at the end like TV or the movies?

Q: Agree that it is impossible in human affairs to prove most things beyond (1) any doubt whatsoever, (2) shadow of a doubt, (3) to absolute certainty?

Q: Understand you are not to search for a reasonable doubt if none arises naturally?

#### Circumstantial Evidence

Q: Understand the law does not favor direct over circumstantial.

Q: kid w/cherry pie

Q: Trash gone from your curb on trash day

Q: Kid/swimming pool

Q: Heard phrase on TV/Movies "merely circumstantial"? Follow judge's instruction that circumstantial evidence is every bit as strong as direct evidence?

Q: Examples -- blind deaf witness vs fingerprint at POE

-- fleeting glance of robber at night vs V's wallet found on D moments after robbery

-- Bank teller: "that's him" vs tellers description that D has red bandana, Gucci bag, showed me a note that said

"this is a stuck up" (sic) and I gave him \$1,234.56. D drove away in car w/license plate ABC123. Cops find car ABC123 occupied by man in red bandanna, a Gucci bag w/ \$1,234.56 and a note which says "this is a stuck up"

#### Duces

Q: Anyone NOT have a driver's license?

Q: Anyone not drive a car?

Q: Would you all agree that a drive needs her full attention and ability to drive a car safely?

Q: Would you agree that alcohol in sufficient quantities reduces ability to drive safely?

Q: Are you aware that there are different degrees of alcohol effects: sober, ui, drunk, falling down drunk, passed out, dead?

Q: Will you follow law and only require proof that D was UI and not necessarily drunk?

Q: Do you take a drink with dinner from time to time?

Q: Do you drink socially?

Q: Is there anyone on the panel who has NOT seen someone they thought was UI alcohol?

Q: (To individuals) What was it about that person that made you think they might be UI alcohol? (Elicit objective symptoms they will hear from wits -- R/BS eyes, slurred speech, staggering, talkative, mean, etc)

Q: Have you seen someone you thought was intoxicated even though

you didn't actually see them drinking an alcoholic beverage?

Q: Did you have occasion to learn the persons BAL?

Q: So you agree that in many cases it's possible to tell if a person is UI alcohol without a chemical sample -- just by the way they look/act/speak/behave?

Q: Have you ever seen a vehicle on the freeway being driven by someone you thought might be under the influence?

Q: What made you think so (here elicit all driving observations you expect from your witnesses -- weaving, speeding, no headlights, driving slow, etc)

Q: Do you think it is unfair to require a person arrested for DUI to provide a sample of their blood, breath, or urine for testing?

Q: You understand that a person arrested for DUI has no right to refuse giving a sample?

Q: (refusals) In this case, there will be no evidence of a chemical test of the defendant. Will you require such evidence before returning a conviction, even if the other evidence of intoxication is strong?

Q: Do you understand that D is not charged with "Drunk Driving", but merely driving Under the Influence? Appreciate the difference?

Q: If I show that D was driving while UI, will you convict even if I don't show the D was drunk?

Q: Does anyone know what a field sobriety test is?

Q: Anyone ever participated in a field sobriety test?

Q: Know anything about or read about the tests used to determine the intoxication level of persons arrested for DUI?

Q: Anyone who does not believe that a scientific instrument, which is properly maintained and operated, can provide the amount of blood alcohol in a person's blood at the time of the test?

Q: Have any of you taken any high school or college chemistry?

Q: Any of you rely on machines at home, work, hobby?

(follow up -- rely on them (of course) oven thermostat, speedometer, computers, etc)

### **Presumption of Innocence**

Q: Do you remember when Jack Ruby shot and killed presidential assassin Lee Harvey Oswald on live television in front of 70 million eyewitnesses?

Q: Had Mr. Ruby gone to jury trial on that murder, do you understand that he would have been covered by the very same presumption of innocence that covers the defendant now?

### **One Witness Case**

Q: Have you ever heard the expression "It's your word against mine -- it'll never hold up in court?"

Q: Understand that it is flat out wrong?

Q: Will you follow the judges instruction if he tells you that you must convict based on the testimony of one witness, if you believe that witness? Anyone feel they cannot do that?

Q: Example -- Mr. X steals your purse late at night in a desert-

ed parking structure. The law says your id is good enough -- no need for corroboration. Anyone have a problem with that?

Q: Anyone here who has never had the experience of listening to a complete stranger and feeling that he was lying? Joe Isuzu?

#### ID cases

Q: Have you ever given any thought to the difference between being able to describe something and being able to recognize it? E.g. smell of popcorn? taste of banana?

Q: Think you could recognize someone even if you couldn't give a complete description? Barbara Bush. Senator Cranston? Abraham Lincoln? Michael J. Fox?

Q: Have you ever had a picture taken of you that you thought didn't look very much like you? -- bad angle, old, odd lighting, etc?

Q: Do you think your driver's license picture is a good likeness of you? Have you ever been questioned about it while cashing checks, etc?

Q: Have you ever had the experience where you were unable to identify a photograph on someone, but you could identify them in person? Do you think its possible for that to happen? 2D vs. 3 D; demeanor, voice, mannerisms, etc

Q: (If bad clothing description) Do you think its possible for a witness to focus in on something, for example a face, to the exclusion of all else? the muzzle of the "cannon" pointed at W?

Q: What role do you think stress plays in ID?

Q: Some experts say stress impairs ID, some say stress enhances ... do you feel strongly one way or another?

Q: Do you agree that different people may react to stress differently?

Q: Do you agree that it is a myth that all black/white/Asian people think all black/white/Asian people look alike?

Q: If the court permits testimony of a psychologist or sociologist concerning the ability of a person to make an identification, would you feel compelled to believe that witness, just because they are an "expert?"

Q: You understand that you are to weigh the credibility of experts just like any other witness?

Q: If your common sense told you that theories propounded by the expert were not worthy of belief, would you feel comfortable throwing them out? eg..."World is Flat" expert or expert in "ESP" or "Extra-Terrestrials"

#### Ability to Judge Others

Q: Some persons have strong personal religious or philosophical convictions which prevent them from "judging" another. Do any of you hold such beliefs? Understand that you are not here to judge whether or not D is a good person, but merely whether or not he did what he is accused of?

#### Duty to reach Verdict

Q: Understand that it is your duty to reach a unanimous verdict

if at possible?

Q: Understand it is your duty to deliberate -- that is to discuss and exchange views with the other jurors?

Q: (after D has asked juror if she will give in "just because" the other 11 are against her) On the other hand, if the other 11 jurors are voting differently than you, will you discuss the differences between your positions? If they can show you that they are correct will you hesitate in changing your vote merely out of pride?

Q: You understand that it is your duty to resolve conflicting evidence to arrive at the truth?

Q: And you will accept that responsibility?

Q: Will you present your views and listen to others?

Q: The defense has already indicated that there are two sides to this case -- indeed common sense indicates that we wouldn't be here if both sides agreed on everything. That means it is likely that there will be at least some conflict in the evidence. you understand that it is your duty to resolve and find the truth based on the evidence? And that's how our system is supposed to work?

Q: If you are the only juror voting for a particular position, will you listen to the other jurors to see if you may be wrong?

Q: Do you believe that it might be possible for you to be wrong in your initial evaluation of the case? Have you never been wrong before?

Evaluating Witness Testimony

- Q: Do you think it is permissible for a witness to lie?
- Q: Do you think it is permissible for police officers to lie?
- Q: Do you think a police officer who lies should suffer severe consequences for lying?
- Q: What do you think those consequences should be?
- Q: Do you think that a police officer should be permitted to testify in any other proceeding once it has been shown that the officer has committed perjury in any hearing?
- Q: Do you think police officers will suffer any sanctions if they tell the truth even if the D is acquitted?
- Q: Do you think most police officers lie?
- Q: You would agree that they are human beings?
- Q: Defense counsel has asked you if you would give cops any more weight MERELY because they are cops -- would you give their testimony any LESS weight?
- Q: Would you be able to give them credit for any special training and experience they might have in evaluating their testimony?

#### **Concluding Questions**

- Q: It is not possible to think of possible sources of bias or concern --- after hearing all the questions from both the People and the Defense, can you think of any reason why you might not be fair and impartial to both sides?
- Q: Can you think of any question we have forgotten to ask which may be important?
- Q: Would it be ok with you if I don't ask you any more questions?



SUMMARY

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NED's RULES

1. Don't be an idiot.
2. Ask open ended questions.
3. LISTEN to the answers.
4. First impressions count.
5. Go with your gut.

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*Santa Clara County Municipal Court*

408/299-4974

VOIR DIRE

The following are types of questions which are objectionable and will not be allowed to be asked;

1. Questions which misstate the law.
2. Questions which ask the juror's knowledge of the law.
3. Questions which argue the facts of the case.
4. Questions which are offensive to the juror.
5. Questions which invade the privacy of the juror.
6. Questions which require the juror to prejudge the case.
7. Questions which do not tend to disclose bias, prejudice, interest or ability to serve as a juror.
8. Questions which cover the same areas previously covered by the Court.
9. Questions designed solely to ingratiate the attorney with the juror.

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10 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

11 IN AND FOR THE COUNTY OF SANTA CLARA

12 THE PEOPLE OF THE STATE OF CALIFORNIA, )

13 Plaintiff, )

No. 135189

14 -vs- )

15 JONATHAN M. BLICK, et al., )

16 Defendants. )

Requested  
Voir Dire  
Questions

17 The People respectfully request the Court to ask the following  
18 questions of prospective jurors.

- 19
- 20 1. Have you, a close friend, or relative ever suffered a serious
  - 21 or disfiguring injury?
  - 22 2. Are you a twin?
  - 23 3. Do you have any relatives or close friends who are twins?
  - 24 4. What is your educational background?

25 Dated: February 19, 1991.

Update on *Wheeler* - 11/8/91

The *Wheeler* case prohibits exercising peremptory challenges to jurors based on group bias. *Wheeler* is still very much alive after the advent of judicial voir dire. Deputies should not give any reasons to justify challenges until after the court has made a finding that a *prima facie* showing of discrimination has been established. For further information, please refer to *People v. Cervantes* (1991) 233 CA3d 323, 335-37; *People v. Fuentes* (1991) 54 C3d 707, 711-21; and *People v. Johnson* (1989) 47 C3d 1194, 1214-22.

*Wheeler* alert - 5/27/92

Most of the recent California cases interpreting *Wheeler* [which prohibits bias in jury selection] have been favorable. In particular, exercising one or two peremptory challenges does not, by itself, indicate presumptive group bias which requires the deputy to state reasons justifying the challenges (*P. v. Wright* (1990) 52 C3d 367, 398-400; *P. v. Christopher* (1991) 1 CA4th 666, 669-73; *P. v. Howard* (1992) 1 C4th 1132, 1153-57; *P. v. Wimberly* (1992) 5 CA4th 773, 781-84; see also *P. v. Rousseau* (1982) 129 CA3d 526, 536-37). One recent case which went the other way - *P. v. Sanchez* (1992) 6 CA4th 913, 916-22 [finding discrimination based on one peremptory] - was decertified on 8/13/92 and thus is not citable as authority.

### B. *Defense Case.*

Defendant presented alibi testimony by his mother, stepfather, stepbrothers, his girlfriend, two women who were living at his mother's house, and employees of Hillhaven Convalescent Home in East Palo Alto. Their testimony was to the effect that defendant left home with his stepbrothers and girlfriend about 12:10 or 12:30 p.m. on the day Dukar was killed to attend a Halloween party at Hillhaven where defendant's stepbrother Barry worked. They arrived 10 to 15 minutes after leaving defendant's house. The witnesses' testimony varied, however, as to the time. The group could have arrived anywhere from 12:30 to 1:35. The varied defense testimony indicated that defendant stayed for 45 minutes to an hour.

Police had been dispatched to the murder scene about 12:52 p.m. It takes about 29 minutes to drive from the murder scene to defendant's residence.

Defendant's family testified that he had lost his wallet in early 1980. They remembered his complaints about it and searching the house for it. Department of Motor Vehicles' records showed that defendant had obtained a duplicate license in February 1980.

Defendant presented expert testimony that there were no fingerprints on the catalog of sufficient quality for comparison purposes. Defendant's mother testified that a few days before the robbery Hodges had come to her house with some jewelry cases and catalogs. Defendant had handled the catalog and had advised his mother not to deal with Hodges.

## II. JURY SELECTION ISSUES

### A. *Representative Cross-section.*

(1a) Defendant contends that the granting of hardship exclusions because of the projected length of the trial tended to systematically exclude poor persons in a disproportionate manner. His contention fails. (2) Claims of denial of a fair cross-sectional jury are analyzed by ascertaining whether a cognizable class has been excluded. (*People v. Fields* (1983) 35 Cal.3d 329, 345 [197 Cal.Rptr. 803, 673 P.2d 680].) (1b) Even assuming that only poor persons were given hardship exclusions, a fact not proven here, persons with low incomes do not constitute a cognizable class. (*People v. Estrada* (1979) 93 Cal.App.3d 76, 91 [155 Cal.Rptr. 731]; see also *People v. Fields, supra*, 35 Cal.3d at pp. 348-349; *People v. Milan* (1973) 9 Cal.3d 185, 195-196 [107 Cal.Rptr. 68, 507 P.2d 956].)

(3) Defendant also contends that the process of death-qualifying a California jury results in the systematic underrepresentation of Blacks and

women on capital juries and denied him his right to a representative jury at the guilt phase. A majority of this court rejected such an argument in *People v. Fields, supra*, 35 Cal.3d at pages 349-350, footnote 7 (plur. opn.), 374 (Kaus, J., conc.).

(4) Defendant further contends that the exclusion for cause of prospective jurors who would automatically vote against a death sentence deprived him of a representative jury. This claim has been rejected by both this court and the United States Supreme Court. (*People v. Miranda* (1987) 44 Cal.3d 57, 78-79 [241 Cal.Rptr. 594, 744 P.2d 1127]; *Lockhart v. McCree* (1986) 476 U.S. 162 [90 L.Ed.2d 137, 106 S.Ct. 1758].)

(5a) Defendant also assigns as error the trial court's denial of his motion pursuant to *People v. Wheeler* (1978) 22 Cal.3d 258 [148 Cal.Rptr. 890, 583 P.2d 748]. In *Wheeler*, we held that peremptory challenges may not be used to remove prospective jurors solely on the basis of presumed group bias. We defined group bias as a presumption that certain jurors are biased merely because they are members of an identifiable group distinguished on racial, religious, ethnic, or similar grounds. (*Id.* at p. 276.) (6) The United States Supreme Court similarly held in *Batson v. Kentucky* (1986) 476 U.S. 79 [90 L.Ed.2d 69, 106 S.Ct. 1712] that the Equal Protection Clause forbids peremptory challenges of potential jurors solely on account of their race when the defendant is a member of that race. Such challenges may not be used "to strike black veniremen on the assumption that they will be biased in a particular case simply because the defendant is black." (*Id.* at p. 97.)

We recognized in *Wheeler*, and the United States Supreme Court recognized in *Batson*, that peremptory challenges have historically served as a valuable safety valve in jury selection. We said in *Wheeler* that such challenges are permissible so long as they are based on specific bias, which we defined as a bias relating to the particular case on trial or the parties or witnesses thereto: "For example, a prosecutor may fear bias on the part of one juror because he has a record of prior arrests or has complained of police harassment, and on the part of another simply because his clothes or hair length suggest an unconventional lifestyle. In turn, a defendant may suspect prejudice on the part of one juror because he has been the victim of crime or has relatives in law enforcement, and on the part of another merely because his answers on voir dire evince an excessive respect for authority. Indeed, even less tangible evidence of potential bias may bring forth a peremptory challenge: either party may feel a mistrust of a juror's objectivity on no more than the 'sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another' [cita-

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tion]—upon entering the box the juror may have smiled at the defendant, for instance, or glared at him.” (*Wheeler, supra*, 22 Cal.3d at p.275.)

*Batson* does not use the term “specific bias.” It permits challenges so long as they may be justified by “a neutral explanation related to the particular case to be tried.” (*Batson v. Kentucky, supra*, 476 U.S. at p. 98 [90 L.Ed.2d at p. 88].) The court emphasized, however, “that the prosecutor’s explanation need not rise to the level justifying exercise of a challenge for cause.” (*Id.* at p.97 [90 L.Ed.2d at p. 88].)

(7a) Under *Wheeler* and *Batson*, if a party believes his opponent is improperly using peremptory challenges for a discriminatory purpose, he must raise a timely challenge and make a prima facie case of such discrimination. Once a prima facie case has been shown, the burden shifts to the other party to come forward with an explanation that demonstrates a neutral explanation related to the particular case to be tried. (*People v. Wheeler, supra*, 22 Cal.3d at pp.280-282; *Batson v. Kentucky, supra*, 476 U.S. at pp. 96-98 [90 L.Ed.2d at pp. 87-89].) The court in *Batson* noted that the prosecutor may not rebut the defendant’s prima facie case merely by denying that he had a discriminatory motive or affirming his good faith in making individual selections: “If these general assertions were accepted as rebutting a defendant’s prima facie case, the Equal Protection Clause ‘would be but a vain and illusory requirement.’”<sup>2</sup> (*Batson, supra*, at p. 98 [90 L.Ed.2d at p. 88].)

Both *Wheeler* and *Batson* profess confidence in the ability of the trial courts to determine the sufficiency of the prosecutor’s showing. In *Wheeler*, we said that we will “rely on the good judgment of the trial courts to distinguish bona fide reasons for such peremptories from sham excuses belatedly contrived to avoid admitting acts of group discrimination.” (*People v. Wheeler, supra*, 22 Cal.3d at p. 282.) The court indicated likewise in *Batson*. (*Batson v. Kentucky, supra*, 476 U.S. at p. 98, fn. 21 [90 L.Ed.2d at p. 89].) The trial court, however, must make “a sincere and reasoned attempt to evaluate the prosecutor’s explanation in light of the circumstances of the case as then known, his knowledge of trial techniques, and his observations of the manner in which the prosecutor has examined members of the venire and has exercised challenges for cause or peremptorily. . . .” (*People v. Hall* (1983) 35 Cal.3d 161, 167-168 [197 Cal.Rptr. 71, 672 P.2d 854].)

<sup>2</sup>The dissent has taken this quotation out of context at pages 1287-1288 in using it to support the argument that subjective reasons are unacceptable. The United States Supreme Court said nothing about subjective versus objective reasons. Its concern was that the reasons be nondiscriminatory, clear, and reasonably specific. (*Batson v. Kentucky supra*, 476 U.S. at p. 98, fn. 20 [90 L.Ed.2d at p. 88].)

In the present case the prosecutor exercised peremptory challenges to remove three Black jurors, four Jewish jurors and two Asian jurors. Defendant objected to exclusion of these jurors by a *Wheeler* motion.<sup>3</sup> The trial court did not make an express finding that defendant had made a prima facie case of group bias. However, the court asked the prosecutor "Do you wish to respond [to the defendant's *Wheeler* motion]?" It then proceeded to hear the prosecutor's explanations for the use of the peremptory challenges. In *People v. Turner* (1986) 42 Cal.3d 711 at pages 718-719 [230 Cal.Rptr. 656, 726 P.2d 102], a decision handed down after this case was tried, we concluded that such an inquiry by the trial court constituted "at least an implied finding" of a prima facie showing. Accordingly, we proceed to evaluate the prosecutor's explanations.

(5b) As to the Jewish jurors, the prosecutor stated that one was a "very nervous person," gave the defendants "a very noticeable smile," was opposed to the death penalty or leaned that way. The second person was 71 years old, looked tired, had a relative who was a lawyer, and felt the death penalty was not a deterrent. He seemed to have a great deal of rapport with defense counsel and appeared more friendly to the defendant than the average juror. The third person was 61 years old and was a "very tired appearing person." She was critical of a police department she had dealt with and she felt an officer had lied. She also gave defendants a very sympathetic look. The prosecutor thought the fourth person was "weird," that sympathy for the defendants might be a problem for him, and that he "didn't seem to be willing to commit to promises to make a decision based on the facts of the evidence." The prosecutor also stated he felt totally unable to relate to him.

As to the Asian jurors, one did not approve of the death penalty and said she could not pass judgment. She seemed to have some trouble understanding the people questioning her. The other person said she preferred life without possibility of parole over the death penalty and was concerned that the case be proven without any doubt. She had also contested a speeding ticket and had lost and had some feelings about that.

Regarding the three Black jurors, Ms. S.'s ex-husband was a policeman, and she seemed to be prejudiced against policemen. She had a brother-in-

<sup>3</sup> Defendant is Black. Under *Batson v. Kentucky*, *supra*, 476 U.S. at page 96 [90 L.Ed.2d at pages 87-88], defendant could challenge only the exclusion of the group of which he is a member. Under *Wheeler*, however, defendant need not be a member of the group to challenge its exclusion. (22 Cal.3d at p. 281; see also *People v. King* (1987) 195 Cal.App.3d 923, 931, fn. 3 [241 Cal.Rptr. 189].) Moreover, under *Batson* it is at least questionable whether the generic description Asian or a religious group can constitute a "cognizable group." (See *United States v. Sgro* (1st Cir. 1987) 816 F.2d 30.)

law who had been arrested and had known others who had gone to jail. She had a very defensive body position when the prosecutor questioned her and would not look at him when introduced. Her pulse seemed to race when the death penalty was mentioned. It was the practice of the prosecutor to rate each juror on a scale. Ms. T. was given a slightly lower than average rating by the prosecutor; he would have left her on had he had a jury panel where others had lower ratings. She was overweight and poorly groomed, indicating that she might not have been in the mainstream of people's thinking. She was very nervous about the death penalty and kept her hand over her mouth when talking about it. She didn't approve of the death penalty. She did not relate to the prosecutor and seemed not to trust him. Mr. F.S. had been arrested numerous times and had been in and out of jail and court many times as a defendant. "He talked about police officers abusing people and juries treating blacks differently, police treating blacks differently." He would not state a position on the death penalty and said he would require proof beyond a shadow of doubt. He did not come to court twice when asked to by the clerk.

After listening to the detailed explanations given by the prosecutor and the objections by defense counsel to the subjectivity of some of the cited reasons, the court denied the *Wheeler* motion. Unlike *People v. Hall, supra*, 35 Cal.3d 161, here there is nothing suggesting that the court misunderstood its obligation to evaluate the prosecutor's explanations. In *Hall* the court indicated hostility to the *Wheeler* holding, stating "a peremptory challenge is a peremptory challenge, otherwise, it's meaningless." (*Id.* at p. 165.) The trial court in *Hall* completely abdicated its responsibility under *Wheeler* and expressed the view that "group bias is shown only when a prosecutor declares an intent to exclude all members of an ethnic group from the jury." (*Id.* at p. 169.) Here, by contrast, the trial court's statement of the basis of a *Wheeler* motion indicated a clear understanding of the distinction between group bias and individual bias, and its explanation of its ruling shows that it found that the challenges had been based on an individual evaluation of each juror and his individual bias. The court thus understood its obligations under *Wheeler* and made a conscientious determination that the prosecutor had not been guilty of group bias.

The dissent's argument to the contrary is unconvincing. First, it rejects a number of reasons given by the prosecutor as being "trivial." Nowhere does *Wheeler* or *Batson* say that trivial reasons are invalid. What is required are reasonably specific and neutral explanations that are related to the particular case being tried. Second, the dissent dismisses a number of statements about particular jurors' dislike of the death penalty on the ground that further questioning revealed such jurors would vote for the death penalty if it were appropriate. Those answers, however, merely ruled out a challenge